IN THE SUPREME COURT OF FLORIDA

CARY M. LAMBRIX,

Appellant,

v.

THE STATE OF FLORIDA,

Appellee.

CASE NO. 65,203

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

INITIAL BRIEF OF APPELLANT

J. L. "RAY" LeGRANDE

BARBARA LeGRANDE

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ATTORNEYS FOR APPELLANT

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STATEMENT OF THE CASE

On March 29, 1983 a Glades County grand jury returned an indictment charging the appellant with two counts of premeditated first degree murder. Alicia Dawn Bryant was the alleged victim in Count I, and Clarence Edward Moore, a/k/a Lawrence Lamberson was the alleged victim in Count II. (R20)*

The appellant pled not guilty and proceeded to a jury trial which began on November 29, 1983. It resulted in a mistrial on December 9, 1983 because the jury could not reach a unanimous verdict.

A second jury trial began on February 20, 1984. (R1427) The jury found the appellant guilty as charged on both counts of the indictment on February 27, 1984. (R2553) On February 29, 1984 the penalty phase of the trial was conducted. (R2561-2679) The jury recommended the death sentence on Count I by a vote of 10-2, and on Count II by a vote of 8-4.

On March 22, 1984 Circuit Judge Richard M. Stanley adjudicated the appellant guilty of both murders and imposed two death sentences. (R2691-2703) Judge Stanley entered his findings of facts in support of the sentences on the same day. (R1354) The appellant's motion for a new trial, filed March 14, 1984 (R1351-1353), was denied on March 22, 1984. (R2698)

The appellant filed his notice of appeal to this Court on April 18, 1984. (R1399)

* Page references to the record on appeal are designated by an "R" preceding the appropriate page number.

STATEMENT OF THE FACTS

Connie Smith, a special agent for the Florida Department of Law Enforcement assigned to investigate organized crime and other major offenses (R1842) testified that on February 14, 1983 she interviewed Francis Smith. Francis Smith related to her that she had assisted the appellant in the burial of two bodies in LaBelle. (R1844) Agent Smith contacted and coordinated numerous law enforcement officials and made initial arrangements for an investigation at the burial site. (R1844-1852) The bodies of Alicia Dawn Bryant and Clarence Edward Moore a/k/a Lawrence Lamberson were recovered. (R1852-1857) Agent Smith identified photographs of the scene and items of physical evidence found in and around a mobile home located near the scene. (R1852-1881) Outside the presence of the jury in proffered testimony Agent Smith testified to the existance of a "drug smuggler's notebook" (R1888) found in Moore's cadillac automobile and photographs of a woman who was "a target of a RICO investigation" in Moore's wallet. (R1890) The Court ruled that cross-examination of Agent Smith on this matter was outside the scope of direct examination, and prohibited defense counsel from inquiring into this phase of the criminal investigation. (R1892)

Carla Mitar, an investigator for the State Attorney's Office, testified that she was involved in the recovery of the

two bodies (R1901-1915) and a search of the mobile home near the burial site. (R1915-1919)

Robert Daniels, a second investigator from the State Attorney's Office, testified to accompanying and assisting Connie Smith and Carla Mitar in their efforts at the burial site; the interrogation of Francis Smith; the recovery of certain physical evidence near the scene; and the acquistion of aerial photographs of the scene. (R1920-1986)

Samuel Johnson, a medical-legal investigator for the Medical Examiner's Office, testified to the recovery of the two bodies, the conditions and circumstances under which they were found, and processing them for autopsy. (R1992-2038)

Dr. Robert Schultz, a forsenic pathologist and an Associate Medical Examiner, testified that he performed autopsies on the recovered bodies. (R2038-2045) He testified that the cause of death of the male was "multiple crushing blows to the head". (R2064) Concerning the female, he indicated that there were "no signs ... that we could point to with certainty and say this was the cause of death. Yet, we have to therefore assume--I assume and I believe within reasonable medical certainty..." that she was manually strangled. (R2076-2077)

Ron Council, a Glades County deputy sheriff, testified that during a routine bar check on the evening of February 5, 1983 he observed Bryant, Moore, Francis Smith, and the appellant drinking together at Squeaky's Bar and that he observed Moore's cadillac automobile parked outside the bar. (R2149-2166)

Francis Smith testified that she first met the appellant on January 3, 1983 when he came to her home in Dover, Florida to meet her brother. (R2179) At that time, Ms. Smith was 30 years old, married, and living with her husband and three minor children. She abandoned her husband and children on January 14, 1983 and accompanied the appellant to Glades County. When they arrived in Glades County they rented a "small two-bedroom house trailer on a huge piece of property with a lot of trees" in the rural area of the County. (R2183-2184)

They lived together in the trailer. The appellant did "ranch and farm work" and she did "little odd jobs" such as raking leaves and cleaning homes. (R2187)

Ms. Smith testified that on Saturday, February 5, 1983 she and the appellant went to LaBelle to the Town Tavern (R2188-2189) where they met Moore a/k/a Lamberson (R2190-2181). She testified they were joined by Bryant, age 19, and shortly thereafter left the tavern and went to Squeaky's Bar in Moore's automobile. (R2181-21940) She testified they consumed drinks and left the bar after midnight to go to the house trailer for spaghetti. (R2201-2204)

Ms. Smith testified that the four of them arrived at the house trailer. She began preparing spaghetti. The others were "having a good time". (R2205) She testified that shortly thereafter the appellant and Moore a/k/a Lamberson went outside and that the appellant returned in "about twenty minutes" and requested Bryant to go with him. (R2205-2208) She testified

that Bryant exited the trailer with the appellant and about 45 minutes later the appellant returned alone. (R2209-2210)

Ms. Smith testified the appellant had blood on his person and clothing, that he carried a tire tool with him and that he indicated to her that Bryant and Moore were dead. (R2210-2211) She testified to further conversation with the appellant and the process of burial of the bodies in an area behind the trailer. She testified that after the burial they went back to the trailer, took changes of clothing, and left to go to Plant City. (R2211-2229) She testified they took Moore's cadillac and disposed of the tire tool and bloody shirt in a nearby stream. (2229-2232)

Ms. Smith testified they arrived at the home of the appellant's sister, Mary Lambrix, in Plant City early Sunday morning February 6, 1983. They stayed there until the following Tuesday. They went to Smith's brother's home on Wednesday. On Wednesday while driving Moore's cadillac alone, Smith was arrested by police officers and placed in jail until Friday night on an unrelated charge. (R2240-2250) On the following Monday, she contacted law enforcement officers and advised them of the burial. (R2251) She testified to subsequent telephone contact with and a letter received from the appellant. (R2260-2285)

During her arrest and incarceration Ms. Smith made statements to police officers, the contents of which conflicted with her testimony. Defense counsel attempted to cross-examine

Ms. Smith on these statements and was prohibited from doing so by the trial court. (R2319-2326)

Bob Johnson testified that he was the owner of the land and trailer where the appellant and Smith resided in Glades County and that he rented it to them. He described the geographical parameters of the area.(R2337-2349)

Larry Banhart, a Hendry County deputy sheriff and a certified diver, testified to the recovery of a tire iron and a T-shirt from a stream near the burial site. (R2350-2365)

John Chezem, the nearest neighbor to the appellant and Smith in Glades County, testified that the appellant borrowed his shovel on February 6, 1983 at 2:30 a.m., and that at the time he was driving a black cadillac.(R2371-2386)

Billy Williams, Jr., testified to the condition of the house trailer after the appellant and Smith left the area and to the appellant's subsequent return to retrieve his possessions from the trailer. (R2387-2401)

Preston Branch, a friend of the appellant testified that he and Debra Hanzel drove the appellant to LaBelle to his house trailer where they helped him empty the trailer, pack furniture and possessions, and return to Plant City. During the return trip, Branch testified that the appellant told hom that he knew where two dead bodies were buried. (R2401-2428) Debra Hanzel's testimony was substantially the same as Branch's testimony. (R2428-2459)

The jury found the appellant guilty as charged on both

counts of the indictment (R2553) and subsequent to the penalty phase (R2561-2679) recommended death sentences, which were subsequently imposed by Judge Richard M. Stanley. (R2691-2703)

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN UTILIZING A JURY SELECTION PROCESS WHICH DENIED THE DEFENDANT A TRIAL BY A JURY REPRESENTATIVE OF A CROSS-SECTION OF THE COMMUNITY AND WHICH CREATED A JURY THAT WAS CONVICTION PRONE.

The "death qualification" issue was raised by defense counsel on numerous occasions during the course of this case. Initially, in a pretrial Motion To Preclude Challenge For Cause (R40-43), defense counsel moved to prevent challenges for cause against persons who would not and possibly might not be able to impose the death penalty. The grounds stated in the motion included the assertions that such exclusion(s):

> " 1. ...is improper and unconstitutional and inconsistent with the Fourteenth Amendment requirements for capital-case jury selection as laid down in Witherspoon v. Illinois, 391 U.S. 510 (1968); Adams v. Texas, 448 U.S. 38 (1980); Maxwell v. Bishop, 398 U.S. 262 (1970); Boulden v. Holman, 394 U.S. 478 (1969); Mathis v. New Jersey, 403 U.S. 946 (1971); and Davis v. Georgia, 429 U.S. 122 (1976).
>
> " 2. ...violate the Accused's right to trial by a jury selected from a representative cross-section of the community, as guaranteed by the Sixth and Fourteenth Amendments ... and Article I, Sections 9 and 22 of the Constitution of the State of Florida.
>
> " 3. ...violate the Accused's Fourteenth Amendment rights to Due Process and Equal Protection ...by denying the Accused a trial by jury selected from a representative cross-section of the community, without furthering any permissible State interest, since: (a) The jury does not finally sentence; (b) Its advisory sentencing verdict occurs at the second stage of the bifurcated trial; (c) This verdict is rendered by a majority vote.
>
> " 4. ...subjects the Accused to trial by a jury which

is not impartial, but in fact, is biased in favor of the prosecution on the issue of the Defendant's guilt of the crime charged...

" 5. ...subjects the Defendant to cruel and unusual punishment...because the jurors selected...will be incapable of performing the functions demanded by Woodson v. North Carolina 428 U.S. 280 (1976), that of 'maintaining a link between contemporary community values and the penal system.' ...

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" 8. ...Restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be reconciled with the constitutional concept of jury trial. Taylor v. Louisiana, 419 U.S. 522 (1975).

" 9. Selection of a petit jury from a representative cross-section of the community is an essential component of the Sixth Amendment right to a jury trial. Taylor v. Lousiana, supra.

" 10. While prospective jurors, with reservations about capital punishment... might properly be excluded from a jury empaneled to make a recommendation as to penalty in a capital case, the exclusion of such jurors for cause from a jury empaneled as a trier of fact to decide guilt or innocence, deprives the Defendant of the right to have the issue of guilty or innocence decided by a fair and impartial jury selected from a representative cross-section of the community in violation of the Sixth and Fourteenth Amendments ... and Article I, Sections 9, 16, and 22 of the Florida Constitution.

" 11. To exclude such jurors ... from the petit jury deciding guilt or innocence would unlawfully discriminate against the Defendant charged with a capital offense, because such jurors would not be excused for cause if the Defendant was charged with other than a capital offense. Because that segment of the commmunity with reservations about capital punishment ... would normally be available as petit jurors to those accused of other than capital offenses, the prohibition of such persons from serving on the Defendant's fact finding petit jury is to deny Defendant the equal protection of the law that is afforded those accused of other than capital offenses, in violation of the Sixth and Fourteenth Amendments ... and ... the Florida Constitution.

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> "13. Since a capital trial is bifurcated, and since new jurors or a new jury could be selected for the second phase ... the Court should permit jurors who could fairly determine guilty or innocence to sit on the petit jury during the first phase. If a guilty verdict of a capital offense is returned, then the prosecuting attorney may be permitted to excuse jurors for cause for the penalty phase if and when such is demonstrated to be necessary for the state to secure a fair hearing. ..."

Defense counsel filed a Motion In Limine seeking an order from the Court prohibiting any questioning of prospective trial jurors (as distinquished from advisory sentencing jurors) regarding their attitudes toward the death penalty. (R44-46)

In an attempt to minimize any prejudicial impact of a collective "death qualification" voir dire, defense counsel filed a Motion For Individual Voir Dire And Sequestration Of Jurors During Voir Dire (R51-52) and a Memorandum In Support Of Motion For Individual Voir Dire and Sequestration Of Jurors During Voir Dire. (R91-92).

As a further pre-trial effort defense counsel filed a 96 page Offer Of Proof, Re: "Death Qualified" Juries And Motion For Cost of Expert (R101-196), wherein the defendant offered to prove:

> that juries from which are systematically excluded those persons who could not recommend the death penalty in any case are more apt to convict than are juries without such exclusions.

Defendant offered data from six comprehensive studies and attached published articles from three experts to his motion.

Defendant requested costs from the Court so that he could have available one of the renowned experts to testify at a hearing on his motion.

Prior to the voir dire of the trial jury, defense counsel again raised the "death qualification" issue before the court. He stated:

> Judge Adams has previously heard all the motions that we filed, and he's made rulings on them. ... We've going to renew them at this time. ... we've moving for individual voir dire ... We're also moving for two separate juries in the case if it comes to that on the basis of Grigsby v. Marby. It's a U. S. District Court opinion of August 5, 1983 and it basically ... says that the use of the death qualified jury in a capital case ... Use of the death-qualified jurors during the bifurcated guilt/penalty phase is unconstitutional... (R1429)

The Court denied the motion. (R1430)

During the voir dire of the jury, the prosecutor began the "death qualification" process. (R1493) The defense counsel objected:

> Your Honor, before we go any further, I have previously stated---we cited before Grigsby v. Marby. ... We object to the death qualification of this jury. ...

The Court overruled the objection, and the prosecutor proceeded to "death qualify" the jury. (R1493, et. seq.)

During the voir dire of Juror #43, Billie G. Proctor, the prospective juror responded negatively to the "death qualification" questions. The Court excused the juror. Defense counsel objected:

> Your Honor, for the record, we would object to the Court excusing him for cause. The basis of the objection is a sizeable protion of the population possess anti-death feelings, and to exclude him would

be impermissible. A certain violation of the 6th Amendment. (R1577)

THE COURT: Your objection is ... overruled. (R1528)

On the second day of jury voir dire, defense counsel renewed his motion:

Your Honor, at this time I would renew...the motion to have a separate jury picked for the bifurcated part of the trial: One for the guilty or innocence phase, and one for the penalty.

THE COURT: Motion will be denied. (R1633)

A second prospective juror, Juror #165, Mary J. Hill, was excused for cause based upon her responses to the "death qualification" questions. The relevant voir dire follows:

(R1728) MR. GREENE (Prosecutor): This case might involve the death penalty. How does that affect you? Would it affect you?

***

(R1729) MRS. HILL: It would affect me greatly.

MR. GREENE: Let me ask you this: You obviously have some ideas about the death penalty. I'm not saying anybody is right or wrong. Do you feel that the death penalty, being the fact that it might affect your possible verdict, that you can not come back with a guilty verdict because of your feelings about the death penalty?

MRS. HILL: It might. I'm a parent, and I feel both for the parents here and for both of the victims, and it might.

MR. GREENE: It might?

MRS. HILL: I'm also against violence.

MR. GREENE: Let me ask you this: Suppose you are picked as a juror in this case, and you heard the evidence, and you saw the evidence, and you were convinced beyond a reasonable doubt as to the defendant's guilt of first degree murder, could you come back with a guilty verdict of that charge, or would you vote for a lesser or not guilty because of the way you feel about the death penalty?

MRS. HILL: I could vote guilty on that, but --

MR. GREENE: You heard before that this is a (R1730) two-step trial?

MRS. HILL: No.

MR. GREENE: Let's go to phase two. If you did in fact come back with a guilty of one or both counts of first degree murder, then we go to the penalty phase. At that point, the jury makes a recommendation to the Judge Stanley as to life imprisonment or death penalty. Could you vote for the death penalty if you were convinced by the evidence and the instructions the Judge gave you?

MRS. HILL: No.

MR. GREENE: Under any circumstances, could you consider the death penalty?

MRS. HILL: I don't think so. Life imprisonment yes, but ---

MR. GREENE: If you gave me an "if possible", I know it's hard for you to do. Could you give me a possibly as a definite answer, as possibly to yes or no? Could you, under any circumstances, vote for the death penalty?

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MRS. HILL: No.

(R1731) MR. GREENE: You would never consider the death penalty?

MRS. HILL: No, I could never.

MR. GREENE: Are you sure of that?

MRS. HILL: Yes. I worked with children too much. That's one of the reasons why I couldn't do it.

MR. GREENE: Your Honor, based on her answers, the State would ask that she be excused for cause.

THE COURT: You may inquire.

MR. JACOBS (Defense Attorney): Ma'am, do you feel you could consider the guilty or innocence in this case if you were asked to decide whether my client was guilty or not guilty? Do you think you could do that?

MRS. HILL: Yes.

MR. JACOBS: Regardless of your views on the death penalty, you could do that?

MRS. HILL: Yes.

MR. JACOBS: Okay. Do you feel that after listening to Judge Stanley's instructions, you could follow the law, and consider --- that's not saying you have to return a death recommendation -- all the law requires is that you consider it?

MRS. HILL: Yes.

MR. JACOBS: You feel that you could consider it?

MRS. HILL: Yes.

THE COURT: It will be denied. (R1732)

After the Court denied the prosecution's challenge for cause of Mrs. Hill, the prosecutor requested an opportunity to present case law to the Court (R1732). Judge Stanley listened to the argument of counsel and took the matter under advisement (R1732-1734) during recess. After recess the Court questioned Mrs. Hill and the following transpired:

(R1735) THE COURT: Mrs. Hill, having to do with the death penalty, under any circumstances, could you vote for the death penalty?

MRS. HILL: No.

THE COURT: Ma'am, you may step down for cause.

MR. JACOBS: Judge, for the record, we would ask that we be given the opportunity to rehabilitate this potential juror as regards to that.

THE COURT: The Court has ruled in this case.

A third juror, Juror #72 Johnnie Felder, was voir dired (R1739-1746) and excused for cause because of his reponses to the "death qualification" questions. The excusal was over the

objection of defense counsel: "Please note our objections on the basis of Witherspoon". (R1746)

A fourth juror, Juror #128 Fred Allen Bowers, a United Methodist Church pastor (R1748), stated his position on the death penalty as follows: "Generally I am opposed to capital punishment. I feel, however, that there might be instances where I could support it." (R1749) Reverend Bowers was eliminated by a preemptory challenge. (R1757)

With the removal of these four prospective jurors (three removed by the Court for cause, and one by preemptory challenge), a death qualified jury was empaneled to try the cause. (R1800)

The right to a fair cross-sectional, representative jury has been based upon the due process and equal protection clauses of the fourteen amendment, and upon the sixth amendment to the federal constitution. Duncan v. Louisiana, 391 U. S. 145, 88 S. Ct. 1444, 20 L.Ed.2d 491 (1968) made the sixth amendment provisions applicable to the states.

After Duncan, the United States Supreme Court concluded that a "representative jury" consisting "of a group of laymen representative of a cross-section of the community" was required. Williams v. Florida, 399 U.S. 78, 90 S. Ct. 1893, 26 L.Ed.2d 446 (1970).

In Taylor v. Louisiana, 419 U.S. 522, 95 S. Ct. 692, 42 L.Ed.2d 690 (1975), the United States Supreme Court concluded:

> We accept the fair cross-section requirement as fundamental to the jury trial guaranteed by the Sixth Amendment and are convinced that the requirement has solid foundation...

It has also long been recognized as a fundamental proposition that a person charged with a serious crime, as a matter of right, is entitled to a trial by a fair and impartial jury. The paramount purpose of the voir dire process is to select a jury that will fairly and impartially decide the issues. Ristaino v. Ross, 424 U.S. 589, 96 S.Ct. 1017, 47 L.Ed.2d 258 (1976)

In Witherspoon v. Illinois, 392 U.S. 510, 88 S. Ct. 1770, 20 L.Ed.2d 776 (1968), the petitioner objected at page 516 to a death qualified jury and contended:

> that a State cannot confer upon a jury selected in this matter the power to determine guilt. He maintained that such a jury, unlike one chosen at random from a cross-section of the community, must necessarily be bias in favor of conviction, for the kind of juror who would be unperturbed by the prospect of sending a man to his death, he contends, is the kind of juror who would too readily ignore the presumption of the defendant's innocence, accept the prosecution's version of the facts, and return a verdict of guilty...

In response to this contention Justice Stewart for the majority in Witherspoon stated:

> The data ... are too tentaive and fragmented to establish that jurors not opposed to the death penalty tend to favor the prosecution in the determination of guilt. We simply cannot conclude either on the basis of the record now before us or as a matter of judicial notice, that the exclusion of jurors opposed to capital punishment results in an unrepresentative jury on the issue of guilt or substantially increases the risk of conviction. In light of the present available information, we are not prepared to announce a per se constitutional rule requiring the reversal of every conviction returned by a jury selected as this one was.

(Emphasis added).

Thus, the United States Supreme Court acknowledged that one of the primary reasons for the Witherspoon decision was a lack of critical data and information supporting any other view.

But now, almost two decades later, numerous studies have been completed and the missing data are available. Witherspoon, however, has become deeply embedded into the law of the land, and despite scientific data which establishes its innate unfairness, it remains virtually unchanged.

Grigsby v. Marby, 569 F. Supp. 1273 (1983) has challenged Witherspoon. This case holds that the jury selection process used by Arkansas for capital cases denies accused trial by juries representation of a cross-section of the community and creates juries that are conviction prone. The case finds that juries that are death qualified under Witherspoon standards are not representative of the community as they should be and cannot be considered fair and impartial with respect to the determination of the defendant's guilt or innocence.

The Grigsby opinion handed down by the United States District Court for the Eastern District of Arkansas, is 51 pages in length. In addition to extensive legal analyses, the Court reviews, analyzes and reports on numerous scientific studies. The Court at page 1290 indicates:

> The petitioners in the case at bar have responded to the Supreme Court's invitation with a plethora of well documented scientific research that does not suffer from numerous deficiencies attributed to the research in Witherspoon.

The research and evidence show, inter alia:

> ...that persons excluded by the process of death qualification share sets of attitudes toward the criminal justice system that set them apart and distinquish them collectively from those not excluded by the process. ... that death qualified jurors are more prone to favor the prosecution, to be hostile to the defendant, to regard significant constitutional rights lightly...

Other evidence reported at pages 1303-1304 shows:

> The death qualification process traps the participants into the necessity of communicating false cues to the jury. It is natural for prospective jurors to look to the participants, and particularly to the judge, for information about the case and what their duties and responsiblities will be.
>
> By focusing on the penalty before the trial actually begins the key participants, the judge, the prosecutor, and the defense counsel convey the impression that they all believe the defendant is guilty, that the "real" issue is the appropriate penalty, and that the defendant really deserves the death penalty. The process desensitizes jurors to the gravity of their pre-penalty duties.

The Grisby court at page 1321 concluded:

> Before a person may be subjected to the possibility of the death penalty he necessarily must be convicted of a capital crime. In this guilt -innocence determination phase of his trial a defendant charged with a capital punishment should be, and is entitled to a fair and impartial jury and he is also entitled to a jury composed of a fair cross-section of the community, a jury which represents and reflects the conscience of that community. The evidence introduced here makes it abundantly clear that juries death qualified under Witherspoon standards are not representative of the community, as they could, and should be, and therefore, do not serve the objective of interposing between the state and the defendant the conscience and broad collective wisdom of that community. It is also clear that such juries cannot be considered fair and impartial with respect to the guilt/innocence of defendants in capital cases.

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> ... this Court now holds that if prospective jurors in capital cases are barred over the defendant's objections from jury service because of their views on capital punishment on any broader basis than inability to follow the law or to abide by their oaths, the guilty verdict must be set aside...

In a supplementary action in this case, Grigsby v. Marby, 583 F. Supp. 629 (1983), the Court at page 630 observed:

> ...There is no good or convenient time to correct a broadly followed unconstitutional practice. Fifteen years after Witherspoon, however, the issues can no longer be avoided despite the turmoil which may result from the delay in coming to grips with the issues. ...

On the foregoing bases, Appellant contends that his conviction must be set aside due to the exclusion of venirepersons who during voir dire professed scruples against the death penalty. Appellant contends that the process of death qualification of prospective jurors, as applied in his case, suffered from at least two constitutional defects: (a) it denied him a trial by jury representative of a cross-section of the community, and (b) it created a jury that was conviction prone, both in violation of the sixth and fourteenth amendments of the federal constitution and rights guaranteed by the Florida Constitution.

ISSUE II

THE TRIAL COURT ERRED IN EXCUSING JUROR MARY HILL FOR CAUSE IN VIOLATION OF THE WITHERSPOON AND CHANDLER STANDARDS.

Juror #165, Mary J. Hill, was excused for cause based upon her responses to the "death qualification" questions. The relevant voir dire follows:

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jury makes a recommendation to the Judge Stanley as to life imprisonment or death penalty. Could you vote for the death penalty if you were convinced by the evidence and the instructions the Judge gave you?

MRS. HILL: No.

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MRS. HILL: Yes.

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>
> THE COURT: The Court has ruled in this case.

Ms. Hill stated unequivocally that her feelings toward the death penalty would not affect her ability to return a verdict of guilty, if such verdict were warranted by the evidence, i. e. "I could vote guilty on that". (R1730 and 1732) As to the penalty phase, in response to defense counsel's questions, Ms. Hill indicated she could listen to Judge Stanley's instructions, follow the law, and consider the death penalty. (R1731)

The Florida Supreme Court in Chandler v. State, 442 So.2d

171 (Fla. 1983) indicated that excusal of prospective jurors under the Witherspoon standard requires an "...unyielding conviction and rigidity of opinion..." Ms. Hill stated that the death penalty would not affect her guilt-innocence deliberation or determination during the first phase of the trial and that she would "consider" the death penalty during the punishment phase.

On these bases, Appellant contends his conviction must be set aside due to the exclusion of a venireperson in violation of the standards established by Witherspoon, as specifically applied in Florida by Chandler.

ISSUE III.

THE TRIAL COURT ERRED IN RESTRICTING THE DEFENDANT'S CROSS-EXAMINATION OF THE STATE'S KEY WITNESS, FRANCIS SMITH, IN VIOLATION OF THE APPELLANT'S RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSITUTION AND ARTICLE I, SECTION 16 OF THE FLORIDA CONSTITUTION.

Francis Smith was the state's star witness. The prosecutor acknowledged and emphasized her importance at the very onset of his opening statement:

> ...I would like to ask you at this time if you could envision a bicycle tire. ... You have a hub that goes in the middle and you have spokes around that wheel. They all support the wheel and reinforce it. That's somewhat like the State's case. ... At the hub there is one witness, Francis Smith. The spokes from each side of her testimony are the other 15 to 17 people we will call in that support and reinforce the testimony of Francis Smith. ...Francis Smith is the hub of the case. ... (R1825)

After the homicides Francis Smith was arrested. She was held in jail on an unrelated criminal charge. (R2249) During the time she was in custody, she made a sworn statement to Detective Kenneth N. Mizell of the Hillsbough County Sheriff's Office. (R578) In that statement, among other things, she indicated that she had not seen the defendant during the week the homicides are alleged to have occurred and didn't see him until four days after the alleged date of the homicides. (R580 and R2322) This statement is in direct conflict with her testimony at trial. (R2188, et. seq.)[1]

[1] Ms. Smith made other conflicting statements in addition to this exclusion. For instance see her statement to Deputy Thomas (R567): "She said she had known him about a month and that she had no idea where he was at or where he was going. She had no explaination for the car other than he picked her up and said take it here and drop it off and somebody will pick it up."

On cross-examination defense counsel began questioning Francis Smith concerning the conflicting statement given to the police officer. (R2319) The prosecutor objected to this process of impeachment. (R2319- 2320) Defense pointed out to the Court that the State on direct examination inquired into the witness' arrest and custody. (R2321) The Court ruled that the questioning could continue on this issue (R2321), but before defense could proceed, a second objection was interjected. (R 2321-2322) After a conference at the bench, defense, outside the presence of the jurors, proffered the testimony. (R2323) A lengthy bench conference insued. (R-2323-2325) after which the Judge, without elaborating on his rationale for the ruling stated:

> Whatever way I go on it, its going to be appealed. I'll just deny the statement and we will proceed here. (R2325)

Defendant contends that the trial court abused its discretion and committed reversible error in sustaining the state's objection.

The sixth amendment to the federal constitution provides that in all criminal prosecutions the accused shall enjoy, inter alia, the right to be confronted with the witnesses against him. This provision has been applied to the states through the fourteenth amendment. Pointer v. Texas, 380 U.S. 400, 85 S. Ct. 1065, 13 L. Ed.2d 923 (1965).

Article I, Section 16 of the Florida Constitution contains a similar confrontation provision.

A primary interest and right secured by the confrontation clauses is the right to cross-examination. Douglas v. Alabama, 380 U.S. 415, 85 S. Ct. 1074, 13 L. Ed.2d 934 (1965).

The right to cross-examination includes the right to extensively question a witness as to matters affecting the witness' credibility. Davis v. Alaska, 415 U.S. 308, 94 S. Ct. 1105, 39 L.Ed.2d 347 (1974).

Florida in Coco v. State, 62 So.2d 892 (Fla. 1953) clearly recognized the absolute and fundamental right to cross-examine. In Coco at pages 894-895 the Court observed:

> ...a fair and full cross-examination of a witness upon the subjects opened by direct examination is an absolute right, as distinquished from a privilege, which must always be accorded to the person against whom the witness is called and this is particularly true in a criminal case ... wherein the defendant is charged with the crime of murder in the first degree. ...Cross-examination of a witness upon the subjects covered in his direct examination is an invaluable right and when it is denied to him it cannot be said that such a ruling does not constitute harmful and fatal error.

The Court in Coco then quoted with approval 58 Am. Jur. Witnesses Section 632, at 352 (1948):

> ...when the direct examination opens a general subject, the cross-examination may go into any phase, and may not be restricted to mere parts...or to the specific facts developed by direct examination. Cross-examination should always be allowed relative to the details of an event or transaction a portion only of which has been testified to on direct examination. ... cross-examination is not confined to identical details testified to in chief, but extends to its entire subject matter, and to all matters that may modify, supplement, contradict, rebut or make clearer the facts testified to in chief...

Faced with a factual situtation in which the trial court

restricted the cross-examination of a key prosecution witness, the Florida Supreme Court in Coxwell v. State, 361 So.2d 148 (Fla. 1978) at page 152 concluded:

> We...hold that where a criminal defendant in a capital case, which exercising his sixth amendment right to confront and cross examine the witness against him, inquires of a key prosecution witness regarding matters which are both germane to that witness' testimony on direct examination and plausibly relevant to the defense, an abuse of discretion in curtailing that inquiry may easily constitute reversible error...

In Jennings v. State, 413 So.2d 24 (Fla. 1982), the Florida Supreme Court reaffirmed the right of cross examination as fundamental. At page 26 the Court stated:

> ...The opportunity for full and complete cross-examination of critical witnesses is fundamental to a fair trial.

Defense counsel's cross-examination of Francis Smith was directed at one main objective---the destruction of her credibility based upon her previously made sworn statement that directly contradicted her testimony. Since counsel's cross-examination was abortively terminated and unduly restricted at an extremely early stage, the record does not reflect and cannot reflect what would have developed. As in Coco at page 896, "...we can only conjecture or surmise what the outcome would have been had the appellant been granted rather than denied, his inalienable right of cross-examination."

Defendant contends that in limiting the cross-examination of Francis Smith the trial court committed reversible error in that such action curtailed a crucial inquiry into the credibility of

the key witness and deprived the defendant of his absolute and fundamental right to cross-examine a witness who testified against him, as guaranteed by the sixth amendment to the federal constitution and Article I, Section 16 of the Florida Constitution.

ISSUE IV

THE TRIAL COURT ERRED IN RESTRICTING THE DEFENDANT'S CROSS-EXAMINATION OF A KEY STATE WITNESS, SPECIAL AGENT CONNIE SMITH.

Connie Smith, a Special Agent for the Florida Department of Law Enforcement, was a primary investigator on this case (R369, R1842). She testified she interviewed the state's key witness, Francis Smith (R1843); coordinated the investigation with the various State Attorney's Offices and law enforcement officials (R1844); participated in the crime scene investigation (R1845); aided in the recovery of the bodies (R1852); and conducted numerous other aspects of the follow-up investigation (R1857, et.seq.).

Agent Smith, during proffered testimony, indicated that in the course of her investigation she was involved in obtaining evidence from a vehicle owned by one of the victims, Clarence Moore (R1889). This vehicle was allegedly taken by the Defendant after the victim's death. A notebook was found in the vehicle (R1889). Agent Smith indicated that the notebook contained numerous names and telephone numbers. Based upon her background, experience and expertise, she believed that the data was consistent with that which would be maintained by a drug smuggler (R1889-1890). Specifically, she testified: "...I viewed those things ... the pages of the notebook. ... they are consistent with what I know or have been trained to identify as

that of a drug smuggler." (R1891).

Agent Smith's proffered testimony also relates to the contents of the wallet of the victim, Clarence Moore. She indicated that the wallet contained a photograph and "... it's true that I saw a picture of Maria Mara ... I later learned that she was a suspect in a RICCO investigation..." (R1890)

Agent Smith's training and her assignment as an "investigator in organized crime" (R1842) makes her uniquely qualified to testify to the nature of a drug smuggler's notebook and the existance of a RICCO investigation, both facts that could cast the nature of this case in an entire different light.

Defense counsel attempted to elicit testimony from Agent Smith on the portion of her investigation relating to the notebook (R1887). The prosecutor objected to the testimony as being "beyond the scope of direct". Defense counsel responded:

> Judge, she testified about certain articles of evidence. I think if she is in the chain of custody of any evidence in this case, I should be able to ask her about it. (R1887)

The Court sustained the objection.

Defense counsel then attempted to elicit testimony from Agent Smith on the portion of her investigation relating to the wallet and the photograph. The prosecutor raised the same objection. (R1889). At a bench conference, defense counsel asserted:

> Judge, during her investigation of this case she came in contact with a notebook which she related to be a drug smuggler belonging to the deceased in this case. Also she related that there was a picture of the deceased's girlfriend, who was under a drug related

> conviction. I think it's very important that we bring that out. (R1888)

The Court sustained the objection (R1888) and Agent Smith's testimony was proffered (R1888-1891). The Court ruled:

> ...This is outside the scope of direct examination. The objection has been made and the Court will sustain the objection. (R1892)

Defendant contends that the trial court abused its discretion and committed reversible error in sustaining the state's objection.

The sixth amendment to the federal constitution provides that in all criminal prosecutions the accused shall enjoy, inter alia, the right to be confronted with the witnesses against him. This provision has been applied to the states through the fourteenth amendment. Pointer v. Texas, 380 U.S. 400, 85 S. Ct. 1065, 13 L. Ed.2d 923 (1965).

Article I, Section 16 of the Florida Constitution contains a similiar confrontation provision.

A primary interest and right secured by the confrontation clauses is the right to cross-examination. Douglas v. Alabama, 380 U.S. 415, 85 S. Ct. 1074, 13 L. Ed.2d 934 (1965).

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> ...a fair and full cross-examination of a witness upon the subjects opened by direct examination is an absolute right, as distinquished from a privilege, which must always be accorded to the person against whom the witness is called and this is particularly true in a criminal case ... wherein the defendant is charged with the crime of murder in the first degree.

> ...Cross-examination of a witness upon the subjects covered in his direct examination is an invaluable right and when it is denied to him it cannot be said that such a ruling does not constitute harmful and fatal error.

The Court in Coco then quoted with approval 58 Am. Jur. Witnesses Section 632, at 352 (1948):

> ...when the direct examination opens a general subject, the cross-examination may go into any phase, and may not be restricted to mere parts...or to the specific facts developed by direct examination. Cross-examination should always be allowed relative to the details of an event or transaction a portion only of which has been testified to on direct examination. ... cross-examination is not confined to identical details testified to in chief, but extends to its entire subject matter, and to all matters that may modify, supplement, contradict, rebut or make clearer the facts testified to in chief...

Faced with a factual situtation in which the trial court restricted the cross-examination of a key prosecution witness, the Florida Supreme Court in Coxwell v. State, 361 So.2d 148 (Fla. 1978) at page 152 concluded:

> We...hold that where a criminal defendant in a capital case, which exercising his sixth amendment right to confront and cross examine the witness against him, inquires of a key prosecution witness regarding matters which are both germane to that witnesse's testimony on direct examination and plausibly relevant to the defense, an abuse of discretion in curtailing that inquiry may easily constitute reversible error...

In Jennings v. State, 413 So.2d 24 (Fla. 1982), the Florida Supreme Court reaffirmed the right of cross examination as fundamental. At page 26 the Court stated:

> ...The opportunity for full and complete cross-examination of critical witnesses is fundamental to a fair trial.

Defense counsel's cross-examination of Connie Smith was

directed at one main objective---the presentation of her findings in the investigation, including the notebook, wallet and photograph. The defendant contends that the prosecutor on direct examination opened a general subject (the investigation conducted by Agent Smith) and that once the general subject is opened defendant may inquire into all phases of that investigation and cannot be restricted to mere parts or those specific aspect selectively chosen by the prosecution to fully explore.

Defendant contends that in limiting the cross-examination of Agent Connie Smith the trial court committed reversible error in that such action curtailed a crucial inquiry into the existance of possible exculpatory evidence and deprived the defendant of his absolute and fundamental right to cross-examine a witness who testified against him, as guaranteed by the sixth amendment to the federal constitution and Article I, Section 16 of the Florida Constitution.

ISSUE V

THE TRIAL COURT ERRED IN PERMITTING A MEDICAL EXAMINER, OVER DEFENDANT'S OBJECTION, TO TESTIFY AS AN EXPERT WITNESS CONCERNING A FACTUAL ISSUE RELATING TO BOTH DECEASED WHERE INSUFFICIENT PREDICATE WAS LAID, AND SPECIFICALLY UNDER SUCH CIRCUMSTANCES TO EXCLUDE "ACCIDENT" AS A CAUSE OF THE DEATH OF ALECIA DAWN BRYANT.

The relevant portion of the record relating to the above issue and the testimony of the medical examiner, Dr. Robert Schultz, follows:

> BY MR. McGRUTHER (Prosecutor): As a part of your duties with District 21 Medical Examiner's office, do you have occasion to perform autopsies? (R2041)
>
> A: Yes.
>
> Q: Would you please explain to the ladies and gentlemen what an autopsy is.
>
> A: An autopsy is an examination after death, external and internal examination, both by the naked eye inspection of the changes that are present and microscopic studies, also laboratory studies of chemical bacteriology and sometimes hematology to determine the cause of death as near as one can possibly identify it in either a natural setting or, in the case where we are referring to, in a setting of post-homicide. (Emphasis Added)
>
> MR. JACOBS (Defense Attorney): Your honor, may we approach the bench?
>
> THE COURT: Yes, sir.
>
> (Bench conference as follows:)
>
> MR. JACOBS: Judge, at this time we would object to Dr. Schultz testifying to anything relating to the term "homicide". That is beyond his scope of expertise. The witness cannot offer an opinion as to the guilt or innocence of the accused person and by making that statement in regard to homicide, we feel that he is attempting to do that.
>
> MR. McGRUTHER: Judge---

THE COURT: What is the definition of homicide?

MR. JACOBS: Your honor?

THE COURT: Yes, sir.

MR. JACOBS: Your honor, for-- (R2041)

THE COURT: I am asking you. What is the definition of homicide?

MR. JACOBS: Unlawful killing.

MR. McGRUTHER: Not necessarily.

THE COURT: Not necessarily.

MR. JACOBS: Judge, for the record, we would cite Spardley v. Florida, opinion filed December 14, 1983, Second District Court of Appeal, Case Number 82-1641, wherein Dr. Schultz was a witness in that case as well.

***

THE COURT: Would you specify your objection one more time, please? (R2042)

MR. JACOBS: Yes, Your Honor. I object to the doctor testifying to the term "homicide". It prejudices my client, infers some inference to implying to the jury my client is guilty. The witness cannot do that. He cannot testify as to guilt or innocence.

THE COURT: The term "homicide" relates to the taking of life, one human being by another human being. It does not specify whether it is accidental, intentional or anything of that nature. I am going to overrule you.

MR. JACOBS: For the record, I understand the Court's ruling but at this point of clarification, my opinion, my understanding of the law is that the term "homicide" excludes all other thing which you---

THE COURT: Black's Legal Dictionary doesn't exclude it and I just went and looked again to make sure. (R2043)

The record thus reflects that the trial court permitted the medical examiner to testify that in this particular case a

homicide had occurred. This testimony was admitted without any predicate whatsoever being laid by the prosecution, and over the objection of defense counsel, who also provided the applicable case law for defendant's position.

Subsequently, describing the autopsy he performed on Alecia Bryant, Dr. Schultz indicated:

> ...the individual was in the advanced state of decomposition to begin with. A female. ... She was -- the body was swollen and showing rather extensive changes of decomposition. (R2045) ...she was apparently young. The decomposition makes it difficult to make these judgments. We X-rayed the body...Also fingerprinted the victim. Then we made an examination of the external evidence of damage or trauma. Therewas a laceration of the right ear which was about 3 centimeters in length in the upper portion of the ear and there was, on the right hand, a ring which had been badly distorted. It had been bent and pinching the middle finger ...(R2046)... There was no other evidence of trauma that I could see, no other lacerations, no other damage to the skin, no evidence of penetrating wounds or lacerations. Internally I found advanced stages of decomposition as well. There was, however, in that which I could identify no evidence of trauma that I could identify grossly. Microscopically it was almost a useless exercise because of the advanced stage of decomposition. (R2047)

On the issue of whether or not the death may have been "accidental", the record reflects the following:

> Q (Prosecutor): Were you able to find any evidence of accidental death?
>
> MR. JACOBS: Your Honor, may we approach the bench?
>
> THE COURT: Yes, sir.
>
> (Bench conference as follows:)
>
> MR. JACOBS: Judge, same objection on the basis of the Spradley case as to opinion in these matters. (R2047)
>
> THE COURT: Let me say this. That my ruling previously as to homicide, in my opinion, did not go against this Spradley case because of the fact of what a homicide is. In the Spradley case they were talking about where they had called

it one thing and then eliminated, I believe, three other things, an accident, whatever, accident, suicide, and undetermined.

MR. JACOBS: For the record, we would object to the testimony that he is giving about accident, whatever.

THE COURT: Objection sustained.

(Bench conference concluded.) (R2048)

Q (Prosecutor): ... You stated that one of the functions of the Medical Examiner... is to attempt to determine the cause of death?

A: Yes, sir.

Q: Could you please tell the jury what factors you take into consideration when making this determination?

A: Well, I take into account all factors that I can lay my hands on. ... (R2048)

****

A: ...I would take into account the findings at the autopsy. I would take into account the circumstances in which the body is found. I would take into account all related data that would help me in determining what that related data might--how it might interphase with the findings at autopsy.

Q: And did you make a determination of the cause of death in this case?

A: Yes, sir.

Q: Did you consider the results of your autopsy?

A: Yes, I did.

***

Q: Sir, what factors from the autopsy itself did you take into consideration in determining the cause of death?

A: ...from the autopsy itself I took into consideration the fact that there was trauma to the hand and to a ring on the hand which would have been a painful wound, and secondly, a laceration of the ear. Both of these wounds were non-lethal wounds but painful wounds. (R2050)

*** (To R2055)

Q: ...did you yourself receive information regarding the scene investigation of the death of Alecia Dawn Bryant?

A: Yes, I did.

***

Q: What information did you receive, sir?

A:...that these bodies from these two autopsies that I have been describing were recovered from a shallow grave in Glades County, the exact site I don't know; that they were adjacent to one another or in the same common grave, I can't recall which.

Q: ...Any other information regarding the facts at the scene?

A: Not really, I don't recall any other data now that influenced me greatly.

*** (To R2073)

Q: ... returning to the body that has been identified as that of Alecia Dawn Bryant, were you able to form an opinion as to the cause of death, sir?

A: Yes.

MR. JACOBS: Your Honor, once again, objecting on the Spradley case.

THE COURT: As to that question, objection be overruled. ...

Q: And, what, sir, is that opinion?

A: I believe this victim was strangled.

Q: Okay.

A: Probably manually.

Q: And would you please state on what basis you make that determination?

A: Well, this will require a little explaination, if you will bear with me. We have a 19 year old girl who is dead, who was found alongside a victim who is, in my opinion, obviously the victim of a homicidal blow---

MR. JACOBS: Objection, Your Honor, objection.

THE COURT: Sustained. (R2073)

MR. JACOBS: At this time I move for a mistrial on the basis of that last comment.

MR. McGRUTHER: Judge, I believe the proper predicate has been laid for this information. I believe Mr. Jacobs' objection is --- I believe the most important point in the Spradley case, which I believe the Court--may we approach the bench?

*** (To R2075)

MR. JACOBS: Judge, ... he asked the question about the female involved here and he is basing his conclusion on the female on what he purports and tells the jury to be a homicide. As far as the male goes, he is giving them his opinion as to guilt or innocence. That is clearly improper. And he is using it to describe possible cause of death for the female.

THE COURT: He is not determining the guilt or innocence of anyone. He has not mentioned that.

MR. JACOBS: Judge, he referred to the death of Clarence Moore just now as a homicide.

THE COURT: I am aware of that. But that---I am going to overrule your objection.

(End of bench conference)

Q: ... you may continue explaining your reasons behind your determination of the cause of death of Alecia Dawn Bryant.

***(To R2076)

A: Hers has some signs of physical trauma but no signs at the time of autopsy that we could point to with certainty and say this was the cause of death. Yet, we have therefore to assume-- I assume and I believe within reasonable medical certainty, that this-- (Emphasis added)

MR. JACOBS: If it please the Court, I would object to an assumption.

***

THE COURT: Objection be overruled. ... (R2076)

A: That the victim died of an unnatural condition. If one has to consider the unnatural states that could leave a victim in this condition, we have little choice but to choose asphyxia, and of the choices that are available to us, manual strangulation is the most likely and that was my opinion as to the cause of death. (R2077)

The record reflects that the trial court permitted the medical examainer to testify that in this particular case a homicide had occurred. This testimony was admitted without any predicate being laid by the prosecution, and over the objection of defense counsel, who also provided the applicable case law for defendant's position. Dr. Schultz indicated that he was not greatly influenced by data from the investigation scene except that the victims were contained in a "common" or "adjacent" grave site. (R2055). The testimony of all other witnesses, including the medical examiner's assistant Sam Johnson indicates that the grave sites were considerable distance from each other. The record thus indicates that Dr. Schultz's testimony was based on inaccurate information and data, that it was given without the proper predicates being laid, that it was based on self-admitted assumptions, and that it rested on conclusions of law (i. e. the incident was a homicide), which when expressed to the jury virtually constituted evidenciary harpoons.

At the time of the medical examiner's testimony the Second District Court of Appeals had decided a case from the same judicial circuit involving similiar testimony and also involving the same witness, Dr. Robert Schultz. In Spradley v. State, 442

So. 2d 1039 (Fla. 2d DCA 1983) at page 1043 the Court held:

> A medical examiner should not be permitted, over objection, to testify as an expert witness concerning a factual issue unless a sufficient predicate is laid. (citations omitted). Over appellant's objection, Dr. Schultz, a forsensic pathologist, testified why he excluded "accident" as a cause of Munn's death, notwithstanding admissions by him that at the time he performed the autopsy he did not have any knowledge about either the shooting incident or the investigation surrounding the incident... He, thus was not qualified to opine that Munn's death was not an "accident".
>
> In any event, by ... testifying that Munn's death was caused by a "homicide", not an "accident", Dr. Schultz effectively eliminated appellant's viable defense of excusable homicide, thereby implying in very clear terms for the jury that appellant was guilty of one of the degrees of homicide. A witness, however, cannot offer an opinion as to the guilt or innocence of an accused person. (citations omitted)

Appellant contends that the trial court erred in permitting a medical examiner, over objection, to testify as an expert witness concerning a factual issue without a sufficient predicate being laid, to exclude other possible causes of death based upon assumptions and inaccurate data, to exclude "accident" as a possible defense by asserting the conclusion that the incident was a homicide, and implying to the jury that the appellant was guilty of one of the degrees of homicide, to the prejudice of the appellant and in specific violation of the case law provided in Spradley.

CONCLUSION

For the reasons presented in this brief, Cary M. Lambrix, by and through his undersigned attorneys, asks the Supreme Court of Florida to reverse his judgments and sentences and to remand the case to the trial court for a new trial. If a new trial is not granted, Cary M. Lambrix, by and through his undersigned attorneys ask that his death sentences be reversed for the reasons stated herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Attorney General's Office, Park Trammel Building, 1313 Tampa Street, Eighth Floor, Tampa, Florida 33602 by United States mail this 15th day of Februray, 1985.

J. L. "RAY" LeGRANDE

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