IN THE SUPREME COURT OF FLORIDA

RAYMOND DOLINSKY,

Appellant,

vs.

CASE NO. 64,743

STATE OF FLORIDA,

Appellee.

REPLY 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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SUMMARY OF THE ARGUMENT

POINT I

The Trial Court committed reversible error by failing to grant Appellant's Motion for Mistrial when an officer for the State testified during the State's Case in Chief that Appellant after receiving his Miranda warnings refused to make a statement. Clark v. State, 363 So.2d 331 (Fla. 1978)

Allowing the State to continue with the next witness only exacerbated this Constitutional Error as further interrogation of Appellant without "fresh warnings" was also reversible Constitutional Error. Bain v. State, 440 So.2d 454 (4 Dist. 1983) In addition failure of the Trial Court to declare a mistrial in the first instance compelled Appellant to elect between attempting to impeach a witness by the fact of Appellant's already introduced silence or allow the alleged damaging and nondisclosed testimony stand unchallenged. Since the alleged statement by Appellant was the result of the Officer's confusion over Appellant's identity at arrest and never disclosed in pretrial depositions, its use at trial by the State was highly suspicious. Moreover, this witness, a police officer, further intensified the Constitutional Error by gratuitously volunteering Appellant's silence at arrest.

The Appellee's reliance on Hastings v. United States, 461 U.S 499 (1983) and State v. Murray, 443 So.2d 955 (1984) are misplaced as prosecutor's improper comment during closing argument which may be susceptible as a comment of a defendant's Right to Remain Silent are factually distinct.

Even applying the Harmless Error Doctine to the instant case reversal is mandated because guilt was not overwhelming. The introduction of Appellant's silence was a violation of constitutional dimension. Appellant's defense was truly undermined before presented. There are no practical problems in a retrial.

POINT II

The prosecutor in this matter deliberately misrepresented the evidence in this matter with false testimony that Appellant himself used the state-created alias when booked at the Monroe County jail. This was reprehensible conduct and is subject to review without objection at the Trial Court. Pait v. State, 112 So.2d 380 (Fla. 1959)

POINT III

The Trial Court improperly found three aggravating circumstances and failed to set forth his findings in a manner contemplated by Dixon v. State, 283 So.2d 1 (Fla. 1973). The lack of any mitigating circumstances was due to the Trial Court's refusal to consider the factors available. Appellant's sentence of death is unwarranted in view of other defendants in this State and particularly in view of the sentences of co-defendants Bowes and Clark. With respect to the latter the State committed rank prosecutorial discretion.

The override of a unanimous jury's recommendation of Life was not the product of a reasoned judgment but rather a trial court's determination to impose the most severe sentence.

POINT IV

The evidence and law supported the Instruction of Aggravated Battery and failure to do so robbed Appellant of fully arguing the evidence and a viable defense. Brown v. State, 206 So.2d 377 (Fla. 1968) Martin v. State, 342 So.2d 501 (1972) The failure of the Trial Court to give this instruction was not based on the law and Appellant preserved this objection in his Motion for New Trial. (R-176)

POINT I

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

Appellee, following the Trial Court, relies on Donovan v. State, 417 So.2d 674 (Fla. 1982) arguing that Appellant waived his Right to Remain Silent by allegedly, according to Detective Gallinaro, making a statement under very confusing circumstances denying he was Ronald Bowes.

In the first place it should be noted that unlike Donovan, supra and the defendants in U.S. v. Martinez, 577 F.2d 960 (5th Cir.) cert. denied 439 U.S. 914 (1978), the Appellant in this cause made no statement to the officers and in fact as Deputy Velicky testified, refused to answer any questions. (T-503). This was not a situation where Appellant made a statement about one thing and not about another. Instead the focus of inquiry and discussion with the officers at Appellant's arrest revolved around the officer's confusion of Appellant's identity rather that a denial or an exculpatory or inculpatory statement. In fact, up to the trial testimony of Detective Gallinaro, it was understood, as disclosed by the State, and numerous depositions of Trial Counsel, that Appellant had made no statement, incriminating, or otherwise as evidenced by this exchange between Appellant's Trial Counsel and Detective Gallinaro:

> Q. Officer Gallinaro, I wonder if you recall a deposition that was taken September 21, 1983?
>
> A. Yes, sir.
>
> Q. Of yourself?
>
> A. Yes, sir.
>
> Q. Do you recall the question on page six, "when he was

arrested, did he make any statement in your presence?" Answer: "Not in my presence, no. If he did, I didn't hear them because there was alot of confusion." (T-508-9) (Emphasis added)

Moreover, a review of the State's Opening Statement in this matter will fail to disclose any mention or even a suggestion that Appellant made a statement of any kind. (T-1040-45) The apparent deliberate ommission of Appellant's so-called statement from the State's Opening is also signifcant in that it is indicative of the surprise tactics utilized by the State in this Trial and one of at least two (2) discovery violations. [1]

Secondly, the challenged testimony in Donovan, supra was relevant in that matter to the mixed question of fact and law concerning the voluntariness of Donovan's confession which was to be determined by the Trial Court and Jury. Donovan, supra p. 676. The instant case presents no such excuse.

Thirdly, Donovan, supra relied on his initial silence and denial of the charges as an excercise of his Right to Remain Silent, whereas the record is clear in the instant matter that Appellant explicitly refused to make a statement. (T-503-10)

1. Another gross violation of discovery occurs during the Defendant's case (T-605-620) where the State reveals a witness it erroneously attempts to characterize as rebuttal although should have been used in the State's Case in Chief. Whether this was a deliberate holdback or lack of State preparation, it is an example of the Trial Court's disregard for the law by failure to hold a Richardson Hearing and the prosecutor's control of the courtroom. Similar favoritism and scheming tactics, whether intentional or not was condemned in Bender v. State, _____So.2d_____10 FLW 1842 (3 Dist. July, 1985). Although this issue in the instant case became moot when the State did not call the witness, it is helpful for this Court's understanding that when considering the totality of the proceedings, Appellant was denied a fair and impartial trial. The Trial Court's adverse ruling may have also affected an important trial decision of whether or not to call Appellant as a witness.

Further, the burden is on the State to overcome the presumtion that Appellant did not waive his rights; and the prosecutor's burden is great. North Carolina v. Butler, 441 U.S 369 99 S.Ct. 1755 60 L.Ed. 286 (1979), Tague v. Louisiana, 444 U.S. 469 100 S.Ct. 652 (1980), Ross v. State, 386 So.2d 1191 (Fla. 1980)

Once the Appellant refused to answer any questions, it was improper for Detective Gallinaro to continue the interrogation. Miranda v. Arizona, 384 U.S. 436 (1966), Bain v. State, 440 So.2d 454 (4 Dist. 1983). The latter directly on point, where the arresting officer after the defendant appeared uncertain about continuing the interrogation, and asked two (2) more questions, (his name and address) thereby eleciting incriminating and crucial evidence for the State's case. In Bain, supra, the Court held that the defendant's Constitutional Rights were violated both by the comment on the Defendant's Right to Remain Silent, and the subsequent interrogation.

In the instant case Deputy Velicky testified:

> "He refused to answer any questions at that time."

The Trial Court then incorrectly reserved ruling on Appellant's Motion for Mistrial to give the State an opportunity to present Appellant's alleged statement.

Here is where the Constitutional Error was initially committed. The Trial Court should have sustained Appellant's Motion for Mistrial and resumed with the selection of a new jury; as the Honorable Court has stated:

> . . . reversible error occurs when any state defense, or Court Witness in a Jury Trial spontaneously volunteers testimony concerning the defendant's excercise of his

Right to Remain Silent. (Clark v. State, 363 So.2d 331 334 (Fla. 1978).

Even had the Defendant made a subsequent statement, the cat was out of the bag; Constitutional Error had been committed and could not be erradicated by further testimony. Thornton v. State, 442 So.2d 1104 (4 Dist. 1984), Travieso v. State, Case #83-245 10 FLW 1685 (4 Dist. July 10, 1985).

However the Trial Court conceded to the State.

Whereupon the following was elicited from Detective Gallinaro:

> Q. Were you present when Mr. Dolinsky was advised of his rights?
>
> A. Yes, sir. He was advised.
>
> Q. And who did that?
>
> A. Deputy Velicky.
>
> Q. At that time, did you ask Raymond Dolinsky or inquire of him as to his knowledge of one Raymond Bowes? (Emphasis added)

To a question which could be answered "yes" or "no" Detective Gallinaro gratuitously and on cue responds:

> A. Yes, I did. I first asked him if his name was Bowes and he said, 'no' his name was not Bowes and I inquired if he knew 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. (T-507-8)

As Appellant had elected not to answer any questions, his Right to Remain Silent should have been "scrupulously honored". Michigan v. Mosley , 423 U.S. 98, 96 S.Ct. 321 46 L.Ed. 313 (1975). Not only was this not done but it is further plain that no attempt was made to give Appellant "fresh warnings" prior to the continued interrogation. State v. Isaac, 465 So.2d 1384 (2 Dist. 1985).

Therefore not only was the trial testimony of Deputy Velicky a violation of Appellant's Constitutional Rights, and absolute reversible error, but the so-called statement of Appellant was inadmissable without foundation and a further violation of Appellant's Constitutional Rights.

Appellee suggests that Appellant waived his objection to Deputy Velicky's comment on Appellant's Right to Remain Silent through his cross-examination of Detective Gallinaro. (Appellee Brief, p. 21). The Florida cases cited are not on point. Moreover Appellant's Trial Counsel was obviously surprised by Detective Gallinaro's testimony as it had never been disclosed, despite his numerous pretrial depositions, including that of Detective Gallinaro. For example:

> Q. That's not what you said in your deposition.
>
> A. Well, that's not the kind of question you asked me in my deposition.
>
> **********
>
> Q. There was no mention in this deposition of your next question of whether he knew Raymond Bowes, right:
>
> A. You never asked me that question. (T-509)

Additional evidence of Appellant's Trial Counsel's surprise is revealed during the bench conference when motion is made for mistrial.

> Mr. Fowler: Your Honor, the fact of the matter is we will produce testimony that Mr. Dolinsky did make a statement; that he did not remain silent.
>
> Mr. Kuypers: Well, what will he do, impeach his own witness. . . ?
>
> Mr. Fowler: Well, I will call Detective Gallinaro.
>
> Mr. Kuypers: Oh, you are? (T-504)

Further, the confusion of Ronald vs. Raymond occurs throughout the trial

and is particularly highlighted during this critical point in the proceedings when both Trial Counsel and Detective Gallinaro mix and mistake Ronald for Raymond and vice versa.

For example:

> A. . . . I first asked him if his name was Bowes and he said, 'no' his name was not Bowes, and I inquired if he knew a Ronald Bowes. . . (T--507)

By Trial Counsel:

> Q. There was no mention in this deposition of your next question of whether he knew Raymond Bowes. . . (T-509)
>
> **********

By Gallinaro:

> A. I asked him if his name was Raymond Bowes. (T-509)

Later by Gallinaro:

> A. I asked him his name, if it was Ronald Bowes. . . (T-510)

By Trial Counsel:

> 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? (T-510)
>
> **********
>
> Q. He did make a statement denying he was Ronald Bowes? ((T-510)

Aside from the confusion and mixing of Raymond and Ronald, Trial Counsel had no choice but to attempt impeachment of Detective Gallinaro's testimony regarding Appellant's heretofore undisclosed statement. In short, it is the failure of the Trial Court's declaration of a Mistrial in the first instance which forced Appellant to elect between allowing Detective Gallinaro's testimony to stand unchallenged or attempt impeachment.

In addition to Trial Counsel's being forced to repeat Deputy Velicky's testimony regarding Appellant's refusal to make a statement, it is Detective Gallinaro, who as a cooperative State Witness, gratuitously adds and highlights the constitutional violation by continually volunteering information:

> Gallinaro: When you asked me that question, I understood that to mean any statements pertaining to this charge that is pending against him. (T-509)
>
> **********
>
> Gallinaro: He made no statements. (T-510)
>
> **********
>
> Gallinaro: He didn't make a statement. I took your question at that time Counsel, if you will recall, an any statement pertaining to the charge that was pending. He made no statement concerning those charges. (T-510)

Not only does Detective Gallinaro's testimony intensify the constitutional violation against Appellant, but also, whether inadvertant or not, suggests and insinuates that Appellant had other criminal charges pending.

From the Record, it is evident that the confusion by the witnesses, Trial Counsel, the Trial Judge, and the Prosecutor over Raymond versus Ronald was highly prejucicial to Appellant's Right to a Fair and Impartial Trial. Further, because of that confusion, the State's contention that it would produce credible testimony through Detective Gallinaro that Appellant did make a statement was dubious at best. After failing to declare a Mistrial after the testimony of Deputy Velicky, there should have been no question of the violation after the testimony of Detective Gallinaro, which only exacerbated the Error. It should be noted that the Trial Court waited until the end of the State's case before ruling on Appellant's Motion for New Trial and no curative instruction was given.

HARMLESS ERROR

Appellee argues that this Honorable Court should rub out the Constitutional Error in this matter by application of the Harmless Error Doctrine. The burden is on Appellee to prove this beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 87 S.Ct. 824 17 L.Ed 2d 705, 24 A.L.R. 3rd, 1065 (1967).

It is submitted that under no circumstance may an officer for the State testify before a jury that a defendant made no statement, or as in the instant case "refused" to make a statement (T-503) and that testimony not mandate an immediate mistrial. Clark, supra.

Once that prejudicial information is placed before the trier of fact, the prejudice cannot be eradicated. Further, it is fundamentally unfair to allow the State to introduce error and then expect Trial Counsel to overcome that stigma through the remainder of the proceedings. It saddles Trial Counsel with virtually an impossible burden before a jury which has been inextricably diverted from its fact-finding mission. This is particularly so when the charges are of a serious nature and the defendant's liability is great. The mere accusation of a serious crime places a defendant before the trier of the fact with at least one strike against him, despite instructions to the contrary. And when trying to prove his innocence, the knowledge of his silence will always prove damaging. United States v. Hale, 422 U.S. 171 95 S.Ct. 2133, 45 L.Ed. 2d 99 (1975).

However should this Honorable Court find the Harmless Error Doctrine applicable to this matter, reversal would still be mandated under the analysis of U.S. v. Hastings, 461 U.S. 499 193 S.Ct. 1974, 76 L.Ed. 96 (1983). Murray, supra.

Not to minimize the tragic outcome of the young men from Tennessee

who traveled to this State on a known repeated criminal enterprise, a new trial will not require a reliving of "harrowing experiences now long past". Hastings, supra p. 1976. Nor has Appellee suggested or does the record reflect a "practical problem" of retrial some three (3) years later. Most all of the relevant witnesses are officers of the State and even James Clark will be under State supervision until November 28, 1988. (Vol. IX Supp. 767-768)

On this point, it should be noted that any practical problems with a retrial would be directly attributed to the State which vigorously opposed the mistrial at the time. A scrupulous prosecutor would have recognized the Constitutional Error and in the interests of justice and professionalism, would have sought an error-free trial.

Also there is no question that the testimony of Deputy Velicky was a violation of the Defendant's Constitutional Right. Miranda, supra, Clark, supra. Further, as stated it is inescapable that Appellant's alibi was totally undermined before even presented to the Jury by the fact of his silence at arrest. Moreover, it is the police witnesses who volunteered Appellant's silence that is before this Court, and future violations are bound to continue at the trial level and become an issue in the District Court of Appeal and this Honorable Court unless it is made clear that similar statements will not pass Constitutional muster under any circumstances.

On this point it should also be noted that the Court of Appeals in Hastings, supra were attempting to deter what they felt was a continuing course of improper conduct regarding the local prosecutors--a habit that The Court felt should not be an absolute reason for reversal; in other words, the existing rift between

the Court of Appeals and local prosecutors could be better corrected by registering disapproval or referring the matter to the bar for disciplinary action. Hastings, supra (1976), State v. Murray, 443 So.2d 955 (Fla. 1984). While the Florida Bar might be a possible forum for correction and admonishment of prosecutors in this State, its effectiveness in such matters is questionable. However there is no such forum for police officers who are careless enough to testify before a jury concerning a defendant's absolute Right to Remain Silent. Further, chastising police or prosecutors does nothing to remedy the Constitutional Error already committed. Thus the only remedy in such an instance is an immediate declaration of mistrial.

This would prevent the consuming of unnecessary time and expense of appeals to the District Court of Appeal or this Honorable Court and act as solid deterrent for the future.

With respect to the evidence in this matter, it was by no means overwhelming and was dependent entirely on the judicially suspect self-serving testimony of the admitted accomplice James Clark. The other State Witnesses, including the medical examiner, offered no corroboration of Clark's testimony which placed Appellant at the scene of the crime. Without James Clark, there was nothing linking Appellant to the charged offense except for the improper theme of guilt by association with Ronald Bowes.

Moreover the Harmless Error Doctrine overlooks an important factor. That is, at what point the Constitutional Error occurs. In the instant matter it was during the State's Case in Chief. The Appellant was entitled to the presumption of innocence however in the minds of the Jury the knowledge of Appellant's

silence at arrest must have had to inject scepticism of Appellant's alibi defense before it was even presented. In addition it may have forced Appellant to testify in an attempt to prove he had nothing to hide. Contrast the instant case with Hastings, supra and Murray, supra where the alleged error occurred during closing argument and thus had no bearing on defendant's presentation to the jury. Truly this was an instance where a defendant was compelled to give testimony against himself.

Finally it is incredulous to think that law enforcement officer trained in the use of Miranda warnings can come to Court and diminish the very rights they hear and read on a daily basis. We know that they are schooled in most areas of law as part of their basic training. For example, the term "furtive gesture" was never seen in a police report until it was used in an opinion of the Court. Now it appears with regularity. If officers can be educated in the methods of making a case, it is logical that they can be similarly taught simple precautionary instructions so as not to impair individual rights and ruin a Trial.

For the foregoing reasons Appellant should receive a New Trial in this matter.

POINT II

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

Appellee contends that Appellant's Trial Counsel's failure to object to the State-created alias and hearsay testimony was waived by his failure to make timely objection. Castor v. State, 365 So.2d 701 (Fla. 1978), and Parker v. State, 456 So.2d 436 (Fla. 1984).

In Parker, supra the use of a false name was brought up by the defendant's own defense counsel in opening statement to explain testimony of prospective defense witnesses who knew defendant under another name in D.C. Further, the false names were relevant to the State's case in identifying defendant as the person who admitted shooting a D.C victim with a bullet that was linked to defendant's charged crime.

In the instant case, there is absolutely no evidence that Appellant at any time ever used a false name or introduced himself as Raymond Bowes. The closest Appellee can come to that assumption is the trial testimony that Appellant and Ronald Bowes referred to one another as "brothers", a street colloquialism which could have been introduced without the improper and untrue suggestion that Appellant had actually used the name Raymond Bowes. No one at Trial ever testified that Appellant used the name Bowes, except for Detective Conrady, who in an obvious preplanned statement falsely testified that Appellant gave the name Ronald Bowes when booked. The fact is Appellant never used the last name Bowes; a fact that is not disputed, and yet was falsely alluded to by the misrepresentation of the prosecutor when asking Conrady the following question:

". . . Now, when Mr. Dolinsky was originally booked into Monroe County Jail, what name did he use? (Emphasis added) (T-499)

A. Ronald Bowes. [2]

In addition to adding to the confusion of Ronald v. Raymond, upon examination of the Trial Transcripts and Records, Conrady fights and sidesteps Appellant's Trial Counsel's cross-examination on this matter so that it is never made clear that Appellant himself did not use the name Bowes when booked; another example of deliberate state-introduced error by subterfuge.

Clearly Raymond Bowes was a name the police used in apprehending and booking Appellant. The misrepresentation that Appellant used such an alias was totally false and known to be false by the prosecutor. In fact, it is in total conflict with the testimony of Detective Gallinaro, wherein Appellant allegedly states he did not know any Bowes. (T-507)

The deliberate, false allusion was highly prejudicial to Appellant's Right to a Fair and Impartial Trial and is a shame to a prosecutor who now occupies the seat of Appellant's Trial Judge. Further, such a perversion of the facts by one sworn to uphold the law is in and of itself enough to warrant a New Trial in this matter. Coleman v. State, 420 So.2d 354 (5 Dist. 1982) . Additionally, false evidence permitted, or failure to correct was condemned in Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed. 2d 1217 (1959).

In addition to the prosecutor's responsibility not to intentionally mislead or misstate the evidence, or to mislead the jury as to the inferences thereof, it was equally upon the Trial Judge to check improper comments and remove

2. Whether this is a mistake in transcription or misapphehension by the Court Reporter, it is but another example of the confusion.

any prejudicial effects. Carlile v. State, 129 Fla. 860, 176 So.862 (Fla. 1937).

An error of this magnitude grounded on improper, unethical, and unprofessional conduct by the prosecutor is preserved for review by the Honorable Court without trial objection. This is particularly true when the error complained could have meant the difference between life or death. Pait v. State, 112 So.2d 380 (Fla. 1959).

As the confusion of Ronald versus Raymond abounded in the trial of the instant case, the Jury may have been unable to separate the two during the deliberations. Clearly the Trial Court and probation officer made this mistake. (T-36) (Supp. Vol. VIII, o, 726)

With respect to the hearsay statements of Ronald Bowes, although unobjected, considering the totality of the circumstances, it was fundamental error for the prosecutor to build this case of guilt by association wth the then unapprehended Ronald Bowes. None of the elicited statements linked Appellant to the crime charged but were rather evidence of Bowes' and Clark's conspiracy with one another. More importantly the complained of hearsay points to the guilt of Bowes and as such was not material to Appellant.

These hearsay statements were not a co-conspirator's inculpating declarations against Appellant, but were rather against Ronald Bowes. Coupled with the confusion created by the State over Raymond versus Ronald and the theme of guilt by association, it was impossible for the Jury to completely separate the two and must have weighed heavily against Appellant. Further, there is nothing that can justify the unethical and extremely prejudicial suggestion that Appellant used the name Bowes, be it Raymond or Ronald, when booked.

For the foregoing reasons Appellant should receive a New Trial in this matter.

POINT III

AGGRAVATING CIRCUMSTANCES

A

DEFENDANT WAS PREVIOUSLY CONVICTED FOR A CRIME OF VIOLENCE

In this country's bicentennial year, a concurrent and contemporaneous conviction did not qualify as an aggravating circumstance under Section 921.141(5)(b) Fla. Stat., Meeks v. State, 339 So.2d 186 190 (Fla. 1976). There the defendant was convicted of Murder in the First Degree, Robbery, Assault with Intent to Commit Murder, and Possession of a Firearm during the Commission of a Felony.

In 1980 this Honorable Court relying on Elledge v. State, 346 So.2d 998 (Fla. 1977) and the ABA Sentencing Alternatives and Procedures (1979) decided to "recede" from Meeks, supra and held that an attempted murder conviction resulting from a separate criminal episode but contemporaneous with a conviction of Murder in the First Degree was a proper circumstance pursuant to Sec. 921.141 (5)(b) Fla.Stat., and King v. State, 390 So.2d 315, 321 (1980).

Concluding that the purpose of considering previous violent felony convictons is to engage in a character analysis to ascertain whether a defendant exhibits a propensity for violence, this Honorable Court has since held that violent felonies committed against the murder victim during the course of action leading to the murder may be used to establish the aggravating circumstance of 921.141(5)(b). Hardwick v. State, 461 So.2d 79 (Fla. 1984).

It is suggested that this Honorable Court's shifting of interpretation over the years has led to disparate treatment of defendants by prosecutors. This is true as evidenced by the disparate application by this Honorable Court in the cases of Meeks, supra and Lucas, supra. But consider also bench and bar who must look to this Honorable Court for guidance. Consider also the application of discretion by the prosecutors before and after Meeks, supra but before Lucas, supra. Compare that with the discretion by prosecutors who are determining whether or not they can seek the death penalty after Hardwick, supra.

Further, by concluding that the purpose of Section 921.141(5)(b) Fla. Stat. was to engage in a character ananysis of a defendant's propensity to commit violent crimes, does this mean that Sec. 921.141(5)(b) Fla. Stat. carries more or less weight as a circumstance depending the circumstance of the previous violent felony?

Consider how bench and bar must now attempt to weigh the circumstance not only in and of itself, but in comparison to the eight (8) other circumstances.

For example, is the third degree felony of resisting with violence pursuant to Section 921.141(5)(b) to be treated differently than the life felony of armed burglary that might be applied pursuant to Sec. 921.141(5)(d)?

While this Honorable Court has repeatedly said that the Death Penalty Statute does not contemplate a mere tabulation but rather a reason weighing Hargrave v. State, 336 So.2d 1 (Fla. 1978) and State v. Dixon, 283 So.2d 1 (Fla. 1973). It is suggested by Appellant that because of the foregoing shifting of interpretation of Section 921.141(5)(b) coupled with the ensuing prosecutorial discretion and necessary resultant treatment, this circumstance has become

constitutionally void as was suggested and predicted by the dissent, Dixon, supra pp. 17, 18 Ervin, J.

In addition it is submitted that this Honorable Court in finding a concurrent and contemporaneous conviction as previous for purposes of Sec. 921.141(5)(b) additional language has been judicially tagged on to a criminal statute which must be strictly construed. Therefore the quality of discretion and the manner it has been applied on this point is a violation of Furman v. Georgia, 408 U.S. 238 92 S.Ct. 2726, 33 L.Ed. 346 (1972).

Turning to the instant case, Appellant's contemporeaneous but previous convictions for second degree felony murder without further findings do not under the cases cited constitute in and of themselves a circumstnance pursuant to Sec. 921.141(5)(b) . The defendants in Lucas. supra, Johnson, 438 So.2d 774 (Fla. 1983), and Hardwick, supra were all actual perpetrators of the crimes charged and not either aiders or abbettors of a robbery as defined in the instruction upon which the jury found Appellant guilty. (R-137). While by law Appellant was held accountable and responsible for the acts of another, this does not show beyond a reasonable doubt his propensity for violent crimes.

Although this Court has held robbery per se a crime of violence Johnson v. State, 465 So.2d 449, 506 (Fla. 1985) and Simmons v. State, 419 So.2d 316 (Fla. 1982) this is not necessarily a legal fact since robbery may take different forms. Reviewing the definition submitted to the jury, it should be noted that violence is but one of the possible elements of robbery contrasted with force or placing a person in fear. Violence and force are not the same as the former is a heightened degree of force. Similarly placing a person in fear has degrees,

as for example, terror versus being afraid. [3] Neither of which require violence to the person. Again, the statute must be strictly construed. This is particularly true when considering a circumstance which can permanently extinguish a person's rights.

As the Jury's finding did not indicate which of the elements it may have found, the fact of violence has not been established as to Appellant. Further by the failure of the Trial Court to make a specific written finding as to the fact of violence, the circumstance pursuant to Section 921.141(5)(b) has not been satisfied beyond reasonable doubt.

B

MURDER COMMITTED DURING A ROBBERY OR FOR PECUNIARY GAIN

The Trial Court found these circumstances present by stating:

> "Evidence revealed beyond a reasonable doubt that the murder was perpetrated during commission of the crime of robbery and is then considered to be an aggravating circumstance under F.S. 921.141(5)(b) and that it was committed for pecuniary gain under F.S. 921141(5)(f)."

Appellee contends that this is not an improper doubling, relying on Blockburger v. United States, 284 U.S. 299 (1932), and extracts language from a case that is not apprpriate in the instant matter. Reliance on State v. Baker, 456 So.2d 419 (Fla. 1984) is also inappropriate. In Baker, supra this Honorable Court dealt with the question of use of a firearm during the commission of a felony as a lesser offense to first degree murder. These are two offenses which have no elements in common. Baker, supra p. 422. Felony murder on the other

3. Violence is unjust or unwarranted excercise of force, usually with the accomanying of vehemence, outrage, or fury. Black's Law Dictionary. (1968).

hand has no existence except for the underlying felony. In this matter robbery was a necessary lesser included offense.

Further Appellee ignores the case law which states that a defendant cannot be also convicted for the underlying felonies which are the basis for the felony murder, nor can the sentences run consecutive for two murders committed during the same criminal episode. Palmer v. State, 438 So.2d 1 (Fla. 1983), Pina v. State, 468 So.2d 475 (2 Dist. 1985), Enmund v. State, 459 So.2d 1160 (2 Dist. 1984), State v. Harris, 439 So.2d 265 (2 Dist. 1984) pet. for review denied 450 So.2d 486 (Fla. 1984), Enriquez v. State, 449 So.2d 845 (3 Dist. 1984) pet. for review denied 459 So.2d 1040 (Fla. 1984).

As to the finding of pecuniary gain, this is not supported beyond a reasonable doubt as to Appellant. Even Appellee must point the evidentiary finger at Bowes followed by a repetitive characterization of Appellant as Bowes' partner. If anything, the evidence revealed Clark and Bowes as partners. Appellant does not appear in this case except for the judicially suspect and self-serving testimony of James Clark.

As a further matter Appellee would object to a requirement that the Trial Court set forth with specificity the facts upon which it relies in finding the aggravating circumstances beyond a reasonable doubt on this circumstance as it failed to do in any of the circumstances alleged to be found. This would appear to be a minor burden to a Trial Court and was mandated by this Court in State v. Dixon, 283 So.2d 1, 8 (Fla. 1973) in order that this Court might make a meaningful review. It is submitted that conclusionary statements tracking the language of the statute are not sufficient to provide this Court with a meaningful

review, or determine whether or not the sentence imposed was the result of reasoned judgment.[4] Holmes v. State, 374 So.2d 944 (Fla. 1979 (cert. denied 100 S.Ct. 1845, 446 U.S. 913 64 L.Ed. 267, rehearing denied 100 S.Ct. 3057, 448 U.S. 910, 65 L.Ed. 2d 1140.

If there is not a mechanical tabulation of x number of aggravating and y number of mitigation circumstances then the Trial Judge should set forth with specificity the quantum of y and x. Further, nonspecific findings fail to inform the Appellant upon what basis and reason the sentence was imposed for not only a common sense understanding, but to also provide an opportunity to correct any misapprehension of the evidence by the Trial Court as exampled in the instant case.

The Court:	. . . 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 the gunshot wounds inflicted by him personally.
Mr. Kuypers:	Excuse me, but it was Bowes who did that.
The Court:	Does the State agree with this?
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)

Even a police officer must be able to articulate his reasonable suspicion to justify a stop and trial courts are required to make written findings of a "clear and convincing" fashion when jumping a grid in the guidelines. Certainly a sentence of death must rest on more than case cites and statutory language.

4. For an example of specific findings see White v. State, 415 So.2d 719 (Fla. 1982) footnote 2.

C

COLD, CALCULATED, AND PREMEDITATED

In finding this circumstance the Trial Court relied on the following:

1. . . . Defendant [was] convicted of premeditated murder. . .

2. The victim was lured to a remote section of the Keys for a pretended delivery of controlled substance. . .

3. . . . almost immediately upon the victim's arrival he was murdered. . . (R-177)

Point one (1) is not a factor in a finding pursuant to Section 921.141(5)(i) as anyone convicted of first degree murder would have an automatic aggravating circumstance thus this circumstance requires a heightened premeditation with emphasis on a cold calculation before the murder itself. Cannady v. State, 427 So.2d 723 (1983).

With response to point two (2) regarding Appellee and the Trial Court's characterization that the victim was "lured" to a remote section for a pretended delivery of controlled substance, it should be noted that aside from the failure of evidence to support this speculative conclusion, the characterization that the victim was "lured" is incorrect. To lure is to:

> "Draw from the usual, desirable, or proper course or situation into one felt as unusual, undesirable, or wrong." Webster's New Collegiate Dictionary. (1973)

It is synonymous with seduce or lead astray. Black's Law Dictionary (1968)

The victims were armed and experienced smugglers from Tennessee and were not led astray but rather were eager to make their known at least second connection with their Florida dealer James Clark and had no apparent misgivings about their venture. Secondly, the fact of remote location cannot be considered

as unusual for consummation of an illegal transaction. Thirdly, the fact that according to Clark it was Appellant who awaited their arrival, this is not the same as lying in wait, and thus relies on the fortuitous fact of who will arrive first as some prearranged destination.

As to point three (3) the Trial Court apprehends the death of the victim as "immediate" to presumably emphasize the premeditation and calculation while Appellee refers to thirty (30) minutes of terror. (Appellee's brief, p. 41)

With respect to the cases cited by Appellee, the instant matter is factually distinguishable. The victim was not sleeping in the presumed sanctity of the home as in Mason v. State, 438 So.2d 347 (Fla. 1983), or shot by Appellant a second time after down as in Herring v. State, 446 So.2d 1075 (Fla. 1985), or contemplated for an hour while the victim was sleeping, Middleton v. State, 425 So.2d 548 (Fla. 1982) or the stalked, bound, and injured victim of Mills v. State, 462 So.2d 1075 (Fla. 1985)

Instead the death of the victim attributed to Appellant as testified by James Clark was a single shot[5] brought about by the more culpable Bowes who apparently ran amuck.

D

PROPORTIONALITY

Affirmation of the Death Penalty in this matter would be an unconstitutional application particularly in view of the treatment of the parties involved. There is no legal or factual basis to support Appellee's conclusion.

The shooting of Redman as attributed to Appellant according to Clark was spontaneous, brought about by the urging of Bowes, who had wounded himself in the apparent struggle and shooting of Colbrough. According to the testimony

5. Which may not have been the actual cause of death.

of Clark, Bowes' involvement was taking place behind himself and Appellant. (R-361) Shots were heard and then Bowes' command. In short, the testimony of Clark is that the single shot fired into Redman's chest attributed to Appellant was at the direction of Bowes. Upon the trial evidence in the instant matter and a subsequent jury finding of Bowes' guilt on two (2) counts of premeditated murder in the first degree, it is plain that Bowes was the more culpable party. Therefore Appellee's suggestion of equal guilt between Bowes and Appellant is not supported.

To suggest that the treatment of James Clark was reasonable ignores the rank prosecutorial discretion which was abused for no apparent reason. Law enforcement knew circumstantially of Clark's participation through the immunized initial plotters, Russell Thornberry and Scott and Melissa Duncan. Clark was not a volunteer to police officials but initially denied any knowledge. (R-368) Considering the facts in the best possible manner toward Clark, his imposed punishment of a withhold of adjudication, probation, and eight (8) hours of community service is a mockery of law enforcement and the criminal justice system. In the cases cited by Appellee in support of this reasonable treatment, all accomplices received terms of imprisonment. White v. State, 403 So.2d 803 (Fla. 1984) Wheelman who never entered the dwelling or structure or participated in the killing received twenty (20) years. Bassert v. State, 449 So.2d 803 (Fla. 1984) Co-defendant received life imprisonment. Brown v. State, _____ So.2d_____ Case #62922 (Fla. June 27, 1985) co-defendant received life imprisonment. Equally insupportive is Appellee's reliance on Witt v. State, 342 So.2d 497 (Fla. 1976) cert. denied 434 U.S. 935 (1977) where 18 year old co-defendant although an

equal participant was mitigated by severe emotional and mental disturbances coupled with domination by 30 year old defendant but still received life imprisonment. White v. State, 415 So.2d 719 (Fla. 1982) where co-defendant's actions were minimal in the death of the victim and was found guilty of third degree murder.

It is submitted that there has never been a case to come before this Honorable Court where the treatment has been so disparate.

E

OVERRIDE OF JURY RECOMMENDATIONS

Imposition of the Death Sentence by the Trial Court in the instant matter cannot be supported and is reflective of the Trial Court's indifference to the law; at best it was a disagreement with the Jury who unanimously (all 12) voted for life imprisonment. At sentencing the Court had absolutely no additional aggravating information regarding the crime and in fact misapprehended the facts presented. (T-36) Refusal to consider the treatment of Clark as a factor, renders his finding of no mitigation meaningless. Although nonstatutory, fact of Appellant's previous record and reputation for nonviolence was mitigating. Similarly the letters in the presentence investigation stating disbelief and support, as well as the recommendation by the probation officer for life were also ignored. the failure to consider the favorable PSI is evidence of the Trial Court's determination to impose death regardless, and is not the product of a reasoned judgment.

With respect to the jury's unanimous recommendation, this was not the result of an emotionalized finding the day before a religious holiday. Francis v. State, _____So.2d_____10 FLW 328, 329 Case #64148 (Fla. June 20, 1985)

or on finding of the Trial Court that the Jury had been traumitized by Defense Counsel's vivid description of the effects of electrocution. White v. State, 403 So.2d 331, 340 (Fla. 1981) but were justified by a number of reasons:

1. The actual cause of Redman's death was in dispute. The shot by Clark with a .44 magnum directly into Redman's head was clearly an executionary coup de grace.

2. The disparate treatment of Clark, who incidentally had no reason to shoot Redman in the head to prove his allegiance. On this point it should be noted that Clark did not suggest he was trying to humanitarily put Redman out of his misery.

3. The Jury may have thought Clark was more of a participant than he would admit.

4. The pass given by law enforcement to the arrangers of the transaction, Russell Thornberry and Scott and Melissa Duncan.

5. No evidence linking Appellant to the crime save Clark's testimony.

6. Lack of wildness or brutality at the scene in comparison to Bowes' description to the Jury who no doubt felt he was responsible for the first murder.

7. No evidence of further shots at anyone by Appellant thus failing to evince a heightened premeditation.

8. The fact of the victims crossing state lines on an illegal mission.

9. The fact that the victims were obvious drug dealers in their own hometown and were not small time as suggested by the amount of money they were carrying.

10. The fact that two (2) of the victims were armed and carrying their weapons concealed.

11. Appellant's alibi defense although undermined by State introduced error coupled with the lack of evidence may have given jurors thoughts of Appellant's innocence while deliberating in the sentencing phase.

12. The testimony of Appellant's witnesses at sentencing regarding inter alia family history although disregarded by the Trial Court

were pursuasive in Jurors' decision that death was not appropriate for Appellant.

In conclusion the Trial Court's override of the Jury recommendation was unwarranted.

POINT IV

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

Appellee contends that an Instruction of Aggravated Battery on Count II was not appropriate, arguing that Appellant as a principal was responsible for the wound inflicted by the accomplice Clark. Citing cases dealing with criminal responsibility, Appellee suggests that since the evidence clearly shows Clark intended the death of Redman, Appellant as a principal is equally responsible. While Appellee may correctly state the law as to principals, this is not the determining or sole factor as to a trial court's determination in giving an instruction. As there was a factual dispute as to whether or not the actual death of Redman was due to the shot fired by Appellant or by Clark, Appellant was entitled to the Category II Offense Instruction of Aggravated Battery. Brown v. State, 206 So.2d 377 (Fla. 1968) Martin v. State, 342 So.2d 501 (Fla. 1977)

Appellee further contends that any failure by the Trial Court to so instruct must be Harmless Error since the Jury found Appellant guilty of an offense more than one step away. State v. Abreau, 363 So.2d 1063 (Fla. 1978). While Abreau, supra suggests a floor by which a jury, based on their verdict would not go below, it is submitted that Abreau, supra does not apply when there is as in the instant case a real factual dispute regarding the injury. By eliminating Aggravated Battery from the Jury's choice, Appellant was denied the option of fully arguing the evidence and a viable defense in this matter. The Trial Court's refusal to give this instruction invaded the province of the Jury by deciding before deliberations began that there was only a homicide to consider, depriving Appellant of the factually entitled defense.

With respect to the timeliness, there was ample opportunity for the Court

to add an additional instruction. This case had had early adjournments, no night sessions, and included time off for a three (3) day holiday. The sorry fact is that the Trial Court just could not be bothered. In addition it is the Court's responsibility to give the proper instructions and reviewing the record, the request was something that could have been easily anticipated and might have been offered or suggested in the first place by the Trial Court. It is also noted that the Trial Court waited until the last minute to inform Appellant's Trial Counsel that he was going to give the requested Circumstantial Instruction. A fact that was no doubt on Trial Counsel's mind during the long weekend of adjournment.

Finally, there was no need for Appellant to make further objection regarding this adverse ruling as it was clear that the Trial Court was in a hurry and had made his decision in the matter.

For this reason Appellant should receive a New Trial in this matter.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply 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 27th day of August, 1985.

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