IN THE SUPREME COURT OF FLORIDA

HERBERT LANDER SPIVEY, JR.,

Appellant,

v.

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

INITIAL BRIEF OF APPELLANT

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

DAVID A. DAVIS
ASSISTANT PUBLIC DEFENDER
POST OFFICE BOX 671
TALLAHASSEE, FLORIDA 32302
(904) 488-2458

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS
(Continued)

IN THE SUPREME COURT OF FLORIDA

HERBERT LANDER SPIVEY, JR., :

Appellant, :

v. : CASE NO. 67,010

STATE OF FLORIDA, :

Appellee. :

_____:

INITIAL BRIEF OF APPELLANT

I PRELIMINARY STATEMENT

Herbert Lander Spivey, Jr. is the appellant in this capital case. The record on appeal consists of 23 volumes, and reference to the pleadings and other matters will be indicated by the letter "R." References to the transcript will be indicated by the letter "T."

II STATEMENT OF THE CASE

An indictment filed in the Circuit Court for Duval County on February 9, 1984, charged Herbert Spivey and Geraldine Crofton with the first degree murder of her husband, Ronald Crofton (R-21). By way of an information, the state charged Spivey, Crofton, John Green, and Vance Ellison with conspiracy to commit murder in the first degree (R-147). Spivey was also charged with one count of robbery (R-147). Subsequently, the court granted a state motion to consolidate the conspiracy and robbery charges with the murder charge (R-147,164).

Spivey filed several pretrial motions, but only his motion for severance of defendants (R-150) has relevance for this appeal. The court denied that motion (R-163).

Spivey and Crofton proceeded to trial on February 5-17, 1985, before the Honorable James Harrison.[1] After hearing the evidence, arguments and law, the jury found Spivey guilty of first degree murder, conspiracy, and robbery (T-241-243). The jury also found that Spivey did not carry a firearm during the robbery (R-243). The same jury acquitted Crofton of the murder (T-3646) but convicted her of the conspiracy to commit first degree murder (T-3647).

---

[1] Vance Ellison and another defendant, Gregory Hawkins, pled guilty to second degree murder in exchange for their testimony (T-1434,2010). Michael Ouchida, yet another defendant, was granted complete immunity for his testimony (T-1600).

Spivey proceeded to the sentencing phase of the trial, at which time he presented mitigating evidence. After hearing the evidence, arguments, and the law, the jury recommended Spivey live (R-271).

The court rejected that finding and sentenced Spivey to death (R-276). It also sentenced Spivey to 30 years in prison for the conspiracy conviction (R-294) and 60 years in prison for the armed robbery conviction (R-295). All sentences were to run consecutively.

In sentencing Spivey to death, the court found in aggravation that:

> 1. Spivey had been previously convicted of any capital offense or of a felony involving the use of threat or violence to some person (R-282).
>
> 2. Spivey committed the murder for financial gain (R-283).

The court found none of the statutory mitigating factors applicable in this case. It did find, however, that there was a mitigating circumstance in the life sentence assured Ellison and Hawkins, the immunity granted Ouchida, and the acquittal of Geraldine Crofton (R-288).

Spivey filed a motion for new trial (R-244) which was denied (R-273).

This appeal follows.

III STATEMENT OF THE FACTS

After 27 years, Ronald and Geraldine Crofton's marriage had finally soured (R-3115,3118). In April 1983 Geraldine filed a petition for divorce because of Ronald's alcoholism (T-1320) and his consequent abuse of her and her children (T-3168). Ronald also was seeing another woman (R-2553). Within a week, however, Geraldine dismissed the complaint as the couple seemed to be reconciling (T-3070).

The apparent reconciliation was short-lived, and within two months both Croftons had filed petitions for divorce (T-3071). Although Geraldine would have received a generous settlement (T-3082,3084,3086,3087), for some reason she was afraid Ronald would somehow liquidate his multimillion dollar construction company and leave her and the children penniless (T-2034). She began making threats on her husband's life to virtually anyone who would listen (T-2526,2547). At least once Geraldine threatened to burn their house with Ronald and Mickey Finch (his girlfriend) in it (T-2553). More often, however, she wanted to find someone who would either beat or kill her husband, and in this search she asked friends (T-2526,2549), relatives (T-2636), and acquaintances (T-2396,2425,2149).

In March 1983, Geraldine met Vance Ellison, the live-in boyfriend of Kathy Millett who was a friend of Geraldine (T-2011). Ellison was a drug dealer trying to

leave the drug business because his drug associates were going to jail (T-2195). By July and August he was out of work and had little money; he and Millett were living off the child support payments Millett received from her ex-husband (T-2197).

Geraldine told Ellison she wanted someone to beat her husband, and at her urging, Ellison began looking for someone who could do the job. He settled on a night club bouncer named David McDonald, and Ellison offered him $1,000 to beat Ronald (R-2018,2019,2428). McDonald did not want to beat the man, but he went along with Ellison because he was giving him money (T-2389).

Ellison introduced McDonald to Geraldine Crofton, and on two occasions McDonald stayed at Crofton's apartment to act as a body guard because she was afraid that her husband would beat her (T-2382). During the second occasion, Geraldine asked McDonald to break into her husband's office and steal a computer part (T-2392). McDonald balked but drove Geraldine to her husband's office. Once there, Crofton deactivated the burglar alarm (T-2393), took the disc out of the computer, gave it to McDonald, and told him to take anything else he wanted (T-2394-2395).

Afterwards, McDonald drove Geraldine home (T-2397). Before he left, she asked him to slap her, which he did (T-2397). McDonald then went to a bar and got drunk; meanwhile Geraldine called the police and reported that someone had beaten her and told her to leave town (T-2477).

By now, Geraldine wanted her husband killed, and when she talked with Ellison he told her it would cost her $20,000 (T-2034). Ellison claimed he did not take Geraldine seriously (T-2032), but he did try to find someone, yet his initial search was unsuccessful (T-2636).

Geraldine apparently thought Ellison was serious, and she kept asking Ellison if he had found anyone to kill her husband (T-2040). Ellison kept looking, and by late August 1983 he had found Herbert Spivey.

Spivey was a small time drug dealer (T-2745) who worked sporadically, had no money and no place to live (T-2745). He and his wife (who was five months pregnant) (T-2745), spent most of whatever money Spivey earned on drugs and both were addicts (T-2745). When Ellison approached him in August 1983, Spivey was living with friends, and he and his wife got about Jacksonville on a bicycle (T-1393,2745). Shortly they would be living in a car and camping in the woods (T-2828).

Ellison talked to Spivey several times (T-2750) and often bought things for Spivey and paid his bills (T-2751, 2757). Eventually he paid $700 for a 1972 El Torino and gave it to Spivey along with $250 cash (T-2063-2065).

After the third or fourth meeting, Ellison mentioned that he needed someone killed (T-2751). Spivey thought he was joking (T-2752), but Ellison persisted. Spivey finally agreed to do the killing for $10,000, but Ellison

said it would be $20,000 (T-2048). But even then Spivey did not want to do the killing (T-1400), and he told Ellison that he did not want to do it (T-2759). Ellison, however, would not let him back out. He told Spivey that he knew too much (T-2853). Ellison also implied that he had underworld connections (T-2760), and if Spivey did not go along he would be killed (T-2853,2861, 2853).

Spivey also felt obligated to Ellison because he owed him about $1100 (T-2766-2767). At one point he thought he could borrow the money from someone else so he would not have to commit the murder (T-1403), but that deal apparently fell through (T-2766).

Spivey felt trapped (T-2766). Geraldine Crofton kept asking Ellison if he had found someone to murder her husband (T-2032), and Ellison in turn wanted to know when Spivey was going to kill Ronald (T-2768).

On September 26, 1983, Ronald went to Geraldine's apartment to discuss with her a lost $2,000 check (T-3202). As soon as she left, she called Ellison, who in turn called Spivey (T-2075-2076). Spivey was told that Crofton had just left his wife's house and had $2,000 (T-2075). He was also told that the killing was to look like a robbery (T-2068).

Spivey got in his car with his wife and drove to a shopping mall in Jacksonville so that he could shoplift

in order to get something to eat (T-2829). While there, he met Michael Ouchida, an acquaintance of his with a reputation for violence (T-2268). He asked Ouchida if he wanted to rob someone, and Ouchida agreed to go along (T-1609-1610). At that time Spivey made no mention of committing a murder (T-1609,1659,1630).

Later, Spivey ran into Gregory Hawkins and his girlfriend (T-2771). Spivey also asked Hawkins along because he had committed robberies before (T-2771). Spivey again made no mention of the murder, and in fact, Spivey's plan was only to take Crofton's $2,000 so he could repay Ellison (T-2768,2773).

The five people got in Spivey's car and went looking for Crofton. They found him at a restaurant then followed him home (T-1447-1450). While the two women waited in the car, Spivey, Ouchida, and Hawkins walked to Crofton's front door. Spivey had a gun which he gave to Hawkins (T-2777).[2] They knocked on the door (T-2776), but let themselves in when no one opened it (T-2776). Crofton was upstairs talking on the telephone, and when he came downstairs, Ouchida grabbed him (T-2777) and Hawkins put a gun in his face (T-2777). Spivey or Hawkins then asked where the money was (T-1509,1621). Crofton was supposed to have $1500 to

---

[2] At trial, Hawkins said he carried the gun (T-1450) as neither Ouchida nor Spivey wanted to carry it (T-1506). Ouchida, when he testified, said he had the gun or that Spivey had it, and he took it from Spivey (T-1661).

$2,000 on him (T-1500), but this night, he had only $63 in his wallet (T-1463). They also took a gold nugget chain and a wristwatch from him (T-1463,1540).[3]

At this point, there is a conflict in the testimony. Ouchida says that he went upstairs and when he returned, he saw Spivey choking Crofton with a pillow case he had taken off of Crofton's bed (T-1624). After a while, Spivey asked for Hawkins' help (T-1625). According to Ouchida, he tried to stop them but could not or did not (T-1625).

Spivey said that he got a pillow case from upstairs so he could tie Crofton up (T-2779). Crofton made a sudden move, he and Spivey fell to the ground (T-2780), then Crofton was knocked unconscious (T-2782). At that point Spivey and Ouchida left (T-1416). Hawkins, however, stayed. According to Spivey, Crofton was alive when he left (T-2782).[4] According to Hawkins, Spivey, and Ouchida, Hawkins stayed in Crofton's house for another 15 minutes during which time he took Crofton's shoes (T-1460,1523). When he left, he took the pillow case and stole Crofton's car (T-2785). He met Spivey minutes later, and Spivey told him to abandon the car (T-1463). Ouchida, however, wanted to sell it (T-1525). Hawkins left the car with the pillow

---

[3] Ouchida says these items were taken before Crofton's death (T-1450). Hawkins, on the other hand, said they were taken after the death (T-1625).

[4] A Leroy Cox was a cellmate with Hawkins and said that Hawkins told him that when he and his two partners left Crofton, Crofton was still alive (T-2738-2740).

case inside of it alongside of the road (T-1463).

Spivey told Ellison that night that Crofton was dead (T-2078).[5] Ellison in turn notified Geraldine, and over the next several weeks, Geraldine Crofton made repeated telephone calls to the coroner asking him for her husband's death certificate (T-1910). While the coroner thought Crofton's death was suspicious, in light of the advanced stage of his emphysema (R-1944), and the lack of any definite evidence of a homicide (T-1931,1941), he said Crofton died of natural causes (T-1936,1953).

Over the next several months, Ellison paid Spivey $17,500 (T-2794). Ellison kept $2,000 for himself (T-2118). Hawkins demanded to share the money (T-2793), and Spivey gave him $4500 (T-2794). Spivey used $1,000 of the remaining $13,000 for living expenses, and he spent the remaining $12,000 on drugs (T-2794).

The police investigation focused on Ouchida after one of his neighbors called the police and told them Ouchida had said he participated in a murder (T-1788-1790). He gave the police a statement six weeks later after he had received complete immunity from the State Attorney (T-1600). Hawkins was arrested and he likewise gave a

---

[5] At trial, Ellison said that Spivey had told him that Spivey had put his foot on the back of Crofton's head while he strangled him (T-2097).

statement in return for which he pled guilty to second degree murder (T-1541-1543). Ellison was arrested, and he gave a statement in return for which he pled guilty to second degree murder (T-2010). Crofton was acquitted of the murder but convicted of conspiracy (T-3647).

IV SUMMARY OF ARGUMENT

During cross-examination of Spivey, the co-defendant's attorney asked Spivey why he did not give his exculpatory story when arrested. The trial court permitted this line of questioning in order to balance Spivey's right to remain silent against Crofton's right to confrontation.

The court's error is that such an inquiry was irrelevant as Spivey's silence after his Miranda rights have been read is ambiguous and hence irrelevant. Crofton, therefore, had no right to confront Spivey as to his post Miranda silence on irrelevant matters.

In addition, if Crofton's attorney had an obligation to inquire about Spivey's silence, the court should have severed Spivey's trial from that of Crofton. If the defenses of Spivey and Crofton were not antagonistic then the court should not have permitted Crofton's attorney to inquire about Spivey's silence. In no case should the court have "balanced" the constitutional rights of Spivey against those of Crofton and permitted the inquiry it did.

The court's error was not harmless as Spivey's credibility was directly pitted against the credibility of other state witnesses, and in such matters the jury must resolve who to believe. This Court cannot say beyond a reasonable doubt that the jury would not have believed Spivey had Crofton's attorney not inquired about Spivey's silence.

The jury recommended life to Spivey, yet the trial judge imposed death. In doing so, the court ignored its role in sentencing when a jury recommends life; instead it looked for aggravating and mitigating factors to weigh. It should have looked for any basis to impose life, and from the record three reasonable bases for the jury's life recommendation exist. Because of these reasons, the judge should have imposed a life sentence.

V ARGUMENT

ISSUE I

THE COURT ERRED IN PERMITTING CROFTON'S ATTORNEY TO INQUIRE AT TRIAL INTO SPIVEY'S POST-ARREST, POST-MIRANDA SILENCE, WHICH WAS A VIOLATION OF SPIVEY'S FIFTH AND FOURTEENTH AMENDMENT RIGHTS TO REMAIN SILENCE.

During his trial, Spivey took the stand in his own defense and said, in essence, that while he robbed Crofton he had no intent to kill him. In fact, when he and Ouchida left Crofton's house, Crofton was alive (T-2782), and Hawkins, in an independent act, must have killed him.[6]

Geraldine Crofton's attorney, over Spivey's objection, intentionally asked Spivey about his silence at the time he was arrested.

> Q Mr. Spivey when were you arrested?
>
> A January 9, 1984.
>
> Q Now who arrested you?
>
> A I am not sure of the officer's name, sir. There were about five or six or maybe seven of them.
>
> Q At the time that you were arrested did you make any statement to anybody at that time?
>
> MR. LINK: I object, Your Honor.
>
> THE COURT: All right, sir. Overruled.
>
> A No, sir, I didn't.

---

[6]The court instructed the jury on independent acts (R-228).

Q You didn't say anything?

A No, sir.

MR. LINK: I object and move for a mistrial.

THE COURT: I will overrule the objection.

Q Did you tell anybody at that time that you had been involved in the killing of Mr. Crofton?

A No, sir, I hadn't.

Q Did you tell anybody at that time that you had been contacted by Mr. Ellison to do a contract murder?

A No, sir.

Q Did you tell anybody at that time that you had ever heard anything about Mickey Finch, or Mickey?

A No, sir.

Q When was the first time -- Did you ask for a lawyer?

A Excuse me, sir.

Q Did you ask for a lawyer at that time?

A No, sir.

Q Did you ever thereafter ask for a lawyer?

A Yes, sir.

Q When was that?

A In Court, sir, when I came to a bond hearing.

Q How long after?

A The next day.

MR. LINK: Once again I object, Your Honor.

THE COURT: All right.

MR. LINK: May I ask for a continuing objection?

THE COURT: Yes, sir, and that will be overruled.

Q When was the first time that you ever told anybody the story that you told here today with regard to the contract and Mickey, and those things?

A The first day I seen my lawyer.

Q When was that, sir?

A Approximately four days after my arrest.

Q Did you tell anybody else?

A No, sir.

Q Did you ever tell a law enforcement officer any such thing?

A Referring to a murder, sir?

Q Yes, sir.

A No, sir, I didn't.

Q Well, and also about this alleged contract?

A No, sir.

MR. LACY MAHON: Excuse me just a moment judge?

Q Did you ever talk to anybody about the matter of how this murder had occurred?

A No, sir, because I didn't kill anybody.

(T-2815-2817).

The court permitted this inquiry of Spivey by his co-defendant Crofton in order to:

> ...balance the Sixth Amendment right of Crofton against the Fifth Amendment right of Spivey to remain silent.

(T-2803).

The court erred in that it conducted a balancing of rights when none should have been done. Both defendants have constitutional rights that should have been protected, and Spivey's right to remain silent should not have been in any way limited to accommodate Crofton's right to confrontation.[7]

Initially, the questions Crofton's attorney asked clearly implicated Spivey's right to remain silent. When arrested, Spivey was informed of his "Miranda" rights (T-289), and consequently any inquiry into his subsequent silence was a violation of his Fifth Amendment right to remain silent. Doyle v. Ohio, 426 U.S. 610, 49 L.Ed.2d 91, 96 S.Ct. 2240 (1976).

In Doyle, Doyle and his co-defendant claimed at trial that one Bonnell, a government agent, had framed them by making it look like they were selling drugs. During cross-examination, the prosecutor elicited the fact that Doyle had not told the police of the frame up story when arrested. Id. at 613-614. The United States Supreme Court, in rejecting this inquiry into Doyle's silence, held:

> ...that the use for impeachment purposes of petitioner's silence, at the time of

---

[7] Spivey moved to sever the trial (R-150,255).

> arrest and after receiving Miranda warnings, violated the Due Process clause of the Fourteenth Amendment.

Id. at 619.

The basis for this ruling lies in the implicit assumption that the Miranda warnings assure a suspect that his silence will not be used against him at the trial. Id. at 618. It is fundamentally unfair to tell a person he has a right to remain silent and then insist that his trial testimony is fabricated because he did not tell his story when he had an opportunity to do so. Silence at the time of arrest may be an admission of guilt, or it may be the act of someone taking advantage of his Fifth Amendment rights. In any event, silence after Miranda rights have been read is ambiguous and has no probative value on the issue of guilt or innocence.[8] United States v. McClure, 734 F.2d 484 (CA 10 1984).

---

[8] The situation here is unlike those in Anderson v. Charles, 447 U.S. 404, 65 L.Ed. 222, 100 S.Ct. 2180 (1980) and Fletcher v. Weir, 455 U.S. 603, 71 L.Ed.2d 490, 102 S.Ct. 1309 (1982). In Anderson, the Supreme Court held that the Doyle proscription does not apply when the defendant makes a statement after his Miranda rights have been read. Anderson at 408. In Fletcher, the court held that Doyle was inapplicable where the defendant remained silent even though his Miranda rights had not been read. Fletcher at 605-607.

In this case, Spivey was read his rights (T-289), and he apparently made no statement after those rights had been read. Thus, neither Fletcher v. Weir or Anderson v. Charles control this case. Rather the questions asked Spivey by Crofton's attorney are very similar to those asked by the prosecutor in Doyle.

In this case, had the court permitted the prosecutor to ask the questions Crofton's attorney asked it surely would have committed reversible error. The entire thrust of Crofton's attorney's inquiry was to impeach Spivey's testimony by showing that his trial testimony was a recent fabrication. It did this by presenting to the jury the fact that Spivey had said nothing to the police when arrested (T-2798). But under Doyle, this line of questioning clearly was impermissible as it sought to impeach Spivey by means of his post-Miranda silence.

At the hearing on Spivey's motion for new trial, the court tried to side step this problem by saying that Crofton's inquiry was not "fairly susceptible" to being interpreted as a comment on Spivey's right to remain silent (T-3786).

In State v. Sheperd, Case No. 64,369 (Fla. opinion filed November 25, 1985), this Court said:

> ...We hold that a prosecutorial comment in reference to the defense generally as opposed to the defendant individually cannot be "fairly susceptible" of being interpreted by the jury as referring to the defendant's failure to testify.

Here Crofton's attorney's inquiries about Spivey's post-Miranda silence clearly referred to Spivey rather than to some nebulous class of similarly situated defendants (T-2815-2817). Crofton's attorney's comments were "fairly susceptible" of being interpreted by the jury as referring to Spivey's right to remain silent.

The question thus presented to this Court is whether the comment on Spivey's silence should be condoned because it was made by a co-defendant's counsel rather than the prosecutor.

The answer to that question is no for several reasons. The most obvious and compelling reason is that such testimony as Crofton's attorney elicited from Spivey was irrelevant. Post-Miranda silence has no relevance because it does not tend to prove or disprove a suspect's guilt because that silence may very well have been induced by the promises implicit in the Miranda warnings. Doyle, McClure, supra. See Marshall v. State, 393 So.2d 584 (Fla. 1st DCA 1981) (post-Miranda silence is "insolubly ambiguous.") State v. Burwick, 442 So.2d 944, 947-948 (Fla. 1983) (The state cannot use a defendant's post-Miranda silence to rebut a claim of insanity. "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 he remained silent at the time of his arrest.") Hence, Crofton could not inquire about Spivey's silence at the time of his arrest, and accordingly, her Sixth Amendment right to confrontation would have been protected had the trial court prohibited any inquiry into Spivey's silence. McClure, supra. That is, there is no right to confrontation on irrelevant matters.

In permitting Crofton's inquiry into Spivey's post-Miranda silence, the court distinguished two cases: Sublette v. State, 365 So.2d 775 (Fla. 3d DCA 1979) and DeLuna v. United States, 308 F.2d 140 (CA 5 1962).

> I am going to recede from any cautionary instruction. Since Spivey has taken the stand he is in a different posture from the defendants in DELUNA and SUBLETTE. Spivey has testified, he has sworn to tell the truth, he has said everything his attorney wanted him to say.

(T-2807).

In Sublette, both the prosecutor and counsel for the co-defendant told the jury during closing argument that Sublette had not testified in his own behalf. Reversing Sublette's subsequent conviction, the Third District Court of Appeal said that the co-defendant's reference to Sublette's failure to take the stand unconstitutionally infringed upon Sublette's right to remain silent.

Sublette, as the trial court here recognized, is different in that Spivey took the stand in his own defense. DeLuna, however, at least in dictum, discussed the Sixth Amendment problem when the defendant testifies as Spivey did in this case. According to DeLuna when a defendant's Fifth Amendment right to remain silent is pitted against a co-defendant's Sixth Amendment right to confrontation, the trial court should sever the cases. DeLuna at 141, United States v. McClure, 734 F.2d 484 (CA 10 1984). Thus, under DeLuna the trial court in this case should have

severed Spivey's and Crofton's cases as both had constitutional rights that should have been equally protected, not balanced.

Other courts, however, have held that a defense attorney has an obligation to comment on a co-defendant's silence only when those comments are necessary to avoid real prejudice to his client. United States v. Graziano, 710 F.2d 691 (CA 11 1983). If there is no real prejudice, he cannot comment or inquire into the silence.

Real prejudice occurs only if defenses are "antagonistic and mutually exclusive." Id. at 695 and defenses are such if the acceptance of one party's defense would tend to preclude the acquittal of the other. McClure, supra, at 488, fn. 1.

In this case, whether Spivey's and Crofton's defenses were antagonistic and mutually exclusive is irrelevant. If they were, the court should have ordered a severance; if they were not, he should have refused to let Crofton's attorney proceed with his inquiry. In this case, the court did neither, and created a third option which as shown above was error.

This error, moreover, was harmful. Proof of Spivey's guilt depended in large part upon the testimony of Ouchida, Hawkins, and Ellison. All were intimately connected with this murder and all made deals with the prosecutor in exchange for their testimony against Spivey. No physical

evidence or clearly unbiased witness linked Spivey to the murder of Ronald Crofton.

Hence, Spivey's credibility was the issue here, and when Crofton's attorney asked Spivey about his post-Miranda silence, he was suggesting that Spivey's story was "recently concocted" (T-2798). This was an attack upon Spivey's credibility, and in a negative way, it enhanced Ouchida's, Hawkins', and Ellison's credibility. As witness credibility is an issue solely within the jury's competence to resolve, c.f. Tibbs v. State, 397 So.2d 1123 (Fla. 1981), this Court cannot say that Crofton's attorney's comments were harmless beyond all reasonable doubt. Chapman v. California, 386 U.S. 18, 17 L.Ed.2d 705, 87 S.Ct. 824 (Fla. 1967).

ISSUE II

THE COURT ERRED IN OVERRIDING THE JURY'S RECOMMENDATION OF LIFE AND SENTENCING SPIVEY TO DEATH AS THERE WERE SEVERAL REASONABLE BASES UPON WHICH THE JURY COULD HAVE RECOMMENDED LIFE.

The jury in this case recommended that the trial court sentence Spivey to life in prison (R-271). The court ignored this recommendation, however, and sentenced Spivey to death. The court erred in doing so as the jury had at least three reasonable bases for justifying its life recommendation: (1) the disparate sentences of the other co-defendants; (2) Spivey's background, and (3) Spivey's lack of intent to commit this murder. The court, in its sentencing order, provided no justification for overriding the jury's recommendation, and at sentencing, it said only that he was aware of the great weight which should attend the jury's recommendation (T-3804).

Under the standard established by this Court in Tedder v. State, 322 So.2d 908, 910 (Fla. 1975) such indifference to the jury's life recommendation as the court in this case demonstrated is error. In Tedder, this Court said:

> In order 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. That is not the situation here.

Id. at 910.

The presumption thus arises that when a jury recommends life that that sentence is correct. To overcome this presumption, evidence or reasons must be presented from which virtually all reasonable men could agree that death was the appropriate sentence. Ignoring the jury's recommendation or simply saying that it was aware that the recommendation should be given great weight, as the court did in this case, is insufficient. The court's use in this case of jargon or buzz words shows that it did not make any effort to look for any basis for imposing life.

In addition, the court in this case misunderstood the use of aggravating and mitigating circumstances in situations where the jury has recommended life. In such instances, finding those factors is irrelevant, as the presumption exists that life is the correct sentence. Instead of weighing aggravating circumstances against mitigating circumstances as the court did in this case, the court should have examined the record to determine if there was any basis for the jury's life recommendation. If so, it should have then imposed a sentence of life without regard to the presence of aggravating or mitigating circumstances. Weighing of aggravating and mitigating circumstances as dictated by State v. Dixon, 283 So.2d 1 (Fla. 1972) occurs only if the jury had recommended death. As the jury recommended life in this case, the trial court should have examined the record for any reasonable basis

to impose that sentence. In this case, the jury had at least three reasonable bases for its life recommendation.

1. The sentences of Spivey's co-defendants

Geraldine Crofton wanted her husband dead, and she asked Vance Ellison to find someone to do it. Hawkins helped strangle Crofton, as he admitted (T-1434). Ouchida stood by (T-1625) and was willing to benefit from these crimes (T-1525). The jury acquitted Crofton of the murder (T-3647), but the state offered deals to the other culpable defendants. Ellison pled guilty to second degree murder as did Hawkins, and the most that these men can receive is life in prison. Ouchida, who participated at least in the robbery, received total immunity (T-1600). Such disparity of sentences is a reasonable basis for the jury to have recommended life, as this Court has acknowledged.

In Herzog v. State, 439 So.2d 1372 (Fla. 1983), Herzog and a co-defendant strangled Herzog's girlfriend. The state let the co-defendant plea to manslaughter and he was placed on five years probation. Another co-defendant, who was present during the murder and had gagged the victim, received "total immunity." Id. at 1375. In sentencing Herzog to death, the trial court found nothing in mitigation, but this Court reduced Herzog's sentence to life because the jury, in recommending a life sentence, could have considered disposition of the co-defendant's cases.

In this case, Hawkins was equally culpable of committing this murder. Hawkins was the one who had the

gun (T-1506), he helped strangle Crofton (T-1456), and it was Hawkins who took Crofton's watch and gold necklace (T-1460). Hawkins also took Crofton's shoes off of his body (T-1461) and stole his car (T-1461). Yet the state let him plead to second degree murder.

Ouchida, according to his story, never had the gun, and he merely stood by and watched as the murder occurred (T-1624-1625). Yet he participated in the robbery (T-1615,1625) but received total immunity (T-1600).

In McCampbell v. State, 421 So.2d 1072 (Fla. 1982), McCampbell and three other men entered a Winn Dixie store to rob those inside and a fifth man waited outside in the getaway car. While two of the men were taking money, McCampbell and another co-defendant guarded the people inside the store. McCampbell had the security guard squat, and he then shot him in the back of the head.

Rejecting the trial court's override of the jury's life recommendation this Court found that the jury could have legitimately recommended life because of the disposition of the co-defendants' cases. Id. at 1075-1076. Three of the co-defendants pled guilty to reduced charges and testified for the state.

McCampbell is especially compelling in this case as McCampbell clearly was the triggerman and more culpable than his co-defendants. In this case, Hawkins was at least as culpable as Spivey in killing Crofton, yet he pled guilty

to second degree murder. Just as in McCampbell, the jury in this case may have recommended life because of that sentencing disparity. See also Lewis v. State, 398 So.2d 432 (Fla. 1981) (Lewis was the triggerman; other co-defendants except Odom got death.) Odom v. State, 403 So.2d 936 (Fla. 1981) (This Court reduced Odom's death sentence to life.) McCray v. State, 416 So.2d 804 (Fla. 1982) (McCray shoots victim three times. One defendant was placed on probation while the other two were acquitted of the murder. McCray's death sentence reduced to life.) Neary v. State, 384 So.2d 881 (Fla. 1980) (Jury's life recommendation may have been influenced by the co-defendant's acquittal and his equal culpability.) Barfield v. State, 402 So.2d 377 (Fla. 1981) (Co-defendants get non-death sentences or nolle prosequi of charges for a contract killing in which Barfield acted as the middle man.)

Justice Boyd, in his dissent in Herzog v. State, 439 So.2d 1372, 1381-1382 (Fla. 1983) rejected the disposition of accomplices as a relevant mitigating factor:

> However, to the extent that an accomplice's lesser punishment is relevant to mitigating, it is only so where the accomplice is equally or more culpable in the matter than the defendant.

(Cites omitted).

Yet, even under Justice Boyd's rationale, the disposition of the other co-defendants in this case

would be relevant as Hawkins was as culpable as Spivey, and considering the possibility that Hawkins may have killed Crofton after Spivey and Ouchida left Crofton's house, perhaps more culpable.

Moreover, Crofton and Ellison instigated this murder, yet Crofton was acquitted of the murder (T-3647), and Ellison pled guilty to second degree murder. Such disparity among principles can likewise justify a life recommendation. See Deaton v. State, Case No. 65,437 (Fla. opinion filed November 7, 1985).

Therefore, the jury's life recommendation was reasonable and should have been followed.

2. Spivey's background.

At the time of this murder, Spivey was in the grip of extreme poverty. He had no home (T-2745), no food (T-2829), and no work (T-2745). His wife was five months pregnant (T-2745), and both were young and ill-equipped to handle the impending responsibilities of parenthood.

Spivey (as well as his wife) was a drug addict (T-2745). Spivey had a disastrous childhood after his father's death, and this was dramatically indicated by the sudden drop in his school grades (T-3665-3667). No child should have to ride a bicycle to his father's funeral and watch it through a fence (T-288). Yet that fact, plus his mother's several subsequent marriages (T-3678) obviously had contributed to his drug addiction and involvement in this murder. Some children can endure

such adversity and somehow emerge stronger for the test. Spivey was not one of those children.

Taken as a whole, or in part, Spivey's life presents a reasonable basis for the jury's recommendation. In Huddleston v. State, Case No. 64,307 (Fla. opinion filed August 29, 1985) this Court said that the jury could have legitimately considered Huddleston's drug addiction in reaching a decision to recommend a sentence of life. This Court also said that Huddleston's unemployment, pregnant girlfriend, and divorcing parents disturbed his situation to such an extent that the jury could recommend life based upon those facts.

Similarly here, Spivey's youth, family, employment, and basic living problems justify the jury's life recommendation.

This Court also has said that a person's rough childhood can justify a jury's life recommendation. Neary v. State, 384 So.2d 881 (Fla. 1980). Likewise, the fact that a defendant's father was killed can mitigate a death sentence. Lara v. State, 464 So.2d 1173 (Fla. 1985). On the other hand, concern for family can justify a life recommendation. Thompson v. State, 456 So.2d 444, 448 (Fla. 1984). Spivey is not saying that his childhood problems, drug problems, or lifestyle in any way excuses his crime. He is saying, however, that these factors do provide a reasonable basis upon which the jury could have recommended life in this case.

Here, we have all of these facts, and the jury's recommendation was reasonable.

3. Spivey did not intend to commit this murder.

At trial, Spivey said that he intended to rob Crofton only; he never intended to kill him (T-2768, 2773). He needed money to repay Ellison (T-2768), and he had been told Crofton carried large amounts of cash (T-2075). The solution to his problems was obvious.

Spivey's story has support from the evidence. When he met Ouchida and Hawkins on the night of the killing, both of the men said Spivey only wanted to rob Crofton (T-1609-1610); he never said he wanted to kill him (T-1609,1659). Moreover, Ellison claimed to have set up this murder for free, yet when Geraldine Crofton started paying Ellison the money, Ellison kept $2,000 (T-2118). That was a rough form of repayment for the money Ellison had spent on Spivey.

What is more, Spivey kept delaying committing the murder, further evidence that he did not want to kill Crofton. Ellison kept pressuring Spivey (T-2768), yet Spivey kept delaying, hoping to find someone from whom he could borrow money so he could repay Ellison and not have to commit this crime (T-1403). The jury, therefore, could have legitimately believed that Spivey intended only to rob Crofton.

The most significant piece of evidence supporting this conclusion is the fact that the jury acquitted Crofton

of the murder of her husband but convicted her of the conspiracy (T-3647). The only rational explanation for this bizarre verdict is that they believed Spivey's version that he intended only to rob but not kill Crofton. Crofton's murder, therefore, was arguably only the product of Hawkins' actions (as Spivey said that Crofton was alive when he left), and as this robbery was not in furtherance of or part of the conspiracy, Crofton was not guilty of murder. The murder was a product of Spivey's robbery; it was not part of the conspiracy.

According to Spivey, when he left Crofton's house, Crofton was alive (T-2782). Hawkins remained behind, and contrary to Spivey's intent, he killed Crofton.

Under this scenario, Spivey was a principle, and although not actually present at the crime scene, was guilty of murder. Yet, under the law announced in Enmund v. Florida, 458 U.S. 782, 801, 73 L.Ed.2d 1140, 102 S.Ct. 3368 (1982), the state cannot execute a principle who is not actually present and who does not intend to commit or contemplate the commission of the murder. Bush v. State, 461 So.2d 936 (Fla. 1985); State v. White, 470 So.2d 1377 (Fla. 1985). Here, by the jury's acquittal of Geraldine Crofton, the jury accepted Spivey's story that he wanted only to rob Crofton, he had no intent to kill him, and when he and Ouchida left, Crofton was alive.

This version of the facts certainly falls within the

dictates of Enmund and as such, it provides a reasonable basis for a jury life recommendation. The court erred, therefore, in not conducting the examination for a reasonable basis for the life recommendation, and it compounded this error by imposing a sentence of death.

VI CONCLUSION

Based upon the arguments presented above, Herbert Spivey respectfully asks this Honorable Court to:

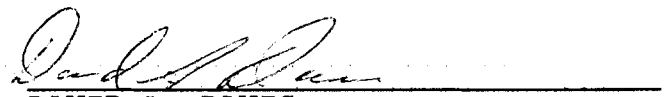
1. Reverse the trial court's judgment and sentence and remand for a new trial.

or

2. Reverse the trial court's imposition of the death sentence and remand with instructions to impose a sentence of life without possibility of parole for 25 years.

Respectfully submitted,

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT



DAVID A. DAVIS
Assistant Public Defender
Post Office Box 671
Tallahassee, Florida 32302
(904) 488-2458

Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand to Honorable Jim Smith, Attorney General, The Capitol, Tallahassee, Florida, this 25th day of March, 1986.

DAVID A. DAVIS
Assistant Public Defender