IN THE FLORIDA SUPREME COURT

ERNESTO SUAREZ,	:	
Appellant,	:	
vs.	:	Case No. 65,260
STATE OF FLORIDA,	:	
Appellee.	:	
	:	

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

INITIAL BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE

On March 19, 1983, the Collier County Grand Jury returned an Indictment charging Ernesto Suarez with the murder of Amedicus Howell. (R15) An information was subsequently filed charging Mr. Suarez with the additional offense of armed robbery. (R136)

Following a jury trial, Mr. Suarez was found guilty of the offenses charged. (R225) Thereafter, on March 29, 1984, the trial court accepted the jury's advisory recommendation and sentenced Mr. Suarez to death. (R240) A consecutive term of 4 1/2 years imprisonment was imposed upon the armed robbery conviction. (R232A)

Mr. Suarez appeals his convictions and sentences to this Court.

STATEMENT OF THE FACTS

A. Pretrial

Prior to trial, Appellant moved to suppress statements which he had made to the State Attorney's Office after he had been indicted and after counsel had been appointed to represent him. (R123-125,128-129) The defense alleged that Appellant had been interviewed by Assistant State Attorneys Jerry Berry and Herman Castro without either the prior knowledge or consent of Appellant's counsel. (R123-124) The defense contended that by interviewing Appellant without the consent or knowledge of his attorney, the State Attorney's Office had violated the Code of Professional Conduct. (R1573)

At the hearing on the motion, the evidence tended to establish that counsel was appointed to represent Appellant in April, 1983. (R1559,1561) Thereafter, on April 5, 1983, a notice of defendant's invocation of the right to counsel was filed with the court and served upon the State Attorney's Office. (R1559-1562)

On August 19, 1983, Appellant made a request to jail personnel that he be permitted to speak with someone from the State Attorney's Office. (R1528, Defendant's pretrial exhibit number 2) Assistant State Attorneys Delano Brock and Jerry Berry discussed the propriety of speaking with Appellant in the absence of his counsel. (R1554) They concluded that the canon of ethics which prohibits an attorney from discussing a case with a party who is represented by counsel would not be "any impediment" to interviewing Appellant. (R1555-1556)

Thereafter, Assistant State Attorney Jerry Berry obtained a statement from Appellant. (R1530, Defendant's pretrial exhibit number 2) The statement was translated from Spanish to English by Assistant State Attorney Herman Castro.[1/] (Defendant's pretrial exhibit number 2)

On November 7, 1983, Appellant's court-appointed attorney, Nelson Faerber, appeared in court with Appellant and objected to the conduct of the State Attorney's Office in taking the foregoing statement. (R130,1546) Mr. Faerber also moved to withdraw as Appellant's counsel and the motion was allowed. (R130, 1546) Attorney Lawrence Martin was appointed to represent Appellant. (R130)

Later the same day, Assistant State Attorneys Berry and Castro conducted another interview with Appellant. (R1546, Defendant's pretrial exhibit number 1) Appellant had previously indicated that he wanted to speak with the State Attorney's Office. (Defendant's pretrial exhibit number 1) Mr. Berry advised Appellant of his rights and the following colloquy ensued:

> Q. You have the right to have an attorney present. We have gone through this before, do you wish to have your attorney present?
>
> A. I do not have a lawyer.
>
> Q. Okay. I know that you do not have a lawyer at this point but there is going to be another attorney appointed to represent you. Do you want him present before you talk to me?
>
> A. It's the same.

[1/] Appellant, a Cuban immigrant, is conversant only in Spanish.

Q. I just want to make sure that you understand that you have the right to have him here.

A. I do not know him. I cannot ask for a lawyer. It's the same to me to speak with you.

Q. Okay. That is just your right to have either him or another attorney here. What is your response?

A. It's the same.

Q. It's the same. That means you can speak to me without your attorney.

A. Yes as I do not have a lawyer.

Q. I am not sure but I believe the attorney that is being appointed for you will be Larry Martin, do you know who Larry Martin is?

A. No Sir.

Q. He is with George Vega's firm.

A. George Vega?

Q. Do you want him here before you talk to me?

A. It's the same in final at the end what I will speak to you is to give you the proof that I was not the one that shot the policeman.

Q. Okay. But you do want to talk to me without Larry Martin or any other attorney being here?

A. I will speak with you.

Q. Okay. Mr. Suarez there is one other thing that is at anytime during this discussion in which you desire not to speak to me anymore or in which you would like to have your attorney present before you answer anymore questions, you [sic] the right to do so and as soon as you request, I will desist and will not ask you anymore questions, do you understand that?

A. Yes Sir.

Q. What is it that you would like to talk to me about?

A. Before, the last time that you and I spoke, I told you that I wanted to talk to you with a

> lawyer to give you the proof of my innocence in this trouble. I do not know if you remember that I tried to talk to you but Mr. Faerber, that today is accusing me, said he prohibited me from speaking with you.
>
> Q. Okay.
> (Defendant's pretrial exhibit number 1, pp.1-2)

Thereafter, Appellant made a statement relating to the crimes charged. (Defendant's pretrial exhibit number 1)

The defense argued that Appellant's statements should be suppressed because they had been obtained in violation of his right to counsel and the Code of Professional Conduct of the Florida Bar. (R1563-1564,1568-1569,1572-1574) The motion was denied. (R1571)

The defense also moved to disqualify the State Attorney's Office based upon the same facts. (R123-125,1571-1572) The defense contended that under the Code of Professional Conduct, the State Attorney's Office had a duty to withdraw from the case because it appeared that Assistant State Attorneys Berry and Castro would be called as witnesses at trial. (R123-124,1572-1583) This motion was also denied. (R1595)

B. Trial

At Appellant's jury trial, the prosecution's evidence tended to establish that on the evening of March 29, 1983, Miguel Sory entered an Immokolee convenience store, approached the counter, and exhibited a handgun. (R519,528,545,551) As Sory pointed the gun at the clerk, he was joined by Raymundo Reyes, Abraham Montoya, and Jorge Rodriquez. (R529,654,857) After obtaining money and merchandise, the man escorted the clerk to the

cooler and then fled the store. (R530-533,590) The men entered a small Chrysler automobile driven by Appellant, which was parked in front of the store. (R590,1118)

The foregoing events had been observed by police officer William McDaniel who was parked across the street in an unmarked car. (R579-589) When the Chrysler automobile left the parking lot, McDaniel followed the vehicle and transmitted his location over the police radio. (R603-604) The automobile proceeded at a moderate rate of speed with McDaniel following approximately one hundred yards behind. (R603) After a short distance, Officer James Waller, driving a marked squad car, pulled in directly behind the Chrysler automobile. (R608) Waller activated the vehicle's flashing red lights and a chase ensued. (R609)

The Chrysler automobile proceeded at a high rate of speed and subsequently traversed a police road block. (R611) McDaniel and Waller were soon joined in their pursuit by Officers Howell and Fuhl. (R616-618) The Chrysler automobile subsequently pulled into the yard of a labor camp and slid to a halt. (R620) The police cars stopped a short distance away. (R621) As the officers were exiting their vehicles, several shots were fired from the driver's side of the Chrysler automobile. (R646-647)

Montoya and Rodriquez were apprehended as they exited the Chrysler automobile. (R622,654) The other suspects fled into the night. (R621,649-650) Officer Howell was found slumped in his car with a .22 caliber slug in his chest. (R623,776) Howell's gun was lying next to him on the seat of the car. (R987) The gun was fully loaded, containing six bullets. (R988) The

medical examiner subsequently determined that the gunshot wound had resulted in almost instantaneous death. (R779)

Officers McDaniel, Waller, and Kuhl each testified that they had not discharged their firearms during the incident. (R662, 749,818) The officers' estimates of the number of shots that they had heard fired ranged from 12 to 30. (R647,690,823) The officers were of the opinion that based upon the different sounds emitted, the shots could have come from at least two different weapons. (R690,793,824)

Fourteen spent .22 caliber shell casings were recovered near the Chrysler automobile. (R895) A .22 caliber semi-automatic rifle was recovered a short distance from the car. (R902-903,914) The State's firearm examiner offered his opinion that the 14 shell casings had come from the rifle, as well as the slug which was recovered from Howell's body. (R967-969)

A .25 caliber shell casing was also recovered from the scene. (R913) The shell casing was described as "dirty," and the crime scene investigator opined that it "appeared to have been there for awhile." (R913) No other shell casings were recovered. (R913)

Jorge Rodriquez and Abraham Montoya testified on behalf of the prosecution pursuant to a plea agreement wherein the charges pending against them were reduced.[2/] Prior to their arrest,

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2/ Rodriquez and Montoya had been charged with first degree murder and armed robbery, along with the Appellant, Reyes, and Sory. (R11, 15) The charges against Rodriquez and Montoya were reduced to second degree murder and robbery, and they were each sentenced to a term of 12-17 years imprisonment in return for their testimony. (R879,1126-1127)

Rodriquez and Montoya had shared a house in Immokalee. (R843-844) According to Rodriquez, Appellant stopped by the house on the morning of March 29, 1983, and informed him that "we were going to do a robbery." (R849) Later that day, Appellant returned with a rifle he had just purchased and inquired if Rodriquez and Montoya wanted to go target shooting. (R351) They proceeded to a tomato field and shot at bottles with the .22 caliber rifle and two .22 caliber pistols. (R852-854) Rodriquez and Montoya subsequently returned to their residence. (R855)

Later that evening, Rodriquez and Montoya were walking to a tavern when Appellant drove by and asked them if they wanted to go for a ride. (R856) Rodriquez and Montoya joined Appellant, Reyes, and Sory in the automobile and they proceeded to drive around. (R858) When Appellant eventually stopped at a Shop & Go, Reyes and Sory went inside. (R858-860) Shortly thereafter, Appellant told Rodriquez and Montoya to go inside and see what Reyes and Sory were doing. (R860)

After entering the store, Montoya observed Reyes and Sory behind the counter, armed with .22 caliber pistols. (R860, 1116) Rodriquez and Montoya assisted the others, obtaining money and merchandise. (R860-861) After escorting the clerk to the cooler, the men returned to the car. (R1117)

Appellant drove away from the store and a chase ensued after a police car was observed in pursuit. (R864-865) During the chase, a rifle was passed from the back seat to the front. (R865-866) When the car stopped, Reyes and Sory were observed running from the scene. (R868-1122) Rodriquez noticed that Sory

was carrying a pistol. (R818) As Appellant was exiting the car, Rodriquez and Montoya heard two or three shots being fired. (R809, 1122) Rodriquez and Montoya exited the car and were arrested. (R1124)

Rodriquez and Montoya both testified that prior to entering the Shop & Go there had been no discussion regarding a robbery. (R876)

Montoya further testified that he had overheard Appellant threaten to kill Rodriquez for testifying in this case. (R1103) This had occurred following Rodriquez' testimony but prior to Montoya being called as a witness. (R1103) Following the threat to Rodriquez, Appellant asked Montoya if he was still going to testify. (R1103)

The State introduced a letter from Appellant to Montoya which was dated January 19, 1984. (R1086-1088) In the letter, Appellant indicated that he had shot at the police after they had shot at him. (R1087)

Following the close of the State's case-in-chief the defense moved for a judgment of acquittal. (R1153-1160) The motion was denied. (R1160)

Ernesto Suarez, testifying in his own behalf, stated that he had no knowledge of the robbery until he was driving away from the store. (R1210-1212) At that time, the others informed him that they had committed a robbery and that a police car was in pursuit. (R1211) Appellant explained that he did not stop because his rifle was in the car and he was afraid that he would be blamed for the robbery. (R1212)

Appellant admitted firing the rifle two or three times, but stated that he shot to protect himself. (R1215-1217) Appellant explained that he saw a pistol pointed at him and observed muzzle fire. (R1215) Appellant fired back but did not aim at anyone. (R1215) After discharging the rifle, Appellant fled from the scene. (R1215-1217) He was arrested the next day. (R1218)

Appellant further testified that he had been born on September 4, 1954 in Havana, Cuba. (R1190) His family served in the military under the Batista regime, and Appellant was imprisoned for refusing to serve in the military under the Castro dictatorship. (R1192-1193) When he was released from prison, Appellant was drafted into combat in Angola. (R1193)

Appellant immigrated to the United States in May 1980. (R1191) He subsequently joined Alpha 66: a group of mercenaries whose mission was to fight communism. (R1195) Appellant explained that he was involved in military training with the Alpha 66 group and he had purchased the rifle for this purpose. (R1195) At the time of his arrest, Appellant was preparing to go to Nicaragua. (R1195)

On cross examination, Appellant admitted that following his arrest he informed the police that he had loaned his car to someone on the night in question. (R1237) Appellant had also claimed initially that he knew nothing of the robbery or subsequent shooting. (R1237)

Appellant also admitted giving statements to Assistant State Attorney Jerry Berry on November 7, 1983 and on August 19, 1983. (R1244,1250) Appellant was cross examined regarding the content of these statements. (R1244-1253)

Following closing arguments, the jury retired for their deliberations and subsequently found Appellant guilty of the offenses charged. (R1401-1403)

C. Penalty Phase

At the penalty phase proceeding before the advisory jury, the State elected to rely upon the evidence which had been adduced at trial. (R1410) The defense called Dr. Jose Lombillo, a psychiatrist. (R1410)

Dr. Lombillo testified that he had examined Appellant on two occasions prior to trial. (R1412) Dr. Lombillo obtained Appellant's history and conducted psychological testing and a psychiatric examination. (R1412)

Dr. Lombillo described Appellant's life as "a series of struggles he has suffered since he was a child." (R1413) Appellant was born in Cuba on September 4, 1954. (R1413) Dr. Lombillo, himself a Cuba immigrant, noted that at this point in time Cuba was "like a military state. (R1414,1417)

As a child, Appellant was very attached to his mother. (R1413) Appellant's mother and father separated at an early age and when his mother remarried, Appellant had difficulty dealing with his stepfather. (R1413) A traumatic episode occurred in Appellant's life at the age of fifteen when his stepfather attacked his mother. (R1413) Attempting to defend his mother, Appellant struck his stepfather. (R1413) This resulted in Appellant being expelled from the house. (R1413)

Because he didn't have anywhere else to go, Appellant joined the military at the age of sixteen. (R1414) The turmoil

that had existed at home between Appellant and his stepfather "was also manifested with his authorities at the military service." (R1414) After three months, Appellant deserted the army and hid in the mountains until he was apprehended. (R1414) Appellant was subsequently sentenced to four years in prison for being absent without leave from the military. (R1414)

Appellant was released from prison at the age of twenty one on the condition that he return to military service. (R1414) Appellant was sent to Angola where he was wounded three times and almost died. (R1415) Dr. Lombillo noted that Appellant had scars on his hand and gums from wounds incurred in Angola. (R1415) Dr. Lombillo further testified that while in Angola Appellant was forced to fight for survival and it became "almost a reflex" to use guns whenever it was necessary. (R1416)

Following his term of duty in Angola, Appellant returned to Cuba and subsequently went to the Peruvian Embassy where be sought political safety to leave the country. (R1416) After obtaining permission to leave, Appellant came to the United States. (R1417)

In Miami, Appellant became associated with a group called Alpha 66. (R1417) Dr. Lombillo described Alpha 66 as a "militaristic underground Cuban organization in Miami whose main goal is to overthrow the Castro government." (R1417) Appellant was subsequently involved in an aborted attempt to infiltrate one of the forts in Cuba. (R1417)

As a result of this history, Dr. Lombello noted, background had been one of "constant turmoil and struggling, guns and

fights and action from one place to another." (R1418) Dr. Lombillo further testified that while Appellant had been pleasant and cooperative with him, Appellant could "react completely different when the instincts for survival take over...." (R1418)

Dr. Lombillo indicated that in times of stress Appellant would do whatever was necessary to protect himself. Dr. Lombillo concluded that while Appellant was not "mentally ill" at the time of the offense, "he was under a great deal of stress...and the issue of his survival is important because when he was in the war in Angola there were acts similar to that." (R1420)

After hearing the evidence, the advisory jury recommended the death penalty by a vote of eight to four. (R1456) The court immediately indicated that it would accept the jury's recommendation. (R1458)

On March 29, 1984, the court filed written findings in support of the death sentence.[3/] (R240) The court concluded that no mitigating circumstances were present. (R242) The court found the following aggravating circumstances to be applicable: the murder was committed while Appellant was engaged in the crime of robbery; the murder was committed for the purpose of avoiding arrest; and in committing the murder, Appellant knowingly created a great risk of death to many persons. (R242-243)

[3/] The court's written findings are attached as an Appendix to this brief.

ARGUMENT

ISSUE I.

BECAUSE HE DID NOT UNDERSTAND ENGLISH, ERNESTO SUAREZ WAS DENIED HIS RIGHTS TO CONFRONTATION AND DUE PROCESS WHERE HE DID NOT RECEIVE CONTEMPORANEOUS TRANSLATION OF THE TESTIMONY GIVEN IN ENGLISH AT HIS TRIAL.

Following Appellant's conviction and the jury's advisory recommendation of death, defense counsel moved for a new trial alleging that Ernesto Suarez had been denied his right to contemporaneous translation of the testimony given in English at trial. (R238) Defense counsel proffered that Mr. Suarez did not speak English and that he had not understood the testimony at trial. (R1465)

After finding that an interpreter had been appointed and was present throughout the trial, the court denied the motion, reasoning:

> The fact that there was no literal translation word for word as the trial progressed, as far as I'm concerned, is the responsibility of the defense.
>
> The Court's not going to take the responsibility for that. (R1465)

The trial court's ruling was erroneous. Ernesto Suarez had a constitutional right to adequate translation of the proceedings against him at trial, and the court had an affirmative duty to insure that Mr. Suarez was aware of that right.

A. Right to Adequate Translation

The Sixth Amendment right to confront one's accusers, which includes the right to cross-examine witness (Pointer v. Texas,

380 U.S. 400,405, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965)), as well as the right to be present in the courtroom at every stage of trial (Illinois v. Allen, 397 U.S. 337,338, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970)), and the fundamental fairness required by the due process clause of the Fourteenth Amendment, include the right of a criminal defendant who does not understand English to have the proceedings at trial translated into a language he understands. United States ex rel Negron v. State of New York, 434 F.2d 386 (2d Cir. 1970); United States v. Carrion, 488 F.2d 12 (1st Cir. 1973), cert.den., 416 U.S. 907, 94 S.Ct. 1613, 40 L.Ed.2d 112 (1974); Commonwealth v. Carcia, 397 Mass. 422, 399 N.E.2d 460 (1980); Baltierra v. State, 586 S.W.2d 553 (Tex.Cr.App. 1979). As the court stated in Carrion:

> The necessity for an interpreter to translate from a defendant's native language into English when the defendant is on the stand, and from English into the defendant's native language when others are testifying, has been elevated to a right when the defendant is indigent and has obvious difficulty with the language. Clearly, the right to confront witnesses would be meaningless if the accused could not understand their testimony, and the effectiveness of cross-examination would be severely hampered ....The right to an interpreter rests most fundamentally, however, on the notion that no defendant should face the Kafkaesque spectre of an uncomprehensible ritual which may terminate in punishment.
> 488 F.2d at 14-15 (Citations omitted).

In this case it is evident from the record that the trial court was aware that Mr. Suarez did not understand English.[4/]

4/ An interpreter was used to translate Appellant's testimony for the jury when he took the stand, as well as the testimony of accomplice witnesses Rodriquez and Montoya. (R842,1096,1190)

In fact, a few days after the indictment was filed the court appointed an interpreter to assist the defense. (R12)

Since the court made a factual determination that an interpreter was needed, Mr. Suarez had a constitutional entitlement to adequate translation of the proceedings at trial. United States v. Carrion, 488 F.2d at 14-15.

B. Duty of the Court

In denying Appellant's motion for a new trial, the court ruled that it was "not going to take the responsibility" for Appellant being deprived of an adequate translation of the proceedings at trial. (R1465) However, the court did have a responsibility to advise Mr. Suarez of his right to a translation of the English testimony given at trial. United States ex rel Negron v. State of New York, 434 F.2d at 390-391; United States v. Carrion, supra. As the court stated in Negron:

> The least we can require is that a court, put on notice of a defendant's severe language difficulty, make unmistakably clear to him that he has a right to have a competent translater assist him, at state expense if need be, throughout his trial.
> 434 F.2d at 390-391.

Although the court in the present case appointed an interpreter following Appellant's indictment to assist the defense, the court never personally admonished Appellant concerning his right to translation of the trial proceedings.[5/] Thus, it cannot

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[5/] There are three principal reasons why a non-English speaking criminal defendant needs an interpreter: (1) to facilitate communication between the defendant and his English speaking attorney; (2) to translate during the defendant's testimony if he takes the stand; and (3) to enable the defendant to reasonably understand (CONT'D)

be said that Appellant waived his right to adequate translation by failing to assert it. Waiver by definition is the "intentional abandonment of a known right." Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed.1461 (1938). As the court emphasized in State v. Natividad, 111 Ariz. 191,194, 526 P.2d 730,733 (1974):

> A defendant who passively observes in a state of complete incomprehension the complex wheels of justice grind on before him can hardly be said to have satisfied the classic definition of waiver as the voluntary and intentional relinquishment of a known right.

Moreover, the right to adequate translation of the court proceedings is a right which is personal to the accused and is not waivable by his attorney. State v. Neave, 344 N.W.2d 181 (Wis. 1984). Certainly, the right of an accused to a translation of the trial proceedings cannot be considered a tactical decision to be left to the determination of counsel. In Negron, the court stated:

> Not only for the sake of effective cross-examination, however, but as a matter of simple humaneness, Negron deserved more than to sit in total incomprehension as the trial proceeded. Particularly inappropriate in this nation where many languages are spoken is a callousness to the crippling language handicap of a newcomer to its shores, whose life and freedom the state by its criminal processes chooses to put in jeopardy. 434 F.2d at 390.

The right to an interpreter is the right of a criminal defendant to be treated at trial as a comprehending individual

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5/ (CONT'D) the trial proceedings conducted in English. There is no indication in the record that either defense counsel or the court was aware that Appellant had a right to translation of the trial proceedings until after the jury had rendered its verdict and advisory recommendation of death.

rather than as an insensate object. As the court emphasized in *State v. Natividad*, *supra*, a trial in which the defendant is unable to understand the language of the proceedings "comes close to being an invective against an insensible object." 526 P.2d at 733.

C. *Summary*

It is evident from the record that Appellant did not understand English and that the trial court was aware of Appellant's language disability. Therefore, because Appellant was not informed that he had a right to translation of the court proceedings and did not personally waive that right, Ernesto Suarez's convictions and sentence must be reversed and this cause remanded for a new trial.

ISSUE II.

THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION TO SUPPRESS STATEMENTS WHERE IT WAS ESTABLISHED THAT ASSISTANT STATE ATTORNEYS HAD CONDUCTED INTERVIEWS WITH APPELLANT WITHOUT NOTIFYING APPELLANT'S DEFENSE COUNSEL, THEREBY VIOLATING THE ETHICAL CANNONS OF THE FLORIDA CODE OF PROFESSIONAL RESPONSIBILITY.

At the hearing on Appellant's motion to suppress statements, it was established that Assistant State Attorneys Jerry Berry and Herman Castro had interviewed Appellant on two occasions prior to trial without the consent or knowledge of Appellant's defense attorney. Because the conduct of Assistant State Attorneys Berry and Castro violated the ethical cannons of the Florida Code of Professional Responsibility, the trial court erred by denying Appellant's motion to suppress.

Following Appellant's arrest counsel was appointed to represent him, and on April 5, 1983, a notice of Appellant's invocation of the right to counsel was filed with the court and served upon the State Attorney's Office. Thereafter, on August 19, 1983, Appellant requested to speak with someone from the State Attorney's Office. After discussing the propriety of speaking with Appellant without first notifying his defense attorney, Assistant State Attorneys Delano Brock and Jerry Berry concluded that the cannon of ethics which prohibits an attorney from discussing the case with a party who is represented by counsel, would not be "any impediment" to interviewing Appellant. (R1555-1556)

Thereafter, Assistant State Attorney Berry obtained a statement from Appellant concerning his involvement in the of-

fenses charged. Assistant State Attorney Herman Castro was also present at the interview for purposes of translation.

After learning of this incident, Appellant's defense counsel appeared in court on November 7, 1983 and objected to the conduct of the State Attorney's Office. Later the same day, Assistant State Attorneys Berry and Castro conducted another interview with Appellant and obtained a second statement relating to the crimes charged.

The defense subsequently moved to suppress the statements. The motion was denied and the statements were introduced at trial.

Disciplinary Rule 7-104 of the Florida Code of Professional Responsibility prohibits an attorney from communicating with a person of adverse interest who is represented by counsel.[6/] The Rule states:

> (A) During the course of his representation of a client a lawyer shall not:
>
> (1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.

This salutory rule is fundamental to the effective functioning of the legal profession. The ethical prohibition protects an adverse party from the imbalance of skill and knowledge between laymen and lawyers. Massiah v. United States, 377 U.S. 201,211, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964)(dissent).

6/ The Florida Rule 7-104 is identical to Disciplinary Rule 7-104 of the ABA Code of Professional Responsibility.

Moreover, prosecutors are no less subject to the prohibition against communication with a represented party than are members of the private bar. As the court stated in State v. Yatman, 320 So.2d 401,402-403 (Fla.4th DCA 1975):

> There appears to be some doubt among some prosecutors that DR7-104 Code of Professional Responsibility, 32 F.S.A., applies to their activities. Perhaps this doubt exists because prosecutors do not have an individual client to represent. Be that as it may, there is no provision of the Canon of Ethics more sacred between competing lawyers than the prohibition against communicating with another lawyer's client on the subject of the representation. Such knowing communication constitutes the grossest sort of unethical conduct.

The ethical prohibition against ex parte communications with an adverse party was clearly violated in this case. Nevertheless, the trial court, while finding the prosecutors' conduct "distressing" (R1570,1596), refused to suppress the statements which resulted from the unethical conduct. The court reasoned that since the Appellant initialed the contact and waived his right to counsel, there had been no constitutional violation.

However, the trial court's reasoning neglects the fact that the Constitution and the Code of Ethics stem from different sources and serve independent interests. While the Constitution represents only the "minimal historic safeguards" (McNable v. United States, 318 U.S. 332,340, 63 S.Ct. 608, 87 L.Ed. 819 (1943)), the Code embodies more. It articulates a lawyer's obligation "to maintain the highest standards of ethical conduct." Florida Code of Professional Responsibility Preamble.

Unlike the Constitution, the Code of Professional Responsibility is not directed solely at a defendant's rights. For

example, Disciplinary Rule 7-104 is also intended to enhance the entire legal profession's ability to perform its essential functions effectively through the protective screen it places around the client and the attorney-client relationship. Once this relationship is established, the attorney has assumed the duty to zealously and competently represent the client and he may be held accountable for faithful performance. Because of this broad responsibility the attorney must have some measure of control over the developments concerning his client, whether in the nature of the investigation, discovery, settlement or otherwise. No attorney can insure that his client will not imprudently sign a release, for example, or divulge priveleged information whether by reason of ignorance or susceptibility to undue pressure. The Code supplies the necessary restraint in order to make the attorney's duty tenable by controlling the conduct of the adversary's counsel.

Thus, the communication prohibition remains operative even where a represented party requests or agrees to communicate in the absence of his own attorney with opposing counsel. ABA Comm. on Professional Ethics, Opinions, No.108 (1934). Unlike the Sixth Amendment right to counsel, the Canon "is not something the defendant alone can waive." United States v. Thomas, 474 F.2d 110,112 (10th Cir.), cert.denied, 412 U.S. 932, 93 S.Ct. 2758, 37 L.Ed.2d 160 (1973).

Although some courts have been reluctant to exclude evidence obtained in violation of an ethical rule (See State v. Yatman, 320 So.2d 401,403 (Fla.4th DCA 1975), there is a strong

reason for invoking Disciplinary Rule 7-104 as the basis for exclusion. The affirmance of convictions obtained as a result of unethical prosecutorial conduct merely encourages contempt for disciplinary rules. This would be particularly true in the present case where the prosecutors discussed the proposed ethical violation and decided it would not be of "any impediment" to interviewing Appellant. (R1555-1556)

For these reasons, Appellant's conviction should be reversed and this cause remanded for a new trial.

ISSUE III.

THE TRIAL COURT ABUSED ITS DISCRETION BY ALLOWING CO-DEFENDANTS REYES AND SORY TO REFUSE TO TESTIFY ON GROUNDS OF SELF-INCRIMINATION WITHOUT FIRST DETERMINING THE EXTENT AND VALIDITY OF THEIR FIFTH AMENDMENT CLAIMS.

At trial, the defense attempted to call co-defendants Reyes and Sory as witnesses in support of Appellant's assertion that he had acted in self-defense. (R1184-1185) After being informed by the co-defendants' attorneys that their clients would invoke their Fifth Amendment privilege, the court precluded Appellant from calling the co-defendants as witnesses. (R1185, 1189) Despite Appellant's assertion that the testimony he intended to elicit from the co-defendants would not incriminate them (R1189), the court failed to determine the extent and validity of their Fifth Amendment claims. This constituted reversible error, depriving Appellant of testimony crucial to his defense.

It is well settled that in any type of proceeding a person is exempt from answering questions which may directly or indirectly incriminate him. State v. Sullivan, 37 So.2d 907 (Fla.1948). However, the matter of deciding what answers may be incriminating is not solely up to the witness himself, but is one requiring the exercise of the trial court's discretion. State v. Kelly, 71 So.2d 887 (Fla.1954). Accordingly, before excluding the testimony of a witness, the court must first establish reliably that the witness will claim the privilege and the extent and validity of the claim. Faver v. State, 393 So.2d 49 (Fla.4th DCA 1981).

In this case, Appellant asserted the claims of self-defense and lack of premeditation. Appellant admitted firing the shot which killed the victim but contended that he had been shot at first. Appellant attempted to call his co-defendants for the sole purpose of testifying that shots had been fired at them. (R1189) Under these circumstances, it was not sufficient for the trial court to rely upon the assertions of the co-defendants' attorneys that their clients would invoke the Fifth Amendment privilege. The court had a duty to determine from the co-defendants personally whether they would in fact invoke the privilege under these circumstances, what their testimony would be, and whether they had a reasonable apprehension that such testimony would incriminate them. Only after obtaining this information would the trial judge have the facts necessary to determine the extent and validity of the claim of Fifth Amendment privilege.

The trial court's failure to properly exercise its discretion was severely prejudicial to Appellant's defense. Defense counsel had proffered that the co-defendants would testify that they had been fired upon. Such testimony would have contradicted the testimony of the State's witnesses while corroborating Appellant's testimony and supporting his claim of self-defense.

For these reasons, Ernesto Suarez's convictions should be reversed and this cause remanded for a new trial.

ISSUE IV.

THE TRIAL COURT ERRED BY INSTRUCTING THE ADVISORY JURY ON AGGRAVATING CIRCUMSTANCES WHICH REFERRED TO THE SAME ASPECT OF APPELLANT'S CRIME, THEREBY ALLOWING THE JURY TO IMPROPERLY DOUBLE AGGRAVATING FACTORS DURING THEIR DELIBERATIONS ON THE PROPRIETY OF THE DEATH PENALTY IN THIS CASE.

This Court has emphasized that aggravating circumstances which refer to the same aspect of a defendant's crime may not be doubled during the penalty phase weighing process. Provence v. State, 337 So.2d 783,786 (Fla.1976). In the present case, the trial judge allowed the jury to improperly double two pairs of aggravating circumstances during their deliberations on whether to recommend the death penalty. This procedure violated the Provence decision and may well have been a determining factor in the jury's 8-4 recommendation of death.

At the penalty phase jury instruction conference, the defense objected to proposed instructions on two pairs of aggravating circumstances under Section 921.141(5), Florida Statutes: that the murder occurred in the commission of a robbery (subsection d) and that the crime was committed for pecuniary gain (subsection f); and that the murder was committed to avoid arrest (subsection e) and that the murder was committed to hinder the exercise of law enforcement (subsection g). (R1430-1431) The defense contended that an improper doubling would occur if the jury was allowed to consider both subsections d and f as separate aggravating factors since both factors referred to the same aspect of Appellant's crime. A similar argument was made

with respect to subsections e and g. The trial court, while noting that consideration of these pairs of aggravating circumstances "might qualify as doubling of the factors" (R1432), nevertheless overruled the defense objections and instructed the jury on all four aggravating circumstances.[7/] The court also refused a defense request to give a cautionary instruction to the jury on the impropriety of doubling-up aggravating factors relating to the same aspect of the crime. (R1432-1433)

The defense objection to the instructions which permitted the jury to double-up aggravating factors was well-founded and should have been granted. In Provence, this Court specifically prohibited the doubling-up of subsections d (commission of a robbery) and f (pecuniary gain). Likewise, in White v. State, 403 So.2d 331,338 (1981), this Court condemned the doubling-up of the aggravating circumstances contained in subsections e (avoiding arrest) and g (hinderance of law enforcement). In fact, in its written findings in support of the death penalty the trial court, after finding the applicability of subsections d and e, specifically did not consider subsections f and g concluding that it "would unnecessarily constitute a doubling of the aggravating factors." (R242)

The reasoning underlying the contradictory policy of allowing the jury but not the court to improperly double aggravating circumstances was expressed by the trial judge as follows:

7/ The jury was also instructed on a fifth aggravating circumstance: that the defendant created a great risk of death to many persons (subsection c).

> It does not appear to the court to be clear from the appellate cases it's read to be improper for the jury to consider those even though it's clear they cannot be used by the court in the sentencing of the defendant.
> (R1432)

However, it is self-evident that if it is improper for the trial court to double-up aggravating factors in reaching its conclusion as to the propriety of the death penalty in a given case, it is equally improper for the jury to double these same aggravating circumstances in making their determination. The trial court's reasoning belittles the jury's function in the death penalty scheme by implying that the advisory jury's role is so insignificant that the jury need not follow the law as enunciated by this Court.

The jury is the conscience of the community and this Court has emphasized the importance of the jury's role in recommending life or death. Tedder v. State, 322 So.2d 908 (Fla.1975). The jury's recommendation must weigh heavily with the trial court, and the jury's advisory opinion takes on added significance on appeal in the event a trial judge overrides a life recommendation. Tedder v. State, 322 So.2d at 910. Therefore, because of the importance of the jury's role to the rational and just functioning of the Florida death penalty process, fundamental fairness requires that the jury, no less than the trial judge, be guided by the applicable standards and law which has been enunciated by this Court.

Therefore, because the trial court erred by allowing the jury to double-up aggravating circumstances, and because

the improper doubling may well have influenced the jury's death recommendation, Ernesto Suarez's death sentence should be reversed and this cause remanded for a new penalty proceeding before an advisory jury.

ISSUE V.

THE TRIAL COURT ERRED BY SENTENCING ERNESTO SUAREZ TO DEATH BECAUSE THE PENALTY WEIGHING PROCESS INCLUDED INAPPLICABLE AGGRAVATING CIRCUMSTANCES AND EXCLUDED APPLICABLE MITIGATING CIRCUMSTANCES THEREBY RENDERING 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 an inapplicable aggravating circumstance; doubling two other aggravating circumstances; injecting the element of remorse into the weighing process; and excluding applicable mitigating factors. The trial court's misapplication of the statute rendered Ernesto Suarez'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 Appellant Knowingly Created A Great Risk Of Death To Many Persons.

The trial court found as an aggravating circumstance that the Appellant created a great risk of death to many persons. In support of that finding, the court stated:

> [T]he facts and evidence of this case demonstrate that there was, indeed, a high probability or great likelihood of death to many persons created by the defendant's actions. The defendant's conduct was contemporaneous

> with the capital felony in that the evidence shows that the defendant wildly fired 14 rounds from his semi-automatic rifle at the police officers and that at the specific time of the murder there were at least three (3) or four (4) other police officers within 20-30 feet of the defendant.
> (R243)

Initially, it must be emphasized that in addition to the deceased, there were only three, not four, other police officers present at the time of the shooting. (R662,711) These officers were McDaniel, Waller, and Kuhl. This fact was noted by the prosecutor in his closing argument to the advisory jury. (R1425-1426)

This Court has held as a matter of law that the presence of three persons in addition to the victim is insufficient to establish the aggravating circumstance of great risk of death to "many" persons. Johnson v. State, 393 So.2d 1069 (Fla.1980). In Kampff v. State, 371 So.2d 1007 (Fla.1979), this Court stated:

> When the legislature chose the words with which to establish this aggravating circumstance, it indicated clearly that more was contemplated than a showing of some degree of risk of bodily harm to a few persons.... The great risk of death must be to "many" persons. By using the word "many," the legislature indicated that a great risk of death to a small number of people would not establish this aggravating circumstance.
> 371 So.2d at 1009-1010.

The Kampff decision was followed by Johnson v. State in which the defendant had engaged in a pistol shoot-out with the proprieter of a pharmacy during an attempted armed robbery. Three other persons were present in the drugstore at the time.

In reversing the trial court's finding that the defendant had created a great risk of death to many persons, this Court emphasized:

> The "many persons" referred to by the trial court were the other three persons present in the drugstore at the time of the shoot-out. Three people are not "many persons" as we have interpreted that term in the context of Section 921.141(5)(c).
> 393 So.2d at 1073.

Therefore, it is clear that in the present case, the trial court erred by concluding that Appellant created a great risk of death to many persons.

B.

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

The trial court found as aggravating factors that the murder was committed while the Appellant was engaged in flight after committing a robbery[8/] and that the murder was committed for the purpose of avoiding arrest. These two aggravating circumstances refer to the same aspect of Appellant's conduct (fleeing arrest) and thus the trial court's findings constitute an improper doubling of aggravating factors in violation of this Court's decision in Provence v. State, 337 So.2d 783 (Fla.1976).

8/ Although the trial court's finding is worded in terms of "attempted commission of the crime of robbery," it is clear from the record that Appellant had fled the scene of the robbery and was fleeing arrest at the time of the shooting. Accordingly, the appropriate finding under Section 921.141(5)(d) is "flight after committing" a robbery.

In Provence, this Court prohibited the doubling of aggravating circumstances which refer to the same aspect of the defendant's crime. Here, the court used the aspect of Appellant's flight from arrest to establish both the aggravating factors of avoiding arrest and flight after committing a robbery. This was error.

C.

The Trial Judge Erred By Using The Factor Of Lack Of Remorse To Enhance The Statutory Aggravating Circumstances And By Injecting His Personal Beliefs Into The Weighing Process.

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 trial court in the instant case violated the foregoing mandate by considering the factor of lack of remorse in concluding that Appellant should suffer the penalty of death.

The trial court concluded its findings in support of the death sentence by stating:

> There are sufficient and great aggravating circumstances which exist to justify the sentence of death. Indead, the actions of the Defendant show a total disregard for the rights and safeties provided by our laws and constitutions to the citizens of this State. His only profession is that of an outlaw and his only response to any provocation is to kill. The court truly believes that this Defendant has nothing but hate and distrust for any law enforcement agency or officer and that he does

not feel any remorse or misgivings for taking the life of Deputy Howell. His only concern is that he did not succeed and make good his scheme of robbery and murder. The Defendant is deserving of no other sentence but death. (R244)[Emphasis added]

It is clear from the foregoing comments that the trial court considered lack of remorse as an enhancement of the statutory aggravating circumstances.

Moreover, the court's conclusion that Appellant lacked remorse was merely personal supposition. There was no evidence presented with regard to a lack of remorse. Similarly, the court's conclusions that Appellant's "only profession is that of an outlaw and his only response to any provocation is to kill" are without basis in fact. Contrary to the court's suppositions, the evidence indicated that Appellant was a soldier and migrant worker, and there was no evidence to establish that Appellant had killed in response to provocation at any other time or place. Finally, the court's finding that Appellant's "only concern is that he did not make good his scheme of robbery and murder" is also without factual support.

Therefore, the trial court erred by considering lack of remorse as an enhancement of the statutory aggravating circumstances, and by injecting his personal beliefs and suppositions into the weighing process.

D.

The Trial Court Erred By Failing To Consider Mitigating Evidence Which Tended To Indicate That Ernesto Suarez Suffered From Post-Traumatic Stress Syndrome As A Result Of His Combat Experience In Angola.

The law is clear that the trial court must consider all evidence offered in mitigation. Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982). In the present case, there was substantial psychiatric and lay testimony presented which tended to indicate that at the time of the crime Appellant was suffering from stress as a result of his combat experience in Angola. The trial court's failure to consider or discuss this evidence in its findings in support of the death penalty constituted error.

At trial, Ernesto Suarez testified that he had immigrated to the United States from Cuba in May, 1980. Prior to coming to the United States, he had been forced to serve in the Cuban military. Mr. Suarez had been involved in combat duty in Angola.

Psychiatrist Jose Lombillo testified on behalf of the defense at the penalty proceedings. Dr. Lombillo had conducted interviews and examinations of Mr. Suarez prior to trial. Dr. Lombillo testified that Appellant had been wounded three times while in Angola and had almost died. While in Angola, Appellant developed instincts for survival and "it was almost reflex to use [guns] whenever it was necessary." (R1415-1416)

As a result of his examinations of Appellant, Dr. Lombillo concluded that Mr. Suarez was competent and that he was not mentally ill. (R1420) However, Dr. Lombillo also concluded that:

> [A]t the time of the offense he was under a great deal of stress and the issue of his survival is important because when he was in the war in Angola there were acts similar to that.
> (R1420)

Dr. Lombillo's conclusion is consistent with the psychological syndrome commonly known as post-traumatic stress disorder. See American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (3rd ed. 1980) Section 309.81. A feature of this disorder is increased irritability which

> may be associated with sporadic and unpredictable explosions of aggressive behavior, upon even minimal or no provocation. The latter symptom has been reported to be particularly characteristic of war veterans with this disorder.
> Diagnositc and Statistical Manual of Mental Disorders, §309.81 at p.237.

Accordingly, Appellant's post-combat related stress may well have been a contributing factor to his aggressive behavior in this case.

Certainly, this potentially mitigating evidence deserved consideration by the trial court. However, the court merely concluded that the statutory mitigating circumstances of mental impairment and mental disturbance had not been met, reasoning that Dr. Lombillo had testified that Appellant was competent and not mentally ill. However, even assuming *arguendo* that the evidence regarding Appellant's post-traumatic stress disorder is not encompassed by the definitions of the statutory mitigating circumstances, it nevertheless deserved consideration and discussion. The trial court is required to consider all evidence in mitigation. *Eddings v. Oklahoma*, *supra*.

Therefore, the trial court erred by failing to consider the mitigating evidence relating to the contributing effect of Appellant's combat induced stress on his actions in this case.

E.

The Trial Court Erred By Failing To Consider Nonstatutory Mitigating Evidence Which Was Presented By The Defense.

In its findings in support of the death penalty the court failed to discuss the nonstatutory mitigating evidence presented by the defense. The court merely concluded, after discussing the absence of statutory mitigating circumstances, that "[t]here are no mitigating circumstances, either statutory or otherwise, which would outweigh any aggravating circumstances." (R241) The court's summary conclusion that no nonstatutory mitigating circumstances existed was inappropriate. The trial court was required to consider the evidence of mitigation and at least make some reference to it in the weighing process. See Dougan v. State, 398 So.2d 439,441 (Fla.1981) dissent.

This Court has recognized that a defendant's history and background are relevant to the existence of mitigating factors. Shue v. State, 366 So.2d 387,390 (Fla.1978). In Shue, this Court noted the relevance of evidence relating to the defendant's violent and deprived childhood. Id., 366 So.2d at 389.

Similarly, in the present case Appellant was reared in an environment of violence and deprivation. Dr. Lombillo described Appellant's life as "a series of struggles he has suffered since he was a child." (R1413) Appellant was born in a Cuban military fortress on September 4, 1954 during a time of turmoil and revolution. Dr. Lombillo, himself a Cuban immigrant, described Cuba during this period as a "military state." (R1414)

Appellant's parents divorced at an early age and when his mother remarried he had difficulty dealing with his stepfather. (R1413) When Appellant was fifteen years of age, his stepfather attacked his mother. In an attempt to defend his mother, Appellant physically confronted his stepfather. (R1413) As a result, Appellant was banned from the house. (R1413) With nowhere else to go, Appellant joined the military. (R1414) However, he was subsequently absent without leave and as a result spent four years in jail. (R1414) As a condition of his release from jail, Appellant was forced to serve in the military again. (R1414) He was a member of a Marine infantry unit sent to Angola. (R1415) Upon his return to Cuba, he sought and was granted permission to come to the United States. (R1417)

Under these circumstances, the court should have considered and discussed the Appellant's violent and deprived background as a nonstatutory mitigating circumstance. Appellant's background, a circumstance over which he had no control, may well have been a contributing factor to his behavior in this case. As Dr. Lombillo stated:

> I'm trying to convey to you the constant turmoil and struggling, guns and fights and action from one place to the other. This is his background and this is what I noticed when I talked with him. My psychiatric examination of him, he appeared to be intelligent and articulate. He was very pleasant and he could be very cooperative. I mean, he can be very pleasant when you're talking to him but you can see how in danger he can turn into another person, almost like a cat. You can see he can react completely different when the instincts for survival take over to the point where he have control or not he might do everything that he do to hurt or help himself.
> (R1418)

Therefore, the trial court erred by failing to consider Appellant's history and background as nonstatutory mitigating circumstances prior to sentencing Ernesto Suarez to death.

Summary

Whether considered cumulatively or individually, the trial court's misapplication of the foregoing aggravating and mitigating factors requires that Ernesto Suarez's death sentence be vacated. Consequently, this Court should either reduce the death sentence to life imprisonment or remand this cause for a new penalty phase proceeding.

CONCLUSION

For the foregoing reasons, Ernesto Suarez respectfully requests this Honorable Court to reverse his convictions and vacate his sentence of death.

Respectfully submitted,

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