IN THE SUPREME COURT OF FLORIDA

WILLIAM MIDDLETON,

Petitioner,

vs.

LOUIE L. WAINWRIGHT,

Secretary, Department of Corrections, State of Florida,

Respondent

CASE NO. 66452

PETITION FOR WRIT OF HABEAS CORPUS

Petitioner, WILLIAM MIDDLETON, by undersigned counsel, pursuant to Rules 9.030(a)(3) and 9.100, Florida Rules of Appellate Procedure, petitions this Court to issue its writ of habeas corpus. Petitioner alleges that he was sentenced to death in violation of his rights under the Sixth, Eighth, and Fourteenth Amendments, and under the statutory and case law of the State of Florida, principally for the reason that Petitioner was accorded ineffective assistance of counsel at the appellate level, on his direct appeal from his conviction and sentence of death.

In support of this petition, in accordance with Rule 9.100(e), Florida Rules of Appellate Procedure, Petitioner states as follows:

I

JURISDICTION

This is an original action under Rule 9.100(a), Florida Rules of Appellate Procedure. This Court has original jurisdiction pursuant to Rule 9.030(a)(3), and Article V, (b)(9) of the Florida Constitution.

As developed more fully below, Petitioner was denied effective assistance of counsel in proceedings before this Court at the time of his direct appeal. Appellate Counsel failed to raise, or bring to the attention of this Court in any way, issues which if raised would have required reversal of Petitioner's conviction and sentence of death. This Court has jurisdiction. Knight v. State, 394 So.2d 997, 999 (Fla. 1981).

This Court can now and should consider issues which should have been raised earlier, through this "belated appeal." State v. Woodon, 246 So.2d 755, 756 (Fla. 1971); Ross v. State, 287 So.2d 372 (Fla. 2d DCA 1977). This Court's habeas corpus jurisdiction is properly invoked to review "all matters which should have been argued in the direct appeal," Ross, 287 So.2d at 374-75, where such matters were originally overlooked or otherwise not pursued by appellate counsel. Id. at 374.

II

FACTS UPON WHICH PETITIONER RELIES

Procedural History:

Petitioner was found guilty, after a jury trial for first-degree murder, and after a sentencing hearing he was sentenced to death on September 23, 1980. A direct appeal was taken to this Court, which affirmed the conviction and sentence of death. State v. Middleton, 426 So.2d 548 (Fla. 1982). Motion for Rehearing was denied. Id. A petition for certiorari to the United States Supreme Court was filed, but certiorari was denied July 6, 1983.

Facts Relevant to the Claim

1. Facts of the Crime

This Court sets forth the underlying facts of the crime from the State's case at the outset of the opinion on Petitioner's initial appeal. See 246 So.2d 755. This Court's opinion is attached as Appendix A to this Petition. However, in addition to the facts in the opinion, defendant testified at trial and recanted his confession, stating that he had left the victim's house, where he also lived, at approximately 8:30 p.m., February 14, 1980, and at that time the victim was alive. He testified that he rode his bicycle to a store, spoke with a man there for a while, and upon returning to the residence about 10:30 or 11:00 p.m., he discovered the victim's body. Transcript at 350-358 (Tr. hereinafter). He testified that he left the residence immediately after discovering the victim's body, because he feared he would be arrested and convicted solely because he had a record (Tr. Id.).

2. Facts Regarding Conduct of Trial

A. Flight Instruction: At guilt/innocence, the trial court instructed the jury:

> The court charges you that when a suspected person in any manner endeavors to escape or evade a threatened prosecution by flight, concealment, resistance to lawful arrest or other after the fact indications of a desire to evade prosecution, such fact may be shown as one of a series of circumstances from which guilt may be inferred.

(Tr. 554).

Trial counsel initially objected to this instruction (Tr. 440), but did not object when the final instructions were formulated. Appellant's counsel raised no claim regarding this instruction.

B. Repeated reference to Defendant's criminal record:

The prosecutor made repeated reference to defendant's parole and prior prison sentence during the guilt phase of trial. In the

first minutes of his opening, the prosecutor referred to the fact that Mr. Middleton was in the "federal prison system" and lived with the victim because he was released to her on parole (Tr. 123). The prosecutor elicited the fact that the defendant was in prison, just prior to the offense, from the first witness (Tr. 132, 155-7). The second witness, a police officer, made the comment that a letter delivered to the victim's residence was addressed to the defendant. He asked the witness to relate the fact the letter was from the Parole and Probation Commission, a fact having no relevance in the trial (Tr. 162-3). The parole issue was also mentioned in the defendant's confession, even though defense counsel had previously moved to preclude mention of that fact from the publication of the confession. (Tr. 286; 308-9). The defendant took the stand and testified on direct regarding his parole after the previously mentioned testimony was elicited (Tr. 337, 354, 359). The prosecutor took the opportunity to bring the fact before the jury several more times (Tr. 367, 369, 376). The most obvious irrelevant reference to defendant's previous conviction was the prosecutor's gratuitious question of the defendant on cross examination: "By the way, Mr. Middleton, what was your address prior to moving in with Gladys Johnson?", to which the defendant truthfully answered, "I don't remember the exact address, but it was Polk City Correctional Institution." (Tr. 376).

Defendant's previous conviction, prison sentence, and parole were not relevant to his guilt or innocence.

C. Defendant's absence from the courtroom.

Petitioner was absent from the courtroom during several crucial and critical phases of his trial: 1). during a discussion in open court of the appropriate jury instructions at the guilt phase, 2). while his counsel stipulated that certain statements would be redacted from his confession, 3). during the swearing of a prosecution witness, and 4). during a communication to the

court from the jury relative to whether it would be permitted to view certain evidence (Tr. 252, 437-77).

D. Lockett violation.

At the close of the the penalty phase, the trial court instructed the jury that: "The aggravating circumstances which you may consider are limited to such of the following as may be established by the evidence ... ", and listed the statutory aggravating factors by letter. (Tr. 654-5). The Court then instructed the jury that: "The mitigating circumstances which you may consider, as established by the evidence are these ... (Tr. 655-56). The trial court did not instruct the jury at any time that it could consider mitigating circumstances other than those appearing on the statutory list. In fact, during jury selection, the court explained to prospective jurors that, "The State of Florida has set guidelines for what is to be considered aggravating and mitigating circumstances having to do with whether or not capital punishment is to be imposed." (Tr. 52). At another point during jury selection, the court indicated the mitigating circumstances were limited to those on the statutory list, saying, "I will give you a new set of legal instructions. Part of what I will tell you are eight or nine factors you are to consider as aggravating circumstances. Things that go to the seriousness of the offense. There are an equal number of things of mitigating circumstances. Things in favor of a lighter sentence." (Tr. 162-163).

During closing argument at penalty phase, the prosecutor told the jury its recommendation should be based on "the specific guidelines. . ." which were "enumerated in what are called aggravating circumstances and mitigating circumstances." (Tr. 630). He further argued these circumstances were the "only things" the jury could "lawfully take into account" in its recommendation. (Tr. 630). The prosecutor then specifically enumerated each aggravating and mitigating circumstance (Tr. 639-

41), and told the jury it had to "determine whether one column outweighs the other column." (Tr. 641). The prosecutor prepared a chart with only the statutory aggravating and mitigating circumstances listed, and informed the jurors: "What you have in front of you is, in substance, the entire basis for your recommendation." (Tr. 630-31). Defense counsel did not seek to correct these arguments and instructions either through objections or rebuttal argument.

Evidence was introduced which could have been considered as nonstatutory mitigating circumstances during the guilt phase, including the fact the defendant confessed, admitted he committed a prior crime by pleading guilty, (Tr. 625-7), and that his mother died when he was young (Tr. 338).

E. Disparaging comments regarding significance of advisory sentence.

During jury selection, the prosecutor explained the bifurcated nature of a capital trial and told prospective jurors that "first of all your recommendation has no real effect on the Court. That is number one." (Tr. 60). (emphasis supplied). He also stated the recommendation was "nothing more" than a "recommendation" and disparaged its effect on the court (Tr. 96). During jury selection the court made remarks to the jurors demeaning their role in the capital sentencing process. The court did not tell jurors their recommendation carried great weight, but rather that the proper penalty was the court's "decision" and "responsibility," and that the jurors "just make a recommendation." (Tr. 68). The court further told the jurors in regard to their recommendation: "I don't have to listen." (Tr. 100). The instructions to the jury did not mention the weight given to the jury's recommendation and instead reiterated that "the final decision as to what punishment shall be imposed is the responsibility of the Judge."

F. The Confession Was Obtained Improperly and Involuntarily

Under New York Law.

The confession was obtained from defendant in New York State by New York law enforcement authorities in a manner which violates New York law, or that state's interpretation of Federal law, and would be suppressed under the law of that state in that it was obtained from defendant after he was removed from his holding pen and questioned prior to arraignment. (Tr. 5,8; 20-24; 359). Appellate counsel failed to brief and argue statements taken in a manner which violates the law of a sister state should be suppressed in Florida. In denying motion for post-conviction relief, the trial court found trial counsel raised the New York law issue.

III

NATURE OF RELIEF SOUGHT

Petitioner seeks an order of this Court, in light of indisputable constitutional and statutory violations set forth herein, vacating Petitioner's judgment and sentence of death, and remanding the case for a new trial. Alternatively, Petitioner seeks an order of this court granting Petitioner belated appellate review from his conviction and sentence of death, allowing full and unhurried briefing of the issues presented herein, and staying Petitioner's execution. Petitioner specifically requests that a special Master be appointed to take evidence on the factual and non-record issues of ineffective assistance of appellate counsel.

IV

BASES FOR THE WRIT

Constitutional Rights Denied to Petitioner.

Petitioner was entitled to "an active advocate" on appeal, one who "support(s) his client's appeal to the best of his ability." Anders v. California, 306 U.S. 730, 744 (1967). Without counsel who will "argue every point which may reasonably be argued," Wright v. State, 269 So.2d 17, 18 (Fla. 2d DCA 1972).

Petitioner is denied rights to a full and meaningful direct appeal, and the effective assistance of appellate counsel, guaranteed by the Sixth, Eighth, and Fourteenth Amendments, and Article I, Sections 16, 17 and 22 of the Florida Constitution Florida statutory law. See Proffitt v. Florida, 428 U.S. at 253.

Under Strickland v. Washington, 466 U.S. ___ , 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), counsel is ineffective when his/her representation is not reasonably competent, and Petitioner is entitled to relief when the ineffectiveness creates a reasonable probability that the result of the proceeding would have been different. If Petitioner demonstrates ineffective assistance of counsel on appeal, he must be granted belated appellate review. Ross v. State, 287 So.2d 372, 374-75 (Fla. 2d DCA 1973).

Specific Errors and Omissions Complained Of:

A. Failure to Argue Unconstitutionality of Flight Instruction.

As this Court noted on direct appeal, "[t]he main evidence of appellant's guilt was a confession ... " However, Defendant testified at trial that his confession was false and he made it only because he was afraid he would be convicted and sentenced to death based on his status as a convict. He explained that he was at the residence and saw the victim's body, which explains what detail is in his confession -- he viewed the scene. He testified that he left the state because he was innocent but afraid.

Without the strength of the confession, the State had extremely weak evidence of guilt. However, a jury instruction on "flight" operated to relieve much of the state's burden.

At guilt/innocence, the jury was instructed:

> The Court charges you that, when a suspected person in any manner endeavors to escape, or evade a threatened prosecution, by flight, concealment, resistance to a lawful arrest, or other after-the-fact indication of a desire to evade prosecution, such fact may be shown in evidence as one of a series of circumstances from which guilt may be inferred. (TR. 554).

Trial counsel initially objected to the flight instruction, without stating any grounds for his objection (R. 440). This instruction is unconstitutional burden shifting.

In essence, the jury was told: "You may infer guilt from evidence of the defendant's flight." The Court's instruction effectively relieved the state of its constitutional burden of establishing every element of the crime charged, in this case the quintessential element of guilt, beyond a reasonable doubt. In Re Winship, 397 U.S. 358 (1970). The prejudicial instruction authorized defendant's jury to make a logical leap that the Constitution of the United States does not permit. The impermissible charge, furthermore, was devoid of the "curative language," Corn v. Zant, 708 F.2d 549, 559 (11th. Cir 1983) that must accompany jury instructions in order to assure that no unconstitutional burden-shifting occurs. Sandstrom v. Montana, 442 U.S. 510 (1979).

In Sandstrom, the Supreme Court asserted the necessary analysis "for whether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable juror could have interpreted the instruction." Id., 442 U.S. at 514. This inquiry also requires that a reviewing court "determine the nature of the presumption or inference described by the challenged instruction." Lamb v. Jernigan, 683 F.2d 1332, 1335 (11th Cir. 1982).

Here, a reasonable juror could have found guilt based on flight, and flight did not have to be proven beyond a reasonable doubt. Such an instruction is particularly pernicious in light of the fact that flight can mean so many other things besides guilt. The United States Supreme Court long ago stressed the unreliability of flight evidence as a factor indicating guilt in Alberty v. United States:

> [T]here are so many reasons for such conduct, consistent with innocence, that it scarcely comes up to the standard of evidence tending to establish guilt.... since it is a matter of common knowledge that men who are entirely

> innocent do sometimes flee from the scene of a crime through fear of being apprehended as the guilty parties, or from an unwillingness to appear as witnesses.

Alberty, 162 U.S. 510 (1895).

Defendant's trial testimony indicated that in fact innocence was his reason for leaving:

> The first thing I thought -- well, I should call the police. Then I figured no. I best leave. I said to myself: I'm out on parole. I'm a convicted convict and there is no way no one is going to believe what I say no matter what happened. I'm going to go to jail either way, so I took the car keys and I left the house.

Because of this type of reason for flight, courts which allow flight instructions demand cautionary language. For instance in United States v. Borders, 693 F.2d 1318 (11th Cir. 1982), the Eleventh Circuit approved a flight instruction that began:

> Intentional flight by a person immediately after a crime has been committed or after that person has been accused of a crime that has been committed is not, of course, sufficient in itself to establish the guilt of that person, but intentional flight under those circumstances is a fact which, if proved, may be considered by the jury in light of all the other evidence in the case in determining the guilt or innocence of that person. (emphasis added).

Borders, supra, at 1327-28.

See also, United States v. Stewart, 579 F.2d 356, 359, n.3 (5th. Cir. 1978) (trial judge "acted properly" in instructing jury "you may consider that there are reasons for this which are fully consistent with innocence...The jury will always bear in mind that the law never imposes on a defendant in a criminal case the burden of calling any witnesses or producing any evidence.")

Unlike the approved instruction quoted above, defendant's jury was not merely informed that it "may consider" evidence of flight. Defendant's jury was informed that such evidence is "one of a series of circumstances from which guilt may be inferred." The instruction was not followed by the critical qualifier that the jury "should also consider that there might be other reasons

fully consistent with innocence" for such flight nor were they cautioned that the defendant must not shoulder the burden of proving his innocence after being instructed that they "may infer" guilt from evidence of flight. Finally, they were not instructed that the accompanying "circumstances" must be proven beyond a reasonable doubt. Particularly where, as here, the defendant offered by his own testimony a reason "fully consistent with his innocence," the failure of the trial court to provide the jury with the appropriate cautionary instruction deprived defendant of his right to a fair trial, and he was entitled to an evidentiary hearing on effective assistance of counsel.

Appellate counsel had a duty to raise this fundamental error, and counsel's failure violated petitioner's Sixth, Eighth and Fourteenth Amendment rights.

B. Failure to Raise on Appeal the Repeated References to the Defendant's Criminal Record.

As outlined in Section II, 2, B, supra, constant reference was made at trial to defendant's criminal history. As noted, without the confession that was rebutted by Petitioner's testimony, there was little evidence of guilt. Under those circumstances, any improperly admitted evidence could have affected the outcome.

Florida law has long prohibited the introduction of evidence or questioning of witnesses about prior convictions of the defendant which are unrelated to the crime charged. Whitehead v. State, 279 So.2d 99 (Fla. 2d DCA 1973); Williams v. State, 110 So.2d 654 (Fla. 1959); F.S.A. Section 90.404(2)(a). The repeated reference to prison and parole was excessive and overreaching, and resulted in the trial of defendant on irrelevant issues. Introduction of such evidence and testimony was found to violate due process and the render a trial fundamentally unfair in Panzaveccio v. Wainwright, 658 F.2d 337 (5th Cir. Unit B 1981) ("The proper balance between judicial

economy and the prejudicial effect of evidence of prior convictions was not struck in this instance.") The position of the Florida Courts is that "admission of evidence of an accused's prior arrests is ordinarily deemed so prejudicial that it automatically requires reversal of his conviction," Dixon v. State, 426 So.2d 1258 (2d DCA 1983). Petitioner was entitled to appellate counsel who would not omit such a glaring constitutional error, which resulted in substantial prejudice to defendant against whom only weak evidence existed.

C. Defendant's Absence From the Courtroom.

The appellate record reflects that Petitioner was frequently out of the courtroom during his trial. Presence may not be waived in a capital trial. Here, there was no record evidence that the absence was ever knowing and voluntary. Appellate counsel had a duty to raise this constitutional claim.

First, the removal of the defendant without an express record waiver is fundamental error. In Francis v. State, 493 So.2d 1175 (Fla. 1982), the Florida Supreme Court reversed a capital conviction when a defendant was not permitted to be present during the exercise of peremptory challenges. Relying both on F.R.Crim.P. 3.180 and the Fourteenth Amendment, the Court found defendants have a constitutional right to be present during jury challenges as well as a right created by Florida criminal procedure rules. Such a right must be knowingly and intelligently waived before the defendant can be removed from the courtroom. Reversing the conviction in Francis, the court held:

> Francis was not questioned as to his understanding of his right to be present during his counsel's exercise of his peremptory challenges. The record does not affirmatively demonstrate that Francis knowingly waived this right or that he acquiesced in his counsel's actions after counsel and judge returned to the courtroom upon selecting a jury. His silence, when his counsel and others retired to the jury room or whenthey returned after the selection process did not constitute a waiver of his right. The state has failed to show that Francis made a

> knowing and intelligent waiver of his right to be present. See, Schneckloth v. Bustamonte, 412 U.S. 218, 83 S.Ct. 2041, 36 L.Ed.2d 854 (1973); Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1983).

Francis, 413 So.2d at 1178.

Francis is one of a long line of cases which hold a defendant has a Sixth and Fourteenth Amendment right to be present at any critical stage of trial. Illinois v. Allen, 397 U.S. 337, 338 (1970); Hopt v. Utah, 110 U.S. 574, 579 (1954); Hall v. Wainwright, 733 F.2d 766 (11th Cir. 1984); Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982). Florida Rule of Criminal Procedure 3.180 (a) defines several of the times during which defendant was absent in this case, most notably the point at which the court determined which portions of the defendant's statements should be redacted, and the exercise of peremptory challenges at the bench, and out of the hearing of the defendant. The jury's communication to the court regarding its view of the evidence is also a notable time during which defendant should have been present in order to enable him to consult with his attorney. Discussion of jury instructions is likewise a critical stage, particularly penalty phase instructions, since the Eleventh Circuit has clearly held that phase of the trial to be a critical stage of the proceedings in Proffitt, 685 F.2d at 1257; Cf. Gardner v. Florida,, 430 U.S. 349, 358 (1977) (sentencing is "critical stage" of capital trial).

Like Francis, there is no express record waiver in this case; there is only defendant's bare statement and that of his counsel. Waiver of a fundamental constitutional right will not be presumed from a silent record. Lewis v. United States, 146 U.S. 1011 (1897). Cf. Brewer v. Williams, 430 U.S. 387 (1977); Miranda v. Arizona, 384 U.S. 436, 384 U.S. 436 (1966). The defendant here was absent during a substantial part of the proceedings. There is no evidence of misconduct justifying such action. Henry v. State, 94 Fla. 783, 144 So. 523 (1927). The

Florida Supreme Court has on several occasions reserved deciding whether a defendant in a capital case can ever waive his right to be present in a capital trial. Herzog v. State, 438 So.2d 1372, 1376 (Fla. 1983); Francis v. State, 413 So.2d 1175, 1178 (Fla. 1982). But See Fails v. State, 60 Fla. 8, 53 So. 612 (1910) (defendant in a capital trial has a right to, and must be present, during his capital trial). However, the Eleventh Circuit has repeatedly held the defendant's right to be present at a capital trial is so fundamental that it cannot be waived, in Hall and Proffitt.

Appellate counsel rendered ineffective assistance of counsel by failing to raise this claim, in violation of Petitioner's Sixth, Eighth, and Fourteenth Amendment rights.

D. Lockett violation.

The appellate record revealed a fundamental error under Lockett v. Ohio, 438 U.S. 586 (1978): the sentencer was restricted in its consideration of mitigating circumstances to those listed in the statute. This restriction was underlined by the State in closing, and by comments of the court. It is the duty of appellate counsel to insure that constitutional issues likely to require resentencing are raised and argued vigorously on appeal. The instructions and comments regarding mitigating circumstances unduly restricted the consideration of mitigating circumstances in violation of the Eighth and Fourteenth Amendments, entitling Petitioner to a new sentencing hearing. Failure to raise such fundamental error is a violation of petitioner's Sixth, Eighth, and Fourteenth Amendment rights.

E. Disparaging comments regarding significance of advisory sentence.

As set out supra, paragraph E, pg. 6, the state and Court demeaned the sentencing role of the jury.

These references all downgrade the jury's advisory sentencing function and imply the life or death decision is not

one to be taken seriously. See Corn v. Zant, 708 F.2d 549, 557 (11th Cir. 1983). The true role of the jury in a capital case is far from that described by the prosecutor and court. The Florida Supreme Court has emphatically and repeatedly declared that "the jury recommendation under our trifurcated death penalty statute should be given great weight and serious consideration" in the imposition of the sentence. Ross v. State, 386 So.2d 1190, 1197 (Fla. 1980); Tedder v. State, 322 So.2d 908, 910 (Fla. 1975). The United States Supreme Court relied in part on that deference in upholding a challenge to non-binding jury life recommendations in Spaziano v. Florida, 462 U.S. ___, 82 L.Ed.2d 340, 104 S.Ct. ___ (1984). The remarks encouraged the jury to take its responsibility lightly, in one fell swoop removing the procedural protections the courts have hoped would guide juries in making reliable determinations on the ultimate sentence.

Appellate counsel's failure to raise this claim violated Petitioner's Sixth, Eighth, and Fourteenth Amendment rights.

F. The Confession Was Obtained Improperly and Involuntarily Under New York Law.

Under Florida law and the Federal Constitution, evidence seized illegally according to the law of the state in which the seizure takes place is inadmissible in state criminal proceedings in Florida.

In McClellan v. State, 359 So.2d 869 (Fla. 1st DCA 1978), the court held the law of the state in which the evidence is seized should be applied in determining whether it is admissible in a Florida criminal proceeding. McClellan involved the sufficiency of a warrant to search a car, issued in another state. The court held the evidence seized as a result of the warrant was admissible in Florida because it was legally seized under the law of the state which issues a warrant, even if it would have been seized illegally under Florida law. The Court states:

> Further, we hold that evidence procured in a sister state pursuant to a search valid under the laws of that state is admissible in the trial of a criminal case in Florida notwithstanding that the warrant validly issued and executed in the sister state would not have been or was not valid under the laws of Florida; provided the warrant and its executionin the sister does not offend U.S. Constitutional standards. In so holding, we have not overlooked the decision cited by defendantof People v. Rogers (Cal.App.1977), 141 Cal. Rptr. 412, but we do not find the principle of that case applicable here. The warrant, sub judice, issued on the basis of the affidavit supplemented by the oral testimony, does meet U.S. Constitutional standards. Accordingly, we affirm on this point.

McClellan,Id., 359 So.2d at 873; accord, State v. Matere, 401 So.2d 1361,1365 n.4 (Fla. 3d DCA 1981); See State v. Maier, 366 So.2d 501,505 n.11 (Fla. 1st DCA 1978). The California case distinguished by the Court in McClellan stands for the proposition that evidence which was seized illegally under the law of the State where the seizure occurred was nonetheless admissible in the California criminal proceeding. People v. Rogers, 141 Cal.Rpt. 412, 416 (2d Dist., Div. 4 1977). Thus, according to McClellan and Metere, this state has rejected that principle and applies the law of the seizing state in determining the admissibility of evidence seized.

The Federal Courts likewise preclude the admissibility of testimony where evidence seized illegally by Federal agents is sought to be used in state court under the "silver-platter" doctrine. Rea v. United States, 350 U.S. 197 (1956). While the silver platter doctrine was developed prior to the application of the exclusionary rule to the states and is based on the supervisory role of the federal courts over federal authorities:

> The command of the federal Rules is in no way affected by anything that happens in a state court. They are designed as standards for federal agents. The fact that their violation may be condoned by state practice has no relevancy to our problem. Federal courts sit to enforce federal law; and federal law extends to the process issuing from those courts. The obligation of the federal agent is to obey the Rules. They are drawn for innocent and guilty alike. They prescribe

> standards for law enforcement.
>
> They are designed to protect the privacy of the citizen, unless the strict standards set for searches and seizures are satisfied. That policy is defeated if the federal agent can flout them and use the fruits of his unlawful act either in federal or state proceedings.

Rea, id 350 U.S. at 217-18. See, United States v. Chemaly, 741 F.2d 1346, 1354 n. 2 (11th Cir. 1989). The principle is no less applicable here. The Courts should not permit the law of a sister state to be followed simply because the person subjected to its violation by law enforcement authorities is prosecuted in another state. To do so violates the Full Faith and Credit Clause, the right to travel and the constitutional protection of privileges and immunities of a citizen when he is within the borders of a state in which he is not a resident. See also, United States v. Martin, 600 F.2d 1175 (5th Cir. 1979), and Navarrow v. United States, 400 F.2d 315, 317 (5th Cir 1968). (Application of state or federal law to validity of search dependent of extent of Federal involvement).

There is clear case law decided by New York courts suppressing confessions where a defendant is taken out of holding pen areas just prior to arraignment and questioned by authorities. When state agents interfere with a defendant's right and access to counsel at a pre-trial critical stage and a statement is obtained from the defendant, the interference creates serious Fifth, Sixth, and Fourteenth Amendment ramifications. In the instant case, defendant was entitled to an arraignment under New York law "without unnecessary delay," see C.P.L. Sections 120.90 (1); 140.20, and defendant was entitled to counsel at that "critical stage". People v. Samuels, 424 N.Y.S.2d 893, 895, 49 N.Y.2d 218, 400 N.E.2d 1344 (1980). State agents clearly interfered with defendant's right to obtain counsel by delaying the arraignment at which counsel would have been appointed, and defendant's statement was unconstitutionally prompted by the state's studied dilatory tactics.

Defendants must be "promptly brought before the court for

arraignment" and not taken "to the police station for questioning" upon arrest. Samuels, 424 N.Y.S.2d at 895. When the state intentionally delays an arraignment and instead questions a defendant, the Sixth Amendment right to counsel is jeopardized:

> What the Assistant Attorney in effect did, with the police colloborating, was to deliberately postpone defendant's arraignment, thereby delaying his right to obtain counsel in order to get from him a stenographic statement taken by the prosecutor, a lawyer. This is a scheme to deny defendant counsel, even if he voluntarily waived his Miranda rights in his statement to police.

People v. Collazo, 412 N.Y.S. 2d 943, 947 98 Misc. 58 (1978). (emphasis added). The mere fact of undue delay, without explicit evidence of ill-motive by state agents, is prima facie evidence that the delay was for the purpose of restricting access to counsel. See also under Florida law, Nixon v. State, 178 So.2d 620, 621 (Fla. App. 1965) (If it appears that such delay induced the confession, reversal is required).

The fact of undue delay is also evidence in support of a defendant's contention that his statements were taken in violation of the Fifth and Fourteenth Amendments rights, and is evidence in opposition to the suggestion of waiver. Samuels; Lockwood;DeJesus. Florida law parallels New York law in this regard, Nixon v. State, 178 So.2d 620 (Fla. App. 1965), and requires strict adherence to arraignment requirements. Jacobs v. State, 248 So.2d 515 (Fla. App. 1971).

Of crucial importance is the fact that defendant was in a holding cell actually awaiting arraignment when the state went rfor its incriminating statement. People v. Richardson, 25 A.D.2d 221, 268 N.Y.S.2d 419; Lockwood. Such tactics are strong evidence of ill-motive by the state.

Evidence of prejudice here is clear. Adequate briefing and argument by appellate counsel would have brought before the court the Massiah and related deprivations which undoubtedly should have been brought to the Court's attention.

CONCLUSION

Serious errors occurred at trial. The State's only evidence, a confession, was refuted when the defendant testified. Trial error significantly affected the guilty verdict, and sentence decision, fundamental error which may and should be raised on appeal, even after trial counsel's failure to preserve the issues. Ray v. State, 403 So.2d 956 (Fla. 1981). The errors herein were fundamental errors involving due process. Burden of proof is a fundamental constitutional concern, and it was weakened here by an insidious flight instruction. Repeated references to past criminal conduct denied defendant a fair trial, guaranteed by due process. Defendant's absence from the courtroom was fundamental error under the Eighth and Fourteenth Amendments.

Lockett error, and demeaning the role of the jury, affect basic Eighth and Fourteenth Amendment guarantees. Reasonably effective appellate counsel would have raised the claims, which prejudiced defendant at guilt/innocence and sentencing.

Petitioner therefore requests that this court issue its writ of habeas corpus, and to direct that Petitioner receive a new trial as to guilt/innocence and sentencing; alternatively, that this Court allow full briefing of the issues presented herein, and grant Petitioner belated appellate review of his conviction and sentence. To examine these claims, the Court should appoint a Special Master to take evidence on the issues raised.

Respectfully Submitted,

N. JOSEPH DURANT, ESQUIRE

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand to the Office of the Attorney General, The Elliot Building, 401 South Monroe Street, Tallahassee, Florida, this 1ST day of March, 1985.

N. JOSEPH DURANT, ESQUIRE