IN THE FLORIDA SUPREME COURT

JASON DIRK WALTON, :

Appellant, :

vs. : Case No. 65,101

STATE OF FLORIDA, :

Appellee. :

_____ :

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

INITIAL BRIEF OF APPELLANT

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TENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE

On March 2, 1983, a three-count Indictment was filed in Pinellas County Circuit Court charging Jason Walton with the first degree murders of Steven Fridella, Bobby Martindale, and Gary Petersen. (R20)

Following a jury trial on February 7-9, 1984, Mr. Walton was found guilty of the offenses charged. (R2476) The jury was reconvened the next day for an advisory sentencing hearing and subsequently recommended the penalty of death. (R2518,2680)

On March 14, 1984, after receiving arguments from counsel, the court imposed the death penalty. (R2717) The findings of fact, filed on June 1, 1984, listed five aggravating factors. (R357-363) No statutory mitigating factors were found by the court.

A timely notice of appeal was filed on March 14, 1984. (R327)

STATEMENT OF THE FACTS

A. Motion to Suppress

Prior to trial the Appellant, Jason Walton, moved to suppress statements which he had made to the authorities following his arrest. (R92-93) The motion alleged that the statements were obtained in violation of the Appellant's constitutional rights to remain silent and have counsel present during questioning. (R93)

At the ensuing hearing, the evidence established that the Appellant was arrested on the morning of January 20, 1983 at a factory in Marion County where he was employed. (R2731) He was transported to the Marion County Jail and counsel was appointed for the first appearance hearing. (R2732-2733)

Later that day, detectives John Halliday and Ronald Beymer transported the Appellant to the Pinellas County Jail. (R2738-2739) The detectives had been admonished by defense counsel not to talk with the Appellant. (R2734) In addition, the detectives were given a document notifying them of the Appellant's intent to invoke his right to counsel and exercise his right to remain silent. (R2756-2757)

The Appellant testified that at the commencement of the trip the detectives commented that "it would be a long ride without conversation." (R2811) Shortly thereafter, the Appellant inquired as to whether his girlfriend had received his paycheck. (R2740,2811) The detectives replied that she had. (R2740)

A few minutes later the Appellant asked why he had been arrested. (R2741,2769,2811) The detectives responded that they had been admonished by the Appellant's attorney not to discuss

the case with him. (R2741-2742,2769-2770) The Appellant repeated that he wanted to talk with the detectives. (R2742) The detectives advised the Appellant that he would have to sign a waiver of his rights. (R2742-2744) The Appellant signed a written waiver. (R2744)

Detectives Halliday and Beymer testified that after the Appellant waived his rights, he asked them about the charges. (R2747) Halliday advised the Appellant that in addition to the crime charged in the arrest warrant, he would be charged with three other offenses. (R2747) The Appellant replied that they had it "all messed up" and that he was "not the one." (R2747) Halliday asked the Appellant, "Well, what are you talking about?" (R2747) The detective further stated, "Go ahead and continue talking if you wish." (R2747) The Appellant replied that "he didn't do any of the shooting at all" and further responded that, "Whatever anyone else may have told you they're wrong." (R2747, 2772)

At that point detective Halliday inquired, "Well, do you wish to give a statement at this time?" (R2747) The Appellant replied, "Well, yes, I would like to but I really don't want to." (R2747) The detective continued his inquiry by asking the Appellant if he wanted to have the statement recorded. (R2747) The Appellant responded negatively, explaining that he just wanted to "fish around." (R2798)

Detective Beymer testified that Halliday then "asked him numerous questions in reference to the incident" and the Appellant responded. (R2772) These responses revealed that

the Appellant was present and participated in the robbery of the house, but that he was not the triggerman in the murders. (R2125-2132) Following his statement, the Appellant agreed to repeat on tape the matters of which he had already spoken. (R2772)

Thereafter, on January 24, 1983, the detectives initiated an interview with the Appellant at the Pinellas County Jail. (R2753) After obtaining a waiver of rights from the Appellant, the detectives elicited additional incriminating statements. (R2146-2154)

After hearing the aforestated evidence, the trial court entertained arguments from the respective counsel and subsequently denied the Appellant's motion to suppress. (R2845-2846)

B. Trial

At the Appellant's jury trial, the prosecution's evidence tended to establish that on the early morning of June 18, 1982, the Pinellas County Sheriff's Department received a telephone call from Chris Fridella. (R1996) Chris, an eight-year old boy, related an incident which had occurred at his residence. (R2090) Pursuant to this telephone call, several officers were dispatched to the residence located in the High Point area of Pinellas County. (R1994,1998,2009)

Upon arriving at the residence, the officers observed three men on the living room floor. (R1994) The men, who were later identified as Steven Fridella, Bobby Martindale, and Gary Petersen, appeared to have expired from gunshot wounds and their wrists were bound behind their backs with duct tape. (R1997, 2030,2047) Chris Fridella, Steven Fridella's son, was found unharmed. (R1995,2091,2110)

The officers further observed that the house had been ransacked, the victims' wallets had been emptied, and the volume on the television set was turned up all the way. (R2014,2089) Five shotgun shells were recovered from outside the doorway, and an additional shell was recovered from just inside the doorway. (R2096,2099-2100)

Dr. Joan Wood, the Pinellas County Medical Examiner, arrived on the scene at 4:30 a.m. and determined the time of death of the three victims to have occurred within the preceding three hours. (R2043,2047) Dr. Wood opined that the deaths had resulted from shotgun wounds in the range of three to six feet. (R2048) Dr. Wood's opinion was consistent with the shotgun wounds having been inflicted from the doorway of the residence. (R2048)

Dr. Wood noted that there had been six shotgun wounds to the three victims: Petersen had been shot once, Martindale twice, and Fridella three times. (R2049) Dr. Wood opined that following the infliction of the wounds the victims would only have remained conscious for a "period of seconds," and further explained:

> Talking about thirty, forty seconds even. I have no way other than to say there's massive destruction incompatible with life for more than a minute or two.

(R2072)

On January 14, 1983, approximately six months after the incident, the police received a telephone call from Robin Fridella, Steven Fridella's ex-wife. (R2107,2110) Robin Fridella and her son Chris were living with Jason Walton at his residence

in Hernando County. (R2110) Ms. Fridella supplied the police with information which led to the arrest of Terry Van Royal on January 19, 1983. (R2109-2110) After interviewing Van Royal, the police obtained an arrest warrant for the Appellant. (R2110)

On the morning of January 20, 1983, Mr. Walton was arrested at the Pall Corporation in Marion County where he was employed. (R2111) Later that day, as he was being transported to the Pinellas County jail, the Appellant made a statement to the police. (R2218,2283)

In his statement, the Appellant indicated that approximately two weeks prior to the incident he had heard that Steve Fridella and Gary Petersen had a substantial amount of money and cocaine at their residence. (R2125) The Appellant subsequently met with Richard Cooper and Terry Van Royal and they planned a robbery. (R2126) On the night of the incident, the trio met at the Appellant's trailer in Citrus County and then proceeded to Fridella's residence in Pinellas County with the Appellant driving. (R2127) The Appellant explained that he was the only one who knew where the house was located. (R2128) He had accompanied Robin Fridella on prior occasions when she had gone to her ex-husband's residence to pick up her children. (R2128)

The trio arrived at their destination at approximately 2:30 a.m. (R2127) The Appellant was armed with a .357 magnum, and Cooper and Van Royal each carried .12 gauge shotguns. (R2128) The Appellant noted that they did not intend to kill anyone but had brought the guns as insurance. (R2300) They each put on ski masks and gloves prior to entering the house. (R2128)

The trio entered the house through an unlocked door. (R2129) Steven Fridella, Gary Petersen and Bobby Martindale were awakened and ordered into the living room. (R2129,2286) Petersen asked, "Is that you J.D.?" (R2287) The Appellant further informed the detectives that although he was known as "J.D.," Petersen's statement "didn't bother me because he just didn't know." (R2287)

The Appellant continued his statement by indicating that the other occupant of the house, Chris Fridella, was placed in the bathroom. (R2130) The Appellant explained that "he didn't want any harm to come to the little boy." (R2131)

The Appellant further advised the detectives that he then proceeded to ransack the house looking for money and cocaine. (R2130) Finding neither, he returned to the living room and observed that Steven Fridella, Petersen, and Martindale were lying face down on the floor with their hands taped behind their backs. (R2130-2131) Van Royal and Cooper were pointing their shotguns at the men. (R2131)

After returning to the living room, the Appellant stated "let's get out of here" and turned up the volume on the television set so that the men could not be heard if they screamed for help. (R2288) Cooper and Van Royal were standing in the doorway as the Appellant exited the house. (R2132) As he stepped outside the door he heard several gunshots. (R2132, 2288) The Appellant ran to the car and waited for the others. (R2132,2288)

The Appellant concluded his statement by noting that Robin and Steve Fridella had been having a legal custody conflict

over their two children. (R2299) The Appellant also stated that Robin had informed him that she and Steve might attempt to get back together. (R2299)

After completing his statement, the Appellant complied with the detectives' request to repeat on tape the matters of which he had already spoken. (R2289) The subsequent taped statement was substantially the same as the initial statement. (R2141, 2288)

After depositing the Appellant at the Pinellas County jail, detectives Halliday and Beymer interviewed Richard Cooper. (R2142) As a result of the Cooper interview, the detectives learned that the Appellant's brother, Jeffrey McCoy,[1/] had also been involved in the incident. (R2145)

Thereafter, on January 24, 1983, the detectives initiated an interview with the Appellant at the Pinellas County Jail. (R2146) After obtaining a waiver of rights from the Appellant, the detectives questioned him concerning his failure to reveal McCoy's participation in the incident. (R2146-2149) In response to the interrogation, the Appellant explained that he had not wanted to get his brother involved. (R2149) The Appellant advised the detectives that McCoy had taped the victims but had left the house and was in the car when the shootings occurred. (R2149-2150)

In response to further interrogation, the Appellant stated that it had been his idea to go to the house and commit

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[1/] The Appellant had changed his name from McCoy to Walton after his mother remarried. (R2587)

the robbery. (R2153,2295) The Appellant explained that he had been upset because Petersen had ransacked his trailer. (R2153-2154) The Appellant further stated that he had attempted to fire his weapon prior to entering the house to see if it would work but it misfired. (R2152,2296) Once inside the house, the Appellant pointed his handgun at Petersen but did not fire it. (R2153) As he exited the house, the Appellant heard Cooper and Van Royal arguing with the victims. (R2297) After he exited the house, the shooting began. (R2297)

Bruce Jenkins testified that approximately two weeks prior to the incident in question, he had a conversation with the Appellant. (R2192) The Appellant had said he was worried that Robin Fridella was going to end her relationship with him and go back to her ex-husband Steven. (R2193) The Appellant further commented that the "only way he could get [Steven Fridella] off his back was to waste him." (R2196) The Appellant also told Jenkins that Steven Fridella and Gary Petersen had been threatening him and that he was afraid of them. (R2201-2202)

The prosecution rested. (R2313)

The Appellant's motion for a judgment of acquittal was denied and the defense rested without presenting evidence. (R2313,2320)

Following closing arguments, the jury retired for their deliberations and subsequently found the Appellant guilty of the three counts of first degree murder charged in the indictment. (R2476)

C. Penalty Phase

At the penalty phase proceedings before the advisory jury, the prosecutor introduced additional evidence including the confessions of co-defendants Richard Cooper and Jeff McCoy.[2/] (R2521-2550) The Appellant's objection to this evidence was overruled. (R2507-2513,2516)

In his statement, Cooper indicated that it was the Appellant's idea to commit the murders. (R2527) According to Cooper, Appellant ransacked the house and then told him that "We're going to get out of here, but we're going to waste them first." (R2529) Cooper further indicated that the Appellant pointed a handgun at Steven Fridella's head and pulled the trigger several times. (R2529-2530) When the gun failed to fire, the Appellant yelled "Shoot 'em, shoot 'em, shoot 'em" at Cooper and Van Royal. (R2530) Cooper and Van Royal complied. (R2530) Cooper further stated that after he left the house, the Appellant called him back to shoot Steven Fridella again. (R2530)

McCoy's statement also indicated that the Appellant pointed a handgun at Fridella's head and attempted to fire the weapon. (R2541)

The prosecution elicited testimony from Paul Skalnik, a former cellmate of Cooper's. (R2554-2555) According to Skalnik, Cooper had told him that the Appellant was the "ring-leader," and that the Appellant had told Cooper prior to arriving

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[2/] Cooper and McCoy were awaiting trial on related charges and had indicated that they would invoke their right against self-incrimination if called to testify at the Appellant's trial. (R2511)

at the victims' house that "they were going to eliminate them." (R2555) Skalnik further testified that Cooper had told him that the Appellant considered the murders to be "a funny joke." (R2558)

The defense presented evidence from several witnesses relative to the Appellant's character. The Appellant's former landlord stated that Jason Walton was a non-violent, steadily employed individual who paid his rent on time and "seemed to get along with everybody." (R2567-2568) A co-worker described Appellant as a non-violent, law-abiding person and further stated:

> J.D. is a very kind and easy person to get along with. If anyone had a problem at work, he was always the first one to help, to make them feel at ease. If there was even, ever an argument at work, he was always the first one to say, let's talk it over.

(R2778) A friend of the Appellant's family noted that the Appellant was a non-violent and friendly person who "seemed to get along with everybody. (R2584-2585) The Appellant's mother also noted that he was non-violent, and further indicated that Mr. Walton had received an honorable discharge from the army. (R2593-2595)

In rebuttal, John Saul testified that he had purchased an ounce of marijuana from the Appellant on two different occasions. (R2608-2610)

Detective Halliday testified that the Appellant's name had appeared on the funeral register of Gary Petersen, and that the Appellant had subsequently purchased Petersen's vehicle. (R2612,2616) Halliday further stated that at the time of the incident the Appellant was 24 years of age, Van Royal 19, Cooper 18, and McCoy 18. (R2616)

After hearing the evidence, the advisory jury recommended the death penalty with respect to each count of the Indictment. (R2680)

The trial court subsequently imposed the penalty of death upon Jason Walton. (R2717)

ARGUMENT

ISSUE I.

THE USE OF JASON WALTON'S CONFESSIONS AGAINST HIM AT TRIAL VIOLATED HIS RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS WHERE THE POLICE SUBJECTED THE APPELLANT TO CUSTODIAL INTERROGATION AFTER HE HAD EXPRESSED A DESIRE TO DISCONTINUE FURTHER COMMUNICATION.

In Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), the Court held that the mere fact that a suspect may have answered some questions does not deprive him of the right to refrain from answering any further inquiries. Here, the police subjected the Appellant to custodial interrogation after he had expressed a desire to discontinue further communication. Because the police failed to heed the Appellant's request, or at the very least clarify his wishes prior to continuing the questioning, the resultant confessions should have been suppressed.

The police obtained confessions from the Appellant on January 20, 1983, and again on January 24, 1983. The initial confession was elicited while the Appellant was being transported from the Marion County Courthouse to the Pinellas County Jail. During the automobile ride, the Appellant initiated a conversation with the arresting officers, waived his Miranda rights, and subsequently made a few brief exculpatory remarks. Thereafter, one of the officers inquired, "Well, do you wish to give a statement at this time?" The Appellant replied "Well, yes, I would like to but I really don't want to." Thereafter, the

police officer interrogated the Appellant, eliciting a confession.

The interrogation of the Appellant following his indication that he did not want to make a statement, violated the Appellant's constitutional right to remain silent. While the Appellant initially waived his Miranda rights and agreed to talk with the officers, this was not a waiver for all time of the Appellant's right to remain silent. See Torrence v. State, 430 So.2d 489 (Fla.1st DCA 1983). It is clear that an accused may invoke his right to silence at any time, even after interrogation has begun. Peterson v. State, 405 So.2d 997 (Fla.3d DCA 1981). As the Court stated in Miranda v. Arizona:

> Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. [Emphasis added.]

384 U.S. at 473-474.

In the present case, it is clear that the interrogation of the Appellant did not cease. Accordingly, the issue becomes whether the words "I would like to [make a statement] but I really don't want to," indicate in any manner that the Appellant desired to invoke his right to remain silent. See State v. Wininger, 427 So.2d 1114,1115 (Fla.3d DCA 1983).

The Appellant's words, "I really don't want to" were a response to the police officer's question "do you want to make a statement at this time?" Under these circumstances, it appears that the Appellant's response was, at the least, an indication in some manner that he did not wish to submit to interrogation.

See State v. Wininger, 427 So.2d at 1116; Thompson v. State, 386 So.2d 264,267 (Fla.3d DCA 1980).

Moreover, if the police officer was in doubt about the meaning of the Appellant's response, then further inquiry should have been limited to clarifying the Appellant's wishes. State v. Wininger, 427 So.2d at 1116; Bain v. State, 440 So.2d 454 (Fla. 4th DCA 1983); See also Drake v. State, 441 So.2d 1079 (1983). The appellate court's conclusion in Bain v. State is equally applicable here:

> [T]he defendant's constitutional rights were violated when the arresting officer continued questioning after the defendant appeared uncertain about continuing the interrogation.

440 So.2d at 445.

The record indicates that the Appellant's subsequent confession was also obtained in violation of his constitutional rights. On January 24, 1983, four days after the initial interrogation, the police initiated an interview with the Appellant at the Pinellas County Jail. After obtaining a waiver of rights from the Appellant, the police elicited a second confession to the crimes charged.

The January 24 confession was the causually tainted fruit of the Appellant's earlier confession. Harrison v. United States, 392 U.S. 219, 88 S.Ct. 2008, 20 L.Ed.2d 1047 (1968); Harney v. United States, 407 F.2d 586 (5th Cir.1969). Although the police again obtained a waiver of the Appellant's Miranda rights prior to his second confession, this was insufficient to dissipate the taint of the earlier invalid interrogation.

As the Supreme Court stated in United States v. Bayer, 331 U.S. 532,540, 67 S.Ct. 1394, 91 L.Ed.2d 1654 (1946):

> Of course, after an accused has once let the cat out of the bag by confessing, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag.

Here, at the time of his second confession on January 24, the Appellant knew the cat was out of the bag. One confession led to the other. See Gilpin v. United States, 415 F.2d 638 (5th Cir. 1969).

Furthermore, there is yet another reason for suppressing the January 24 confession. Prior to interrogating the Appellant on January 20, the police were given notice of the Appellant's intent to invoke his right to deal with the police only through counsel. The Appellant waived this right for purposes of the initial confession by initiating a conversation with the police and waiving his Miranda rights. However, the record is clear that the police initiated the subsequent interrogation of the Appellant on January 24, thereby violating the Appellant's constitutional rights. Edwards v. Arizona, 451 U.S. 477, 68 L.Ed.2d 378, 101 S.Ct. 1880 (1981). In Edwards, the court held that once an accused has invoked his right to have counsel present during custodial interrogation, he is not to be subjected to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication.

Therefore, because the Appellant's confessions were inadmissible and should have been suppressed, Jason Walton's

convictions should be reversed and this cause remanded for a new trial.

ISSUE II.

JASON WALTON'S MOTION FOR DISQUALIFICATION WAS IMPROPERLY DENIED WHERE THE FACTS ESTABLISHED A WELL GROUNDED FEAR BY THE APPELLANT THAT HE WOULD NOT RECEIVE AN IMPARTIAL TRIAL DUE TO THE JUDGE'S PRIOR EXPOSURE TO PREJUDICIAL AND POTENTIALLY INADMISSIBLE EVIDENCE.

Prior to trial, the defense filed a motion to disqualify the trial judge, indicating that the judge had recently presided over the trial of a co-defendant whose defense was aimed at the culpability of Appellant Walton, and alleging that the Appellant feared that the judge's impartiality would be impaired as a result of the earlier trial. (R196,2851) At the hearing on the motion, the judge agreed that at the co-defendant's trial, "there was some responsibility placed upon Mr. Walton." (R2861) The judge further noted:

> [T]here was some testimony to the effect that, at the time of the particular alleged crimes, that Mr. Walton initiated the actual deaths by saying something to the effect, "Shoot him. Shoot him. Shoot him."

(R2861) However, the judge denied the motion as legally insufficient, reasoning that the facts failed to establish bias or prejudice.

It is clear that a motion for disqualification will be deemed sufficient if the facts allege a well grounded fear that the defendant will not receive a fair trial. Livingston v. State, 441 So.2d 1083 (Fla.1983). "If the attested facts supporting the suggestion are reasonably sufficient to create such a fear, it is not for the trial judge to say it is not there." Dickenson v. Parks, 140 So. 459,462 (Fla.1932). Further,

"it is a question of what feeling resides in the affiant's mind and the basis for such feeling." State ex rel Brown v. Dewell, 179 So.2d 695,697-698 (Fla.1938). As this Court stated in Livingston v. State:

> What is important is the party's reasonable belief concerning his or her ability to obtain a fair trial. A determination must be made as to whether the facts alleged would place a reasonably prudent person in fear of not receiving a fair and impartial trial.

441 So.2d at 1087.

In this case, the trial judge had recently presided over the trial of a co-defendant whose defense had been aimed at Appellant Walton's culpability. Moreover, the judge's own comments indicate that he had been exposed to potentially inadmissible statements alleging that the Appellant had ordered the shooting deaths of the victims.[3/] Under these circumstances, the Appellant certainly could have a well grounded fear that the judge's impartiality might be impaired or that the judge might be psychologically predisposed to reject Appellant's defense.[4/] This is especially true in a prosecution for first degree murder where the Appellant's life is at stake and in which the circuit judge's sentencing decision is so important. See Livingston v. State, 441 So.2d at 1087.

[3/] The record indicates that the judge improperly considered these hearsay statements during the penalty phase of Mr. Walton's trial. See Appellant's Argument V.

[4/] Mr. Walton's defense was that his co-defendants were the culpable parties. While admitting that he was present at the scene of the crime, Mr. Walton asserted that he did not participate in the shooting.

For these reasons, Jason Walton's convictions and sentence should be reversed and this cause remanded for a new trial before a different judge.

ISSUE III.

THE SENTENCE OF DEATH IMPOSED UPON JASON WALTON MUST BE VACATED BECAUSE IT WAS IMPOSED IN VIOLATION OF THE PRINCIPLES ESTABLISHED IN WITHERSPOON V. ILLINOIS.

The Supreme Court has held that jurors in a capital case may be excused for cause only if they make it "unmistakably clear" (1) that they would automatically vote against capital punishment or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt. Witherspoon v. Illinois, 391 U.S. 510,522 n.21, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). In the present case, venirewoman Nellie Batten was excused for cause in violation of the foregoing principles. Since the improper exclusion under Witherspoon of even one prospective juror precludes the imposition of the death penalty (Davis v. Georgia, 429 U.S. 122, 97 S.Ct. 399, 50 L.Ed.2d 339 (1976)), Jason Walton's sentence must be vacated.

In response to the prosecutor's voir dire examination, Ms. Batten stated that she thought she could make a decision that might affect a person's life (R1908); that she was "not sure" if she could vote for a recommendation of death (R1909); that she felt that the death penalty should be applied in some cases "[b]ut you would have to be real sure" (R1909); that the prosecution would have to establish that the Appellant was the triggerman before she would vote to recommend the death penalty (R1918); and that she could return a verdict of guilty if the prosecution proved the Appellant's guilt "beyond every possible

doubt." (R1910) The prosecutor's voir dire examination continued as follows:

> [Prosecutor]: So you don't think you could follow the court's instructions?
>
> Ms. Batten: Yeah, I could follow the court's instructions if --
>
> [Prosecutor]: Except for it would have to be more than a reasonable doubt?
>
> Ms. Batten: Yeah.

(R1910) Thereafter, Ms. Batten was examined by defense counsel:

> [Defense counsel]: There were some statements you made that troubled me. You said you could come back with a verdict of death if you were sure, and then you said you could follow the law but that you would require the State to prove the crime beyond their standard of a reasonable doubt.
>
> And then you talked about not being sure except for the triggerman. And I will put the same question to you that I put to Ms. Tenney.
>
> In the first phase of trial, if the Judge told you the State's burden was to prove the case beyond a reasonable doubt and the State did that in your mind, according to the facts you heard, could you find him guilty of first-degree murder in the first phase?
>
> Ms. Batten: I think I could.
>
> [Defense counsel]: And then going to the second phase...could you return a verdict of guilty if the facts warranted it?
>
> Ms. Batten: I would have to be real sure.
>
> [Defense counsel]: Is that a yes or a no?
>
> Ms. Batten: Well, they would have to prove he was really guilty.
>
> [Defense counsel]: I'm saying, assuming they did that.
>
> Ms. Batten: Yes.
>
> [Defense counsel]: You would be capable of returning a verdict of death in the second phase if you were convinced that the State had met its burden?

Ms. Batten: That's right.

(R1929-1930)

The prosecutor moved to excuse Ms. Batten for cause arguing that "I think Ms. Batten indicated that she would require a higher burden of proof [in the penalty phase], and I don't think she ever deviated from that." (R1933) The prosecutor's motion was granted over defense objection. (R1934)

The excusal of Ms. Batten for cause constituted constitutional error. The trial court's excusal of the venirewoman was in response to the prosecutor's contention that Ms. Batten never deviated from her initial indication that she would require the prosecution to prove the Appellant guilty beyond every possible doubt. However, the record reveals that Ms. Batten not only later deviated from her initial response but specifically stated that she could find the Appellant guilty if the prosecution proved its case beyond a reasonable doubt, and that she would be able to return a verdict of death if the prosecution met its burden of proof.

The Supreme Court has indicated that a prospective juror must be permitted great leeway in expressing opposition to the death penalty before she qualifies for dismissal for cause. Adams v. Texas, 448 U.S. 38,50, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980). Here, Ms. Batten's statements fall far short of the certainty required by Witherspoon for excusal. Ms. Batten's responses were neither automatic nor unequivocal.

Therefore, since Ms. Batten's responses did not make it unmistakably clear that she would automatically vote against

the death penalty or be unable to find the Appellant guilty regardless of the evidence that might be presented, her excusal for cause constituted constitutional error under Witherspoon. This error requires that the sentence of death imposed upon Jason Walton be vacated.

ISSUE IV.

JASON WALTON WAS DENIED HIS CONSTITUTIONAL RIGHT TO CONFRONTATION WHERE THE PROSECUTION WAS ALLOWED TO INTRODUCE AT TRIAL STATEMENTS OF A CO-DEFENDANT IMPLICATING APPELLANT AS THE TRIGGERMAN.

The Supreme Court has held that a statement of a co-defendant which implicates the accused is not admissible unless the accused has an opportunity to confront and cross-examine the co-defendant. In this case, during the guilt phase of trial, the prosecution was allowed to introduce statements of a co-defendant which implicated Jason Walton as the triggerman. The introduction of these statements denied the Appellant his constitutional right to confront the witnesses against him.

At trial, it was established that the warrant for the Appellant's arrest was issued pursuant to an affidavit signed by detective Halliday. (R2181) The information in the warrant was obtained from the confession of co-defendant Terry Van Royal. When the prosecutor asked detective Halliday what information he put in the affidavit as a result of the interview, the defense registered a hearsay objection. (R2181) The court overruled the objection reasoning that the information "he put in the affidavit that per se is not hearsay." (R2182) Thereafter, Detective Halliday was allowed to testify that co-defendant Terry Van Royal had implicated the Appellant as one of the triggermen.

The trial court's ruling was erroneous. Under the traditional rules of evidence, a co-defendant's confession inculpating the accused is inadmissible against the accused as

hearsay. Bruton v. United States, 391 U.S. at 138 n.3. Moreover, because the statements were admitted without the co-defendant taking the stand, Mr. Walton was denied his Sixth Amendment right to confront the witnesses against him. Bruton v. United States; Hall v. State, 381 So.2d 683 (Fla.1978).

The admission of the co-defendant's statements was prejudicial to the Appellant whose defense was that he was not the triggerman and therefore less culpable than his co-defendants. This prejudicial evidence not only permeated the guilt phase of the trial, but extended to the penalty phase wherein the jury was instructed that they could consider as a possible mitigating circumstance that "the defendant was an accomplice in the offense for which he is to be sentenced, but the offense was committed by another person and the defendant's participation was relatively minor." (R2677)

For these reasons, Jason Walton's convictions and sentence should be reversed and this cause remanded for a new trial.

ISSUE V.

JASON WALTON WAS DENIED HIS RIGHT TO CONFRONTATION WHEN THE PROSECUTION WAS ALLOWED TO INTRODUCE AT THE PENALTY PHASE PROCEEDING CONFESSIONS AND STATEMENTS MADE BY THE APPELLANT'S CO-DEFENDANTS.

This Court has recognized that the right of confrontation extends to the penalty phase of capital proceedings. Engle v. State, 438 So.2d 803 (Fla.1983). In this case, the prosecution was permitted to introduce at sentencing confessions and statements made by Jason Walton's co-defendants. Not only was the jury made aware of this inadmissible and prejudicial evidence, but the trial judge in fact considered it in sentencing the Appellant to death. Consequently, Jason Walton's death sentence should be vacated.

Prior to the commencement of the penalty phase proceeding, the prosecution announced its intention to introduce confessions and statements obtained from two of Mr. Walton's co-defendants, Richard Cooper and Jeff McCoy. (R2507) The Appellant's objection to the introduction of this evidence was overruled. (R2511-2512, 2517) Thereafter, the prosecution introduced before the jury tape recorded confessions of co-defendants Cooper and McCoy; testimony from detective Halliday regarding information obtained from interviews with Cooper and McCoy; and the testimony of Paul Skalnik, a former cellmate of Cooper's, regarding statements made to him by Cooper. These hearsay confessions and statements portrayed the Appellant as the "ringleader" of the group: the person who orchestrated the crimes and ordered the shootings of the victims.

The introduction of the prejudicial hearsay statements constituted reversible error. Under similar circumstances in

Engle v. State, this Court held that the introduction at sentencing of a co-defendant's confession acted to unconstitutionally deny the accused an opportunity to cross-examine and confront that individual. The Court's reasoning in Engle is equally applicable here.

Moreover, as in Engle, the record in this case establishes that the judge considered the inadmissible evidence in sentencing the Appellant to death. In the court's written findings in support of the death penalty, the judge stated:

> JASON D. WALTON pointed his gun at a victim and pulled the trigger on his gun which either accidentally or intentionally misfired. JASON D. WALTON in effect ordered "shoot them, shoot them." Cooper and another obliged with shotgun blasts. Death came to the three helpless men; the struggling Fridella died after Cooper administered a coupe de grace at the request of JASON D. WALTON.

(R358)

> ...a conversation between Cooper and Walton shows that a conscious decision was made that the victims would be executed.

(R359)

> Defendant, JASON D. WALTON, at minimum, gave the orders and ordered the final shot into Fridella.

(R361) The foregoing findings came exclusively from the hearsay confessions and statements of co-defendants Cooper and McCoy.

The inadmissible hearsay confessions and statements were obviously an integral part of the court's decision to impose the death penalty and no doubt influenced the jury's recommendation of death. The evidence at trial relating to the physical commission of the murders consisted primarily of Mr. Walton's confessions. These confessions were partially exculpatory in

nature in that they indicated that the Appellant did not participate in the actual shootings and was fleeing the scene when the victims were shot. Under these circumstances, it cannot be said beyond a reasonable doubt that the inadmissible and prejudicial hearsay statements influenced neither the jury's advisory recommendation nor the trial court's imposition of the death penalty. Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

For these reasons, Jason Walton's death sentences should be vacated and this cause remanded for a new sentencing proceeding. Since the inadmissible and prejudicial evidence may well have influenced the jury's advisory recommendation of death, a new jury should be impaneled. Furthermore, because of the trial judge's prior exposure to, and consideration of, the inadmissible evidence, the sentencing hearing should be held before a different judge.

ISSUE VI.

THE TRIAL COURT ERRED BY REFUSING TO INSTRUCT THE ADVISORY JURY THAT THEY COULD CONSIDER THE APPELLANT'S AGE AS A MITIGATING CIRCUMSTANCE.

The defense requested the trial court to instruct the jury that they could consider the Appellant's age as a statutory mitigating circumstance. (R2497) This request was improperly denied.

The age of the Appellant at the time of the crime is a statutory mitigating circumstance. §921.141(6)(g), Fla.Stat. (1983). This Court has held that there is "no per se rule" which pinpoints a particular age as a factor in mitigation. Peek v. State, 395 So.2d 492,498 (Fla.1980). While the trial judge in this case may have personally felt that the Appellant's age of twenty four years was not a mitigating factor, he had no legal authority to preclude the advisory jury from so considering it. As this Court stated in Cooper v. State, 336 So.2d 1133,1139-1140 (Fla.1976):

> If the advisory function were to be so limited initially because the jury could only consider those mitigating and aggravating circumstances which the trial judge decided to be appropriate in a particular case, the statutory scheme would be distorted.

Therefore, because the trial judge improperly precluded the jury from considering the Appellant's age as a statutory mitigating circumstance, Jason Walton's death sentence should be vacated and this cause remanded for resentencing with directions to impanel a new advisory jury.

ISSUE VII.

THE TRIAL COURT ERRED BY SENTENCING JASON WALTON TO DEATH BECAUSE THE PENALTY WEIGHING PROCESS INCLUDED INAPPLICABLE AGGRAVATING CIRCUMSTANCES AND EXCLUDED APPLICABLE MITIGATING CIRCUMSTANCES THEREBY RENDERING THE APPELLANT'S DEATH SENTENCE UNCONSTITUTIONAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The record reveals that the trial court improperly applied the Florida death penalty statute (§921.141, Fla.Stat. (1983)) by erroneously finding three inapplicable aggravating circumstances; doubling two aggravating circumstances; injecting the element of lack of remorse into the weighing process; and excluding several mitigating circumstances. The trial court's misapplication of the statute rendered Jason Walton's death sentence arbitrary and capricious in violation of the Eighth and Fourteenth Amendments. Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976).

A.

The Trial Court Erred In Finding As An Aggravating Circumstance That The Capital Felony Was Committed In The Course Of A Kidnapping.

It is well-settled that aggravating circumstances must be proved beyond a reasonable doubt before being considered in sentencing. State v. Dixon, 283 So.2d 1 (Fla.1973). In the present case, the trial court found as an aggravating factor that the capital felony was committed in the course of a kidnapping. Because the offense of kidnapping was not proven beyond a reasonable doubt, the trial court's consideration of this aggravating circumstance was error.

The Appellant was not charged with kidnapping and the jury was not instructed upon this offense during the guilt phase of trial. However, at the penalty phase, the prosecutor requested that the advisory jury be instructed that they could consider as an aggravating circumstance that the capital felony was committed in the course of a kidnapping. The prosecutor explained that he was requesting a kidnapping instruction, rather than the underlying felony murder charge of robbery, "[T]o prevent any stacking problems."[5/] (R2482) The instruction was given over defense objection.

The jury was specifically instructed with respect to kidnapping with intent to inflict bodily harm or terrorize, pursuant to subsection (1)(a)(3) of 787.1, Florida Statutes (1983). This is also the specific intent which was found by the trial court:

> Specifically, CHRIS FRIDELLA was kidnapped... He was so confined with intent to terrorize his father, STEVEN FRIDELLA.

(R359) The court reasoned that Chris Fridella's "confinement and segregation when he was moved from the bedroom to the bathroom was in part done to terrorize his father and reduce or make it less likely that the father would resist during the course of the particular events." (R359)

The foregoing finding is not supported by the evidence. There was absolutely no evidence that Chris Fridella was threatened,

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[5/] The jury was also instructed upon, and the trial court found, the aggravating circumstance of commission of the capital felony for pecuniary gain. (R360,2675)

nor was there any evidence that Steven Fridella was threatened with harm to his son. To the contrary, the only evidence relating to this issue indicated that Chris Fridella was confined in the bathroom so that no harm would come to him. Significantly, this evidence was elicited by the prosecutor during his examination of the arresting officer, detective Halliday:

> Q. Why did the defendant say that the little boy was put in the bathroom?
>
> A. He said he didn't want any harm to come to the little boy.

(R2131) Equally significant is the fact that this evidence was incorporated in the court's findings:

> A part of a previously determined plan was at least to rob for money or drugs....As part of the plan, no harm was to come to CHRIS.

(R358)

For these reasons, the court's finding that Chris Fridella was kidnapped, premised as it was upon the intent to terrorize, constituted error. Since it is impossible to determine how much weight either the judge or the advisory jury may have given to this improper aggravating circumstance, Jason Walton's sentence must be vacated and this cause remanded for resentencing with directions to impanel a new advisory jury.

B.

The Trial Court Erred In Finding As An Aggravating Circumstance That The Capital Felony Was Committed For The Purpose Of Avoiding Arrest.

The trial court concluded that the murders were motivated "in part" by the risk of arrest, reasoning that the Appellant had

been recognized by one of the victims. (R360) As the court noted:

> The evidence clearly indicates at a minimum, one of the victims recognized JASON D. WALTON in spite of the mask. After the recognition, a conversation between Cooper and Walton shows that a conscious decision was made that the victims would be executed.

(R358-359) However, the reasoning underlying the court's conclusion that the capital felony was committed for the purpose of avoiding arrest is expressly contradicted by the court's subsequent findings:

> [T]his Court's further finding that to and beyond every reasonable doubt the initial plan was to execute the victims....It is clear that there was no attempt on the part of JASON D. WALTON to disguise his voice and because of his prior acquaintance with some of the victims, he faced the initial risk of being recognized in spite of the mask...[T]he Court finds that the death and execution of each of the victims was coldly planned, premeditated and calculated prior to the murderers entry into the premises. [Emphasis added]

(R362)

From the foregoing comments, it is clear that the trial court used contradictory findings to support the presence of two different aggravating circumstances. On the one hand, the court concluded that the murders were motivated by the risk of arrest, reasoning that the intent to kill arose after the Appellant was recognized. On the other hand, the court found that the murders were cold and calculated, reasoning that the decision to kill was part of the initial plan.

It is well-settled that aggravating circumstances must be proved beyond a reasonable doubt. State v. Dixon, 238 So.2d 1 (Fla.1973). This Court has held that an intent to avoid arrest is not present unless it is clearly shown that the dominant or

only motive for the murder was the elimination of witnesses. Menendez v. State, 368 So.2d 1278 (Fla.1979).

In light of the trial court's contradictory findings in this case, it is apparent that the proof of the requisite intent to avoid arrest was not sufficiently clear to establish this aggravating circumstance beyond a reasonable doubt.

C.

The Trial Court Erred In Finding As An Aggravating Circumstance That The Murder Was Especially Heinous, Atrocious, Or Cruel.

This Court has held that the aggravating circumstance of "heinous, atrocious, or cruel" contemplates the conscienceless, pitiless crime which is unnecessarily torturous to the victim. Cooper v. State, 336 So.2d 1133 (Fla.1976) In Cooper, this Court held that this aggravating circumstance was improperly found where the victim was killed instantaneously.

Similarly, in the present case, the victims' deaths were almost instantaneous. (R2070-2071) Moreover, the victims were neither tortured nor taunted prior to the murders, and the whole incident was relatively brief. Compare, White v. State, 403 So.2d 331 (Fla.1981).

For these reasons, the trial court erred in finding that the capital felonies were especially heinous, atrocious, or cruel.

D.

The Trial Court Erred By Finding The Presence Of Two Aggravating Circumstances Based Upon The Same Facts.

The trial court found that the Appellant was previously convicted of another capital felony on the basis of the Appellant's three contemporaneous first degree murder convictions in this case. While this finding was proper under Florida law (Fitzpatrick v. State, 437 So.2d 1072 (Fla.1983)), the trial court erred by finding that the capital felony was heinous and atrocious on the basis of the same facts.

In finding the presence of the aggravating circumstance heinous and atrocious, the trial court emphasized:

> [T]here was not one person executed, but three persons slaughtered.

(R361) Thus, the fact that three persons were killed not only constituted the basis for the court's finding that the Appellant had previously been convicted of another capital felony, but was also an integral part of the court's conclusion that the felony was heinous and atrocious. This constituted an improper doubling of aggravating circumstances based upon the same facts. See Provence v. State, 337 So.2d 783 (Fla.1976).

E.

The Trial Court Erred By Rejecting The Appellant's Lack Of A Prior Criminal Record As A Statutory Mitigating Circumstance.

The trial court specifically found that the "defendant has no history of any substantial criminal convictions." (R362) Nevertheless, the court concluded that the statutory mitigating circumstance of no significant history of prior criminal activity was not established. (R362) This conclusion was erroneous.

Initially it is necessary to emphasize certain defects in the trial court's findings with respect to this statutory miti-

gating circumstance. First, a rap sheet was admitted into evidence which indicated not only that the Appellant had no "substantial criminal convictions," but that the Appellant had absolutely no prior criminal record either as an adult or a juvenile. (R2565-2566,364G) The prosecution was unable to offer any evidence to rebut this fact. Second, the trial judge cited no facts to support his conclusion that the Appellant "did not establish lack of criminal history." (R362) This omission makes any meaningful review of the trial court's finding virtually impossible.

Concededly, the prosecution did offer evidence that the Appellant had sold two ounces of marijuana to a friend. However, such evidence certainly was insufficient to overcome the fact that the Appellant had no significant history of criminal activity. §921.141(6)(a), Fla.Stat. (1983).

The prosecution also offered hearsay testimony in an attempt to establish that the Appellant had been in possession of several bales of marijuana allegedly taken during a burglary of the Citrus County Sheriff's Department warehouse. (R2605-2608) However, if the trial court considered this hearsay evidence in rejecting the mitigating circumstance, then the trial court's finding contravened the Appellant's constitutional right to confrontation. See Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1971).

Finally, a review of the trial court's finding reveals that the court applied an improper standard in rejecting the mitigating circumstance of no significant history of criminal activity. After concluding that the Appellant failed to establish "lack of criminal history," the court further stated:

> Assuming however, that it were shown that up to this date there was absolutely no criminal act of any kind by the defendant, and the above mitigating circumstance was established, this Court is of the opinion it would no way be of sufficient weight or consequence to overcome the aggravating circumstance established. [Emphasis added]

(R362) From the foregoing comments, it is clear that the court was requiring the Appellant to establish that he had committed "absolutely no prior criminal act of any kind." However, the standard is not lack of any criminal history as applied by the trial court, but lack of significant criminal history as mandated by the statute. §921.141(6)(a), Fla.Stat. (1983).

Therefore, because the trial court misapplied the statutory mitigating circumstance of lack of significant criminal history and erroneously rejected this mitigating factor, Jason Walton's sentence should be vacated.

F.

The Trial Court Erred By Weighing The Factor Of Lack Of Remorse Against The Mitigating Circumstance Of The Appellant's Honorable Service In The United States Army.

The trial court noted that the Appellant's honorable service in the United States Army was a potential mitigating factor.[6/] However, after weighing this mitigating circumstance against a finding that the Appellant lacked remorse, the court concluded that no mitigation was present. The court's injection

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6/ This Court has recognized that prior military service is a mitigating circumstance. Halliwell v. State, 323 So.2d 557,561 (Fla.1975), Pope v. State, 441 So.2d 1073,1076 (Fla.1983).

of this finding into the weighing process constituted prejudicial error.

In Pope v. State, 441 So.2d 1073,1078 (Fla.1983), this Court stated:

> [W]e hold that henceforth lack of remorse should have no place in the consideration of aggravating factors. Any convincing evidence of remorse may properly be considered in mitigation of the sentence, but absence of remorse should not be weighed either as an aggravating factor nor as an enhancement of an aggravating factor.

The record reveals that the trial court in this case placed repeated emphasis on the Appellant's lack of remorse and improperly weighed this finding against the mitigating circumstance of the Appellant's prior military service:

> While he has been a serviceman, the record indicates that he is without remorse....He was so remorseless that apparently without qualm, after the crime the defendant purchased the vehicle of one of the decedents. The terms "callous" and "remorseless" in this Court's opinion, aptly fit his character and there is no real mitigation present in these matters.

(R362-363) Thus, the trial court weighed the Appellant's prior military service against a finding that the Appellant lacked remorse and concluded that no mitigation was present.

By injecting this finding into the weighing process, the trial court, in effect, treated the lack of remorse as an aggravating circumstance. The weighing of the Appellant's lack of remorse against the mitigating circumstance of prior military service distinguishes this case from Agan v. State, 445 So.2d 326 (Fla.1983). In Agan, this Court upheld the Appellant's death penalty even though the trial court had mentioned the Appellant's

lack of remorse in connection with the fact that there were no mitigating circumstances. Unlike Agan, there was a mitigating circumstance in this case which the trial court improperly found to be outweighed by the Appellant's lack of remorse.

Therefore, because the injection of lack of remorse into the weighing process violated this Court's decision in Pope v. State and prejudiced the Appellant, Jason Walton's sentence should be vacated.

G.

The Trial Court Erred By Failing To Consider Relevant Non-Statutory Mitigating Circumstances.

The Supreme Court has emphasized that decisions to impose the death penalty must focus on the character and record of the particular defendant, as well as the circumstances of the capital felony. Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). Accordingly, the trial court is required to consider and weigh as a mitigating factor any aspect of the defendant's character or record that the defendant proffers as a basis for a sentence less than death. Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982). Moreover, to insure meaningful appellate review, the trial court is required to articulate the mitigating and aggravating circumstances it considered at sentencing. State v. Dixon, 283 So.2d 1 (Fla.1983).

In the present case, evidence was introduced at sentencing relating to the Appellant's non-violent character and his record of gainful employment. These factors were relevant non-statutory mitigating circumstances. See Washington v. State, 432

So.2d 44,48 (Fla.1983). Wilson v. State, 436 So.2d 908,913 (Fla. 1983), Justice McDonald dissenting.

Several witnesses described the Appellant as a non-violent person. (R2567-2568,2778,2584-2585,2593-2594) The evidence further established that the Appellant had been steadily employed for the preceding two years at Pall Pneumatic Products Company. (R364J,2577) Despite this mitigating evidence, the trial judge made no mention of these factors in his findings of fact to support the death penalty. (R357-363)

In Ross v. State, 386 So.2d 1188 (Fla.1980), the trial judge found that there were "no mitigating circumstances which outweigh the aforementioned aggravating circumstances," but failed to specify what mitigating circumstances he considered. On appeal, this Court vacated the Appellant's death sentence and remanded the case for resentencing, reasoning that the trial judge failed to discharge his responsibility of articulating the mitigating circumstances which were considered. This reasoning is equally applicable to the instant case.

Therefore, Jason Walton's death sentence should be vacated.

Summary

The foregoing misapplications of the Florida death penalty statute render Jason Walton's death sentence unconstitutional in violation of the Eighth and Fourteenth Amendments. See Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); State v. Dixon, 283 So.2d 1 (Fla.1973), cert.den., 416 U.S. 943.

CONCLUSION

For the foregoing reasons, Jason Walton requests this Honorable Court to reverse his convictions and vacate his sentence of death.

Respectfully submitted,

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