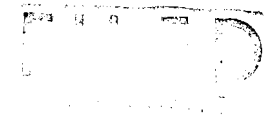
IN THE
SUPREME COURT OF FLORIDA



MAY 29 1986

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HERBERT LANDER SPIVEY, JR,

APPELLANT,

vs.

CASE NO. 67,010

STATE OF FLORIDA,

APPELLEE.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT
IN AND FOR DUVAL COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Herbert Lander Spivey, Jr., the defendant below in this capital case, will be referred to as "appellant." The State of Florida, the prosecuting authority below, will be referred to as "the State" or "appellee."

The record on appeal consists of 23 volumes, a one-volume supplement to the record on appeal, and a one-volume supplemental transcript. References to the volumes containing the docket instruments will be designated by "R" followed by the appropriate page number. References to the transcript of the pre-trial, trial, and post-trial proceedings below will be designated by "T" followed by the appropriate page number and enclosed in parentheses. Any references to the supplemental record and transcript will be designated by "SR" and "ST" respectively.

It should be noted that appellant was tried below with a co-defendant, Geraldin Joyce Crofton, whose appeal to the First District Court of Appeal from her conviction for conspiracy to commit murder in the first degree is currently pending. Crofton v. State, No. BG-46.

STATEMENT OF THE CASE AND FACTS

The State rejects appellant's statement of the case and facts as incomplete and somewhat inaccurate inasmuch as it omits much of the evidence as it was presented by the State during its case-in-chief. As a result, the State substitutes the following statement of the case and facts.

By indictment filed February 9, 1984, appellant and Geraldine Crofton were charged with the first-degree murder of Mrs. Crofton's husband Ronald. (R 21). In a separate information filed July 25, 1984, the State in Count I charged John Henry Green, Vance Ellison, Geraldine Crofton, and appellant with conspiracy to commit murder in the first degree.[1] In the second count of that information, appellant was charged with the armed robbery of Ronald Crofton. (R 147).

On August 2, 1984, the State filed a motion to consolidate the murder charge with the conspiracy and robbery charges. (R 148-149). On that same date, appellant moved to sever his trial from that of Geraldine Crofton on the ground that the introduction by the State of various statements made by Geraldine Crofton would not be admissible against appellant, and a joint trial would therefore violate appellant's sixth amendment rights under Bruton v. United States, 391 U.S. 127 (1968). (R 150)

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[1] Subsequently, Vance Ellison and another defendant, Gregory Hawkins, plead guilty to second-degree murder in exchange for their testimony sub judice. (T 24, 1434, 2010). A third defendant, Michael Ochuida was granted complete immunity in return for his testimony. (T 1600).

Argument on these motions was heard on September 7, 1984. (T 255-277). Thereafter, the trial court granted the State's motion to consolidate and denied the defense's motion to sever without prejudice to raise the issue during the trial should a Bruton problem become apparent. (T 270, 277, 370-379; R 163, 164).

The trial of appellant and Geraldine Crofton was held February 5 to February 17, 1985, with the Honorable James Harrison presiding. At the trial, the following evidence was presented:

Ronald Crofton was found dead in the kitchen of his home on September 27, 1983. (T 1305, 1310-1312). Some three months earlier, he had moved into the home, constructed by his company, Crofton Builders, Inc., after filing for divorce from his wife of 27 years, Geraldine. (T 1290, 1310, 3115, 3127).

According to Mrs. Crofton, the marriage had been deteriorating for some time as a result of Ron Crofton's alcoholism, his all-night carousing, and his physical abuse of Mrs. Crofton and their children. (T 3124-3125). In March of 1983, Mrs. Crofton filed for divorce but dismissed the petition nine days later. (T 3068-70). Then, in April, Mr. Crofton filed for divorce and Mrs. Crofton filed a counter petition. (T 3071).

During this time, Mrs. Crofton made it plain to friends and relatives that she knew her husband was seeing another woman by the name of Mickey Finch. In one instance, she phoned her friend, Susan Bailey, who was living next door to Mr. Crofton, told her that she thought Mr. Crofton had a woman in his home,

and threatened to burn the home down with her husband and the woman inside. (T 2553). She also told Mrs. Bailey that Ron Crofton had told her he would run his construction company into the ground before he would give her half of it (apparently as a result of the dissolution of their marriage). (T 2554). She subsequently told several people that she could operate her husband's business just as well as he could, (T 1336, 2555, 2593-94), that if she couldn't have him no one else would (T 2526), and that she would kill him. (T 2593-94). She also attempted to solicit her nephew, Thomas Outlaw, to kill her husband in exchange for her husband's life insurance proceeds in the amount of $20,000. (T 2631).

In January, 1983, Mrs. Crofton met Vance Ellison through his live-in girlfriend Kathy Millett and they became friends. (T 2012-13, 3134-35). Ellison was a drug dealer who was attempting to leave the drug business in an effort to avoid jail. (T 2195). By mid-1983, he had little money and he and Kathy were subsisting on her ex-husband's child support payments. (T 2197).

At the end of February or the beginning of March 1983, Mrs. Crofton began complaining to Ellison about the worsening state of her marriage. (T 2014-15). She told Ellison that she disliked the fact that her husband was running around with other women and she wanted him back home. (T 2015). In an effort to teach him a lesson, she asked Ellison to have her husband beaten up, and Ellison told her he would arrange it.

His choice for the job was a local nightclub bouncer named Jeffrey McDonald. (T 2018-19). Ellison offered McDonald a $1000 to beat Mr. Crofton and McDonald agreed. (T 2019).

It was McDonald's testimony that in 1983 Ellison introduced him to Geraldine Crofton at her home. (T 2379). At that first meeting, Mrs. Crofton asked McDonald to stay at her home as her bodyguard that night because she feared that her husband was coming to beat her. (T 2381). When her husband did not arrive, Mrs. Crofton paid McDonald $100 and took him back to Ellison's apartment. (T 2383-84). In a second trip to Mrs. Crofton's home, McDonald was told by Mrs. Crofton that she wanted to slow her husband's business. (T 2392). She took McDonald to Crofton Builders, turned off the burglar alarm with a key, and entering the offices, removed a computer tape, cash box, and chain saw, all of which she gave to McDonald. (T 2392-95). Upon returning to her home, she stated that she wanted her husband either beaten or killed so that Mickey Finch could not get the business. (T 2396). She told McDonald that she had a $20,000 insurance policy which she would give to whoever killed her husband. (T 2396). Before he left that night, Mrs. Crofton asked McDonald to slap her face so that it looked as though her husband had been there. (T 2397). She then called her daughter and the police. (T 2477).

Meanwhile, Ellison continued to groom McDonald for the beating of Mr. Crofton. He took McDonald several times to a restaurant frequented by Crofton and Mickey Finch. He pointed Mr. Crofton out to McDonald, and showed McDonald the El Camino

Crofton drove. (T 2019-23), 2384-88). In return, McDonald received some $1000. (T 2024).

In June, 1983, Mrs. Crofton informed Ellison that she wanted her husband killed and persistently asked Ellison if he had found anyone to do the job. (T 2031-34). He contacted Johnnie Green, a local drug dealer, to see if he knew of anyone that would take on a contract killing. (T 2035). Ellison met Green in July, 1983, and told Green he would pay $20,000 for the contract. (T 2041). Green subsequently phoned Ellison and told him to contact the appellant, Herbert Spivey. (T 2042). In August, 1983, Ellison went to the place appellant was renting and introduced himself to appellant. (T 2043-45).

At their third meeting, Ellison broached the subject of the contract murder with appellant. (T 2018). Ellison told appellant that appellant would receive $20,000 for the job and appellant agreed to do it. (T 2049). Ellison contacted Mrs. Crofton and told her he had found someone to kill Mr. Crofton. (T 2050-51).

In subsequent meetings in August and September of 1983, Ellison familiarized appellant with Mr. Crofton's lifestyle and habits. (T 2051). He took appellant by Mr. Crofton's business, his residence, the restaurants he frequented, even the dock where he kept his boat. (T 2052-53). He described Mr. Crofton's El Camino to appellant and gave him the license tag number. (T 2052). Ellison also showed appellant a photo of Mr. Crofton given Ellison by Mrs. Crofton. (T 2059).

In at least one instance, because Mr. Crofton had seen Mr. Ellison's car the two times they had met, Mr. Ellison suggested to Mrs. Crofton that a car with which Mr. Crofton was not familar should be rented to drive appellant by Mr. Crofton's home. (T 2055-57). Mrs. Crofton arranged the rental through a neighbor who owned a car rental agency and who rented the car to Ellison without the customary identification prerequisites. (T 2055-28, 2305-26). The rental contract was for one day, executed September 9, 1983. (T 2326). The rented car was used to show appellant Mr. Crofton, his residence, and the night spots he frequented. (T 2058-59).

Subsequently, Ellison purchased a 1972 or 1973 blue Ford Torino for appellant because appellant said he needed a car if he was going to find Crofton. (T 1361-76, 2058-60). The car was purchased for $750 in cash, part of $1000 obtained from Mrs. Crofton by Ellison. (T 2063-64). The remaining $250 was given to appellant for expenses. (T 2064). The Ford was used in a second trip past Mr. Crofton's home, office, and favorite social spots. (T 2063).

Ellison testified that he had instructed appellant to shoot Mr. Crofton. (T 2068). However, after this second trip, appellant stated he would have it his own way, and Ellison did not press him for details. (T 2069).

Timothy Tyler, an acquaintance of appellant's testified that during the summer of 1983, appellant had no steady job, his wife was pregnant, and a bicycle was their only form of transportation. (T 1392-93, 1396). Then, in August or

September, appellant came by Tyler's house to show him his new Ford Torino. (T 1394-95). During their conversation, appellant told Tyler the car was a down payment for a murder appellant had to commit. (T 1397). Appellant told Tyler that someone wanted a man killed and that he had obtained all the information about the man and the places he frequented. (T 1398). Once he killed the man, appellant told Tyler he would receive some money. (T 1399). This conversation took place seven to ten days before the killing. (T 1401).

On the afternoon of September 26, 1983, Mrs. Crofton contacted Ellison by way of his beeper at McDuff's Appliances where he was employed. (T 2074-75). Ellison returned her call from a pay phone at a nearby convenience store, and Mrs. Crofton told Ellison that her husband had just left her house and that he had at least $2000 on him. (T 2075-76). Ellison replied that he would attempt to contact appellant. (T 2096).

Ellison subsequently heard from appellant, who called to tell Ellison that he and his partner were "going out looking." (T 2077). Ellison related to appellant that Mr. Crofton had just left Mrs. Crofton's house, that he had $2000 on him, and that he was headed for home. (T 2077). Between 8:00 and 8:30 p.m. that night, appellant contacted Ellison and informed him that "it was done." (T 2079).

Michael Ochuida testified that he had known appellant for some three years when he ran into him and his wife at the Normandy Mall on September 26, 1983. (T 1608-09). Appellant told Ochuida that he knew of a man who had $1000 on him and

Ochuida agreed to help rob the man. (T 1608-10). No mention was made of committing a murder. (T 1609).

Later that afternoon, appellant, his wife, and Ochuida ran into Gregory Hawkins and his girlfriend, Angie. (T 1612). Appellant asked Hawkins if he wanted to rob someone for $1000, and Hawkins replied, "Sure, why not." (T 1438). Hawkins and his girlfriend parked their car and got into appellant's Torino. (T 1438-39). They stopped for gas and, then, appellant pulled out the pistol to be used in the robbery and handed it to Hawkins. (T 1439-40, 1614). Appellant stopped at a convenience store where Ochuida bought a six-pack of beer and appellant used the telephone. (T 1440, 1614). They subsequently drove by Mr. Crofton's home, but Crofton's car was not there, and appellant turned back to Beach Boulevard and went to a restaurant that appellant knew Crofton frequented. (T 1441, 1442-43). When they pulled into the restaurant's parking lot, appellant spotted Crofton's El Camino, parked the car, and waited for Crofton to come out. (T 1447, 1618). Some 35 minutes later, Ron Crofton emerged from the restaurant and got into his car. (T 1448). Appellant followed him back to his house. (T 1448, 1618). As appellant, Mike Ochuida, and Greg Hawkins got out of the car, appellant told Angie and Kelly Spivey to stay in the car and if the trio did not return in 20 to 30 minutes, to start driving around. (T 1449, 1619).

The three men walked up to the front door of Mr. Crofton's home, and Ochuida rang the bell. (T 1449-50, 1619). There was no answer. At this point, Hawkins testified that he had the gun

(T 1450), although Ochuida testified that appellant had the gun, gave it to Ochuida briefly, then took it back once inside. (T 1620-1622).

The door was unlocked and the three men entered. (T 1450, 1620). They could hear Mr. Crofton talking on the telephone upstairs, and they waited for him to come downstairs. (T 1451, 1621). Two to three minutes later, Mr. Crofton came down the stairs and began to head out the front door. (T 1451, 1621). Mike Ochuida grabbed him from behind and pushed him into the kitchen as Greg Hawkins stepped in front of Mr. Crofton and, pointing the gun in his face, asked him for all of his valuables. (T 1452, 1621). There is some dispute as to the sequence of events that followed. According to Hawkins, Mr. Crofton handed Hawkins a gold nugget on a chain, his wrist watch, and his wallet. (T 1452). Hawkins stuck the watch and the gold nugget necklace in his pocket and handed Ochuida the wallet. (T 1453). The wallet contained only $63. (T 1463, 1540, 1624). However, it was Mike Ochuida's testimony that Mr. Crofton's watch, gold nugget necklace and car keys were all removed from Mr. Crofton by appellant after Mr. Crofton's death. (T 1625).

At this point, according to Hawkins, Mike Ochuida and appellant went upstairs. (T 1453-54). Hawkins testified that Ochuida returned first with two pairs of socks. He put a pair on his hands and gave the other pair to Hawkins who did likewise. (T 1454). Appellant then came downstairs with a pillowcase and began choking Mr. Crofton with it. (T 1454).

It was Mike Ochuida's testimony, however, that he went upstairs to look for valuables (T 1622), and a few minutes later, appellant joined him, grabbing a piece of linen from the bed, and returned downstairs. (T 1623). When Ochuida went back downstairs a few minutes later, he saw appellant choking Mr. Crofton with a pillow case. (T 1624). When Ochuida asked appellant what he was doing, appellant motioned toward the gun in his waistband, and told Ochuida to shut up and get back. (T 1624-25).[2]

Hawkins testified that as appellant began choking Mr. Crofton, Crofton reached up to his neck, grabbed his chest and fell down. (T 1456). Appellant continued to pull on the ends of the pillow case, and Hawkins asked appellant why he was doing it. (T 1456). Appellant replied that he had to kill Crofton so Crofton couldn't identify him. (T 1456). Hawkins watched while appellant held the pillow case around Mr. Crofton's neck for ten minutes. (T 1456). Then, appellant asked Hawkins to help him, and Hawkins grabbed the other end of the pillow case and pulled on it for three to four minutes. (T 1456-57, 1625). At this time, there was no sign of life in Mr. Crofton. (T 1457).

After appellant and Ochuida left (allegedly unbeknownst to Mr. Hawkins who said he was upstairs at the time (T 1459-60)),

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[2] Appellant testified that he had retrieved the pillow case only to tie up Mr. Crofton (T 2779), but when Crofton made a sudden move, Mr. Crofton fell to the ground with the pillow case around him and appellant fell with him. (T 2780-81). According to appellant, when Mr. Crofton fell, he was knocked unconscious (T 2782), and, at that point, he and Ochuida left while Hawkins remained behind. (T 2783). Appellant contended at trial that when he left, Mr. Crofton was still alive. (T 2782).

Hawkins remained in the Crofton house, taking a pair of gloves, Mr. Crofton's shoes, the pillow case, and the car keys. (T 1460). Driving Mr. Crofton's car, Hawkins caught up with appellant and the others, and appellant pulled off of the road behind Hawkins. (T 1462). Everyone but Ochuida wanted to leave the El Camino there on the side of the road. (T 1463). Only Ochuida wanted to sell the car. (T 1463, 1525). Hawkins abandoned the El Camino, leaving the pillow case in a grocery bag in the front seat, and got into appellant's car with the others. (T 1464, 1628). Appellant then pulled into a convenience store where he used the telephone. (T 1465, 1628). That same night, appellant traded the $63, the gold chain, and the gun for cocaine. (T 1465, 1629).

When appellant contacted Ellison that evening and told him "it was done," Ellison called Mrs. Crofton and told her to "be prepared because it was done." (T 2081).

The next day, September 27, 1983, Thomas Jamison, Mr. Crofton's business associate, discovered the body. (T 1303, 1311-12). A white sock was lying on the floor near the body and the victim was wearing no shoes. (T 1318, 1320). Detective Bradley of the Jacksonville Sheriff's Office testified that no valuables were found on Mr. Crofton's body at the scene. (T 1814). Neither was his El Camino in the driveway. (T 1814-15). The car was later discovered some two miles away on Beach Boulevard. (T 1814-15). One white sock was found outside the residence. (T 1815).

Medical examiner Dr. Bonifacio Floro testified that when he arrived at Mr. Crofton's residence on September 27, 1983, the body was on the kitchen floor face down in a pool of blood. (T 1896-97). It was the doctor's opinion that death occurred some 12 to 18 hours prior to the doctor's examination at 11 a.m. (T 1897). The doctor's visual examination of the victim revealed a small laceration above an eyebrow and bruises on the lips and arm. (T 1900). His subsequent autopsy revealed that Mr. Crofton was suffering from severe pulmonary emphysema. (T 1905-11). He testified at trial that although he was suspicious of the manner in which Mr. Crofton died, without more evidence, he was unable to conclude that Mr. Crofton died of anything but natural causes. (T 1911). Upon further investigation into the case, the doctor amended the death certificate on January 26, 1984, to reflect that while Mr. Crofton had died of severe pulmonary emphysema due to hemmorhaging, the manner of death was homicide. (T 1915-16). The doctor stated that with the severity of Mr. Crofton's emphysema, Mr. Crofton would have lost consciousness within ten to fifteen seconds upon being choked with a pillow case while a healthy man may have remained conscious five to six minutes. (T 1916-17).

Because of the delay in the issuance of the death certificate, Mrs. Crofton was unable to obtain the insurance money. (T 2096). In the meantime, appellant began asking Ellison about his money. (T 2093). During these conversations, appellant told Ellison he had placed his foot in the back of Mr. Crofton's head and strangled him with a pillow case. (T 2097).

The next time Ellison saw appellant he paid him $500. (T 2100). Over the next several months, Ellison paid Spivey some $17,000. (T 2103-24, 2794). A portion of this money was given to Hawkins after appellant told Ellison that Hawkins was his partner. (T 2101, 2794). The remaining amount was largely spent by appellant on drugs. (T 2794).

The full extent of the conspiracy was brought to light when Betty Fletcher, a neighbor of Mike Ochuida and his family, contacted the police. She testified that she had talked to Mike in October or November of 1983 and that he had said he had really gotten "in trouble this time." (T 1786). He told Ms. Fletcher that he, appellant, and another man were involved in a murder. (T 1787). He stated that when he came downstairs with the socks, he saw appellant and the other man choking the victim. (T 1789).

On February 20, 1985, the jury found appellant guilty, as charged, of murder in the first degree, conspiracy to commit murder in the first degree, and armed robbery. (T 3644-45; R 241-43). Mrs. Crofton was found not guilty of murder, but was convicted of conspiracy to commit murder. (T 3646-47).

On February 26, 1985, appellant filed a motion for new trial. (R 244-246). After a hearing prior to sentencing on March 29, 1985, the motion was denied. (T 3789, R 273).

On March 15, 1985, the jury heard testimony presented by appellant in mitigation of the death penalty. (T 3661-3700). The witnesses were a Duval County school supervisor who testified to the content of appellant's school records, (T 3661-72), family members and friends who likewise testified to appellant's back-

ground (T 3682-86; 3688-90; 3692-95), and Mrs. Kelly Spivey's probation officer who testified to the concern appellant had while in jail for his wife and newborn son. (T 3695-99). Following this testimony, the jury recommended that appellant be sentenced to life imprisonment without possibility of parole for 25 years. (T 3775-76, R 271).

A sentencing hearing was held on March 29, 1985. At the hearing, the court overrode the jury's recommendation and sentenced appellant to death. (R 274-278). The court also imposed consecutive sentences of 30 years for the conspiracy conviction and 60 years for the armed robbery conviction. (R 292-297).

As required by statute, the trial court made lengthy written findings in support of its imposition of the death penalty. (R 278-290). Specifically, the court, after considering the aggravating and mitigating (statutory and non-statutory) circumstances, found two aggravating circumstances, to wit: that appellant had been convicted of another capital offense or of a felony involving the use of threat or violence to some person (R 282) and that appellant committed murder for financial gain. (R 283-284). The court also found the only mitigating circumstance to be "the life sentences assured Ellison and Hawkins, the immunity granted Ochuida and the acquittal of Geraldine Crofton." (R 288). The court then concluded that each of the two aggravating circumstances outweighed the non-statutory mitigating circumstance. (R 289). This appeal followed. (R 298-299).

SUMMARY OF ARGUMENT

ISSUE I: It is the State's position, first, that the appellant should be estopped from raising the instant issue on appeal because, although appellant's trial counsel had ample opportunity in which to correct the trial court's misperception of the law concerning whether appellant's co-defendant had the right to cross-examine appellant as to his post-arrest silence after Miranda warnings, appellant did nothing to dissuade the court from allowing the cross-examination and, in fact, at no time made the specific argument he now makes on appeal that Mrs. Crofton's attorney had no duty to his client to perform such cross-examination. Alternatively, the State contends that because the prosecution was not responsible for the error, there clearly was no state action and, therefore, appellant's due process rights under the fourteenth amendment could not have been violated. Finally, whether or not the subject cross-examination was error, it clearly was, under the facts of this case, harmless.

ISSUE II: Contrary to what appellant suggests in his brief, regardless of the jury's recommendation, the trial judge still may properly weigh aggravating and mitigating factors in making his sentencing determination. Moreover, it is clear, based upon the circumstances of the case, that none of the factors asserted by appellant to have possibly been reasonable bases for the jury's recommendation, could have been so considered by the jury.

ARGUMENT

ISSUE I

(RESTATED) THE TRIAL COURT DID NOT REVERSIBLY ERR IN ALLOWING CO-DEFENDANT CROFTON'S ATTORNEY TO CROSS-EXAMINE APPELLANT AS TO WHETHER APPELLANT MADE ANY POST-ARREST STATEMENTS TO ANYONE REGARDING THE CIRCUMSTANCES SURROUNDING THE MURDER OF RONALD CROFTON.

Appellant testified in his own behalf at the trial, admitting that he was at Mr. Crofton's home the night he died and that he participated in the robbery. (T 2774-79). It was his testimony that before he left, he attempted to bind Mr. Crofton with a pillow case, but as he approached Mr. Crofton, Crofton made a sudden movement and appellant grabbed him with the pillow case, which appellant had already placed around Mr. Crofton's upper body. Both Mr. Crofton and appellant fell to the floor. (T 2780-82, 2885). At some point during the fall, Crofton was rendered unconscious. (T 2782). However, appellant testified that when he and Mike Ochuida left Hawkins alone with Crofton inside the house, Crofton was still breathing, thereby inferring that Hawkins must have stayed behind and killed Mr. Crofton. (T 2782-83).

Subsequently, immediately prior to conducting his cross-examination of appellant, defense counsel for co-defendant Mrs. Crofton advised the trial court of the following:

> Judge it is my intention, and I would advise the Court, to pursue a line of cross examination of this witness as to whether or not this is a recently concocted story on his part. My intention is to merely question him concerning what if any statement he made at the time he was arrested, whether he asked for an attorney, and whether he said he knew nothing about the whole thing and didn't have anything to do with it at all. Now, that's a strong question as to whether the State can do that or not. However, he is an adversary witness to me, and I want full opportunity to fully cross examine.

(T 2798). The following colloquy between the trial court, assistant state attorney Michael Obringer, appellant's counsel Mr. Bob Link, and co-defendant Mrs. Crofton's counsel Lacy Mahon was then held:

> THE COURT: Is DELUNA still viable from the Fifth Circuit saying just that? That a codefendant has the right to cross examine on such matters?
>
> MR. LINK: I believe it is, Judge.
>
> THE COURT: It's my understanding it has been cited with approval.
>
> MR. OBRINGER: That's my recollection, too.
>
> MR. LACY MAHON: It's an extremely vital area to me.
>
> THE COURT: Well, based on my understanding of DELUNA, and your Sixth Amendment Right to cross examine, and I will note your objection, Mr. Link.

MR. LINK: I certainly will object, and also move for a mistrial.

THE COURT: Yes, sir.

MR. OBRINGER: The State of Florida brought this to the Court's attention, and we're not going to ask the question.

THE COURT: All right. Let me ask this now, gentlemen: Mr. Obringer, assuming that Mr. Mahon does go into that area as he represented that he will, let me hear you first, what right do you have to further examine, or cross examine on that particular issue brought out by Mr. Mahon?

MR. OBRINGER: Judge, I'm not going to touch it. I may have the right, but out of an abundance of caution I am not going into that.

(T 2798-99).

After further discussion, the ensuing exchange occurred:

MR. MAHON: My intention is to pursue the questioning of when he was arrested; who he was arrested by; under what circumstances he was arrested and if at that time he made any statements, if he made a statement to any police officer, if he told the same story [to] them that he is telling here on the stand at the present time; did he remain silent, or did he deny any involvement in the offense whatsoever or any knowledge of the offense and ask him if he asked for an attorney in order that he might discuss the matter with him and if he talked to an attorney, and depending on what his replies are, Your Honor, then I intend to pursue either, one, why he changed his story, if it was changed. Of course, if he says yes, I was arrested and I told him exactly the same thing that I have told today, then that would end that line of questioning. We know that he will not, of course. If he says that I didn't say anything, I didn't tell them I was involved in it or say anything with regard to this matter, then I want to pursue with him how long did your silence continue; when did you first tell anyone the story that you have told here today and who was that and I think

> generally those are the lines of questioning that I would like to pursue with the witness. The purpose of it, of course, is to show that it's a recent fabrication, and attack the credibility of the witness based on that fact.
>
> THE COURT: All right. Sir. Let the record show that this is the first time that the Court has been made aware of this intention to make any such inquiry. Now, it would be my intention to permit you to exercise your Sixth Amendment Right to confront the witness by permitting you to ask him if at the time of his arrest he made a statement to any police officer about his involvement or this case. If his answer is no, I will permit you then to say have you ever made a statement to a police officer about your involvement or this case. If his answer is yes to the question about making a statement, I will permit you to ask what he told the police officer. If it differs from what he has told today, if that's true, I will then permit you to ask him why he has changed his account of the facts. I will not permit you to ask him why he did not make a statement after his arrest. If he says he did not make a statement at the time of arrest, I will not permit you to ask why or to inquire any further.
>
> The intent of my order is to balance the Sixth Amendment Right of Crofton against the Fifth Amendment Right to remain silent of Spivey.

(T 2801-03). The court further warned the attorneys that it would not allow during closing arguments any reference to appellant's failure to make a statement to the police at the time of his arrest. (T 2803-04).

The discussion as to the propriety of Mr. Mahon's cross-examination of appellant regarding his post-arrest silence was extensive, covering pages 2798 to 2812 of the trial transcript and included a recess by the court to research the issue.

(T 2800). Despite the recess and the fact that opportunity was given appellant's trial counsel to make the specific argument appellant now raises on appeal (T 2799), appellant's trial counsel at no time argued to the court, as he does now, that the court should not allow Mr. Mahon to cross-examine appellant as to his post-arrest silence because such silence after Miranda warnings proved nothing under Doyle v. Ohio and, thus, to deny Mr. Mahon cross-examination in that area would not violate his client's sixth amendment right. Rather, appellant's trial counsel limited his involvement in the discussion to agreement with the trial court's statement that DeLuna v. United States, 308 F.2d 140 (5th Cir. 1962), in which the Fifth Circuit stated that a defendant has as full a constitutional right to confrontation with regard to his co-defendant as if he were tried separately, was still good law (T 2798) and citation to Sublette v. State, 365 So.2d 775 (Fla. 3d DCA 1978), holding that it was reversible error to allow a co-defendant's counsel to comment in closing argument on a defendant's failure to testify. (T 2799-2800).

Over appellant's general objection and motion for mistrial, Mr. Mahon proceeded with his cross-examination of appellant specifically asking appellant when he was arrested and whether he made any statement to anyone at the time of his arrest. Appellant stated that he made no statement regarding a contract murder or "Mickey" until the first time he spoke with his lawyer four days after his arrest. (T 2815-17).

It was not until appellant's motion for new trial that appellant specifically articulated the exact nature of his objection at trial, that the subject cross-examination of appellant constituted a comment on the appellant's post-arrest silence in violation of the fifth, sixth, and fourteenth amendments. In that motion, appellant relied for the first time upon Doyle v. Ohio, 426 U.S. 610 (1976). (R 245). At the hearing on the motion, the trial court, faced at the time with the per se reversal rule of Bennett v. State, 316 So.2d 41 (Fla. 1975), ruled that the subject testimony was not "fairly susceptible" of being a comment on appellant's right to remain silent especially in light of the fact that appellant took the stand and gave testimony in which he admitted being at the scene of the murder, thereby incriminating himself in the murder. Moreover, the court noted that no undue emphasis had been placed upon the testimony and no mention of the post-arrest silence was made during closing argument. (T 3787). Consequently, the court denied appellant's motion for new trial. (R 272).

The appellant now contends, relying largely on Doyle v. Ohio, supra. that the trial court erred in "balancing" appellant's fifth amendment right to remain silent against his co-defendant's sixth amendment right to cross-examination. He argues that because appellant was informed of his Miranda warnings at the time of his arrest (a fact not brought out at trial but mentioned during the motion to suppress hearing (T 289)), inquiry into his subsequent silence violated his due process rights under the fifth and fourteenth amendments.

Of course, this assertion pre-supposes that the subject testimony sub judice did constitute a comment on the appellant's right to remain silent. Even if the State were to agree, the State by no means concedes that reversible error occurred sub judice. Nor is the State conceding that appellant's due process rights were violated by the co-defendant's cross-examination. The State concurs, however, with appellant that Mrs. Crofton had no constitutional right to cross-examine appellant as to his post-Miranda, post-arrest silence because such testimony from appellant was not relevant to Mrs. Crofton's cause.

Thus, it appears there was trial court error sub judice, but who induced it is very important to a consideration of whether reversal is mandated. The prosecution had already stipulated during pre-trial motions that it would not elicit testimony from any witness as to any statement or the lack of any statement made by the appellant after his arrest, and the prosecution kept its word. (T 283, 2798-99). Nevertheless, an error appears to have occurred, and the manner in which it occurred is of extreme significance to the proper resolution of this cause.

Returning to that portion of the trial in which Mr. Mahon first informed the court of his intention to cross-examine appellant regarding his post-arrest silence, Mr. Mahon told the court that there was "a strong question" as to whether the State could properly cross-examine appellant as to his post-arrest silence, but that appellant was "an adversary witness to me, and I want full opportunity to fully cross examine." (T 2798). The predicate for the error that followed was then laid when the

court asked counsel whether "DELUNA is still viable from the Fifth Circuit saying just that? That a codefendant has the right to cross examine on such matters?" Appellant's trial counsel replied that it was. (T 2798). Based on the dictum in DeLuna v. United States, which says that a co-defendant's right of confrontation in a joint trial should be no less than if he were prosecuted singly, the trial judge concluded that Mrs. Crofton had a right of cross-examination sub judice.[3]

DeLuna v. United States is completely irrelevant to the issue at hand for a myriad of reasons. First, the case is not a comment-on-silence case; it is a case involving a co-defendant's failure to testify. The specific issue in DeLuna was:

> When one of two defendants jointly tried in a criminal proceeding in a federal court exercises his right not to testify, does the Fifth Amendment protect him from prejudicial comments on his silence made to the jury by an attorney for the co-defendant?

Sub judice, unlike in DeLuna, the appellant took the stand and testified. Moreover, in DeLuna, the Fifth Circuit reversed the defendant's conviction rejecting the government's argument that it was free from blame, and held that:

> In a criminal trial in a federal court an accused has a constitutionally guaranteed right of silence free from prejudicial comments, even when they come only from a co-defendant's attorney. If an attorney's duty

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[3] The court relied on this dictum from DeLuna to conclude that Mrs. Crofton had the right of cross-examination, but because in DeLuna, the Fifth Circuit reversed for new, separate trials, the court then distinguished DeLuna on its facts, stating that in DeLuna, the defendant had not testified but that in the instant case appellant had testified and, in so doing, had incriminated himself. (T 2807).

> to his client should require him to draw the jury's attention to the possible inference of guilt from a co-defendant's silence, the trial judge's duty is to order that the defendants be tried separately.

Id. at 141. This reasoning is not so readily applicable to the facts of the instant case because: First, this was a state court proceeding requiring an application of both the fifth and fourteenth amendments, and, because the prosecution did not elicit the error sub judice, there was no state action and thus there is some question as to whether a due process violation under the fourteenth amendment occurred; second, as noted above, Mrs. Crofton's attorney did not have a duty to "draw the jury's attention to the possible inference of guilt from a co-defendant's silence" because there could be no inference of guilt. This latter point gives rise to the most important reason why DeLuna is inapposite here: the DeLuna decision predates Miranda v. Arizona, 384 U.S. 436 (1966) by four years. Therefore, in 1962, the year DeLuna was decided, if a defendant remained silent at the time of his arrest, such silence certainly was probative of his guilt because he had not been informed by police under Miranda that he had the right to remain silent. Today, however, as Doyle suggest, a defendant's post-arrest silence is not probative of anything because once Miranda warnings are given, a defendant's silence could as easily be the result of inducement based upon receipt of such warnings as they could be probative of the defendant's guilt. Thus, of necessity, Miranda has rendered the dictum in DeLuna completely irrelevant to the issue at hand.

Despite DeLuna's clear irrelevance with regard to the facts of this case, appellant's trial counsel at no time argued that DeLuna was inapposite, and at no time until the present appeal did appellant's trial counsel suggest that Mrs. Crofton had no right to cross-examine his client on his post-arrest silence following Miranda warnings. Instead, trial counsel essentially agreed with the trial court that the dictum in DeLuna was applicable and made little effort other than general objections and a single citation to the clearly distinguishable case of Sublette v. State (which appellant's appellate counsel now admits was properly rejected by the trial court below (Initial Brief at 21)), to dissuade the trial court from committing the error he now so vigorously raises.

Given these circumstances, it is the State's position that the appellant should be estopped from raising the instant issue on appeal. Although defense counsel had ample opportunity in which to correct the trial court's misperception as to the relevant case law, the record shows that other than interposing the perfunctory objections necessary to preserve the issue for appeal, defense counsel did little to avoid the establishment of clear error on the face of the appellate record. Indeed, the facts of the instant case offered a golden opportunity for a strategically minded defense counsel to ensure that error was built into the record, and sub judice, appellant's trial court clearly took advantage of that opportunity. As a result, inasmuch as appellant acquiesced in the reliance by the trial court upon a clearly inapposite case and did not make the

argument based on Doyle v. Ohio, that he now makes on appeal, i.e., that Mrs. Crofton did not have a sixth amendment right to cross-examine the appellant as to his post-Miranda, post-arrest silence, the appellant should be estopped from claiming reversible error on appeal.

In this vein, the effect of trial counsel's actions sub judice , is not unlike what occurred in Jackson v. State, 359 So.2d 1190 (Fla. 1978). There, Jackson challenged the comments made by the Bay County Sheriff who was involved in appellant's arrest to the effect that when the sheriff warned Jackson, following the giving of his Miranda warnings, that he was going to ask questions regarding the two women who were murdered, Jackson stated, "I want a lawyer." Id. at 1193. Specifically, Jackson contended on appeal that the sheriff's statement constituted an impermissible comment upon Jackson's exercise of his rights under the fifth and sixth amendments pursuant to the then per se reversal rule of Bennett v. State, supra. This Court rejected Jackson's argument, stating:

> Appellant correctly states our holding in Bennett v. State, 316 So.2d 41 (Fla. 1975), that any comment upon a defendant's standing mute or silent or refusing to testify in the face of an accusation is fundamental error requiring reversal for a new trial. But this is not a Bennett situation. In Bennett the prosecutor elicited testimony from his own witness to the effect that after being advised of his constitutional rights, defendant "refused to sign the waiver . . .." This statement suggests that defendant had a duty to respond and was held to be an impermissible comment on defendant's exercise of his Fifth Amendment rights. In the present case, the appellant's statement, "I want a lawyer" was brought out on cross-

> examination by counsel for the defense. But for the insistence of appellant himself, the fact would not have come before the jury. Appellant cannot initiate error and then seek reversal based on that error. Gagnon v. State, 212 So.2d 337 (Fla. 3d DCA 1968); Borst v. Gale, 99 Fla. 376, 126 So. 290 (1930).

Id. at 1193-1194. (Emphasis supplied). Likewise, in the instant case, it was not the prosecutor but the co-defendant's attorney who elicited the subject testimony, and appellant did little to ensure that such testimony was not brought before the jury. No specific argument was ever made by appellant's trial counsel as to the viability of DeLuna and whether there was even a duty on the part of the co-defendant's counsel to cross-examine his client on his post-arrest silence after Miranda warnings. Rather, appellant's trial counsel allowed the cross-examination and, as a result, he should not now be allowed to raise a matter as error on appeal which, upon proper objection and argument to the trial court, he could have avoided. Regardless, because the prosecutor was not involved in the questioning, Jackson makes plain that even if the per se rule of Bennett was still viable, it would not mandate reversal under the facts of this case. Cf. Lucas v. State, 376 So.2d 1149 (Fla. 1979), where this Court, reviewing the alleged failure by a trial court to conduct a Richardson inquiry, noted that while defense counsel brought the State's non-compliance with discovery rules to the attention of the court, he did not object, but, rather, deferred in the trial court's erroneous statement of the applicable law; consequently, this Court ruled that it would "not indulge in the presumption that the trial judge would have made an erroneous ruling had an

objection been made and authority cited contrary to his understanding of the law." Id. at 1152. (Emphasis supplied).

Assuming this Court chooses to address the instant issue despite appellant's clear acquiescence in the court's erroneous ruling, however, it is the State's alternative argument that because the prosecution was not responsible for the error, there clearly was no state action and, therefore, appellant's due process rights under the fourteenth amendment could not have been violated.

Appellant contends in his brief that the fact that it was the co-defendant's counsel who elicited the subject testimony and not the prosecutor should make no difference. (Initial Brief at 20). However, appellant's entire argument is based almost solely upon the rationale of Doyle v. Ohio, supra, which dealt only with impeachment by a prosecutor of a defendant regarding his exculpatory story.

In Doyle v. Ohio, the issue was "whether a state prosecutor may seek to impeach a defendant's exculpatory story, told for the first time at trial, by cross-examining the defendant about his failure to have told the story after receiving Miranda warnings at the time of his arrest." 426 U.S. at 611. Both Doyle and his co-defendant in separate trials claimed that a government agent framed them on charges of selling ten pounds of marijuana. At each defendant's trial, the prosecutor, during cross-examination of the defendant, asked him why he had not told the frameup story at the time of his arrest. Id. at 613-14. The United States Supreme Court, ruled that such an inquiry was reversible error,

holding that "the use for impeachment purposes of petitioner's silence, at the time of the arrest and after receiving Miranda warnings, violated the Due Process Clause of the Fourteenth Amendment." Id. at 619. In so holding, the Supreme Court quoted Mr. Justice White's concurrence in United States v. Vitale, 422 U.S. 171, 182-183, 45 L.Ed.2d 99, 95 S.Ct. 2133 (1975), in which the justice stated:

> "[W]hen a person under arrest is informed, as Miranda requires, that he may remain silent, that anything he says may be used against him, and that he may have an attorney if he wishes, it seems to me that it does not comport with due process to permit the prosecution during the trial to call attention to his silence at the time of arrest and to insist that because he did not speak about the facts of the case at the time, as he was told he need not do, an unfavorable inference might be drawn as to the truth of his trial testimony. . . .

(Emphasis supplied.)

This rationale was adopted with equal vigor by this Court in State v. Burwick,[4] 442 So.2d 944 (Fla. 1983):

> The reason for the rule holding inadmissible at trial evidence of the post-arrest silence and request for counsel for a defendant who has been advised of his Miranda rights is that the evidence creates the inference that the defendant is guilty of committing the criminal act. There is no dispute that it is reversible error for the prosecution to attempt to impeach a defendant's alibi testimony by asking on cross-examination why

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[4] To the extent that the Burwick court relied upon Bennett v. State, 316 So.2d 41 (Fla. 1975), it has been modified somewhat by State v. DiGuilio, 10 F.L.W. 430 (Fla. August 29, 1985), wherein this Court repudiated the per se reversal rule of Bennett and adopted the harmless error doctrine expounded by the United States Supreme Court in Chapman v. United States, 386 U.S. 18 (1967) and Hastings v. United States, 461 U.S. 499 (1983).

> he remained silent at the time of his arrest. Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976); United States v. Hale, 422 U.S. 171, 95 S.Ct. 2133, 45 L.Ed.2d 99 (1975).
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> * * * *
>
> It is fundamentally unfair for the state to lure Burwick into remaining silent then impeach the man with this very same silence. To permit the state to benefit from the fruits of its own deceptions violates the due process clause of the fourteenth amendment and article I, section 9, of the Florida Constitution. See Doyle v. Ohio; see also United States v. Hale, 422 U.S. 171, 182, 95 S.Ct. 2133, 2139, 45 L.Ed.2d 99 (White, J., concurring).

Id. at 947-948.

Although neither Burwick nor Doyle address the issue of whether it is a violation of due process under the fourteenth amendment for a co-defendant's attorney and not the prosecutor to impeach a witness on cross-examination regarding his post-arrest silence following Miranda warnings, both cases nevertheless suggest that due process rights are violated only when the prosecution lures the defendant to remain silent and then at trial uses that silence against them. If a due process violation requires state action and state action must come from the prosecution, it is difficult to construe a co-defendant's independent impeachment of a defendant on cross-examination as rising to the level of state action, and without state action, there can be no due process violation. As a result, contrary to appellant's assertion it does make a difference as to whether a comment on silence is made by a co-defendant's counsel or by the prosecution.

Regardless, even if it could be construed that the co-defendant's cross-examination of appellant sub judice was a violation of appellant's due process rights, it is the State's final contention that the error was clearly harmless.

Last year, in State v. DiGuilio, 10 F.L.W. 430 (Fla. August 29, 1985), this court repudiated its long-standing position set out in such cases as Donovan v. State, 417 So.2d 674 (Fla. 1982), Shannon v. State, 335 So.2d 5 (Fla. 1976), and Bennett v. State, 316 So.2d 41 (Fla. 1975), that a comment on an accused's silence required per se reversal. Instead this Court adopted the harmless error analysis of Chapman v. California, 386 U.S. 18 (1967) and United States v. Hasting, 461 U.S. 499 (1983). In so doing, the DiGuilio court stated:

> The harmless error rule promotes the administration of justice. In Chapman the Supreme Court, after noting that the law of all fifty states and federal law maintain a harmless error statute, stated:
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> > All of these rules, state or federal, serve a very useful purpose insofar as they block setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial.
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> 386 U.S. at 22. See also Hastings, 461 U.S. at 508. It makes no sense to burden our legal system with a new trial when the result will be the same. As the Supreme Court noted in Hastings, there can be no such thing as an error-free, perfect trial, and the constitution does not guarantee such a trial. 461 U.S. at 508-09. To insure that as fair a trial as possible is given, we adopt the harmless error test used in Chapman and Hastings. Therefore, an appellate court must inquire on review: Absent the comment on silence, is it clear beyond a reasonable doubt that the jury would have returned a verdict of guilty?

Id. 10 F.L.W. 431 Pursuant to this test, there is no question that the jury would have returned a verdict of guilty sub judice even absent the comment on silence. First, appellant by his own direct testimony implicated himself in the crimes with which he was charged. Appellant admitted that he was at the scene of the murder, admitted to taking part in the robbery, and admitted that Mr. Crofton was rendered unconscious by his actions. At the very least, appellant, by his own testimony, admitted to aiding and abetting a co-defendant in the commission of a murder and at the most his testimony suggested that he was guilty of felony murder. His testimony was by no means exculpatory.

Appellant contends, however, that the error sub judice was not harmless because the three main witnesses against appellant, Ochuida, Hawkins, and Ellison, were all intimately connected with the murder and had all made deals with the prosecutor in exchange for their testimony. However, this argument overlooks the incriminating testimony that came out of appellant's own mouth as well as the testimony of the other individuals who were not involved in any way in the murder but who learned of the contract murder both before and immediately after it occurred. (T 1394-1401, 1786-89, 2396). All three individuals actually involved in the murder, including appellant himself, agree that it was appellant who instigated the robbery, (T 1608-10, 1438, 2769, 2771), tha it was appellant who produced the gun and then the pillow case, (T 1449, 1618, 2779), and that it was appellant who first placed the pillow case around Mr. Crofton's upper body. (T 1454, 1624, 2780-81). Given the fact that appellant was clearly

the principal in the commission of the murder, there can be no doubt the jury would have returned the same verdict absent the subject cross-examination testimony.

Looking at the alleged error in light of appellant's motion for mistrial made sub judice, it is well settled that ruling on a motion for mistrial is within the sound discretion of the trial court and a motion for mistrial should only be granted in cases of absolute necessity. Wilson v. State, 436 So.2d 908 (Fla. 1983); Salvatore v. State, 366 So.2d 745 (Fla. 1978), cert.denied, 444 U.S. 885 (1979). Stated another way, a mistrial is appropriate only when the error committed is so prejudicial as to vitiate the entire trial. Duest v. State, 462 So.2d 446 (Fla. 1985); Cobb v. State, 376 So.2d 230 (Fla. 1980). Because it most assuredly cannot be said that the error sub judice was so egregious as to vitiate the entire trial, the trial court properly denied appellant's motion for mistrial.

Finally, the State urges this Court, whatever the result of this cause, to make it plain to the trial courts, prosecutors, and defense counsel alike that a defendant in a joint trial does not have a sixth amendment right, much less a duty, to cross-examine his co-defendant with regard to co-defendant's silence following Miranda warnings. This testimony is not relevant because no ligitimate inference of guilt can be made from such silence. Doyle v. Ohio, supra. Such a holding from this Court would curb any further abuse, intentional or otherwise, by defense counsel in joint trials, would prevent undue prejudice both to the co-defendant's case and to the State's prosecution of

these co-defendants, and would ensure the proper administration of justice in the joint trial setting, thereby possibly preventing the joint trial from becoming an obsolete method of prosecution.

ISSUE II

(RESTATED) THE TRIAL COURT DID NOT ERR IN OVERRIDING THE JURY'S RECOMMENDATION OF LIFE AND SENTENCING APPELLANT TO DEATH.

It was the jury's advisory sentence sub judice, pursuant to section 921.141(2), Florida Statutes, that appellant be sentenced to life imprisonment. (R 271). The trial court, however, upon "closely examin[ing], weigh[ing], and consider[ing] the aggravating and mitigating circumstances, evidence, and arguments of counsel produced at the trial, penalty proceeding, and the sentencing hearing" (R 281), concluded that the death penalty was appropriate. (R 280-290). Specifically, the court determined that the State had proven two aggravating circumstances beyond a reasonable doubt and that the appellant had proven no statutory mitigating circumstances and one non-statutory mitigating circumstance. (R 289). The court then found that each of the aggravating circumstances outweighed the nonstatutory mitigating circumstance and required imposition of the death penalty. (R 289).

Appellant now contends that the trial court erred in overriding the jury's life recommendation because there were at least three reasonable bases upon which the jury could have premised its advisory sentence. It has generally been held that to sustain a sentence of death following a jury recommendation of

life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ, Engle v. State, 438 So.2d 1058 (Fla. 1982), Tedder v. State, 322 So.2d 908 (Fla. 1975).[5] However, by his argument sub judice, it is apparent tha appellant would do away with the sentencing judge's statutory right of override altogether and relegate the judge to a role of perfunctorily accepting the jury's life recommendation without giving any consideration to aggravating and mitigating circumstances. (See Initial Brief at 25). Indeed, appellant goes so far as to contend that the weighing of aggravating and mitigating circumstances occurs only if the jury recommends death. (Initial Brief at 25).

Appellant's argument flies in the face of established Florida law. Section 921.141(2), Florida Statutes makes clear that the jury's role at sentencing in a capital case is merely advisory and not binding on the trial court, and section 921.141(3) further provides that:

> Notwithstanding the recommendation of the majority of the jury, the court after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set

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[5] The State would reiterate its position made in past cases that abolition of this so-called Tedder rule by this Court would be totally appropriate inasmuch as the Fifth Circuit Court of Appeals has realistically stated in Spenkellink v. Wainwright, 578 F.2d 582, 605 (1978), that ". . . reasonable persons can differ over the fate of every criminal defendant in every death penalty case." However, as desirable as the abolition of Tedder may be, it is not required in the instant case. What is required is total rejection of any suggestion by appellant sub judice that Tedder should be extended to ignoring the trial judge's sentencing order and focussing wholly on the unstated predicate of the jury recommendation.

> forth its findings upon which the sentence of death is based as to the facts . . .

(Emphasis supplied).

Moreover, this Court has repeatedly noted that in Florida, it is the judge and not the jury that imposes sentence; the jury only recommends. Thomas v. State, 456 So.2d 454 (Fla. 1984); State v. Dixon, 238 So.2d 1 (Fla. 1973); Lamadline v. State, 303 So.2d 17 (Fla. 1974). The ultimate decision as to whether the death penalty should be imposed rests with the trial judge. Thomas; Hoy v. State, 353 So.2d 826 (Fla. 1977), cert. denied, 439 U.S. 920, 99 S.Ct. 293, 58 L.Ed. 2d 265 (1978).

Clearly, then, pursuant to the statute governing capital sentencing proceedings as well as prevailing case law and contrary to appellant's assertions, a trial judge appropriately may weigh aggravating and mitigating circumstances regardless of what the jury's advisory sentence has been. In the instant case, the trial court in its role as the ultimate sentencer considered all of the evidence that was before the jury and concluded that each of the aggravating factors outweighed the sole nonstatutory mitigating circumstance and, thus, the death penalty was appropriate.

Nevertheless, appellant contends that the trial court did not give proper consideration to the jury's basis for recommending life imprisonment before the court imposed the death penalty. While there is some authority for the position that "where there are one or more aggravating circumstances and the trial judge has found no mitigating circumstances sufficient to outweigh the aggravating circumstances, application of the Tedder

rule calls for inquiry into whether there was some reasonable ground for a life sentence that might have influenced the jury to make such a recommendation," Thomas; Lusk v. State, 446 So.2d 1038 (Fla. 1984); Stevens, 419 So.2d 1058 (Fla. 1982) that authority does not suggest, as appellant does in his brief, that this Court engage in speculative perusals of the record in search of any circumstance which could possibly have supported the jury's recommendation of life. Tedder cannot reasonably be construed as creating a license by which this court may speculate as to the basis for the jury's recommendation and, in the process, ignore the well-considered written findings of the sentencing judge. Indeed, to so construe Tedder would have the practical effect of judicially abolishing the jury override as set forth in section 921.141, Florida Statutes, and as noted above, would, contrary to clear legislative intent, reduce the trial judge's function to that of merely explaining why he concurs with a jury's recommendation of death. Certainly, if a jury's recommendation was entitled to the deference appellant would attach to it, then the legislature would have done away with the jury override and would have made the jury the final arbiter of life and death by requiring it to provide written findings in support of its sentence. Without such written findings, the jury's advisory sentence must remain just that: advisory. To give the jury's recommendation more deference than it is due, without such written findings being provided, could only invite the very charges of arbitrariness and inconsistency condemned in Furman v. Georgia, 408 U.S. 238, 33 L.Ed.2d 346, 92

S.Ct. 2726 (1972), and certainly would do nothing to promote meaningful appellate review.

The better approach was taken by this Court recently in Echols v. State, 10 F.L.W. 526 (Fla. September 19, 1985), in which it was stated that in determining, pursuant to Tedder, whether an override is based on facts so clear and convincing that virtually no reasonable person could differ, one must look at the trial court's sentencing order. Id. at 529. The order sub judice was plain in the factors the court considered. The court explicitly stated that it had conducted a thorough review of the evidence, argument, and pleadings presented during the course of the proceedings, i.e., everthing the jury was privy to and more. (R 281). The court then engaged in a detailed application of every statutory aggravating and mitigating circumstance to the facts of the case. In considering the nine aggravating factors in light of the evidence sub judice the court concluded that two of the nine were present in this case. (R 285). The validity of the court's finding in this regard is not challenged by appellant. Neither does appellant challenge the court's conclusion that none of the statutory mitigating factors was present in the evidence. In reviewing all of the potential non-statutory mitigating factors presented in the case dealing with appellant's "character or record and any other circumstance of the offense," the court listed ten different factual considerations. (R 288). Of these, the court combined the last four items of the list to conclude that there was one non-statutory mitigating circumstance "in the life sentences

assured Ellison and Hawkins, the immunity granted O'Chuida [sic] and the acquittal of Geraldine Crofton." (R 288).

It is submitted that implicit within this detailed order of the sentencing court, which considers every item of significance presented by the defense during the trial and sentencing phase of the case, is the fact that, by necessity, the court had to consider whether, under the facts before him, the jury had some reasonable basis for making its life recommendation. Clearly, the trial judge concluded, based upon his own reasoned judgment, that there existed no such basis. This determination, having been made by the sentencing court after full consideration of the facts, coupled with the clear and convincing nature of the facts in support of the court's conclusion, makes clear that the trial court's imposition of the death penalty sub judice was appropriate.

Regardless, assuming this Court chooses to consider the three bases upon which appellant speculates the jury may have premised its life recommendation, the State will turn to a review of the factors. The three grounds listed by appellant are: 1) the alleged disparate sentences of appellant's co-defendants; 2) appellant's background and 3) appellant's alleged lack of intent to commit the murder. It is important to note before considering each of these factors individually that at least the first two factors were listed by the trial judge in his order as nonstatutory mitigating circumstances, with the court concluding that only the first factor, the alleged disparate sentences of the co-defendants, warranted being labeled a

mitigating circumstance. (R 288). However, this circumstance, when weighed against either of the two aggravating circumstances found by the court, was ruled to carry less weight. As to the appellant's third factor alleged as a reasonable basis for the jury's life recommendation, i.e., appellant's alleged lack of intent to commit the murder, it is obvious why the court did not even consider it a potential nonstatutory mitigating circumstance: The sentencing court clearly found in its factual statement, as did the jury by its verdict, that appellant was primarily, if not totally, responsible for executing the contract murder of Ronald Crofton. (R 280). This conclusion is especially inescapable when one considers that appellant was also found guilty of conspiracy to commit first-degree murder.

With regard to appellant's first listed basis, the alleged disparate sentences of his co-defendants, Hawkins and Ellison pled guilty to second-degree murder and received life sentences, Ochuida received total immunity, and Geraldine Crofton was acquitted of murder but convicted of conspiracy to commit murder in the first degree. (R 288).

In support of his contention, appellant cites Herzog v. State, 439 So.2d 1372 (Fla. 1983) and McCampbell v. State, 421 So.2d 1072 (Fla. 1982). Both cases are clearly distinguishable.

In Herzog, this Court determined that the trial court properly found that no statutory mitigating circumstances existed, but noted that "there was no indication in the sentencing order that the court considered nonstatutory mitigating circumstances" even though there was evidence in the

record regarding the disposition of the co-defendants' cases which this Court stated could have been considered by the jury in finding nonstatutory circumstances. Id. at 1380-81. As mentioned above, this was not the case sub judice. The trial court properly noted the disposition of the co-defendants' cases and determined that their sentences together constituted a single nonstatutory, mitigating circumstance. As a result, because the record shows that the trial court gave due consideration to that factor, Herzog is inapposite.

In McCampbell, supra, contrary to what appellant suggests in his brief, this Court's rejection of the trial court's override of the jury's life recommendation was premised upon at least four other factors, in addition to the factor dealing with the disposition of the co-defendants' cases, which this Court stated would have influenced the jury in its recommendation of life imprisonment.

As part of this argument, appellant suggests that the court should have given more consideration to Hawkins' role in the robbery and murder because, he alleges, Hawkins was at least as culpable as appellant. (Initial Brief at 26-27, 28, 29). At one point in his brief, appellant notes that Hawkins helped strangle Mr. Crofton (Initial Brief at 27) and, at another point, he relies on his unsuccessful defense at trial that it may have been Hawkins who killed Crofton after appellant and Ochuida left the Crofton house. (Initial Brief at 29). The facts upon which the jury's verdict and the court's factual findings are based simply

do not support the theory that Hawkins was equally as culpable as appellant with regard to the murder.

Appellant was the one contacted by Ellison to commit the murder (T 2018, 2035-45). After receiving partial payment in the form of a car, appellant sought out two of his friends to help him allegedly only rob Mr. Crofton. (T 1438-39, 1608-10). Appellant was the one who produced the gun from the under the front seat of his car (T 1439-40, 1614) and he was the one who first obtained and used the pillow case on the victim. (T 1454, 1624). Moreover, both Hawkins and Ochuida testified that appellant strangled Mr. Crofton with the pillow case for several minutes (at least ten) before appellant asked Hawkins to help him. (T 1456-57, 1625). By that time, according to Hawkins, the victim as either unconscious or already dead. (T 1457). Thus, under these facts--the facts clearly relied upon by the jury during the guilt and sentencing phases and the judge during the sentencing phase--the appellant's attempt to paint a picture showing Hawkins to be as equally as culpable of the murder as appellant must fail. Cf. Salvatore v. State, 366 So.2d 745, 752 (Fla. 1978), where the defendant alleged that the death penalty was unconstitutionally imposed against him because his co-defendant under similar facts was not sentenced to death, and this Court rejected the claim because the evidence showed that the defendant had formulated the plan to kill the victim, was the actual perpetrator of the crime and the co-defendant did not begin beating the victim with the pipe until after the defendant had already commenced the beating.

As for Ochuida, Mrs. Crofton, and Ellison, none of these co-defendants physically participated in the crime to the extent appellant did and, therefore, was deserving of the lesser sentences they received. Ochuida, while present and participating in the robbery, took no part in the murder and was instrumental in bringing the full extent of the circumstances surrounding Ronald Crofton's death to the attention of authorities. Neither Mrs. Crofton nor Ellison were present at the scene of the murder, and while Ellison actively solicited appellant for the contract murder, he was never privy to the manner in which appellant intended to commit the murder, and neither he nor Mrs. Crofton ever learned in advance the method which would be utilized. Indeed, the record shows that only appellant was responsible for the manner in which the murder was ultimately committed. Thus, inasmuch as the appellant was clearly the dominant individual in the actual perpetration of the crime, appellant's argument as to the first alleged reasonable basis for the jury's recommendation must fail. It is clear that the trial court properly minimized the weight to be given that factor as a nonstatutory mitigating circumstance, and regardless, this Court has made it clear that it is permissible to impose different sentences on capital co-defendants whose various degrees of participation and culpability are different from one another. Hoffman v. State, 474 So.2d 1178 (Fla. 1985). Moreover, the exercise of prosecutorial discretion in granting immunity to a less culpable accomplice, co-conspirator, or aider and abetter does not render invalid the disposition of an

appropriate death sentence. Hoffman; Palmes v. Wainwright, 460 So.2d 362 (Fla. 1984); Downs v. State, 386 So.2d 788 (Fla.), cert. denied, 449 U.S 976 (1980).

As a second alleged reasonable basis for the jury's recommendation, the appellant cites his background, which was testified to at sentencing. The sentencing court in its order listed the items brought out at the sentencing hearing by appellant in mitigation of his sentence. (R 288). However, while it is clear the court considered these factors, it is equally clear that the court did not believe that appellant's background rose to the level of being a mitigating circumstance. Cf. Lusk v. State, 446 So.2d 1038 (Fla. 1984), holding that the fact that the trial judge, in an override of the jury's recommendation, did believe that the defendant's mitigating evidence in its totality rose to the level of mitigation with respect to sentencing for murder, it did not demonstrate that the trial judge ignored evidence presented by the defendant in mitigation. As the ultimate sentencer, the trial judge had the discretion to give what he considered to be the appropriate weight to the circumstances of appellant's backgound, and did so, determining that under the facts of the instant case, such circumstances were of little significance. In Hall v. Wainwright, 565 F.Supp. 1222, 1239 (Fla. N.D. 1983), the court stated:

> The sentencing judge must consider in mitigation any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant offers as a basis for a sentence less than death. Eddings v. Oklahoma, 455

> U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982). It is clearly within the province of the sentencer to determine the weight to be given to evidence of relevant mitigating circumstances. Id. 102 S.Ct. at 875. In some instances, such evidence may properly be given little weight. Id. 102 S.Ct. at 876.
>
> The fact that Judge Booth did not find that the evidence of Hall's ingestion of drugs and alcohol was sufficient to substantiate a finding of mitigation under the statutory factors does not indicate that he gave the evidence no weight at all. The law only requires that the defendant be permitted to present evidence in mitigation, and requires the sentencer to listen. Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). This Court concludes as a matter of constitutional law that the trial court could have reasonably found that this testimony did not establish the statutory mitigating factors. [footnote omitted].

See also Lara v. State, 464 So.2d 1173 (Fla. 1985), in which this Court agreed with the trial judge that while a history of childhood problems might constitute a mitigating circumstance, the trial court could properly conclude that the defendant's actions in committing the murder were not significantly influenced by his childhood experience so as to justify its use as a mitigating circumstance. Surely, if the trial court could reach such a conclusion from the evidence so, too, could the jury. This is especially the case when one considers that the murder sub judice was committed strictly for precuniary gain with no emotion and that it had no direct connection with appellant's family life.

Finally, as to the third factor the appellant lists as a possible reasonable basis for the jury's recommendation, i.e., that appellant did not intend to commit the murder, appellant points to his own testimony as well as testimony of others which,

he says, indicates that he never intended to kill Mr. Crofton but only intended to rob him. On the basis of that testimony together with the fact that Mrs. Crofton was convicted of conspiracy to commit murder and was acquitted of murder, appellant asserts that the jury could have reasonably based its recommendation on appellant's lack of intent to commit the murder itself.

The State submits that if the jury were to draw the conclusion appellant now suggests from the evidence before it, such a conclusion would be entirely unreasonable and therefore would not have been an appropriate basis for a life recommendation. This is especially so when one considers that appellant was indicted not on charges of felony murder, but on charges of premeditated murder (R 21), which requires an intent to kill, and that the jury's verdict form indicates it found appellant guilty of first-degree murder "as charged in the indictment." (R 241).

Moreover, by appellant's own testimony, he was at the least an aider and abettor to the murder and at most the actual principal in the commission of the murder. He admitted obtaining the pillow case from upstairs and placing it around Mr. Crofton and he admitted that Mr. Crofton was rendered at least unconscious by the fall. According to his version of what occurred, appellant never saw Hawkins touch Mr. Crofton. However, a very important consideration here is that appellant's testimony is inconsistent with all the other witnesses involved in the contract murder conspiracy. Both Ochuida and Hawkins

testified to appellant's prolonged strangulation of the victim. (T 1454, 1624). Likewise, Ellison testified to the numerous meetings he had with appellant regarding the planning of the murder and the money he paid appellant in the months after the murder. (T 2018-63, 2100-2124). Additionally, Mr. Tyler, a witness not involved in the murder testified to conversations he had with appellant before and after the murder regarding the contract. (T 1397-1401). Mr. Tyler also testified to appellant's receipt of the car before the murder and to appellant's admission to him that it was a down payment for a contract murder. (T 1394-95, 1398). Given the vast amount of testimony incriminating appellant as the principal in the instant case, appellant's alleged third basis for the jury's verdict is clearly unreasonable.

Moreover, simply because Mrs. Crofton was not convicted of murder does not mean that the jury believed appellant's version that he only intended to rob and not kill Mr. Crofton. Indeed, by the jury's verdict, it found appellant guilty of premeditated murder and not felony murder. (R 241). Moreover, the fact that appellant was found guilty of conspiracy to commit first-degree murder indicates clearly that the jury believed appellant committed the murder as part of a contract killing and not simply during the commission of a robbery. In other words, the jury found appellant possessed the intent to kill Mr. Crofton.

Finally, appellant points to his testimony that when he left Hawkins alone with Mr. Crofton, Mr. Crofton was alive and contends that while he may have been a principal, having

participated in the robbery, he was not actually present at the murder scene. Under this scenario, appellant contends, under Enmund v. Florida, 458 U.S. 782, 102 S.Ct 3368, 73 L.Ed.2d 1140 (1982), he is entitled to a life sentence because the State cannot execute a principal who was not actually present and who did not intend to commit or contemplate the commission of the murder.

The facts of this case do not support appellant's theory. If anyone contemplated the commission of the murder on the night of September 26, 1983, and, indeed, long before that it was appellant and, clearly the evidence overwhelmingly supports the conclusion that it was appellant who retrieved the pillow case from upstairs and strangled Ronald Crofton with it for a period in excess of ten minutes.

Enmund v. Florida holds that the death penalty statute cannot be applied to one who did not kill, attempt to kill, intend to kill, or intend that lethal force was used. With their verdict of guilty, the jury concluded that appellant did intend the murder as part of a planned robbery and as part of a much bigger conspiracy to commit the murder. If the jury did not believe he had knowledge of the contract murder and carried out the murder as a result, they would not have convicted appellant of conspiracy to commit first-degree murder. The appellant was the principal. He provided the weapon used to kill Mr. Crofton and was indeed present at his death as the most culpable participant. As a result, the instant case is clearly factually distinguishable from Enmund.

As a result, the court did not err in weighing the aggravating and mitigating circumstances in this case and overriding the jury's recommendation of life.

CONCLUSION

Based on the foregoing, appellant's judgment and sentence must 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 forwarded by U.S. Mail ~~hand delivery~~ to Mr. David A. Davis, Assistant Public Defender, Post Office Box 671, Tallahassee, Florida 32302 on this the 23 day of May, 1986.

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