IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

MELVIN NELSON, JR. *

APPELLANT, *

VS. * CASE NO.: 65,279

STATE OF FLORIDA, *

APPELLEE, *

APPELLANT'S INITIAL BRIEF

ROBERT H. DILLINGER
DILLINGER & SWISHER, P.A.
5511 Central Avenue
St. Petersburg, Florida 33710
(813) 343-0132

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STATEMENT OF THE CASE

On October 24, 1982, a Pinellas County Grand Jury returned an indictment charging the Defendant MELVIN NELSON, JR. with murder in the first degree, robbery, and burglary. (R-17,18). The Defendant entered his plea of Not Guilty (R-28) and trial was originally scheduled in this cause for January 3, 1984. (R-56). Because of speedy trial, problems resulting from the extradition of the Defendant, the trial was reset to December 13th. (R-224). The trial began on the 13th and ended on December 17, 1983 with a guilty as charged to all counts. (R-294-296). On Monday, December 19th, the jury, after hearing the presentation recommended a life sentence. (R-305). On April 11, 1984, the trial court overrode the jury's verdict and sentenced the Defendant to death on the murder in the first degree charge; to a sixty (60) year sentence on the burglary, to run consecutive to the murder charge; and, a sixty (60) year sentence with a retention of jurisdiction on the robbery charge, also to be consecutive to the burglary charge. (R-333-339). Defendant's Motion for New Trial was denied (R-328), and a Notice of Appeal was timely filed. (R-348).

STATEMENT OF THE FACTS

The victim, Waldimir Baskovich, and his family moved to Clearwater, Florida from Gary, Indiana some twenty (20) years ago. (R-868). Mr. Baskovich was a local restauranteur. (R-864, 874a).

The victim's wife, Faye Baskovich, testified that around 7:20 p.m. on April 20, 1982, she and her husband were in the family room of their home at the corner of Magnolia and Duncan Street in Clearwater, Florida. Two men wearing hats and rubber surgical gloves and carrying weapons entered the room. (R-713). One of the men took her to a bathroom (R-714) and the other man took her husband to the bedroom. (R-715). After a short period of time, she heard two (2) soft gunshots. (R-716). The men took items of jewelry and money from her house (R-719), had her lay on the floor, and hit her. (R-721). After the men left, she made a phone call to the operator in order to get the police. (R-722). The victim was found at the house by the paramedics to be unconscious with powder burns at the back of his head. (R-751). The emergency room physician pronounced the victim dead. (R-756).

A neighbor testified that at 7:30 p.m. on the day of the murder she saw two (2) black men arguing in a car parked near her house, which car was later determined to match the description of the vehicle rented by the Co-Defendant Echols. (R-759).

Later that evening, neighbors found various items taken from the victim's residence including a blue bag, a jewelry box and the victim's wallet. (R-778,786,790,812). Another person also found a gun, which was later to be determined to be consistent with the murder weapon (R-804) and which was later shown to be stolen from a liquor store in Indiana in 1972. (R-915).

Later, investigation by the police determined that a Robert Echols had rented a vehicle at Tampa Airport on the day of the homicide and that the renter returned the vehicle on the same day with fifty-eight (58) miles on the odometer. (R-950,956,966) Investigation also revealed that there were phone records between Mr. Echols and the victim's brother-in-law both before the offense, the day of the offense, and after the offense. (R-919, 938).

The State also introduced the testimony of witness, Leonard Adams, Echols' son-in-law, who indicated that he had had numerous conversations with Mr. Echols regarding the homicide in Clearwater, Florida. The testimony of Leonard Adams involved a tape recording made in Mr. Echols' home, non-recorded statements made at various points around Gary, Indiana, and another tape recorded statement made at the request of the Indiana State Police. (R-1167,1248,1340). The State introduced several experts who testified that a fingerprint of the Defendant MELVIN NELSON, JR. was found on the jewelry box which was removed from the victim's home. (R-1010,1033).

SUMMARY OF ARGUMENT

The Defendant raises the following points:

I. The State was allowed to offer an incriminating statement made by a Co-Defendant who was not present or available to testify against the Defendant in the Defendant's trial. The State argued that the statement was a declaration against penal interest and was thus allowed. Under Florida law this is incorrect since the legislature specifically provided in Florida Statute 90.804(2)(c) that this type of statement was prohibited. The specific sentence added by the Florida legislative to the statement against interest paragraph reads as follows:

> A statement or confession which is offered against the accused in a criminal action, and which is made by a Co-Defendant or other person implicating both himself and the accused, is not within this section.

The statement was made by a Co-Defendant and implicated the Defendant. It clearly should not have been admitted and it was harmful and prejudicial to the Defendant.

II. The second point involves statements implicating the Defendant, which statements were admitted under the co-conspirator exception to the hearsay rule. While there was evidence showing a conspiracy between Defendant Echols and Dragovitch, Defendants who were tried separately, there was no independent proof of the Defendant NELSON's involvement. The record shows that the Defendant NELSON was not even available

physically until eight (8) days before the murder. The evidence shows that Echols and Dragovitch had been planning the homicide for a long period of time. Defendant NELSON was not involved in any of the prior attempts or the prior planning. The evidence against the Defendant NELSON was a fingerprint on a box taken from the house and a neighbor who saw two (2) black males arguing in the victim's white neighborhood after the crime. There simply was no evidence of the involvement of the Defendant in a conspiracy and the law is clear that being an aider and abettor is not evidence of being a co-conspirator.

III. The Defendant's next point involves the procedure used at trial regarding the transcripts made of the two taped statements of the Co-Defendant. The judge allowed each juror to have a copy during the playing of the tape and during the examination of the witnesses regarding the tape. The trial court also allowed a procedure wherein the witness would testify to the contents of the tape, the tape would be played and then the State would go over the transcript of the tape page by page. This procedure violated the rules involving the use of transcripts of tape recordings and the rules against under repetition and improper influence.

IV. The fourth argument regarding guilt phase was the error in closing agument when the prosecution argued that "to acquit the Defendant was to give the Defendant a license to kill". There were also several comments on the Defendant not testifying.

V. In penalty phase, the question is whether the jury override was proper. The jury found the Defendant guilty of felony murder and even wrote it on their verdict form. Implicit in the evidence and the finding of the jury was that the Defendant was not the triggerman and was not preent in the room wehen the victim was killed. The trial court found the jury's verdict as to felony murder was a legal nullity. The trial court also considered numerous non-statutory aggravating circumstances including but not limited to non-violent crimes, declaring the Defendant a menace, not rehabilitatable and a person who showed no remorse or compassion for the victim. Many of the trial court's findings resulted from a letter from the psychiatrist which was submitted as a response to the prosecutor's letter to the doctor. The doctor's letter refers to a lengthy report from the sentencing memorandum which the prosecutor apparently sent to the doctor. The doctor's conclusions are based on the report. There is no copy of the report sent to the doctor in the record and no copy was made available to the Defendant. This doctor's examination also was done without the benefit of Miranda.

ARGUMENT

POINT I

THE COURT ERRED IN ALLOWING THE TAPED STATEMENT (TAPE #1) INTO EVIDENCE AGAINST THE DEFENDANT NELSON.

The State, over the objection of the Defendant, introduced a taped statement between an informant - Leonard Adams and Co-Defendant Echols. The State predicated this admission as a statement against interest and thus an exception to hearsay under Florida Statute 90.804(2)(c). (R-1119). It was undisputed that the Defendant NELSON was not present during this conversation.

Florida Statute 90.804(2)(c) reads as follows:

> (c) Statement against interest. -- A statement which, at the time of its making, was so far contrary to the declarant's pecuniary or proprietary interest or tended to subject him to liability or to render invalid a claim by him against another, so that a person in the declarant's position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is inadmissible, unless corroborating circumstances show the trustworthiness of the statement. A statement or confession which is offered against the accused in a criminal action, and which is made by a codefendant or other person implicating both himself and the accused, is not within this exception.

The State showed that Co-Defendant Echols was not available (R-1079) and then indicated that in light of Echols not being available that the statement under the Florida law can thus

come in. The State cites some Federal cases on the subject (R-1125) and then represents to the Court that the addition of the last sentence in the Florida Statute - the Bruton aspect - was meant to narrow the interpretation under the Federal Rules. (R-1123-24).

The Florida addition of the Bruton section was clearly meant to expand the federal interpretation of declaration against penal interest. See Ehrhardt, Florida Evidence, 2nd Edition at page 560. The Federal Rules do not include the last sentence which appears in the Florida Rules. The addition of that wording of -- "A statement or confession which is offered against the accused in a criminal action, and which is made by a Co-Defendant or other person implicating both himself and the accused, is not within this exception" - was clearly added to prevent the precise situation which occurred here. Clearly the Defendant NELSON could not cross-examine the Co-Defendant Echols since Echols invoked the 5th Amendment. The statements made by the Co-Defendant Echols clearly implicated the Defendant NELSON. The statements introduced showed that the Defendant Echols and his partner did the killing. Defendant NELSON is on trial for being the partner of Defendant Echols. The State's assertiion that because the Defendant NELSON is not directly named he is not directly implicated (R-1123,1125), is without merit. It is "highly likely", in fact, it is the only plausible conclusion, that Defendant NELSON was the "other" person named and

incriminated by the statements in Tape 1. See State v. Williams, 554 P2d 646 (Ariz. 1976); Cook v. State, 353 So.2d 911 (Fla. 2d DCA 1977); Mims v. State, 367 So.2d 706 (Fla. 1st DCA 1979). This conclusion is particularly inescapable when viewed in light of the manner in which the evidence was presented at trial. When the State called the informant - Leonard Adams, to the stand, the Court asked the State if the State was going to introduce both statements of Adams before it introduced the tape.(1) The State responded affirmatively and proceded in that manner.

During direct examination and before the tape was played the State elicited that Echols had said that he and a friend went and shot the guy (R-1236) and that they had to leave her alive (R-1238). The State then elicits from a later conversation that the other participant is Defendant NELSON. After this is elicited the tape is played. (R-1248). Following this the State, still on direct of Adams, goes through the transcript of the tape wherein they elicit the following:

they conked her on the head (R-1258)

they didn't find any money (R-1259)

whatever they found in the house (R-1259)

This was all done on direct and clearly was done to implicate the Defendant NELSON as being the other person.

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(1) The statements were initially divided for the purpose of argument into the Tape 1 group and then the non-taped statements which directly identified the Defendant NELSON.

The sponsor's notes to the Florida Rules of Evidence regarding the declaration against penal interest clearly indicate that "this subsection could not make admissible against a criminal defendant statements which violated his right of confrontation". Defendant NELSON clearly could not confront the Co-Defendant Echols' statements and thus the admission of that first tape which clearly implicated Defendant NELSON was error. See also 4 Louisell and Mueller, Federal Evidence at 977, 1004-5, 1182.

This Court has confronted this issue before in Hall v. State, 381 So.2d 683 (Fla. 1980). This case was never cited to the trial court. In Hall, this Court stated the following at 687:

> [3] The fact that the defendants here were tried separately rather than jointly does not vitiate the constitutional infirmity. The crux of a Bruton violation is the introduction of statements which incriminate an accused without affording him an opportunity to cross-examine the declarant. It is immaterial whether denial of this opportunity occurs because the statements are introduced through the testimony of a third party or because the speaker takes the stand and refuses to answer questions concerning the statements.

The Court in Hall further noted (at 689):

> The policy reason for this holding is apparent. If the defendant has an opportunity to cross-examine the codefendant he may be able to develop facts which will convince the trier of fact that the prior statements were false. Where, as here, the codefendant's invocation of his fifth amendment privilege precludes such

> questioning by the defendant, the principles of Bruton and Douglas have been violated. Accord, Hill v. State, 330 So.2d 487 (Fla. 4th DCA 1976).

In this instance, the principles of Bruton were clearly violated and the evidence code iteself was likewise violated. The error was substantial and mandates reversal here as it did in Hall.

ARGUMENT

POINT II

THE COURT ERRED IN ALLOWING THE STATEMENTS FOLLOWING TAPE 1 INTO EVIDENCE ON THE BASIS THAT THEY WERE STATEMENTS OF A CO-CONSPIRATOR.

The State in its arguments as to the statements of Echols clearly represented that the statements of the Co-Defendant Echols on tape 1 were being offered on the basis of the exception of declaraton against penal interest and that the subsequent statements - both non-taped and taped (Tape #2) - were being offered as co-conspirator statements. (R-1131). The State never justified the admission of the post tape 1 statements on any other ground.

In Section 5.03(7)(a) of Model Penal Code conspiracy is defined as follows:

> Conspiracy is a continuing course of conduct which terminates when the crime or crimes which are its objects are committed or the agreement that they be committed is abandoned by the Defendant and by those with whom he conspired.

Florida's definition of conspiracy in Florida Statute 777.04(3) likewise recognizes the aspect of an agreement to commit a crime. Under Florida law the well recognized principles governing the admission of co-conspirator statements under Florida Statutes 90.803(18)(e) are: 1) independent proof of the existence of the conspiracy and of the Defendant's participation in it; 2) the

making of the declaration during the course of the conspiracy; and, 3) that the statements were made in furtherance of the conspiracy. Honchell v. State, 257 So.2d 889 (Florida 1971); Farnell v. State, 214 So.2d 753 (Fla. 2d DCA 1968).

All statements offered under this exception were made after the murder occurred. (R-1126, 1130). The State never argued that the conspiracy involved anything other than the murder. The State's argument was that the post murder statements came in because of the activities of the conspirators after the murder. The State acknowledged that no case or point in the Florida law regarding the termination of a conspiracy for the purpose of terminating this hearsay exception had been discovered. (R-1183,1184). Both sides submitted conflicting federal cases on the issue. (R-1182, 1187).

The factual basis for the admission of the post murder statements involved the Co-Defendant Echols' concern with the actions of Defendant NELSON. Clearly the substance of Echols' fear was that Defendant NELSON by his actions would cause events to occur which would expose the prior murder and hurt the Defendant's and that Defendant NELSON might physically hurt Co-Defendant Echols. None of these fears in any way involved events which were involved in the planning of or the commission of the murder. The actions of Echols involved fears arising after the murder and Echols' concern that Defendant NELSON's actions may expose the prior deed. The actions being plotted by Echols to

Defendant NELSON were to placate the Defendant NELSON in order that the prior murder was not revealed. This results in a concealment type situation in which the State alleges that these post murder statements to conceal the murder result in the conspiracy continuing beyond the attaining of the criminal objective. This situation was confronted by the United States Supreme Court in Krulewitch v. U.S., 336 U.S. 440 (1949). Krulewitch involved an allegation of a conspiracy to transport women across state lines for prostitution purposes. The grant of certiorari in that case was specifically limited to the question of whether certain hearsay statements were made during the course of and in furtherance of the conspiracy. The conversations took place one and one-half months after the transportation of the women and involved an attempt by one of the conspirators to placate another co-conspirator, a situation analogous to Defendant NELSON's case.

Mr. Justice Black, writing for the majority, began his opinion by noting that whatever the conspiracy had been with regard to the transportation of the women, that conspiracy ended long before the conversation took place.

Considering the devastating nature of the conversation in issue, Black questioned why it had been deemed in furtherance of the seemingly completed conspiracy and why it had been allowed into evidence. Justice Black noted the far reaching results of the broad view being offered by the government by stating:

The Government now asks us to expand this narrow exception to the hearsay rule and hold admissible a declaration, not made in furtherance of an alleged implied but uncharged conspiracy aimed at preventing detection and punishment. . . . The rule contended for by the Government could have far-reaching results. For under this rule plausible arguments could generally be made in conspiracy cases that most out-of-court statements offered in evidence tended to shield co-conspirators. We are not persuaded to adopt the Government's implicit conspiracy theory which in all criminal conspiracy cases would create automatically a further breach of the general rule against the admission of hearsay evidence.

Justice Jackson, in a strongly worded concurrence, agreed with Black as to the ramifications of adopting the government position.

It is difficult to see any logical limit to the "implied conspiracy," either as to duration or means, nor does it appear that one could overcome the implication by express and credible evidence that no such understanding existed, not any way in which an accused against whom the presumption is once raised can terminate the imputed agency of his associates to incriminate him. Conspirators, long after the contemplated offense is complete, after perhaps they have fallen out and become enemies, may still incriminate each other by deliberately harmful, but unsworn declarations, or unintentionally by casual conversations out of court. On the theory that the law will impute to the confederates a continuing conspiracy to defeat justice, one conceivably could be bound by another's unauthorized and unknown commission of perjury, bribery of a juror or witness, or even putting an incorrigible witness with damaging information out of the way. e.a.

See also: Lutwak v. U.S., 344 U.S. 604 (1953) and Grunewald v. U.S., 353 U.S. 391 (1957).

The Supreme Court of California confronted the issue of incriminating statements made after a murder for hire plot had been successfully concluded in California v. Leach, 15 Cal.3d 419, 124 California Reporter 752 (1975) cert denied 424 U.S. 926. In Leach (as summarized in Criminal Conspiracies) there were numerous members of the conspiracy. The victim's daughter who was to pay for the killing, a woman who acted as a go between, and the named Defendant and another man who . . .

> . . . actually murdered the victim. In essence, the plan was for the killers to murder the victim for the sum of $10,000. Initially, only the two killers were arrested, after they were traced to the stolen gun used in the murder. While awaiting trial county jail Leach told the story of the killing to a fellow inmate, a story later repeated by the daughter to officers who posed as friends of Leach.
>
> At trial the statements of Leach and the daughter were admitted against all the defendants. The defense objected, claiming that no showing had been made by the prosecution that the statements were made during the course of the conspiracy; indeed, counsel argued that the conspiracy had terminated with the killing of the victim, long before the statements were made. The government countered by arguing that within the murder-for-hire conspiracy was another conspiracy, one designed to receive insurance benefits from the victim's policy and then to distribute the money to Leach, among others, as compensation for the killing. The trial court accepted the prosecution position finding that there was independent evidence of a continuing conspiracy which was in effect at the time the declarations were made.
>
> The California Supreme Court agreed that the test to be utilized was whether there was

independent evidence showing a conspiracy in effect at the time of the declarations, but it said that "such evidence is simply not to be found in this case." (at 763). While conceding that there was evidence that some of the conspirators engaged in the plot so as to collect the insurance proceeds and further evidence that at the time of the declarations the proceeds had not yet been collected, there was absolutely nothing to show that Leach was a party to <u>that</u> part of the conspiracy.

> The objective of the conspiracy was to kill Howard Kramer, not to collect insurance, and Leach cared not a whit whence his remuneration came, be it by insurance fraud, bank robbery, or dope peddling.
>
> We accordingly decline to treat a conspiracy to commit a particular criminal offense as necessarily entailing a second conspiracy to collect the insurance proceeds which will be paid as a matter of course upon the successful commission of the contemplated offense.

Moreover, the mere fact that Leach had not yet been paid did not show that the initial conspiracy continued as to him until the time of payment.

> In light of the inconsistency between the record in this case and the ruling below that there was independent evidence that the conspiracy was still continuing when Leach began confiding in Hagler some six months after the murder, it appears that the trial court erroneously [held] that once there is independent evidence that one conspirator was induced to enter the conspiracy by a promise of payment, then as a matter of law the conspiracy is to be deemed continuing until such time as other evidence indicates payment has been received. Such a presumption that conspirators who stand in an unenforceable debtor-creditor relationship are going to be motivated by a continuing common desire to make a full and satisfactory accouting,

> and are going to act in concert towards this objective in continuation of their conspiracy to commit the crime for which payment was promised, belies common sense and adds but another layer of tarnish to the already dull finish of conspiracy doctrine. (at 763)

The same situation occurred in this case. If any conspiracy existed it was certainly over when the victim was killed. The post murder statements in this cause, as in Leach, go to concern with actions of a Co-Defendant's concern with payments and the fact that that concern may result in exposure. In light of the above, the statements of Echols should not have been admitted.

This Court, however, need not even confront the issue of statements made after the object of conspiracy has been completed since in this instance there was insufficient evidence to show that the Defendant NELSON was involved in any conspiracy. The trial court believed that the fingerpirnt on the jewelry box found a few blocks from the crime scene was the significant factor. (R-1185). The defense counsel noted that a fingerprint was not indicative of a conspiracy and that fingerprint on a box some distance from the crime did not prove conspiracy. (R-1185). The Court thought it did and admitted the statements. In reviewing the evidence there are two non-hearsay elements of evidence reflecting on the Defendant NELSON. They are the jewelry box with his fingerprint and the testimony of a neighbor -Irene Brobst - that in a time frame consistent with after the murder, she saw two black men arguing in a car. (R-759). The showing of the phone toll records between Echols and

Dragovitch, the renting of the car and the weapon used may show a conspiracy between Echols and Dragovitch but they clearly do not show that the Defendant NELSON was involved. In fact, there was no evidence that the Defendant NELSON received calls, was on the phone with Echols or was even present when the car was rented. The car rental people never noted NELSON's presence. (R-950,955,959). The aspect of the Defendant NELSON being physically unavailable until only eight (8) days before the murder (R-1817) must also be noted because the State argued that in essence an aider and abettor must be a conspirator. (R-1189). The State stated that "it is possible under some circumstances, rather unusual ones, to be an aider and abettor without being a co-conspirator" but that it was impossible in a crime of this nature. (R-1189,90). That allegations under Florida law was clearly incorrect. In Ramirez v. State, 371 So.2d 1063 (Fla. 3d DCA 1979), the Court specifically noted that conspiracy is a separate and district crime from the offense which is the object of the conspiracy and that conspiracy is one step removed from an attempt and two steps removed from the commission of the substantive offense. The Court in Ramirez went on to note that evidence that a person aided and abetted another in the commission of an ofense, although sufficient to convict the person as a principal in such offense is insufficient to convict either person of a conspiracy to commit the subject offense. (at 1065).

Factually the Court noted that several men were seen unloading bales of pot and that upon arrival of law enforcement, the men fled. The Defendant Ramirez was located a short distance away and the Defendant's fingerprint was found on a cigarette box in one of the boats carrying the pot. The Court noted that this type of evidence was sufficient to show aiding and abetting but was clearly insufficient to show any involvement in a conspiracy. The Court indicated that its decision in the regard to the conspiracy charge was suppported by this court's decision in Goldberg v. State, 351 So.2d 332 (Fla. 1977). In Goldberg, this Court spoke to the dangers which lurk in the charge of conspiracy and the duty of the Courts to eliminate or at least minimize these dangers. One of the dangers specifically noted was the tendency to make conspiracy so elastic, sprawling and pervasive as to defy meaningful definition. The Court in Ramirez then specifically declined to expand the crime of conspiracy to embrace the acts of an aider and abettor. The Court stated that to do so would be to blur the demarcation line between a conspiracy to commit an offense and the substantive offense which is the object of the conspiracy, thereby lending unnecessary confusion to the crime of conspiracy contrary to the teachings of Goldberg, supra. The Court in Rameriz concluded by stating that the acts of aiding and abetting clearly make each actor a principal but without more cannot also make each actor a principal in the conspiracy to commit the crime.

Nothing was shown as to Defendant NELSON to show that he did anything more than aid and abet in the substantive offense. There were no phone calls involving the Defendant NELSON before the murder, there was no evidence of the Defendant NELSON being present when the conversation between Echols and Dragovitch took place, there was no evidence that the Defendant NELSON flew to Florida with Echols and there was no evidence that the Defendant NELSON was even present when the car was rented. Like Ramirez, the only evidence against Defendant NELSON is that he was present near the scene of the crime and his fingerprint was found on an object taken from the scene of the crime. There simply was no evidence to show the Defendant participated in any conspiracy, particularly since he was not even available until eight (8) days before the crime, and thus the trial court erred in allowing the statements of Echols in evidence against Defendant NELSON.

The Court erred on other grounds in allowing in Tape 2. The State had continuously stated that they were not going to enter the tape because of the highly prejudicial nature of the tape. (R-1132-3). During a proffer of the informant Adams, the State says the Defendant is opening the door to the tape because of his cross-examination. (R-1192). The cross-examination to which the State refers is contained in the record from pages 1169-1174. The only questions asked by defense counsel were those questions in which defense counsel was trying to determine which

statements were not taped and which statements were taped and when the statements were made. It is clear from the record that the number of statements made, the location when made and the time when made were confusing to not only the defense counsel but also the State and Court. There simply was no allegation of fabrication made and the point the defense counsel was trying to make was made clear when the following colloquoy took place:

> Q. (By Mr. McDermott:) The non-taped conversation.
>
> A. Yes, Sir.
>
> Q. All right. Let's ignore the tape for a while, so we can zero in. You said that sometime after --
>
> MR. SANDEFER: Judge, excuse me. for purposes of clarification, we never indicated that any of these other conversations were not part of the second taped conversation. I didn't simply ask him if it was taped, Mr. McDermott prefaced it by non-taped conversation. Is he eliminating the second one? I am not sure he wants to do that.
>
> MR. McDERMOTT: I am not sure what I am doing, either, because they won't tell me what they are talking about. I would like to get into what conversation he has had, whether it was taped or not. They led me to believe that matters on the second tape were not admissible.
>
> THE COURT: Excuse me, Mr.McDermott. Why don't you ask him?
>
> MR. McDERMOTT: I am trying to. (at 1170)

After this cross the State again says they are not going to present Tape II (R-1190) and state that the only purpose of using

Tape 2 is to indicate that Echols used the Defendant NELSON's name in the tape. (R-1192). The defense counsel then indicates that he has not suggested that the Defendant's name was fabricated and is unclear as to what the State is saying. (R-1193). The State then puts on Adams before the jury, defense counsel cross-examines and the State gets back on redirect and three pages into redirect begins questioning about the second tape. (R-1135). The State argued successfully that because the defense suggested the witness was aware of a reward being offered that the defense had clearly indicated that the witness fabricated the story. (R-1338). The record does not bear this out since nowhere during the cross of the witness Adams does the aspect of fabrication exist. The defense counsel adroitly presented evidence showing the Defendant NELSON was <u>not</u> the triggerman and attacked the witness's criminal record and dealings. The Court then ruled that the type of cross-examination opened the door for the clearly prejudicial tape. This was error.

ARGUMENT

POINT III

THE COURT ERRED IN THE PROCEDURE UTILIZED WHICH ALLOWED THE JURY ACCESS TO A TRANSCRIPT OF THE TAPE RECORDINGS AND WHICH PROCEDURE LED TO UNDUE REPETITION AND IMPROPER EMPHASIS UPON THE TAPED CONVERSATIONS.

Transcripts of the two tapes which have been previously mentioned were made and a copy was given to each juror. (R-1221, 1340,1247). The transcripts were not put into evidence and are not a portion of this record on appeal.

After each juror was given a copy of the first transcript the Court instructed the jury as follows:

> I would advise the jury that you are going to receive a copy of the transcript. The transcript itself, is not evidence. It's only an aid for you in following the evidence.
>
> You will rely upon the transcript, upon the transcript itself as being the evidence, and how you hear the tape. (at 1247) e.a.

This instruction was clearly erroneous and even though the Court gave an additional instruction later, (at 1251), the jury clearly had been told to rely upon the transcript.

The Defendant objected to the use of the transcripts (R-1221) and this was overruled. (R-1224). The State admitted that there were omissions and that portions were difficult to hear. (R-1223). The State indicated that in light of the hearing problems that the transcripts would be of substantial assistance to the jurors in understanding and interpreting what was going

on. (R-1223).

Florida Courts have struggled with the problem of transcripts to tape recorded conversations for twenty (2Ø) years. In Brady v. State, 178 So.2d 121 (Fla. 2d DCA 1965), the Court criticized the procedure of giving each individual juror a copy of a transcript of a tape recording. The Court ws concerned that the procedure wherein law enforcement prepared a transcript by repeated playbacks and reruns would result in the jury relying more on the transcripts than the tape and that the transcript would supplant the tape in the juror's mind. The procedure utilized in the instant case was similar since the witness Adams sat down with a detective who "aided" the witness in preparing the transcript. (R-1245). Likewise in Duggan v. State, 189 So.2d 89Ø (Fla. 1st DCA 1966) the Court held that the providing of a transcript violated the best evidence rule, was unauthenticated and violated the rules against undue repetition and improper emphasis. In Duggan the State requested that the transcripts be admitted "for the purpose of aiding the jury in hearing and listening to these tapes" (at 891). Each juror was then handed an individual copy for their use while the tapes were played. The jurors also took them into the jury room. The Court held this procedure to be improper. The Court also noted that the problem which arises when this procedure occurs is one of repetition and undue emphasis. The Duggan opinion quoted the Oklahoma case of Bonicelli v. State, 399 P.2d 1Ø63 (Okla. 1959)

when it said:

> "* * * [a]s defense counsel urges, the (trial) court might as well have said: 'Here is something good, we want you to have a double dose of it so you won't overlook it. We think its importance deserves extra special treatement. Hence, we do not only present the recording but in transcripted form so you won't possibly forget it and hence we place the judicial finger of approval on it by way of emphasis.' This too, was reversible error."

The problem of repetition and improper emphasis occurred in the instant case. The State was allowed to question the witness Adams about the substance of the conversations on the tape before the tape was played. (R-1229-1239). Then the transcripts were handed to the jury and the tape was played. (R-1247,1248). Folowing the playing of the tape the State then again questions the witness about the conversations by going over the transcript. (R-1251). The prosecutor begins at page 1 and continues through until the end of the taped conversation. (R-1259). A similar procedure occurred during the playing of the second tape. The jury was given the transcript (R-1454), the tape was played and then the State went over the contents with the witness. (R-1464-1484). There are numerous objections during this rehashing because the witness is being allowed to not only add material not on the transcripts but also to give explanations beyond what references were made in the tape. (R-1467). The witness, over Defendant's objection, also was allowed to fill in the "unintelligible" portions. (R-1473). The

problems which arise from this type of procedure was best shown during cross when there was questioning as to specific wording and the witnesses response was - I am not sure. Check the transcript. (R-1490). Following cross, the State tried to replay the entire tape but was not allowed. (R-1503).

The "double dose" of repetition referred to in Duggan became a triple dose on direct examination during Tape 1. This type of repetition is what the Duggan Court feared and is exactly what occurred here. The State clearly could not have put the victim's wife on the stand three times to say the same thing nor could they have put on any other witness three times for the same purpose. The clear purpose of this repetition is to emphasize the testimony and by utiliing this procedure undue emphasis was indeed placed. The trial Court, by allowing the transcript and this procedure, clearly, as noted in Duggan, placed the "judicial finger of approval" on it. This was error. See also Florida Statute 90.403; Coral Plaza Corporation v. Hersman, 220 So.2d 672 (Fla. 3d DCA 1969).

In Golden v. State, 429 So.2d 45 (Fla. 1st DCA 1983), cert denied 431 So.2d 988, the Court summarized the previous law in light of the circumstances of that particular case. In Golden the tape itself had not been introduced into evidence and apparently the witnesses at trial testified from transcripts made from those tapes as well as playing enhanced versions. Also certain small portions of the testimony were projected on an

overhead screen. No transcripts were provided to the jury during the playing or showing nor were any taken back into the jury room. The Golden court noted that the Druggan rule against undue repetition and improper emphasis did not appear to be violated by the procedure of merely reading the transcript and flashing brief excerpts on a screen. The Golden court noted that there was precedent in Brady, supra, Grimes v. State, 244 So.2d 130 (Fla. 1971) and Waddy v. State, 355 So.2d 477 (Fla. 1st DCA 1978), cert denied 362 So.2d 1056 (Fla. 1978) for reading to the jury but not for physically delivering for their use transcripts of taped statements. The Court in footnote 5 to the opinion, noted that only the attorneys had the transcripts and that the trial court made sure that the jury was not able to read from a transcript while the witness was being examined. Certainly Golden recognizes the problem inherent in undue repetition and improper emphasis. In Defendant NELSON's case the procedure utilized created exactly the improper situation feared in Golden. The jurors individually received a copy of the transcript, had it available to them during the playing of the tapes, and had it available to them while the State then went through the transcript by page number. The tapes were extremely important to the State's case and clearly constituted the bulk of their case. This type of undue repetition and improper emphasis has consistently been recognized as error and was error in this situation.

ARGUMENT

POINT IV

THE COURT ERRED IN NOT GRANTING A MISTRIAL DURING CLOSING ARGUMENT IN LIGHT OF IMPROPER REMARKS MADE BY THE STATE.

During closing argument the State made the following statement (at 1545):

> To use your common sense, all witnesses aren't free of eye problems. They aren't free of cataracts. That does not mean a crime didn't happen. That does not mean it can never be proved. If you are willing to say what Mr. McDermott asks you to say, that fingerprint on, a lot of corroboration is not enough, then what in effect you are doing, is giving this man right here a license to kill. e.a.
>
> MR. McDERMOTT: May we approach the bench?

The Defendant's objection was overruled. (R-1546). The State followed up with this argument by stating the following:

> MR. SANDEFER: Because in effect, what that argument entails is that the better planned a murder is, you are going to have to let him go because reward him for planning a murder.

Comments of this nature are intended to create the impression that if the jury acquits a Defendant, the Defendant will kill again. These types of comments have long been recognized as error. Rahmings v. State, 425 So.2d 1217 (Fla. 2d DCA 1983) (so you can sleep real good tonight because you will have prevented a murder by giving her a conviction); Grant v. State, 194 So.2d 612

(Fla. 1967) (do you want to give this man less than first degree murder and the electric chair and have him get out and come back and kill somebody else); Sims v. State, 371 So.2d 211 (Fla. 3d DCA 1979) (if acquitted, he can "go get another one" giving impression that the Defendant would commit another murder); Chavens v. State, 215 So.2d 750 (Fla. 2d DCA 1968) (... let him go back out in your community and handle more morphine); Jackson v. State, 451 So.2d 458 (Fla. 1984).

The prosecutor later argues regarding various statements made by the participants and Adams. He states: There is only one way the Defendant could relate those things or Echols could relate those things to Adams. (R-1554-5). The Defendant had not testified and no statements of the Defendant had been admitted. He continues on this course by later saying (at 1559):

> Mr. McDermott wants you to ignore the scientific proof and let the man go. There is nothing in the evidence to indicate innocence. The fingerprint is uncontradicted proof this man was involved. There is no other evidence.
>
> MR. McDERMOTT: Approach the bench, Your Honor?
>
> THE COURT: Yes, sir.

The Defendant's objection was overruled and the prosecutor went on to later say the same thing. (R-1582). Clearly the inference is that the Defendant has offered no evidence to the contrary and this ignores the fact that the Defendant does not have to offer anything and to imply in this manner that he does is clearly erroneous. Griffin v. California, 380 U.S. 609 (1965); Layton v. State, 435 So.2d 883 (Fla. 3d DCA 1983).

ARGUMENT

POINT V

THE COURT ERRED IN SENTENCING THE DEFENDANT TO DEATH IN LIGHT OF THE JURY'S LIFE RECOMMENDATION, PARTICULARLY IN LIGHT OF THE STRONG EVIDENCE INDICATING THAT THE DEFENDANT WAS NOT THE TRIGGERMAN.

The Jury was given verdict forms for murder, robbery and burglary. (R-294-6). The verdict forms were detailed for the robbery and burglary in that they included sub-paragraphs which needed to be checked. (R-295-6). The jury even returned to the courtroom to inquire if they were required to check those sub-paragraphs. (R-1651). The verdict form for the murder charge was not detailed. (R-294). Following their deliberations, the jury returned a vedict as to the robbery and burglary which included following the detailed verdict instructions as to specific findings. As to the murder, they found the Defendant guilty of murder in the 1st degree and wrote on the verdict form "Felony - Florida Statute 782.04." (R-294). The inclusion of the statutory enumeration is significant since the written jury instructions supplied to the jury included this enumeration for felony murder. (R-261). The instruction for premeditated murder did not include any statutory citation. (R-261). The instruction for premeditated murder did not include any statutory citation. (R-260). Thus the jury, after receiving detailed instructions as to specific findings with regard to the various types of robbery and burglary, when confronted with a

lack of detailed instruction as to first degree murder, made known its finding as to the type of first degree murder charge by clearly writing "Felony - Florida Statute 782.04." This result is based on common sense in light of what was clearly written on the verdict, and what was argued to the jury in penalty phase closing. (R-1777). Further, the finding as to felony murder in this situation is constitutionally mandated by Stromberg v. California, 283 U.S. 359 (1931).

The record is replete with evidence that the Defendant was not the triggerman. On cross-examination of the State's star witness - Adams - the following occurred (at 1302):

> Q: Did Echols tell you he shot Wally Baskovich?
>
> A: Yes, he did.
>
> Q: Tell me what he said?
>
> A: He said he shot Baskovitch twice, indicating bap, bap, he was gone.

Following this exchange, the witness again indicates that Echols said that Echols had shot the victim. He then admitted that he - the witness - had previously stated the following (at 1303,1304):

> Q: Do you recall the answer on line 23? He (Echols) said that they came in the house with the key that Alex had given them, shut off the alarm. His wife and Baskovich were in the kitchen. He took his wife to the bathroom, Ehcols' partner did, and Echols took Baskovich to another part of the house and shot him twice. Did you make that answer?
>
> A: Yes.

Following this, the witness again indicated that the following conversation had occurred (at 1305,1306) e.a.:

> Question: You had a conversation with Robert Echols about this murder. You can start from the beginning and tell me what you know, what you were told by Robert Echols.
>
> Answer: Okay. That morning I walked in the Bob Echols house and I said, "Bob, I'm going to ask you something straight out, and I want you to give me a straight answer." I asked, do you know anything about a murder in Florida? And he said, "yeah, I hit a guy in Florida." So, I asked who was this guy and he told me it was the business partner of Alex --he's speaking of Alex Dragovich -- he went on to say that the business partner, which I found out later was Baskovich, was standing in the way of a business deal, that a business deal that Bob and Alex and a guy named George had going there in Gary on the land that Bob's house is on now. He told me that they attempted to kill this guy Baskovich on three occasions, succeeding the third time.
>
> First time, he went to Florida to kill the guy, Baskovich's wife was having parties and friends over at the house. There was too many people around, so he had to scratch the deal. And he told me the second time his partner that he took down with him to kill this guy, Sham, had gotten drunk before he attempted to kill him. They had to scratch the deal again. The third time he told me that they got there and followed Baskovich from a restaurant he had stopped at after he played golf that evening. And he said that they waited in the bushes behind this restaurant, until he went home, and then they went to his home and came in with a key that Alex had given him to the home and burglar alarm. He said that they went in and found Baskovich and his wife in the kitchen of their home.
>
> Bob's partner took Baskovich's wife into the bathroom, roughed her up and hit her over the head, knocked her out, and Bob took Baskovich into another part of the house and

shot twice, indicating to me that, "bap, bap, he was gone."

Did you give that answer?

A: Yes.

Q: So, you told them that Bob told you that he did the shooting?

A: That was the impression I got on the first tape, yes.

The witness then admitted that before the taping occurred the Defendant Echols had said the following (at R-1320) e.a.:

Q: But, you had some conversation with Robert Echols before you even started taping, correct, about when he handed you the article?

A: Yes, he just told me, "I hit a guy in Florida."

Q: Did he use those words?

A: Yeah.

Q: I hit a guy in Florida.

A: Yes.

Following this the witness admitted that Defendant Echols had said the following (at R-1328):

I burned a mother fucker in Florida three to four months ago.

All the above statements were the initial statements made by Defendant Echols in this matter. Clearly, the record has substantial, if not overwhelming, evidence that Defendant Echols was the murderer and that the Defendant NELSON was in another room at the time of the murder. The jury's recommendation for

life is clearly consistent with this evidence and was a finding that the Defendant did not kill the victim and was in another room when it occurred. The Court's ruling that this finding "is but a legal nullity" is clearly erroneous. (R-342). The Court then continued on its erroneous path by finding that the Defendant NELSON was the triggerman (R-344) in spite of the considerable evidence to the contrary.

The trial court constantly placed considerable weight upon the fact that the Defendant NELSON was found to be armed. (R-344). The Court continued to stress this matter in the jury instruction conference too. This premise of the Court appears to be based on the fact that there was only one gun involved. The only aspect of this in the record is that the victim's wife saw what she believed to be a club and a gun. This witness, by the State's own admission, had been traumatized by the event and had difficulty recalling the events and coherently testifying as to what occurred on the day of the murder. (R-697). A review of her testimony in the record verifies this. (R-at 709). There clearly could have been two guns; however, a point that cannot be overlooked is that a club (billyclub shotgun) was recovered from the Defendant Echols' house. (R-1072,1655). This could certainly be the club that was carried by Defendant NELSON when he took the victim's wife into the bathroom. This club was also a firearm, as reflected by the jury's finding and, as shown by the evidence. (R-1655). The testimony of witness Adams is again

helpful in this regard since Adams testifed on two different occasions that Echols stated that Echols had thrown his gun out near the scene. (R-1320,1484). This gun was consistent with the murder weapon and was found near the scene of the crime. There was no testimony that Defendant NELSON carried the gun which was thrown out of the car and introduced at trial.

The Court never would consider and in fact totally rejected consideration of the issue presented in Enmund v. Florida, 458 U.S. 782 (1982) (R-1840,340-346). When the record is reviewed in light of witness Adams' testimony, it is clear that the Defendant NELSON was in another room with the victim's wife when the murder occurred. (R-1302,1303,1304,1305,1306). The failure of the Court to recognize this is also reflected in the Court's findings regarding the conspiracy argument (Point II on appeal). When one places Defendant NELSON in the light presented during the testimony of Adams, there is nothing to show Defendant NELSON knew that anything other than a burglary/robbery was going to occur. There had apparently been long ongoing conversations and previous attempts toward this murder by Defendant Echols and Defendant Dragovitch. Defendant NELSON, however, was only available a few days before this murder. (R-1817). Defendant NELSON was never shown to be aware of the previous discussions and never shown to have been present at any of them. His involvement was going into a house - which was guarded by an alarm system and which apparently had many

valuables and lots of cash - and taking the victim's wife into a bathroom apart from the victim. Defendant Echols did the killing and to say that Defendant NELSON knew that when they separated that Defendant Echols was going to kill the victim is speculation totally unsupported from the record. Another aspect which is supported by the record is that after the murder the two participants were seen arguing. (R-759). It is certainly reasonable to assume that the Defendant NELSON was upset about becoming involved in a murder when the event was probably supposed to be an easy burglary/robbery. (R-759). The non-triggerman issue (Enmund situation) was considered by the jury in light of the evidence but was not considered by the trial judge. This is error and is the type of error that requires reversal of the trial judge's override.

The trial judge also relied on numerous non-statutory aggravating circumstances in reaching his decision. The non-statutory aggravating circumstances considered by the trial judge are as follows:

a) Defendant was a dangerous person. (R-341)

b) Defendant was a menace and would continue to be for the rest of his life. (R-329,345)

c) Defendant had no reasonable prospect for rehabilitation. (R-329,339,341)

d) Defendant had a substantial prior non-violent criminal history. (R-345)

e) Defendant's lack of remorse. (R-1853)

f) Premeditation. (R-340,344)

g) A sentencing memorandum submited in Defendant Echols' case but not submitted to defense counsel or placed in this record. (R-329,1628)

Several of the factors listed above came from a post-trial examination of Dr. Walter Afield, a psychiatrist. Dr. Afield had been appointed for sentencing after Defendant's counsel filed a Motion to Determine Competency to be sentenced. (R-308-310). Competency to be sentenced was the only issue raised in the motion; however, the report far exceeded this. (R-317). The portion of the report most heavily relied upon by the Court, however, was a letter sent by the doctor and addressed to the prosecutor only. (R-329). This letter was then placed in the Court file approximately two (2) weeks later at which time copies were then sent to the defense lawyer. Dr. Afield's examination was done without the benefit of Miranda being given to the Defendant. (Dr. Chamber's, the other psychiatrist appointed, did advise the Defendant of his Miranda rights (R-318,319) and, interestingly enough, the trial court did not place any emphasis upon Dr. Chamber's report.) The law is clear that the admission of a doctor's testimony concerning evidence obtained from a Defendant undergoing a competency examination is inadmissible at the penalty stage of the prosecution unless the questioning had been preceded by Miranda warnings and a valid waiver of the Defendant's Fifth Amendment Rights. Estelle v. Smith, 451 U.S. 454 (1981). The report is particularly damaging

since it states that the Defendant is a menace, is a danger to civilized human beings and will be dangerous for the rest of his life. (R-329). The report also notes that there is no prospect for him being rehabilitatable or treatable. (R-329). The additional problem with this report - which is in essence a letter of response to a letter from the prosecutor - is that it is based upon the doctor's reading of "your (the prosecutor's) lengthy report in the sentencing memorandum." (R-329). Nowhere in the record is there a copy of the prosecutor's sentencing memorandum and in all likelihood it appears to be the same sentencing memorandum from the Echols' case previously referred to by the prosecution and previously made known that it was not in this record. (R-1678). Thus, the facts upon which the doctor based his conclusion as gathered from the sentencing memorandum are unknown. Clearly the doctor's findings were relied upon by the Court and clearly this procedure and the Court's reliance thereon is error. This type of procedure leads to arbitrariness and unreliability and was used to override the jury's recommendation of life. [It should also be noted that Dr. Afield did find that the Defendant "does have some severe, emotional disturbance" (R-329) but the trial court completely ignored this and even found that there was no mitigation mentioned anywhere in the record. (R-345)]

This Court has previously found that the non-statutory aggravating factors found by the trial in this instance are

erroneous: Miller v. State, 373 So.2d 882 (Fla. 1979) (propensity); Mikenas v. State, 367 So.2d 606 (Fla. 1978) (substantial criminal history); Provence v. State, 337 So.2d 783 (Fla. 1976) (prior arrests); Pope v. State, 441 So.2d 1073 (Fla. 1983); McCampbell v. State, 421 So.2d 1072 (Fla. 1982) (lack of remorse).

It is well settled that a jury's advisory opinion is entitled to great weight, reflecting as it does the conscience of the community and should not be overruled unless no reasonable basis exists for the opinion. Richardson v. State, 437 So.2d 1091 (Fla. 1983); Tedder v. State, 322 So.2d 908 (1975). In this instance, the jury implicitly found that the murder was a felony murder in which the Defendant was not the triggerman. All parties including the Court agreed it was not heinous, atrocious and cruel. (R-1681) (R-302,343). The Court in this instance treated the jury recommendation and the evidence upon which it is based as a legal nullity. This is error as there was a reasonable basis for the jury's finding in this cause. The Court also appears to have been affected in its decision by considering the facts and arguments of the Co-Defendant's trial. The State asked the Court to take judicial notice of evidence in Echols' case (R-1846) and the prior sentencing memorandum from Echols' case likewise kept popping up. (R-329,1817). This type of reliance has been recognized as error. Engle v. State, 438 So.2d 803 (Fla. 1983).

The trial court offered three statutory aggravating circumstances to the jury:

1. Prior violent felony-robbery.

2. Felony murder.

3. Cold, calculated and premeditated murder.

The trial court offered two mitigating circumstances to the jury:

1. Defendant was an accomplice.

2. Any other circumstances of the offense.

The evidence eventually showed a prior robbery conviction and the jury signified the finding of a felony murder in its verdict in the guilt phase. While the cold, calculated and premeditated instruction has been found to apply to a contract murder situation, it does not apply in a situation where the Defendant is the non-triggerman and is not physically present when the murder occurs. Enmund, supra; Cannady v. State, 427 So.2d 723 (Fla. 1983). Thus, the jury, based on the evidence, found the Defendant a participant in a robbery/burglary which resulted in a death in which the Defendant was not the triggerman. Their decision clearly is based on a reasonable interpretation of the evidence and a reasonable basis exists for their opinion as to life. The trial court accorded no weight to their opinion and not only ruled against the clear weight of the evidence as to the cold, calculated and premeditated, and triggerman aspect, but he also injected numerous non-statutory aggravating circumstances into the process. The jury's recommendation was reasonable and thus must stand.

Regarding the penalty phase, there is another issue which this Court should address. The issue in light of the jury's recommendations may not be harmful error. The practice, however, is clearly improper and should be stopped. The event complained of this the playing of the video tape in the penalty phase of an encounter created by the Clearwater Police against the other Defendant Dragovitch. The Defendant NELSON was not present and never had an opportunity to confront his accuser. The Bruton aspect of this clear. This is not an isolated instance of this type of conduct, however. It occurred in the guilt phase and it also occurred in the penalty phase of another case pending before this Court wherein the same prosecutor and judge followed the same course of conduct. See Walton v. State, case #65,101. Constitutional controls still apply in penalty phase and this Court should correct the problem in an appropriate manner.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the within and foregoing has been served upon the Attorney General's Office, Park Trammel Building, Eighth Floor, 1313 Tampa Street, Tampa, Florida, 33602.

This 28th day of February, 1985.

ROBERT H. DILLINGER, ESQ.