IN THE SUPREME COURT
STATE OF FLORIDA

ALEXANDER DRAGOVICH,

Appellant,

vs. Case No. 65,382

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT OF FLORIDA,
IN AND FOR PINELLAS COUNTY.

BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Alexander Dragovich will be referred to as "Appellant" in this brief. The State of Florida will be referred to as the "Appellee." The Record on Appeal will be referred to by the letter "R" followed by the appropriate page number.

SUPPLEMENTAL STATEMENT OF FACT

The statement of fact in the brief of appellant is generally accurate and sufficient for the purposes of the issues briefed. The state would, however, like to add its perspective on facts germain to two of the issues presented by the appellant's brief. The facts surrounding the Clark[1] Issue:

Near the close of the state's case in chief, the prosecution introduced videotapes of the appellant. R. 2729 These tapes showed the appellant meeting with Leonard Adams and Det. Edgar White who was posing at "Maddog's" man, Ziggie. White testified and was cross-examined at length about the events that these tapes showed. R. 2737-2793 The state also introduced a videotape of the appellant being questioned after his arrest. It was the state's exhibit 45. R. 2802 As the tape contained a five minute portion of the appellant sitting and waiting, handled there was a conference devoted to how it should be handled. R. 2804-2807 And, as the videotape contained the appellant's request for counsel, the court and counsel conferred about how that portion of the videotape should be kept from the jury. R. 2810-2814 The court instructed the jury that that portion of the tape had no evidentiary value and they would not hear it. R. 2418

In addition to introducing the videotape of the appellant's interrogation, Det. Fire also told the jury about a spontaneous

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1 Clark v. State, 363 So.2d 331 (Fla. 1978)

statements the appellant made after he had conferred with counsel and was on his way to the jail. R. 2816 Fire told the jury that the appellant said, "I'll never see these again." as he looked up at the palm trees just before getting into the car that was to transport him to the maximum security section of the Pinellas County Jail. R. 2816 During the trip to the jail, the appellant talked bitterly about how much money his victim had costs him. He told them that he had so little that that he could not even take his wife out to dinner. And, he talked about running the restaurant with the boys and what a good job they had done. R. 2816-2817

As soon as appellant's counsel had the opportunity to cross-examine the detective he asked whether he had a tape recorder running in the car when the appellant made those statements. When Fire responded that he did not, appellant's counsel asked whether tape recording was available to him as a detective. Fire responded that he did. Counsel then asked whether it was in the automobile when the statements were made. Fire responded that it was not. Counsel then moved on to other matters. R. 2818

When it was the state's turn for redirect examination, counsel asked one question and then requested a bench conference. R. 2829-2830 It was at this point, the prosecutor informed the court he wanted to ask the detective why he did not have a tape recorder in the car. And, he told the court that he expected to disclose to the jury that the appellant had asked for counsel and

that the officer would indicate that it was his understanding that once a request for counsel had been made that he was not allowed to reinitiate questioning. The prosecutor told the court that he thought the appellant's cross examination about the absence of a tape recorder in the police car opened the door to this inquiry. R. 2830 After the appellant's question had been read back another prosecutor told the court that he thought that the defense was trying to insinuate that Det. Fire had fabricated the statement. The other prosecutor then told the court, "the obvious thing that that infers is that he tapes everything else, how come he didn't tape this?" R. 2831 The prosecution repeated this theme through the argument. R. 2834-2843 During that proffer, the prosecution established that the attorney who had asked the question had consulted with the appellant before he was to be transported and told him not to answer anymore questions. R. 2841 After the proffer, the court ruled that appellant's questions about whether there had been a tape recorder in the car had "opened the door" to the state's proposed inquiry. R. 2844 The state then conducted the redirect examination giving rise to this issue. R. 2844-2845 And, counsel for the appellant moved the court for a mistrial which it denied. R. 2846

The facts relevant to the penalty phase issue:

When the time came for the penalty phase, the state did not present any additional evidence. The state did, however, reserve the right to present evidence to rebut the existence of mitigating circumstances claimed to exist by the appellant. The

appellant then offered evidence to establish mitigating circumstances. He offered the testimony of old friends, relatives and acquaintances in an effort to depict himself as a good family man and a hard worker. And, he entered into evidence without objection an FCIC printout. R 3593 (transcript reference) and 3878 (document). He did this in an attempt to establish the mitigating factor established by Fla. Stat. §921.141(6)(a) (1983), lack of a significant history of prior criminal activity.

Apparently recognizing that the defense would probably attempt to establish this mitigating factor, the state supplied the defense with the name of the fire marshall they intended to call and every document in his possession some three or four weeks prior to the penalty phase of the case. R. 3591 In addition to evidence rebutting the appellant's evidence that he was a good family man, the state presented evidence to negate the existence of a lack of a significant history of prior criminal activity on the appellant's part. The state had already shown him to be a business failure.

The victim's son testified that the appellant had a reputation as an arsonist. R. 3633 He told the story of how he heard that one the restaurants the appellant was involved with was going to burn since the appellant's son was out of it before it happened. R. 3633 The victim's daughter related hearing from a man who worked in a band in a club owned by the appellant and his son Michael that he had overheard a conversation between the

appellant and his son about burning the place to the ground. R. 3641 She established that his nick name in the Gary Indiana area was "The Torch." R. 3646-3647 The victims are also established that the appellant had stolen from a business he was in with the witness' father, the victim. R. 3649 Betty Verdon, who worked with the appellant at Jackson's Restaurant, testified to the appellant's stealing of tips. R. 3656 She was aware that ever time he got a place started in the Gary Indiana area it caught fire. R. 3657

Finally, the state called George J. Kaminskas, Chief Inspector of the Gary Indiana Fire Department, to the stand. R. 3663 He testified to four fires in restaurants the appellant was a suspect in as he had some interest in either the business, the property or the fixtures. R. 3664, 3674, 3675 He testified that they were all determined to be arson fires. R. 3665 And, he testified that the appellant had two houses that burned down in the area. R. 3677 And there was a fire at a bus station the appellant operated. With the exception of one fire, there was evidence of insurance and insurance claims surrounding each fire. R. 3678 For that one fire the fixtures had been moves out either the day before the fire or the evening before the fire. R. 3678

SUMMARY OF THE ARGUMENT

I.

Well established precedent teaches that a Motion and Affidavit asserting that a judge has formed a fixed opinion as to the guilt of an accused who is to stand trial in front of that judge is not a sufficient ground for the judge to recuse himself and call for a hearing. Likewise, the fact that a judge had over-ridden a jury recommendation of mercy and imposed the death penalty on a co-defendant at the conclusion of an earlier trial gives no basis for recusal and an evidentiary hearing. The factors that motivate the imposition of either life or death are unique to each individual. The court did not err in denying the appellant's Motion to Disqualify him as insufficient.

II.

When the appellant's counsel cross-examined Detective Fire about the absence of a tape recording of the appellant's spontaneous statements showing a consciousness of guilt, despite the availability of such recorders to him, he invited the State to present evidence that the officer could not have anticipated such a statement as the appellant had consulted with counsel and been instructed. This was the only way to foreclose argument to the jury to the effect that they recorded everything else, why not this, he must have invented it. The trial included numerous other recordings of the appellant.

Invited comment on the invocation of the right to counsel is one of the exceptions to the per se reversible error rule of Clark, infra. Even if the court does not agree with the State's invited error analysis, the error here is harmless as the evidence is overwhelming. The court is currently considering the continuing viability of it per se reversible error rule pursuant to certified questions and related questions as well.

III.

The appellant did not present evidence in support of his Grigsby, infra. type motion and he did not raise this issue over the exclusion of jurors Pauley and Mosher. Accordingly, he had forfeited the right to present the argument here. And, the argument is wrong on the merits. This court has authoritatively rejected the Grigsby position joining all other jurisdictions except the Eighth Circuit that have addressed the issue.

IV.

The appellant had notice of the hearsay that the State sought to introduce to negate his claim of a lack of a significant history of criminal activity. The court below found it probative for this purpose. The authority offered by the appellant's argument simply does not address the questions presented. It addresses the improper use of this type of evidence to establish aggravating factors. And, the authority addresses situations where there has been a lack of notice, a situation refuted by the facts.

ISSUE I

WHETHER THE CIRCUIT COURT ERRED IN FINDING A MOTION TO RECUSE AND SUPPORTING AFFIDAVITS ALLEGING THAT THE APPELLANT COULD NOT RECEIVE A FAIR AND AT THE HANDS OF THE TRIAL; JUDGE BECAUSE HE HAD FORMED A FIXED OPINION AS TO THE APPELLANT'S GUILTY AND HAD OVERRIDDEN A JURY RECOMMENDATION OF MERCY IN A CO-DEFENDANTS AND THAT IT WAS THEREFORE REASONABLE TO CONCLUDE THAT HE WOULD BE UNDER PRESSURE TO IMPOSE THE DEATH SENTENCE IN THE APPELLANT'S CASE IN THE EVENT OF A GUILTY VERDICT LEGALLY INSUFFICIENT?

The appellant urges the court to reverse under this point because the trial court denied his allegedly legally sufficient motion.[2] While the appellant's argument cites this court to the appropriate case law and states the standard for determiniation of the sufficiency of a motion to recuse, it makes no reference to the content of the affidavits that allegely reflect facts that would justify a reasonable defendant that he has "a well grounded fear that he will not receive a fair trial at the hands of the judge." Nor, is there any other reference to the content of these affidavits in the appellant's brief. Likewise, there is no showing that the motion and affidavits at issue here bear any analogy to similar ones that have supported recusal in the past. The closest the appellant's argument comes to such a reference is the assertion that the motion at issue here was similar to the motion in Jones v. State, 446 So.2d 1059

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[2] The appellant sought to litigate this issue on common law certiorari. But, the court denied relief. Dragovich v. Walker, 438 So.2d 838 (tabled)

(Fla. 1984). There is a reason for this. The analogies do not exist. Precedent and simple logic demonstrate that those affidavits did not meet the test for legal sufficiency first established in State ex rel. Brown v. Dewell, 131 Fla. 573, 179 So. 695, 697 (1938).

The motion itself makes two assertions. First it asserts that Judge Walker had formed an opinion as to the appellant's guilt on the basis of Robert Echols trial. The second assertion is that since he overrode the jury's recommendation of mercy in Echols trial he would make the same finding in the appellant's case and feel compelled to sentence the appellant to death in the spirit of uniformity. R. 112

There were three affidavits filed in support of the motion to disqualify Judge Walker from hearing the appellant's case. R. 113-116 They appear to be identical except for information peculiar to each individual affiant. They reflected the allegations of the motions. The first paragraph asserts that the judge had formed a fixed opinion as to the guilt of the appellant. The second paragraph alleged that because Judge Walker had overrode the jury's recommendation of mercy for Echols that he would be under pressure to sentence the appellant to death if he were convicted.

The claim that he should disqualify himself because he had formed a fixed opinion of the appellant's guilt was rejected by this court long ago. This tactic has been tried before. In Nickles v. State, 86 Fla. 208, 98 So. 497 (1923) the court ruled

that affidavits reciting that the judge had formed a fixed opinion of the defendant's guilt and discussed it with others were insufficient. The court said that if this were the case then no judge would be able to hear the same case twice and rejected the affidavits as insufficient. More recently in State ex rel. Schmidt v. Justice, 237 So.2d 827 (Fla. 2d DCA 1970) the district court had occasion to consider a similar claim. In that case, there were allegations that the judge had formed an opinion as to the relator's guilt. He had presided at an earlier trial in the case that had resulted in a mistrial. The court found this insufficient. Even more recently, a district court rejected a similar claim in Hope v. State, 449 U.S. 1315, 1317 (Fla. 2d DCA 1984). The appellant in that case had wanted to disqualify the judge from presiding over his trial for criminal contempt because he had found him guilty of civil contempt involving the same conduct. The affidavits in this case are no more compelling than the affidavits in the previously discussed cases and are insufficient on this ground.

While there is no precedent directly addressing the second ground asserted in support of recusing Judge Walker, the appellee contends that the situation is sufficiently analogous to the previously argued matter that the decisions cited above compel the same result here. And, simple logic shows why this assertion does not meet the test of legal sufficiency for the disqualification of the trial judge. The weighing process involved in determining the appropriate sentence, life or death,

is unique to each individual. Simply because the judge overrode a jury recommendation of mercy for one co-defendant in multi party murder, it is not reasonable to conclude that the judge would feel pressure to impose a death sentence on the other principals. There is no telling what may have prompted an override, perhaps an inflammatory argument or knowledge of evidence that did not go to the jury prompted the override. The instant defendant could well have established some mitigating factor of extreme weight. The affidavit's conclusion assertion of reasonableness is not a fact. It is a conclusion. And as previously demonstrated it is unreasonable to so conclude. The circuit court did not err in denying the appellant's motion to recuse as legally insufficient.

The argument's assertion that the motion here is compel reversal sufficiently similar to Jones supra is simply without merit. The motion and affidavits in Jones alleged, in material part, that the judge who was to preside over the appellant's Rule 3.850 hearing on the effectiveness of his trial counsel had presided at trial and complimented counsel on the fine job he had done defending Jones. THe court ruled this insufficient to justify a recusal. 446 So.2d at 1061. The court should reach the same result here.

ISSUE II

WHETHER THE CIRCUIT COURT ERRED TO THE PREJUDICE OF THE APPELLANT IN RULING THAT THE APPELLANT'S INQUIRY ABOUT THE ABSENCE OF A TAPE RECORDER TO PRESERVE SPONTANEOUS COMMENTS THE APPELLANT MADE AS HE WAS BEING TRANSPORTED TO JAIL AFTER INTERROGATION IN THE CONTEXT OF A TRIAL WHERE THE STATE'S CASE INCLUDED OTHER TAPES OF THE APPELLANT INVITED THE PROSECUTION TO SHOW THAT THE TRANSPORTING OFFICERS HAD NO REASON TO EXPECT THAT THE APPELLANT WOULD MAKE SUCH A STATMENT AS HE HAD PREVIOUSLY INVOKED HIS RIGHT TO COUNSEL AND BEEN TOLD BY COUNSEL NOT TO ANSWER ANY FURTHER QUESTIONS?

The appellant's argument under this point contends that when the trial court ruled that the interrogation of Det. Fire about the absence of a tape recorder in the vehicle transporting the appellant to jail after his interrogation opened the door to the state's establishing on redirect that the officers had not anticipated his making a statement worth recording as he had invoked his right to counsel and had conferred with counsel who had told him not to answer any further questions was erroneous. And, he further contends, pursuant to Clark, supra and it progeny, this resulted in reversible error without regard to the harmless error doctrine. The state cannot agree. It is the state's position that the circuit court's ruling that the cross-examintion of Det. Fire, in the context of all the other taped statements in the trial, "opened the door" to the evidence that appellant complains of was tant amount to a finding that the appellant invited this showing.

One of the exceptions to the pre se reversible error for comment on an accused's exercise of his rights under Miranda[3] is the invited error situation. Clark v. State, 363 So.2d 331, 334-335. That is the situation presented by the facts of this case. As the court's comment at R. 2836 shows this was the only way to deal effectively with the cross-examination and the kind of argument that it suggests (He recorded everything else. Why didn't he record this. He must be making it up.) and get the officer out of the "double box" the defense was trying to create.

Both Jackson v. State, 359 So.2d 1190 (Fla. 1978) cert. denied, 439 U.S. 1102 (1979) and Castle v. State, 305 So.2d 794 (Fla. 4th DCA 1974) cert. denied, 317 So.2d 766 (Fla. 1975) illustrate in a slightly different context how the invited error exception works. In Jackson, this court ruled that its fundamental error calling for reversal when there is a comment on an accused invocation of his right to counsel established in Bennett v. State, 316 So.2d 41 (Fla. 1975) did not apply in the following invited error context. During the course of cross-examination of an officer about a statement the appellant had made after Miranda warnings appellant's counsel insisted that the sheriff tell why the stenographer had stopped taking the appellant's answers to his questions. The response was that he had invoked his right to counsel. 359 So.2d at 1193-1194 This court ruled that appellant had invited the comment and would

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[3] Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 964 (1966).

not be allowed to claim that it should serve as a basis for reversal. Likewise, in Castle, the court found that a question about why an officer had gone to the hospital invited the response that the officer had gone there for the purpose of getting a statement from the accused but that he had refused to give one after having been read his rights.

While these cases deal with direct interaction between a witness and the accused's counsel, that is no reason to confine them to their facts. To do so would be to put a dangerous weapon in the hands of all accused. Such a rule would allow exactly the kind of cross-examination as occurred here laying the ground for the kind of argument the state has already indicated it expected and leave the prosecution no effective method for dealing with such tactics on the part of an accused's counsel. The state is aware that both Jackson and Castle have been distinguished in Knight v. State, 374 So.2d 1065, 1066-1067 (Fla. 3d DCA 1979) on the ground that the defendant's counsel asked the question. But, the state submits that this distinction is not well founded for the reasons that this case illustrates.

This court currently has pending before it a number of cases certifying whether a comment on an accused's exercise of his right to remain silent can ever be harmless error in light of the decision of the Supreme Court of the United States in United States v. Hastings, ___U.S.___, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1983) and this court's decision in State v. Murray, 443 So.2d 955 (Fla. 1984). Sone of those cases are Burns v. State,

10 F.L.W. 904 (Fla. 3d DCA Apr. 9, 1985); Crawford v. State, 10 F.L.W. 814 (Fla. 4th DCA Mar. 27, 1985); Marshall v. State, 10 F.L.W. 88 (Fla. 4th DCA Dec. 28, 1984). But see Rowell v. State, 450 So.2d 1226 (Fla. 5th DCA 1984)(concluding that State v. Murray, supra did not adopt the harmless error analysis of a United States v. Hastings, supra). There are also cases certifying the related question of whether a comment on the accused failure to testify can ever be harmless error. Two of those cases are Long v. State, 10 F.L.W. 1039 (Fla. 5th DCA Apr. 25, 1985) and Barry v. State, 10 F.L.W. 934 (Fla. 5th DCA Apr. 11, 1985).

If the court should conclude that this situation does not fit the invited error exception to the per se reversible error rule of Clark, it should reconsider the harmless error portion of the ruling. This case is appropriate for its application as even the restrained statement of fact in the appellant's brief shows that there is no doubt as to the appellant's factual guilt.

ISSUE III

WHETHER THE COURT BELOW ERRED IN EXCLUDING PAULEY AND MOSHER FOR CAUSE AND REJECTING THE APPELLANT'S GRIGSBY[4] TYPE MOTION?

The appellant did file an appropriate Grigsby type motion. R. 51-52 But, when he had the opportunity to present evidence in support of his motion he did not do so. R. 1428 The court accordingly denied the motion. R. 171 When appellant's counsel had an opportunity to argue this ground in favor of retaining juror Pauley, he did not do so. R. 1717 Likewise, he failed to argue this ground when he had an opportunity to do so in the argument over the state's Witherspoon based challenge for cause of juror Mosher. R. 1747-1748 Accordingly, the state submits that the appellant has defaulted this issue by his failure to present any evidence in support of it.

In any event this court has authoritatively rejected the appellant's position. Patten v. State, 10 F.L.W. 244, 246 (Jan. 10, 1985)(revised opinion released in May 3, 1985 in F.L.W.; original opinion at 10 F.L.W. 51); Dobbert v. State, 409 So.2d 1053 (Fla. 1982); Riley v. State, 366 So.2d 19 (Fla. 1978). This is in keeping with all other jurisdictions that have considered the issue but the Eight Circuit. McCleskey v. Zant, ___F.2d___ (11th Cir. 1985)(en banc); Keeton v. Garrison, 742 F.2d 129 (4th Cir. 1984); Spinkillink v. Wainwright, 578 F.2d 582, 583-586 (5th

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4 Grigsby v. Mabry, 758 F.2d 226 (8th Cir. 1985) (en banc)

Cir. 1978) cert. denied 440 U.S. 976 (1979). The United States Supreme Court has also shown how it feels about the issue. It was a big part of the dissent in Witt v. Wainwright, ___U.S.___, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985) See also Witt v. Wainwright, 36 Cr.L. 4227 (1985) (on application for stay of execution). The appellant's position is simply without merit on both procedural grounds and the merits.

ISSUE IV

WHETHER THE COURT BELOW ERRED IN ALLOWING THE STATE TO INTRODUCE EVIDENCE ESTABLISHING THE APPELLANT'S REPUTATION AS AN ARSONIST AND SHOWING CIRCUMSTANCES THAT ESTABLISHED HIM AS A SUSPECT IN A NUMBER OF ARSON ORIGIN FIRES IN REBUTTAL TO HIS ATTEMPT TO ESTABLISH THE MITIGATING FACTOR OF LACK OF A SIGNIFICANT HISTORY OF CRIMINAL CONDUCT?

Under this point, the appellant contends that the admission of evidence establishing the appellant's reputation as an arsonist and demonstrating that he was a suspect in a number of arsons was error calling for resentencing. The court correctly allowed this evidence to rebut the appellant's attempt to establish the mitigating circumstance established by Fla. Stat. §921.141(6)(a) (1983) The authority offered by the appellant's argument simply does not address the question presented by the facts of this case. And, it ignores the fact that the state gave the appellant plenty of notice about the existence of this evidence, furnishing the appellant's counsel with all the reports some three or four weeks before the sentencing hearing.

As this court recently reaffirmed in Delap v. State, 440 So.2d 1242, 1255 (Fla. 1983) the statute itself permits the presentation of any evidence the court deems relevant to the sentence regardless of its admissibility under the exclusionary rules of evidence provided only that the defendant shall have a fair opportunity to rebut any hearsay. The appellant had plenty of notice of the hearsay that the state presented to negate his

claim that he lacked a history of significant criminal activity. It is worthy of note that the statute does not address convictions for crimes but "criminal activity".

The authority offered in support of the appellant's position is simply not aposite. Provence v. State, 337 So.2d 783 (Fla. 1976); Perry v. State, 395 So.2d 170 (Fla. 1981) and Odom v. State, 403 So.2d 936 (Fla. 1981) are all inaposite because the deal with improper ways of establishing aggravating circumstance rather than negating the existence of a mitigating circumstance.

Garnder v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 293 (1977); Cole v. Arkansas, 333 U.S. 196, 68 S.Ct. 514, 92 L.Ed. 645 (1948); Elledge v. State, 346 So.2d 998 (Fla. 1971) and Porter v. State, 400 So.2d 5 (Fla. 1981) are all inaposite because the appellant had notice of what the state sought to prove with this evidence and the state's evidence was offered in rebuttal not to establish any aggravating circumstances.

Accordingly, it is clear that this portion of the appellant's brief fails to demonstrate reversible error. The court should, accordingly, affirm the appellant's sentence.

CONCLUSION

Based on the foregoing argument and citations of authority, the Appellee submits that the judgment and sentence of the trial court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to John Thor White, P.O. Box 10096, St. Petersburg, Florida 33733 this 6th day of June, 1985.

OF COUNSEL FOR APPELLEE.