IN THE SUPREME COURT OF FLORIDA

WILLIE A. BROWN, and
LARRY TROY,

Appellants,

vs.

STATE OF FLORIDA,

Appellee.

_____/

APPEAL NUMBERS 64,802
64,803
69,427

INITIAL BRIEF OF APPELLANT BROWN

Patrick D. Doherty
619 Turner Street
Clearwater, Florida 33516
(813) 443-0405

Philip J. Padovano
Post Office Box 873
Tallahassee, Florida 32302
(904) 224-3636

ATTORNEYS FOR APPELLANT BROWN

TABLE OF CONTENTS

TABLE OF CITATIONS

STATUTES AND COURT RULES

PRELIMINARY STATEMENT

Throughout this brief the record has been referred to by the following abbreviations:

R: Record on Appeal (Volumes I through III)
T: Trial Transcript (Volumes I through V)
PT: Transcript of Penalty Phase
ST: Transcript of Sentencing Hearing
MNT: Transcript of Motion for New Trial
RCN: Pleadings in the Coram Nobis Proceeding
TCN: Transcript in the Coram Nobis Proceeding

In view of certain ambiguities in the system employed to prepare the record, the Defendant has referred to all transcripts by the number assigned by the Court Reporter and not the number assigned by the Clerk. Several depositions were included in the record and these have been cited individually by the name of the deponent.

The appellants, Willie Brown and Larry Troy, have been referred to as the Defendants, and the Appellee, State of Florida, has been referred to as the State.

STATEMENT OF THE CASE

Earl Owens, a white inmate at Union Correctional Institution, was stabbed to death on July 7, 1981. the following day a black inmate, Willie Brown, was placed in administrative confinement where he remained for about seventeen months. The Union County Grand Jury returned an indictment on October 14, 1982 (R-1) charging Brown with first degree murder in connection with Earl Owen's death.

Numerous pretrial motions were filed on behalf of Willie Brown and his codefendant, Larry Troy. These include a motion for change of venue (R-731), a motion to prohibit the systematic exclusion of death scrupled jurors or blacks (R-470-472), and motions to dismiss (R-264) and to discharge for prejudicial preindictment delay. (R-264) The trial judge conducted a series of hearings and ultimately denied each of the defense motions.

The case proceeded to trial before Circuit Judge John J. Crews on June 13, 1983. During the trial the defense attorneys sought to exclude the testimony of a State's witness on the ground that the witness had refused to answer questions at a defense deposition, and upon the further ground that the State attorney had obtained an undisclosed tape-recorded statement from the witness more than a week before the trial. The trial Judge rejected these arguments and allowed the witness to testify.

The jury returned verdicts of guilty as charged against both Brown and Troy, and at the conclusion of the penalty phase, the jury recommended to the Judge that he sentence each of the

Defendants to death. Judge Crews accepted the recommendation and sentenced Brown and Troy to death on June 22, 1983. The Defendant's motion for new trial was denied on December 27, 1983 (R-920), and this appeal was timely filed on January 25, 1984. (R-933,936)

During the pendency of the appeal before this Court, certain evidence came to light regarding the conduct of the jury, and the Defendants filed a request for leave to file a petition for writ of error coram nobis. This Court authorized the Defendants to seek coram nobis relief in the trial Court and temporarily stayed the direct appeal.

An application for writ of error coram nobis was filed in the Circuit Court on May 11, 1986. Following and evidentiary hearing on the application, the trial Judge entered an order discharging the writ. A separate appeal was filed with respect to that order and the two appeals were later consolidated for review by this Court.

STATEMENT OF THE FACTS

A.

The Trial

The victim, Earl Owens, had been an inmate at the Union Correctional Institution prior to his death on July 7, 1981. Dr. William Hamilton, the District Medical Examiner, testified that Owens died as a result of multiple stab wounds and cuts. (T-311) As Dr. Hamilton explained, the injuries were such that Owens must have been stabbed within a very short time before his death, probably not more than ten minutes. (T-331,332,338)

Frank Wise, one of the principal witnesses for the State, testified that he observed the Defendants coming out of the victim's cell at approximately 5:00 p.m. on the day of the homicide. (T-343) Wise explained that he was in the process of obtaining materials to make some homebrew wine and that he had gone up to B-floor to get some sugar from one of his friends. (T-343) The inmate he was to obtain the sugar from was not in his cell at that time, so Wise decided to wait for him. He stood at the head of the stairs for about five minutes and then heard some noises which he assumed to be either a homosexual rape or beating. (T-345) The noises appeared to be coming from the cell of the victim, Owens.

There was a blanket above the cell door of the victim's cell and Wise started over toward the cell to look in. (T-345) At that point, Wise thought better of the idea of getting involved, so he backed up toward the head of the stairs. (T-345) During

the time that Wise was standing there, inmates Singleton and Claude Smith came upstairs and proceeded over to the "high side" of B-floor. (T-345) A few minutes after that, Wise observed two men he identified as the Defendants Troy and Brown coming out of the cell. (T-346)

When Troy and Brown emerged from the cell, Wise gave them a signal indicating that there was no one in the area. (T-346) He explained that he did that because he knew that the men had done something wrong. (T-346) According to Wise, Troy and Brown then passed by him and proceeded downstairs to the barbershop. (T-348) Wise did not notice any blood, nor did he notice whether the defendant had a weapon. (T-347,348)

On cross examination Wise admitted that he had previously made a different statement in which he had sworn that he could not identify the men who came out of the cell. (T-377) He also concluded that he had written some letters to the Defendants wherein he accused them of attempting to slander his name. (T-386, R-359-362) Finally, he declined to admit or deny the correctness of a deposition statement wherein he said that he hoped the Defendants got the chair whether they were guilty or innocent. (T-403)

Inmate Herman Watson was called to the witness stand by the State and he related certain conversations he had with the Defendants. Watson said that the Defendant Troy told him that he had just "killed the cracker." (T-437) According to Watson, Troy made an additional remark that he "might be going to jail."

(T-438) The Defendant Willie Brown did not make any statement about the homicide directly, but Watson said that he did ask him to "check with the bald head" about whether he "did get rid of the clothes and stuff." (T-441) Watson admitted on cross-examination that he sometimes hears voices and noises that make his nerves real bad. (T-483) He conceded the possibility that the voices and the noises had caused him to recount the statements he attributed to the defendants. (T-487)

Over the objection of defense counsel, the State was permitted to call Claude Smith who also gave testimony to the effect that he saw Troy and Brown coming out of the victim's cell on the day of the homicide. Smith testified that a few minutes after 5:00 p.m. on July 7, 1981, he was heading toward his cell on the high side of B-floor (T-535,536), he passed Frank Wise, who was standing by the doorway at the entrance to B-floor, and as he started around to the right side of the floor, he heard noises coming from the cell. (T-536,541) At that time two inmates, identified by Smith as Troy and Brown, came out of the cell. (T-537)

Smith testified that he followed the two black males down the stairs into the shower area. (T-536,538) He then started back upstairs where he encountered a white inmate who had been stabbed trying to make his way down the stairs. (T-538) Smith said he helped the white inmate until the stretcher bearers came to take him to the hospital. (T-544,546)

Roy Weiland, a correctional officer, received word about 5:45 p.m. that there was an injured inmate at the clinic. (T-614) He proceeded to the clinic and had a brief opportunity to speak with the victim Owens before he expired. Owens reportedly told Weiland, "two blacks stabbed me, one tall and slender, one short and slender." (T-606,607) He was unable to say who they were or where they worked. (T-617)

Another correctional officer named Mitchell Anderson testified that on the morning after the stabbing incident, he was on the athletic yard and that he found a bucket containing a shirt and other personal items which had been partially burned. (T-506) Anderson could not say exactly how long the bucket had been there (T-509,510), and although an analysis of the shirt revealed the presence of human bloodstain, the tests performed by an FDLE serologist were otherwise inconclusive. (T-565)

Donald Conner, the laundry manager at UCI, testified that his records showed that as of August 3, 1981, inmate Willie Brown was missing a set of clothes. (T-511-513) He acknowledged, however, that it is hard to keep track of inmate clothing, and that clothing is lost, stolen, or misplaced at the prison in a number of different ways. (T-514) He admitted also that he did not have any personal knowledge as to whether Brown was missing any clothing. (T-515,516)

The Defendants called a series of witnesses who contradicted various portions of the prosecution's case. The first was William Thompson, a Court Reporter who contradicted Frank Wise's

version of his own deposition. (T-649) Wise testified that he had told attorney Mazar that he was going to lie in the deposition. Thompson never heard any such remark.

Lieutenant Lee was recalled to the stand by the defense to establish that Frank Wise's initial story had been that he didn't know who committed the murder (T-659), and that it was only later that he had changed that story to implicate the Defendants.

The next witness the defense called was Eric Fisher, a licensed private detective who was present when prosecution witness Herman Watson said his head was full of noises which made him tell lies. Watson had said everything he'd told Investigator Sands was a lie. (T-685)

Noel White Testified that he heard noises coming from cell 3 where the homicide occurred. He saw two black men exit the cell and they were not the Defendants, Brown and Troy. (T-695,700) Furthermore, he testified that neither Wise nor Smith was in the area at the time the black men exited the cell. (T-697)

Eric Fisher was recalled to testify that he had participated in an interview of Noel White in South Carolina and that White had been promised nothing. (T-719)

Franklin Kelly testified for the defense that he had gone to dinner early accompanied by Larry Troy, and as they came out of dinner, Kelly noticed blood from the victim on the bench and wall. (T-733,734)

John Allen, an inmate who knew both the victim and Larry Troy was called to the stand. Allen testified that Owens, the decedent, had his hair cut on several occasions by Troy and certainly knew him and would have been able to identify him as "Scuffy Ray". (T-742)

Adrian Howard testified that at the time Frank Wise claimed to be witnessing the murder he was, in fact, in a cell getting high. (T-748)

Michael Madry further disputed the prosecution's version by stating that he saw the Defendant, Willie Brown, coming out of dinner at the same time the decedent was coming down the stairs bleeding. (T-761-763)

The defense rested at that point, and the prosecution called two rebuttal witnesses. First, the State called D.L. Cochran to dispute Noel White's testimony. According to Cochran, White had previously identified the defendants as the black men he saw exit the decedent's cell. (T-791) Furthermore, White had threatened to lie on the stand unless a deal was made according to Cochran.

The second rebuttal witness was H. Edward Sands who claimed to have shown Noel White an entire photo lineup instead of the two photographs Noel White described. (T-799-800) According to sands, Noel White identified the defendants. (T-801,802)

B.

The Coram Nobis Proceeding

The testimony and evidence presented on the defendants' motion for writ of error coram nobis, consisted primarily of the testimony of five of the jurors who served during the trial.

Marvin Seay testified that he spoke with Virginia Snyder, an investigator working for the Defendants, and that he gave her a sworn statement concerning his experience as a juror. In the affidavit, Seay made the following statements: "I was convinced after the first day of the trial that the individuals were guilty," and "other members of the jury were also thinking like me, that the two individuals were guilty." (Seay Affidavit, TCN-58) During the hearing, Seay testified that he did not actually make the statement he swore to in the affidavit (TCN-64), and that he did not remember whether the other jurors formed an opinion of guilt before the end of the trial. (TCN-62) He acknowledged that he signed the affidavit, and that Ms. Snyder did not pressure him in any way to sign it (TCN-58), but explained that he did not read it carefully. (TCN-59,60).

Another juror, Anita Thomas, testified that she gave the jury certain information she acquired as an employee of another correctional institution. Thomas told the jury that, as a matter of practice, the white inmates had their hair cut by white barbers, and the black inmates had their hair cut by black barbers. (TCN-81) The significance of this information is that the Defendant Troy is a barber and one of the defense witnesses

testified that the victim was in the barbershop participating in a conversation with Troy on the day of the homicide. (T-741,742) Ms. Thomas' out-of-court information served to rebut the testimony of the defense witness, and to explain why the victim could not identify the Defendant Troy.

Anne Hendricks verified that another juror, possibly Anita Thomas, had explained that the white inmates did not ordinarily get their hair cut by black barbers. (TCN-46) She stated that the question came up about the barbers because the white victim's cell was right by the barber shop where one of the Defendants worked. (TCN-51) Evidently, there was a question as to why the victim did not identify the defendant who was a barber.

Juror Florence Wilson was called as a witness and she recounted certain remarks by another juror prior to the advisory verdict in the penalty phase proceeding. First, Ms. Wilson identified an affidavit she had given to investigator Snyder and verified that she had in fact, signed the affidavit. (TCN-22,23) In her affidavit Wilson said that, "one of the female jurors stated that she had spoken with her minister about which sentence to recommend." In response to that inquiry the minister was said to have articulated the proverb, "if you live by the sword, you die by the sword." The juror then explained that "she voted for the death penalty because after talking with her minister she thought it was the right thing to do." (Wilson Affidavit)

At the hearing, Ms. Wilson verified the essence of her affidavit and disavowed only the statement that the female juror

had actually voted for the death penalty as a result of the conversation with her minister. (TCN-32) She acknowledged that the remarks were made to the jury, and that the woman said that she had spoken to her minister. (TCN-26)

Deborah Taylor, the juror who was the subject of Ms. Wilson's testimony, verified that she did actually speak with her minister after the guilty phase of the trial, and before the penalty phase. (TCN-72) Taylor denied, however, that she was seeking the pastor's advice and maintained that he merely told her to pray and that she would then come to the right decision. (TCN-75)

Finally, the defense called Virginia Snyder, who testified that she has been a licensed private investigator for ten years. (TCN-101) Ms. Snyder identified her own affidavit incorporating the essence of each of the other affidavits she obtained from the jurors. (TCN-104) She testified that all of the jurors she questioned had a full opportunity to read the affidavits before signing them. (TCN-107)

The State did not present any testimony or evidence at the hearing.

SUMMARY OF THE ARGUMENT

In the first point, the defendant Brown contends that the trial judge erred in failing to conduct a hearing on certain violations of the discovery rules. Claude Smith, a crucial witness for the State, was allowed to testify at trial even though he refused to testify at a defense deposition, and even though the prosecutor failed to disclose the fact that Smith had given the State a tape recorded statement more than a week before trial. Since these acts and omissions constitute violations of the discovery rules, the trial court was obligated to conduct a hearing to determine the existence of prejudice to the defense. The failure to conduct such a hearing is reversible error.

Second, the defendant Brown contends that the trial judge erred in denying his application for writ of error coram nobis. The general argument in support of this contention is that the evidence presented at the post-trial hearing demonstrated the existence of misconduct on the part of certain jurors, and that the trial judge therefore abused his discretion in denying coram nobis relief. Serious acts of misconduct on the part of several jurors are detailed in the text of the argument. As an example, one juror admitted that she provided the jury certain information she learned out of court. The information in question served to rebut the testimony of an important defense witness and to provide an explanation for the reason the victim did not identify the defendants in his dying declaration.

The third point involves a claim that the trial court erred in denying his motion to prohibit the systematic exclusion of blacks from the jury. This claim requires a reversal for an evidentiary hearing since all of the peremptory challenges were made during unreported side bar conferences. The defendant's conviction and sentence cannot stand upon a silent record since the reviewing court has an independent duty to review the entire record of proceedings in capital cases.

Fourth, the defendant contends that the sentencing of black males to death for homicides of white victims is disproportionate from other death sentences and is therefore violative of the Eighth and Fourteenth Amendments. This claim has been made to preserve the argument in light of the fact that the issue is pending before the United States Supreme Court. The defendant Brown recognizes that this Court has rejected arguments of this nature in the past.

The argument in the fifth point demonstrates that a change of venue was necessary in order to protect the defendant's basic right to a fair trial. Although the matter of venue in criminal cases is discretionary, the evidence presented at the hearing clearly established the unfairness of trying the case in Union County where such a large percentage of the population is employed by the Department of Corrections. In view of the evidence presented at the hearing, the trial judge abused his discretion in denying the motion for change of venue.

In the sixth point, the defendant has catalogued a number of unnecessary and improper remarks the trial judge made in the presence of the jury. As explained more fully in the argument itself, these remarks were derogatory and often sarcastic comments directed at the defendant's trial attorney. The cumulative effect of these comments was to deprive the defendant of his right to a fair trial.

The seventh and eighth points present violations of the right to speedy trial under the Sixth Amendment and the Florida Rules of Criminal Procedure respectively. The constitutional argument is based upon evidence demonstrating that the defendant irrevocably lost his opportunity to present a meaningful defense as a result of his seventeen-month administrative confinement. The remaining argument involves a claim that the administrative confinement triggered the commencement of the speedy trial time under the Rules of Criminal Procedure.

ARGUMENT

POINT ONE

THE TRIAL JUDGE ERRED IN ALLOWING UNDISCLOSED TESTIMONY OF A STATE'S WITNESS WITHOUT FIRST CONDUCTING AN INQUIRY INTO THE CIRCUMSTANCES SURROUNDING THE STATE'S FAILURE TO COMPLY WITH THE DISCOVERY RULES

In this case the trial Judge allowed the State to present critical inculpatory testimony by a witness who had refused to answer any questions at a defense deposition, and who had given the prosecution a tape-recorded statement which was not disclosed to the defense prior to trial. The Court's acceptance of this testimony, over the objection of the defense, constitutes reversible error under Richardson v. State, 246 So.2d 771 (Fla. 1971) because the trial Judge failed to make any inquiry as to whether the discovery violations prejudiced the defendants in the preparation of their case.

On January 13, 1983, counsel for the Defendant Troy attempted to take the deposition of Claude Smith, a witness listed in the State's discovery response. Counsel asked Smith twice if he had observed an individual around B-floor by the name of Frank Wise, but each time Smith remained silent. (Smith Depo. p.4) When the defense counsel asked Smith if he was refusing to answer the question, Smith asked to speak privately with Assistant State Attorney, Tobin. After a brief recess, Tobin made the following statement for the record:

> Mr. Smith is concerned to answer any question for his personal safety and that is what we discussed in the other room.

> At this point, as to any substantive questions, Mr. Smith is going to refuse to answer.
>
> We discussed a couple of things regarding his personal safety, but I am incapable at this time, of making him any guarantees or as to any statement of what we could do or not do, or what could be done for him.
>
> Because of that, he doesn't feel that, because of his own safety, he can answer questions.
>
> Am I correctly stating what we talked about?
>
> CLAUDE SMITH: Yes, sir.

(Claude Smith depo. p.5)

In response to further questioning by the defense attorney, Mr. Tobin acknowledged that there were no allegations of any specific threat, direct or indirect, toward Smith. Rather, Mr. Tobin stated his concern was simply that Smith was housed in "the same general area as potential defendants" and, because of that, Smith felt his life could be threatened. Mr Tobin continued:

> In other words, he is not under the Evanko decision. He is not (talking) of invoking the Evanko saying that he doesn't ever have to answer them.
>
> He is simply saying that, until we can discuss those matters with him more fully, he doesn't wish to answer.
>
> MR. MAZAR (defense counsel): Do you intend to go into this a little bit farther?
>
> MR. TOBIN (prosecutor): Yes, I will. I will at a future date. I am incapable of doing it now because it is 4:30 in the afternoon.

(Claude Smith depo. p.5,6)

Claude Smith indicated that he would give a statement at such time as the Assistant State Attorney would be able to offer him some protection. At the present time, however, "I have got enough problems with living with what I did to come in here (to prison). I don't need no more headaches. I take medicine four or five times a day, see, and I got a bad heart. I don't need none of the bull crap. When the time is right, if he says the time is right, I will give you a full statement." (Claude Smith depo. p.6,7)

Although the defense attorneys were unsuccessful in taking Smith's deposition, they were aware of the pretrial statement Smith had given to Investigator Sands. The problem is that the statement Smith gave to Sands is radically different from the testimony he gave at trial over the objection of defense counsel. Furthermore, Smith's pretrial statement is Sands clearly served to contradict the testimony of another of the State's witnesses, Frank Wise. Based upon Sands' version of Smith's pretrial statement, the defense attorneys had no reason for any concern that Claude Smith would actually give testimony incriminating to

the Defendants and favorable to the State.[1]

In June 1983, it occurred to the prosecutor that a deposition had never been taken from Claude Smith. (T-497) For that reason, he asked Lieutenant Lee to talk to Smith, "to find out what he had to say." (T-497) A week or more before the trial, Lieutenant Lee took a tape recorded statement from Smith and provided it to the prosecutor. (T-497) the tape-recording was not provided to the defense, nor were the defense lawyers advised of its existence.

The prosecution called Claude Smith as a witness at trial and the defense attorneys objected to his testimony on two separate grounds: (1) The witness' refusal to answer questions on deposition (T-491-496), and (2) the State's violation of the

---

[1] Investigator Sands related Claude Smith's statement as follows:

Inmate Claude Smith was interviewed on 7/8/81, alleges to have returned to B-floor on 7/7/81 at approximately 5:00 p.m. and, on B-floor, observed Frank Wise standing at the southwest corner of the floor and appeared to him (Smith) to be standing lookout.

According to Smith, he asked Wise, while en route to the east side of B-floor (to his cell B-54), to get a cigarette in, as he returned to the area of the pipe alley...(Between east/west side of B-floor), he heard someone scream.

Smith stated that he then saw Wise at Cell B-3 lift a blanket, which was draped over the cell door, and look in the cell.

Smith indicates he then left B-floor. (Sands depo. p.38-39)

discovery rules, in failing to disclose the tape-recorded statement made by the witness to Lieutenant Lee. (T-496-498) As to the first ground for the objection, the trial Judge agreed with the prosecutor that the defense attorneys should have filed a motion to compel, and that their failure to do so precluded their objection. (T-493-496)

With regard to the second ground, the prosecutor admitted that he had the tape for at least a week, but, nevertheless contended that there was not discovery violation. In that regard he argued that taking a tape-recorded statement is just like talking to a witness. (T-497) The defense disagreed and argued that the tape-recording itself was evidence that should have been disclosed to the defense. (T-498)

Instead of addressing the discovery objection, the trial Court returned to the subject of defense counsel's failure to file a motion to compel when Claude Smith refused to answer questions on deposition:

> I know good and well what the law is. Now, they're just the same, there never has been, and I don't know as there ever will be, any death penalty case here. But if there is, the competency of counsel is the first thing, the middle thing that is being seized upon. And that would be true if Clarence Darow was down here to try it.
>
> Until it is made into utter ridiculousness, a procedure of law, I think the Supreme Court is going to straighten that out next year. If they don't, perhaps the Congress will.
>
> But I know, Mr. Tobin, that you are exactly right. They should have filed.

> And outside of this being a capital case, I just absolutely have to tell you to go ahead and call your witness. And that's just too bad.
>
> But the fact is that I just don't believe that these lawyers are incompetent, although, they inadvertently overlooked doing that.

Without conducting any further inquiry, the trial Court ruled that the prosecutor could call Claude Smith as a witness, but not until after the defense attorneys had and opportunity to listen to the tape. (T-499,500) Other witnesses were called that afternoon and Claude Smith began his testimony the following morning. (T-535)

As serious as it is, this point does not require a great deal of explanation. The law unquestionably required the trial Court to conduct an inquiry to determine the existence of any prejudice resulting from a discovery violation, and the record clearly demonstrates that the trial Judge failed to conduct such an inquiry. This Court made it clear in Richardson, supra that a hearing is necessary, and in subsequent cases the Court explains that the failure to allow such a hearing can not be regarded as harmless error. Cumbie v. State, 345 So.2d 1061 (Fla. 1977) See also McDonnough v. State, 402 So.2d 1233 (Fla. 5th DCA 1981), Hickey v. State, 484 So.2d 1271 (Fla. 5th DCA 1986), Donahue v. State 464 So.2d 609 (Fla. 4th DCA 1985).

The trial Judge apparently thought that there was no violation of the discovery rules since the defense attorneys never filed a motion to compel Smith's deposition testimony. This rationale, however, is unsupported by any legal authority.

The Florida Rules of Criminal Procedure establish a remedy for compelling testimony from recalcitrant witnesses, but they certainly do not require defense lawyers to pursue this remedy. Stated otherwise, the failure to enforce the deposition subpoena does not justify Smith's refusal to honor it in the first place.

It is illogical to say that there was no violation of the discovery rules simply because the defense did not file a motion to compel because the violation of the discovery rules existed apart from the issue of enforcement. Furthermore, the defense attorneys in this case had every reason to refrain from continuing with Claude Smith's deposition. They inquired of the prosecutor at the deposition if he intended to go into the matter further and he clearly led them to believe they would be notified in that event. (Claude Smith depo. p.5)

The statements attributed to Smith up until that point were certainly no cause for alarm. In the statement Smith gave to Investigator Sands, he did not say that he could identify the men coming out of the room, and actually gave a version of the events that contradicted the testimony of Frank Wise, the principal witness for the State. (Sands depo. p.38,39) Certainly, the defense attorneys had no reason to suspect that Smith would take the stand and testify that he did see two men leaving the cell, and could actually identify those men as the Defendants.

It appears that the trial Judge did not even consider the second alleged discovery violation, i.e. that the prosecutor had a tape-recording of a statement made by Claude Smith and did not

disclose the statement to the defense. The prosecutor argued that taking the tape was the same as talking to the witness, but that argument is without merit. (T-497) The tape-recording contained a statement the prosecution was obligated to disclose under the express terms of Fla.R.App.P. 3.220(1)(ii), and the tape itself was a tangible item of evidence which should have been disclosed under Fla.R.App. 3.220(1)(ix).

For each of these reasons, the admission of Claude Smith's testimony constituted reversible error. The trial Judge plainly failed to conduct the type of inquiry required by Richardson v.State, and the failure to hold such a hearing is per se reversible error.

POINT TWO

THE TRIAL JUDGE ABUSED HIS DISCRETION IN DENYING THE MOTION FOR WRIT OF ERROR CORAM NOBIS BECAUSE THE EVIDENCE CLEARLY DEMONSTRATED THAT CERTAIN MEMBERS OF THE JURY COMMITTED ACTS OF MISCONDUCT DURING THE COURSE OF THE TRIAL

The trial Judge denied the application for writ of error coram nobis for two reasons: (1) the alleged impropriety on the part of the defense in interviewing the jurors warranted suppression of the evidence relating to the request for relief, and (2) the evidence presented at the hearing did not support the defense conclusion that the jurors were guilty of misconduct. (RCN,order) The first of these grounds is unsupported by any legal authority, and the second is simply incorrect.

At the outset of this argument, the Defendant Brown concedes that the standard of review by this Court is whether the trial Judge abused his discretion in deciding the issues presented by the application. It is generally accepted that the decision to grant or deny an application for a writ of error coram nobis is vested in the sound discretion of the trial Judge. La Rocca v. State, 151 So.2d 64 (Fla. 2d DCA 1963), Fisk. v. State, 107 So.2d 745 (Fla. 2d DCA 1958). Nevertheless, it is apparent from the transcript of the hearing, and from the face of the order itself, that the denial of the application in this case was an abuse of discretion.

As to the first reason given by the trial Judge, it is clear that there is no legal authority to "suppress" the result of the investigation into the conduct of jurors. The State did not cite

any such authority, nor did the Court refer to any such authority in the order denying relief. In this regard, the defendant Brown respectfully submits that the "discretion" vested in the Court does not include the discretion to fashion previously unknown principles of law to a case in order to arrive at the desired result.

The stated justification for suppressing the evidence was the defense lawyers' decision to contact the jurors after the conclusion of the case. The problem with this purported basis for denying the writ, however, is that there is not any evidence that Investigator Virginia Snyder contacted the jurors at the request of the attorneys. Even if such evidence had existed, the remedy for a violation of the code of Responsibility lies exclusively with the Florida Bar in a proceeding that has absolutely no bearing on the question of whether the admissibility of the evidence in this case. Simply stated, the rules of evidence do not change in a case merely because one of the lawyers has been perceived to have violated an ethical consideration.

The trial Judge was evidently of the view that Virginia Snyder had herself been guilty of some type of impropriety in the manner in which she conducted her investigation. In the order denying relief, the Judge noted that "people like Virginia Snyder earn a living by harassing jurors." (RCN,order) He then referred to the "devious and highly suspect manner used in this case" and reasoned that it warranted suppression of the resulting evidence.

This determination was made upon the theory that jurors could not otherwise function properly and that there is no other way to "protect them from Virginia Snyders." (RCN,order)

The conclusion of the Court is supported only by the State's argument; there is no evidence in the record to sustain a finding that Virginia Snyder "harassed" the jurors or that she deceived them in any manner whatsoever. On the contrary, the record tends to establish the rather unpleasant fact that some of the jurors candidly admitted serious improprieties to Snyder and then had difficulty dealing with that when it came time to go before the Court. The record is not only totally devoid of any evidence of duress or coercion on Snyder's part; it affirmatively negates such a conclusion. Some of the jurors attempted to retract their earlier sworn statements by explaining that they had not read the affidavit carefully, but none of them accused Snyder of deception. When asked if Mrs. Snyder had used pressure or threats, Mr. Seay said, "no, she was a real nice lady." (TCN-64) In spite of this testimony, the trial Judge implicitly found that Snyder had "harassed" the jurors and that the result of her investigation should be suppressed.

There seems to also to be some unstated conclusion in the order that it is improper for anyone to talk to a juror after a trial. That is simply not the case. Jurors are frequently told at the close of a trial that they are free to talk about the case if they wish but that they do not have to talk to anyone about the case if that is their wish. The decision to make out-of-

court statements after a trial belongs exclusively to the juror; not the Court. In this case, the jurors chose to talk to Virginia Snyder about the case, and there was absolutely nothing wrong with that. Neither the State nor the trial Judge referred to any authority holding that it is wrong to engage in a post-trial discussion with a juror who has given his or her consent to speak about a case. That is simply not the law.

Turning now the merits of the argument, it is evident from the testimony that several jurors committed acts of impropriety and that these acts warrant a new trial. The right of a criminal defendant to have a jury free from any outside or improper influences is a paramount right which must be closely guarded. Durano v. State, 262 So.2d 733 (Fla. 3d DCA 1972) Furthermore, the Sixth Amendment right to a fair and impartial jury demands that the jury render a verdict only upon the evidence presented in the case. Alfonso v. State, 443 So.2d 176 (Fla. 3d DCA 1983).

Anita Thomas admitted that she had provided other members of the jury certain information which came, not from the witness stand, but from her own experience working in another correctional institution. She said that white inmates do not ordinarily get their hair cut by black barbers. This was highly improper as it is well established that a juror cannot rely upon evidence other than that presented during the trial. Russ v. State, 95 So.2d 594 (Fla. 1957), Snook v. Firestone Tire & Rubber Co., 485 So.2d 486 (Fla. 5th DCA 1985), Edelstein v. Roskin, 356 So.2d 38 (Fla. 3d DCA 1978).

The defendant Brown acknowledges that reliance upon out-of-court information does not require a new trial in a criminal case unless it is prejudicial. see e.g. Bottomson v. State, 443 So.2d 962 (Fla. 1984), (improper evidence merely duplicated proper evidence), and White v. State, 462 So.2d 52 (Fla. 1st DCA 1984), (improper view of the scene was momentary and insubstantial). In this case, however, the information provided by Anita Thomas was crucial because it provided the only reasonable explanation for the fact that the victim could not identify one of the defendants.[2]

Juror Seay also provided a good reason in granting relief. One version of his testimony is that he and the other jurors decided that the Defendant's were guilty on the first day of the trial. The other requires the Court to accept the fact that he showed such a lack of responsibility regarding his duty as a juror that he gave a sworn statement about serving as a juror without even reading it. This Court could choose the latter version in deference to the trial Judge, but not without great difficulty. Juror Seay either committed an act of misconduct in prejudging the case, or he made a material false statement about the case under oath. The very fact that he signed such an

---

[2] A defense witness names John Allen testified that the victim had his hair cut on several occasions by the Defendant Troy and that he would have known him as "Scuffy Ray." (T-742) Acceptance of the information provided by Anita Thomas that white inmates do not usually go to black barbers would have raised serious questions about this evidence presented by the defense.

affidavit, regardless of the excuse for doing so, is enough to demonstrate an irregularity so serious as to warrant a new trial.

Either view of the evidence relating to Juror Seay leaves a serious question as to whether the Defendants received a fair and impartial trial. As the Court noted in Russ v. State, supra:

> If the statements by the jurors are such that they would probably influence the jury, and the evidence in the cause is conflicting, the onus is not on the accused to show he was prejudiced for law presumes he was.

Russ v. State, at 600.

It was conceded that a juror, Deborah Taylor, talked to her minister after the guilt phase and before the penalty phase. (TCN-72) It was also conceded that Ms. Taylor made a comment regarding that conversation to the effect that a person who lives by the sword must die by the sword. (TCN-26) The only thing denied in this incident is that the juror actually made up her mind to vote for the death penalty as a result of the conversation. (TCN-72-75) That is not necessary, however, as the conversation itself was improper. The defense did not have to show that the meeting with the minister changed the juror's mind about the death penalty, but only that improper discussion occurred. Ms. Taylor said that the Judge told the jurors that they could talk about the case if they wished (TCN-72), but there is no evidence that he gave such an instruction before the conclusion of the case. Nor, is it likely that any Judge would have told a juror that he or she was free to confer with others about a case before rendering a decision.

The decision under review cannot be supported simply by reciting the general principle that the trial Judge had the right to make a credibility decision. Trial Judges are certainly free to reject evidence on one side that conflicts with evidence on another. One of the most disturbing aspects of this case, though, is that several jurors testifying in the case contradicted themselves. By accepting the testimony at the hearing and rejecting any contrary evidence in the affidavits, the Court has accepted the possibility that the jurors, at one time, made false statements about the case under oath. That in itself is an impropriety which should cause grave concern about the regularity of the proceedings.

For each of these reasons, the Defendant Brown respectfully submits that the trial Judge abused his discretion in denying the application for writ of error coram nobis. The decision of the Court should be reversed with directions to issue the writ and grant the Defendant a new trial.

POINT THREE

THE COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO PROHIBIT THE SYSTEMATIC EXCLUSION OF BLACKS FROM THE JURY IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

The Defendant Brown's co-defendant moved pretrial for an order prohibiting jurors or black jurors. (R-452,453) This motion was denied (R-700), except that the Court stated its intention to follow the dictates of Witherspoon v. Illinois, 391 U.S. 510, 20 L.Ed 2d 776 88 S.Ct. 1770 (1968) regarding death scrupled jurors.

The record is silent with regard to the use of peremptory challenges against black jurors. In fact, there is not record of the process of excusals at all since that process occurred outside the hearing of the court reporter.

The Defendant Brown moved for a new trial based upon the systematic exclusion of black jurors. (R-857) This motion was denied but the Court made no specific finding as to the motion. (R-920-923)

This Court is required by Florida Statutes 921.141 to review the record in its entirety to establish the propriety of the Defendant's conviction and sentence of death. Apparently, by local custom, the dialogue where peremptory challenges were used was not recorded. Therefore, an evidentiary hearing is required to establish the truth of the allegations in the motion for new trial and to complete the record on appeal.

POINT FOUR

THE SENTENCING OF BLACK MALES TO DEATH FOR HOMICIDES OF WHITE VICTIMS IS DISPROPORTIONATE FROM OTHER SENTENCES OF DEATH IN FLORIDA AND THEREFORE VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS

The Defendant Brown is a black inmate of the correctional system accused of the homicide of a white male. The Defendant Brown challenged to application of Florida death penalty to him as being arbitrary and irrational. (R-428) This motion was denied. (R-684) While this Court has repeatedly refused to recognize the disproportionate infliction of the death penalty of those black defendants convicted of the homicides of white victims, this issue is presently being litigated. McLesky v. Kemp, 753 F.2d 877, cert. granted ____ U.S.____, 88 L.Ed 2d. 43 (1986)

POINT FIVE

THE COURT ABUSED ITS DISCRETION IN FAILING TO GRANT A CHANGE OF VENUE FROM UNION COUNTY TO ANOTHER COUNTY IN THE SAME JUDICIAL CIRCUIT IN VIOLATION OF THE DEFENDANT'S RIGHTS TO A FAIR AND IMPARTIAL JURY AS SECURED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

It is clear that a motion for a change of venue is addressed to the sound discretion of the Court. However, the existence of such discretionary authority cannot justify wholly arbitrary decisions. In fact, a standard of fairness is implied. The Court pointed this out in Hawkins v. State, 206 So.2d 5,6 (Fla. 1968) when it stated the rule in the negative saying the refusal to grant a change of venue will not be held error "unless it appears the Court acted unfairly."

To permit the trial of this case to be conducted in Union County was plainly unfair. A proper motion for change of venue was made. It was supported by the testimony of Dr. Charles Thomas, whose expertise was essentially agreed to by the State. (Vol. 5, Change of Venue, p.16) This testimony should be interpreted in the context of this Court's ruling in Singer v. State, 109 So.2d 7, 14 (Fla. 1959) where the Court warned that "every reasonable precaution should be taken to preserve to the Defendant trial by such a jury (fair and impartial jury), and, to this end, if there is a reasonable basis shown for a change of venue, a motion therefor properly made should be granted." In Singer, the Court discussed the balance which must be struck between the convenience of prosecuting a defendant locally and

the accused's right to a fair trial. Of course, an individual's right to a fair trial overshadows the State's interest in convenience.

It is against this backdrop that Dr. Thomas' testimony should be considered, since the Defendant Brown was suggesting the relatively minor inconvenience of a trial in an adjoining county and within the circuit. (Vol. 5, p.62) Dr. Thomas' unrebutted testimony establishes the probability of a biased, albeit honest, jury. Two of the prospective jurors illustrated this when they could not vote to acquit a defendant even if they entertained a reasonable doubt and the Court so instructed them.

Additionally, this Court should consider that the Defendant Brown was tried by a jury composed almost entirely of men and women who worked for the Department of Corrections or who had family and friend who worked for the Department of Corrections. This situation was foreseen by Dr. Thomas when he testified that, "Something in excess of 85 percent of the people surveyed either themselves were employed by the Department of Corrections or their families were or had been employed by the Department of Corrections or close friends had been or were then directly connected with the Department of Corrections." (Vol. 5, P.21, Change of Venue transcript)

Since the case at issue involves a killing in jail by an inmate or inmates and since a guard had recently been murdered and these facts were publicized, the resulting unfairness is obvious. In fact, Dr. Thomas testified, "I don't think you need

fourteen Ph.D.'s to project the impact of that kind of pretrial publicity for the citizens of Union County." (Vol. 5, p.22) Indeed, a county which derives its major source of revenue from the operation of prisons is going to be affected by that fact. The effect is that jurors attempting to be truthful will nonetheless view the personnel of the Department of corrections and the Prosecution-aligned inmates of the Department of Corrections in an entirely more favorable light than those inmates testifying for the defense. This underlying bias is not surfaceable through the voir dire process. Dr. Thomas suggested that, "these are not the kinds of things which are likely to be surfaceable on the closest questioning during voir dire because people will try to answer honestly, but the pre-existing levels of bias and prejudice, while understandable, may effectively undermine the defendant's Sixth Amendment rights." (Vol. 5, p.27) Thus, the normal analysis which is used in a change of venue cases does not apply here. Voir dire will not suffice to pick a fair jury in Union County, at least not where a guard has recently been murdered. The prospective jurors will describe themselves as fair and unbiased because they believe they are; however, Dr. Thomas' study shows differently.

In the final analysis, Dr. Thomas stated that: "it would be my opinion in a situation like this that the levels of tension and anxiety and fear and frustration, which up to a point always exists in communities where there is a substantial amount of prison violence, has been exacerbated by recent events, by the

reputation of the person who was killed, by the heinousness of the events itself, that a lot of people who aren't very damned happy with the way the whole system is working and would very much like to do something about it. Here we have someone coming to trial in the county, who, while directly not involved in the Dennard offense (the killing of the guard), may profit in a very negative way from the circumstances surrounding a possible trial." (Vol. 5, p.25) Thus, he testifies that, "It would be my honest and expert opinion that the possibility that Mr. Brown would receive a fair and impartial trial in that county has been seriously impaired by the elevation of pre-existing sentiments created by the type and amount of pretrial publicity." (Vol.5, p.33)

In the face of that testimony, which was unrebutted, the Court denied the motion to change venue and the Defendant Brown stood trial before a jury exactly like that described earlier by Dr. Thomas.

POINT SIX

THE COURT VIOLATED THE DEFENDANT'S RIGHT TO A FAIR TRIAL BY ENGAGING IN A CONTINUOUS PATTERN OF SARCASM AND INVECTIVE DIRECTED AT DEFENSE COUNSEL, THEREBY VIOLATING THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Throughout the course of the trial, the Court engaged in a pattern of sarcastic, demeaning remarks toward defense counsel. This conduct took place in fully view of the jury. It should be remembered that the jury who witnessed this conduct is the same group whose attitudes were described by Dr. Thomas and whose existing prejudices had been influenced by events and their attendant publicity.

It is axiomatic that the Court should refrain from any conduct toward a party or his counsel which betrays his opinion or partiality. Here, the trial Judge time and again lapsed into sarcasm. As an illustration, the Judge told Mr. Mazar, "Mr. Mazar, I don't care what you would like to do. We are limited by proper procedure." (T-677) When Mr. Mazar suggested that a position taken by the prosecution was the most ridiculous insinuation he'd ever heard in a courtroom, the Judge replied, "Well, you haven't been in the courtroom enough, Mr. Mazar." (T-690) When the prosecutor objected to defense counsel's question as irrelevant, the Court agreed saying, "Well, its irrelevant, but what difference does it make except to prolong the trial." (T-717) When Mr. Salmon objected to a witness' testimony, he was told to "sit down." (T-750) It is difficult to imagine a clearer indication by the Court that defense counsel was not worth

listening to, than to instruct them in mid-sentence to sit down. To paraphrase Dr. Thomas, a person doesn't need fourteen Ph.D.'s to understand what that means.

These remarks occurred earlier in the trial as well and always within the hearing of the jury. When Mr. Salmon argued that he should be able to impeach a witness under the "traditional concepts of what he said on direct examination," the Judge informed Mr. Salmon and the jury that, "Your idea of traditional concept and my idea of traditional concept are not the same." (T-415) When Mr. Salmon attempted to argue an objection later, he began by saying, "Your Honor." The Court stated, "Don't 'your honor' me. He can explain his answer." (T-423) On the following page, he was told to "go on a sit down if that's all you've got." (T-425)

This process continued. In an attempt to establish how long it took for a witness to get somewhere, Mr. Mazar asked for an approximate length of time.

Q. Do you know approximately how long it took you to get there?

A. No, sir, I didn't time myself going down the steps.

Q. I understand, I'm not asking -

A. Would you time yourself in a situation like that, would you time yourself saying it was so many minutes?

Q. I'm only asking you if -

A. No, I asked you if you would time yourself.

The Court responded to the witness interrupting defense counsel by stating, "No, I don't think so, I think you're just badgering the witness." (T-545-546) Not only is it false that Mr. Mazar was badgering the witness, the witness would not allow the lawyer a chance to finish his question. Once again, the Court's remarks were made in the presence of the jury.

Mr. Salmon was not spared any of this either. When a witness responded to a question with a hearsay answer, the motion to strike was ignored and the Judge suggested that "Mr. Salmon asked for it until he got it." (T-551) Later, when Mr. Mazar wanted the jury removed so he could make a motion for a mistrial, he was told, "Make any kind of motion you want to make... I don't have time to send the jury out." (T-555) Shortly after that, Mr. Salmon objected to the introduction of some item of evidence and the Court sarcastically responded, "Well, that's not quite right. But, thank you very much for your alertness, Mr. Salmon. Your objection is overruled." (T-569) This attitude continued to the point that Mr. Salmon asked the Court to be heard on a motion and the Court responded, saying, "I don't need any hearing...Your objection is overruled. That is to say, that argument is discounted." (T-588)

It could not be clearer that the trial Judge had little respect for either defense counsel or their role before the Court. The rule requiring the Court to be impartial extends to remarks to counsel about their conduct of the case. Robinson v. State, 161 So.2d 578 (3rd DCA 1964). This rule requires that the

Court avoid any remark which is capable of being interpreted as an indication of what the Judge thinks of a party. Seward v. State, 59 So.2d 529 (1952) Likewise, the Court should avoid disparaging remarks toward counsel. Mathews V. State, 44 So.2d 664 (Fla. 1950)

Mathews and its predecessor, Bethel v. State, 167 So. 685 (Fla. 1936) seem to analyze the problem of disparaging remarks along the lines of invited error. If a lawyer was in some sense deserving of the belittling remark, the Court will absolve the trial Judge. If, however, the trial Judge simply disparaged the lawyer without cause and to his client's detriment, this Court has not been slow to reverse. In Mathews, the defense lawyer interviewed a witness without notice to the prosecutor and the trial Judge equivocated about the issue of whether this was unethical. Of course, it was not unethical and the conviction was reversed. Here there are so many sarcastic remarks, and so many disparaging comments, that it is impossible to argue that they were all justified by defense counsel's conduct. furthermore, it is not a matter of defense counsel needing to develope thick skin because the impact of the barrage was felt by the Defendant Brown, who was sentenced to death. In Robinson v. State, 161 So.2d 578 (3rd DCA 1964), the conviction was overturned based upon the possibility that a gratuitous remark could have been interpreted as a preference "where there is

simply a doubt, as here, that the accused has been prejudiced by a remark of the Court, we must grant him a new trial." Id. at 579.

Here, the list of remarks is not exclusive but illustrative and what it illustrates is the Court's attitude to counsel and their case. There is nothing resembling the magnitude of this barrage directed at anyone but defense counsel. They were both told to sit down, and by implication, to shut up. What they said was treated frequently as if it were not worth hearing, in fact, once it is "discounted." Later, one of these men was called upon to argue to the jury, who heard all of this, for his client's life. The direct beneficiary of this fabric of abuse and sarcasm was the prosecution.

POINT SEVEN

THE COURT ERRED IN FAILING TO DISCHARGE THE DEFENDANT AS A RESULT OF A SEVENTEEN MONTH PREINDICTMENT DELAY THUS ABRIDGING HIS SIXTH AMENDMENT RIGHT TO A SPEEDY TRIAL

Within twenty-four hours of this homicide, the Defendant Brown was placed in administrative confinement. He remained there for seventeen months while the prosecution interviewed inmates and built its case. The Defendant Brown was advised of his rights and told that he was being confined because of the killing. (Vol. 5, p.103, Motion for Discharge) During that period of seventeen months, he was not even allowed to send letters. (Vol. 5, p.118)

Barker v. Wingo, 92 S.Ct. 2182; 33 L.Ed.2 101, 407 U.S. 514 (1972) sets out the principle that speedy trial is constitutionally mandated and requires the Court to balance certain factors to determine whether a defendant's Sixth Amendment rights have been violated. Certainly, the threshold requirement of a presumptively overlong period between arrest and trial is met by a seventeen-month delay. That is exacerbated by the fact that the Defendant Brown was placed in confinement and prevented for seventeen months from doing anything whatsoever to help his defense. The Barker Court recognized this when it pointed out that, "Moreover, if a defendant is locked up, he is hindered in his ability to gather evidence, contact witnesses or otherwise prepare a defense." Id. at 2193. Although later the Supreme Court in Moore v. Arizona, 414 U.S. 25, 38 L.Ed. 2d 183, 94 S.Ct. 188, 189 (1973) rejected the notion that an affirmative

demonstration of prejudice was necessary to prove a denial of the constitutional speedy trial right, that demonstration is possible here. The Defendant Brown testified that he was placed in confinement on July 8, 1981. (Vol. 5, p.86, Motion to Discharge) The Defendant Brown further testified that on that day he requested a lawyer. (Vol. 5, p.88) and was not provided counsel until after indictment. The Defendant Brown echoed the Barker court by saying that this confinement hindered his ability to mount a defense. (Vol. 5, p.89) The Defendant Brown identified two men he needed to speak with in order to orient himself as to where he was at the time of the killing. (Vol. 5, p.95) He was unable to do so. The impact of this violation without counsel is seen in its starkest from when the Defendant Brown testified that he was not even permitted to send a letter. (Vol. 5, p.118) Once a defendant is deprived of his ability to speak to witnesses and lawyers or even correspond for seventeen months, prejudice to that person's defense is clear. Additionally, the Supreme Court in U.S. v. Marion, 404 U.S. 307, 320; 92 S.Ct. 455, 30 L.Ed.2 468 (1971) permits the inquiry of prejudice to extend to more subtle issues than simply the missing witnesses. "Inordinate delay wholly aside from the possible prejudice to the defense on the merits may seriously interfere with a defendant's liberty, whether he is free on bail or not, and may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy and create anxiety in him, his family and friends." Few things on this earth will

produce more anxiety than being placed in administrative confinement for seventeen months while the State builds its case.

The other factors Barker requires the Court to balance are the reason for the delay and whether the Defendant asserted his right to a speedy trial. The Defendant Brown was forbidden to write letters or speak with an attorney during this entire period. It would be useless to suggest that the Defendant assert his right since he had no access to attorneys or to the Court. In administrative confinement, there was simply no forum within which to assert this right. for its part, the prosecution offers no reason or excuse for this delay.

The right to a speedy trial has been termed "fundamental" Klopfer v. North Carolina, 386 U.S. 213, 223; 87 S.Ct. 988, 993, 18 L.Ed. 21 (1967) and seems to turn on whether the procedures have violated the idea of fundamental fairness. Few people would argue that the confinement of one litigant by another while that other litigant interviews, cajoles and bargains with inmates in return for testimony places one litigant with an unfair advantage over the other. When that confinement spans seventeen months, the deprivation of freedom, counsel and an ability to gather evidence reaches constitutional proportions.

POINT EIGHT

THE COURT ERRED IN FAILING TO DISCHARGE THE DEFENDANT PURSUANT TO FLORIDA RULES OF CRIMINAL PROCEDURE 3.191

The Defendant Brown was placed into administrative confinement on July 8, 1981 and stayed there essentially until he was tried and convicted for this offense. The Defendant argues that his act was tantamount to an arrest and an appropriate time for the speedy trial period to commence. The Defendant described the situation as if it were an arrest. "Well, on July 8th, I think it was 8:30 p.m., I was in the cell and two officers came and told me I was to pack up. I said, 'pack up?' He said, 'yes,' that they got these orders from Lt. Lee to put me in confinement on F-floor for an investigation of a homicide. I said, 'what?' He took me to lock-up." (Vol. 5, Motion for Discharge, p.103) The Defendant described being told that he was being "charged with the homicide of Earl Owens," and advised of his Miranda rights. (Vol. 5, p.106) About one week later, he was brought back and asked if he would take a polygraph test. (Vol. 5, p.106) He asked for a lawyer after the first meeting with Sands, an investigator for the Department of Corrections, but never got one until months later. (Vol. 5, p. 109) While he was kept on administrative confinement, he could not even write letters. (Vol. 5, p.118)

Any analysis of a speedy trial problem should begin with an understanding of the policy underpinnings of the rule. Three reasons are traditionally given for a speedy trial rule: (1) to

prevent oppressive pretrial incarceration; (2) to minimize the anxiety and concern of the accused; and, (3) to limit the possibility that the defense would be impaired. Of these, the greatest is the last because the inability of a defendant to adequately prepare his case skews the entire system. United States v. McDonnell, 435 U.S. 927, 55 L.Ed 2d 522, 98 S.Ct. 1496 (1978) Every one of these policy statements is violated by the use of seventeen months of pre-indictment administrative confinement, during which nothing can be done of a defensive nature and during which potential defense witnesses are transferred and paroled.

While three cases have held that placing an inmate in administrative confinement does not constitute an arrest Height v. State, 459 So.2d 470 (1st DCA 1984); King v. State, 468 So.2d 510 (1st DCA 1985); Lynn v. State, 436 So.2d 416 (1st DCA 1983), these cases seem to flow from an earlier case - Powers v. State, 442 So.2d 981 (1st DCA 1982). The Court in that case concluded from the evidence that the date of the administrative confinement was not the date of arrest. "We conclude the evidence does not show an arrest as of the date of the administrative confinement for the purpose of commencing the 180-day speedy trial time." Id. at 982.

This holding implicitly stands for the proposition that a case by case analysis is required to determine when an arrest is made for speedy trial purposes. It is clear from the record that administrative confinement is to an inmate as arrest is to a free

man. It takes him out of the population, restricts his freedom within the institution and is brought on by some criminal act or suspicion of some criminal act. It is, likewise, clear that the Defendant Brown was confined because of the belief that he had committed a crime. In fact, Lt. Lee testified to that fact as well as the Defendant. (Vol. 5, p.123-124) It is also agreed that when the Defendant was interrogated on July 8, 1981, he was given his Miranda warnings. (Vol. 5, p.10) It was the intention of the authorities to place the Defendant in confinement and keep him there, if necessary, until he was prosecuted. (Vol. 5, p.19)

It was, at that point, while he was confined administratively and isolated from all means of preparing his defense, that the policy factors underlying the rule came into play. When the factual analysis as envisioned by Powers is applied to the instant case, it is clear that July 8th was the day this prosecution began and the day for all intents and purposes that the Defendant was arrested.

CONCLUSION

This case should have been dismissed on the ground that the delay in prosecution constitutes a violation of the Defendant's right to a speedy trial. Alternatively, the Defendant submits that the Court should remand the case for a new trial for the reasons given in any or all of the remaining points of this brief.

Respectfully submitted,

PATRICK D. DOHERTY
619 Turner Street
Clearwater, Florida 33516
(813) 443-0405

And

Philip J. Padovano
Post Office Box 873
Tallahassee, Florida 32302
(904) 224-3636

ATTORNEYS FOR APPELLANT BROWN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and exact copy of the foregoing was furnished to John Tiedemann, Esquire, Assistant Attorney General, The Capitol, Tallahassee, Florida 32301, and Steven L. Bolotin, Esquire, Assistant Public Defender, 376 South Franklin Boulevard, Tallahassee, Florida 32301 by U.S. Mail on this 28th day of January, 1987.

PATRICK D. DOHERTY