IN THE SUPREME COURT OF FLORIDA

LOUIS PINA,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 67,014 and
CASE NO. 67,105

DISCRETIONARY REVIEW OF DECISION
OF THE DISTRICT COURT OF APPEAL
SECOND DISTRICT OF FLORIDA

BRIEF OF PETITIONER ON MERITS

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STATEMENT OF THE CASE

Pina and his three co-defendants were charged by an indictment filed in the Manatee County Circuit Court with seven felonies. (R 1362-6) Pina entered a plea of not guilty to all charges. (R 1397) Pina filed a Motion to Suppress Confessions (R 14-22-3), an Amended Motion to Suppress Confessions and Statements (R 1430-1), and a Second Amended Motion to Suppress Confessions and Statements (R 1460-1). The trial court heard the motions and entered an order granting the motions as to certain statements made by Pina and denying the motion as to others. (R 1650-4).

The case was tried by a jury before the Honorable Paul E. Logan, Circuit Judge. (R 1-640) The Court denied Pina's motion for a judgment of acquittal made at the close of the State's case and renewed at the conclusion of all the evidence. (R 558-62) The Court refused defense requests for jury instructions on the following lesser included offenses: Attempted robbery (R 576-80), theft (R 576-8), and third degree murder (R 654-7). The jury returned verdicts on the seven charges as follows:

Count I:	Guilty of conspiracy to commit armed robbery with a firearm as charged. (R 1708)
Count II:	Guilty of felony murder in the first degree of Willie West. (R 1709)

Count III: Guilty of felony murder in the first degree of Martha West. (R 1710)

Count IV: Guilty of the lesser offense of attempted first degree murder of Rosena Welch without a firearm. (R 1748)

Count V: Guilty of the lesser offense of robbery of Rosena Welch. (R 1711)

Count VI: Guilty of the lesser offense of robbery of Willie West. (R 1712)

Count VII: Guilty of the lesser offense of robbery of Martha West. (R 1713)

On both convictions of felony murder in the first degree, the jury returned advisory recommendations of a sentence of life imprisonment without possibility of parole for a period of twenty-five years. (R 1723-4) The Court denied Pina's Motion for New Trial. (R 1341-3; 1725)

The Court adjudged Pina to be guilty on all seven counts in accordance with the jury's verdicts (R 1727; 1749), and imposed sentences upon Pina. (R 1729; 1730; 1731; 1751; 1732; 1733; 1734) At the sentencing hearing, Pina's trial counsel noted an objection on the record to the sentencing of Pina on the robbery charges as well as on the felony murder charges. (R 1345) Notice of Appeal was timely filed. (R 1738)

On appeal, Pina raised nine issues as follows:

(1) The trial court erred in failing to suppress the tape-recorded statement made by Pina to Sheriff Burton and Detective Benjamin on October 8, 1982.

(2) The trial court erred in failing to suppress the tape-recorded statement made by Pina to Investigator James C. Foy on November 23, 1982.

(3) The trial court erred in failing to admit into evidence at the hearing on the Motion to Suppress Pina's confessions and statements the testimony of Dr. Robert Greene concerning the inability of Pina to understand the Miranda warnings.

(4) The trial court erred in failing to grant the defense motion for judgment of acquittal as to Count Six, Armed Robbery of Willie West, and Count Seven, Armed Robbery of Martha West.

(5) The trial court erred in refusing a defense request for jury instruction on attempted robbery as to Counts Six and Seven of the indictment.

(6) The trial court erred in refusing a defense request for a jury instruction on the lesser included offense of theft.

(7) The trial court erred in imposing judgments and sentences on Counts Five, Six, and Seven, the robbery charges, as well as on Counts Two and Three, the felony murders of Willie and Martha West.

(8) The trial court erred in imposing a sentencing penalty on Pina because he unsuccessfully exercised his constitutional right to stand trial.

(9) The trial court erred in imposing upon Pina two consecutive mandatory life sentences without possibility of parole for a period of twenty-five years.

With respect to the seventh point, the Second District Court of Appeal vacated Pina's convictions and sentences for the robberies of Willie and Martha West on the grounds that a defendant cannot be convicted and sentenced for robbery and for first-degree felony murder where the robbery is the underlying felony. The Second District Court of Appeal certified this issue to this Court as a question of great public importance.

In view of its decision vacating the convictions and sentences for the robbery of Willie West and Martha West, the Second District Court of Appeal treated Pina's arguments on the fourth and fifth points as moot.

The Second District Court of Appeal declined to address the first three points concerning the confession issues on the grounds that there was other, overwhelming evidence of Pina's guilt. Therefore, the Court concluded, the error, if any, was harmless.

The Second District Court of Appeal found no error with respect to the sixth point on the trial court's failure to instruct on the lesser included offense of petty theft. The Court found that defense counsel had requested an instruction on grand theft, not petty theft.

The Second District Court of Appeal dismissed without discussion the eighth point, Pina's argument that he had been penalized for unsuccessfully exercising his right to jury trial.

The trial court agreed with Pina's contentions on the ninth point and reversed the two mandatory minimum life sentences with directions to the trial court to correct the mandatory minimum life sentences so that they would be served concurrently instead of consecutively.

STATEMENT OF FACTS

In its opinion, the Second District Court of Appeal stated the facts pertinent to the consideration of the issues raised on appeal as follows:

On October 8, 1982, four men robbed Wests' Farm Market. At the time of the robbery, the owners of the market, Willie and Martha West, and a clerk, Rosena Welch, were in the store. During the robbery, the robbers shot and killed the Wests. They shot Welch five to seven times and left her for dead. Welch survived and testified at Pina's trial.

Welch's testimony was that on the day of the robbery a man she knew as "Benny" and three other men entered the market. All four of the men pulled out guns. One of them pushed Mrs. West into the back room with Mr. West. Benny and Pina remained at the front counter and forced Welch to open the cash register. They removed the cash drawer from the register and put the money into a bank bag which they carried. Welch could hear the two men in the back room talking to Mr. and Mrs. West. They repeatedly asked Mrs. West where the money was. She replied that she didn't have any more. Welch heard one of the men say, "You better hope he gets here soon because if he doesn't you're gonna die." Welch could also heard the sound of desk drawers and filing cabinets being opened in the back room. The men brought Welch into the

back room and Welch saw Mr. and Mrs. West face down on the floor. Shots ensued. AFter being shot, Welch fell to the floor and pretended to be dead.

At trial, Welch identified Pina as the man who helped Benny take the money from the cash register drawer. She also testified that Pina was in the back room of the market until after all the shots had been fired and that he left the market at the same time as the other three men.

There was evidence that prior to the robbery the four men had been seen with guns and had made comments indicating that they were going to get money through the use of guns. Included in those comments was a comment by Pina that if he had to kill, he would do so. Pina was seen with a gun just before the four were seen in a car traveling in the direction of Wests' Farm Market. Shortly after the robbery, Pina was seen spray-painting the car a different color and was overhead saying that they had "killed a cow."

SUMMARY OF ARGUMENT

Issue One

The double jeopardy clauses of the United States and Florida Constitutions protect against multiple punishments for the same offense. Legislative intent determines which punishments are unconstitutionally multiple. The Legislature does not intend separate convictions and sentences for necessarily included lesser offenses. In felony murder cases, the underlying felony is a necessarily included lesser offense. Therefore, separate convictions for both felony murder and the underlying felony are not permitted.

Issue Two

Pina's statement to Sheriff Burton and Detective Benjamin was involuntarily made and obtained in violation of his Miranda rights. The other evidence against Pina was not overwhelming. Therefore, the Second District Court of Appeal should have reversed Pina's convictions and sentences and remanded the case for a new trial.

Issue Three

Pina's statement to Investigator Foy was obtained in violation of Pina's right to counsel and his Miranda rights. The

other evidence against Pina was not overwhelming. Therefore, the Second District Court of Appeal should have reversed Pina's convictions and sentences and remanded the case for a new trial.

Issue Four

The trial court erred in failing to admit into evidence expert testimony concerning Pina's inability to understand the Miranda warnings at a hearing on the Motion to Suppress Pina's confessions and statements. The evidence against Pina apart from the confessions was not overwhelming. Therefore, the Second District Court of Appeal should have reversed Pina's convictions and sentences and remanded the case to the trial court for a new hearing on the Motion to Suppress Pina's confessions and statements.

Issue Five

The plea bargain offered to Pina and two of his three co-defendants prior to trial, the relative culpability of Pina and his co-defendants, and other circumstances demonstrate that the trial court imposed a sentencing penalty upon Pina because he unsuccessfully exercised his constitutional right to a jury trial. Therefore, the Second District Court of Appeal should have remanded the case to the trial court with directions that the sentences imposed for the two felony murders should be designated to run concurrently, rather than consecutively.

ARGUMENT

ISSUE ONE

WHEN A DEFENDANT IS CONVICTED OF FELONY MURDER, CAN HE BE CONVICTED OF, ALTHOUGH NOT SENTENCED FOR, THE UNDERLYING FELONY?

In Whalen v. United States, 445 U.S. 684, 688, 100 S.Ct. 1432, 63 L.Ed.2d 715, 721 (1980), the United States Supreme Court ruled:

> The Fifth Amendment guarantee against double jeopardy protects not only against a second trial for the same offense, but also "against multiple punishments for the same offense," . . . But the question whether punishments imposed by a court after a defendant's conviction upon criminal charges are unconstitutionally multiple cannot be resolved without determining what punishments the Legislative Branch has authorized.

This Court has repeatedly found that the Legislature intends separate convictions and sentences only for separate offenses and does not intend separate convictions and sentences for both a greater and a necessarily included lesser offense. State v. Gibson, 452 So2d 553, 556-558 (Fla. 1984); Bell v. State, 437 So2d 1057, 1958 (Fla. 1983); Borges v. State, 415 So2d 1265, 1267 (Fla. 1982). See §775.021(4), Fla. Stat. (1983). Convictions for lesser included offenses are punitive in effect because they expose the defendant to enhanced sentences under both the sentencing guidelines and habitual offender statutes, they adversely

affect parole release dates in those cases where parole remains available, and they may be used as impeachment evidence in subsequent criminal proceedings. Bell v. State, supra at 1059; Fla. R. Crim.P. 3.701. Since the Legislature does not intend separate convictions for necessarily included lesser offenses and separate convictions for such offenses are punitive, separate convictions are proscribed by the multiple punishment protections afforded by the double jeopardy clauses of the United States and Florida Constitutions. Porter v. State, 447 So2d 219, 220 (Fla. 1984); Bell v. State, supra at 1058, 1061. See Whalen v. United States, supra at 688-690; U.S. Const., amends. V and XIV; Art I, §9, Fla. Const.

Whether a lesser offense is necessarily included in a greater offense is determined by examining the statutory elements of the two offenses. The two offenses are separate and may be separately punished only if each offense requires proof of a fact the other does not. Whalen v. United States, supra at 691-692; State v. Baker, 456 So2d 419, 420 (Fla. 1984); Bell v. State, supra at 1058; §775.021(4), Fla. Stat. (1983).

In a felony murder case, the underlying felony is a statutory element of the felony murder. Thus, the elements of the underlying felony are wholly included within the elements of felony murder, and the underlying felony is a necessarily included lesser offense. Whalen v. United States, supra at 693-694; Copeland v.

State, 457 So2d 1012, 1018 (Fla. 1984); State v. Gibson, supra at 557 n.6; State v. Hegstrom, 401 So2d 1343, 1346 (Fla. 1981); §782.04(1)(a), Fla. Stat. (1983).

Because the underlying felony is a necessarily included lesser offense to felony murder and the Legislature did not intend separate convictions and sentences for necessarily included lesser offenses, the double jeopardy clauses of the United States and Florida Constitutions prohibit the imposition of separate convictions and sentences for the underlying felony. See State v. Gibson, supra at 558 n.7; Bell v. State, supra at 1058, 1061. However, this Court has created an anomaly in the law by allowing convictions for the underlying felony while reversing sentences for the underlying felony in Copeland v. State, supra at 1018; Hawkins v. State, 436 So2d 44, 47 (Fla. 1983); and State v. Hegstrom, supra at 1346. See Snowden v. State, 449 So2d 332, 335-337 (Fla. 5th DCA 1984), pet. for rev. pending, Fla. Case No. 65,176.

This Court recognized the conflict between State v. Hegstrom , supra, and Bell v. State, supra, in State v. Gibson, supra at 558 n.7. This conflict should be resolved by holding that separate convictions for felony murder and the underlying felony are not permitted by §775.021(4), Florida Statutes (1983), and the double jeopardy clause. Id. Accordingly, the decision of the Second District Court of Appeal on this issue should be approved.

ISSUE TWO

THE TRIAL COURT ERRED IN FAILING TO SUPPRESS THE TAPE-RECORDED STATEMENT MADE BY PINA TO SHERIFF BURTON AND DETECTIVE BENJAMIN ON OCTOBER 8,1982

After Pina's arrest, Manatee County Sheriff Tom Burton and Detective Bruce Benjamin of the Manatee County Sheriff's Department went to Wauchula to interview Pina at the Hardee County Sheriff's Department. Burton and Benjamin were alone with Pina in the interview room at the Sheriff's Department. Pina was handcuffed. Both Burton and Benjamin were armed with handguns. The interview began at approximately 10:45 P.M. During the interview, Pina made a tape-recorded statement to Burton and Benjamin. (R 1085-90) An edited version of the tape-recorded statement was played for the jury at the trial of this case. (R 367-443) A transcript of the entire statement prepared by the State is included in the record on appeal. (R 1517-82) It is necessary to refer to the State's transcript of the entire statement in order to consider the issues raised on this point. This is because the statement as played to the jury was edited to eliminate various representations made by the officers to Pina concerning statements purportedly made by co-defendants and other matters. (R 10-3; 344-6)

A. VOLUNTARINESS

In order for a confession or an incriminating statement of a defendant to be admissible in evidence, it must be shown that the confession or statement was voluntarily made. The due process clause of the Fourteenth Amendment to the United States Constitution prohibits the States from using the coerced confession of an accused against him. The burden of showing that a defendant's confession is voluntarily made is on the State. The State is required to establish voluntariness by a preponderance of the evidence. Drake v. State, 441 So2d 1079 (Fla. 1983); Brewer v. State, 386 So2d 232 (Fla. 1980); and Reddish v. State, 167 So2d 858 (Fla. 1964).

1. Threats of Physical Violence

During the course of the interview and before Pina had made any incriminating statements, Sheriff Burton threatened Pina with physical violence, saying: "Tell us, but don't make us do anything to you." (R 1532) Burton's words, "don't make us do anything to you," can only be interpreted as a direct threat to resort to physical violence if Pina persisted in his refusal to admit involvement in the incident at the Wests' Farm Market.

The general rule is that a threat of violence to the person of the accused renders a confession induced thereby involuntary. 3 Wharton's Criminal Evidence, §679; 29 Am Jur 2d,

Evidence, §568. The Florida decisions are to the same effect. Harrison v. State, 152 Fla. 86, 12 So2d 307 (1943); Simon v. State, 5 Fla. 285 (1853). Burton's threat alone was sufficient to render Pina's confession involuntary.

2. Deception and Trickery

At the time Burton and Benjamin were interrogating Pina, Torres was still at large. (R 1114-6) Garcia and Torres had been the "trigger men" at the Wests' Farm Market. Ribas and Pina had not used weapons at the Market. Nevertheless, Burton and Benjamin repeatedly informed Pina that Torres was already in custody, and that he had made a statement naming Pina as the man who had shot and killed Mr. and Mrs. West. (R 1530-1; 1532; 1536-7) The repeated false assertions by Burton and Benjamin that Torres was in custody and that he had named Pina as the trigger man were designed to overcome Pina's will to resist and to elicit incriminating statements. Burton and Benjamin's tactic was obviously intended to induce Pina to incrimnate himself by defending himself against the false assertions purportedly made by Torres.

Florida courts have held that deception and trickery alone practiced by the interrogating officer will not necessarily invalidate a confession. Halliwell v. State, 323 So2d 557 (Fla. 1975); Flowers v. State, 152 Fla. 649, 12 So2d 772 (1943); and Denmark v. State, 95 Fla. 757, 116 So 757 (1928). Nevertheless, under the totality of the circumstances test, the use of deception, trickery, or misrepresentation is a factor to be considered

in determining the voluntsriness of a confession. See Gaspard v. State, 387 So2d 1016 (Fla. 1st DCA 1980). See also, Fields v. State, 402 So2d 46 (Fla. 1st DCA 1981); and Williams v. State, 441 So2d 653 (Fla. 3rd DCA 1983).

The deception and trickery practiced upon Pina by Sheriff Burton and Detective Benjamin in this case is identical to the conduct condemned in Fields v. State and Williams v. State. This deception is, when considered in conjunction with the threats of physical violence and other coercive factors to be discussed below, sufficient to render Pina's statement to Burton and Benjamin involuntarily made.

3. Promises of Leniency

Of all the coercive factors at work in the interrogation of Pina by Burton and Benjamin, the most telling was the unmistakeable suggestion made by the officers that if Pina would make a statement demonstrating that he was not the trigger man, he would not be prosecuted or, at the very least, he would be shown leniency. Burton and Benjamin made such statements several times during the course of the interview, and these statements appear at R 1533; 1536-7. Two of the representations made by the officers deserve special mention. Benjamin told Pina that Pina really had a "shot at this thing," but that the officers needed to hear his side of the story. In the context of the interview, Benjamin's suggestion to Pina that " had a shot at this thing" could only be interpreted

as a chance to escape punishment. The unmistakeable suggestion in Benjamin's words was a promise that if Pina would make a statement demonstrating that someone other than himself was the trigger man, he would escape punishment. Benjamin reinforced this promise of immunity or leniency when he told Pina that the detectives needed to hear his side of the story in order "to go to bat" for him and "try to prove" that he "didn't do it."

The promises of leniency held out by Burton and Benjamin must also be viewed in the context of the false representations made by the officers that Torres was already in custody and had given a statement implicating Pina as the trigger man. To an illiterate farm laborer of limited intelligence unfamiliar with the law of principles and the felony murder rule, these statements made by Burton and Benjamin could only be interpreted as a promise that in return for a statement, Pina would not be prosecuted or, at the very least, he would receive leniency. The courts have supressed numerous confessions in cases in which the investigating officers used a promise of leniency or other benefit to induce the confession. See, e.g., Williams v. State, 441 So2d 653 (Fla. 3rd DCA 1985); Henthorne v. State, 409 So2d 1081 (Fla. 2nd DCA 1982); Foreman v. State, 400 So2d 1047 (Fla. 1st DCA 1981); Fillinger v. State, 349 So2d 714 (Fla. 2nd DCA 1977); and M.D.B. v. State, 311 So2d 399 (Fla. 4th DCA 1975).

Pina's first admission that he had been involved in the killings at the Wests' Farm Market followed immediately upon Ben-

jamin's promise to go to bat for him and try to prove that he didn't do it if Pina would only tell what happened. (R 1537) It was this promise of immunity or leniency dangled in front of Pina by the officers which, more than any other single factor, apparently overcame Pina's will to resist self-incrimination and produced the statement which the officers desired to fervently to obtain from Pina. Similar promises made by investigating officers to help the defendant out were deemed sufficient to render a confession involuntary in the case of Brewer v. State, 386 So2d 232 (Fla. 1980). The promises of immunity or leniency made by the officers to Pina are sufficient in and of themselves to render Pina's statement involuntary.

4. Injunctions to Tell the Truth

Burton and Benjamin repeatedly directed Pina to tell the truth and confess. These injunctions to tell the truth were accompanied by promises that Pina's cooperation would be made known to the "Judge and the jury." These statements appear in the transcript at R 1531-2; 1533; 1551-2.

While advising an accused to tell the truth and to confess does not ordinarily render a confession inadmissible, where the adjuration to tell the truth is accompanied by an inducement or suggestion of a benefit, the resulting confession cannot stand. Frazier v. State, 107 So2d 16 (Fla. 1985); State v. Chorpenning, 294 So2d 54 (Fla. 2nd DCA 1974). While a simple representation

to a cooperating confessor that the fact of his cooperation will be made known to prosecuting authorities or to the court is insufficient to render a confession involuntary, Bova v. State, 392 So2d 950 (Fla. 4th DCA 1983), such statements are to be considered in determining the voluntariness of a confession in the light of the totality of the circumstances. Williams v. State, 441 So2d 653 (Fla. 3rd DCA 1983).

Therefore, the statements made by Benjamin and Burton demanding that Pina tell the truth and stating that his cooperation would "look good" in front of the Judge and the jury are factors to be considered in determining the voluntariness of his confession. While such statements might not be sufficient in and of themselves to render the statement involuntary, they become so when considered in the light of the other statements made.

5. Mental Capacity

A clinical psychologist who had examined Pina testified at the hearing on the Motion to Suppress that Pina had an I.Q. of 69. This indicated mild mental retardation and placed Pina just below the second percentile of the entire population. (R 1179) Pina's lowest score on the battery of tests administered to him by the psychologist was in the area of verbal comprehension. The psychologist testified further that Pina only understood simple, concrete, straight-forward language. Pina had difficulty processing abstract concepts. (R 1180-3)

Mental weakness alone will not automatically render a confession involuntary and inadmissible. Rather, this is only a factor to be considered in determining the voluntariness of a confession. Ross v. State, 386 So2d 1191 (Fla. 1980). Nevertheless, mental capacity may be considered in determining whether under the totality of circumstances a confession is voluntary. Myles v. State, 399 So2d 481 (Fla. 3rd DCA 1981); State v. Chorpenning, supra. Accordingly, Pina's limited intelligence is another factor to be considered in assessing the voluntariness of his confession to Burton and Benjamin.

6. Other Factors

The record discloses several other significant factors to be considered in determining the voluntariness of Pina's statement to Benjamin and Burton. First, Pina was twenty at the time of his arrest. Second, Pina could not read even though he had a seventh grade education. Third, although Pina could speak and understand English, Spanish was his first language. The transcript of the taped statement made to Benjamin and Burton indicates that Pina's command of the English language was limited. For example, Pina asked Benjamin to tell him what the word "favorably" meant. (R 1531) These other factors add weight to the factors discussed above which require a finding of involuntariness.

7. Summary

To summarize, the numerous coercive factors at work in connection with the interrogation of Pina by Burton and Benjamin are as follows:

1. Threats of physical violence.
2. Deception and trickery calculated to mislead Pina as to his true position.
3. Promises of immunity from prosecution or leniency.
4. Injunctions to tell the truth.
5. Promises to tell the Judge and jury of Pina's cooperation.
6. Pina's youth.
7. Pina's limited education and illiteracy.
8. Pina's limited command of the English language.
9. Pina's limited intelligence.

The State had the burden of establishing the voluntariness of the statement by a preponderance of the evidence. When all of the factors listed above are considered, the conclusion that the State failed to carry its burden is inescapable. The trial court committed reversible error in failing to so hold and to suppress the statement.

B. THE MIRANDA ISSUE

Pina argued in the trial court that his statement to Sheriff Burton and Detective Benjamin was not admissible in evidence because he had not been adequately informed of his rights under Miranda and that he had at no point waived his rights voluntarily, with knowledge and intelligence. Detective Benjamin undertook to advise Pina of his Miranda rights prior to beginning the interrogation at the Hardee County Sheriff's Department. (R 1091) Benjamin testified at the hearing on the Motion to Suppress that he read Pina the Miranda warnings from a form. The process of advis-

ing Pina of his rights, Benjamin testified, occurred prior to the activation of the tape recorder. According to Benjamin, after reading each line of the form, he asked Pina if he understood and Pina responded, "Yes." Again, according to Benjamin, Pina acknowledged that he understood his rights and was willing to waive them and talk to theofficers. Benjamin handed Pina the form to sign, and Pina signed his name without making any additional statements. The form was received in evidence. (R 1091-15)

After Pina had signed the form, Benjamin turned on the tape. (R 1096) After turning on the tape, Benjamin referred to the Miranda warnings and asked Pina if he understood. Pina's response on the tape-recorded transcript of the interview is in marked contrast to Benjamin's testimony concerning what had occurred prior to turning on the tape. The tape reveals the following:

> This is Detective Sergeant Bruce Benjamin, Manatee County Sheriff's Department. Today's date is October 8, 1982. Approximate time is 22:52 hours. I am present in the Sheriff's Department of Hardee County, located in Wachula [sic] Florida. Located in the detective's office. Present and being interviewed is a Louis Pina, Mexican male, date of birth 6/2/62. Also present is Sheriff Burton. Okay, Louis, prior to me turning the tape on, I advised you of what your rights were. The fact that you had the right to remain silent, the fact that you had the right to have an attorney present during questioning and so forth and that you agreed that you understood what these rights were is that, is that right?
>
> A. A little bit not too much.
>
> Q. But you understand?
>
> A. Yes, sir.
>
> Q. Either yes or no.
>
> A. Yes (Emphasis supplied) (R 1517)

Pina's tape-recorded response, "A little bit not too much," to Benjamin's question concerning Pina's understanding of his rights is completely inconsistent with Benjamin's testimony concerning Pina's complete understanding and cooperation prior to turning on the tpe. After Pina's equivocal response on the tape, Benjamin made no effort to explain the Miranda warnings further or to ascertain that Pina did, in fact, understand them. On the contrary, Benjamin limited himself to forcing Pina to make a yes or no response.

The trial court found that the statement taken by Benjamin and Burton indicated that there was a knowing, intelligent, and voluntary waiver of the Miranda rights to Pina. The State failed to carry its burden of proof in this regard, and the trial court's finding constituted error.

The State has a three-fold burden of proof with respect to Miranda issues. It must show that:

(1) The required Miranda warnings were given;
(2) After receiving warnings, the accused made a waiver; and
(3) The waiver was made voluntarily, with knowledge and intelligence.

Colquitt v. State, 396 So2d 1170 (Fla. 3rd DCA 1981). The State has a heavy burden to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to obtain appointed counsel. Miranda v. Arizona, 384

U.S. 436, 86 S.Ct. 1602, 16 L.Ed 2d 694 (1966); North Carolina v. Butler, 441 U.S. 369, 99 S.Ct. 1755, 60 L. Ed 2nd 286 (1979).

In order to establish a knowing and intelligent waiver of rights, the State was required to establish that Pina actually understood the Miranda warning. See DeConingh v. State, 433 So2d 501 (Fla. 1983); Ware v. State, 307 So2d 255 (Fla. 4th DCA 1975). The most reliable evidence on this issue was obviously the tape-recorded discussion between Benjamin and Pina. Pina's response to Benjamin's question concerning his understanding of the Miranda rights was equivocal at best. Pina's response indicated confusion, not understanding.

The other evidence on the issue of Pina's understanding of the Miranda warning, such as it was, was insufficient to overcome the clear and convincing evidence of his lack of understanding as reflected on the tape. Pina did sign a waiver of rights form. This fact, however, is of no significance whatsoever in the light of Pina's inability to read. The only evidence that Pina did understand the Miranda warning was Benjamin's testimony concerning the articulate and intelligent responses Benjamin claimed Pina gave to his questions prior to activating the tape. Benjamin's testimony on this point is simply incredible given the confused and unintelligent responses Pina made to Benjamin's questions after the tape was activated and throughout the entire statement.

Moreover, the State also failed to prove that Pina waived his rights. The accused's making of a confession or statement alone is not evidence of a waiver. In Miranda, the court stated that " a valid waiver will not be presumed . . . simply from the fact that a confession was, in fact, eventually obtained." 384 U.S. at 475. Nowhere in the tape-recorded conversation did Benjamin or Burton ask Pina if he was willing to waive his rights. Benjamin's questions on the tape were limited to asking Pina if he understood his rights.

The waiver of rights form signed by Pina does not supply the absence of any evidence concerning a waiver because Pina was unable to read the form. While Benjamin testified that Pina indicated a willingness to talk prior to the time the tape recorder was activated, this testimony is unbelievable for the same reasons as were stated previously. The most credible evidence of what occurred is the tape-recorded conversation, not Benjamin's self-serving statements made at the hearing.

Finally, any waiver of rights by Pina could not be found to be voluntary because of the humerous coercive factors in the interrogation previously discussed. A waiver of rights is not voluntary if made in response to police threats and promises. Miranda v. Arizona, supra at 476.

C. HARMLESS ERROR

The Second District Court of Appeal declined to address the

foregoing issues, stating that there was other, overwhelming evidence of guilt. Therefore, the Court concluded, the error, if any, was harmless citing Palmes v. State, 397 So2d 648, 654 (Fla.) cert. denied, 454 U.S. 882, 102 S.Ct. 369 70 L.Ed2d 195 (1981).

The Second District Court of Appeal erroneously found the evidence at trial against Pina to be overwhelming. The only direct evidence linking Pina to the events at the Wests' Farm Market was the testimony of Rosena Welch. Mrs. Welch informed Deputy Turner, the first law enforcement officer on the scene, that she and the Wests had been robbed and shot by three Mexicans, not four. (R 98) Mrs. Welch also testified at trial, against all of the evidence, that each of the men at the Market had been armed with a gun. Mrs. Welch recognized only one of the men, Benito "Benny" Torres, as a regular customer. She did not know the others. The stress and excitement of the events at the Market understandably distorted Mrs. Welch's perception and recollection of the incident, including her identification of Pina. Thus, absent the statements, the credibility and accuracy of Mrs. Welch's eyewitness identification of Pina would have been highly questionable.

The remaining evidence against Pina was circumstantial. Mrs. Welch was the only eyewitness. No accomplice testified against Pina. There was no fingerprint or other scientific evidence identifying Pina as one of the participants. In summary, the State had a prima facie case against Pina without his statements.

Nevertheless, such a case could not be characterized as "overwhelming."

Examination of the harmless error issue is not complete without consideration of the significant impact the two statements had at the trial. The two statements were a significant feature of the trial for two reasons. First, both statements were tape-recorded. Edited versions of the tape were played for the jury at trial. The playing of the tape-recorded statements certainly had a greater impact on the jury than a mere summary or transcript of the statements would have had. Second, the statements were quite lengthy and detailed. The statement Pina made to Sheriff Burton and Detective Benjamin occupies 76 pages of the trial transcript. (R 367-443) The Foy statement occupires 50 pages. (R 458-508) Under these circumstances, there was more than a reasonable possibility that the error in admitting the statements into evidence may have contributed to Pina's convictions.

For these reasons, the error in admitting Pina's statements into evidence cannot be characterized as harmless. Therefore, the Second District Court of Appeal should have reversed the convictions and sentences and remanded the case to the trial court for a new trial.

ISSUE THREE

THE TRIAL COURT ERRED IN FAILING TO SUPPRESS THE TAPE-RECORDED STATEMENT MADE BY PINA TO INVESTIGATOR JAMES C. FOY ON NOVEMBER 23, 1982.

After Pina's arrest, he was transferred to the Pinellas County Jail to isolate him from his co-defendants. On November 23, 1982, Chief Investigator James C. Foy of the Twelfth Judicial Circuit took a statement from Pina at the Pinellas County Jail. Pina had no counsel present while this statement was taken. The statements made by Pina to Foy were incriminating and were received in evidence over defense objection at the trial of this cause. (R 454-5; 458-508) The trial court erred in failing to suppress the statement for two major reasons. First, the statement was obtained from Pina in violation of his right to have counsel present during custodial interrogation. Second, Pina was never adequately informed of his rights under Miranda, and at no point waived his rights voluntarily, with knowledge and intelligence.

A. DENIAL OF RIGHT TO COUNSEL

Consideration of this issue requires an examination of the chronology of events following Pina's arrest. Pina was arrested on October 8, 1982. The Public Defender of the Twelfth

Judicial Circuit was appointed to represent Pina and his three co-defendants on October 28, 1982. (R 656) On the same day, the Public Defender's Office filed a Certificate of Conflict and Motion for Appointment of Counsel because it had previously been appointed to represent one of Pina's co-defendants, Urbano Ribas, Jr., on October 11, 1982. (R 656-7; 1372) On November 8, 1982, the trial court entered an order granting the Public Defender's Motion to Withdraw from representation of Pina. (R 658) Ahtough the court permitted the Public Defender's Office to withdraw from representation of Pina on November 8, 1982, no new counsel was appointed to represent Pina until December 15, 1982, thirty-seven days after the Public Defender was permitted to withdraw, and sixty-eight days after Pina's arrest. (R 1373)

On November 19, 1982, the State Attorney's Office received a letter signed by Pina. The letter was dated October 25, 1982. (R 1122-4) Someone had written the letter for Pina, and he had signed his name. Pina could not write. The letter was addressed to the District Attorney. (R 1127) In full, the letter read as follows:

> I, Louis Pina, would like to talk to you on a very important matter.
>
> It deals with the crime that I'm being held on.
>
> I think I have some information that could help you (and me, also).
>
> I would like to talk with you (in person) as soon as possible.
>
> Thank you. (R 1127)

The words "Louis Pina, K Cell" were printed at the bottom of the letter. The letter was also signed "Louis Pina." (R 1127)

The letter was dated October 25, 1982. (R 1123; 1127) On November 19, 1982, the date the State Attorney's Office received the letter, no counsel had been appointed to represent Pina. Nevertheless, the Public Defender's Office had previously filed a request for the appointment of counsel on his behalf on October 28, 1982. Thus, it is clear that the Public Defender's Office requested alternate representation for Pina after any request by Pina to speak with the State Attorney.

One of the Assistant State Attorneys assigned to the case directed James C. Foy, Chief Investigator for the Office of the State Attorney of the Twelfth Judicial Circuit to visit Pina and determine the purpose of the letter. (R 1123-4) Foy met with Pina at the Pinellas County Jail on November 23, 1982. After Foy inquired of Pina about the letter, Pina made a tape-recorded statement to Foy. The statement was received in evidence at trial over defense objections. Based upon the events set forth above, this statement was taken in violation of Pina's right to have counsel present during the costodial interrogation by Foy. Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed 2d 378 (1981).

See also, Florida Rule of Criminal Procedure 3.111(a); and State v. Brewington, 320 So2d 17 (Fla. 2d DCA 1975).

B. THE MIRANDA ISSUE

The State has a three-fold burden of proof with respect to Miranda issues. It must show that:

(1) The required Miranda warnings were given.

(2) After receiving warnings, the accused made a waiver, and

(3) The waiver was made voluntarily, with knowledge and intelligence.

Unlike Detective Benjamin, Investigator Foy placed the entire recitation of the Miranda warnings and Pina's responses on the tape-recorded statement. The portions of the tape-recorded statement pertinent to Foy's recitation of the Miranda warnings and Pina's responses thereto are set forth at R 1583-5.

In order to establish a knowing and intelligent waiver of rights, the State was required to establish that Pina actually understood the Miranda warning. See, DeConingh v. State, 433 So2d 501 (Fla. 1983); Ware v. State, 307 So2d 255 (Fla. 4th DCA 1975). As in the statement Pina gave to Burton and Benjamin, Pina's responses to Foy's questions indicated that Pina did not understand his rights. Indeed, Pina's most positive response was the equivocal, "Some I know." The balance of Pina's responses were limited to statements indicating a lack of understanding such as "I don't know too much," and "Huh."

Therefore, the tape-recorded statement itself indicates affirmatively that Pina did not understand the Miranda warning.

The only evidence offered by the STate to establish that Pina did understand the warning does not appear on the tape. Foy testified that when he asked Pina if he understood that he did not have to talk, Pina nodded affirmatively. (R 1138) The tape-recorded statement itself does not support Foy's testimony given at the hearing on the Motion to Suppress. When Foy asked Pina if he understood that he did not have to talk to him unless he wanted to, Foy specifically requested Pina to answer audibly. Pina's answer was not affirmative. He replied,"I don't know to talk." (R 1583) Therefore, Foy's testimony concerning Pina's affirmative head nod is not supported by the evidence on the tape. The tape is certainly the most reliable evidence on this issue.

Moreover, there is no evidence whatsoever of a waiver of rights by Pina on the tape. Foy did ask Pina if he wished to talk, but once again Pina's response was equivocal. This exchange was as follows:

> Q. Okay, having these rights in mind, do you want to talk to me? Do you want to tell me the reason why you wrote this letter to us, or had someone write it for you?
>
> A. Yes, somebody wrote it for me. (R 1585)

Pina's response indicated that he did not understand Foy's question concerning whether or not he wished to waive his rights. Pina's affirmative answer to Foy's series of questions related only to the fact that someone had written the letter for Pina. This was not sufficient to establish a waiver. The mere making of a statement does not constitute evidence of a waiver. In

Miranda, the court stated that "a valid waiver will not be presumed . . . simply from the fact that a confession was, in fact, eventually obtained." 384 U.S. at 475. In the tape-recorded statement which Pina made to Foy, there is simply no showing of any intentional waiver of Pina's rights even if he had understood them.

C. HARMLESS ERROR

See the argument on this point in Issue Two.

For these reasons, the Second District Court of Appeal should have directed that the statement to Investigator Foy be suppressed, reversed Pina's convictions and sentences, and remanded the case to the trial court for a new trial.

ISSUE FOUR

THE TRIAL COURT ERRED IN FAILING TO ADMIT INTO EVIDENCE AT THE HEARING ON THE MOTION TO SUPPRESS PINA'S CONFESSIONS AND STATEMENTS THE TESTIMONY OF DR. ROBERT GREENE CONCERNING THE INABILITY OF PINA TO UNDERSTAND THE MIRANDA WARNINGS.

Robert James Greene, a clinical psychologist, testified on behalf of the defense at the hearing on the Motion to Suppress. (R 1170-1218) Greene was qualified as an expert witness in the field of clinical psychology. (R 1170-5) Greene had examined Pina on December 23, 1982, for the purpose of evaluating Pina's competence to stand trial, his potential insanity at the time of the offense, and his ability to understand the Miranda warnings. (R 1175-9) Based upon his examination of Pina, Greene testified that Pina had an I.Q. of 69. This score placed Pina just below the second percentile of the population and reflected mild mental retardation. (R 1179-80) Pina's lowest score on the battery of tests administered to him by Greene was in the area of verbal comprehension. Greene testified further that Pina could only understand simple, straight-forward language expressed in a concrete fashion. Pina experienced considerable difficulty in processing abstract concepts. (R 1180-2)

Dr. Greene also testified that Pina had the intellectual capacity to understand the concepts embodied in the Miranda warnings. (R 1186) The State then objected to the balance of Greene's testimony (R 1187-96), and the testimony was proffered

to the court. The testimony of Dr. Greene on the proffer was as follows: According to Greene, Pina could not understand the Miranda warnings if they were merely read to him from a card. Greene qualified his earlier statement that Pina had the intellectual capacity to understand the Miranda warnings by stating that unless the warnings were explained to Pina at length in simple, concrete language, he would not understand. Pina, Greene stated, simply could not comprehend the reading of the warnings from a card or a form. Greene had also listened to the tape-recorded interviews of Pina by Sheriff Burton and Detective Benjamin and by Investigator Foy. Based upon his review of the tape, Greene testified that he found no indication that Pina understood the Miranda warnings or knowingly and intelligently waived his rights in the interview conducted by Burton and Benjamin. With respect to the Foy interview, Greene testified that Pina might have understood that he had a right to remain silent because Foy had repeated the concept several times. Nevertheless, Greene stated that he did not find any indication on the tape that Pina understood the remainder of his rights, or that he had knowingly and intelligently waived his rights. (R 1196-1208)

The trial court sustained the State's objection to the proffered testimony of Dr. Greene on the grounds that the material proffered constituted legal conclusions by the witness. (R 1196-6; 1203-4) Accordingly, Greene was not permitted to testify to these matters, and the information contined in the proffer was not received in evidence.

The basis of the trial court's ruling excluding the proffered material was that Dr. Greene's proposed testimony was merely a legal conclusion by the witness. This objection was not well-founded. Florida Statute §90.702 provides as follows:

> If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion; however, the opinion is admissible only if it can be applied to evidence at trial.

Florida Statute §90.703 further provides as follows:

> Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it includes an ultimate issue to be decided by the trier of fact.

Thus, whatever the status of the older "ultimate issue" exclusionary rule in Florida, the Florida Evidence Code has decisively eliminated the Rule by the enactment of the sections quoted above.

The proffered testimony of Dr. Greene was admissible under Florida Statute §§90.702 and 90.703. Dr. Greene had been qualified an expert in the area of clinical psychology. He had specialized knowledge concerning a fact in issue. The subject of the proffered testimony related directly to Pina's understanding of the Miranda warnings. The State had the burden of proving that Pina had, in fact, understood his rights and made a knowing and intelligent waiver of them before any questioning could begin. The testimony of Dr. Greene tended to disprove this fact. Although Greene's testimony was in the form of an opinion, this

was not a ground for objection under the Florida Evidence Code. Accordingly, the trial court erred in failing to admit the proffered testimony into evidence.

The cases are legion in which testimony substantially identical to that proffered by the defense in this case has been admitted into evidence and considered by the trial court in ruling on motions to suppress confessions. See, e.g., Ross v. State, 386 So2d 1191 (Fla. 1980); Hall v. State, 421 So2d 571 (Fla. 3rd DCA 1982); Eason v. State, 421 So2d 35 (Fla. 3rd DCA 1982); and Fields v. State, 402 So2d 46 (Fla. 1st DCA 1981). Additional cases from other jurisdictions in which similar testimony has been received in evidence are collected in Anno. "Mental Subnormality of Accused as Affecting Voluntariness or Admissibility of Confession," 8 ALR 4th 16 (1981).

The trial court's ruling resulted in substantial prejudice to Pina. In the order denying the Motion to Suppress, the trial court made a specific finding that Pina was "capable of understanding his Miranda rights according to Dr. Robert Greene, a clinical psychologist who tested Pina." (R 1651) This finding of fact concerning Pina's capability to understand his Miranda rights did not reflect the very important qualification of this statement made by Dr. Greene in the proffer. This qualification was that although Pina had the capability to understand his Miranda warnings, he could not do so merely upon the reading of them to

him from a card or a form. The finding of fact also took Greene's testimony out of context in another way. Greene testified on the proffer that after listening to the tape-recorded conversations between Pina and Benjamin and Burton and Pina and Foy, Greene found no evidence that Pina had understood the Miranda warnings or made a knowing and intelligent waiver of his rights. The evidentiary ruling made by the court thus substantially distorted the thrust of Greene's testimony and deprived the court of important information concerning Pina's ability to understand the Miranda warnings and his actual understanding of them under the circumstances of the taped interviews conducted by Benjamin and Burton and Foy.

(For a discussion of the harmless error issue, see the argument on Issue Two of this brief.)

For these reasons, the Second District Court of Appeal should have reversed the judgments and sentences imposed upon Pina and remanded the case to the trial court for a new hearing on Pina's Motion to Suppress his confessions and statements.

ISSUE FIVE

THE TRIAL COURT ERRED IN IMPOSING A SENTENCING PENALTY ON PINA BECAUSE HE UNSUCCESSFULLY EXERCISED HIS CONSTITUTION RIGHT TO STAND TRIAL

At the beginning of the trial of the charges against Pina, defense counsel conducted a colloquy with Pina which outlined the plea offer made by the State prior to trial. Pursuant to the terms of this plea offer, Pina was to withdraw his plea of not guilty to the charges and enter a plea of guilty to all charges. In return for his guilty plea, Pina was to receive a life sentence without possibility of parole for a period of twenty-five years on the two murder charges. The two life sentences were to run concurrently. Pina was also to be sentenced on the remaining five charges, all of the sentences to run concurrently with the sentences on the two murder charges.

The trial judge, who had previously accepted an identical plea agreement for the co-defendant Torres (R 1788-1818) and who subsequently accepted an identical plea agreement for the co-defendant Ribas (R 1770-8; 1783-6), did not indicate any disapproval of the proposed plea bargain. Pina announced to defense counsel and to the Court that he was aware of the offer, wished to decline it, and would go to trial on the charges. (R 2-4) After trial, the trial court imposed on Pina two consecutive life sentences without possibility of parole for a period of twenty-five years. (R 1730-1)

It is well settled that any judicially imposed penalty which needlessly discourages assertion of the Fifth Amendment right not to plead guilty and deters the exercise of the Sixth Amendment right to demand a jury trial is patently unconstitutional. An accused cannot be punished by a more severe sentence because he unsuccessfully exercised his constitutional right to stand trial rather than plead guilty. Gillman v. State, 373 So2d 935 (Fla. 2nd DCA 1979). The record in this case affirmatively discloses that the trial court improperly imposed a sentencing penalty on Pina because he refused to plead guilty and elected to exercise his right to a jury trial on the charges against him. We begin our consideration of this issue by examining the relative culpability of Pina and his co-defendants and the sentences imposed upon each.

By a distortion of her perception and recollection of events which was entirely understandable under the circumstances, Rosena Welch steadfastly insisted that all four of the men who robbed the Wests' Farm Market had carried hand guns. This was not true and the State knew it. In fact, there were only two hand guns involved. Garcia used one to shoot and kill Mr. and Mrs. West; Torres used the other to wound Rosena Welch. Neither Pina nor his co-defendant, Ribas, fired a weapon in the course of the events at the Wests' Farm Market. While Ribas may have carried one of the weapons at one point, Pina never even had a weapon in his hand at the Market. The knowledge of the State and the

trial court concerning the relative culpability of Pina and his co-defendants may be determined from the record on appeal in this case in several ways.

First, the indictment alleged in Counts IV, V, VI and VII that only Garcia and Torres used hand guns. (R 1363-5; 1747) The allegations in the charging documents designating Garcia and Torres as the "trigger men" in the crimes were never amended or withdrawn. Had the State known or believed it could prove that Pina and Ribas used hand guns at the Market, it would certainly have so alleged in the charging documents filed with the Court.

Second, on February 13, 1984, prior to the trial of the charges against Pina, James A. Gardner, State Attorney of the Twelfth Judicial Circuit, made statements on the record in open court describing Garcia and Torres as the "trigger men" and indicating that Pina and Ribas had not used firearms in the commission of the crimes. (R. 1793-5) Gardner's statements were made in the course of a plea and sentencing hearing for Torres taken before the same trial judge who tried the charges against Pina. (R 1788-1818) Torres' counsel also conceded at the plea and sentencing hearing that Torres had discharged his weapon. (R 1808-9)

Third, Nancy Gaona, a State witness, testified that she saw the men at her home immediately beofre they left to go to the Wests' Farm Market. According to Gaona, the men had only two guns. (R 231) Torres was carrying Pina's gun; Ribas had the other. (R 233-4; 235-6)

Thus, it was clear to all concerned long before Pina went to trial that there were only two guns involved at the scene of the crime, and that the trigger man were Garcia and Torres. While these facts may not diminish Pina's legal responsibility for what occurred at the Wests' Farm Market, they are very significant in determining his culpability and, therefore, in considering the appropriateness of the sentence imposed upon him by the trial court. With these factors in mind, we turn now to an examination of the sentences imposed upon Pina and his co-defendants by the trial court.

The State took Garcia's case to trial first. Garcia had shot and killed both Mr. and Mrs. West. On December 14, 1983, Garcia received two death sentences for these crimes. (R 1766-7)

Two months later, on February 13, 1984, Torres entered guilty pleas to the charges against him. He admitted shooting Mrs. Welch. Torres received two concurrent life sentences without possibility of parole for a period of twenty-five years on the two murder charges. (R 1757-8) His sentences on the remaining charges were designated to run concurrently with the sentences on the murder charges. (R 1756; 1759-62; 1779)

Pina's case went to trial on March 12, 1984, one month later. The State offered Pina the same sentences which it had previously offered to Torres, one of the trigger men. Pina declined the offer and received two consecutive life sentences.

One month later, on April 10, 1984, Ribas entered pleas of nolo contendere to the charges against him. The sentences imposed on Ribas were identical to the sentences imposed on Torres and to the sentences offered to Pina prior to trial. Like Pina, Ribas was not one of the trigger men in the robbery.

Therefore, although Pina's culpability was probably equal to that of Ribas and much less than that of Torres, he received a more severe sentence than any of his co-defendants except Garcia. It is significant that the same trial judge who sentenced Pina also sentenced Torres and Ribas. The unfairness of the sentences imposed upon Pina in relation to the relative culpability of the four men and the sentences received by the others is readily apparent. It is painfully obvious that the only reason a more severe sentence was imposed upon Pina than that imposed upon Torres and Ribas was Pina's decision to exercise his constitutional right to stand trial.

Accordingly, the Second District Court of Appeal should have vacated the sentences imposed upon Pina for the two felony murders and remanded the case to the trial court with directions that the sentences be designated to run concurrently rather than consecutively.

CONCLUSION

The specific relief requested as to each issue on this brief is as follows:

Issue One: The decision of the District Court of Appeal reversing the convictions and sentences for the robbery of Willie West and Martha West should be approved.

Issue Two: The statement made by Pina to Sheriff Burton and Detective Benjamin on October 8, 1982, should be suppressed, the judgments and sentences on all charges reversed, and the case remanded to the trial court for a new trial.

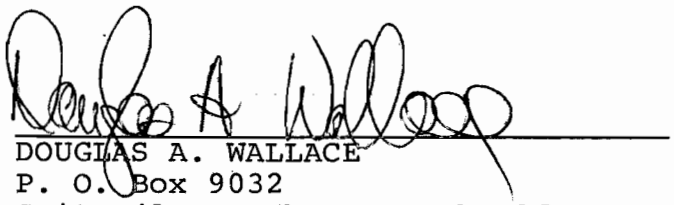
Issue Three: The statement made by Pina to Investigator Foy on November 23, 1982, should be suppressed, the judgments and sentences on all charges reversed, and the case remanded to the trial court for a new trial.

Issue Four: The judgments and sentences on all charges should be reversed and the case remanded to the trial court for a new hearing on the Motion to Suppress Pina's confessions and statements.

Issue Five: The case should be remanded to the trial court with directions that the sentences imposed on the felony

murder counts should be designated to run concurrently, rather than consecutively.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a copy of the foregoing has been mailed to Katherine Blanco, Esquire, Attorney General's Office, Park Trammel Bldg., 8th Floor, 1313 Tampa Street, Tampa, Florida 33602, this 4th day of June, 1985.

Douglas A. Wallace

DOUGLAS A. WALLACE