IN THE SUPREME COURT OF FLORIDA

CASE NUMBER: 64, 883

HARRY PHILLIPS, :

Appellant, :

v. :

STATE OF FLORIDA, :

Appellee. :

_____ :

BRIEF OF APPELLANT, HARRY PHILLIPS

ERIC WM. HENDON
Attorney for Appellant
8011 N. W. 22nd Avenue
Miami, Florida 33147
(305) 693-1122

TABLE OF CONTENTS

INTRODUCTION

The APPELLANT was the DEFENDANT in the court below: The APPELLEE was the State of Florida. Parties shall be referred to as they stood in the trial court. References to the Record on Appeal will be by the letter "R". References to the trial transcript will be indicated by the letters "TR".

TABLE OF CITATIONS

STATUTES AND OTHER AUTHORITY

STATEMENT OF THE CASE AND FACTS

Appellant was charged by indictment with the first degree murder of Bjorn Thomas Svenson on August 31st, 1982 in Dade County case number 83-435. (R-1).

At approximately 8:40 p.m. on August 31st, 1982, Mr. Glen Kitchen heard what appeared to be a rally of gunfire in the vicinity of the Parole and Probation Office building on Northwest 183rd Street in Miami, Florida. (TR-214). When Mr. Kitchen and a friend went to see what the noise was, they discovered a body (TR-216) and immediately went to summon a policeman. Shortly thereafter, Officer Mike Santos of the Metro Dade Police Department (who also heard the shots) arrived on the scene where the body was discovered (TR-235). Officer Santos and the other Officers sealed off the immediate area and began searching for evidence.

The deceased body was determined to be Bjorn Thomas Svenson, the supervisor of that particular probation office. (TR-362). The assailant was not seen at the scene of the shooting. Appellant (Harry Phillips) was subsequently arrested for and charged with the killing of Bjorn Thomas Svenson (R-44).

Prior to the trial, Appellants counsel filed a Motion in Limine with the Court seeking to prevent the introduction of any testimony or evidence concerning an unrelated shooting into the home of Ms. Nanette Brochin, Appellant's former parole officer. (R-131). Although the Motion in Limine had been granted by the Court, there was extensive testimony presented to the jury concerning this collateral crime for which Appellant had not been convicted of. Furthermore, one of the State witnesses (Detective Steve Alter) who had been

specifically instructed not to mention the fact that charges had been filed against the Appellant for the collateral offense, announced to the jury (in an answer that was unresponsive to a question asked by Appellant's counsel) that the Appellant had in fact been charged with the collateral offense in another county. (TR-528). Appellant's counsel made a timely Motion for a Mistrial which was subsequently denied by the Court (TR-).

The State proceeded to call its witnesses, some of whom were inmates who testified to having been told information about the facts surrounding the shooting by Appellant while incarcerated. The other State witnesses were either Probation Officers who were familiar with the Appellant prior to the homicide, or law enforcement officers who investigated the case. At the close of the States case in chief, Appellant's counsel moved the court for a judgment of acquittal, which was denied. (TR-967).

After Appellant put on his case in Defense, the State put on rebuttal witnesses. Following all of the testimony, Appellant renewed his Motion for Judgment of acquittal, which was again denied.

At the close of their deliberations, the jury returned a verdict finding Appellant guilty of the first degree murder of Bjorn Thomas Svenson. The jury recommended the death penalty by a vote of seven to five (TR-1269). The court, after finding the existance of four aggravating factors and no mitigating factors, imposed the death sentence (R-329).

This appeal follows.

POINT I

THE TRIAL COURT ERRED IN ALLOWING THE STATE TO ELICIT TESTIMONY CONCERNING COLLATERAL UNCHARGED CRIMES

Prior to the trial of this cause, Appellant filed a Motion in Limine, seeking to prevent the jury from hearing any information concerning a shooting incident that had taken place days before the occurrance of the homicide with which Appellant was charged. (R-131). The Motion in Limine was granted by the Court. Nevertheless, the entire trial was replete with testimony and argument concerning this shooting, which was if anything, a collateral crime in which Appellant's involvement can only be arrived at by speculation.

During his opening statement, the Prosecutor made the following remarks:

> "they said: Mr. Phillips, you stay away from Mike Russell, you stay away from Nanette Brochin, you stay away from 183rd Street,.....You stay away. Three days after he's told: Stay away, stay away, stay away, somebody fires four shots into Nanette Brochin's home.....Four bullets came flying into that house in the evening. The very next morning.....Two supervisors of the two people who are shot at go to the Defendant's home; wanted to talk to him about it, wanted to see if he had a gun. (TR-161)

During the direct examination of State witness Nanette Brochin, the prosecutor solicited the following testimony:

> "Q: [By Prosecutor]: Okay. What happened up at your home in Broward County seven, eight, nine days afterwards?
>
> A: [witness]: Mike and I were watching television. We were watching a movie. And, somebody tried to kill us.
>
> Q: Tell us how that happened.

A: Somebody fired four shots through our front window.

Q: Did you see who did it?

A: No.

Q: Did you call the local police?

A: Yes, we did.

Q: Did they come out to your house?

A: Yes, they did.

Q: Did they recover any of the projectiles?

A: I believe they did. Two of them were in the living room.

Q: Which window did they enter the house -- did the projectiles enter the house?

A: Front living room window.

Q: Did you see the police officers looking for the projectiles in your house?

A: Yes.

Q: Do you know if they recovered any?

A: I believe they did."

(TR-358)

During the direct examination of State witness Mike Russell, the prosecutor solicited the following testimony:

"Q: So, you advised your supervisor. Something unusual happen three days later at your home?

A: Yes, sir.

Q: Please tell us about it.

A: The night of August 23, 1982, at approximately ten o'clock, my wife and I were sitting, watching T.V. and somebody tried to kill us; somebody fired four, five rounds into our house. One nearly missed my by two inches on my left and one hit the chair to my right where I was sitting. I yelled for Nanette to jump down. I seen puffs and heard the shots and yelled to Nanette, who

was sitting on the couch, to jump on the floor and crawl in the kitchen.

We crawled in the kitchen. The house became smokey. I went to the kitchen phone. I dialed 911, called the police, and I belly crawled into my daughter's room, which is in the front part of the house. She was asleep at the time. I carried her to the back of the house.

Q: Did the Miramar Police Department respond to your home?

A: Yes, sir, they did."

(TR-454)

The State called as a witness, Detective Steve Alter of the Miramar Police Department. Dective Alter was questioned extensively by the prosecutor about his investigation into the shooting at Ms. Brochin's residence (TR-517). Detective Alter's testimony included an account of his interview of Appellant hours after the shooting and the fact that Appellant was taken to the Miramar Police Station where chemical tests were performed on his hands to determine if he had fired a handgun that evening. (TR-522).

During cross examination by Appellant's counsel, Detective Alter was asked the following question:

"Q: You, in fact, for a fact, do not know who fired into that house; isn't that correct..for a fact?

A: [By. Det. Alter]: Well, we were able to charge him with Broward County...

Appellant's counsel immediately objected to the Detective's answer as being unresponsive. After the Court gave an curative instruction admonishing the jurors to disregard the remark, Appellant's counsel moved the court to declare a mistrial due to the extremely prejudicial nature of the Detective's response. (TR-528).

The court reserved ruling on the Motion for Mistrial at that time. However, the motion was subseqently denied by the court (TR-804).

During the Prosecutors closing argument, he made several references to the shooting incident. (See TR-1124;1125;1172; 1175;1177; and 1184).

It should be noted that during the trial of this case below, the Appellant was not on trial for the attempted murders of Nanatte Brochin and or Mike Russell. Nevertheless, the record reflects that the jury was continuously bombarded with testimony relative to and concerning the shooting into Mr. Brochin's home. This testimony was extremely prejudicial to the Appellant in that it bore no indica of relevancy to the case for which Appellant was bieng tried and it served only to inflame the jury against Appellant by showing his propensity to commit murder.

The instant case is similar to the case of RODRIGUEZ v. STATE, 372 So.2d 1107 (3rd DCA), wherein the trial court had allowed the State to elicit testimony concerning collateral crimes with which the defendant was not being tried for. In reversing the conviction and remanding the case for a new trial, the court said:

> "Our review of the record persuades us that the appellant was prosecuted not only for the offenses charged in the information filed against him but that he was irremediably prejudiced by the improper admission of evidence of collateral misconduct and collateral crimes in order to convict the appellant. The prosecutor was repeatedly permitted to introduce evidence that the appellant may have committed similar crimes at some point prior to the crimes charged."
>
> Id. at 1167

In the instant case, as in RODRIGUEZ, the sole purpose for which the prejudical evidence was admitted was to assail the Appellant's character, which had not been placed in issue.

The State also elicited testimony from two other witnesses concerning the shooting. During the direct examination of Tony Smith, the state asked the following questions:

> "Q: [Prosecutor]: What else did the [Appellant] tell you?
>
> A: [Witness]: That he was transferred to another one [parole officer] and at that time being that she kept hassling him. So, he tried to take care of her, but he missed.
>
> Q: Did he use the words, "take care"?
>
> A: He tried to get her.
>
> Q: What did he say?
>
> A: Shoot.
>
> Q: Did he say where he shot at her?
>
> A: Out Carol City, I believe , sir."
>
> (TR-610)

During the direct examination of Malcom Watson, the State elicited the following:

> "Q: What did you hear Harry Phillips say?
>
> A: This particular time he was talking about he had fired a shot around at his parole officer's house.
>
> Q: At the house?
>
> A: Yes, sir.
>
> Q: Do you know anything about that case?
>
> A: About the case?
>
> Q: Other than what he said, do you know anything about it?
>
> A: No, sir.
>
> (TR-693)

Clearly the above-mentioned testimony was extremely prejudicial to the Appellant in that the purported admissions involved an incident totally irrelevant to the crime for which he was being tried.

In DILLMAN v. STATE, 411 So.2d 964 (3rd DCA), the Court, for similar reasons, reversed a conviction for armed robbery and in doing so held:

> "However, because the State, over-the defendant's objection, persisted in eliciting statements of the defendant made to a State witness, which statements implicated the defendant in a murder totally unrelated to the armed robbery charge being tried and established nothing more than the criminal propensities of the defendant, we are compelled to reverse the defendant's conviction and remand the cause for a new trial."

Id at 965

Under the totality of circumstances, the extensive testimony concerning this issue during and through out the entire trial, coupled with Detective Alters announcement that Appellant had in fact been charged with the shooting incident by officials from Broward County, rendered it impossible for Appellant to receive a fair trial for the offense for which he was being tried, to wit: the murder of Bjorn Svenson. Instead, Appellant was irremediably prejudiced by the constant references to this collateral crime to the extent that it is more likely than not that the jury's ultimate determination of the Appellant's guilt was due to their belief that Appellant had committed the collateral crimes complained of.

In essence, the prejudicial effect of this evidence far outweighed any possible relevance it may have had. The totality

of this prejudice is such that a new trial is necessary.

POINT II

THE PREJUDICIAL COMMENTS ELICITED BY THE STATE DEPRIVED THE DEFENDANT OF HIS FUNDAMENTAL RIGHT TO A FAIR TRIAL

During the direct examination of State witness William Farley,the prosecutor elicited the following testimony:

> "Q:[Prosecutor]: Did he [Appellant] tell you anything about the crime itself?
>
> A:[Witness]: Yes sir.
>
> Q: Please tell us what he told you.
>
> A: He said that he actually murdered the man.
>
> Q: What words did he specifically use?
>
> A: He said that he actually murdered the cracker.
>
> Q: Murdered the cracker?
>
> A: Yes, sir.
>
> Q: What does that word mean?
>
> A: Well, it's like a derrogatory term, like say if I was a racist and a white called me a nigger. It's the same thing.
>
> Q: So, he said: I murdered the cracker?
>
> A: Yes, sir.
>
> (TR-811) [emph. added]

Clearly there was no good faith reason for the Prosecutor to elicit the alleged off color remarks from the witness. The remarks bore no relevancy to the matters testified to and served only to inflame the jury and prejudice them against the Appellant, who is black and was being tried for the murder of his parole supervisor, Bjorn Svenson, who was of Anglo descent. The underlined portions of the above-mentioned testimony show the extent to which the prosecutor went to make this point.

The prejudicial nature of the elicited statements outweighed any possible (even remotely possible) relevance that the statements had.

During direct examination of State witness William Farley, the Prosecutor elicited the following:

> "Q: What else did Mr. Phillips tell you?
>
> A: Well, during--at that point he produced a news article from out of a folder that he have.
>
> Q: Where did he have this newspaper article?
>
> A: In a manila folder.
>
> Q: Was the manila folder anywhere special?
>
> A: No, it just a folder.
>
> Q: And, did he show you that article?
>
> A: Yes, sir.
>
> Q: What did it say or what did you see on it?
>
> A: Well, it was a picture of a lady and a little boy --
>
> Q: A lady and boy?
>
> A: -- departing a funeral.
>
> Q: Departing a funeral?
>
> A: Right, sir.
>
> (TR-809)

Prior to that point in the trial, there had been no testimony concerning the survivors (if any) of the victim in this case. Further, in response to the Prosecutor's question regarding the witnesses motive for testifying, the witness said the following:

> "...And, besides that, I was sort of like sorry--I was real sorry for the little kid, <u>the grieving little boy</u> I seen in the news article"
>
> (TR-817) [emph. added]

The references to the victims aggrieved survivors served only to further inflame the jury against Appellant. Although the Prosecutor did not raise this issue via opening statement or closing argument, the time honored rule proscribing verdicts based on appeals to sympathy, bias, passion or prejudice is defeated if the same type of dangerously prejudicial information (i.e. information about grieving relatives of the victim) is presented to the jury via other State witnesses. See EDWARDS v. STATE, 428 So.2d 357 (3rd DCA).

Inasmuch as the prejudicial testimony elicited by the Prosecutor from the above mentioned state witness (William Farley) served the sole purpose of invoking hostility towards the Appellant by the jurors, the Appellant was effectively denied his fundamental right to a fair trial.

POINT III

THE TRIAL COURT ERRED IN REFUSING TO GIVE THE ALIBI INSTRUCTION REQUESTED BY APPELLANT

At the close of the State's case in rebuttal, the court conducted a charge conference. (TR-1077) Appellant's counsel made a request that the court give the alibi instruction found in the Florida Standard Jury Instructions in Criminal Cases (second edition) which is as follows:

> "2.10 AFFIRMATIVE DEFENSES
>
> (a) ALIBI
>
> One of the defenses in this case is an alibi, that is to say that at the the time of the alleged crime the defendant was not at the place of the crime and that he was so fare away that he could not have been at the place where the crime was committed.
>
> Where an alibi is claimed as a defense, it is not necessary that the alibi be proved beyond a reasonable doubt. It is sufficient as a defense if you have a reasonable doubt as to the presence of the defendant at the scene of the alleged crime. If there is such a reasonable doubt it is your duty to find the defendant not guilty."

The court, noting that Appellant's counsel had requested the old alibi instruction denied this request (TR-1080) and announced that it would give the jury the alibi instruction as written and found on page 36 of the revised Florida Standard Jury Instructions, to wit:

> "3.04 AFFIRMATIVE DEFENSES
>
> 3.04(a) ALIBI
>
> An issue in this case is whether defendant was present when the crime alleged was committed.
>
> If you have a reasonable doubt that the defendant was present at the scene of the alleged crime, it is your duty to find the defendant not guilty.

As grounds for his request for the old alibi instruction, Appellant's counsel stated the following:

> "MR. GURALNICK: If I may, just for the record, please, even the alibi that's standard -- if you have a reasonable doubt that the Defendant was present at the scene of the alleged crime, it is your duty to find the Defendant not guilty. It's very easy for the jury to get confused since we've been harping on the fact that the State has the burden of proving him guilty beyond and to the exclusion of every reasonable doubt.
>
> They may think the same thing is applicable to an alibi, and that would not be correct.
>
> THE COURT: I suggest you take your comments up with the Supreme Court of Florida. I do not change standard jury instructions.
>
> (TR-1080)

The revised Standard Jury Instructions in Criminal Cases went into effect on October 1st, 1981. In Re Standard Jury Instructions in Criminal Cases, 431 So.2d 594 (Fla. 1981). Although in that opinion this court acknowledged its intent to eliminate confusion (of jurors with the instructions) and make the instructions easier for jurors to understand, it was for this same reason that Appellant's counsel requested that the old (former) instruction on alibi be given.

As pointed out by Appellant's trial counsel (supra), under the revised alibi instruction, it would be very easy for a jury to assume that a defendant (such as appellant herein) would have to prove or establish his alibi beyond a reasonable doubt. This is so especially in a case such as the instant case where the principle evidence connecting the accused to the crime charged is circumstantial, as opposed to direct evidence.

There was evidence presented to support the Appellants theory of alibi as an affirmative defense (see testimony of Laura Phillips TR-1039-1071). Although the court did in fact give the revised alibi instruction (TR-), Appellant was entitled to have the jury accurately instructed on each aspect of the law applicable to his theory of defense when he so requests. MOTLEY v. STATE, 20So.2d 798(A45), BRYANT v. STATE, 412 So.2d 347 (Fla. 1982). Accordingly, the trial court abused its discretion in refusing to give the Appellant's requested alibi instruction.

POINT IV

THE COURT ERRONEOUSLY FOUND THE KILLING TO HAVE BEEN ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL

It is well settled that in reviewing the appropriateness of the penalty in the instant case, the facts herein should be examined in light of other holdings of this honorable court. (citations omitted). In its findings of fact and sentence of Death (R-329) the trial court found that:

> "the victim was shot twice in the left side of the chest....then ran approximately one hundred feet and was then shot four times in the head and once in the spine. There was a grazing wound to the head as well."
>
> (R-334)

Based upon these findings and the trial courts' perception that the victim, while running, "must have agonized over his ultimate fate", the court found that the murder was especially Heinous, Atrocious, or Cruel as per Florida Statute 921.141(5)(h).

The circumstances of the homicide in the instant case are strikingly similar to those surrounding the killing described in LEWIS v. STATE, 377 So.2d 640 (Fla. 1980), in which the court rejected the trial courts finding under Florida Statute 921.141 (5)(h). In LEWIS, the relevant facts were that the defendant drove up to or approached the victim for purposes of conversation. After talking to the victim for several minutes, the defendant pulled out a gun and shot the victim several times. And that the defendant continued shooting the victim while the victim was attempting to flee.

In rejecting the finding under Section 921.141(5)(h), the court in LEWIS, said the following:

> "The finding under section 921.141(5)(h) was predicted upon the fact that appellant shot the victim in the chest and, as the latter attempted to flee, shot him several more times in the back. In State v. Dixon, we held that "heinous" means "extremely wicked or shockingly evil." We then elucidated the acts which the legislature intended to come within the scope of that term:
>
> What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies--the conscienceless or pitiless crime which is unnecessarily torturous to the victim.
>
> 283 So.2d at 9. Accord, Cooper v. State, 336 So.2d 1133 (Fla. 1976); Tedder v. State, 322 So.2d 908 (Fla. 1975).
>
> It is apparent that all killings are heinous-the members of our society have deemed the intentional and unjustifiable taking of a human life to be nothing less. However, the legislature intended to authorize the death penalty for the crime which is "especially heinous" - "the consciencesless or pitiless crime which is unnecessarily torturous to the victim." (Emphasis supplied.) The killing in the case at bar simply does not fall within that category when viewed in the context of the published decisions of this Court."

In the instant case, as in LEWIS, the killing simply does not fall within this category (i.e., Heinous, Atrocious or Cruel) when viewed in the context of the published decisions of this court.

In it's findings of fact, the court, in considering this aggravating factor gave significance to the defendant's purported statement, "I'm glad the motherfucker is dead" (R-334). Since any consideration of an accused's "lack of remorse" is totally

irrelevant to the atrocity of a homicide, the trial court improperly found this aggravating circumstance to exist. See GORHAM v. STATE, 9 FLW 310 (Fla. 1984); and POPE v. STATE, 441 So.2d 1073 (Fla. 1983).

POINT V

THE TRIAL COURT IMPROPERLY FOUND THE HOMICIDE TO HAVE BEEN COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER

In finding this aggravating factor, the trial court likened the killing herein to the "execution style" killings noted in other decisions of the court. (R-335) However, there is no support in the record for a finding that the victim herein suffered an "execution styled" killing, or that he was mercilessly tortured by his assailant.

The events that took place leading up to the murder in the instant case are certainly less severe than those present in the case of MANN v. STATE, 420 So.2d 578 (Fla. 1982). In MANN, the victim was a 10 year old girl who had been abducted, stabbed and cut several times, and killed by a blow to the skull. Nevertheless, the Florida Supreme Court found that the trial Court had erred in finding that killing to have been committed in a cold, calculated, premediated manner.

Appellant submitts that the circumstances surrounding the killing in the instant case fail to exhibit a heightened premeditation greater than that required to establish premediated murder. Consequently, the trial court improperly found the existence of this aggravating factor.

CONCLUSION

The record demonstrates that the State relied heavily on the evidence relating to Appellant's involvment in the collateral crime of shooting into the home of one of the State witnesses in order to secure a conviction for the first degree murder of Bjorn Thomas Svenson. Inasmuch as the Appellant hadn't been convicted of that shooting and was clothed with the presumption of innocence with respect thereto, the Appellant was denied his fundamental right to a fair trial which he is entitled to under the laws of this State and the United States Constitution. Accordingly, the conviction for first degree murder and subsequent sentence of death should be reversed and remanded for new trial.

Furthermore, the court erred in finding the killing to be of such a nature as to meet the standards of Florida Statute 921.141(5)(h) and Florida Statute 921.141(5)(i).

Respectfully submitted,

Eric Wm. Hendon

ERIC WM. HENDON
Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing brief was forwarded to Ms. Carolyn Snurkowski, Assistant Attorney General, at 401 N. W. Second Avenue, Miami, Florida this 1st day of August, 1984.

By: Eric Wm. Hendon

ERIC WM. HENDON
Attorney for Appellant
8011 N. W. 22nd Avenue
Miami, Florida 33147
(305) 693-1122