

NO. 65991

IN THE
SUPREME COURT OF FLORIDA

FRANK SMITH,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

FILED

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INITIAL BRIEF OF APPELLANT

On Appeal from the Second Judicial Circuit,
in and for Wakulla County, Florida

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COUNSEL FOR APPELLANT

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PRELIMINARY STATEMENT

Due to the time constraints placed on counsel, who had only a few hours to write this brief and have it typed and copied from the time he received the order of the court below denying appellant's application for a stay of execution and Motion to Vacate, counsel was unable to prepare a table of authorities cited.

STATEMENT OF THE CASE

Appellant, Frank Smith, was convicted of first degree murder, kidnapping, armed robbery, and sexual battery in the Circuit Court of the Second Judicial Circuit in and for Jefferson County on August 30, 1979. The jury recommended that the death sentence be imposed on August 31, 1979. On September 10, 1979, the Court sentenced appellant to death for the charge of first degree murder and sentenced him to life imprisonment for each of the remaining charges. This Court affirmed. Smith v. State, 424 So.2d 726 (Fla. 1982). A petition for rehearing was filed on November 11, 1982, and was denied on January 27, 1983. A petition for a writ of certiorari in the United States Supreme Court was denied on June 20, 1983, Justices Marshall and Brennan dissenting.

On April 25, 1984, Mr. Smith appeared before the Board of Executive Clemency. On September 19, 1984, Governor Bob Graham denied clemency and signed a death warrant effective from noon on Wednesday, October 10, 1984, to noon on Wednesday, October 17, 1984. Mr. Smith's execution is scheduled for Tuesday, October 16, 1984 at 7:00 a.m.

At the time the warrant was signed appellant did not have counsel. From the time the death warrant was signed

until present counsel were contacted, volunteer agencies tried arduously to obtain counsel for Mr. Smith. Counsel was engaged to represent appellant as of Monday, September 24, 1984, and received the full record which comprises nearly 5000 pages on September 26, 1984. The record was incomplete and counsel had to spend his first day in Florida, October 2, 1984, attempting to put it in order. Ms. Sonenberg did not even see the record until reaching Florida on October 3, 1984.

A motion for relief pursuant to Fla.R.Crim.P. 3.850, together with motions, inter alia, for a stay of execution, for a continuance, and for payment of defense experts and costs, as well as an application for a stay of execution pending appeal were filed in the Circuit Court for the Second Judicial Circuit on October 8, 1984. The case was assigned to the original trial judge, the Honorable Kenneth E. Cooksey. Oral argument on the application for a stay of execution and on procedural matters regarding how to handle the motion was heard on October 8, 1984. On October 9, 1984, the Honorable Kenneth E. Cooksey denied the motion for a stay. An evidentiary hearing solely as to the issue of ineffective assistance of counsel at the penalty phase was held on October 9, 1984. Mr. Smith was not granted a continuance, over objections, in order to gather and present evidence on his ineffectiveness claim beyond that submitted in his exhibits. The "hearing consisted of no more than the

testimony of the trial attorney. A full and fair hearing on the issue of the denial of Mr. Smith's Sixth Amendment right to a jury representing a fair cross-section of the community was denied as was a full and fair hearing on the claim that race was unconstitutionally used as a factor in the decision to sentence Mr. Smith to death. Mr. Smith appeals from these denials as well as from the fact-findings by the lower court regarding ineffective assistance of counsel at the penalty phase of the trial. The Court signed the State's proposed order over the strenuous objection of Mr. Smith's counsel on October 10, 1984, after a meeting in chambers. Mr. Smith submitted an Answer to the State's Proposed Order containing his vehement objections. He also appeals from the finding that Mr. Smith be precluded from raising claims in his 3.850 Motion to Vacate. The court below specifically ruled that the impermissible excusal of jurors with conscientious objections to the death penalty, the denial of due process and Sixth Amendment rights by the impermissible bolstering of state witness Victor Hall on direct examination, the unconstitutional violation of Mr. Smith's Eighth Amendment rights through a blanket instruction at the guilt-innocence phase on all lesser included offenses, the unconstitutional instruction on aggravating circumstances, the unconstitutional jury instructions at the sentencing phase,

and the unconstitutional preclusion of mitigating circumstances were not proper issues for a motion to vacate. The court below found that the issue of the refusal to instruct the jury on the proffered defense of withdrawal was improperly raised at this stage -- the State argued that this issue should be precluded since it was decided adversely to Mr. Smith on direct appeal. The Court also ruled that the issues of discriminatory application of the Florida death sentencing statute and violation of Mr. Smith's rights to a fair cross-section of the community were improper for a motion to vacate. Mr. Smith had argued each of these issues raised claims that Mr. Smith's fundamental rights were denied at trial, and denial of fundamental rights has been recognized as something clearly cognizable in collateral proceedings, See, Dozier v. State, infra; Flowers v. State, infra; O'Neal v. State, infra; Dallas v. Wainwright, infra; Skinner v. State, infra, particularly where the ultimate penalty of death has been imposed, see, Wells v. State, infra; Burnette v. State, infra; Pait v. State, infra; Grant v. State, infra; Singer v. State, infra. The court below failed to specifically address the merits of this argument.

On October 10, 1984, Appellant filed the instant appeal and a petition for an original writ of habeas corpus in this Court. The original habeas raises a claim of ineffective assistance of counsel on appeal.

The Court below signed its order denying relief on October 10, 1984. Oral argument is scheduled for Thursday, October 11, 1984, at 9:30 A.M. This Court has requested that counsel's brief be submitted by 4:00 P.M. on October 10, 1984. Counsel has had no more than a few hours to prepare this document. Counsel therefore specifically incorporates each and every argument raised in appellant's Motion to Vacate, filed with the court below pursuant to F.R.Cr.P. 3.850, in his Motion for a Continuance and Motion for Experts and Costs and transcript of the proceedings below. In his appeal, Mr. Smith will provide a brief outline of the arguments presented below.

ARGUMENT

I

APPELLANT WAS DENIED A FULL AND FAIR HEARING ON HIS CLAIM THAT THE EXCLUSION OF DEATH SCRUPLED JURORS VIOLATED HIS SIXTH AMENDMENT RIGHT TO A TRIAL BY A JURY REPRESENTING A FAIR CROSS-SECTION OF THE COMMUNITY AND HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS OF LAW.

On October 9, 1984, the Honorable Kenneth Cooksey denied Mr. Smith the right to present evidence in support of his claim that the exclusion of jurors with conscientious objections to the death penalty denied his rights under the Sixth and Fourteenth Amendments to the Constitution of the United States. Counsel was denied any hearing on this issue and was denied the right to gather and collect evidence in support of this claim through the lower court's denial of a motion for continuance and a motion for payment of funds to hire experts and investigators to substantiate this claim.

Mr. Smith hereby incorporates by reference the claim raised in his Motion to Vacate, filed pursuant to Fla.R.Cr.P. 3.850, regarding the impermissible excusal for cause of jurors with conscientious objections to the death penalty. See, Motion to Vacate, pages 32-43.

Mr. Smith asks that this Court remand his case to allow for a hearing on this issue and that in the interim, pending resolution of this issue, a stay of his execution be ordered. This issue is cognizable at this stage of the proceedings. See, Nova v. State, 439 So.2d 255 (3d DCA 1983); Flowers v. State, infra.

II

APPELLANT WAS ERRONEOUSLY DENIED
A HEARING ON THE ISSUE OF THE
UNCONSTITUTIONAL USE OF RACE AS
A FACTOR IN DECIDING TO SENTENCE
HIM TO DEATH.

The Honorable Kenneth Cooksey erred in denying Mr. Smith the opportunity to present evidence in support of his claim that race was unconstitutionally a factor in the determination to sentence him to death.

In support of this claim counsel proffered three appendices to his Motion to Vacate, filed pursuant to Fla.R.Cr.P. 3.850. Appendix Nine (9) was a study regarding discrimination in capital sentencing based on the race of both the accused and the victim. See, Appendix 9, Motion to Vacate.

Counsel further proffered Appendix Ten (10), an affidavit of Professor Michael Radelet of the Department of Sociology at the University of Florida revealing the highly disproportionate ratio in the Second Judicial Circuit by which blacks and defendant's who allegedly kill whites are sentenced to death.

Finally, counsel proffered Appendix Eleven (11), an affidavit of attorney David Lipman attesting to the patterns of racial discrimination in Leon and Jefferson Counties.

Counsel was denied the opportunity, through the denial of the Motion for a Continuance and the Motion for Funds for Expert Witnesses and Costs, the opportunity to present the Court with additional evidence in support of his claim of racial discrimination. In fact, Mr. Smith was denied any hearing at all on this claim.

Mr. Smith hereby incorporates by reference the claim made in his Motion to Vacate, that race was used as a factor in the decision to sentence him to death in violation of his rights under the Eighth and Fourteenth Amendments to the Constitution of the United States. (Motion, pages 82-90).

For the aforementioned reasons Mr. Smith respectfully requests that his case be remanded to the lower court for a hearing on this issue and that in the interim his execution be stayed pending resolution of this issue.

The State argued below that the issue of racial discrimination in the application of the Florida death penalty statute is not cognizable in 3.850 proceedings since it should have been raised at trial or on direct appeal. The court below agreed. Mr. Smith submits that the court below fundamentally erred. This Court indicated in Henry v. Florida, 377 So.2d 692 (Fla. 1979), that the issue of a discriminatory application of the Florida death penalty statute is appropriate in a 3.850 proceeding. Mr. Smith should have been granted a hearing on this issue. His challenge to the application of the statute was on both Eighth and Fourteenth Amendment grounds. Moreover, Mr. Smith argued that the statistical underpinnings for his claim were unavailable at the time of his trial and could not have been raised on direct appeal -- since, to state the obvious, the Supreme Court is not the appropriate forum for a factual hearing. Mr. Smith presented the court below with sufficient support for his claim upon which the court could have granted a stay of execution pending a full and fair hearing.

Mr. Smith incorporates by reference the arguments submitted below in his Motion to Vacate, Motion for Funds for Experts and Costs, Motion for a Continuance and during oral argument on October 8th and 9th. These arguments indicate not only why Mr. Smith is entitled to a hearing on this claim, but also why, in Mr. Smith's case, this claim is sufficient to warrant relief. Mr. Smith has specifically tailored his claim to discrimination in the Second Judicial Circuit. He has, in light of the stringent time and funding constraints on his counsel, made a substantial prima facie showing on this claim.

Finally, the denial of a hearing on Mr. Smith's claim that racial discrimination violated Mr. Smith's Eighth and Fourteenth Amendment rights involves the most fundamental right of all -- Equal Protection of law. See, Yick Wo v. Hopkins, 118 U.S. 356 (1886); Lane v. Wilson, 307 U.S. 268 (1939); Swain v. Alabama, 380 U.S. 202 (1965); cf. Furman v. Georgia, 408 U.S. 238, 249-51 (Douglas, J., concurring, 364-66 (Marshall, J., concurring), 310 (Stewart, J., concurring) (1972)). This issue is specifically cognizable in Fla.R.Crim.P. 3.850 proceedings under the authority of Henry, supra, and, since it involves fundamental rights under Nova v. State, supra and Flowers v. State, infra. This Court should therefore remand for full fact-finding hearings on these claims.

III

THE LOWER COURT ERRED IN DECIDING THAT MR. SMITH COULD NOT PRESENT EIGHT OF THE CLAIMS RAISED IN HIS MOTION TO VACATE HIS SENTENCE.

The court below erred in ruling that Mr. Smith was bound from presenting eight of his claims:

- a) that jurors with conscientious objections to the death penalty were impermissibly excused from the jury, See, Motion to Vacate, pages 32-43, hereby incorporated by reference;
- b) that the trial court unconstitutionally refused to instruct the jury on the proffered defense of withdrawal, see, Motion to Vacate, pages 51-55, hereby incorporated by reference;
- c) that the burden was unconstitutionally shifted at the penalty phase, see, Motion to Vacate, page 44, hereby incorporated by reference;
- d) that Mr. Smith was denied his Sixth Amendment right to confrontation and his Fourteenth Amendment right to due process of law through impermissible bolstering by the State of its own witness before he had been impeached, see, Motion to Vacate, pages 45-50, hereby incorporated by reference;
- e) that Mr. Smith's Eighth Amendment rights were violated by the blanket jury instruction on all lesser included offenses at the guilt-innocence phase, see, Motion to Vacate, pages 56-59, hereby incorporated by reference;
- f) that Mr. Smith's rights were abrogated when the jury was unconstitutionally instructed on aggravating circumstances, see, Motion to Vacate, pages 60-61, hereby incorporated by reference;
- g) that Mr. Smith's rights were violated by the unconstitutional jury instructions at the sentencing phase, see, Motion to Vacate, pages 62-65, hereby incorporated by reference.

- h) that it was unconstitutional to preclude the jury from considering non-statutory mitigating circumstances, see, Motion to Vacate, pages 66-71, hereby incorporated by reference.

Each of these claims raise issues of the abrogation of Mr. Smith's fundamental rights upon which the court below should have ruled on the merits. The rule that a Motion to Vacate pursuant to Fla.R.Crim.P. 3.850 may not be generally used to relitigate issues which were raised on direct appeal nevertheless allows for review of constitutional grounds that go to fundamental rights at this stage of the proceedings. See, Dozier v. State, 361 So.2d 727, 728 (Fla. 4th DCA 1978). Thus, a post conviction court may review errors affecting fundamental rights whether raised on direct appeal or not. See, Flowers v. State, 351 So.2d 387 (Fla. 1st DCA 1977). For example, finding a constitutional violation of double jeopardy in sentencing, the court in Flowers v. State, supra, recognized that although the issue had been raised on appeal, reversal on the motion to vacate was required:

(T)he trial court's resentencing error and our own were fundamental errors which deprived Flowers of a constitutional right not to be placed twice in jeopardy for the same offense. . . We decline to watch helplessly in the hope that our decision here may create decisional conflict that would authorize the Supreme Court to correct our former error, or in the hope that a federal court will do so.

Id. at 390. See also, O'Neal v. State, 308 So.2d 569, 570 (Fla. 2d DCA 1975) (defendant deprived of due process without notice); Dozier v. State, 361 So.2d 727, 728 (Fla. 4th DCA 1978) ("A funda-

mental error of constitutional dimension may be collaterally attacked"); French v. State, 161 So.2d 879, 881 (Fla. 1st DCA 1964) (denial of continuance); cf. Dallas v. Wainwright, 175 So. 2d 785 (Fla. 1965) (although issue was properly a ground for a motion to vacate, Florida Supreme Court considered it in collateral proceedings because error was fundamental); Skinner v. State, 366 So.2d 486, 487 (Fla. 3d DCA 1979).

Furthermore, this Court should consider the companion principle applied when the ultimate penalty of death has been imposed: that errors must be more strictly reviewed when a life is at stake. That is, fundamental error is more closely considered and more likely to be present where the death sentence has been imposed. See, e.g., Wells v. State, 98 So.2d 795, 801 (Fla. 1957) (overlook technical niceties where death penalty imposed); Burnette v. State, 157 So.2d 65, 67 (Fla. 1963) (error found fundamental "in view of the imposition of the supreme penalty"); Pait v. State, 112 So.2d 380, 385 (Fla. 1959) (improper prosecutorial argument); Grant v. State, 194 So.2d 612, 615-616 (Fla. 1967); Singer v. State, 109 So.2d 7, 30 (Fla. 1959);

Harrison v. State, 149 Fla. 365, 5 So.2d 703 (1942); see also, Gardner v. Florida, 430 U.S. 349 (1977) (heightened reliability requirements under Eighth Amendment when life is at stake).

As a corollary to these principles, this Court has the authority to consider certain issues raised in this proceeding which were not raised on direct appeal. These issues, albeit not presented to the Florida Supreme Court, also raise fundamental grounds that go to the essence of constitutional protections and are therefore cognizable in collateral proceedings. See, e.g., Benitez v. State, 230 So.2d 190 (Fla. 2d DCA 1970); Cioli v. State, 303 So.2d 82 (Fla. 4th DCA 1974) (defendant's mental competence at time of trial or plea). Most recently, the District Court of Appeal for the Third District held that denial of the right to trial by a fair and impartial jury is an infringement on the rights of the accused which constitutes fundamental error. Nova v. State, 439 So.2d 255, 262 (1983). Thus, the Court concluded that this issue was cognizable in collateral proceedings although not raised on direct appeal, Nova, supra, at 261. The standard is appropriate for 3.850 proceedings for capital defendants such as Mr. Smith. See, Gardner, supra; Wells v. State, supra. Since all the issues presented in this proceeding are either the type traditionally raised under Fla.R.Crim.P. 3.850 or encompass fundamental rights, that Court should consider this Motion in its entirety.

a.

THE WITHERSPOON AND
CROSS-SECTION ISSUES

Four jurors were excused for cause from service at Mr. Smith's trial in violation of Mr. Smith's Sixth and Eighth Amendment rights. The responses provided by the jurors to the prosecutor's and trial court's questions regarding their scruples on the death penalty were insufficient to warrant excusal for cause under the exacting standards of Witherspoon v. Illinois, 391 U.S. 510 (1968). See also, Davis v. Georgia, 429 U.S. 122 (1976). The responses these jurors provided to questions respecting capital punishment did not make it unmistakably clear that (1) they would automatically vote against the imposition of capital punishment without regard to the evidence developed at trial, or (2) that their attitudes toward the death penalty would prevent them from making an impartial decision as to guilt. Witherspoon, supra at 522, n.21 (emphasis in original); see also, Adams v. Texas, 448 U.S. 38 (1980); Granviel v. Estelle, 655 F.2d 673 (5th Cir. 1981) (equivocal responses of prospective jurors do not justify excusal for cause); Alderman v. Austin, 663 F.2d 558 (5th Cir. 1981); Hance v. Zant, 696 F.2d 940 (11th Cir.), cert. denied, 103 S.Ct. 3544 (1983).

Moreover, the excusal for cause of these prospective jurors violated Mr. Smith's Sixth Amendment rights to a jury represent-

ing a fair cross-section of the community and to a properly functioning jury which could effectively express community views on the issue of guilt or innocence. See, Grigsby v. Mabry, 637 F.2d 525 (8th Cir. 1980); Ballew v. Georgia, 435 U.S. 223 (1978); Swain v. Alabama, 380 U.S. 202 (1965); Duren v. Missouri, 439 U.S. 357 (1979).

Mr. Smith did not intentionally relinquish his jury trial rights under Witherspoon, supra. Since the deprivation of the right to a constitutional jury trial is "fundamental error," this issue was an appropriate one for collateral proceedings and is appropriate on this appeal. Nova v. State, supra, 439 So.2d 261-2 (Fla. App. 3d DCA 1983); Flowers v. State, 351 So.2d 331 (Fla. 1st DCA 1977). Mr. Smith therefore respectfully requests that this Honorable Court reverse his conviction and vacate his sentence.

b.

UNCONSTITUTIONAL REFUSAL
TO INSTRUCT ON DEFENSE
OF WITHDRAWAL

The issue was decided adversely to Mr. Smith on direct appeal. It is presented on this appeal, as it was at the 3.850 proceeding, under the authority of Flowers, supra; Nova v. State, supra. Mr. Smith submits again that the failure to instruct the jury on his proffered defense of withdrawal violated his fundamental rights and that therefore the issue is appropriate for the Court's consideration.

The refusal to instruct the jury on the defense of withdrawal was error because there was evidence adduced at trial to demonstrate that Mr. Smith abandoned and renounced his participation in the criminal conduct and that he communicated his renunciation in sufficient time for his accomplices to consider abandoning the criminal plan. Wharton's Criminal Law §37 (14th Ed. 1978); 40 C.J.S. Homicide §9.

A defendant is entitled to have the jury instructed on the rules of law applicable to his theory of defense if there is any evidence to support such an instruction. Pope v. State, Case No. AV-382 at 3 (Fla. 1st DCA, Oct. 2, 1984); see also, Davis v. State, 254 So.2d 221 (Fla. 3d DCA 1971) (alibi); Koontz v. State, 204 So.2d 224 (Fla. 2d DCA 1967) (coercion); Kwasniewski

v. State, 303 So.2d 373 (Fla. 1st DCA 1974) (entrapment); Stinson v. State, 245 So.2d 688 (Fla. 1st DCA 1971) (justifiable homicide); Laythe v. State, 330 So.2d 113 (Fla. 2d DCA), cert. denied, 339 So.2d 1172 (Fla. 1976) (withdrawal). In this regard, Florida law comports with constitutional standards. See, e.g., Zemina v. Solem, 438 F.Supp. 455 (D. South Dakota, S.D. 1977), affirmed, 573 F.2d 1027 (8th Cir. 1978); Strauss v. United States, 376 F.2d 416 (5th Cir. 1967). Therefore, an instruction on the defense of withdrawal must be provided if there is any evidence introduced to support it. Laythe v. State, supra, 330 So.2d at 114; cf. Barnes v. State, 93 So.2d 863 (Fla. 1957) (instruction on theory of defense must be provided if there is any evidence, however improbable, to support it). Furthermore, in deciding whether to provide a requested theory of defense charge, the trial court is required to view the evidence in the light most favorable to the defendant. Bolin v. State, 297 So.2d 317, 319 (Fla. 3d DCA 1974).

Under Florida law, once evidence is presented to support a defense, the burden shifts to the State to disprove the defense beyond a reasonable doubt. See, Retenberry v. State, 429 So.2d 378 (Fla. 1st DCA 1983); see also, Yohn v. State, 450 So.2d 898, 900-01 (Fla. 1st DCA 1984). Although a specific instruction on the State's burden to disprove the defense may not be required, see Retenberry, supra, the instructions, taken as a whole, must fairly present the theory of defense and the State's burden to

prove guilt beyond a reasonable doubt. See, Yohn, supra, at 900-01; Holmes v. State, 374 So.2d 944 (Fla. 1979), cert. denied, 446 U.S. 913 (1980), rehearing denied, 448 U.S. 910 (1980); Spanish v. State, 45 So.2d 753 (Fla. 1950). In other words, a defendant has the burden of production of some evidence to support his defense theory, but the burden of proof of all the elements of the offense beyond a reasonable doubt never shifts from the State. See, e.g., McDaniel v. State, Fla. Appl. 1965, 179 So.2d 576. The State, therefore, is required to prove that a proffered defense does not raise a reasonable doubt. In failing to give the proffered withdrawal instruction, the trial court unconstitutionally removed from the State its burden to prove guilt beyond a reasonable doubt and thereby violated Mr. Smith's due process rights. Mullaney v. Wilbur, 421 U.S. 684 (1975); Hankerson v. North Carolina, 432 U.S. 233 (1977). This case therefore presents circumstances quite different than those in which the instructions, taken as a whole, adequately present the State's burden to the jury. See, Bolin v. State, supra; see also, Holmes v. State, supra.

Significantly, in Anderson v. State, the Florida Supreme Court held that a trial court's failure to define premeditation in a first degree murder charge constituted reversible error since the trial court's actions left the jury essentially unguided, i.e., without "an understanding of what they were looking for to determine" that element. 276 So.2d 17, 18 (1973), citing Polk v.

State, Fla. App., 1965, 179 So.2d 236. This danger of confusion of the jury, Anderson, supra, due to the lack of specific guidelines in the trial court's charge, is also present in the instant case. In effect, the defense of withdrawal would have allowed for conviction on the lesser included felonies but acquittal on the charge of murder. Yet, the uninstructed jury did not have the option of reaching this result since they were precluded from considering the defense of withdrawal. As in Anderson, this case poses the danger of an unguided and confused jury verdict. See also, Polk v. State, supra. Thus, the trial court's charge to the jury was insufficient to protect against an arbitrary and capricious imposition of the death penalty in violation of Beck v. Alabama, 447 U.S. 625 (1980). The charge in this case, excluding the theory of defense which would have allowed for a jury verdict of guilt on the lesser included felonies but an acquittal on the murder charge, failed to give the jury a clear, comprehensive and correct standard on which to base their application of the law. See, e.g., Bolin, supra, 297 So.2d at 319; Yost v. State, Fla. App. 1971, 243 So.2d 469; Anderson v. State, supra.

The evidence at trial sufficiently demonstrated that Mr. Smith abandoned and renounced his participation in the criminal conduct and that he communicated his renunciation in sufficient time for accomplices to consider abandoning the criminal plan. Wharton's Criminal Law §937 (14th ed. 1978); 40 C.J.S., Homicide §9. Evi-

dence adduced at trial demonstrated that Mr. Smith objected to Copeland's plan to kill Ms. Porter while the defendants and Ms. Porter were still at the motel (R. 2266), and again when the parties reached the actual scene of the homicide (R. 2268). Most importantly, evidence was adduced showing that Mr. Smith renounced any participation in killing Ms. Porter and communicated that renunciation directly to Copeland for the express purpose of dissuading him from his stated intention to kill Ms. Porter before the killing occurred (R. 2266, 2268, 2318, 2319).

The failure to instruct on withdrawal thus violated Mr. Smith's rights. His conviction and sentence should be reversed.

c.

UNCONSTITUTIONAL BURDEN -
SHIFTING AT PENALTY
PHASE

The trial court instructed the jury that its "verdict must be based upon its finding of whether sufficient aggravating circumstances exist and whether sufficient mitigating circumstances exist which outweigh any aggravating circumstances found to exist." (R. 2768.) This instruction violated Mr. Smith's rights under Arango v. State, 411 So.2d 172 (Fla. 1982) and Mullaney v. Wilbur, 421 R.W. 684 (1975) since a reasonable juror could have concluded that Mr. Smith bore the burden of proof on the issue of whether a capital sentence was warranted. Mr. Smith's sentence therefore violates the Eighth and Fourteenth amendments and must be reversed.

d.

THE CONFRONTATION
CLAUSE ISSUE

By permitting the State to bolster its own witness, accomplice Victor Hall, on direct examination prior to his having been impeached, Mr. Smith was denied his Sixth Amendment right of confrontation through abrogation of his right of cross-examination, Chambers v. Mississippi, 410 U.S. 234 (1974), and his right to due process of law under the Fourteenth Amendment. In Re Oliver, 333 U.S. 257; Douglas v. Alabama, 380 U.S. 415 (1965).

Confrontation of a witness is essentially exercised through impeachment of credibility. Davis v. Alaska, 415 U.S. 308, 316-17 (1974).

Bias can be demonstrated by eliciting testimony that shows the jury why a particular witness has reason to curry favor with the State. Napue v. Illinois, 360 U.S. 264 (1959). Evidence of an accomplice's agreement with the prosecution that leniency would be forthcoming in exchange for testimony on behalf of the prosecution is clearly relevant to bias and is an area which the defense has the right to pursue effectively on cross-examination. Giglio v. United States, 405 U.S. 150 (1972); Cash v. Culver, 385 U.S. 633, 637-38 (1959).

Since a witness' credibility is always at issue, Davis v. Alaska, supra, and since Victor Hall was the State's key

eyewitness respecting the events on December 12, 1978, the veracity of his testimony and its vulnerability to impeachment were especially important. As recognized by the Supreme Court in Napue v. Illinois, supra:

"The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend."

360 U.S. at 469. See also, United States v. West, 680 F.2d 652 (9th Cir. 1982) (prosecutor's improper attempt to bolster testifying witness' credibility warranted reversal, notwithstanding defense counsel's failure to object, where witness was pivotal and the bolstering had a material effect on the verdict); Giglio v. United States, supra at 154.

The right to elicit testimony regarding a witness' bias is an integral component of the right to cross-examine and confront the witnesses against oneself. Roberts v. State, 164 So.2d 817, 821 (Fla. 1964) (a defendant's right to cross-examination includes the right to show the motive of the witness in

giving testimony for the state; this includes the right to interrogate the witness about any agreement to grant him leniency or immunity from prosecution in exchange for his testimony); Goswick v. State, 137 So.2d 863 (Fla. 1962) (great latitude is allowed in cross-examination of a witness as to matters affecting his credibility, especially whenever subject of cross-examination goes to motive, interest, or animus of witness as directed to a party).

The State's bolstering in the instant case effectively denied Mr. Smith these confrontation rights. It is well-settled that bolstering of a witness' credibility is not permitted until that credibility has been attacked by the opposing side. cf. Hernandez v. State, 222 So.2d 781 (Fla. 1945).

The State preempted legitimate impeachment and usurped Mr. Smith's right to elicit evidence of bias. The violation of constitutional rights is most striking in the instant case since the State bolstered Hall's testimony by using the very means through which he could have been discredited -- his agreement with the State. Mr. Smith's conviction and sentence were thereby gained in violation of his Sixth and Fourteenth Amendment rights. Depriving Mr. Smith of effective confrontation, this conviction and sentence fail to meet the Eighth Amendment's stringent reliability requirements. The conviction and sentence should therefore be reversed.

e.

DENIAL OF EIGHTH AMENDMENT
RIGHTS BY BLANKET INSTRUCTIONS
ON ALL LESSER INCLUDED
OFFENSES AT GUILT-INNOCENCE

Mr. Smith's fundamental rights were denied when the jury was instructed on all lesser included offenses at the guilt-innocence phase in violation of Hopper v. Evans, 456 U.S. 605 (1982). These instructions, provided to Florida juries during capital trials at the time of Mr. Smith's trial, created arbitrary and capricious results which are untenable under Eighth Amendment standards.

f.

UNCONSTITUTIONAL INSTRUCTION
ON AGGRAVATING CIRCUMSTANCES

The trial court's instruction on aggravating circumstances was unconstitutional because it created a substantial risk that the jury's advisory verdict was based upon improper aggravating circumstances for which there was insufficient or no proper evidence. It thereby created a risk that the aggravating circumstances were applied in an overbread manner. Godfrey v. Georgia, 446 U.S. 420(1980). The instructions given and those required by law presented the danger that Mr. Smith was arbitrarily sentenced to death upon the recommendation of a jury whose discretion was not channelled by facts in evidence and thus made an arbitrary recommendation. See, Gregg v. Georgia, 428 U.S. 153 (1976). See also, Ross v. State, 386 So.2d 1191 (Fla. 1980); Le Duc v. State, 365 So.2d 149 (Fla. 1978).

UNCONSTITUTIONAL JURY INSTRUCTIONS
AT SENTENCING PHASE

The trial court instructed the jury that seven or more members must agree on a recommendation of life imprisonment. This violated the Eighth and Fourteenth Amendments to the Constitution of the United States.

The operation of this erroneous instruction thus violated the Eighth and Fourteenth Amendments, for it created the substantial risk that the death sentence was imposed in spite of factors calling for a less severe punishment. Incorrectly telling the jury that it had to reach a majority verdict "interject(ed) irrelevant considerations into the factfinding process, diverting the jury's attention from the central issue" of whether life or death was the appropriate punishment. Beck v. Alabama, 447 U.S. 625, 642 (1980). It encouraged the jury to reach a death verdict for an impermissible reason -- its erroneous belief that a majority verdict was required.

Furthermore, the charge of the trial court violated Mr. Smith's Sixth and Eighth Amendment rights to a constitutional jury verdict. See, Apodaca v. Oregon, 406 U.S. 404 (1972); Burch v. Louisiana, 441 U.S. 130 (1979); Brown v. Louisiana, 447 U.S. 323 (1980); Ballew v. Georgia, 435 U.S. 223 (1978).

h.

UNCONSTITUTIONAL PRECLUSION
OF MITIGATING CIRCUMSTANCES

At the penalty phase the trial court instructed the jury only on statutory mitigating circumstances - thus it precluded the jury from considering non-statutory mitigating circumstances. Moreover, the trial court failed to consider non-statutory mitigating circumstances on September 10, 1979, when rendering its own sentencing verdict. The instructions and application of the statute by the trial court thus violated Mr. Smith's Eighth Amendment rights, Eddings v. Oklahoma, 455 U.S. 1094 (1982), Goodwin v. Balkcom, 684 F.2d 794 (11th Cir. 1982), Green v. Georgia, 442 U.S. 48 (1979).

IV

APPELLANT WAS DENIED A FULL
AND FAIR HEARING.

Mr. Smith was denied a full and fair hearing below by the trial court's denial of the Motion for Experts and Costs and by the denial of the Motion for a Continuance. Mr. Smith, an indigent defendant, was thereby denied access to the Court below and to a full and fair hearing on his claims. Mr. Smith specifically incorporates by reference the points raised in his Motion for Experts and Costs, the Memorandum of Law in Support Thereof, and his Motion for a Continuance. Moreover, the Court's acquiescence in signing the State's proposed Order violated Mr. Smith's rights to a fair fact-finding proceeding. The Answer to the State's Proposed Order submitted on behalf of Mr. Smith is hereby incorporated by reference. Finally, the trial court's denial of a hearing on Mr. Smith's other claims violated his rights to a full and fair hearing. Specifically, the denial of a hearing on his racial discrimination claim and his denial of a fair cross-section of the community in his jury was a substantial violation of Mr. Smith's Equal Protection rights. The arguments raised in support of those claims (Motion to Vacate at page 32, et seq and page 82, et seq.) are incorporated by reference on this appeal.

Mr. Smith was denied a full and fair hearing in the court below on his claim that he was denied effective assistance of counsel at the penalty phase of his trial.

To substantiate his claims of ineffective assistance of counsel

expert testimony was necessary as was the investigation and presentation of the many witnesses who would have been able to provide mitigating evidence at the sentencing phase. Mr. Smith was denied the opportunity to have a full and fair hearing because he was denied the funds and time he requested to muster expert testimony and to investigate and present the numerous witnesses who would have been able to provide mitigating evidence at the sentencing phase.

It is submitted that the trial court's findings of fact are not supported by the record and are the product of an unfair fact-finding proceeding. It is specifically submitted that the findings of the court are in and of themselves a violation of Mr. Smith's equal protection rights since they are the product of a proceeding that was not full and fair.

In short, the disposition of the issues raised in the Motion to Vacate by the court below violated Mr. Smith's rights to a full and fair hearing. Mr. Smith was denied these rights because of his poverty which precluded him from securing counsel at an earlier date in order to perfect his post conviction documents, and precluded him for securing further evidentiary support for his claims (the appendix to Mr. Smith's Motion to Vacate, presenting affidavits and factual support, is hereby incorporated by reference.) Thus, the hearing below was conducted in such a manner as to violate Mr. Smith's rights to Equal Protection of law and access to courts.

See, Bounds v. Smith, 430 U.S. 817 (1977); Johnson v. Avery,
393 U.S. 483 (1969); Gardner v. California, 393 U.S. 367
(1969); Hooks v. Wainwright, 352 F. Supp. 163 (M.D. Fla. 1972).

CONCLUSION

For the foregoing reasons, this cause must be remanded to the trial court for a full and fair hearing on Mr. Smith's claims. Mr. Smith also requests a stay of his execution pending disposition of the issues raised herein.

Respectfully Submitted

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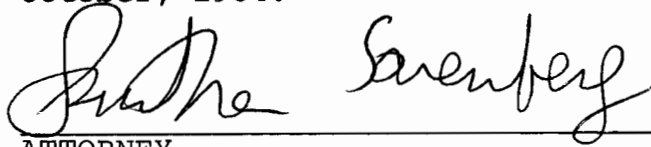
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ATTORNEYS FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand to Lawrence Kaden, Office of the Attorney General, The Elliot Building, 401 South Monroe Street, Tallahassee, Florida, this 10th day of October, 1984.



ATTORNEY