O/A 5-6-86

IN THE SUPREME COURT OF FLORIDA

CASE NO. 67,279

HENRY LAVADO, JR.,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL OF
FLORIDA, THIRD DISTRICT

BRIEF OF PETITIONER ON THE MERITS

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INTRODUCTION

Petitioner, Henry Lavado, Jr., was the appellant in the district court of appeal, and the defendant in the trial court. Respondent, the State of Florida, was the appellee in the district court of appeal, and the prosecution in the trial court. In this brief, the parties will be referred to as the defendant and the state. The symbol "R" will be used to refer to the record on appeal. The symbol "TR" will be used to refer to Volume II of the supplemental record on appeal. The symbol "SR" will be used to refer to Volumes III and IV of the supplemental record on appeal. All emphasis is supplied unless the contrary is indicated.

STATEMENT OF THE CASE

The defendant was charged by information on June 15, 1982 with armed robbery and a jury trial on that charge commenced on January 17, 1983 (R. 54). During the voir dire examination on January 18, defense counsel informed the prospective jurors that specific intent was an essential element of the charged offense of robbery, whereupon the trial judge advised defense counsel that it was "not proper on a jury selection to go into law." (TR. 5). The judge stated that defense counsel could inquire as to a prospective juror's bias against drinking in general, but defense counsel advised the court that he was not seeking to make such an inquiry (TR. 5). Defense counsel then proffered the nature of the inquiry he sought:

> "One of the elements for the crime is that the defendant have specific intent to deprive the owner of his property and one of the defenses to the crime of robbery, especially and specifically this element, is that of voluntary intoxication. I was going to ask the jury questions, elicit answers, dealing with their ability to entertain or accept the premise of voluntary intoxication as a defense."

(TR. 5). The court ruled that defense counsel would be allowed to ask general questions concerning the prospective jurors' willingness to follow the court's instructions, but denied defense counsel the opportunity to conduct the inquiry which he sought to make (TR. 26).

Following presentation of the state's case, defense counsel moved for a judgment of acquittal on the grounds that the defense of voluntary intoxication had been established through cross-examination of the state witnesses (SR. 150-151). The motion was

denied (SR. 151). Following presentation of the case for the defense, the motion for judgment of acquittal was renewed and again denied (SR. 170-171).

During his closing argument to the jury, the prosecutor made the following comments concerning the defense of voluntary intoxication:

> "The fact that he may have been taking drugs does not excuse what he did. He fired at Mr. Stiles. He knew what he was doing, intentionally took the drugs. This voluntary intoxication business is simply a limp excuse used to try to get him out of a heap of trouble. What else is he going to say, ladies and gentlemen?
>
> You're going to hear the Judge read an instruction on voluntary intoxication or intoxication. Please listen to it carefully. Voluntary intoxication is no defense, okay? Certainly, he had two hours to become intoxicated after the crime, 5:00 till 7:00 or 7:30. So, the fact that he was passed out and intoxicated when he was found has nothing to do with the crime.
>
> Voluntary intoxication before the crime or during the crime to build up his nerve is no excuse, no defense. Don't be fooled by the voluntary intoxication business. I submit to you that the defendant is attempting to be a magician. He's attempting to pull a rabbit out of a hat when there is no rabbit in the hat."

(TR. 206-207).

The jury was given a full instruction on the defense of voluntary intoxication (SR. 223-224). However, during their deliberations, the jury sent the following questions to the judge: "What is the rule on the state of intoxication of the defendant?", and "Are we to concider [sic] his state of intoxication at the time of the robbery." (R. 58). In response to these questions, the jury was re-read the instructions

previously given on intent and voluntary intoxication (SR. 237-239).

The jury subsequently returned a verdict of guilty as charged (SR. 240). The court entered an adjudication of guilt (SR. 242). On April 11, 1983, the court denied the defendant's motion for new trial and amended motion for new trial (TR. 21-33). The defendant was sentenced to a thirty-year term of imprisonment, with the court retaining jurisdiction for one-half of the defendant's sentence (SR. 267-269).

Notice of appeal to the District Court of Appeal, Third District, was filed on May 5, 1983 (R. 106). A majority of that Court upheld the trial judge's refusal to permit defense counsel to question prospective jurors concerning their willingness and ability to accept and apply the defense of voluntary intoxication, and the defendant's judgment of conviction and sentence were affirmed. Lavado v. State, 469 So.2d 917 (Fla. 3d DCA 1985). Judge Daniel S. Pearson filed a dissenting opinion.

Notice of invocation of this Court's discretionary jurisdiction to review the decision of the district court of appeal was filed on June 27, 1985. On January 21, 1986, this Court accepted jurisdiction of the case.

STATEMENT OF THE FACTS

The evidence presented at trial by the state established that on May 25, 1982 the defendant entered the Big Pine Pharmacy and pointed a gun at Robert Stiles (SR. 20, 24, 34). The defendant took a number of drugs and several syringes (SR. 22-23, 46-47). He tied up Stiles and another worker in the pharmacy, Staggers, but they managed to free themselves as the defendant was leaving the pharmacy (SR. 24-25, 48). Stiles exchanged shots with the defendant and saw him drive away from the scene (TR. 25, 29-30).

Stiles testified at trial that the man who robbed him seemed nervous, but he appeared to know what he was doing (SR. 26). He testified that the man could have been under the influence of drugs at the time, but he didn't think the man was "high" (SR. 41). Staggers testified at trial that the man appeared to be confused and "just didn't seem to know what to do with the bag [containing the drugs]" (SR. 51). The man spoke in a very low, nearly inaudible voice (SR. 52).

The automobile in which the defendant drove away from the pharmacy was found later that same day parked outside the house of the defendant's father, Manuel Fernandez (SR. 80-81). When the police arrived at his house, Mr. Fernandez told them that the defendant had left in his boat (SR. 83-84). Mr. Fernandez testified as a state witness at trial that his son had not been himself on the morning of the robbery (SR. 86). His son's behavior was consistent with his behavior on other occasions when he had been under the influence of drugs (TR. 87). His son had

been in that condition at approximately 4:00 AM, at approximately 11:00 AM, and when he left the house in the afternoon (SR. 87-89). Fernandez had argued with his son that morning about his condition (SR. 88).

The defendant was eventually found later that same day on his boat (SR. 94-96). He was unconscious in the sleeping area of the boat (SR. 95-96, 106-107, 131). A hypodermic needle was sticking out of his hand (SR. 96, 107). Drugs taken from the pharmacy were found on the boat (SR. 108-109, 115, 132, 141).

The defendant testified at trial (SR. 152). He admitted being a drug addict, and detailed his prior history of drug abuse (SR. 153-154). He testified that in the time period immediately prior to the date of the robbery he was physically addicted to a number of different drugs (SR. 158). He was injecting Dilaudid and cocaine, and he would often pass out as a result of heavy drug use (SR. 158).

Prior to his parents' arrival at the house on Ramrod Key at approximately 4:00 AM on the date of the robbery he had taken a large quantity of cocaine (SR. 159). His parents became very upset with him, and he took four or five Quaaludes and went to bed (SR. 159-160). When he awoke at approximately 11:00 AM, he injected two doses of Dilaudid (SR. 160). He argued with his family again, and then took two more doses of Dilaudid (SR. 161). The defendant testified that he did not remember anything that happened after this last injection of Dilaudid (SR. 161). The next thing he remembered was waking up in the hospital (SR. 162).

SUMMARY OF ARGUMENT

The restrictions imposed by the trial judge on the questioning of prospective jurors by defense counsel require reversal of the defendant's judgment of conviction and sentence. The trial judge refused to allow defense counsel to ask the jurors any questions concerning their willingness and ability to accept and apply the defense of voluntary intoxication. As the defendant was charged with the specific intent crime of robbery, voluntary intoxication was a valid defense. The propriety of questions to prospective jurors concerning their willingness to apply a particular legal doctrine relevant to the case has long been recognized by this Court, and two district court of appeal decisions have found error in a trial judge's refusal to allow such an inquiry.

Questioning of prospective jurors concerning their attitudes towards defenses such as the insanity defense and the voluntary intoxication defense is particularly important because it is well known that such defenses are disfavored by a large segment of the public. There are a number of reasons why a juror would be particularly reluctant to accept and apply the defense of voluntary intoxication and therefore it is imperative that defense counsel be allowed to question prospective jurors on that subject.

The refusal of the trial judge to allow such questioning cannot be justified based on either the permitted inquiry concerning the jurors' biases against drinking in general or the permitted inquiry concerning the jurors' willingness in general

to follow the court's instructions on the law. Neither inquiry is sufficient to reveal whether a prospective juror has a bias against the defense of voluntary intoxication which would render that juror incapable of finding the facts impartially and applying the law to the facts conscientiously.

Although the case law establishes that in any case involving the defense of voluntary intoxication defense counsel must be permitted to question prospective jurors concerning their willingness and ability to accept and apply that defense, the record in the present case establishes that such inquiry was particularly important. Notwithstanding the substantial evidentiary support at trial for the defense of voluntary intoxication, the prosecutor made several comments in his closing argument which could have led the jury to believe that voluntary intoxication was not a valid defense. Whether as a result of this argument or as a result of the jurors' natural reluctance to accept and apply the defense, after the jury had been fully instructed on the defense and had begun their deliberations they sent out questions to the judge which indicated their hesitancy to fulfill their duty to accept and apply the defense. Under these circumstances it is clear that the trial judge's erroneous restriction of defense counsel's questioning of the prospective jurors requires reversal.

ARGUMENT

THE TRIAL COURT ERRED IN DENYING DEFENSE COUNSEL'S REQUEST TO INQUIRE OF PROSPECTIVE JURORS CONCERNING THEIR WILLINGNESS AND ABILITY TO ACCEPT THE DEFENSE OF VOLUNTARY INTOXICATION, THEREBY DENYING THE DEFENDANT HIS RIGHT TO A FAIR AND IMPARTIAL JURY GUARANTEED BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 16 OF THE FLORIDA CONSTITUTION.

An accused's constitutionally guaranteed right to a fair and impartial jury requires that he be permitted a meaningful voir dire of prospective jurors:

> Voir dire plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored. Without an adequate voir dire the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled. See Connors v. United States, 158 U.S. 408, 413, 15 S.Ct. 951, 953, 39 L.Ed. 1033 (1895). Similarly, lack of adequate voir dire impairs the defendant's right to exercise peremptory challenges where provided by statute or rule, as it is in the federal courts.

Rosales-Lopez v. United States, 451 U.S. 182, 189, 101 S.Ct. 1629, 1634, 68 L.Ed.2d 22 (1981). While the conduct of a voir dire examination is a matter within the discretion of the trial judge, Ristaino v. Ross, 424 U.S. 589, 96 S.Ct. 1017, 47 L.Ed.2d 258 (1976); Ham v. South Carolina, 409 U.S. 524, 93 S.Ct. 848, 35 L.Ed.2d 46 (1973); Aldridge v. United States, 283 U.S. 308, 51 S.Ct. 470, 75 L.Ed. 1054 (1931), the exercise of that discretion is limited by the essential demands of fairness. Aldridge v. United States, supra.

This Court has long recognized the broad scope of the inquiry to be allowed during voir dire:

> The examination of jurors upon their voir dire is not necessarily to be confined strictly to the questions formulated in [the former statute governing voir dire questioning], but should be so varied and elaborated as the circumstances surrounding the juror under examination in relation to the case on trial would seem to require, in order to obtain in every cause a fair and impartial jury, whose minds were free and clear of all such interest, bias, or prejudice as would seriously tend to militate against the finding of such a verdict as the very right and justice of the cause would in every case demand.

Pinder v. State, 27 Fla. 370, 375, 8 So. 837, 838 (1891). See also Pope v. State, 84 Fla. 428, 94 So. 865 (1922). More recent decisions of this Court have also emphasized the importance of voir dire questioning seeking to uncover possible bias of a prospective juror:

> The purpose of the voir dire proceeding is to secure an impartial jury for the accused . . . . . Consequently, the possible bias of a member of the jury venire which, as here, might affect the fairness of the trial of the accused, is clearly a proper ground of inquiry during this proceeding.

Lewis v. State, 377 So.2d 640, 642-43 (Fla. 1979) (citations omitted). Accord, Moody v. State, 418 So.2d 989, 993 (Fla. 1982), cert. denied 459 U.S. 1214, 103 S.Ct. 1213, 75 L.Ed.2d 451 (1983).

The restrictions imposed by the trial judge in this case on the questioning of prospective jurors by defense counsel rendered that questioning meaningless for it precluded any inquiry to determine the possible bias of prospective jurors against the

principle of law which was the central issue in the case. As a result of these restrictions, it was impossible for defense counsel to intelligently exercise either challenges for cause or peremptory challenges, and it was thus impossible for the defendant to obtain a fair and impartial jury. These erroneous restrictions therefore mandate reversal of the defendant's judgment of conviction and sentence.

During the questioning of prospective jurors, defense counsel, in an attempt to learn of the jurors' attitudes about voluntary intoxication as a defense to the charge, stated as a predicate to his inquiry that specific intent was an essential element of the crime of robbery (TR. 5). The trial judge admonished defense counsel that it was "not proper on a jury selection to go into law." (TR. 5). The judge stated that defense counsel could ask about the prospective jurors' bias against drinking in general, but counsel advised the judge that he was not seeking to make such an inquiry (TR. 5). Defense counsel then proffered the inquiry he sought to make:

> "One of the elements for the crime is that the defendant have specific intent to deprive the owner of his property and one of the defenses to the crime of robbery, especially and specifically this element, is that of voluntary intoxication. I was going to ask the jury questions, elicit answers, dealing with their ability to entertain or accept the premise of voluntary intoxication as a defense."

(TR. 5). The court refused to allow this proposed inquiry, and restricted defense counsel to asking general questions concerning the jurors' willingness to follow the court's instructions (TR. 6).

The trial judge's refusal to permit defense counsel to inquire of prospective jurors concerning their willingness and ability to accept the defense of voluntary intoxication precluded counsel from uncovering a possible bias which surely would have affected the fairness of the defendant's trial. Voluntary intoxication is a valid defense in this state to specific intent crimes, Linehan v. State, 476 So.2d 1262, 1264 (Fla. 1985); Cirack v. State, 201 So.2d 706 (Fla. 1967); Garner v. State, 28 Fla. 113, 9 So. 835 (1891), and robbery is a specific intent crime, Bell v. State, 394 So.2d 979 (Fla. 1981); Graham v. State, 406 So.2d 503 (Fla. 3d DCA 1981). Accordingly, as voluntary intoxication was a defense to the robbery charge against the defendant in this case, defense counsel should have been permitted to question prospective jurors concerning their willingness to apply that specific doctrine of law.

The propriety of questions to prospective jurors concerning their willingness to apply a particular legal doctrine has long been recognized by this Court:

> Hypothetical questions having correct reference to the law of the case that aid in determining whether challenges for cause or peremptory are proper, may, in the sound and reasonable discretion of the trial court, be propounded to veniremen on voir dire examination.

Pope v. State, supra, 94 So. at 869. Accord, Pait v. State, 112 So.2d 380, 383 (Fla. 1959). Thus, in Pope v. State, supra, this Court found no error where the prosecutor was allowed by the trial court to explain the legal doctrine of criminal responsibility of aiders and abettors to prospective jurors and

then ask those jurors if they would render a verdict of guilty if the evidence established all the necessary elements to support a conviction under that doctrine. Similarly, in Pait v. State, supra, this Court held that the trial court had not erred in allowing the prosecutor to propound questions to prospective jurors concerning their attitudes toward a finding of guilt on a homicide charge based solely on a theory of felony murder.

This Court's decisions in Pope and Pait clearly establish the propriety of the inquiry sought by defense counsel in the case at bar. The inquiry sought by defense counsel in this case, questions concerning the prospective jurors' willingness and ability to accept the defense of voluntary intoxication, is just the sort of inquiry approved by this Court in Pope and Pait.

Neither of the decisions cited by the district court of appeal in this case, Dicks v. State, 83 Fla. 717, 93 So. 137 (1922) or Saulsberry v. State, 398 So.2d 1017 (Fla. 5th DCA 1981), support the trial judge's refusal to allow such an inquiry. As this Court expressly recognized in Pope, the nature of the inquiry sought in that case was different from the type of inquiry sought in Dicks and Saulsberry. The defendants in Dicks and Saulsberry could be deemed to have been asking whether the jurors would acquit based on hypothetical testimony, not whether they were willing and able to accept a particular legal doctrine. In Pope, on the other hand, as in the present case, the defendant was not proposing to lay the evidence in the case before the jurors and ask what their verdict would be, but was only seeking to explain the legal doctrine applicable to the case

and determine if the prospective jurors had any bias toward applying that doctrine. Accordingly, Dicks and Saulsberry do not support the restrictions imposed by the trial judge in this case.

In addition to this Court's decisions in Pope and Pait, further support for the inquiry sought by defense counsel in this case can be found in two district court of appeal decisions finding error in a trial judge's refusal to permit defense counsel to inquire of prospective jurors concerning their willingness to apply a particular legal doctrine. In Jones v. State, 378 So.2d 797 (Fla. 1st DCA 1979), cert. denied 388 So.2d 114 (Fla. 1980), the court found error in the trial judge's refusal to permit defense counsel to ask questions of prospective jurors concerning specific legal doctrines applicable to the case:

> Subject to the trial court's control of unreasonably repetitious and argumentative voir dire questioning, counsel must have an opportunity to ascertain latent or concealed prejudgments by prospective jurors which will not yield to the law as charged by the court, or to the evidence. For that purpose counsel must be permitted to inquire of prospective jurors concerning their willingness and ability to accept the court's charge in a criminal case concerning the presumption of innocence, the state's burden of proof in respect to each element of the offense charged, and the defendant's right not to testify, if the court has not first thoroughly examined the prospective jurors on those subjects.

Id., at 797-98. In Washington v. State, 371 So.2d 1108 (Fla. 4th DCA 1979), the court held that a restriction on defense counsel's questioning of prospective jurors concerning the defense of insanity was improper:

> By reason of the ground rules as set forth by the court, the defense was unable to examine the jury concerning the defense of insanity. The defendant filed his notice of intention to rely upon an insanity defense and to prohibit a voir dire examination of prospective jurors concerning that defense is error.

Id., at 1109. See also, People v. Stack, 128 Ill.App.3d 611, 83 Ill. Dec. 832, 470 N.E.2d 1252, 1256 (1984) ("[w]here insanity is in issue, the parties have a right to examine jurors concerning their attitude on the insanity defense.")

As noted by Judge Daniel S. Pearson in his dissenting opinion in this case, questioning of prospective jurors concerning their attitudes towards defenses such as the insanity defense involved in Washington and the voluntary intoxication defense involved in this case is particularly important:

> Like the defense of insanity, the defense of voluntary intoxication suggests that the accused was incapable of forming or entertaining the intent necessary to commit the crime charged. Both defenses concede the commission of the acts and request the jury to excuse the conduct.[4] Because, as is well known, such defenses are disfavored by a large segment of the public, it is all the more critical that counsel be able to explore with prospective jurors their attitudes about these defenses. . . . . Indeed, because the public's antipathy to the voluntary intoxication defense is likely stronger than its antipathy to the insanity defense, see Annot., 73 A.L.R.3d at 112 § 2[b],[5] it would appear that there is an even greater necessity for the voir dire inquiry where the defense is voluntary intoxication.

4

> It has been noted that a temporary insanity defense is involved, at least implicitly, in most cases where voluntary drug intoxication is asserted as a

defense. See State v. Richard, 4 Wash.App. 415, 482 P.2d 343 (1971); Annot., 73 A.L.R.3d 98, 106 §2[a] (1976). Cf. Wools v. State, 665 S.W.2d 455 (Tex.Crim.App. 1983).

5 The author of the annotation notes:

"As would be expected and as the cases confirm, the prosecutor has fewer problems with the voluntary drug intoxication defense than does the defendant. The entire defense has an air of speculation about it. Few persons have experienced temporary insanity from drugs or alcohol and consequently the ordinary juryman or judge does not really seem to believe that such a thing occurs."

Lavado v. State, 469 So.2d 917, 920-21 (Fla. 3d DCA 1985) (Daniel S. Pearson, J., dissenting).

The controversial nature of the defense of voluntary intoxication was recently documented by the Second District Court of Appeal in Linehan v. State, 442 So.2d 244 (Fla. 2d DCA 1983); affirmed, 476 So.2d 1262 (Fla. 1985). The Court listed the following public policy considerations in support of its conclusion that the application of the defense of voluntary intoxication should be severely restricted: 1) Most people are sufficiently aware of what they do when they are intoxicated so as to justify a finding that they probably meant to do what they did and therefore should not be excused of the consequences thereof; 2) the defense involves voluntary intoxication and "if a person casts off the restraints of reason and consciousness by a voluntary act, no wrong is done to him if he is held accountable for any crime which he may commit in that condition";

3) the protection of society, a primary purpose of the criminal law, will be subverted by relieving a person from the consequences of his own conduct; and 4) even if voluntary intoxication is not allowed as a defense to a charge, it may still be considered as a mitigating factor at sentencing. Id., at 249-250. Just as these considerations led the court in Linehan to a conclusion that the defense of voluntary intoxication should be limited in its application, so too these same considerations would lead a prospective juror to be naturally reluctant to acquit a defendant based on that defense. Accordingly, in any case involving the defense of voluntary intoxication, it is imperative that defense counsel be allowed to question prospective jurors concerning their willingness and ability to accept and apply that defense.

Although the decision of the district court of appeal in the present case is the only decision in Florida dealing with the right of defense counsel to question prospective jurors concerning the defense of voluntary intoxication, several decisions from other jurisdictions have recognized the propriety of such questioning. In People v. Balderas, ___ Cal.3d ___, 222 Cal.Rptr. 184, 711 P.2d 480 (1985), the sole defense was that of diminished capacity with respect to the specific intent crimes with which the defendant was charged. The defense presented evidence suggesting that the defendant was a "chronic poly-drug abuser" who had ingested substantial doses of PCP and "crank" during the week before the charged crimes. Under these circumstances, the California Supreme Court held that defense

counsel had the right to question prospective jurors concerning their attitudes toward the defense of voluntary intoxication:

> "[I]t is well known that a substantial segment of the public looks with disfavor on the controversial doctrine of diminished capacity. The court was aware that diminished capacity principles were likely to play a major role in the trial; indeed, diminished capacity was the sole defense offered at the guilt phase. At the time of the court's ruling, one prospective juror had already volunteered that he could not "go along" with the notion that drug or alcohol use absolves someone of responsibility for criminal acts. Thus, the court would have erred had it unduly restricted counsel from probing jurors' attitudes toward that doctrine.

711 P.2d at _____. The Court did not find any improper or prejudicial restriction of questioning in the case before them because the record established that "[t]he diminished capacity issue was well aired, and any deficiency in examination arose primarily from the defense's own lack of diligence." 711 P.2d at ___.

In Le Vasseur v. Commonwealth, 225 Va. 564, 304 S.E.2d 644 (1983), cert. denied, 464 U.S. 1063, 104 S.Ct. 744, 79 L.Ed.2d 202 (1984), the defense was based entirely upon the contention that the defendant was so affected by the ingestion of drugs and alcohol that he was incapable of premeditation or deliberation at the time of the murder with which he was charged. Under these circumstances, the Court approved questioning almost identical to the inquiry sought by defense counsel in the instant case:

> A proper question, which might have been framed to meet the defendant's concern, would have inquired whether the juror could follow the court's instruction which would reduce the defendant's criminal responsibility if the jury found that he was so affected by

> voluntary intoxication as to be incapable of premeditation or deliberation.

304 S.E.2d at 652. See also Bernal v. State, 647 S.W.2d 699, 707 (Tex.Ct.App. 1982) (prosecutor entitled to question the panel to determine any bias or prejudice any prospective juror might have to the law in Texas that voluntary intoxication does not constitute a defense to the commission of a crime).

Decisions from other jurisdictions have also noted the particular importance of questioning of prospective jurors concerning their willingness to apply other controversial principles of law besides the insanity defense and the defense of voluntary intoxication. Thus, in People v. Williams, 29 Cal.3d 392, 174 Cal.Rptr. 317, 628 P.2d 869 (1981) defense counsel sought to question prospective jurors concerning their attitudes towards the law of self-defense. The Court first held that the trial judge had not abused his discretion in excluding a question as to a particular venireman's opinion of the right of a person to defend himself in his own home. This holding was based on the non-controversial nature of this principle of law:

> The panelist to whom this question was put had expressed no reservations about application of the law of self-defense in response to prior questions. And of all the aspects of self-defense law, the principle allowing a person to defend himself in his own home is perhaps the least likely to meet with serious opposition. Counsel therefore had little if any reason to suspect that the venireman would quarrel with this generally accepted tenet.

628 P.2d at 879.

The Court went on, however, to hold that the trial judge had abused his discretion by refusing to allow defense counsel to ask

prospective jurors whether they would willingly follow an instruction to the effect that a person has a right to resist an aggressor by using necessary force and has no duty to retreat. This holding was based on the controversial nature of this particular aspect of the law of self-defense:

> On the other hand, there is a real possibility the average juror might disagree with the controversial rule that a person may use force in self-defense even though an avenue of retreat is open. As most attorneys and judges are aware, the law regarding the duty to retreat varies substantially throughout the country, reflecting a wide range of attitudes on the subject.

Ibid.

Similarly, in State v. Brown, 547 S.W.2d 797 (Mo. 1977), the Court held that defense counsel should have been allowed to question prospective jurors concerning their ability to follow the law concerning the burden of proof on the issue of self-defense. As support for this holding the Court noted that the average juror might naturally be reluctant to accept the law on this subject:

> The jurors would be required to apply the principle that the burden of proof on this issue would not be on the defendant to establish it but upon the state to negate it. (MAI-CR2.40). This is an apparent departure from the principle that the party asserting an "affirmative defense" has the burden of proving it. An average juror might well have a mental attitude against the converse principle in effect here. So, the defendant had good reason to determine if any venireman had a fixed opinion against the principle of requiring the state to disprove self-defense. If so, defendant would have a good ground for challenging for cause, or at least peremptorily striking, such a venireman.

547 S.W.2d at 799. See also State v. Frederiksen, 40 Wash.App. 749, 700 P.2d 369, 372 (1985) (one of three situations which require specific questioning of prospective jurors because of a real possibility of prejudice is "when the case involves other matters [e.g., the insanity defense] concerning which either the local community or the population at large is commonly known to harbor strong feelings that may stop short of presumptive bias in law yet significantly skew deliberations in fact") and United States v. Robinson, 475 F.2d 376, 381 (D.C.Cir. 1973) (same).

The defense of voluntary intoxication, like the defense of insanity, like the principle of law that a person has a right to resist an aggressor by using necessary force without having a duty to retreat, and like the principle of law that the defendant does not have the burden of proving self-defense but rather the burden is upon the state to negate self-defense, involves matters which an average juror might naturally be reluctant to accept. Accordingly, it is essential that prospective jurors in a voluntary intoxication case be questioned concerning their willingness and ability to accept and apply that defense.

The refusal of the trial judge in this case to allow such questioning cannot be justified based on either the permitted inquiry concerning the jurors' biases against drinking in general or the permitted inquiry concerning the jurors' willingness in general to follow the court's instructions on the law. In the first place, the voluntary intoxication defense in this case was based on the defendant's ingestion of large quantities of illegal drugs, not his excessive drinking. Accordingly, questions about

prospective jurors' biases toward drinking in general would be of little use to defense counsel.

More importantly, even if the trial judge had allowed questioning of jurors concerning their attitudes toward illegal drugs in general, such inquiry would also have been of little use to defense counsel. As noted by the court in Le Vasseur v. Commonwealth, supra, prospective jurors' attitudes toward the use of illegal drugs generally, rather than the defense of voluntary intoxication, "might well be interesting to counsel, but they have no relationship to the juror's ability to abide by the court's instructions, to find the facts impartially, and to apply the law to the facts conscientiously." 304 S.E.2d at 653. A prospective juror might very well honestly state that he had no bias against the use of drugs which would prevent him from finding the facts impartially and applying the law to the facts conscientiously. However, that same juror might very well also honestly state upon further questioning that he could not accept and apply the principle of law that a defendant is to be relieved from all responsibility for a crime he committed while under the influence of those illegal drugs. Accordingly, it is essential in a voluntary drug intoxication case that even though defense counsel is allowed to question prospective jurors concerning their attitudes toward drugs in general, he must also be allowed to question the jurors concerning their willingness and ability to accept and apply the defense of voluntary drug intoxication.

For similar reasons, the permitted inquiry in this case

concerning the jurors' general willingness to follow the court's instructions on the law was no substitute for the inquiry sought by defense counsel. In People v. Balderas, supra, the California Supreme Court, in the course of finding that defense counsel had the right to question prospective jurors concerning their attitudes toward the defense of voluntary intoxication, expounded on the insufficiency of such general questioning. Referring to their prior opinion in People v. Williams, supra, the Court stated:

> Williams noted at length the increasing modern awareness that general questions about a prospective juror's willingness to "follow the law" are not well calculated to reveal specific forms of prejudice and bias. In the first place, general questions about whether a juror will follow instructions have only one "right" answer -- "yes". One who wishes to seem fair-minded in the company of peers is unlikely to give a negative response.
>
> More fundamentally, a panel member may reply to such questions in entire good faith, having no knowledge of the specific doctrines and principles he or she will be asked to apply. "His answer may be true to the extent that he is willing generally to act as the judge instructs him. But it is untenable to conclude that the venireman's general declaration of willingness to obey the judge is tantamount to an oath that he (sic) would not hesitate to apply any conceivable instruction, no matter how repugnant to him. (footnote omitted.) Hence the answer is merely a predictable promise that cannot be expected to reveal some substantial overtly held bias against particular doctrines ..." (Williams, supra, 29 Cal.3d at p. 410, 174 Cal.Rptr. 317, 628 P.2d 869, italics added.)
>
> ... Even if a juror has proclaimed his general willingness to follow the law and instructions, the rule should not prohibit further reasonable questioning calculated to elicit a jurors' admission of actual unwillingness to apply a particular rule of law pertinent to the impending trial. Any overt resistance of that kind and degree would

> form the basis for a challenge for cause on grounds of "actual bias."

Balderas, supra, 711 P.2d at ___ (footnote omitted).

The insufficiency of general questioning of prospective jurors concerning their willingness to follow the court's instructions on the law was also noted in People v. Stack, supra,

> Further, the general questions of whether the jurors could follow the law and whether they could be fair and impartial were also insufficient to cure the error. Such broad inquiries failed to call attention to specific matters which might lead the jurors to display disqualifying attitudes and preoccupations.

83 Ill. Dec. at 836, 470 N.E.2d at 1256. See also People v. Zehr, 103 Ill.2d 472, 83 Ill. Dec. 128, 469 N.E.2d 1062 (1984).

Thus, the restrictions on questioning of prospective jurors concerning the defense of voluntary intoxication imposed by the trial judge in this case cannot be upheld based on the permitted inquiry concerning jurors' biases against drinking in general or their willingness in general to follow the court's instructions on the law. In any case involving the defense of voluntary intoxication, it is imperative that questioning be permitted concerning prospective jurors' willingness and ability to accept and apply the defense of voluntary intoxication.

Moreover, the record in the instant case demonstrates that it was particularly important for defense counsel to conduct such an inquiry. Testimony of both state and defense witnesses at the trial established that the defendant had taken large quantities of several different types of narcotics prior to the robbery (SR. 86-89, 158-161). Notwithstanding this substantial evidentiary support for the defense of voluntary intoxication, the prosecutor

made the following comments in his closing argument which could very well have been understood by the jury to mean that voluntary intoxication was not a defense they should consider:

> "The fact that he may have been taking drugs does not excuse what he did. He fired at Mr. Stiles. He knew what he was doing, intentionally took the drugs. This voluntary intoxication business is simply a limp excuse used to try to get him out of a heap of trouble. What else is he going to say, ladies and gentlemen?
>
> You're going to hear the Judge read an instruction on voluntary intoxication or intoxication. Please listen to it carefully. Voluntary intoxication is no defense, okay? Certainly, he had two hours to become intoxicated after the crime, 5:00 till 7:00 or 7:30. So, the fact that he was passed out and intoxicated when he was found has nothing to do with the crime.
>
> Voluntary intoxication before the crime or during the crime to build up his nerve is no excuse, no defense. Don't be fooled by the voluntary intoxication business. I submit to you that the defendant is attempting to be a magician. He's attempting to pull a rabbit out of a hat when there is no rabbit in the hat."

(TR. 206-207).

Whether it was the result of this closing argument or simply the result of the jurors' natural reluctance to accept the defense of voluntary intoxication, after the jury had been fully instructed on the law concerning that defense, and after they had retired to consider their verdict, the jurors sent out the following questions: "What is the rule on the state of intoxication of the defendant?", and "Are we to concider [sic] his state of intoxication at the time of the robbery." (R. 58). These questions demonstrate that the jury's deliberations were focused on the defense of voluntary intoxication and that

the jury was hesitant to fulfill their duty to accept and apply that legal doctrine. Under these circumstances, it is clear that the trial judge's erroneous refusal to allow defense counsel to question the jurors during voir dire concerning that legal doctrine requires reversal.

CONCLUSION

Based on the foregoing facts, authorities and arguments, petitioner respectfully requests this Court to quash the decision of the Third District Court of Appeal, and direct that Court to reverse petitioner's judgment of conviction and sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to the Office of the Attorney General, 401 Northwest 2nd Avenue, Miami, Florida, this 10th day of February, 1986.

HOWARD K. BLUMBERG
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