IN THE FLORIDA SUPREME COURT

ROBERT ECHOLS,	:	
Appellant,	:	
vs.	:	Case No. 64,246
STATE OF FLORIDA,	:	
Appellee.	:	
	:	

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

53 pages

INITIAL BRIEF OF APPELLANT

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TENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE

On October 26, 1982, a Pinellas County grand jury returned an indictment charging Robert Echols with first degree murder.[1/] (R1-2) On March 4, 1983, an information was filed charging Echols with robbery with a firearm[2/] and armed burglary with an assault.[3/] (R365-366)

Before trial, Echols filed motions to suppress two tape recordings supposedly containing conversations in which he participated. (R165-173,180-182) The motions were denied after an evidentiary hearing. (R731,735)

Jury trial was held July 26 through August 4, 1983. (R812-2729) Echols was found guilty as charged (R245,373-374, 2723-2724) and was so adjudicated. (R246-247,270-273,376-377) On specific verdict forms provided for the robbery and burglary charges, the jury found that Echols did not personally possess a firearm during commission of the crimes. (R373-374)

After the advisory sentencing hearing the jury recommended a life sentence. (R2940) However, on August 12, 1983, the trial judge imposed the death penalty for the murder conviction (R2989); a life sentence for the robbery conviction (R387-388,391,2989); and a sixty year sentence, with retention of half, for the burglary conviction. (R388-389,2989) All sentences were run concurrent. (R2990)

1/ §782.04(1)(a), Fla.Stat. (1981).

2/ §812.13(2)(a), Fla.Stat. (1981).

3/ §810.02, Fla.Stat. (1981).

In his written findings of fact in support of the death sentence the trial judge found three aggravating circumstances: felony murder; for pecuniary gain; and cold, calculated and premeditated. (R298-301)(A1-4) He found one mitigating circumstance: no significant criminal history. (R301,303)(A4,6)

Echols' motion for new trial was denied. (R274-279,310) He timely appeals. (R392)

STATEMENT OF THE FACTS

A. Trial

The victim, Waldamar Baskovich, and his family moved to Clearwater from Gary, Indiana, some twenty years ago. (R1286) Baskovich owned a local Kentucky Fried Chicken franchise and The New Orleans Restaurant. (R1307)

Faye Baskovich testified that around 7:20 p.m. on April 20, 1982, she and her husband were in the family room of their home at the corner of Magnolia and Duncan Streets. (R1273-1274,1287,1293) The side door was probably unlocked. (R1288-1289) Two men, wearing hats and rubber surgical gloves and carrying a handgun and club, entered the room. (R1275-1276,1283, 1311) One man shut her in a bathroom. (R1278) She overheard her husband tell the men that there was $1,000 in one of the bedrooms. (R1278,1298) After a short silence, she heard one of the men ask if there was a gun in the bedroom. (R1278-1279) A few seconds later she heard two soft gunshots. (R1279) The men then took her into a bedroom which had been ransacked. (R1280)

On the way, she saw her husband lying face down on the floor of the family room but one of the men said he was alright. (R1279) She gave the men cash. (R1280) They put some of her jewelry into a blue bag of hers and searched her purse. (R1281) After having her lie down, one of the men struck her on the head. (R1282) She feigned unconsciousness and phoned for assistance when they left. (R1282) She later noticed that a blue jewelry box was among the items missing. (R1281) At trial, she was unable to identify Echols. (R1311) She described the men as soft spoken, light skinned black males. (R1296) She said one of the men was slightly taller, older and lighter skinned than the other. (R1277) The darker man had a thin beard. (R1296)

Upon their arrival, the police found no signs of forced entry. (R1475) Baskovich was transported to a hospital where he soon died of two close range gunshot wounds to the back of the head. (R1326-1328,1340) Either gunshot would have caused immediate unconsciousness. (R1333)

A neighbor testified that at 7:30 p.m., April 20, two black men were arguing in a car parked near her house. (R1345-1347,1353) The car was a late model, brown or maroon, American made, two door car. (R1349)

Around 8:00 p.m., April 20, a neighbor found Mrs. Baskovich's blue bag lying in Woodcrest Avenue two blocks from the Baskovich residence. (R1374-1379) Around 8:35 p.m. another neighbor found a pair of rubber surgical gloves lying in Duncan Street, two doors south of the Baskovich residence. (R1399-1400, 1445,2230) Around 11:30 p.m. a pedestrian found an empty .38

caliber Smith and Wesson revolver near the corner of Hercules and Druid. (R1436,1440,1442) A police check on the gun revealed that it had been stolen in 1977 from a liquor store in Gary, Indiana. (R1560-1563) Although the bullets removed from the victim could have been fired from the gun, they lacked sufficient individual markings for positive identification. (R1805)

Around 2:00 or 3:00 a.m., Detective McManus of the Clearwater Police Department found some pink jewelry boxes in the street at 1707 Jeffers. (R2231,2236,2368) Over objection, the State admitted the jewelry boxes into evidence. (R1465-1470) Over further objection, the State presented testimony that one of the boxes bore the latent thumbprint of Melvin Nelson a/k/a Mad Dog or Dog Nelson. (R2356-2357,2359-2360,2368-2369) Nelson, an ex-boxer from Gary, is a dark skinned black. (R1569-1570) He is around forty years old, is 5'10" tall, weighs 200 lbs., and has a scar above one eye. (R1567-1570)

Later that morning, another officer found a blue felt jewelry box farther east on Jeffers. (R1426-1427,2232) It was at the corner of Jeffers and Woodcrest, two or three blocks from the Baskovich residence. (R1426-1427,2232) Around 8:30 a.m. a jogger found Baskovich's wallet on the Courtney Campbell Causeway. (R1389-1390)

The trail of evidence suggested that the perpetrators had traveled east toward Tampa International Airport. (R1816) A police check on flights to Gary, Indiana, revealed nothing useful. (R1817-1821) However, the State presented evidence that at 2:14 p.m. on April 20 Echols, from Gary, had rented a Cutless

automobile at the Tampa airport using his own name. (R1841-1852, 2438-2443) He returned the car at 8:23 p.m., having driven fifty eight miles. (R1823,1841,1852)

A rental agent from a car rental company in Clearwater also testified that on March 12, 1983, Echols rented a car from her using his own name. (R2324-2326,2233) He returned the car on March 19, accompanied by an older black man carrying what appeared to be a mixed drink. (R2331-2332) On March 26, 1982, the agent again assisted Echols when he returned a car which he had rented earlier that day from another rental agent. (R2327, 2339)

The State presented evidence that between October 1981 and August 1982 numerous long distance phone calls were placed between Echols' phone number and a Pinellas County number listed to Gari Dragovich. (R1864-1882,1888)

Gari Dragovich is Faye Baskovich's sister. (R1306) Before Baskovich moved to Clearwater he and Gari's husband, Alex Dragovich, jointly owned a restaurant and various property in Gary. (R1307) Around 1978 the Dragoviches also moved to Clearwater from Gary. (R1287) In 1981 Baskovich severed his relationship with Alex Dragovich. (R1628,1631) Baskovich often told family members that he did not want Dragovich involved in his businesses. (R1629-1630,1644,1660) He also told them that he kept his property in his children's name because if it was in his wife's name and anything happened to him Dragovich would take over. (R1630,1635-1636) After the murder, the Dragoviches moved in with Mrs. Baskovich. (R1658) Dragovich tried to advise

the Baskovich children on the operation of the restaurant and expressed interest in finding a buyer for the Kentucky Fried Chicken franchise. (R1659,1698,1717-1719)

Leonard Adams, Echols' daughter's boyfriend, testified that in early September 1982, Echols told him he had participated in the killing. (R1969-1982) Over objection, a tape recording of the conversation (Tape 1) was admitted into evidence. (R1987-2015)

On Tape 1 the person identified as Echols says that he and Dragovich had discussed the possibility of Echols building apartments for Dragovich and operating them after completion. (R512,515) But Baskovich was in the way because he did not want to sell the "chicken houses" and restaurant. (R511) One day Dragovich called unexpectedly and told him to prepare blueprints for the apartments. (R512) He flew to Florida and Dragovich took him to the boss's house. (R512) After discussing the apartments, Dragovich told the boss that Baskovich was a problem. (R514) The boss told them to get rid of the problem. (R514) Dragovich planned to get money out of Mrs. Baskovich after Baskovich was eliminated. (R520) Echols and an accomplice then went to Florida three times. (R516) Their plans were aborted the first time because there were too many people at the Baskovich residence and the second time because his accomplice got drunk. (R516-518) Echols briefly relates the details of the murder as testified to by Mrs. Baskovich, but does not identify the triggerman. (R510,520) He says his pay was supposed to be the "scrappings," that is, the $30,000 to $50,000 that was supposed

to be in the house. (R520-521) But the scrappings were not there. (R520-521) He called Dragovich and, using a code, told him that the architect had drawn up the blueprints and wanted his money. (R521-522) Dragovich flew up and talked to him. (R521) Echols also says that he (Echols) has maintained a separate mailing address for years so that he cannot be easily found. (R510) Adams says he would have liked to participate and asks to be let in on any future activities. (R510,516,521-522,524) He also suggests that maybe Dragovich got the scrappings out of the house before the incident. (R523)

Adams further testified that Echols later told him he had acted as a middleman; that Melvin Nelson was the trigger-man; that Nelson was not his accomplice on the first two trips to Florida; that Nelson was mad because the scrappings were not in the house; and that Nelson had put a contract out on him. (R2016-2019)

Additionally, Adams testified that on October 23, 1982, he taped another conversation with Echols (Tape 2). (R2211) He was not under police surveillance when he made the tape and several hours expired between the time the police sent him out to make the tape and the time he returned with it. (R2312) Over objection, Tape 2 was also admitted into evidence. (R2025-2048)

On Tape 2 Adams tells Echols that Nelson apparently plans to put a contract out on him (R527,532); that if Echols is put in jail with Nelson his life might be in jeopardy (R534); and that Nelson might testify against him. (R536) He says,

however, that Nelson probably would not talk if he was paid $10,000. (R536) He offers to talk to Nelson on Echols' behalf and to go to Florida to get the money from Dragovich. (R527,528-529,532,535) Echols says he will check with Dragovich, but that they only talk to each other from pay phones and it will take two or three days to reach him. (R528) Echols repeats the details of the murder. (R540-541) He adds that Nelson was the triggerman and the person who struck Mrs. Baskovich. (R540-541) Echols says if he is implicated in the Baskovich murder he is going to say he has never heard of Nelson but that he knows Dragovich since he worked on Dragovich's house and also worked for years at a park Dragovich owned. (R543) Adams asks whether they should put up bond for Nelson, who is in jail on unrelated charges, and "hit" him. (R537) He offers to shoot Nelson. (R538) Echols says to bond him out, put him in a manhole and drop a bag of lime on him. (R542) Echols also says he has two places where he can hide out. (R544)

Adams' credibility was impeached by testimony that he made the tapes while working as an informant providing information on stolen cars passing through an auto shop he was associated with; that numerous charges against him were dropped in exchange for the tapes; that he has previously been convicted of a felony; and that he plans to collect a $15,000 reward offered for information leading to the conviction of the perpetrators. (R1916-2078)

On October 26, 1982, Echols was arrested. (R2201) His wallet contained a slip of paper bearing the phone number

of the Baskovich residence and Dragovich's name. (R2255-2256) A search of his house disclosed a newspaper article about the murder, an address book containing the Baskovich phone number, a commemorative .45 caliber weapon and a billy shotgun. (R422, 2254-2255,2383-2385,2394-2395)

Several hours after Echols' arrest, Adams called Dragovich and set up a meeting. (R2444) He and Officer White of the Pinellas County Sheriff's Office then met with Dragovich in a parking lot in Clearwater. (R2447-2449,2455) White testified that he played the role of Nelson's agent who had come down from Indiana to collect money for Nelson and that Adams played the role of Echols' agent. (R2448,2452) Another detective surrepitiously videotaped the meeting. (R2458) Over objection, the videotape was admitted into evidence. (R2407-2434,2462-2512)

On the videotape, Adams and White pressure Dragovich for money. (R2470-2512) Initially Dragovich denies knowing what they are talking about. (R2470) However, he eventually says that he agreed to pay Echols $4,000; that he has paid him all but $150; that he does not know why Adams and White are there; that he knows nothing about Nelson; and that he wants to talk to Echols directly. (R2472,2475,2480-4283,2491,2495,2508) Later, he qualifies his statements by saying that Echols said he could not do this himself and was going to bring in someone else as a favor to Dragovich. (R2485-2486) Dragovich denies that there was supposed to be $30,000 to $50,000 in the house. (R2474,2477,2486) He says if Echols promised Nelson $10,000, then Echols is responsible for paying him. (R2501-2502) When

asked about the condominiums Echols is supposed to build for him, Dragovich says that was just a dream Echols has had for years and was not part of the bargain. (R2483-2484) Dragovich says he did not have Baskovich killed for financial gain and that his "score was mental." (R2487-2490,2503)

The defense rested without presenting evidence. (R2517)

B. Penalty Phase

The State presented no additional evidence. (R2826) The defense introduced a copy of Echols' 1960 conviction for second degree burglary (R2886-2887) and presented testimony relating to nonstatutory mitigating circumstances.

Mamie Anderson, Echols' sister, testified that Echols is fifty eight years old. (R2839) He was raised in a loving, supportive household. (R2828,2830) After high school Echols worked in the carpentry or masonry department of a steel mill in Gary. (R2831) His employment was interrupted when he served honorably in the United States Army in the Korean war. (R2832) Eventually he left the mill to become self-employed as a general contractor. (R2833-2834) He later owned a car wash and a restaurant. (R2833,2840-2841) As Ms. Anderson is the head of her household, Echols helped her with home maintenance, as well as provided emotional support. (R2830) Echols also helped their mother and their brothers and sisters. (R2839) He has been married twice and has three children. (R2837) He is a loving father who took an active part in raising his children. (R2837) He was very active in his church and has never exhibited violent tendencies. (R2834-2834,2838)

Ma Eva Echols, Echols' twenty eight year old daughter, testified that she and her father have always had a close relationship. (R2843-2845) Echols took a more active part in raising his children than the children's mother did. (R2846) He attended PTA meetings, helped the children with their homework, encouraged them to do well in school and disciplined them. (R2845-2846) In addition to being a general contractor he also did construction repair work. (R2847,2853) He was a church usher and active member of the men's fellowship. (R2849) He contributed money and facilities at his car wash during the church's building fund drive. (R2849) He would respond day or night to help church members with emergency housing repairs. (R2853) He was a well-known and trusted member of the community and has never exhibited violent tendencies. (R2847-2848)

Clemmon Allen, Jr., a police officer and city council member from Gary, testified that for many years he has known Echols to be a peaceful, nonviolent and law abiding citizen. (R2873,2876) Echols was a conscientious and steady worker who came highly recommended in the construction, carpentry and electrical fields. (R2874-2875,2885) He did work for his friends for a nominal sum. (R2875) On several occasions Echols helped raise money for a pre-teen ball club. (R2877) During Mr. Allen's campaign for councilman Echols helped raise funds and solicit votes; as Echols communicates well, he was a great asset. (R2877-2878)

James Harris, Jr., a newspaperman from Gary, testified that Echols was active in a businessmen's group which raised in-

vestment and operating capital for minority businesses. (R2861) He was also active in his church and in solar energy projects. (R2861-2862,2866) He was also good with children. (R2864)

C. Suppression Hearing

In July of 1982, Detective McManus of the Clearwater Police Department contacted the Indiana State Police. (R653) After telling them that Echols was a murder suspect, he asked them to obtain toll call information on Echols' phone number, to get a photo and set of fingerprints for Echols, to verify Echols' address and, generally, to obtain any information they could about Echols. (R654,660,668-670)

Officer Snipes of the Indiana State Police received the assignment. (R660,668-670) In early August, he discussed it with Officer Moore, also of the Indiana State Police. (R670-671) In a later conversation, Moore told him that he thought one of his "informational sources," Leonard Adams, was related to Echols. (R661,671,678) Snipes asked Moore to ask Adams to get a photo of Echols. (R678) Snipes then reported this development to Detective McManus. (R651)

Officer Moore had first met Adams in April of 1982. (R680) At that time Adams was in prison in Chicago. (R681) Moore had traced an automobile used in an armed robbery to Adams. (R681) Upon meeting with Adams, Moore learned that he had information about an auto theft ring. (R682) Adams agreed to provide information concerning the theft ring if, in exchange, Moore would write a letter to the parole commission asking for Adams to be released on parole in Indiana instead of Missouri.

(R677) Moore testified that it was understood that Adams would continue to cooperate after being paroled. (R693) Moore wrote such a letter in Adams' behalf, and Adams provided information. (R677)

After being paroled, Adams returned to Gary and continued to provide information to Moore. (R678,682-683) For a time, they met almost every day. (R684,699)

The Indiana State Police distinguish between an "informational source" and a certified informant. (R1683) A certified informant is paid $25 per day for services and a file is kept on him. (R672) Adams was not certified as an informant. (R683) However, he was providing the same type of information as a certified informant but without monetary payment. (R683-684)

In the latter part of August of 1982, during this ongoing auto theft investigation, Moore asked Adams to get a photo of Echols. (R679,696,684,699) Instead of getting a photo, Adams went to Echols' house, in Gary, and asked Echols if he had been involved in a murder. (R697) After preliminary conversation, Adams went outside to his car on a pretext. (R698) He put his mini-cassette recorder in his pocket and returned to the house. (R698) He resumed his conversation with Echols, taping the conversation without Echols' knowledge. (Tape 1) (R698)

Detective McManus and Officers Snipes and Moore testified that they had not requested that such a tape be made and that they had not known that Adams was going to make the tape. (R651,662-663,679) Adams testified that he engaged Echols in

conversation about the murder out of curiosity. (R706) He said he taped the conversation so that he could preserve it and turn it over to Officer Moore. (R708)

Around September 2, Adams allowed Moore to hear Tape 1 but would not give the tape to him. (R679,688-790,698-699) Adams testified that at that point he was having second thoughts about providing evidence against Echols. (R698-699) By this time, however, there was a grand theft charge pending against Adams in Indianapolis. (R704)

On September 3, Moore told Officer Snipes about Tape 1 and Snipes, in turn, told Detective McManus. (R651,662) Snipes talked to Adams twice, unsuccessfully trying to get the tape. (R663,665) Snipes' captain also unsuccessfully tried to talk Adams into giving them the tape. (R664)

On September 13, Adams told Snipes that he would consider turning over the tape in exchange for help on the grand theft charge pending in Indianapolis. (R665-666,673) On September 24, Snipes obtained a promise from a deputy prosecutor in Indianapolis that Adams would not be incarcerated on the theft charge if he cooperated with Snipes. (R673) Adams then turned over the tape. (R666) Adams testified that he was never prosecuted for the Indianapolis charge and admitted that he used Tape 1 as a negotiating tool. (R704-705)

Around October 23, 1982, Adams, at the direction of Detective McManus and Officer Snipes, engaged Echols in further conversation concerning the murder. (R652-653,667) The conversation occurred in Adams' car and was taped with equipment

provided by Officer Snipes. (R668) After making Tape 2, Adams rendezvoused with the officers and gave them the tape. (R668)

ARGUMENT

ISSUE I.

THE TRIAL COURT ERRED IN ADMITTING TAPE 1 INTO EVIDENCE SINCE THE TAPE WAS MADE BY MEANS WHICH WERE ILLEGAL UNDER FLORIDA LAW.

Initially, even though Tape 1 was made in Indiana, Florida law should govern since Florida's interest in the prosecution of a capital felony committed within its borders is greater than any interest Indiana might have in the case. This approach was followed in People v. Rogers, 141 Cal.Rptr. 412 (Ct.App. 1977). There a New Jersey law enforcement officer arrested the defendant and searched his van, finding evidence that the defendant had committed several crimes in California. The defendant was subsequently prosecuted in California and the evidence obtained in New Jersey was used against him. His conviction was reversed on appeal. The court held that the arrest and search in New Jersey were illegal under principles of law followed in California. Therefore, fruit from the search was inadmissible. Citing a prior California case, the court stated: "When a California prosecution is based, at least in part, on evidence which has been gathered in another jurisdiction, it has been held that, even assuming that the other jurisdiction's law differs from that of California, California may apply its own law to the case, because of California's interest in proceeding effectively to prosecute for a major crime committed within its boundaries...." Id. at 416.

Tape 1 was made by means which were illegal under Florida law. If Adams was acting as a government agent, the tape was inadmissible under State v. Sarmiento, 397 So.2d 643 (Fla.1981). If Adams was not a government agent, the tape was inadmissible under Chapter 934, Florida Statutes (1981).

State v. Sarmiento held that Article I, Section 12, of the Florida Constitution excludes from use at trial any tape recording of a conversation between a defendant and an undercover police officer made in the defendant's home without a warrant.[4/] It is Echols' primary position that Tape 1 was inadmissible under State v. Sarmiento since Adams, despite the trial court's contrary ruling (R731), made the tape while acting as a government agent.

Adams was acting as an informant in an ongoing investigation of a car theft ring when the authorities approched him and asked him to obtain a photo of Echols for use in the investigation of the instant case. (R679,696,684,699) The authorities testified that they did not ask him to obtain further intelligence information on the case. (R651,662-663,679) It is significant, however, that they did not testify that they instructed him not to obtain further information; since Adams had been supplying

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[4/] Article I, Section 12, of the Florida Constitution was amended after State v. Sarmiento was decided. However, the amendment, effective January 4, 1983, is to be given prospective effect only. State v. Lavazzoli, 434 So.2d 321 (Fla.1983). Since the interception in Echols' home took place prior to the effective date of the amendment, the holding of State v. Sarmiento applies.

general intelligence on the car theft ring, once his informant status was extended to the instant case his general intelligence duties were transferred absent specific instructions to the contrary. It is also significant that when asked why he made Tape 1 Adams said it was so that he could preserve it to turn over to the authorities. (R708) Further, Adams received substantial consideration in exchange for the tape.

This case is distinguishable from prior cases where this Court has found that a person who obtained incriminating statements from a defendant was not acting as a government agent. In Michael v. State, 437 So.2d 138 (Fla.1983), cert. denied, __U.S.__ (1984), the two inmates who obtained incriminating statements from Michael had not been approached by the authorities regarding the case. Although the inmates had acted as informants in prior investigations, those investigations were not ongoing at the time they obtained Michael's statements. In Sireci v. State, 399 So.2d 964 (Fla.1981), cert.denied, 456 U.S. 984 (1982), and Barfield v. State, 402 So.2d 377 (Fla.1981), the inmates approached the authorities on their own initiative after hearing the incriminating statements.

It is Echols' secondary position that if Adams was not a government agent when he made Tape 1, the tape was inadmissible under Sections 934.03(2) and 934.06, Florida Statutes (1981). Those provisions of Florida's Security of Communications Act provide that a warrantless tape recording is inadmissible unless it was made under the direction of law enforcement authorities or with the consent of all parties. See, State v.

Tsavaris, 394 So.2d 418 (Fla.1981); Chiarenza v. State, 406 So.2d 66 (Fla.1981).

As Tape 1 contained a confession its admission was clearly harmful.

ISSUE II.

THE TRIAL COURT ERRED IN ADMITTING TAPE 2 INTO EVIDENCE SINCE IT WAS DERIVED THROUGH EXPLOITATION OF PRIOR ILLEGAL POLICE ACTION.

Before trial the defense moved to suppress Tape 2 on the ground that it was derived through exploitation of Tape 1. (R165-170) The trial court ruled that Echols did not have standing to challenge Tape 2. (R735-736) Earlier, in seeking a continuance and costs to obtain an expert in voiceprint analysis, defense counsel had filed an affidavit which stated that Echols claimed Tape 2 did not contain his voice. (See Issue III) The affidavit formed the basis for the court's ruling that Echols lacked standing as to Tape 2. (R735-736)

The court's ruling was incorrect. The person speaking on the tape obviously had standing to assert that his rights had been violated. In taking the position that the tape was admissible the State was asserting that it contained Echols' voice. Therefore, Echols had standing. The fundamental unfairness of the ruling is demonstrated by the court's later denial of Echols' motion for a continuance and costs to obtain an expert in voiceprint analysis. (R160,567)

Evidence derived through exploitation of prior illegal police action is inadmissible. Wong Sun v. United States, 371

U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); Norman v. State, 379 So.2d 643 (Fla.1980); See also, Section 934.06, Florida Statutes (1981). Here, Tape 1 was obtained illegally. (See Issue I) If Adams had not made Tape 1, law enforcement would not have been led to make Tape 2. At the suppression hearing Detective McManus of the Clearwater Police Department testified that the purpose of Tape 2 was to obtain more information concerning the other perpetrator. (R653) Thus, Tape 2 was prompted because after listening to Tape 1 the authorities determined that they needed specific information to fill in the gaps left from Tape 1.

ISSUE III.

THE TRIAL COURT ERRED IN DENYING ECHOLS' MOTION TO CONTINUE AND RELATED MOTION FOR COSTS TO OBTAIN AN EXPERT IN VOICEPRINT ANALYSIS SINCE AN EXPERT WAS NECESSARY TO THE PREPARATION OF AN ADEQUATE DEFENSE.

A. Background

Echols was indicted October 26, 1982. (R1-2) The public defender's office was appointed and filed a demand for discovery. (R9,17) On December 10, 1982, the public defender withdrew as counsel based on conflict of interest, and attorney Ira Berman was appointed. (R18-21) On January 6, 1983, the State filed its first discovery response. (R25-32) The response listed some 67 witnesses, 10 of which were from out of state, and specified that the State possessed recorded oral statements by Echols. (R25)

At pretrial conference on January 21, 1983, trial was set for April 4, 1983. (R33-34) After pretrial conference, the State filed a two count information against Echols. (R365-366) It also filed supplemental discovery responses listing 12 additional witnesses and tangible evidence. (R35-36,38) Mr. Berman, citing the number of witnesses and complexity of the case, then successfully moved for appointment of attorney Thomas McCoun as co-counsel. (R39-40,42) The defense waived speedy trial rights and was granted a continuance. (R45-46)

At the second pretrial conference on May 6, 1983, trial was set for July 12, 1983. (R50) After the conference, the State filed additional discovery listing nine more witnesses, as well as tangible evidence. (R65-66,96,98,102) The defense was granted a two week continuance and trial was set for July 26, 1983. (R103) Thereafter, the State filed more discovery listing 3 additional witnesses, two from out of state. (R110, 114,135)

On July 19, 1983, the defense filed a motion to continue, seeking time to obtain an expert in voiceprint analysis. (R140-145) It also filed a motion for costs to obtain the expert. (R146-149) The motion to continue disclosed that Echols first heard a copy of Tape 2 on July 17; at that time he said Tape 2 did not contain his voice. (R140-145)

In an affidavit accompanying the motions, defense counsel explained that in April, 1983, they received two tapes from the State. (R144) They played Echols the tapes between May 4 and 10, 1983, but the tapes proved inaudible. (R144)

Sometime thereafter they received a second set of tapes from the State. (R144) These tapes were also inaudible. (R144) In June, 1983, they received a third set of tapes from the State. (R144) However, both tapes were copies of Tape 1. (R144) In early July they made a fourth attempt to obtain an audible copy of Tape 2. (R144) It was received on July 14 and played for Echols on July 17, at which time Echols said it did not contain his voice. (R144)

A hearing on the motions was held July 20, 1983. (R546-570) The defense asked for two weeks in which to consult with one of two experts, Mr. Kersta in New Jersey or Dr. Tosi in Michigan.[5/] (R550,553) Defense counsel cited Florida authority holding that an indigent defendant is entitled to experts. (R551-552) They argued that since the tapes were the evidence most damaging to Echols, they could not render effective assistance of counsel without exploring Echols' claim that Tape 2 did not contain his voice. (R552-553) The court denied the motion to continue without stating its reasoning. (R567)

On July 22, the defense filed another motion renewing its request for a continuance. (R152-155) In the motion and at the hearing held thereon, Mr. Berman stated his belief that he had provided ineffective representation in failing, despite

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5/ Mr. Kersta is the inventor of the process of using sound spectrograms for identification purposes. Dr. Tosi is a professor of audiology and speech sciences and physics at Michigan State University. Both have previously qualified as expert witnesses in their field. Annot., Admissibility and Weight of Voiceprint Evidence, 97 A.L.R.3d 294. Dr. Tosi has previously qualified as an expert witness in Florida. Alea v. State, 265 So.2d 96 (Fla.3d DCA 1972).

Echols' requests, to obtain an audible copy of Tape 2 earlier. (R152-155,572-576,609-610) Continuance was again denied. (R623) The motion for costs was also denied. (R160) Upon commencement of trial on July 26, the motion to continue was unsuccessfully renewed. (R812)

B. Admissibility of Voiceprint Evidence

A spectrograph is a device which scientifically processes the sounds of human speech and reproduces them graphically as a "voiceprint." Alea v. State, 265 So.2d 96 (Fla.3d DCA 1972); Annot., Admissibility and Weight of Voiceprint Evidence, 97 A.L.R.3d 294. Spectrographic analysis is based on the principle that no two human voices are identical. Id. Therefore, voiceprints can be compared in a manner similar to fingerprint comparisons. Id. Alea v. State, the only Florida case on the subject, held that spectrographic voiceprint identification is admissible in a criminal prosecution.

Other jurisdictions divide on the admissibility of voiceprint evidence depending upon which test of admissibility prevails in the jurisdiction. 97 A.L.R.3d at 300. When the test of admissibility is the "general acceptance" or "Frye test" enunciated in Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), the evidence has generally been excluded. Id. The Frye test requires a showing that the reliability of a scientific technique or device is generally accepted by the scientific community. 293 F. at 1014. However, even under the Frye test some jurisdictions have found that spectrogram analysis has reached the standards of scientific acceptance necessary for admissibility.

See, e.g., Commonwealth v. Lykus, 367 Mass. 191, 327 N.E.2d 671 (1975); People v. Rogers, 86 Misc.2d 868, 385 N.Y.S.2d 228 (1976).

Jurisdictions which do not apply the Frye test generally admit voiceprint analysis. See, e.g., United States v. Baller, 519 F.2d 463 (4th Cir. 1975), cert.denied, 423 U.S. 1019; United States v. Jenkins, 525 F.2d 819 (6th Cir. 1975); United States v. Williams, 583 F.2d 1194 (2d Cir. 1978); State v. Williams, 388 A.2d 500 (Me.1978). As fully discussed in Brown v. State, 426 So.2d 76 (Fla.1st DCA 1983), although several Florida cases pay homage to Frye, the Frye rule is not adhered to in Florida. That conclusion is best demonstrated by Coppolina v. State, 223 So.2d 68 (Fla.2d DCA 1968), appeal dismissed, 234 So.2d 120 (Fla.1969), cert.denied, 399 U.S. 927, 90 S.Ct. 2242, 26 L.Ed.2d 794 (1970). Coppolina was charged with murdering his wife. The State's expert medical witness testified that the cause of death was a lethal injection of succinylcholine chloride. He arrived at his conclusion by utilizing a new test that he had developed. The other witnesses testified that medical science believed it was impossible to demonstrate the presence of succinylcholine chloride in the body. Nevertheless, the trial court admitted the test results. The Second District Court of Appeal, in affirming, cited Frye as the proper rule to apply to determine admissibility. The court, however, did not apply Frye. Instead it ruled that the trial court had properly admitted the test results because there was substantial competent evidence to find the tests were

reliable. 223 So.2d at 70-71. Clearly, if Frye had been employed, the test results would have been inadmissible.

As also discussed in Brown v. State, legal scholars prefer the "relevancy approach" for determining admissibility of scientific evidence. 426 So.2d at 87-89; See also Gianelli, The Admissibility of Novel Scientific Evidence: Frye v. United States, a Half-Century Later, 80 Colum.L.Rev. 1197,1232-1245 (1980); McCormick on Evidence, §203 (2d ed. 1972). Under the "relevancy approach" any relevant conclusion supported by a qualified expert witness should be received unless there are other reasons for exclusion. Id. In Alea v. State the District Court of Appeal for the Third District apparently applied the relevancy approach.

Under Alea v. State and by weight of authority voiceprint evidence is admissible in Florida.

C. Entitlement to Costs for an Expert

Florida, by statute and court rule, authorizes funds for the defense of indigents. Sections 914.06, 914.11, 939.07, Florida Statutes (1981); Fla.R.Crim.P. 3.220(k). Section 914.06 specifically authorizes funds for an expert witness when the witness's opinion "is relevant to the issues of the case."

Here, as conceded by the State, the tape recordings allegedly containing admissions by Echols were crucial to the prosecution. (R615) Since an expert's opinion on whether Tape 2 contained Echols' voice would have been highly relevant, the costs for obtaining an expert should have been granted.

In addition to Florida law, several constitutional provisions were violated. Since the equal protection clause

of the Fourteenth Amendment guarantees that an indigent be given a trial equal to that given the person of means, Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956), equal protection requires a court to appoint an expert needed to assist an indigent. Williams v. Martin, 618 F.2d 1021 (4th Cir. 1980). Due process notions are also involved. See generally, Ross v. Moffitt, 417 U.S. 600,609, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974). Further, an indigent has a right to the provision of experts as part of his right to counsel enunciated by the Sixth and Fourteenth Amendments. Hintz v. Beto, 379 F.2d 937 (5th Cir. 1967); See also, Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932). Adequate expert assistance is also an integral part of the Sixth Amendment rights to cross-examination, compulsory process to obtain witnesses in the defendant's favor, and presentation of a defense. See, Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975); Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973) and United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967).

D. Motion to Continue

A motion to continue is directed to the sound discretion of the trial court. Magill v. State, 386 So.2d 1188 (Fla. 1980) However, a denial of a continuance will be reversed upon a showing of a palpable abuse of discretion. See, Jent v. State, 408 So.2d 1024,1028 (Fla.1981), cert.denied, __U.S.__, 102 S.Ct. 2916, 73 L.Ed.2d 1322 (1982).

A palpable abuse of discretion has been found in a number of Florida cases. Lane v. State, 388 So.2d 1022 (Fla.

1980)(murder conviction and death sentence vacated where trial court failed to grant a continuance to allow defendant time for further examination by psychiatric expert); Brown v. State, 426 So.2d 76 (Fla.1st DCA 1983); Marshall v. State, 440 So.2d 638 (Fla.1st DCA 1983); Harley v. State, 407 So.2d 382 (Fla.1st DCA 1981); Lightsey v. State, 364 So.2d 72 (Fla.2d DCA 1978); Sumbry v. State, 310 So.2d 445 (Fla.2d DCA 1975). The common thread running through these cases is that defense counsel was not afforded an adequate opportunity to investigate and prepare any applicable defenses. These cases recognize that not only does due process require that a defendant be afforded counsel, but that it is a denial of a defendant's right to a fair trial to force him to trial with such expedition as to deprive him of the effective assistance of counsel. 407 So.2d at 383-384; 310 So.2d at 447; See also, White v. Ragen, 324 U.S. 760,764, 65 S.Ct. 978, 89 L.Ed. 1348 (1945); Powell v. Alabama, 287 U.S. 45, 77 L.Ed. 158, 53 S.Ct. 55 (1932).

The denial of a continuance sought for the purpose of obtaining an expert was reversible error in Brown v. State. Brown was charged with uttering a forged instrument and grand theft based on a check cashing incident. Between the check cashing incident and trial, the bank teller's recollection of the perpetrator's identity faded. Four days before trial, the State used hypnosis to refresh her memory and she identified Brown's photo from a photo array. The day of trial, defense counsel unsuccessfully sought a continuance to obtain another expert for the purpose of presenting evidence in Brown's favor

concerning hypnosis. Brown was convicted. The First District held that in denying a continuance the trial court had so restricted defense counsel's ability to prepare an adequate defense as to impinge upon Brown's right to liberal cross-examination.

In the instant case, as in Brown v. State, defense counsel did not learn of the necessity for an expert until shortly before trial. Considering counsel's difficulty in obtaining an audible copy of Tape 2, the continuing barrage of discovery from the State and the complexity of the case, counsel reasonably explained their unpreparedness. They were in a difficult position, unable to obtain a needed expert in the time remaining before trial. In the circumstances, the trial court abused its discretion in refusing to grant a continuance.

ISSUE IV.

THE TRIAL COURT ERRED IN DENYING ECHOLS' MOTION TO DELETE PORTIONS OF TAPE 2 DEALING WITH OTHER CRIMES COMMITTED BY MELVIN "MAD DOG" NELSON SINCE SUCH EVIDENCE WAS IRRELEVANT AND PREJUDICIAL.

Defense counsel unsuccessfully asked the court to delete two portions of Tape 2. (R1759,1764-1765) Defense counsel also unsuccessfully moved for a mistrial after the tape was played to the jury. (R2049)

Tape 2 contained the following objectionable portion (R530-531):

> ECHOLS: ...plane tickets and everything out of my pocket. You know, all the expenses from...jump came out of my pocket.
>
> ADAMS: Oh, okay.

ECHOLS: You know, so whatever scrappings you get, split down the middle. [Mad Dog] comes back, takes him a change of clothing.

ADAMS: Um hmm.

ECHOLS: Then he say well, drop me off out here to the watchamacallit. See if he can get him some cocaine, you know...

ADAMS: Yeah, yeah. He love that cocaine.

ECHOLS: He had five or six hundred, whatever...

ADAMS: Um hmm.

ECHOLS: So right then he finds some bitch.

ADAMS: Um hmm.

ECHOLS: Takes the bitch back to the hotel with him, and the bitch clips him.

ADAMS: For his money?

ECHOLS: Yeah.

ADAMS: Oh, shit...Now he's mad.

ECHOLS: Yeah.

ADAMS: That MAD DOG is sick.

ECHOLS: (Unintelligible) Two days...third day he caught up with the bitch, and took her out and bumped her.

ADAMS: Killed her? Damn. That MAD DOG is sick, ain't he?

ECHOLS: Yeah.

ADAMS: Killed the broad for clipping him?

ECHOLS: Um hmm.

ADAMS: Oh, man.

ECHOLS: (Unintelligible) Yeah,...took her out on the west side...

Tape 2 also contained the following (R534):

ADAMS: Oh yeah, MURRAY work out there at the jail don't he.

ECHOLS: Yeah, MURRAY works for KIMBROUGH.

ADAMS: Oh yes, his bailiff.

ECHOLS: ...MAD DOG whipped MURRAY's sister. Beat her to a pulp.

Section 90.401, Florida Statutes (1981), defines relevant evidence as "...evidence tending to prove or disprove a material fact." Evidence concerning other crimes committed by Mad Dog did not prove or disprove that Mad Dog, much less Echols, committed the current crimes. The evidence merely showed Mad Dog's bad character or propensity. Therefore, it was irrelevant. See, Williams v. State, 110 So.2d 654 (Fla. 1959), cert.denied, 361 U.S. 847, 80 S.Ct. 102, 4 L.Ed.2d 86 (1959).

The evidence was highly prejudicial. By establishing Mad Dog's propensity to kill, the evidence suggested that he killed Baskovich. Since the State's theory was that Echols had hired Mad Dog, it clearly implied criminal conduct on Echols' part also.

The jury heard the prejudicial evidence numerous times. Tape 2 was played for them twice. (R2025-2048) Additionally, they were given transcripts of the tape so they could follow it as it was played. (R1752-1757) Further, Adams was permitted to explain to the jury the first objectionable portion. (R2036-2037)

Case law establishes that where evidence of collateral crimes committed by third persons prejudices the defendant, a new trial is required. In Hirsch v. State, 279 So.2d 866 (Fla.

1973), the defendant was convicted of perjury. The theory of prosecution was that she had tried to help one Janice Harvey obtain a new trial by falsely testifying that she saw the prosecutor enter the jury room during deliberations at Harvey's trial. At the defendant's trial, the State introduced evidence that a Mrs. Carney had attempted to tamper with witnesses at Harvey's trial. This Court granted a new trial, holding that evidence of Mrs. Carney's crime was irrelevant and prejudicial to the defendant.

In Armstrong v. State, 377 So.2d 205 (Fla.2d DCA 1979), the trial court allowed a store clerk to testify that he saw the defendant's wife put items in her purse several days before the defendant's alleged theft from the same store. The District Court of Appeal reversed.

ISSUE V.

THE TRIAL COURT ERRED IN LIMITING THE DEFENSE'S CROSS-EXAMINATION OF THE LEAD INVESTIGATOR SINCE THE DEFENSE IS ENTITLED TO WIDE LATITUDE ON CROSS-EXAMINATION.

The right of cross-examination is a fundamental right encompassed within the confrontation clause of the Sixth Amendment made applicable to the States through the Fourteenth Amendment. Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1085, 13 L.Ed.2d 923 (1965). A criminal defendant should be afforded wide latitude on cross-examination. Coxwell v. State, 361 So.2d 148 (Fla.1978).

The State made a motion in limine to prevent the defense from inquiring of law enforcement witnesses whether they

had ordered a voiceprint analysis of the tapes. (R1785) Over defense objection, the motion was granted. (R1785-1786,1791)

Detective McManus was the lead investigator on the case. (R1827,2225) On direct, he testified to a wide range of investigation activities, beginning with the scene investigation and continuing through Echols' arrest. (R2225-2258) He specifically testified to the Indiana State Police's involvement with the investigation and said that that agency turned Tapes 1 and 2 over to him. (R2243,2247-2248)

In a proffer, the defense elicited Detective McManus's testimony that he had not ordered a voiceprint analysis but that the prosecutor's office took the tapes out of the evidence room for the purpose of having a voiceprint analysis done. (R2291-2296) The trial court reaffirmed its earlier ruling that the defense could not elicit this testimony. (R2299) The court ruled that the testimony was beyond the scope of direct, irrelevant and beyond Detective McManus's expertise. (R2299)

Since McManus testified that he was lead investigator and had custody of the tapes, whether a voiceprint was done was a proper area for cross-examination. Since the tapes were crucial pieces of state evidence, the defense should have been allowed to explore whether efforts were made to determine their authenticity.

On proffer, the defense also elicited Detective McManus's testimony that about a week after the murder, Mrs. Baskovich worked with an artist in preparing an artist's rendering of the perpetrators. (R2280) Further, the defense elicited

testimony that shortly after the murder, a Danny Lombard was developed as a suspect. (R2272-2276) The trial court's ruling that these areas were beyond the scope of direct and improper areas for cross-examination (R2285-2286,2300-2301), was also incorrect.

These limitations on cross-examination violated Echols' rights under the Sixth Amendment to the United States Constitution and Article I, Section 16, of the Florida Constitution.

ISSUE VI.

THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE OVER OBJECTION STATE'S EXHIBIT #7 AND TESTIMONY RELATING TO IT SINCE THE STATE FAILED TO ESTABLISH RELEVANCE, A REQUIRED PREDICATE FOR ADMISSION.

Some six and a half to seven and a half hours after the crimes, Detective McManus found three pink jewelry boxes in the street at 1707 Jeffers. (R1467,2231,2235-2236,2368) Over objection the boxes, or box tops as they were variously described, were admitted into evidence as State's exhibit number 7. (R1465-1470) Admission of the boxes and testimony relating to them was error since the State failed to establish their relevance as required by Section 90.402, Florida Statutes (1981).

The boxes were never identified as having come from the victim's house. Mrs. Baskovich testified that the intruders put loose jewelry into a blue bag of hers. (R1281) Although she said she later noticed that a blue jewelry box was missing (R1281), she made no mention of pink boxes being missing. In fact, she never even testified that she had such items before

the incident. Her testimony that Detective McManus showed her some jewelry boxes which she recognized as hers (R1282), did not establish the relevance of the pink boxes since she did not describe the boxes shown to her.

Admission of the boxes was extremely prejudicial; after introducing the boxes the State was allowed, over further objection, to present testimony that one of them bore the latent thumbprint of Melvin Nelson. (R2356-2357,2359-2360,2368-2369) The sole question presented in the guilt phase was the identity of the perpetrators. The thumbprint was the only physical evidence linking Echols, through his alleged accomplice, to the crimes.

ISSUE VII.

THE TRIAL COURT ERRED IN ADMITTING THE VIDEOTAPE OF DRAGOVICH'S MEETING WITH ADAMS AND WHITE INTO EVIDENCE UNDER THE CO-CONSPIRATOR EXCEPTION TO THE HEARSAY RULE SINCE THE VIDEOTAPE WAS NOT MADE DURING THE PENDENCY OF OR IN FURTHERANCE OF THE CONSPIRACY.

The videotape of Dragovich's meeting with Adams and White was admitted against Echols under the co-conspirator exception to the hearsay rule. (R2407-2434,2462) The necessary foundation for admission of hearsay testimony under the exception consists of three distinct prerequisites: (1) there must be independent proof of the existence of the conspiracy and of the defendant's participation in it; (2) the declaration must have been made during the conspiracy; and (3) the declaration

must have been made in furtherance of the conspiracy. Farnell v. State, 214 So.2d 753 (Fla.2d DCA 1968); See also, Thomas v. State, 349 So.2d 743 (Fla.1st DCA 1977), cert.denied, 354 So.2d 987 (1977). Admission of the videotape was error since requirements (2) and (3) were not met.

A conspiracy must have as its object a criminal offense. See, Section 777.04(3), Florida Statutes (1981). A conspiracy usually comes to an end when the substantive crime for which the co-conspirators are being tried is either attained or defeated. Krulewitch v. United States, 336 U.S. 440, 69 S.Ct. 716, 93 L.Ed. 790 (1949); People v. Leach, 541 P.2d 296 (Calif. 1975), cert.denied, 424 U.S. 926, 96 S.Ct. 1137, 47 L.Ed.2d 335. Here, the conspiracy was not in existence when the videotape was made since its object, murder, had been attained.

People v. Leach is factually similar. Leach was arrested for the murder of a Howard Kramer. In several conversations he told one Hagler that Lorraine and Edith Kramer had hired him to kill Kramer for $10,000. He said he was paid a small sum in advance and was to receive the balance when the Kramers collected the victim's life insurance. Further, he said that a Ms. Mayo was to receive $2,000 for introducing Leach and the Kramers. He asked Hagler to collect the money owed him by the Kramers. At times Leach instructed Hagler to go to Mayo for the money. At other times, he maintained that he was being "burnt" by Mayo and that Hagler should go directly to the Kramers. Hagler informed the authorities. An undercover deputy then represented himself to the Kramers as Leach's agent

and pressured them for money. These tape recorded conversations were admitted into evidence under the co-conspirator exception to the hearsay rule. The Supreme Court of California reversed. It found that there was no independent evidence that the conspiracy continued past the accomplishment of the primary objective, the murder. It rejected the arguments that a primary objective of the conspiracy was the collection of insurance proceeds and that the conspiracy continued as long as Leach remained unpaid and the insurance proceeds remained uncollected.

Further, it can hardly be said that Dragovich's statements were in furtherance of the conspiracy. Neither Echols nor Nelson sent Adams and White. The videotape was nothing more than a ploy by the police to obtain incriminating statements. The ploy began on Tape 2 when Adams unsuccessfully tried to talk Echols into sending him to Florida to get money from Dragovich. (R527-535) Significantly, on the videotape Dragovich continually maintains that he has no idea why Adams and White are there since he and Echols do not need their intervention. (R2472,2475,2480-2483,2491,2495,2508)

Improper admission into evidence of a co-defendant's incriminating statements is highly prejudicial to the defendant on trial. Bruton v. United States, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968). Admission of Dragovich's statements violated Echols' right of cross-examination secured by the Confrontation Clause of the Sixth Amendment and Article I, Section 16, of the Florida Constitution.

ISSUE VIII.

THE TRIAL COURT ERRED IN DENYING ECHOLS' REQUEST TO INSTRUCT THE JURY ON JUSTIFIABLE HOMICIDE AND EXCUSABLE HOMICIDE AS PART OF THE MANSLAUGHTER INSTRUCTION SINCE SUCH INSTRUCTIONS ARE ESSENTIAL TO AN UNDERSTANDING OF MANSLAUGHTER.

At the charge conference the defense unsuccessfully requested that the definitions of justifiable homicide and excusable homicide contained in the standard jury instructions be given as part of the instruction on manslaughter. (R2524-2525)

At the end of the trial the judge instructed the jury on first degree murder, robbery with a firearm and armed burglary with an assault. (R2671-2680) He then instructed on second degree murder and manslaughter, followed by instructions on the lesser included offenses for robbery and burglary. (R2680-2685)

The manslaughter instruction was as follows (R2681):

> Manslaughter: Before you can find the defendant guilty of Manslaughter, the State must prove the following two elements beyond a reasonable doubt:
> 1. Waldimir Baskovich is dead.
> 2. The death was caused by the act, procurement or culpable negligence of Robert Echols.

The court then defined culpable negligence. (R2681-2682) At the end of the instructions defense counsel unsuccessfully renewed his prior objections and motions. (R2699)

The manslaughter instruction was clearly incomplete. There is extensive case law holding that when a trial court gives an instruction on manslaughter, as the charged offense or as a lesser included offense, it must, as a concomitant, instruct on justifiable and excusable homicide. See, Hedges v. State, 172

So.2d 824 (Fla.1965); Nelson v. State, 371 So.2d 706 (Fla.4th DCA 1979); Pouk v. State, 359 So.2d 929 (Fla.2d DCA 1978); Jackson v. State, 317 So.2d 454 (Fla.4th DCA 1975). This is because manslaughter is defined in Section 782.07, Florida Statutes (1981) as follows:

> The killing of a human being by the act, procurement, or culpable negligence of another, without lawful justification according to the provisions of chapter 776 and in cases in which such killing shall not be excusable homicide or murder, according to the provisions of this chapter, shall be deemed manslaughter***. (Emphasis added.)

Thus defined, manslaughter is a residual offense. That is, if a homicide is either justifiable or excusable, as defined in Sections 782.02 and 782.03 respectively, it cannot be manslaughter. Therefore, a complete definition of manslaughter must include definitions of justifiable and excusable homicide. It is immaterial whether or not there is evidence to support a finding of justifiable or excusable homicide.[6/] Hedges; Pouk.

The trial court's definition of excusable and justifiable homicide in the introductory instruction on homicide does not cure the error since the court in no way tied the definitions

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6/ The harmless error rule set forth in State v. Abreau, 363 So.2d 1063 (Fla.1968), does not apply here. Abreau held that failure to instruct the jury on an offense two steps removed from the charged offense is harmless error where the jury, although instructed on an offense one step removed, returns a guilty verdict on the charged offense. Abreau was based on the theory that the jury obviously did not wish to "pardon" the defendant in such a situation since it did not return a guilty verdict on the next immediate lesser included offense.

Abreau does not apply here since manslaughter is not a true lesser included offense of first degree murder. Rather, it is a lesser degree of homicide having elements totally distinct from first and second degree murder. See Brown v. State, 206 So.2d 377 (Fla.1968). Thus the pardon power of the jury was not involved.

to the manslaughter instruction. (R2670-2671) The definitions in the introductory instruction merely explained the general law of homicide; since each degree of homicide is defined as an "unlawful killing," to fully explain an "unlawful killing" the court was required to explain "lawful" killings. See, Section 782.04, Florida Statutes (1981), and Henry v. State, 359 So.2d 864 (Fla.1978).

ISSUE IX.

THE TRIAL COURT ERRED IN RETAINING JURISDICTION OVER THE SENTENCE IMPOSED ON THE BURGLARY CONVICTION SINCE WHERE CONCURRENT SENTENCES ARE IMPOSED THE TRIAL COURT MAY ONLY RETAIN JURISDICTION OVER THE SENTENCE IMPOSED FOR THE HIGHEST FELONY.

Section 947.16(3), Florida Statutes (1982 Supp.), which was in effect at the times pertinent here, provided that the trial judge may retain jurisdiction over the first half of "the maximum sentence imposed" for certain enumerated felonies. Section 947.16(3) further provided: "When any person is convicted of two or more felonies and concurrent sentences are imposed, then the jurisdiction of the trial court judge as provided herein shall apply to the first half of the maximum sentence imposed for the highest felony charged and proven." (Emphasis added)

Echols received concurrent sentences for murder, armed robbery and armed burglary with an assault. (R387-389,2989-2990) All of the offenses are enumerated felonies under Section 947.16(3). Since the capital felony is the highest felony, retention of jurisdiction, if any, would have to be on it.

The trial judge, however, retained jurisdiction over half the sentence imposed on the burglary conviction (Count II of the information). (R384,387-389,391,2989-2990) The retention of jurisdiction was clearly improper.

Where separate sentences are imposed to run concurrently with the sentence imposed on a capital crime, the trial judge simply has no authority to retain jurisdiction. Any entitlement to parole consideration is solely controlled by the separate statutory requirement that the defendant serve twenty five years before becoming eligible for parole. See, §775.082(1), Florida Statutes (1981). This is because Section 947.16(3) is inoperable where a life sentence is imposed since the length of time jurisdiction is retained cannot be calculated. Cordero-Pena v. State, 421 So.2d 661 (Fla.3d DCA 1982). Where the other possible sentence for a capital offense, death, is imposed Section 947.16(3) is similarly inoperable because obviously one cannot calculate retention of jurisdiction on a death sentence.

ISSUE X.

THE TRIAL COURT ERRED IN SENTENCING ECHOLS TO DEATH BECAUSE THE SENTENCING WEIGHING PROCESS INCLUDED INAPPLICABLE AGGRAVATING CIRCUMSTANCES AND EXCLUDED EXISTING MITIGATING CIRCUMSTANCES, RENDERING THE SENTENCE UNCONSTITUTIONAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A.

The Trial Court Erred In Doubling The Statutory Aggravating Circumstances Murder For Pecuniary Gain and Cold, Calculated And Premeditated.

Where the same aspect of a capital crime gives rise to two or more aggravating circumstances, only one circumstance can be found and considered in sentencing. Clark v. State, 379 So.2d 97 (Fla.1979); Provence v. State, 337 So.2d 783 (Fla.1976), cert. denied, 431 U.S. 969, 97 S.Ct. 2929, 53 L.Ed.2d 1065 (1977). Here, the trial judge found that the murder was cold, calculated and premeditated based on evidence of a planned murder for hire. (R299-300) The judge also found that the murder was for pecuniary gain. (R299)(A2) In support, he found that Echols' motive for the murder was the promise of long-term payment by construction of and management after completion of a condominium project. (R299)(A2)

A murder for hire is necessarily a planned murder and a murder for pecuniary gain. Finding two aggravating circumstances based on the murder for hire aspect of the crime constituted improper doubling.

B.

The Trial Court Erred In Considering Lack Of Remorse As A Nonstatutory Aggravating Circumstance.

In his findings of fact to support the death penalty, the trial judge wrote (R302)(A5):

> ***Standing out as if painted in red with his victim's blood is that aspect of [Echols'] character that shows no remorse. At no place on either of the tapes is there any twinge of conscience shown.***Notable on the tapes is

> the defendant's laughter and obvious pride in the professional manner of the assassination. For example, he describes the commission of these horrendous crimes as "sweeter than pie."

This Court has recently held that lack of remorse may not be considered either as an aggravating factor nor in enhancement of proper statutory aggravating factor. Pope v. State, 441 So.2d 1073 (Fla.1983). However, it may be used, where relevant, to support rejection of defense counsel's arguments for mitigation. Agan v. State, __So.2d__, 8 FLW 508 (Fla.Case No. 60,476, opinion filed Dec. 15, 1983).

Here, lack of remorse was used as an aggravating factor. It was clearly not relevant to negate mitigating factors as defense counsel did not argue remorse in mitigation. (R2731-2937,2976-2986)

C.

The Trial Court Erred In Failing To Consider Echols' Age As A Statutory Mitigating Circumstance.

Before penalty phase the defense requested an instruction on age, a statutory mitigating circumstance. (R2786) The judge denied the request expressing his belief that the circumstance only applies to youths. (R2787) Evidence presented at penalty phase established that Echols was fifty eight years old. (R2839)

This Court has stated that there is no per se rule which pinpoints when age is a mitigating circumstance. Peek v. State, 395 So.2d 492,498 (Fla.1981). Recently the Court interpreted the circumstance to apply to older persons, as well as

to youths. Agan v. State, __So.2d__, 8 FLW 508 (Fla.Case No. 60,476, opinion filed Dec. 15, 1983). Accordingly, Echols was entitled to have his age considered in mitigation.

In Eddings v. Oklahoma, 455 U.S. 104, 71 L.Ed.2d 1, 102 S.Ct. 869 (1982), as here, the trial judge imposed a death sentence under the mistaken belief that as a matter of law he could not consider certain mitigation evidence offered by the defense. Holding that the judge's incorrect position had foreclosed the individualized consideration of Eddings' character and record constitutionally required, the Supreme Court remanded the case for reconsideration of sentence. The Court reaffirmed its commitment to the rule of Lockett v. Ohio, 438 U.S. 586, 57 L.Ed.2d 973, 98 S.Ct. 2954 (1978), requiring the trial court to consider and weigh all of the mitigating evidence presented by the defense.[7/]

Here, since the judge rejected the mitigating factor age based on his incorrect belief that the factor only applies to youthful offenders, Echols' sentence was not the result of informed discretion and was imposed without the individualized consideration of mitigating factors required by the Eighth and Fourteenth Amendments.

D.

The Trial Court Erred By Failing To Find Nonstatutory Mitigating Circumstances And By Finding Nonstatutory Aggravating Circumstances.

7/ Even in noncapital cases it is recognized that the judge must exercise informed discretion when sentencing. See Encinosa v. State, 431 So.2d 705 (Fla.2d DCA 1983), and Fowler v. State, 375 So.2d 879 (Fla.2d DCA 1979).

In penalty phase the defense presented impressive non-statutory mitigation evidence. Echols served honorably in the United States Army in the Korean war. (R2832) He had a good work record, having owned several small businesses and coming highly recommended within the construction field. (R2831-2834, 2840-2841,2847,2853,2874-2876,2885) He was a loving parent who took an active part in raising his children. (R2837,2843-2846) He was a good brother, son and neighbor. (R2839,2853) He was active in his church (R2834-2835,2849,2861-2862); in civic affairs (R2877-2878,2866); and in minority business affairs. (R2871) He had a nonviolent character.[8/] (R2838,2847-2848,2873)

Many of these factors have specifically been held to be valid mitigating circumstances. In Halliwell v. State, 323 So.2d 557,561 (Fla.1975)(death sentence vacated/death recommendation), service as a Green Beret in the Vietnam war was recognized as a valid mitigating factor. In Jacobs v. State, 396 So.2d 713 (Fla.1981)(death sentences vacated/life recommendations), being a caring parent was recognized as a valid mitigating factor.[9/] Although Jacobs involved a female defendant, its holding must be applied to male defendants to avoid gender based discrimination in the application of the death penalty. In McCampbell v. State, 421 So.2d 1072 (Fla.1982)(death sentence

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8/ Even Leonard Adams, the State's chief witness, described Echols as a gentle, nonviolent person. (R2059)

9/ Compare, Porter v. State, 400 So.2d 5 (Fla.1981)(mere parenthood is not a valid mitigating factor).

vacated/life recommendation), the defendant's employment record and family background were recognized as mitigating factors. In Washington v. State, 432 So.2d 44 (Fla.1983)(death sentence vacated/life recommendation), being a "good person" and son and having never before committed a violent act were recognized as mitigating factors.

Despite case precedents, the trial judge not only rejected the mitigation evidence, but he used it to find aggravating factors unsupported by law or fact. With imagination, he wrote (R301-303)(A4-6):

> As to aspects of the Defendant's character, the evidence of his family and character witnesses indicate that outwardly he is a businessman, churchgoer, family man and generally a law-abiding citizen. His real character as shown by the crimes and the tapes is of a sinister person skulking in the shadows. He is a possessor of a "sawed-off" shotgun, a billy gun and a .45 caliber handgun. No legitimate explanation for the possession of the first two has been advanced. Rather, all could be considered as "tools of the trade" of a professional contract killer. The sophistication of communication with Dragovich and the payment of $4,000.00 through the pretext of payment of a "bad debt" clearly indicate the Defendant possesses a high degree of sophistication in concealment and conspiracy. The jury did not have the advantage of hearing the last portion of the first tape about bombs, but again it is clear that the Defendant is no neophyte in clandestine matters. His character is clearly such that there was no hesitation in committing the robbery and the burglary involving MRS. BASKOVICH as a mask for the homicide. The Defendant, on the tapes, also exhibits "concealment of forethought" as to where he lived; if arrested he would "play it to the bust."

* * *

> The evidence shows the Defendant to be a mature man; no green twig bent but one time in the direction of crime by criminal associations; not one to be reshaped back toward the path of civilization by rehabilitative forces. The dialogue on the tapes shows the law-abiding surface character of this 58 year old man to be but a shielding cloak paraded before his family, his legitimate business associates, church and friends; in short, hypocrisy of the highest order. The mark of a professional involved in criminal activity is his successful concealment of that activity.

The trial judge's analysis was grossly improper. First, his theory that Echols' good character traits are a "shielding cloak" designed to hide a "sinister" character is unsupported in the record. It is ludicrous to think that Echols, among other things, served in the Korean war and was a caring parent and family member merely as an elaborate cover-up. Given the extensive mitigation evidence, the case is more reasonably seen as a tragic case of a good man gone astray. Yet the judge went so far as to turn Echols' virtues into a nonstatutory aggravating factor, "hypocrisy of the highest order." One wonders whether a defendant who has made it a lifelong pattern to flaunt criminal behavior and who has made no contributions to his community or family would be held in higher esteem by this judge.

Second, the judge improperly used the contract murder aspect of the case to negate valid mitigating evidence. Aggravating and mitigating circumstances are separately enumerated in the capital sentencing statute. See, §921.141(5), Florida Statutes (1981). Although they are to be weighed against each other, Dixon v. State, 283 So.2d 1 (Fla.1973), cert.denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974), they are

doctrinally separate. See, e.g., Michael v. State, 437 So.2d 138 (Fla.1983)(A defendant's mental problems do not effect the application of aggravating factors, but, rather, affect their weight). Accordingly, an aggravating factor cannot be used to actually negate mitigation evidence. To allow otherwise would interject a new doubling problem into death penalty analysis.

Third, the judge's conclusion that Echols was a "professional" contract killer is unsupported by the record since there was no proof that he had previously killed anyone. In fact, on the videotape Dragovich said that Echols had to hire a third person because he was incapable of killing. (R2485-2486) Additionally, the unrefutted testimony at penalty phase established that Echols was nonviolent by nature. (R2838,2847-2848,2873) Further, a police officer testified that in the many years he has known Echols he has never received any information suggesting involvement in crime. Evidence that Echols possessed a gun collection and made efforts to conceal the current crimes falls far short of establishing "professional" status. Again, the judge even went so far as to turn his theory into a nonstatutory aggravating factor.

In short, the judge not only rejected valid mitigation evidence for invalid reasons, but he actually used the mitigation evidence against Echols.

ISSUE XI.

THE TRIAL COURT ERRED IN SENTENCING ECHOLS TO DEATH AFTER A JURY RECOMMENDATION OF LIFE IMPRISONMENT SINCE ANY FACTS SUGGESTING DEATH ARE NOT SO CLEAR AND CONVINCING THAT VIRTUALLY NO REASONABLE PERSON COULD DIFFER.

A jury recommendation is entitled to great weight since it represents the judgment of the community as to whether the death penalty is appropriate. Tedder v. State, 322 So.2d 908 (Fla.1975). A death sentence following a jury recommendation of life should not be sustained unless the facts suggesting a death sentence are "so clear and convincing that virtually no reasonable person could differ." 322 So.2d at 910. Thus, where reasonable persons can differ over the fate of a capital defendant, it is the jury's determination, and not the judge's, which must be given effect. Provence v. State, 337 So.2d 783 (Fla.1976). Even if the judge's sentencing findings are reasonable or supported by the evidence, where there is any view of the evidence from which a jury could reasonably have recommended life, the sentencing judge is not free to substitute his own judgment to override it. See, Cannady v. State, 427 So.2d 723,731 (Fla.1983); Gilvin v. State, 418 So.2d 996,999 (Fla. 1982); Chambers v. State, 339 So.2d 204,208 (Fla.1976)(England, J., concurring). Further, a jury's life recommendation is reasonable if it may have been based on statutory or nonstatutory mitigating circumstances even though the trial court was not compelled as a matter of law to find them. Gilvin v. State

Here, the judge imposed the death penalty despite a life recommendation by the jury. (R2940,2989) He found three statutory aggravating circumstances: felony murder; for pecuniary gain; and cold, calculated and premeditated. (R298-301)(A1-4) He found one statutory mitigating circumstance: no significant history of criminal activity. (R301,303)(A4,6)

The jury's life recommendation, however, could have been based on one or more of the following aspects of Echols' character or record: (1) military service; (2) employment record; (3) caring parent and family member; (4) participation in church and community affairs; (5) nonviolent character; (6) lack of significant history of criminal activity; and (7) age. Many of these factors have been recognized as reasonable bases for a life recommendation. See, Jacobs v. State, 396 So.2d 713 (Fla.1981)(caring parent); McCampbell v. State, 421 So.2d 1072 (Fla.1982)(employment record and family background); Washington v. State, 432 So.2d 44 (Fla.1981)(being a good son and having never before committed violence); Cannady v. State, 427 So.2d 723 (Fla.1983)(age).

Additionally, the life recommendation could have been based on two aspects of the offense. The first is Echols' middleman status. Barfield v. State, 402 So.2d 377 (Fla.1981), recognized that a defendant's middleman status in a contract killing could provide a reasonable basis for a jury's life recommendation. The Court reduced Barfield's death sentence to life imprisonment even though the trial court had not found any

mitigating circumstances. The instant case is an even stronger one for reducing the sentence to life since here the trial court found one statutory mitigating circumstance. (R301,303)(A4,6)

The second aspect of the offense justifying the life recommendation is the absence of victim suffering or other circumstances qualifying as heinous, atrocious or cruel. The decisions of this Court implicitly recognize that such a basis for a life recommendation is reasonable.

Presence of the circumstance heinous, atrocious or cruel is the common thread running through the cases in which this Court has approved a life override. The Court has affirmed only 19 of the 61 life override murder cases decided to date. See A7-10. In 18 of those 19 cases, the trial court found the heinous, atrocious or cruel circumstance. This Court upheld the heinous, atrocious or cruel finding in all 18 of the cases.[10/] The only life override case this Court has affirmed in the absence of a finding of heinous, atrocious or cruel is Sawyer v. State, 313 So.2d 680 (Fla.1975). Sawyer was the earliest life override case affirmed by the Court. In his concurring opinion in Witt v. State, 387 So.2d 922,931 (Fla.1980), Justice England observed that if Sawyer's case were reviewed under the standards

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[10/] In Ziegler v. State the defendant was convicted of two counts of first degree murder and two counts of second degree murder. The trial court found both first degree murders to be heinous, atrocious or cruel. Although this Court only approved the finding as to one of the first degree murders, it stated that under the totality of the circumstances of the mass murder it was immaterial whether the other first degree murder was heinous, atrocious or cruel.

later developed, his death sentence in all probability would be vacated. It is worthy of note that after the appeal the trial judge reduced Sawyer's death sentence to life imprisonment. 313 So.2d at 931-932.

Thus, the jury's life recommendation was reasonable. In contrast, the judge acted improperly and unreasonably. He doubled two statutory aggravating factors, considered nonstatutory aggravating factors and, most importantly, rejected numerous mitigating factors. (See Issue X) To affirm this death sentence would be to exalt the individual, unreasonable opinion of the judge over the considered opinion of the jury.

ISSUE XII.

A TRIAL JUDGE'S OVERRIDE OF A JURY'S LIFE RECOMMENDATION IS UNCONSTITUTIONAL SINCE IT PUTS A DEFENDANT IN DOUBLE JEOPARDY, VIOLATES THE DUE PROCESS CLAUSE AND CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT.

It is Echols' position that a trial judge's override of a jury's factually based decision against the death penalty contravenes, in all cases, the Fifth, Sixth, Eighth and Fourteenth Amendments. It is his alternate position that if the override of a jury's life verdict is constitutional on its face, the Florida standards for the override are applied in a manner that discounts the jury's consideration of mitigating factors and that is so broad and vague as to violate the constitutional requirement of reliability in the determination that death is the appropriate punishment in a particular case. These positions were preserved below. (R74,111)

Although this Court has rejected these positions, the Supreme Court of the United States has recently granted certiorari to review them. Spaziano v. State, 433 So.2d 508 (Fla.1983), cert.granted, __U.S.__, 104 S.Ct. 697 (1984)(No. 83-5596).

ISSUE XIII.

FLORIDA'S DEATH PENALTY STATUTE IS UNCONSTITUTIONAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS SINCE IT IS IMPOSED PURSUANT TO A PATTERN AND PRACTICE OF DISCRIMINATION, WITH A RESULTING DISPROPORTIONATE IMPACT ON BLACKS, TAKING INTO ACCOUNT THE RACE OF THE DEFENDANT, THE RACE OF THE VICTIM, AND THE LOCALITY OF THE CRIME.

Before trial, Echols moved to dismiss the indictment on the ground that Florida's death penalty statute is unconstitutional since it is applied discriminately based on the race of the defendant and the race of the victim. (R79) The motion was denied without an evidentiary hearing. (R111)

In their dissent in Pulley v. Harris, __U.S.__, __S.Ct. __, __L.Ed.2d__ (1984)[34 Cr.L. 3027], Justices Brennan and Marshall took note of the growing scientific evidence showing such discrimination in the application of the death penalty. They listed eleven studies as indicative of a rapidly expanding body of literature on the subject. 34 Cr.L. at 3035.

Georgia's application of the death penalty was challenged on the basis of defendant and victim race in Spencer v. Zant, 715 F.2d 1562 (11th Cir. 1983), rehearing en banc granted, __F.2d__ (1983). The United States Court of Appeals for the Eleventh Circuit remanded the case for an evidentiary

hearing. In Stephens v. Kemp, 721 F.2d 1300 (11th Cir. 1983), stay granted, __U.S.__, 104 S.Ct. 562, 78 L.Ed.2d 370 (Dec. 13, 1983), the Supreme Court stayed the execution of another Georgia inmate pending the Eleventh Circuit's decision in Spencer v. Zant.

Echols acknowledges that this Court has previously rejected this issue. Proffitt v. State, 360 So.2d 771 (Fla. 1978). He asks the Court to reconsider its position in light of the recent judicial developments.

CONCLUSION

Echols asks this Honorable Court to reverse his case for a new trial for the reasons expressed in Issues I through VIII. For the reasons expressed in Issue IX he asks that retention of jurisdiction be stricken from the judgment and sentence imposed on Count II of the information. For the reasons expressed in Issues X through XIII he asks that his death sentence be reduced to life imprisonment.

Respectfully submitted,

JERRY HILL
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

BY: Karla J. Staker
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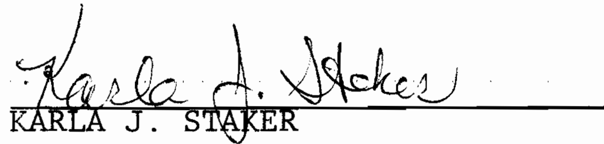
CERTIFICATE OF SERVICE

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 29th day of March, 1984.



KARLA J. STAKER

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