IN THE FLORIDA SUPREME COURT

JOHN WILLIAM FERRY, JR., :

Appellant, :

vs. : Case No. 67,759

STATE OF FLORIDA, :

Appellee. :

:

APPEAL FROM THE CIRCUIT COURT
IN AND FOR HILLSBOROUGH COUNTY
STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Appellant Ferry relies on initial brief to reply to the State's arguments except for the following additions concerning Issue I.

ARGUMENT

ISSUE I

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT FERRY'S ABSENCE FROM THE JURY SELECTION AND IMPANELING PROCESS VIOLATED HIS SIXTH AMENDMENT RIGHT TO BE PRESENT AT ALL CRITICAL STAGES OF HIS TRIAL.

Ferry disagrees with the State's assertion that only the Fourteenth Amendment is involved in this question. The United States Supreme Court and this Court have recognized that the Sixth Amendment protects a defendant's right to be present at the crucial stage of selecting a jury. See, Illinois v. Allen, 397 U.S. 337 (1970); Francis v. State, 413 U.S. 1175 (Fla. 1982). The quotation from United States v. Gagnon, 470 U.S.___, 84 L.E.2d 486, 490 (1985) cited on page 6 or the State's brief is not a holding that the Sixth Amendment protects only those stages of the trial where evidence is presented. Gagnon merely acknowledged that the "right to presence is rooted to a large extent in the Confrontation Clause." Ibid. All Gagnon held was that the Due Process Clause extends a constitutional right to be present to certain other states of the criminal proceedings under some situations. However, the importance of

jury selection and the exercise of peremptory challenges has long been held essential to securing a fair and impartial trial which the Sixth Amendment does guarantee. See, e.g., Swain v. Alabama, 380 U.S. 202 (1965). In any event, the error in this case compels a reversal for new trial regardless of which constitutional provision may be involved.

The State attempts to distinguish this case from Francis by asserting that Ferry voluntarily absented himself from the proceedings. This assertion is without merit. Nothing in the record demonstrates that Ferry voluntarily absented himself from the courtroom; he was in custody. Nothing indicates that Ferry knew that jury selection would occur in his absence. Nothing indicates he gave his lawyers prior authorization to exercise challenges in his absence or ratified their action upon his return. The record merely shows that Ferry was absent in the custody of bailiffs.

The State's reliance upon United States v. Gagnon is misplaced. In Gagnon, a juror had expressed concern about the defendant sketching portraits of the jurors during the trial. In the presence of Gagnon and his lawyer, the judge said he would question the juror in chambers during the recess to determine if the incident had prejudiced the juror. The judge, the juror and Gagnon's lawyer participated. Gagnon was not present. The United States Supreme Court held the defendant did not have a constitutional right to be personally

present on a conference of such a minor matter and that he had waived his rights to be present under the Federal Rules of Criminal Procedure.

Gagnon is distinguishable from this case on several points. First, Gagnon dealt with a defendant's rule right to be present in a noncritical proceeding, not the constitutional right to be present at the critical stage of jury selection and exercise of challenges. The stringent test for the waiver of a constitutional right, see, Johnson v. Zerbst, 304 U.S. 458 (1938), was not involved. Second, the record clearly demonstrated that Gagnon was aware of the nature of the proceedings and when and where the proceedings would take place. Third, the importance of inquiry of the juror in Gagnon does not even approach the importance of jury selection and the exercise of challenges. Fourth, a factor critical to decision in Gagnon was the fact that the defendant could have contributed nothing to the conference with the jury. Gagnon, at 490. In contrast, Ferry could have contributed to the evaluation of prospective jurors and the exercise of challenges.

CONCLUSION

For the reasons expressed in this Reply Brief and in the Initial Brief, John William Ferry, Jr. asks this Court to reverse his convictions with directions that he receive a new trial, or in the alternative, reduce his sentence to life imprisonment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Office of the Attorney General, Park Trammell Building, Eighth Floor, 1313 Tampa Street, Tampa, FL 33602, by mail on this 25 day of September, 1986.

W.C. McLAIN