IN THE SUPREME COURT OF FLORIDA

RAYMOND DOLINSKY,

Appellant,

v.

STATE OF FLORIDA,

Appellee.



CASE NO. 64,743

INITIAL BRIEF OF APPELLANT
APPEAL FROM THE CIRCUIT COURT OF
THE SIXTEENTH JUDICIAL CIRCUIT OF
FLORIDA IN AND FOR MONROE COUNTY
HONORABLE BILL G. CHAPPELL, JUDGE

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## PRELIMINARY STATEMENT

The Appellant, RAYMOND DOLINSKY, was the Defendant in the Trial Court of the Circuit Court of the Sixteenth Judicial Circuit of Florida, the Honorable Bill G. Chappell presiding. Appellee, STATE OF FLORIDA, was the Plaintiff in the Trial Court. They will be referred to in this Brief as the "Appellant" and "Appellee" or "State".

## STATEMENT OF THE CASE

Appellant, RAYMOND DOLINSKY, was arrested and booked mistakenly under the name of Raymond Bowes on three (3) counts of First Degree Murder. A subsequent affidavit was filed reflecting the name Raymond Dolinsky a/k/a Raymond Bowes (R-5). On April 22, 1983, upon application thereto, a search warrant was issued and executed for search of Appellant's van.

On May 9, 1983, Appellant was indicted by the Monroe County Grand Jury on three (3) counts of First Degree Murder F.S. 782.04(1)(a) (R-19-22).

On September 27, 1983, Appellant's Motion to Suppress certain items taken from Appellant's van pursuant to the search warrant was denied.

On October 7, 1983, Appellant filed an individual verified Motion to Dismiss Counts I and II of the indictment (R-82-87) which was subsequently denied on November 2, 1983 (R-101-2).

On November 3, 1983, Appellant's Motion to Preclude Challenge for Death, Scrupled Jurors, Individual Voir Dire, Sequestration, and Motion to Dismiss Indictment and or Declare the Death Statute as Unconstitutional were all summarily denied (R-109).

On November 7, 1983, Jury Trial was commenced in this matter with the selection of Jurors.

On November 14, 1983, the Jury returned a verdict of guilty against Appellant of Murder First Degree as to Count II with a finding of guilt on Counts I and III of Felony Murder Second Degree. After receiving the verdict, the Trial Court adjudicated Appellant guilty on all Counts with the penalty phase continued to the next day (R-162-4).

On November 15, 1983 the Jury unanimously rendered an advisory opinion of Life Imprisonment with respect to Appellant as to Count II (R-158).

On December 16, 1983 Appellant's Motion for New Trial and Motion to Continue Sentencing was denied.

The Trial Court then proceeded to override the Jury's advisory opinion of Life and sentenced Appellant to Life as to Counts I and III and Death as to Count II (R-205-9).

Appellant's Motion for Correction or Reduction of Sentence filed December, 19, 1983 (R-210-11) was denied on December 30, 1983 (R-243). The instant Appeal followed.

## STATEMENT OF THE FACTS

On April 13, 1983, after being dispatched to Cudjoe Key, members of the Monroe County Sheriff's Office discovered two (2) bodies later identified as Tennessee residents, Curtis G. Redman and Kenneth Colbaugh (T-287-8). A third body was found in the general area four (4) days later and was identified as Gerald Hamilton (R-292) also a resident of Tennessee.

The medical examiner for Monroe County, Florida testified that Curtis Redman received a single mortal gunshot wound to the head and a single mortal gunshot wound to the chest as did Kenneth Colbraugh, who also received a third gunshot wound to the external genitalia and a fourth gunshot wound to the left elbow. Gerald Hamilton received a single mortal wound to the chest.

At Trial, Scott and Melissa Duncan of Fort Lauderdale, Florida, testifying under State-granted use of immunity, indicated that Scott Duncan had received a phone call in early April of 1983 from Gerald Hamilton who was seeking to purchase a quantity of marijuana (T-423). Duncan told Hamilton that he had a friend who might be able to supply some marijuana and would return Hamilton's call. Duncan's friend was James Clark who in turn told Duncan that he could in fact furnish some marijuana but that the transaction would be in the Keys (T-424). Duncan relayed this information to Hamilton who indicated that he and some friends would be in Fort Lauderdale, Florida within twenty four (24) hours (T-424).

Arriving at Duncan's residence some sixteen (16) to twenty (20) hours later, Hamilton indicated that his friends were staying at a local motel. While Hamilton watched television, Duncan called Clark. Clark in response to Duncan's phone call appeared at Duncan's residence with Ronald Bowes(T-424-6). In the presence of

Scott and Melissa Duncan, and their neighbor Ronald Thornberry, Gerald Hamilton upon request by Bowes to display the money, counted out fifteen to sixteen thousand ($15,000-16,000) dollars for Clark and Bowes for the purchase of fifty (50) pounds of marijuana (T-427).

After counting the money, the trio of Hamilton, Bowes, and Clark left the Duncans' to presumably consummate the deal but not before Hamilton displayed a .44 magnum concealed under his shirt in a shoulder holster (T-428) (T-437).

The Duncans and Thornberry received five hundred ($500.00) dollars which they split among themselves for their roles in setting up said transaction.

It should be noted that the Duncans were no strangers to this enterprise and had apparantly engaged in at least on previous transaction also in conjunction with James Clark (T-430).

James Clark, an admitted participant testified that he and Bowes, after leaving the Duncans, followed Hamilton to a local motel where Hamilton picked up Curtis G. Redman and Kenneth Colbaugh (T-343).

With Bowes leading the way, accompanied by Clark as a passenger, the parties proceeded south and eventually arrived in a remote area of Cudjoe Key (T-346).

As Bowes got out of the vehicle, Clark stated that he observed Bowes remove a .357 pistol from between the seats, which according to Clark, Bowes then concealed under his shirt and in his pants.

While Clark and Colbaugh and Redman waited, Clark stated that Bowes and Gerald Hamilton walked out of sight to the vicinity of a van which had been parked at the time of their arrival. Clark further stated that he heard loud laughter and then a shot (T-348).

After fifteen to twenty (15-20) minutes following the shot, during which time Clark stated that he and Colbaugh and Redman engaged in general conversation about the Corvette Bowes had been driving, they heard a voice yell out, "Freeze, Police." Clark stated that the voice was that of Bowes. A second command, according to Clark came from Bowes ordering everyone to "Lay down on the ground" (T-351). Clark went on to state that he and one of the parties from Tennessee [Redman] complied while the other armed with a .25 caliber pistol crouched down between the vehicles. At this point Clark stated that a second voice stated, "There is still one behind the car" and then "Come out from behind there".

In response, Redman lay down on the ground. The .25 caliber pistol was thrown into the bushes.

Clark further testified that he continued to lie on the ground until a person whom Clark identified as the Appellant appeared and asked, "...are you with us or against us?..." Clark replied, "I am with you" and got up from off the ground (T-357).

While Appellant, according to Clark, was holding a pistol on Curtis Redman, Clark testified that Bowes was frisking Colbaugh who was still lying on the ground.

Clark continued to state that Bowes then retrieved the .44 magnum, which was still in the holster and identified previously as having been in the possession of Gerald Hamilton, from the vehicle of the parties from Tennessee. This weapon Clark indicated was given to him by Bowes (T-358). At the direction of Bowes, Clark stated that he accompanied Appellant who, according to Clark, was walking toward the van with Curtis Redman.

As the three were walking a shot was heard and Clark testified that he saw Bowes standing over Kenneth Colbaugh yelling, "I blew my thumb off" and "Kill him

Ray" (T-361).

Clark states that Appellant then fired two (2) shots at Curtis Redman who fell to the ground. Bowes in the meantime fired an additional two to three (2-3) shots.

Clark, in response to the leading questions by the State went on to testify that Bowes then ordered him to shoot Curtis Redman. Clark stated that he responded by telling Bowes that "...he was already dead..." Bowes then, according to Clark pointed a gun at Clark and said, "...I said shoot him." Clark then testified that he shot Curtis Redman in the head with the .44 magnum (T-397).

Clark further testified that they then left the area with Appellant leading the way in the van. As they headed north on U.S. 1, the .44 magnum and the .357 pistol were thrown by Bowes, at Clark's direction into the water as they crossed a bridge (T-364). These weapons were later retrieved by a diver for the Monroe County Sheriff's Office (R-302-3).

Clark additionally testified that during a stop for gas that Bowes returned from the van with a tee shirt containing money. When Bowes and Clark arrived in Fort Lauderdale, Clark stated that he received four thousand seven hundred ($4,700.00) dollars from Bowes which Clark said he turned over in total to the Monroe County Sheriff's Office.

The van, which according to Clark was occupied by Appellant, again, according to Clark, became separated from Clark and Bowes en route to Fort Lauderdale, Florida.

Other facts to be cited as appropriate throughout Appellant's Brief.

## POINT I

## THE TRIAL COURT ERRED IN NOT GRANTING APPELLANT'S MOTION FOR A MISTRIAL AFTER AN OFFICER FOR THE STATE MADE A DIRECT TESTIMONIAL COMMENT ON THE APPELLANT'S RIGHT TO REMAIN SILENT

During the State's Case in Chief the following interchange occured between the State and its police witness, Deputy Donald J. Valicky:

> Q. "Would you read us now, please, the rights that you gave to Raymond Dolinsky on the occasion of his arrest?"
>
> A: "Yes, sir, one moment so I can put my glasses on. 'You have the right to remain silent and refuse to answer questions.' Then he is asked, 'Do you understand?' 'Anything you say may be used against you in a court of law, do you understand? You have the right to consult an attorney before speaking to the police and to have an attorney present during questioning now or in the future. Do you understand? If you cannot afford an attorney, one will be appointed for you before any questions if you wish. Do you understand? If you decide to answer questions now, without an attorney present, you will still have the right to stop answering at any time until you talk to an attorney. Do you understand? And knowing and understanding you rights as I have explained them to you, are you willing to answer my questions without an attorney present?'"
>
> Q: "And did Mr. Dolinsky indicate to you that he understood his rights?"
>
> A: "Yes, sir, and he refused to answer any questions at that time."

At that point, Trial Counsel made timely objection. Carter v. State, 365 So. 2d 701 (Fla. 1978) and State v. Cumbie, 380 So. 2d 1031 (Fla. 1980).

After a brief conference at the bench, the Trial Court sustained the objection, but withheld ruling on the Motion for Mistrial. Later, after discussion between the parties the Trial Court denied the Motion for Mistrial. (T-532-544)

No curative instruction of any kind was given to the Jury (T-503-5). Counsel for the State asked this witness no further questions and Defense Counsel did not cross-examine.

During the conference at the bench, the State indicated that the foregoing

was not a comment on Appellant's Right to Remain Silent, as Appellant made statements "at that time" to Detective Gallinaro, the State's next witness (T-504).

It should be noted that the only testimony offered by the State through Detective Velicky was that Velicky had "...the occasion to effect the arrest..." of Appellant, and that Velicky advised Appellant of his Miranda Rights in the presence of Detective Gallinaro (T-502). To that end Velicky testified that he had read to Appellant the warnings from a printed card he was carrying at the time and then, in response to the State's request, proceeded to read from a printed card the verbatim warnings Velicky had given Appellant the day of his arrest. After reading each warning contained on the card, Detective Velicky testified that he asked Appellant the question, "Do you understand?" Velicky, while volunteering the foregoing question in his narrative testimony, failed to include whether or not Appellant replied to each "Do you understand?" Presumably one would infer that Velicky, in reading these warnings to Appellant, did wait for a reply to each "Do you understand?" before going on to the next warning. Certainly that was the mandate enunciated when the Court stated:

> "The Defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly, and intelligently." Miranda v. State of Arizona, 384 U.S. 436 S.Ct. 1602, 1612, 16 L.Ed. 2d 694 (1966)

To establish the alleged voluntary, knowingly, and intelligent waiver, the State then asked Deputy Velicky:

> Q: "And did Mr. Dolinsky indicate to you that he understood these rights?" (T-503)

To a question which could have been answered "yes" or "no" Velicky responds:

> A: "Yes sir, and he refused to answer any questions at that time." (T-503)

Of further note, Velicky was not a rookie officer at the time of the arrest and Trial of Appellant, but in fact had been with the Fort Lauderdale Police Department three (3) years after the decision of Miranda.

> Q: "How long have you been employed with the Broward County Sheriff's Office?"
>
> A: "I've been employed by them for approximately eight and a half months. Prior to that I was with the Fort Lauderdale Police Department for twenty (20) years. (T-501-2)

The following witness for the State was Detective Gallinaro. The State had advised the Trial Court earlier that Appellant had made statements "at that time" to said Gallinaro. (T-504)

In addition to hearsay testimony regarding the registration of Appellant's van, the State, after inquiring whether or not Appellant was advised simply of his rights, (T-507) the following statements of Appellant were offered:

> Q: "At that time did you ask Raymond Dolinsky or inquire of him as to his knowledge of one Ronald Bowes?"
>
> A: "Yes, I did. I first asked him if his name was Bowes and ne said, 'No' his name was not Bowes and I inquired if he know a Ronald Bowes and he said he did not know any Ronald Bowes and never heard of any Ronald Bowes."
>
> Mr. Fowler: "Thank you very much." (R-507-8)

The foregoing represents in total the so-called statements made by Appellant at the time of his arrest and offered by the State.

Appellant's Trial Counsel, surprised by this testimony attempted impeachment or clarification of Detective Gallinaro's testimony. Gallinaro sidesteps Appellant's Counsel's questions with the following interchange which further highlights aforementioned violation.

Q: "And you kept calling him what? Raymond Bowes?"

A: "I asked him if his name was Raymond Bowes."

Q: "And he said it wasn't?"

A: "That's correct."

Q: "There was no mention in the deposition of your next question of whether he knew Raymond Bowes, right?"

A: "You never asked me that question."

Q: "I asked you if he made any statements."

A: "When you asked me that question, I understood that to mean any statements pertaining to the charge pending against him."

Q: "Question: And when he was arrested, did he make any statements in your presence?"

A: "He made no statements."

Q: "You felt compelled to tell us that he denied he was Raymond Bowes but you didn't feel compelled to tell us that he didn't know Raymond Bowes?"

A: "He didn't make a statement. I took your question at that time, Counsel if you will recall, as any statements pertaining to the charge that was pending. He made no statements concerning those charges."

Q: "Right. He did make a statement denying that he was Raymond Bowes."

A: "Well, I didn't assume--I didn't take your question in that context." (T-509-10)

At the conclusion of Deputy Velicky's testimony, there is no question in the Juror's minds that Appellant refused to make a statement during his initial custodial

interrogation. The inference to the Jury would have to have been that Appellant did make a statement at some later time. The inference would also have to have been that Appellant would deny the charge consistent with his Trial testimony.

Such was not the case as testified by Detective Gallinaro, but was rather an ambiguous statement regarding the confusion of Appellant's testimony.

Florida has long recognized the Accused's absolute Right to Remain Silent as inviolate. Jackson v. State, 34 So. 2d 243 (1903) citing Chapter 4400, p. 162 of the Acts of 1895.

In Miranda, The Court found that the privilege to remain silent has a basis in the Bible itself.

> "Thirteenth century commentators found an analogue to the privilege founded in the Bible. 'To sum up the matter, the principle that no man is to be declared guilty on his own admission is divine decree.' " Maimonides, Misneh Torah (Code of Jewish Law), Miranda supra 86 S.Ct. 1602, 1619 footnote 27.

It was also stated in Miranda supra that the prevention of self-incrimination has its roots firmly established by the framers of our Constitution and Bill of Rights, who were aware of the encroachments of individual liberty through Star Chamber Oaths which compelled answers to all questions on any subject.

> "In sum, the privilege is fulfilled only when the person is guaranteed the Right to Remain Silent unless he chooses to speak in the unfettered excercise of his iron will." Miranda supra p. 1620, citing Mallory v. Hogan, 378 U.S. 1, 8, 84 S.Ct. 1489, 1493, 12 L.Ed. 2d 653 (1964)

In a case decided shortly after Miranda, and subsequently followed by the Courts of this State, the Third District Court of Appeal held per curium that silence by the Accused in the presence of accusation of his guilt may not be used as evidence

of guilt. Jones v. State, 260 So. 2d 574 (3 Dist. 1967). Here the Court referred to Miranda supra 86 S.Ct. 1602, 1625 footnote 37, citing the following language:

> "In accord with our decision today, it is impermissable to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore use at Trial the fact that he stood mute or claimed his privilege in the face of accusation."

The Court in Jones supra further cited Miranda supra 86 S.Ct. 1602, 1629, wherein it was stated:

> "No distinction can be drawn between statements which are direct confessions and staements which amount to 'admissions' of part or all of an offense. The prejudice against self-incrimination protects the individual from being compelled to incriminate himself in any manner."

The Court in Jones supra rejected arguments by the State that absence of an objection prevented review of such evidence which constituted fundamental error or that by testifying, the Defendant waived the point. Further, it was held that the interests of justice were best served by reversing the matter even though a review of the record aside from the complained of testimony was sufficient to support a conviction.

This Honorable Court adopted Jones supra in Bennett v. State, 316 So. 2d 41 (Fla. 1975) where an agent for the State in that instance, a fire marshal, testified:

> "...Mr. Bennett refused to sign the waiver, which would not permit us..."

As the Honorable Court noted, this was not the deliberate product of the prosecutor but perhaps the result of an overzealous attempt by a witness to secure a conviction. It was further held by this Honorable Court that the error was of "Constitutional Dimension" without regard to the doctrine of harmless errors.

And further that, "The error should not be held harmless if there is a reasonable possibility that it may have contributed to the conviction". Bennett supra p. 44

This position was reinstated by the Court in Sherman v. State, 355 So. 2d 5, (Fla. 1976), Willinsky v. State, 360 So. 2d 760 (Fla. 1978), and followed by the Fourth District as preserved as grounds for collateral attack in a Motion for Post-conviction Relief. Dozier v. State, 361 So. 2d 727 (4th Dist. 1978)

Subsequently this Honorable Court recanted the absolute rule in Jones supra and Bennett supra by requiring Trial Counsel to make timely objection. Clark v. State, 363 So. 2d 331 (Fla. 1978)

Now this Honorable Court is being asked to further recede from this fundamental right through Rowell v. State, 450 So. 2d 1226 (5th Dist. 1984), Crawford v. State, 10 F.L.W. 814 (4 DCA) and Marshall v. State, 10 F.L.W. 88 (Fla. 4 DCA Dec. 28, 1984). Upon consideration of U.S. v. Hastings, 461 U.S. 499, 103 S.Ct. (1974) 76 L.Ed. 2d 96 (1983), and this Honorable Court's decision in State v. Murray, 443 So. 2d 955 (Fla. 1984) where it was declared a further exception when it is clear beyond a reasonable doubt after a review of the Trial Record that the Jury would have returned a verdict of guilty in absence of, as in Hastings supra, an improper comment by the prosecutor or as in Rowell supra, a police officer's testimony regarding the Defendant's refusal to make a statement.

There exists a major distinction between the errors complained of in Murray supra, Hastings supra, and the instant case. Murray and Hastings represent improper comments by the prosecutor regarding the respective Defendants' credibility and strength of the case as opposed to the instant case where there was direct testimony

by a police officer telling the Jury that Appellant had refused to make a statement.

In Hastings supra, the prosecutor's comment was an improper statement but was responsive to argument that the Defense had attempted to direct the Jury's attention from the central question in the case. Hastings supra, J. Stevens concurring, 103 S.Ct. 1974, 1983, and thus alluding to the Defendant's failure to present evidence.

In Murray supra the complained of error was also a prosecutor's improper comment although stronger, but the focus was on the conduct of the prosecutor as excessive and overzealous rather than a direct infringement of the Defendant's fundamental rights as in the instant case. Secondly, it would appear that in Murray supra, the improper prosecutorial comment was but a lone instance rather than a continuing pattern of prejudice as it was in the instant case.

Furthermore, a single improper comment made by the prosecutor in response to the defense during the heat of final argument, a speculative allusion to the Defendant's credibility, or a failure to challenge every element of the State's case is a far cry from the direct testimonial remark of a State witness which directly called to the Jury's attention in the instant case, the Appellant's reliance on his Fifth Amendment privilege. Depreciation of this privilege cannot be alleviated by a curative instruction by the Court. Nor can the impact of the violation be reduced by a Defendant's later testimony. Nor can a test of overwhelming guilt by a suitable exception for the loss of privilege which has come to be recognized as an individual's substantive right; a right which has become the hallmark or our democracy. Miranda supra p. 1620.

Application of the Harmless Error Rule in the instant matter creates an impractical if not impossible burden on reviewing Courts. While in Hastings supra the opinion of Justice Burger indicates the review proves a clear finding of the Defendant's guilt beyond a reasonable doubt, this is contradicted by Justice Stevens' concurring opinion where he candidly states he was unable to read all of the one thousand thirteen (1,013) pages of the Trial Transcript and but a few of the four hundred fifty (450) pages of the transcript of the Suppression Hearing. Hastings supra 103 S.Ct. 1974, 1983

Also it is recognized that it is one impression to read the written word and another to see and hear the spoken word. It is a fair statement that there is always something lost in the translation.

It is submitted that the interpretation of proof beyond a reasonable doubt from the written word can be a dangerous task. Particularly in the instant case where individual rights can be permanently extinguished over the interpretation of "proof of overwhelming guilt" and upon what "no reasonable man could differ".

Further, such a test would lack clarity for bench and bar and would create the additional issue of what is and what is not overwhelming evidence in trying to determine when a comment on a Defendant's Right to Remain Silent may be made.

For example, the instant case represents a situation where the Defendant's guilt is by no means clear beyond a reasonable doubt. Other than judicially recognized suspect testimony of the admitted participant, mastermind and triggerman James Clark, there is absolutely no evidence to link Appellant to the crime.

Moreover there is no evidence in the form of physical or testimonial that would support Clark's testimony that Appellant participated in any way in the charged crime.

In fact, it was strictly as lawyers would say, a Defendant's case. The only link was the State's showing of Appellant's prior association with the then unapprehended Ronald Bowes and Bowes' telephone call to Appellant in the early morning hours of the alleged crime.

Appellant's ownership of a nondescript van which was never identified as the van in question added nothing to the State's case against Appellant. The processing of Appellant's van with negative results went to a lack of evidence in the case.

A remedy has been suggested to prevent or punish prosecutors for making improper statements by publishing names in the opinion or disciplinary action. Hastings supra, Murray supra. The former would become revered accolades while the latter would create another hazard in the already delicate relationship between the State and the Defense Bar. Murray supra p. 958

Suggestion of chastising the prosecutor does nothing to impede law enforcement officers from indiscriminately blurting out prejudicial remarks in order to secure a conviction or to verbally fence with defense counsel.

Witness the instant case where Detective Gallinaro challenges Appellant's Trial Counsel:

> Q: "And if Detective Velicky said he [Appellant] didn't make any statements, would he be wrong?"
>
> A: "I don't know. If you want me to go into detail about what happened on that particular evening, I would be glad to do that Counsel." (T-508)

In every case reviewed in this matter regarding testimonial evidence which comments on the Defendant's Right to Remain Silent, it is invariably the prosecutor, or a law enforcement officer, or agent of the State who makes improper comments. The following are but a sample:

Ford v. State, 431 So. 2d 349 (5 DCA 1983) similar to instant case where State attorney asked whether or not defendant responded to Miranda rights and officer stated defendant had nothing to say. Jones v. State, 200 So. 2d 574 (3 DCA 1967) where officer testified that defendant stood silent in the face of accusation. Roban v. State, 384 So. 2d 683 (4 DCA 1980) in which officers answer that defendant was asked if he wanted to say anything and he said no. Harris v. State, 381 So. 2d 260 (5DCA 1980) the officer testified that after reading Miranda to defendant he said nothing. Bennett v. State, 316 So. 2d 5 (Fla. 1976) fire marshal. Shannon v. State, 335 So. 2d 5 (Fla. 1976) followed Bennett, was reversed for improper comment by legal intern on defendant's Right to Remain Silent although Trial Court curative instruction was found to render the remarks harmless. Rowell v. State, 450 So. 2d 1226 (5 DCA 1976) officer made a statement that defendant refused to give any information. J.W. Trope v. State, 10 FLW 605 (2 DCA March 15, 1985) in which police officers prejudicial comments were not cured by defendant testifying. Dozier v. State, 361 So. 2d 727 (4 DCA 1978) involved a police officer - on point with instant case - reversed on fundamental error. Clark v. State, 363 So. 2d 331 (Fla. 1978) involving a police officer. Burwick v. State, 408 So. 2d 722 (3 DCA 1982) involving a police officer. Rojas v. State, 412 So. 2d 71 (3 DCA 1982) there was a reference before the jury to defendant's declination to answer police questioning after being given Miranda warnings.

Most of these cases involve a voluteering of information in answer to the prosecutor's questions as in the instant case. Some involve inartful direct questions. Plainly it is the combination of the State and its agents that produce

these comments and it is not the fault of the defendant that these prejudicial comments come in as testimonial evidence.

This is definitely a situation which can be controlled and eliminated. Witnessed are routinely "prepped" and surely police officers who read the Miranda warnings every day for over twenty years can be instructed in the simple meaning of the warnings. An officer of the law should not come into court and diminish the very right he alleges to protect.

After Deputy Velicky's testimony, the Jury in this instance had to give the Appellant's failure to make a statement to law enforcement in the initial stages of interrogation great weight in their discarding of Appellant's alibi witnesses and testimony and would have had to reach the inescapable conclusion that the Defendant had something to hide.

The introduction of Appellant's silence questioned the validity of the appellant's alibi that he was at home with his wife and a friend, and surely must have cast suspicion on his defense from the onset, in the eyes of the Jury.

While no Court, Judge, or lawyer can second-guess the rationale of a Jury on its reasons for determination of guilt or innocence, it should be apparent that Deputy Velicky's deliberate comment against the Appellant's Right to Remain Silent was highly prejudicial to the Appellant and contributed to his conviction. Without the knowledge that Defendant refused to make a statement, the Jury would have been able to consider Appellant's alibi witnesses and testimony free of any taint, and might very well have brought in not-guilty verdicts.

In United States v. Hale, 422 U.S. 171. 95 S.Ct. 2133. 2138. 45 L.Ed. 2d 99 (1975) the Supreme Court said:

> "Not only is evidence of silence at the time of arrest generally not very probative of a defendant's credibility, but it also has a significant potential for prejudice. The danger is that the jury is likely to assign much more weight to the defendant's previous silence than is warranted. And permitting the defendant to explain the reasons for his silence is unlikely to overcome the strong negative inference that the jury is likely to draw from the fact that the defendant remained silent at the time of his arrest."

As a further matter Hastings supra does not supplant Florida law regarding Harmless Error. Overwhelming evidence of guilt and lack of effect to a defendant's intrinsic rights has rendered a single improper question or remark harmless. Dunlop v. State, 404 So. 2d 853 (1981). Henry v. State, 290 So. 2d 73 (1974). Sec. 924.33 Fla. Stat.

However, direct testimonial evidence by a witness which comments on the Defendant's Right to Remain Silent is error of "Constitutional Dimension," to a paramount individual right.

In Willinsky supra the Court intended by its decision that law enforcement and prosecutors would be induced to caution by the simplicity of the rule by taking from them all hope that any useful advantage would be gained by even intimating that the defendant exercised his Right to Remain Silent during any preliminary stage of the proceedings. While the dictates of Willinsky supra have not been scrupulously observed in all trial proceedings, this Honorable Court should not be altered in its administration of justice and the protection of the constitutional rights of individuals.

Because of Deputy Velicky's comment against Appellant's Right to Remain Silent, conviction in this matter should be reversed and remanded for a new Trial.

## POINT II

## THE APPELLANT WAS DENIED A FAIR TRIAL BY AN IMPROPER QUESTION BY THE PROSECUTOR

The Appellant was originally arrested pursuant to a warrant under the incorrect name of Raymond Bowes (R-3). This mistake in name was a result of James Clark's information to the police and State Attorney that Appellant was the brother of Ronald Bowes (T-500). Later an amended affidavit was filed for the sole purpose of correcting the name (R-5) but Appellant was stuck with and subsequently prejudiced by this State-created alias of Raymond Bowes (R- 1821). This was true even though Appellant identified himself as not being Raymond Bowes at the time of his arrest. (T-639)

No Florida cases could be found on this point, but it is assumed that aliases on charging documents are to be used for purposes of identity of the accused and to prevent inter alia the problem of double jeopardy. As the use of an alias is almost always for identity purposes and not for use as evidence of the crime charged, the use of an alias should not be brought before the Jury unless it has some probative value for the crime charged.

In this case there was absolutely no legal reason for Appellant's State-created alias to come before the Jury. A search of the Record will indicate that the tagging of the name Raymond Bowes upon Appellant was purely through the misapprehension of the State's chief witness, that Appellant was the brother of Ronald Bowes (T-405).

Although it was well understood by the State that Appellant's true name was Raymond Dolinsky, and there was no evidence the Appellant had ever at any time nor at any place used the name Raymond Bowes, the following interchange between the State and a police officer took place during the trial:

Q. "...Now did there come a time when an individual by the name of Raymond Dolinsky was booked into the Monroe County Jail?"

A. "That is correct."

Q. "Do you see that individual located in this Courtroom?"

A. "Yes, I do."

Q. "Would you indicate where he is and what he is wearing?"

A. "The person that is known to be Raymond Dolinsky is in the blue suit sitting beside Bill Kuypers his attorney."

Q. "Let the record reflect that the witness has identified the defendant. Now, when Mr. Dolinsky was originally booked into the Monroe County Jail, what name did he use?" (emphasis added)

A. "Ronald Bowes."

Q. "Thank you, sir."

(T-499)

This was a deliberate act by the State which totally misrepresented a material fact which the State knew full well was false. Raymond Dolinsky had never used the name Raymond Bowes. Yet the State, eager for a conviction, sought from the officer a further confirmation of the association of Appellant to Ronald Bowes.

This was important to the State, for the only evidence linking Appellant to this crime is the testimony of James Clark. The Trial Record, on the other hand, is replete with testimony circumstantially placing James Clark and Ronald Bowes at the scene. For example, Scott and Melissa Duncan, who originally set up the transaction, name and identify Clark and Bowes as leaving with Gerald Hamilton (T-422-39). Later witnesses for the State name and identify Bowes as complaining of a hurt hand, the result of a drug transaction (Cynthia Mordehei (T-459) Russell Shuvin,(T-464-6) Alan Layton (T-471).

Since no one at Trial other than James Clark indicated in any way that Appellant had participated in the venture, the State sought testimony linking Appellant to Bowes and Clark. Through un-objected-to hearsay, it was testified by various witnesses that they thought Appellant and Bowes were brothers. Aside from the repetitive and improper hearsay regarding Bowes before and after the episode, it was a manifest act of misrepresentation for the State to suggest that Appellant had used the name Bowes when he was originally booked for this offense.

So much attention had been given to Bowes during Appellant's Trial that even the booking officer became confused as to Appellant's State-created alias and he answered:

"...Ronald Bowes." (T-499) *

This confusion between Bowes and Appellant exists also in the Trial Court's mind during sentencing when the Trial Court attempts to assess Appellant with the aggravating factor of duress:



* Possibly this is a misapprehension made by the court reporter or transcription error.

The Court: "...but it was shown that he elicited help on carrying out his plan by ordering the Defendant James Clark, at gunpoint to also shoot the victim as he laid mortally wounded from gunshot wounds inflicted by him personally."

Mr. Kruypers: "Excuse me, but it was Bowes who did that."

The Court: "Does the State agree with his?"

Mr. Smith: "I believe so, Your Honor, yes."

The Court: "Alright, strike the part after three. The Court will remove it from the written findings..."
(T-36)

This same misapprehension was also made by the probation officer (Supp. Vol. VIII, p 726). Consider also this slip by theState during cross-examination of Appellant.

Q: "Okay, Mr. Bowes, lets ---I'm sorry. Mr. Dolinsky, lets back up just a minute."
(T-648)

No doubt the continuing testimony regarding Bowes' participation followed by Appellant's alleged use of the State-created alias and social association with Bowes figured heavily in the Jury's finding of guilt in this matter. Defense Counsel even takes time in his closing statement to direct the attention of jurors to evidence regarding Appellant rather than Bowes. (T-1069-70)

However, the damage had been done. Even though un-objected-to, the continuing call for hearsay by the State, was Fundamental error:

> "...Fundamental error is among others one which reaches down to the legality of Trial itself; involves a violation of Defendant's rights which will always be harmful, and it is very difficult for the Court to determine when it is not; and one that goes to the essence of a fair trial and impartial trial." Nova v. State, 436 So. 2d 255 (2 DCA 1982)

At first opportunity, the State began eliciting hearsay statements of Ronald Bowes:

Mr. Fowler: "Who did you check with?"

James Clark: "Ronald Bowes."

Mr. Fowler: "What was Mr. Bowes' response?"

James Clark: "He would have to check and see."

Mr. Fowler: "And did he ever get back to you about that?"

James Clark: "Yes, a couple days later."

Mr. Fowler: "I will assume Mr. Bowes said he could in fact get you in touch with that kind of marijuana."

James Clark: "Yes, sir."

Mr. Fowler: "Did he tell you anything else about what would be necessary in terms of securing marijuana?"
(T-339-40)

This improper elicitation of Bowes hearsay was continued throughout the testimony of James Clark who repeated statements Bowes allegedly made during the meeting with the Duncans (T-342), and then during the drive back to Fort Lauderdale (T-363). Through the testimony of Scott and Melissa Duncan, the State deliberately called for Bowes hearsay.

To Scott Duncan:

Mr. Fowler: "Did Ron make any statement about where they were going to go or if they needed to stop anywhere on the way?" (T-428)

To Melissa Duncan:

Mr. Fowler: "Did Ronnie say anything about needing to make a stop on the way down?" (T-437)

To Cynthia Mordehei:

Mr. Fowler: "Did you and Ronnie Bowes become friends?"

A: "Yes, we did."

Q: "Did there come a time when he introduced you to Raymond Dolinsky?"

A: "Yes."

Q: "And how did he introduce you to him?" (T-457)

* * * * * * * * *

Q: "At that time did he happen to mention drugs to you?" (T-458)

* * * * * * * * *

Q: "Did he explain any injury to you?" (T-458)

* * * * * * * * *

Q: "Did you ever hear any conversation between them?" (T-460)

To Russell Shuvin:

Q: "Did he tell you how he had hurt his thumb?" (T-466)

To Alan Layton:

Q: "Did Mr. Bowes tell you anything about a transaction he was involved in in the keys?" (T-471)

* * * * * * * * *

Q: "Well, let me ask you was it drug-related?" (T-471)

The foregoing repetitive and improper hearsay testimony regarding Bowes' and Appellant's social conversations as well as equally improper hearsay testimony regarding Bowes' incriminating statements before and after the transaction, were followed by the necessarily morbid testimony of the Medical Examiner.

The State, having set the stage for its theory of guilt by association, called Lieutenant Conrady to offer evidence cummulative to the State's first witness, Detective Garcia, regarding the grisly details of the bodies found, closing the inflammatory testimony with the totally false allusion that

Appellant himself had used the name Bowes when he was booked. (T-443-499)

At this point, the Jury had heard and seen evidence conclusively linking Bowes to the crimes charged. This was a fact that was never disputed and further highlighted by improper testimony regarding Bowes' subsequent flight. (T-473)

Through improper hearsay the case against Bowes was particularly strong and it is easy to see how this evidence carried over to Appellant. Not only were Bowes and Appellant long-standing friends, but Appellant even used Bowes' name when booked.

In Grant v State, 194 So 2d 612 (Fla. 1967), this court citing Washington v. State, 86 Fla. 533, 542-543, 98 So 2d 605, 609 stated:

> "*** The prosecuting attorney occupies a semi-judicial position. He is a sworn officer of the government, with no greater duty imposed on him than to preserve intact all the great sanctions and traditions of the law
>
> Any attempt to pervert or misstate the evidence is to influence the jury by the statement of facts or conditions not supported by the evidence should be rebuked by the trial court, and, if by such influenced, a new trial should be granted."

Not only was the prosecutor in this matter duty bound to refrain from the repetitive elicitation of improper hearsay and perjured testimony, the Trial Court in this matter was likewise duty-bound to ensure Appellant a fair and impartial trial.

> "...it is the duty of the trial court on its own motion to restrain and rebuke counsel..."
>
> Grant supra citing

Also on point:

Stewart v State, 51 So 2d 494 (Fla. 1951)

Kirk v State, 227 So 2d 40 ( 3 D.C.A. 1969)

Pait v. State, 112 So 2d 380 (Fla. 1959)

Teffeteller v. State, 439 So 2d 840 (Fla. 1983)

In the instant case the prosecutor plotted a clear course of guilt by association. None of the improper hearsay statements elicitated were in response to provocation or examination by defense counsel. They were, rather, needless excursions into evidence calculated to prejudice Appellant in the minds of the jurors.

Further, there was no excuse for the prosecutor to have deliberately misstated to the Jury through the obviously "prepped" Lieutenant Conrady a totally untrue fact.

In Grant supra, page 615, the Court stated:

> "Were we to fail to reverse this case on this record, it would be a tacit approval by this the highest court of this State - the supreme arbiter in most cases involving the imposition of the death penalty - of remarks made by the State's attorney and would be clear authority to every other State's attorney in this State to use the same language in every case charging Murder in the first degree."

The elicitation of improper and prejudicial hearsay coupled with the deliberate misstatement of a material fact which bordered on perjury far exceeds any characterization of prosecutional zest or good faith trial strategy. Rather, this is an instance where the State's case, as presented, worked against justice, Ryan v. State, 457 So 2d 1084 (4 D.C.A. 1984).

As a result, Appellant was denied a fair and impartial trial and this matter should be remanded for a new Trial.

## POINT III

## THE TRIAL COURT ERRED IN OVERRIDING THE UNANIMOUS JURY ADVISORY OPINION OF LIFE BY IMPOSING A SENTENCE OF DEATH

On November 15, 1983, the penalty phase in this matter began with the Appellant's presenting two (2) witnesses, Appellant's mother and wife (T-727-34). Both provided general background information regarding the Appellant and by inference established inter alia, Appellant's reputation for nonviolence. Neither witness was cross-examined by the State.

At the conclusion of the evidence, the State was given the procedurally incorrect benefit of Opening and Closing. Subsequently, the Trial Court instructed the Jury on four (4) possible aggravating circumstances and five (5) mitigating circumstances (T-745-49) and after forty-one (41) minutes, the Jury rendered a unanimous advisory opinion of Life Imprisonment without possibility of parole for twenty-five (25) years. (T-750). After receiving the opinion, the Jury was discharged by the Trial Court and the Trial Court directed the Department of Corrections to prepare a presentence investigation on Appellant along with a score sheet under the sentencing guidelines on Counts I and III Sentencing was set thereafter for December 16, 1983.

At the time of sentencing, over Appellant's objection for a continuance, the Trial Court found that there were three (3) aggravating circumstances present, to wit:

1. Conviction of Murder in the Second Degree of a second and third victim arising out of the same criminal episode and entered contemporaneously with the First Degree Murder, the Trial Court citing Lucas v. State, 376 So. 2d 1149 (Fla. 1979) and King v. State, 390 So. 2d 315 (Fla. 1980).

2. That the murder was perpetuated during the commission of a robbery or

for pecuniary gain.

3. That the murder was cold, calculated, and premeditated.

The Trial Court found no mitigating circumstances (R-177-78).

A

With response to the circumstance of "contemporaneous" conviction, in addition to the cases cited by the Trial Court, convictions for "contemporaneous" yet "previous" to sentencing have been upheld by this Honorable Court in Johnson v. State, 438 So. 2d 774, 778, (Fla. 1983). Hardwick v. State, 461 So. 2d 79 (Fla. 1984).

Sec. 921.141 (5)(b) Fla. Stat. states as follows:

> "The Defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person."

It is submitted that the use of Appellant's "contemporaneous" but "previous" convictions of Felony Murder Second Degree are in this instance an improper combination of a bootstrap principal theory and a doubling of circumstance. Furthermore, "contemporaneous" and "previous" are mutually exclusive and "contemporaneous" convictions are not "previous" for the purposes of Sec. 921.141 (5)(b) Fla. Stat. (1983).

In King supra the defendant was found guilty of robbery involving sexual battery, arson, and attempted first degree murder. In Lucas supra, the contemporaneous convictions were to two (2) counts of attempted First Degree Murder. In Johnson supra, the convictions were that of two (2) counts of Robbery, Kidnapping, Arson, and two (2) counts of attempted First Degree Murder. All of the foregoing convictions were on charges for separate distinct

felonies involving as elements inter alia violence to the person.

In Appellant's case, his "contemporaneous" but "previous" convictions were for that of Felony Murder in the Second Degree; a finding the Jury made, not from Appellant's actions toward Hamilton and Colbaugh, but from their factual finding of Appellant's presence and association with Ronald Bowes, on James Clark's testimony.

Since Appellant was not charged with the separate and distinct crime of Robbery, the jury was only given a definition of Robbery rather than an instruction on the requisite elements. The Jury therefore did not find Appellant guilty beyond a reasonable doubt of Robbery as in Lucas, King, or Johnson supra.

It is submitted, therefore, that a conviction of Felony Murder in the Second Degree under these factual curcumstances, standing alone without the conviction for the underlying felonies involving the use or threat of violence to the person, is not to be considered an aggravating circumstance pursuant to Sec. 921.141 (5)(b) Fla. Stat. (1983)

This is particularly true when as in this case, the Trial Court failed to include in its findings that the evidence, as noted with specificity, is conclusive as to the Defendant's guilt in a robbery or some other felony involving the use of or threat of violence to the person.

Instead, the Trial Court merely cited two cases and assumed correctness of the finding.

This absence of written findings forces the Court to search the record and attempt to infer how the Trial Court found the circumstances beyond a reasonable doubt.

This, in turn, would be violation of Furman supra and the Court's expectation that:

> "...the trial judge justifies his sentence of death in writing to provide an opportunity for meaningful review..." State v. Dixon, 283 So. 2d 1, 8 (Fla. 1973)

In order that this Court make a meaningful review it is incumbent on the Trial Court to expound on its experience in the facts of criminality and its knowledge to balance the facts of this case against a standard of criminal activity. State v. Dixon supra p. 8.

Since "contemporaneous" and "previous" are mutually exclusive terms, this Court was correct in 1976 when it indicated that contemporaneous crimes could not be considered an aggravating circumstance pursuant to Fla. Stat. 921.141 (5)(b). Meeks v. State, 339 So. 2d 186, 190 (Fla. 1976) Moreover, doubling has ensued in this case due to overlapping with Fla. Stat. 921.141 (5)(d).

It is under Fla. Stat. 921.141 (5)(b) that in using a contemporaneous felony murder conviction, the circumstance relies on a written finding beyond a reasonable doubt that some underlying felony involving threat or violence to a person occurred, in this instance, Robbery. Therefore, not only does the underlying felony supply the circumstance pursuant to Fla. Stat. 921.141 (5)(b), but also supplies the circumstance for Fla. Stat. 921.141 (5)(d).

Further, the convictions of appellant for Felony Murder in the Second Degree are for the acts of another, and therefore do not exhibit a propensity for violence on the part of the appellant. Hardwick v. State, supra p. 81.

Previous convictions cannot be also contemporaneous and must at best rely on a totally separate and distinct conviction, albeit act, of the Appellant. Perhaps the legislature needs to add an additional circumstance of multiple deaths arising out of the same transaction, however the answer here is not to attempt to accommodate a gap in the law by considering mutually exclusive terms as equal.

B

With respect to the Trial Court's finding of an aggravating circumstance of a murder perpetuated during the commission of a Robbery or that of pecuniary gain, it is noted that the burden is upon the State to prove every aggravating circumstance beyond a reasonable doubt. Clark v. State, 443 So. 2d 973 (Fla. 1983) and Williams v. State, 386 So. 2d 538 (Fla. 1980).

The Jury did find Appellant guilty on two (2) counts of Felony Murder in the Second Degree, however this is not conclusive by any means. The Trial Record is scant of anyshowing that Appellant, or anyone else for that matter, participated in a robbery. It was testified that Gerald Hamilton dispalyed between fifteen and sixteen thousand ($15,000-$16,000) dollars to Ronald Bowes and James Clark to be used for the purchase of marijuana. (T-436) Also there was testimony from James Clark that during the drive back to Fort Lauderdale, while at a stop for gasoline, Ronald Bowes left the Corvette and went to the van Clark claimed Appellant was driving and then returned with a tee shirt containing an undetermined amount of money. (T-365) Clark indicated that Bowes gave to him four thousand, seven hundred ($4,700) dollars for his participation in the incident, from the tee shirt. There is no mention of how much money, if any,

was left in the shirt. Aside from these two (2) factors, there is not other evidence regarding money. To be noted at this point, there is no evidence indicating where the money came from, in whose custody it had been, or the absence of consent, only the inference from Clark's testimony that the money must have been retrieved from the van which Clark alleged Appellant was driving.

Secondly, there is no evidence from Clark or even circumstantially that Gerald Hamilton had the money on his person when he got out of the car at Cudjoe Key, or when he walked out of sight of Clark, Redman, and Colbraugh. In fact, there is a suggestion that the money may have been left elsewhere, as Gerald Hamilton's wallet containing one thousand, eight hundred ($1,800) dollars was found in the vehicle after the Monroe Sheriff's Office processed the scene. (T-315)

Furthermore, while the Trial Court indicated in the written findings that the evidence revealed beyond a reasonable doubt that the murder was perpetrated during the commission of the crime of Robbery, neither the written finding or the Trial Court comments indicate upon what evidence the Trial Court relied in reaching that determination. Since, as indicated, there is scant evidence in the record supporting a robbery, and the Appellant was not charged and thus found guilty of robbery, it is incumbent on the Trial Court to state with specificity the evidence which the Court ruled on in making its finding without a reasonable doubt. State v. Dixon, 283 So. 2d 1, 8 (Fla. 1973).

Furthermore, this would be an improper doubling with Fla. Stat. 921.141 (5)(b).

C

As to the aggravating circumstance Number three (3) pursuant to Sec. 921.141 (5)(i) Fla. Stat. (1983), the Trial Court found as follows:

> "Not only was the Defendant convicted of premeditated murder, but the evidence shows that the victim was lured to a remote section of the Keys for a pretended delivery of a controlled substance where the Defendant waited, and almost immediately upon victim's arrival, he was murdered, thus showing cold, calculated, and premeditated murder or aggravating circumstance under F.S. 921.141 (5)(i)."

The facts and the Trial Court findings do not support the circumstance that this was a cold, calculated, and premeditated murder. This aggravating factor requires a degree of premeditation exceeding that necessary to support a finding of premeditated First Degree Murder. Jent v. State, 408 So. 2d 1024 (Fla. 1982). cert. denied, 457 U.S 1111, 102 S.Ct. 2916, 73 L.Ed. 2d 1322 (1982). Card v. State, 453 So. 2d 17 (Fla. 1984). Mason v. State, 438 So. 2d 374 (Fla. 1983). Hardwick v. State, 461 So. 2d 79 (Fla. 1984).

This aggravating factor requires a heightened premeditation, emphasizing a cold calculation before the murder itself. Cannady v. State, 427 So. 2d 723 (Fla. 1983).

This heightened premeditation must also be proved beyond a reasonable coubt. Williams v. State, 386 So. 2d 538 (Fla. 1980).

The Trial Court found that the victim was lured to a remote spot for a pretended delivery of a controlled substance.

Considering the burden of proof, this finding was not established by a reasonable doubt. There is nothing in the record or the Trial Court findings

that this was a pretended deal. Whether marijuana was present at the time of this incident is completely unknown. Furthermore, there is no evidence to indicate that Curtis Redman or his associates were lured to the scene for purposes of a Robbery or Murder.

In fact, the death of Curtis Redman, from the evidence, was a spontaneous act provoked by the command of Ronald Bowes, who, at the time, had wounded himself in the struggle with Kenneth Colbaugh. The actual factual circumstance does not support a finding that the death was one coldly calculated before the act. In short, there are no factual circumstances in support of this finding and it is a mere guess that any of the deaths were planned.

This should be compared with the premeditation found of a confessed sniper in Jones supra or the shotgun wounding followed by four (4) shots to the victim's head from a distance of less than two (2) inches as in Squires v. State, 450 So. 2d 206.

Contrast this case with the lack of premeditation in Hardwick supra where the defendant raped, robbed, and strangled a seventy-two-year-old widow.

In addition to the lack of factual circumstances to support a "cold, calculated and premeditated murder" there is nothing in the Trial Court findings or the evidence to suggest a death "without any pretense of moral or legal justification."

Appellant's actions toward Curtis Redman, according to Clark, were in response to Bowes' being wounded. In spite of all the hearsay testimony added during the trial, there is absolutely no testimony as to the motive in the instant case, only the inference of a robbery.

It is submitted that when armed parties meet over an illegal transaction

that injury and death can result due to minor differences. The good faith of Redman, Colbraugh, and Hamilton, who are carrying firearms during the purchase of controlled substances cannot be assumed.

D

Since the Trial Court imposed the sentence of death upon Appellant over the Jury's unanimous advisory opinion of life "...the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975).

The jury's opinion in the instant matter, rendered after hearing all the evidence and the Court's instruction, was entitled to great weight, reflecting the conscience of the community, and should not be exceeded unless there was no reasonable basis for the opinion. Bowman v. State, 437 So. 2d 1095 (Fla. 1983), Tedder supra.

The Trial Court did not explain its reason for rejecting the Jury's unanimous advisory opinion of life imprisonment, or how it found three (3) aggravating circumstances outweighing mitigating factors when the Jury had found none. Although the Trial Court had additional information concerning Appellant in the form of a PSI report and letters from friends and family (Supp. Vol. 8 R-724-764), this was not an appreciable influence since the report was in favor of recommending life. Also, the letters expressed support for Appellant as well as a confirmation of Appellant's reputation for nonviolence. In fact, one of the interviews in the PSI was with the Chief of Police in Hartford, Connecticut, who indicated from personal knowledge that

Appellant was non-violent and always cooperated with the authorities. (Supp. Vol. 8 pg. 733) Although non-statutory, the foregoing could be factors the Trial Court should have considered as an aspect of the Appellant's character. Hall v. Wainwright, 565 F. Supp. 1222 (1983), affirmed in part, reversed in part 733 F. 2d 766. In addition, the Trial Court rejected as mitigation the illegal purpose of the victims or that they were armed. (R-178)

With reference to the Jury's advisory opinion, the Trial Court surmised that the Jury may have considered in mitigation the disparate treatment of James Clark by the State, but failed to explain how reasonable men would not differ on the matter of sentencing. Smith v. State, 403 So. 2d 933 (Fla. 1981). In short, the Trial Court simply did not agree with the Jury.

In reviewing previous cases where Trial Courts have overruled the advisory opinion, the instant matter lacks the savage brutality of Gardner v. State, 313 So. 2d 675 (Fla. 1975) and Barclay v. State, 343 So. 2d 1266 (1977), or the child torture murders in Dobbert v. State, 328 So. 2d 433 (Fla. 1976), the determination to kill found in Douglas v. State, 328 So. 2d 18 (Fla. 1976), or the brutal beating of an elderly widow in McRae v. State, 395 So. 2d 1145 (Fla. 1981).

Of note is Herzog v. State, 439 So. 2d 1372 (Fla. 1983) where the Judge overrode the jury's opinion of life imprisonment in the death of a drugged, gagged, choked, strangled, and then burned, female victim. Sentence of death vacated.

E

With respect to proportionality, the disparate treatment of the parties charged

is a significant factor. The chief witness and accomplice, James Clark, was permitted to plead nolo contendere to Accessory After the Fact, for five years probation, a withhold of adjudication, and eight hours of community service (Supp. Vol. IX R-767-8) in return for his testimony against Appellant and Bowes.

Ronald Bowes, after Jury Trial, was found guilty of two (2) counts of premeditated Murder in the First Degree and one (1) count of Murder in the Third Degree. Upon an advisory opinion of the Jury,Bowes was sentenced to two (2) concurrent terms of life imprisonment without parole for 25 years, and a ten year concurrent term for the Murder in the Third Degree by a different Trial Court sitting in Monroe County. (Supp. Vol. IX R 769-774)

Defendants should not be treated differently on same or similar facts, Slater v. State, 316 So. 2d 539 (Fla. 1975), where death sentence was reduced on an accomplice to a triggerman sentenced to life imprisonment.

Definitely Bowes, by Jury verdict alone, was the most culpable. Clark, while testifying to the defense of duress, was an admitted mastermind of the transaction, responsible for the meeting, and a triggerman.

Imposition of the death penalty in the instant case would be a totally unconstitutional application under Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed. 346 (1972). This matter and the disposition of the respective defendants' cases clearly shows the inherent dicrimination through the discretion of the sentencing authority and the prosecutor. Although this Court has consistently held that prosecutorial discretion does not render the Florida Capital Sentencing Law unconstitutional, the exercise of discretion in this

was excessive to the point of an abuse. There are no cases which have come before this Court that reflect the prosecutor's discretion applied in such an unconstitutional manner. There was no reason expressed that would explain the lenient treatment of Clark, other than the fact that he was the first participant apprehended, and who confessed. This fortuitous fact, however, does not justify the discriminatory discretion and the unconstitutional application of the Capital Sentencing Law.

F

As a final matter, sentencing in the instant case was procedurally incorrect in that defense counsel and Appellant did not have an opportunity to rebut any of the information contained in the PSI. At allocution, the Appellant stated:

> "I don't feel I should be sentenced today. I don't understand what's going on as far as the sentence procedures go, and I haven't had a single opportunity to discuss the procedures with my lawyer at this time..."
>
> * * * * * * * * * *
>
> "...I believe you said that - - - to have a pre-sentence investigation done. I just don't understand. How come it wasn't explained to me? I haven't had an opportunity to go over it with my lawyer."
>
> (T-33)

After dismissing Appellant's confusion, the Trial Court proceeded to impose the death penalty.

This was a procedural error by the Trial Court and violated Appellant's right to Due Process. U.S. Constitution, 14th Amendment. Gardner v. Florida,

430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed. 393 (1977) Barclay v. State, 362 So. 2d 657 (Fla. 1978).

For the foregoing reasons the death sentence in this matter must be vacated.

## POINT IV

### THE TRIAL COURT ERRED IN NOT INSTRUCTING THE JURY AS TO COUNT II ON AGGRAVATED BATTERY

Upon the opening of Court on the last day of Trial, defense counsel requested an instruction as to Aggravated Battery on Count II. Since resumption of Trial was scheduled in the next 30 minutes and the request would necessitate further typing, the Trial Court denied the request:

> The Court: "Well, we are now almost a half hour towards getting started. You know they have to be in writing and what you are suggesting, if I grant it, that would change the whole thing from the word go, you know, numerous instructions would have to be changed and I think it's too late to bring that up now."
>
> Mr. Kuypers: "I don't know what would have to be changed except just add the one count."
>
> The Court: "Well, it has to be added in every instruction that involves lesser included, which there is a number of them and that is not Category one offense anyway."
>
> Mr. Kuypers: "No, sir,but there was evidence to support it, so I asked for it."
>
> The Court: "Well, on the record, I will look at you request as being too late to be considered. We went over that and I came in an hour early this morning and so did Sandy to get those things out and now you put us right back to zero." (T-681-82)

This point was preserved on Appellant's Motion for New Trial, which was denied after argument. (T-18-21,30)

Aggravated Battery is, to premeditated Murder, a category four crime. Brown v. State, 206 So. 2d 377 (1968). The exclusionary difference between the offenses is the end result of the act. In Murder, of course, there must be a death, whereas Aggravated Battery requires inter alia "...Intentionally or knowingly cause great bodily harm..." Sec. 784.045 Fla. Stat. (1975). Therefore, the

accusatory pleadings as to Count II of the instant case include the elements of Aggravated Battery.

The evidence at Trial did support such an instruction.

During Trial, the Medical Examiner testified that Curtis Redman received two (2) wounds, one to the head which would have caused instantaneous death, and one then to the chest which would have caused death in three to five minutes (T-491). The actual cause of death regarding the victim was in dispute. Although James Clark self-servingly presumed Redman was dead when he (Clark) fired the .44 magnum wound to Redman's head, there is evidence from the Medical Examiner's testimony and the position of the body that Redman was alive. (T-491, 518)

It is incumbent upon the Court to charge the Jury on every defense which is recognized by the law and sustained by a version of the testimony which the Jury has a right to accept. Rodriguez v. State, 396 So. 2d 798 (3 DCA 1981). Muro v. State,445 So. 2d 374 (3 DCA 1984).

This is true when, even as in the instant case, the crime of Murder could be established withough proof of the lesser offense. Brown v. State, supra p. 384. Further the proof of overwhelming guilt in the Murder does not negate the right of the Appellant to an instruction in the lesser charge, giving the Jury the discretion to determine whether it will convict on the major or minor offense.

Failure to give an Aggravated Battery instruction denied the Appellant the Jurors' consideration for the lesser offense and as such was reasonable error.

## CONCLUSION

Due to the testimonial comment by an officer for the State on Appellant's Right to Remain Silent, the improper, misleading questions by the State, and the failure to instruct as to Aggravated Battery the Appellant was denied a fair and impartial trial and the instant matter must be reversed and remanded for a new trial. In addition, due to the improper consideration of aggravating circumstances, the failure to consider mitigating circumstances, the inappropriateness of the death sentence, and failure to give Appellant an opportunity for input in sentencing, the sentence in the instant matter must be vacated.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief of Appellant, RAYMOND DOLINSKY, Case No. 64,743 was furnished to G. BART BILLBROUGH, Department of Legal Affairs, 401 NW Second Avenue, Suite 280, Miami, Florida, 33128, this 16th day of May, 1985

Michael L. Sullivan

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