IN THE SUPREME COURT OF FLORIDA

FILED
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FEB 25 1987
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CLARENCE JACKSON, :

Appellant, :

vs. : Case No. 68,097

STATE OF FLORIDA, :

Appellee. :

_____ :

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

INITIAL BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE

A Hillsborough County grand jury returned an indictment on October 14, 1981, charging CLARENCE JACKSON with two counts of first degree murder. (R2182-2183) Roger McKay was the alleged victim in Count I and Terrance Milton was the alleged victim in Count II. (R2185-2183) Jackson proceeded to a jury trial on August 16, 1982. He was convicted as charged and sentenced to death. (R2336-2337,2340-2345) On May 10,1984, this Court reversed and remanded for a new trial. Jackson v. State, 451 So.2d 458 (Fla. 1984). (R2388-2398)

Jackson again proceeded to a jury trial. On September 28, 1985, the jury found him guilty as charged. (R2538-2539) After hearing further arguments concerning penalty (R2000-2020), the jury recommended a life sentence for the murder of Roger McKay and a death sentence for the murder of Terrance Milton. (R2020-2021,2540-2541) Circuit Judge John P. Griffin followed the jury's recommendations. He sentenced Jackson to life on Count I and to death on Count II on December 9, 1985. (R2547-2556)(A1-5)

In support of the death sentence imposed in Count II, the trial court found three aggravating circumstances: (1) that Jackson had been previously convicted of a felony involving violence because of the contemporaneous conviction for the murder of Roger McKay; (2) that the homicide of Terrance Milton was especially heinous, atrocious or cruel; and (3) that the homicide of Terrance Milton was committed in a cold, calculated and

premeditated manner. (R2552-2554)(A1-3) The court found no mitigating circumstances. (R2555)(A4)

Jackson filed his notice of appeal to this Court on December 20, 1985. (R2559)

STATEMENT OF THE FACTS

In 1981, Clarence Jackson and his wife, Ramona, moved from their home in New York to Tampa. (R1583-1586) The Jacksons' purchased a home in Lutz. (R1586) Ramona Jackson, a licensed stockbroker, obtained employment in a local brokerage firm. (R1605-1606), and Clarence began working at a gasoline station. (R1767) The youngest of Clarence Jackson's eight children from a previous marriage, 18-year old Darren, lived with his father in Lutz. (R1415)

Clarence Jackson was addicted to heroin and used heroin and cocaine on a regular basis. (R1762) He frequented the Twenty-second Street area of Tampa where narcotics could be obtained. (R1769) In the summer of 1981, Jackson met James Lucas, and through Lucas, he later met Roger McKay and Terrance Milton. (R554-555,1764-1765) Lucas gave Jackson the nickname "Unc." (R554-555) McKay, Milton and Lucas also went by nicknames. Lucas was "Crunch," McKay was "Goon-Goon," and Milton was "Bowink." (R555,561-562) All of them were addicted to heroin, and they frequently used drugs together at a house on Twenty-second Street. (R563) Jackson, Lucas and McKay entered a drug rehabilitation program in St. Petersburg, but they left within a month. (R1329-1344) Jackson re-entered the program and was participating on the dates these homicides allegedly occurred. (R1340)

The bodies of Roger McKay and Terrance Milton were discovered on September 16, 1981, floating in a backwater pond off the Hillsborough River. (R759-763,775-776) Divers recovered

the bodies and searched the pond. (R782-785) A .32 caliber revolver containing five empty shell casings was discovered. (R785-789,844) Bloodstains were found on the bridge and on some rocks below the bridge. (R829-832) Crime scene technicians collected samples of the blood and photographed the stains. (R829-841)

Deputy Medical Examiner Charles Diggs performed the autoposies. (R878,897) McKay suffered two gunshot wounds which caused his death. (R880,883) One shot entered the base of his neck and lodged inside the backbone. (R880-881) The second bullet wound severed a major blood vessel causing bleeding into the thoracic cavity. (R886-887) It entered the middle of the neck, severed the jugular vessel and lodged in the backbone. (R881-882,883-885) Either wound would have been fatal. (R889-892)

Terrance Milton received four gunshot wounds. (R898-903) Three were entrance wounds and one was an exit wound located near the base of the neck. (R900-901) Two entrance wounds to the back passed at an upward angle through the lungs. (R902,904-907) These wounds produced hemorrhaging in the chest cavity which would have been fatal. (R904-906) The third entrance wound was between the eyes. (R898) This bullet passed through the brain and lodged in the back of the skull. (R901) It would have produced immediate death. (R910) Bleeding along the bullet path indicated Milton was still alive when this wound occurred. (R911) Stippling around the wound indicated the shot was fired at close range. (R910)

After discovery of the bodies, Detective Al Luis spoke with James Lucas on three separate occasions about the deaths.

(R649-652,1226-1230) On the third interview, Lucas finally admitted knowledge of the deaths and related his involvement. (R652-654,1228) Lucas was not charged with any offense relating to the homicides, although he had other pending felony charges. (R683,684,735-737) He was the key witness in Jackson's trial. (R551-758)

Lucas testified that he first met Clarence Jackson in the summer of 1981 at a house where several people were using narcotics. (R554) According to Lucas, Jackson was having difficulty injecting himself and Lucas assisted him. (R554-555) They became friends and Lucas gave Jackson the nickname "Unc." (R554-555) Lucas continued to assist Jackson by injecting him with narcotics, and also introduced Jackson to sources of drugs on Twenty-second Street. (R556-557) In return, Jackson provided the money for heroin and cocaine. (557) Lucas also introduced Jackson to Terrance Milton and Roger McKay. (R557) The four of them spent a great deal of time together and their primary recreation was using heroin and cocaine. (R563-564) Lucas said his friendship with Jackson was not without turmoil and disagreements. (R558)

On Saturday morning, September 12, 1981, Jackson visited Lucas at Lucas's house. (R564-565,567) Lucas was somewhat surprised because they had not been communicating with each other at that time due to an earlier disagreement. (R573) Jackson had cocaine and heroin with him, and the two of them injected it. (R567-569) They drove Jackson's Volvo to Twenty-second Street around the Paradise Bar for several hours and injected themselves

with heroin a number of times during that period. (577-578) While they were in a poolroom near the bar, Roger McKay entered and Jackson called him over. (R583-584) Lucas said that it appeared as if Jackson and McKay were arguing. (R584) Jackson, McKay and Lucas then left in Jackson's car. (R585-586) Lucas was driving, McKay was in the front passenger's seat, and Jackson sat in the back seat. (R585-586) They drove to Brandon looking for someone but they did not find him. (R586-587)

According to Lucas, Jackson and McKay began arguing about narcotics during the drive back to Tampa. (R587,590) Lucas testified that Jackson shot McKay inside the car while the car was still traveling. (R590-591) The noise of the gunshot inside the car frightened Lucas. (R590-591) McKay said, "Unc shot me" two or three times and fell over onto Lucas's lap. (R591) Jackson directed Lucas to continue driving and to sit McKay up in the seat. (R591-593) Lucas drove down a dirt road and stopped the car. (R594) Jackson then carried McKay to the rear of the car, pulled a garbage bag partially over McKay's head, shot him again, and placed him inside the trunk. (R595-596)

Lucas said that he and Jackson then drove around Tampa. During that time they took the car to a car wash, wiped some blood off the seat, and Lucas pointed out a small round hole in the top of the front passenger's seat just below the headrest. (R597-598,-601) Next, they went to an auto parts store and finally a convenience store to find something with which to patch the seat. (R600-603) They were unsuccessful. (R600-603)

Jackson and McKay returned to Twenty-second Street where

they purchased and injected more narcotics at Lucas's house. (R604) Lucas said that he was scared and that Jackson threatened him. (R603-604) Furthermore, Lucas testified that he did not have an opportunity to run from Jackson. (R605-606) They remained at Lucas's house until nightfall and then returned to Twenty-second Street. (R604,609) There they met Terrance Milton. (R609) Jackson and Milton purchased more narcotics, and the three men began driving Jackson's Volvo. (R611-613) Jackson directed him to drive down a secluded road. (R614) At that time, Jackson began arguing with Milton, pulled him into the backseat and hit him with the pistol. (R617-618) Milton asked Jackson not to shoot him anymore and to take him to a hospital. (R618-619) Lucas drove around for a long time with Jackson and Milton continuing to argue in the backseat. (R619-620) They stopped down a dirt road where Jackson and Lucas zipped a garment bag around Milton, encasing him except for his head. (R622-623)

On the drive back to Tampa, Jackson directed Lucas to stop on a bridge over the Hillsborough River on Highway 301. (R624-626) Jackson pulled Milton from the car and shot him twice, once in the head and once in the neck. (R626-627) Milton and McKay were then thrown over the bridge into the water. (R628) Jackson also threw the smaller of the two revolvers he had into the water. (R630) After driving to a second bridge on Highway 301, Jackson threw the larger revolver into the water. (R630-632) A plastic bag was discarded further down the highway. (R633)

At Lucas's direction, detectives recovered several items of physical evidence. (R1229-1240) Among these items was a .357 magnum revolver recovered from the water beneath a bridge on

Highway 301. (R936,1219-1220) This was not the same location where the bodies were found. (R1219-1220) The ownership of the .357 magnum was not traced. Ownership of the .32 caliber pistol found with the bodies was traced via records kept at the time of its sale. (R796-801) John Maxwell was the original purchaser but he sold the gun to Richard Jackson, Clarence Jackson's brother. (R797-806) Richard Jackson testified that he gave the firearm to his brother. (R807-809) Clarence Jackson later testified that he loaned the pistol to Lucas. (R1769-1770) Edward Bigler, a ballistics expert, examined the projectiles removed from the bodies. He concluded that one of them may have been fired through that weapon. (R1184-1185) The fourth projectile was a .38 caliber bullet which Bigler concluded was fired from the .357 magnum. (R1187-1190) The two projectiles for which positive matches were made came from the body of Terrance Milton.

Physical evidence was also obtained from Jackson's Volvo. (R1085-1107) Crime laboratory technicians discovered blood stains with the use of certain chemical reaction tests. (R1090-1091) Stains were located on the driver's seat, the front passenger seat and the floor behind the driver's seat. (R1090) The lock mechanism of the trunk also had a stain which appeared to be blood. (R1090) Serology testing showed the stains to be blood type A. (R1114-1116) This was Roger McKay's blood type and the same type discovered on the bridge where the bodies were found.[1/]

1/ Terrance Milton had type O blood. (R114) No type O was detected in the stains. However, if type A and type O blood are mixed, type A will mask the type O factor. Only type A would be detected from the sample. (R1122-1123)

(R1114-1119) Finally, lead residue was discovered on the foam padding of the passenger seat at the location of the tear. (R1178-1180)

Jackson presented an alibi defense at trial. (R1750) Several witnesses corroborated his testimony. (R1329,1344,1353,-1414,1515,1525,1535,1583) He also presented other witnesses who contradicted various portions of Lucas's testimony and the degree of Lucas's involvement. (R1305,1388,1472,1558)

Clarence Jackson denied any knowledge of the homicides. He related his actions on the Saturday and Sunday when the crimes allegedly occurred. On Saturday morning he drove to St. Petersburg to the drug rehabilitation facility for medication. (R1776) The program's records indicated that he arrived at 9:48 a.m. (R1340) He usually remaied there about 15 minutes. (R1776) Next, he drove to Tampa to his brother's house and then to Twenty-second Street to play pool. (R1777) James Lucas approached him there around 1:00 p.m. and asked for a ride to visit his girlfriend who was in the hospital with a new baby. (R1777) Jackson loaned Lucas the car as he had done several times in the past. (R1777-1778) He asked Lucas to return in time to get the car washed. (R1777)

Lucas returned to Twenty-second Street around 4:30 p.m. (R1779) and accompanied Jackson to have the car washed. (R1779) Lucas told Jackson that his little sister had punched a hole in the passenger's seat. (R1779) Jackson was upset over the damage and the two of them unsuccessfully attempted to find patching material. (R1779-1780) The two men then drove to Jackson's home, arriving around 6:00 p.m. (R1780) Lucas borrowed the car again

and was to repair the seat and buy drugs before returning it. (R1780) Jackson expected Lucas to awaken him when he returned. (R1780)

That Saturday night, the Jacksons had a dinner party with friends from the neighborhood. (R1783) Jackson said he was present for the party and went to bed around 10:00 p.m. (R1783-1784) Romana Jackson, Darren Jackson, and the friends, Clara Aponte and Eileen Rivera, testified about the party, verified Clarence's presence and that he went to bed at 10:00 p.m. (R1355-1362,1419-1422,1541-1549,1588-1595)

Sunday morning, Clarence awoke to go to the drug rehabilitation clinic. (R1785) He noticed that his wife and car were gone. (R1785) Around 1:00 p.m., a telephone call awakened him. (R1785) His wife had forgotten her keys and could not rouse him to open the door. (R1579-1599,1785-1786) She telephoned from Clara Aponte's house. (R1579-1599) Romana was upset because she had had a minor accident in the Volvo. (R1579-1599) Clara Aponte remembered Romana using the telephone the day after the dinner party. (R1547) Deputy Matthew Beck investigated Ramona Jackson's accident and his report stated he was dispatched on Sunday, September 13, 1981, at 10:08 a.m. (R1345-1352) Clarence did not leave his home Sunday until 7:30 p.m. (R1786) Monday, Clarence went to the drug program, and later, to Twenty-second Street. (R1789-1790) Around 5:00 p.m. on Monday, Clarence learned that Roger McKay was missing. (R1790)

Several defense witnesses contradicted James Lucas's version of the crimes. Sara Smith, Lucas's girlfriend, said Lucas told her he was in trouble because he had killed someone. (R1325) This conversation occurred about one week after she had Lucas's baby on September 11, 1981. (R1325-1327) She also found a pair of pants with blood on them in their house and a shotgun which had not been there before she went to the hospital. (R1310-1311) Clarence Jackson's brother, Richard Jackson, and Dennis Collins contradicted Lucas's testimony about being present when Clarence borrowed his brother's truck. (R1515-1534)

Several times during the testimony of James Lucas and Sylvester Dumas, references to Jackson's possessing guns and bulletproof vests were made. (R558-562,567,570,583,586,689-690, 1006-1014) Both witnesses also testified about prior unrelated assaults they had seen Jackson commit. (R583,586,1007,1014) Jackson objected to the testimony as irrelevant evidence of collateral crimes. (R1006-1014,2078-2148,2760-2996) His objections were overruled.

Twice during the trial, witnesses commented on Jackson's right to remain silent. (R1210-1211,1562) Detective William Davis was present during Jackson's arrest. (R1211) When the prosecutor asked, Davis stated that Jackson "appeared very calm" when the charges were read to him. (R1210-1211) The prosecutor reiterated and argued the comment in his closing argument. (R1896) Detective Al Luis, while testifying as a defense witness, gratuitously stated that "Jackson made no statement to us when we arrested him." (R1562,2057) The trial judge ruled that the first comment

was admissible (R1562-1563), and that the second comment was harmless error. (R2057)

Sylvester Dumas testified as a corroborating witness for a portion of James Lucas's testimony. Over defense objections, the prosecutor was allowed to introduce Dumas's entire testimony from the first trial of this case as a prior consistent statement. (R1290-1292,1680-1739) The prior testimony was read to the jury just as if it were the testimony of an unavailable witness. (R1680-1739) The trial judge rejected defense arguments that the exception to the rule prohibiting use of prior consistent statement did not apply. (R1265-1292)

Dennis Collins testified as a defense witness. On cross-examination, the prosecutor asked him if he had ever been convicted of a crime and what the crime was. (R1520-1524) Defense counsel's objections were sustained. (R1520-1524) Collins was not required to reveal that he had a prior drug related conviction. (R1520-=1524) However, the prosecutor immediately asked Collins if he had ever been arrested for a homicide. (R1524-1525) Defense counsel's objections were again sustained, but the court denied a motion for mistrial. (R1524-1525)

While Clarence Jackson and Romana Jackson were testifying on direct examination, defense counsel attempted to have them explain some prior inconsistent statements. (R1595-1597,-1753-1759) The prosecutor objected, arguing that anticipatory rehabilitation was improper. (R1753-1754) The trial court agreed and would not allow the defense witnesses to explain the inconsistencies on direct. (R1595-1597,1753-1755)

On cross-examination of Sylvester Dumas, defense counsel attempted to impeach Dumas with an inconsistent statement from his discovery deposition. (R1065-1069) The prosecutor objected, asserting that the statement in the deposition was not inconsistent with the trial testimony. (R1068-1067) The court agreed and prohibited the impeachment effort. (R1068-1069)

During his penalty phase argument to the jury, the prosecutor made two objectionable arguments. (R2008,2011) In the first, he asked the jury to consider the fact that the victim's could no longer enjoy life. (R2008) In the second, he urged the jury to return a recommendation of death to demonstrate that that community cares. (R2011)

SUMMARY OF ARGUMENT

1. The trial court permitted testimony from two state witnesses about Clarence Jackson's possessing guns not linked to the homicides and his committing unrelated assaults. This evidence was irrelevant evidence of collateral crimes, §90.404(2), Fla. Stat., and its admission prejudiced Jackson's trial. On the first appeal of this case, this Court reversed for a new trial because of a similar error. Jackson v. State, 451 So.2d 458 (Fla. 1984).

2. Defense counsel's motion for mistrial should have been granted after two comments on Jackson's exercise of his right to remain silent occurred. Detective William Davis testified that Jackson "appeared very calm" when arrested and read the nature of the charges. Detective Al Luis testified that Jackson made no statement when arrested. The prosecutor argued Detective Davis's comment in his closing argument.

3. Evidence of prior consistent statements is inadmissible except to rebut a charge of improper motive, influence or recent fabrication. For the exception to apply, the event prompting the motive to fabricate must have occurred after the prior statement. The trial court erroneously ruled that the exception applied regarding the testimony of Sylvester Dumas. The prosecutor was improperly allowed to introduce Dumas's entire first trial testimony as a prior consistent statement.

4. The trial court should have granted a mistrial after the prosecutor's two attempts at improper impeachment of a defense

witness. First, the prosecutor asked defense witness Dennis Collins the nature of his prior convictions (drug charges). Immediately after the court prevented the answer upon defense counsel's objection, the prosecutor asked Collins if he had ever been arrested for a homicide. The prosecutor knew that Collins had been arrested, but the charges had been dismissed nine years earlier. Although the inquiry was stopped, the questions implied to the jury the untrue fact that Collins had a prior conviction for homicide.

5. Defense counsel twice sought to have defense witnesses explain some prior inconsistent statements during their direct examination. The prosecutor objected and argued the procedure was improper under Ryan v. State, 457 So.2d 1084 (Fla. 1984). The trial court agreed with the prosecutor and prohibited defense counsel from presenting the prior inconsistencies on direct. This ruling was in error since this Court disapproved of Ryan in Bell v. State, 491 So.2d 537 (Fla. 1986).

6. The trial court improperly restricted defense counsel's cross-examination of Sylvester Dumas. Counsel attempted to impeach Dumas with a prior inconsistent statement made during a discovery deposition. The statement involved Dumas's giving character testimony concerning James Lucas's reputation for truthfulness. Erroneously ruling that Dumas's prior statement was merely a personal opinion that Lucas was a liar, the trial court prohibited the presentation of the inconsistent statement.

7. During his penalty phase closing argument, the prosecutor made two improper comments. The first asked the jury

consider the fact that the victims could no longer enjoy life as a basis to recommend a death sentence. The second urged the jury to recommend death to show that the community cares. These arguments improperly tainted the jury's decision to recommend a death sentence and rendered Jackson's death sentence unconstitutional.

8. The trial court erred in giving the standard penalty phase jury instructions. These instructions imply to the jury that its responsibility in the sentencing decision is minimal since the final decision rests with the trial judge. The instructions violate the mandate of Caldwell v. Mississippi and Adams v. Wainwright.

9. In reaching a decision to impose a death sentence for the murder of Terrance Milton, the trial judge erroneoulsy found and considered two aggravating circumstances. The homicide of Terrance Milton was neither especially heinous, atrocious or cruel nor cold, calculated and premeditated. Including these two improperly found aggravating factors unconstitutionally skewed the sentencing weighing process in favor of death.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN ADMITTING IRRELEVANT EVIDENCE OF COLLATERAL CRIMES WHICH ONLY TENDED TO PROVE JACKSON'S PROPENSITY TO COMMIT CRIMES AND BAD CHARACTER.

On the first appeal of this case, this Court reversed for a new trial because the State introduced irrelevant evidence of collateral crimes. Jackson v. State, 451 So.2d 458 (Fla. 1984). State witness Sylvester Dumas testified that Jackson once pointed a gun at him and boasted of being a "thoroughbred killer." Ibid. at 460. Holding that this evidence was inadmissible, this Court said,

> Turning to the merits of the issue, we agree with Jackson that the testimony was impermissible and prejudicial. We envision no circumstance in which the objected to testimony could be "relevant to a material fact in issue," nor has the state suggested any. The testimony showed Jackson may have committed an assault on Dumas, but that crime was irrelevant to the case sub judice. Likewise the "thoroughbred killer" statement may have suggested Jackson had killed in the past, but the boast neither proved that fact, nor was that fact relevant to the case sub judice. The testimony is precisely the kind forbidden by the Williams rule and section 90.404(2).

Ibid. at 461; see, also, §90.404(2), Fla.Stat.; Peek v. State, 488 So.2d 52 (Fla. 1986); Drake v. State, 441 So.2d 1079,1082 (Fla. 1983); Drake v. State, 400 So.2d 1217 (Fla. 1981); Williams v. State, 110 So.2d 654 (Fla. 1959). In spite of this Court's prior ruling in this case, the trial court admitted irrelevant evidence of Jackson's possessing guns and assaulting others through the

testimony of James Lucas and Sylvester Dumas.

James Lucas was unavailable to testify at this second trial. Prior to the introduction of Lucas's previous trial testimony, Jackson lodged several relevancy objections. 2/ Among the contested items were several references to Jackson's possessing guns and bulletproof vests and making assaults on certain individuals. (R558-562,567,570,583,586,689-690,2269-2770,2780,-2783,2798-2799,2801-2802,2922-2923) The testimony proceeded as follows:

> Q. Did [Jackson] ever use any weapons when he was using this vulgar language?
> A. No. He ain't never really like drawn a weapon or anything on me.
> Q. Did he carry weapons?
> A. Yeah.
> Q. What kind?
> A. Big handguns, which I don't know--I am not too familiar with guns, but be like magnums, you know, thing of that nature. You know.

(R558-560,2769-2770)

> Q. All right, sir. Did he ever wear anything for protection during that time?
> A. He did own a bulletproof vest. He had several of them.
> Q. Did you see those yourself?
> A. I seen one for sure.
> Q. Where was it when you saw it?
> A. He had it own [sic].

(R561-562,2770)

> Q. Did [Jackson] say anything to you about what he had with him?
> A. Yes, sir.
> Q. What did he say?
> A. He had a shotgun, pistol, cocaine, cut.

(R567,2780)

2/ These objections were noted by red markings on a copy of Lucas's prior testimony. (R2760-2996) The copy is in the record as Court's Exhibit #1, and was admitted during a pretrial hearing. (R2078-2148)

A. He didn't inject all the narcotics. He more or less like pulled them out and told me to put them in the ice box and I did. So far as the guns, I put them under the sofa 'cause he say he didn't want to ride with them. Okay. So he say--

Q. Did he say why he didn't want to ride with them in the car.

A. He just say he didn't want to ride with them in the car.

Q. What kind of guns were they?

A. One of them was an automatic with a clip on the bottom, chrome-plated; and the other was a shotgun of some form in a case like a zipper bag.

(R570,2783)

Q. Now, when you all were out there behind the poolroom, did you see Roger McKay?

A. Not until later on. Before McKay came along in the picture, Jackson had an argument with an individual back there and threatening to kill him and stuff, shot at him several times.

(R583,2798-2799)

Q. Did you see any weapons on Unc when you all got in the car?

A. The gun that he had drawed a little earlier on that individual which I was holding, also, with the cocaine. It was a big gun with like a beige handle on it, very large gun, pistol.

Q. Okay. Where had you seen this earlier?

A. Back there when he had the argument with that individual and he shot at him.

Q. This was the first time you had seen the gun that day?

A. Yes, sir.

Q. How did you come--how did you have this gun?

A. Holdin' it like I hold it because the shirt was too shot to conceal it.

Q. So this is still back part of being a mule, right?

A. Yeah.

Q. And then when you all get in the car, did you see the gun then?

A. No, sir.

(R586,2801-2802)

Q. Now, you made comment about seeing Clarence wearing a bulletproof vest; is that correct?
A. Yes, sir.
Q. What color, blue. I think you said?
A. Yes, sir.
Q. You know he sells them, don't you?
A. No, sir.
Q. You'd be surprised to find out he used to sell them up in New York?
A. Yes, sir.

(R689-690,2922-2923)

During the testimony of Sylvester Dumas, the court overruled defense objections and admitted additional irrelevant evidence concerning possession of guns and prior assaults. (R1006-1014) Dumas testified as follows:

Q. Have you ever seen [Jackson] with a gun before September 14th, 1981?
A. Yes, sir.
Q. Can you tell us what kinds of guns?
A. Well, Mr. Jackson, Unc, he practically always had a gun with him when I saw them, and on one occasion he had opened the trunk of his Volvo and show us some bulletproof vests and some carbine type rifle, and I saw a .32 caliber pistol and a .44 Magnum handgun.

(R1006)

Q. Before September 12th, 1981, did you ever see the defendant assault or hit or in any fashion harm Mr. McKay, Goon Goon, with a firearm?
A. Yes, sir.
Q. Can you tell us about that?
[objection and motion for mistrial]

(R1007)

Q. Can you tell us when this happened, approximately, and tell us what happened and where?
A. Sir?
Q. And where?
A. We were at Olivia's house. We were about to inject some heroin and an argument came up about who would inject heroin first, and he smacked Roger with a -- I don't know what caliber it was, but he smacked Roger side the head with it.

Q. And this was over what?
A. About who would inject themselves first with heroin, sir.
Q. And approximately when did that happen, Mr. Dumas, if you recall? How much between September 12th?
A. I would say it was about two, three weeks before September 12th, sir.

(R1014)

This irrelevant evidence of collateral crimes prejudiced Jackson's trial. He was deprived of due process and a fair trial. Amends. V, VI, XIV, U.S. Const. Just as this Court concluded in the first appeal, the error was not harmless. Jackson, 451 So.2d 458; see, also, Drake, 441 So.2d 1079,1082. A second new trial is required.

ISSUE II

THE TRIAL COURT ERRED IN REFUSING TO GRANT A MISTRIAL AFTER WITNESSES TWICE COMMENTED ON JACKSON'S RIGHT TO REMAIN SILENT AND THE PROSECUTOR ARGUED THIS FACT IN HIS CLOSING ARGUMENT TO THE JURY.

On two separate occasions, witnesses commented on Jackson's right to remain silent. The first occurred during the direct examination of prosecution witnesses Detective William Davis. (R1208-1212) And, the second occurred during defense counsel's direct examination of defense witness Detective Al Luis. (R1562) Defense counsel objected and moved for a mistrial after each comment (R1211-1212,1562-1564) and after the prosecutor's reference to the first comment during closing. (R1896-1897) Counsel also reraised the issue on a motion for new trial. (R2048-2057) The trial judge should have granted a mistrial. Jackson's constitutional rights were violated. Amends. V, XIV, U.S. Const. A reversal for a new trial is now required. See, Smith v. State, 492 So.2d 1063 (Fla. 1986); Bennett v. State, 316 So.2d 41 (Fla. 1975).

Detective Davis's Comment

During Detective Davis's testimony, the prosecutor elicited the fact that Davis had read the arrest warrant to Jackson which included the nature of the charges. (R1210) Davis also stated that he remained with Jackson from his arrest through the booking procedures. (R1211) The prosecutor then asked about

Jackson's demeanor during that time, and Davis replied that Jackson appeared "very calm." (R1211) The questions and answers proceeded as follows:

> Q. You stated earlier, I believe, that you read the warrant to Mr. Jackson. Did the warrant inform him of what he was being arrested for?
> A. Yes, sir, it did.
> Q. What did you tell him then in that regard?
> A. I informed him that he was being charged with two counts of first degree murder against Roger McKay also know as a street name of Goon Goon and Terrence Wayne Milton, also known as a street name of Bowink.
> Q. All right. And did you then stay in his presence from the -- well, first of all let me ask you: Where was he arrested?
> A. He was arrested at the corner of Nebraska and Hanna Road in a traffic stop.
> Q. All right. And did you transport or insist in transporting him down to the jail?
> A. Myself and Sergeant Luis transported him to the sheriff's office.
> Q. And were you with him the entire time then until he was booked?
> A. Yes, sir, we were.
> Q. And are you able to tell me or the jury, Detective, or Sergeant Davis, his demeanor all during that time?
> A. Yes, sir.
> Q. What was that?
> A. His demeanor was he appeared very calm.

(R1210-1211) Finally, the prosecutor argued Davis's comment in closing as an indicator of Jackson's guilt:

> Crunch didn't have anything to do with this man appearing calm when he was arrested on the 24th, read a warrant that said, you're under arrest for first degree murder of Terrence Milton and Roger McKay just out of the blue, and he just takes it calmly. Lucas had no control over any of these things. And this also corroborates and proves that his testimony was truthful.

(R1896)

The State contended during the motion for mistrial argument that evidence of Jackson's calm demeanor at the time of his arrest was not a comment on his post-arrest silence. This position is without merit. A witness's remark which is fairly susceptible of being interpreted as a comment on silence must be deemed an improper comment. See, Thornton v. State, 491 So.2d 1143 (Fla. 1986); Kinchen v. State, 490 So.2d 21 (Fla. 1985); David v. State, 369 So.2d 943 (Fla. 1979). Davis's testimony that Jackson appeared "very calm" after being read and booked on murder charges meets this test. Moreover, the prosecutor's use of the remark in closing as in indicator of guilt strengthened the implication. The natural interpretation for the jury to reach is that if Jackson were innocent, he would not have been quiet upon being charged; he would have talked, denied the charges, and related his alibi to the detective.

A similar remark to the one in this case was in issue in Hall v. State, 364 So.2d 866 (Fla. 1st DCA 1978). The prosecutor in Hall said in closing argument that the defendant was "sitting over here quietly." The trial judge concluded that "quietly" had been used solely as a description of the defendant's demeanor, not a reference to his silence. Reversing for a new trial, the First District Court disagreed stating:

> On this record, we cannot agree that the statement was anything but a comment on appellant's failure to present testimony on his own behalf. The comment by its very terms contrasts the state's presentation of a case with appellant's failure to make such a presentation. Furthermore, it appears obvious to us that the word "quietly" refers to appellant's silence during the cross-examination

> portion of the testimony rather than during the closing argument.

364 So.2d at 867.

"Quiet" is a synonym for "calm." Webster's New Collegiate Dictionary (9th ed. 1986) Just as in Hall, the comment and the prosecutor's argument was not an innocuous reference to Jackson's demeanor. The comment and argument implied that Jackson did not talk when confronted with these charges. The prosecutor was trying to impeach Jackson's alibi testimony with the implication that if it were true, Jackson would have told it to the detective upon his arrest. (R1896) Jackson's being "calm" was equated with his silence at his arrest. This impeachment strategy violated Jackson's constitutional right to remain silent. See, David v. State, 369 So.2d 943 (Fla. 1979)(prosecutor in closing argument commented "Why didn't [the defendant] say anything about...") Torrence v. State, 430 So.2d 489,490 (Fla. 1st DCA 1983)(where prosecutor on cross-examination of the defendant asked if he had told his story to anyone else and the defendant replied "No.")

In Kembro v. State, 346 So.2d 1083 (Fla. 1st DCA 1977), a prosecutor's remarks about the defendant's demeanor at trial were held to constitute a comment on the defendant's silence. During his closing, the prosecutor said,

> 'Go back in and look at the evidence and look at it hard and look at it closely and I think each of you are going to be satisfied, as I told you in the beginning, in your hearts and in your consciences that the man sitting right there and has continued sitting right there in that chair and has not gotten up here * * * '

Ibid. at 1084. The First District Court of Appeal held that a comment on the defendant's failure to testify occurred. "[T]he remarks were unmistakable in meaning to the jury and prejudicial to appellant." Ibid. at 1085. Testimony and argument about Jackson's being "calm" also had an unmistakable meaning and impact on the jury. A reversal for a new trial is required.

Detective Luis's Comment

The second comment on Jackson's silence happened during the testimony of Detective Al Luis while he testified as a defense witness. (R1562) Defense counsel asked the detective if anyone had attempted to interview Jackson's son, Darren Jackson. (R1562) Jackson's son testified as an alibi witness at trial. (R1414) The detective replied,

> A. No. We at that point had no reason to interview them. Mr. Jackson made no statement to us when we arrested him insofar as any possible information that they may have.

(R1562) Defense counsel moved for a mistrial, but the court denied the motion. (R1562-1563)

During the motion for mistrial and the subsequent motion for new trial, the prosecutor did not argue that no comment on Jackson's silence occurred. (R1563-1564,2048-2057) Instead, the State asserted that no error occurred because defense counsel elicited the comment by his own questions to his own witness. (R1563-1564) See, Clark v. State, 363 So.2d 311 (Fla. 1978); Jackson v. State, 359 So.2d 1190 (Fla. 1978); Castle v. State, 305 So.2d 794 (Fla. 4th DCA 1974). Although denying defense counsel's

motions, the trial court rejected the State's position. (R1563-1564,2057) The court specifically found: (1) that a comment on silence occurred (R2057); (2) that defense counsel did not invite the remarks--the witness's comments were gratuitous (R2057); and (3) that the error was harmless. (R2057) While correctly concluding that the detective volunteered the comment and that defense counsel had not elicited or invited it, the trial court incorrectly concluded that the comment did not prejudice the case. This court must reverse this case for a new trial.

The Comments Were Not Harmless

In State v. DiGuilio, 491 So.2d 1129 (Fla. 1986), this Court recognized

> that comments on silence are high risk errors because there is a substantial likelihood that meaningful comments will vitiate the right to a fair trial by influencing the jury verdict and that an appellate court, or even the trial court, is likely to find that the comment is harmful....

Ibid. at 1136-1137. This Court further held that the harmless error test of Chapman v. California, 384 U.S. 436 (1966) was to be applied in evaluating prejudice and stated the test as follows:

> The harmless error test, as set forth in Chapman and progeny, places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction. See Chapman, 386 U.S. at 24, 87 S.Ct. at 828. Application of the test requires an examination of the entire record by the appellate court including a close examination of the permissible evidence on which the jury could have legitimately relied, and in addition an even closer

> examination of the impermissible evidence which might have possibly influenced the jury verdict.

DiGuilio, at 1135. Application of this test in the instant case demonstrates that the comments were not harmless.

The trial of this case involved a classic "liars' contest." Credibility of the witnesses was the key factor in the case. The State's case depended completely upon the credibility of James Lucas and the impeachment of Jackson's alibi. Emphasizing the fact that Jackson was silent after his arrest and in the face of the accusations against him could have easily suggested to the jury that Jackson had no defense at that time; his later related alibi was a fabriciation. Without the understanding that Jackson was merely asserting his right to remain silent, the jury may have construed Jackson's silence as a tacit admission of guilt. However, as this Court acknowledged in State v. Burwick, 442 So.2d 944,947-948 (Fla. 1984), post-arrest silence is an enigma. The prejudice in its use at trial is the fact that the jury may draw improper inferences. And, in this case, such an improper inference would severely impact Jackson's credibility and his alibi defense.

Compounding the prejudice is the fact that Jackson's post-arrest silence was communicated to the jury three times--twice during testimony and once in the prosecutor's closing argument. With this repetition, particularly during closing argument, the jury would have attached significance to Jackson's silence.

Jackson's constitutional right to remain silent has been violated. Amends. V, XIV, US. Const. The comment on his silence was not harmless and this Court must reverse this case for a new trial.

ISSUE III

THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OF PRIOR CONSISTENT STATEMENTS MADE BY A KEY STATE WITNESS, SYLVESTER DUMAS.

As this Court recently reaffirmed in Jackson v. State, 11 F.L.W. 609 (Fla. 1986), a witness's prior consistent statements are generally inadmissible as corroboration of the witness's trial testimony. Accord, Van Gallon v. State, 50 So.2d 882 (Fla.1951). An exception to this rule exists where the prior statements are introduced "to rebut an express or implied charge against [the witness] of improper influence, motive or recent fabrication." §90.801(2)(b), Fla.Stat.; see, Jackson; Gardner v. State, 480 So.2d 91,93 (Fla. 1985). However, this exception applies only when the prior consistent statement occurs before the fact allegedly prompting the improper influence, motive or fabrication. Jackson; McElveen v. State, 415 So.2d 746,748 (Fla. 1st DCA 1982). The prosecutor asserted that the exception to the rule applied in this case (R1265-1290), and the trial judge allowed the introduction of Sylvester Dumas's entire testimony from the first trial of this cause. (R1290-1292,1680-1739) 3/

The trial judge's decision to allow the introduction of the prior testimony was wrong. Defense counsel never alledged or suggested that Dumas's trial testimony was a recent fabrication.

3/ The prior testimony was read to the jury as if it were the prior testimony of an unavailable witness. (R1680-1739) Although the court and counsel recognized the evidence was not technically rebuttal, it was introduced during the State's presentation of rebuttal evidence. (R1291-1292)

Counsel's impeachment efforts focused on Dumas's motives and recall abilities before his very first statement to police officers, well before his testimony at the first trial. Cross-examination covered five areas: (1) Dumas's addiction to heroin at the time he allegedly saw and heard the events about which he testified (R1020-1028); (2) Dumas's being under the influence of drugs at the time which could have impaired his ability to perceive and remember events (R1030,1039-1054); (3) Dumas's status as a paid police informant prior to the events in question and his continued employment in that capacity (R1021-1027); (4) the fact that Dumas did not like Jackson for reasons prior to the homicides (R1055-1056); and (5) the fact that Dumas became convinced of Jackson's guilt as soon as the victims' fate became known because Dumas last saw the victims in Jackson's company. (R1032) Defense counsel also limited his closing argument to these same areas. (R1926-1928)

In arguing for the introduction of the prior testimony, the prosecutor directed the court's attention to the fact that defense counsel did inquire of Dumas's pending criminal charges and his release on his own recognizance. (R1267-1271) Although these matters arose after Dumas's prior testimony, the defense did not allege them to be events prompting Dumas to fabricate. (R1020-1028,1926-1928) The inquiry only explored Dumas's prior and current status as a paid police informant. (R1020-1028) However, this informant status was not new. It existed well before these homicides and continued through his trial testimony. (R1025-1027) Defense counsel's only position was that this status

which existed well before the prior statement, may have prompted Dumas to fabricate from the outset of the investigation. (R1927-1928) At no time was an allegation made that Dumas was lying at trial simply because of his more recent legal difficulties in 1985. Consequently, the exception to the rule allowing the admission of prior consistent statements was not applicable. Jackson, 11 F.L.W. 609.

The improper admission of Dumas's prior testimony was not harmless. Dumas's credibility was a significant issue at trial and was a major factor supporting the State's case. Allowing the prosecution to improperly bolster Dumas's testimony prejudiced the defense. Jackson has been denied his rights to due process and a fair trial. Amend. VI, XIV, U.S. Const. This Court must reverse his case for a new trial.

ISSUE IV

THE TRIAL COURT ERRED IN REFUSING TO GRANT A MISTRIAL WHEN THE PROSECUTOR ATTEMPTED TO IMPROPERLY IMPEACH A DEFENSE WITNESS BY ASKING HIM IF HE HAD EVER BEEN ARRESTED FOR HOMICIDE.

The general rule is that a witness may not be impeached by references to his prior arrests or pending charges which have not resulted in a conviction. Fulton v. State, 335 So.2d 280 (Fla. 1976). An exception exists for a prosecution witness where the defense is attempting to show bias in favor of the State because of those pending charges. Morrell v. State, 297 So.2d 579 (Fla. 1st DCA 1974). However, that exception does not extend to defense witnesses. Fulton. In spite of these rules, the prosecutor asked a defense witness, Dennis Collins, if he had ever been arrested for a homicide charge. (R1524) The prosecutor knew that the witness had been arrested and that the charges had been dismissed nine years earlier. (R1525) Defense counsel immediately objected and the court sustained it. (R1524-1525) The court denied a motion for mistrial. (R1524)

Although the court prevented the State from obtaining an answer to the improper question, a mistrial should have been granted. The question, alone, did the damage by introducing the nature of the crime. Knight v. State, 316 So.2d 576 (Fla. 1st DCA 1975); Wilt v. State, 410 So.2d 924 (Fla. 3d DCA 1982). The jury was given the clear impression that the witness had not only been arrested for a homicide, but had been convicted of one as well. (R1520-1524) This occurred because of a preceeding line of

inquiry where the prosecutor improperly attempted to elicit the nature of the witness's prior conviction for drug charges. (R1520-1524) See, Jackson v. State, 11 F.L.W. 609 (Fla. 1986); McArthur v. Cook, 99 So.2d 565 (Fla. 1957). Excluding the bench conferences where argument on the objections were made, the questioning the jury heard proceeded as follows:

> Q. Have you ever been previously convicted of a crime, Mr. Collins? 4/
> A. Yes.
> Q. What was that crime?
>
> MR.FUENTE: I object to that, Judge. That's improper.
> MR. SKYE: Approach the bench, Judge?
> THE COURT: All right. Approach the bench.
> [Bench conference during which the court sustained the objection]

(R1520-1524)

> Q. Did you tell us how many times you've been convicted of a crime?
> A. Did I tell you how many times?
> Q. How many times? Can you tell us that?
> A. Well, I served prison one time for being convicted.
> Q. That's all you remember?
> A. And probation.
> Q. You served prison or you got probation?
> A. I got prison term and then I got time again for probation time.
> Q. I see. Were you ever arrested for a homicide charge?
>
> MR. FUENTE: Judge, I object strenuously. Request to approach the bench.
> THE COURT: Approach the bench.

4/ The form of this question was also improper. The correct inquiry is whether the witness has ever been convicted of a felony. Davis v. State, 397 So.2d 1005 (Fla. 1st DCA 1981); Cummings v. State, 412 So.2d 436 (Fla. 4th DCA 1982); King v. State, 431 So.2d 272 (Fla. 1983).

> [Bench conference during which the objection was sustained and a motion for mistrial denied.]

(R1524-1525)

The jury was well aware that defense counsel's first objection thwarted the proscutor's effort to disclose the nature of the witness's prior conviction. (R1520) Consequently, the jury would naturally infer that the prosecutor's later question about a homicide arrest was another attempt to reveal the crime for which the witness had been convicted. (R1524) As the court in Knight v. State, 316 So.2d 576 noted,

> What is the average juror to think when the representative of the State is allowed to repeatedly ask an accused whether he had been convicted of a particular crime? The unfortunate tendency of the human mind to conclude that "where there is smoke, there is fire" operates to prejudice the right of an accused to a fair trial.

Ibid. at 578. The State effectively impeached the witness on an untrue fact--that he had a prior conviction for homicide. Such impeachment was both procedurally and factually in error, and the motion for mistrial should have been granted.

Since the credibility of Jackson's defense witnesses was crucial to this case, the impeachment error was not harmless. Jackson has been deprived of his rights to due process and a fair trial. Amends. V, VI, XIV, U.S. Const. This Court must reverse this case for a new trial.

ISSUE V

THE TRIAL COURT ERRED IN PROHIBITING THE DEFENDANT AND A KEY DEFENSE WITNESS FROM EXPLAINING ON DIRECT EXAMINATION THEIR PRIOR INCONSISTENT STATEMENT AS ANTICIPATORY REHABILITATION OF THEIR TRIAL TESTIMONY.

In Bell v. State, 491 So.2d 537 (Fla. 1986), this Court held that a party may reduce the impact of a prior inconsistent statement by introducing and explaining the statement on direct examination. Such a practice does not constitute improper impeachment of one's own witness because its intent is anticipatory rehabilitation rather than impeachment. On two occasions, Jackson's trial counsel sought to introduce prior inconsistent statements on direct. The prosecutor objected and the trial judge sustained the objections. 5/ (R1595-1597,1753-1755)

The first incident occurred during the testimony of Jackson's wife, Romana Jackson. (R15895-1597) She testified as an alibi witness about a dinner party she and her husband had on the night in question. In a deposition, she indicated some friends by the name of Ostrowski were present. (R1596) However, at trial, she corrected that information; the Ostrowski's had been invited but did not attend. (R1595) Defense counsel attempted to explore the fact that Romana Jackson had made the prior inconsistent statement. (R1595) The prosecutor objected on the ground that such a procedure amounted to improper impeachment of one's own

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5/ The prosecutor and the trial judge relied upon Ryan v. State, 457 So.2d 1084 (Fla. 4th DCA 1984) which disapproved the parctice. (R1753) Bell v. State was decided after Ryan and after the trial of this case.

witness. (R1595-1596) Agreeing with the prosecutor, the trial judge sustained the objection. (R1597)

A second incident occurred during Clarence Jackson's own testimony. (R1752-1759) Defense counsel tried to elicit some prior inconsistent statements made during two pretrial hearings which Jackson admitted were untruthful. (R1755-1757) Jackson had lied about his drug addiction (R1755-1756) and had not mentioned two of his alibi witnesses because he did not want to involve them in the case. (R1756) The prosecutor objected, asserting that defense counsel was impeaching his own witness. (R1753-1754) Specifically relying on Ryan v. State, 457 So.2d 1084, the court sustained the objection.

The trial judge's erroneous ruling gave an undue tactical advantage to the prosecutor. It allowed him to preserve first introduction of these inconsistent statements until cross-examination (R1615-1616,1807-1808,1818-1822), thus enhancing their impeachment value. Credibility of the witnesses was the key to this case for both the State and the defense. Consequently, any improper evidentiary ruling giving greater force to the prosecutor's impeachment efforts prejudiced Jackson's trial. This Court must reverse this case to insure Jackson a fair trial.

ISSUE VI

THE TRIAL COURT ERRED IN RESTRICTING CROSS-EXAMINTATION OF STATE WITNESS SYLVESTER DUMAS.

It is axiomatic that a witness may be cross-examined and impeached with his prior inconsistent statements. See, §90.608(1)(a), Fla.Stat.: Salvatore v. State, 366 So.2d 745,750 (Fla.1979); Taylor v. State, 139 Fla. 542, 190 So. 691 (1939); Pitts v. State, 333 So.2d 109 (Fla.1st DCA 1976); Colbert v. State, 320 So.2d 853 (Fla.1st DCA 1975). Defense counsel attempted to exercise this rule and impeach Sylvester Dumas with a prior inconsistent statement Dumas made during a discovery deposition. However, the trial judge restricted the attempt in violation of Jackson's constitutional right to confront and cross-examine the witnesses against him. Amends. VI, XIV, U.S. Const.; Coxwell v. State, 361 So.2d 148 (Fla.1978).

During a discovery deposition, Sylvester Dumas testified as follows:

> Q. All right. And the length of time that you knew "Crunch" throughout his lifetime and your lifetime would be, roughly, what? Several years?
> A. Many years.
> Q. Many years?
> A. Uh-huh. Maybe eighteen years or more or so.
> Q. And you know "Crunch's" reputation, I guess, in this community, don't you?
> A. Uh-huh.
> Q. Would you consider yourself, and this is an aside, but would you consider "Crunch" to be a truthful person or is he a liar?
> A. He's a liar.

(R3150-3151) At trial, when the prosecutor on redirect

examination asked, Dumas said that he did not know James Lucas's reputation for truthfulness. He said, "I couldn't say that he had that reputation in either way of truthful or untruthful." (R1065) On recross, defense counsel was prohibited from impeaching Dumas with his prior deposition. (R1068-1069)

The trial judge rested his ruling on the conclusion that Dumas had not testified to reputation in the deposition, but had merely expressed his opinion that Lucas was a liar. (R1068-1069) This conclusion was not accurate and was based upon an unduly restrictive reading of the deposition. It was apparent that defense counsel was eliciting reputation testimony from Dumas during the deposition. Dumas's statement that Lucas was a liar immediately followed his testimony concerning his knowledge of Lucas's reputation in the community. To rule this was only Dumas's personal opinion of Lucas's credibility and to restrict cross-examination on this ruling denied Jackson his constitutional right to confront his accusers. Any ambiguity in the deposition should have been decided in favor of Jackson's right to cross-examine. This Court must reverse for a new trial.

ISSUE VII

THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTOR TO INJECT INTO HIS PENALTY PHASE CLOSING ARGUMENT IRRELEVANT APPEALS TO THE JURY'S SYMPATHY AND SENSE OF COMMUNITY RESPONSIBILITY.

On two occasions during his penalty phase closing argument, the prosecutor asked the jury to impose a death sentence on the basis of irrelevant, emotional considerations. (R2008,2011) First, he asked the jury to deprive Jackson of life soley because McKay and Milton no longer enjoyed life.

> I would suggest to you that in prison Mr. Jackson can visit his family, or have his family visit him, that he can write letters to his family and receive letters from his family. That he can read books, have friends, see the sun come up in the morning, smell coffee. But Terrence and Roger can't do any of those things any more.

(R2008) Second, the prosecutor urged a death recommendation in order to make a statement that the community cares about the sort of crimes committed in this case.

> I said it before and in closing let me just say that Sylvester Dumas was afraid that no one would care. I'm going to ask you to go back in this jury room and I'm going to ask you to do your duties, nothing more but nothing less, and I'm going to ask you to show Sylvester Dumas that this community does care about those sort of crimes and I'm going to ask you to recommend to this judge that Mr. Jackson be executed on both counts.

(R2011) Such arguments prejudiced the jury and tainted the jury's recommendation of death. Jackson's rights as guaranteed by the Sixth, Eighth and Fourteenth Amendments have been violated.

This Court has consistently and recently condemned similar prosecutorial argument which appeals to jurors's sympathies and asks for retribution. See, e.g., Bertolottio v. State, 476 So.2d 130,132-134 (Fla. 1985); Jennings v. State, 453 So.2d 1109,1113-1114 (Fla.1984); Teffeteller v. State, 439 So.2d 840,844-845 (Fla. 1983); Grant v. State, 194 So.2d 612 (Fla.1967); Singer v. State, 109 So.2d 7,27-28 (Fla. 1959). Neither sympathy for the victims who can no longer enjoy life (R2008), nor concern over a death recommendation's impact on the community (R2011) are relevant sentencing factors.

> The considerations are outside the scope of the jury's deliberation and their injection violates the prosecutor's duty to seek justice, not merely "win" a death recommendation. ABA Standards for Criminal Justice 3-5.8 (1980).

Bertolotti, 476 So.2d at 133. The trial judge abused his discretion in failing to limit the prosecutor's argument and a new penalty phase trial is required.

The prosecutor's arguments cannot be considered harmless. "The remarks of the prosecutor were patently and obviously made for the express purpose of influencing the jury to recommend the death penalty." Teffeteller v. State, 439 So.2d at 845. However, in spite of this improper argument, the jury was convinced to recommend life for one of the two homicides. A recommendation of death for the other could easily have been the product of the prosecutor's inflammatory appeal. The jury may have felt compelled to return at least one death recommendation to demonstrate that "the community cares." (R2011)

Jackson's death sentence, based upon a jury's death recommendation which has been tainted by the prosecutor's prejudicial argument, cannot stand. This Court must reverse the death sentence and remand for a new penalty phase trial with a new jury.

ISSUE VIII

THE TRIAL COURT ERRED IN GIVING THE STANDARD PENALTY PHASE JURY INSTRUCTIONS WHICH DIMINISHES THE RESPONSIBILITY OF THE JURY'S ROLE IN THE SENTENCING PROCESS.

In Caldwell v. Mississippi, __U.S.__, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), the Supreme Court held that any suggestion to a capital sentencing jury that the ultimate responsibility for sentencing rests with the courts or others violates the Eighth and Fourteenth Amendments. The Court noted that a fundamental premise supporting the validity of capital punishment is that the sentencing jury is fully aware of the magnitude of its responsibility in sentencing.

> [A]n uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role.

Caldwell, 86 L.Ed.2d at 242.

While the capital sentencing jury in Florida differs from the Mississippi jury in that its responsibility is to recommend a sentence, not impose one, the reasoning in Caldwell nevertheless applies. The Eleventh Circuit Court of Appeals in Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986), so held. The Adams court grounded its decision on the fact that a Florida jury's recommendation of life affords the defendant greater protections than a death recommendation because of the review standard announced in Tedder v. State, 322 So.2d 908 (Fla. 1975). The jury's decision, even though a recommendation, is "so crucial that

dilution of [the jury's] sense of responsibility for its recommended sentence constitutes a violation of Caldwell." Adams, 804 F.2d at 1530.

The standard jury instructions given during the penalty phase of Jackson's trial unconstitutionally diluted the jury's sense of responsibility for its sentencing decision. The instructions clearly state that the judge is the final sentencing authority. Fla.Std.Jury Instr. (Crim.) Penalty Proceedings-Capital Cases. As read to the jury, the instructions said,

> The final decision as to what punishment shall be imposed rests solely with the judge of this court.

(R1999)

* * *

> As you have been told, a final decision as to what punishment shall be imposed is the responsibility of the judge.

(R2015) Although not an inaccurate statement of Florida law, see, §921.141, Fla.Stat.; State v. Dixon, 283 So.2d 1 (Fla. 1973), the instruction is incomplete and misleading. It fails to advise the jury of the importance of its recommendation and the requirement that the sentencing judge give it great weight. Moreover, the instruction completely fails to explain the special significance of a life recommendation under Tedder. The instruction violates the requirements of the Eighth and Fourteenth Amendments as announced in Caldwell and Adams. This Court must reverse Jackson's death sentence and remand this case for a new penalty phase trial.

ISSUE IX

THE TRIAL COURT ERRED IN FINDING TWO OF THE THREE AGGRAVATING CIRCUMSTANCES USED TO SUPPORT IMPOSITION OF THE DEATH SENTENCE THEREBY RENDERING THE SENTENCE UNCONSTITUTIONAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS.

The trial court found three aggravating circumstances regarding the homicide of Terrance Milton. (R2252-2256)(A1-5) First was that Jackson had been previously convicted for a violent felony because of the contemporaneous conviction for the murder of Roger McKay. (R2552-2553)(A1-2) Second was that the homicide was especially heinous, atrocious or cruel. (R2553)(A2) And, third was that the homicide was committed in a cold, calculated and premeditated manner. (R2553-2552)(A2-3) The homicide was not especially heinous, atrocious or cruel and was not committed in a cold, calculated and premeditated manner. The death sentence is not legally justified under the Eighth and Fourteenth Amendments.

The Heinous, Atrocious or Cruel Aggravating Circumstance is Not Applicable.

In State v. Dixon, 283 So.2d 1 (Fla. 1973), this Court defined the aggravating circumstance of especially heinous, atrocious or cruel as follows:

> It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was

> accompanied by such additional acts as to set the crime apart from the norm of capital felonies--the conscienceless or pitiless crime which is unnecessarily torturous to the vicitm.

Ibid., at 9. Finding that the circumstance applied to the homicide of Terrance Milton, the trial court stated:

> After having murdered the first victim, Roger McKay, the Defendant picked up the second victim, Terrence Wayne Milton, took him to a secluded area, and shot him in the back. The victim, not being killed outright, was required to get into a laundry bag and lie on the back floor of the Defendant's car while being driven around remote areas of Hillsborough County. The victim, Terrence Wayne Milton, pleaded to be taken to a hospital, and after being assured that he would be taken for medical treatment, the victim was dragged from the Defendant's car by the hair of his head, shot in the head by the Defendant, and his body, together with the body of the Defendant's earlier victim, McKay, was thrown into the Hillsborough River. In considering the Defendant's killing of Terrence Wayne Milton, the Court cannot overlook the fact that the Defendant, after having shot Milton, required the victim to get into a plastic laundry bag and lie on the back floor of the Defendant's car. It is obvious that Milton did not die instantly from his initial gunshot wounds, as he begged to be taken for medical treatment, and although he was given such assurances, he was never provided any medical treatment, but instead was required to lie on the back floor of the car in which he was being transported to his eventual death, suffering the cruelty of both physical and emotional pain. This aggravating factor exists in the instant case.

(R2253)(A2) However, these facts do not justify the application of this aggravating circumstance.

This Court has held, and frequently reaffirmed, that simple shooting deaths do not qualify for this aggravating factor. E.g., Jackson v. State, 11 F.L.W. 609 (1986); Armstrong v. State,

399 So.2d 953,962-963 (Fla.1981); Cooper v. State, 336 So.2d 1133 (Fla. 1976). Moreover, the fact that the shooting victim may have lived for a significant period of time in pain does not transform the homicide into an especially heinous, atrocious or cruel one. See, Teffeteller v. State, 439 So.2d 840 (Fla. 1983). Even the fact that the perpetrator ignored the victim's pleas for medical attention after the shooting does not qualify the crime for the circumstance. Tedder v. State, 322 So.2d 908 (Fla. 1975). Consequently, the trial court's reliance upon these facts were misplaced. While the homicide may have been cruel, it was not of such a character as to qualify for this aggravating circumstance. This factor should not have been considered and weighed in sentencing. Jackon's death sentence must be reversed.

The Homicide Was Not Committed in a Cold, Calculated and Premeditated Manner.

In finding that the homicide of Terrance Milton was committed in a cold, calculated and premeditated manner, the trial court made the following findings:

> The killing of Terrence Wayne Milton was cold, calculated and premeditated. After having shot and killed the first victim, Roger McKay, the Defendant stuffed McKay's body into the trunk of the Defendant's automobile and then made a well-reasoned and calculated attempt to remove trances of the crime by taking his automobile through a car wash and by attempting to conceal the bullet holes in the right front seat of the Defendant's automobile. Later, the Defendant, with his accomplice, purshcased some cocaine and/or heroin, consumed it, made efforts to wrap the victim, McKay, in plastic bags and conducted himself in a cold and calculated manner indicative of a person fully aware of his actions. Thereafter, in an obviously

> premeditated manner, the Defendant , with his accomplice Lucas, picked up the second victim, Terrence Wayne Milton, in the Defendant's automobile. The Defendant had Milton sit in the right front seat, where the Defendant had previously shot Roger McKay. After driving this victim around for a period of time, the Defendant shot Terrence Wayne Milton in the back and after more driving and having reached a point on U.S. Highway 301, appropriate for disposing of the bodies, the Defendant dragged the victim, Milton, from the back floor of his automobile, shot him through the head and dumped both bodies in the Hillsborough River.
>
> The Defendant's actions, after the killing of Roger McKay, are clearly indicative of a cold, calculated and premeditated design to hide the evidence of the fist killing and to lure the victim, Milton, to the same fate that the Defendant had meted out to the earlier victim, McKay.
>
> There was no passion involved in the killing of Terrence Wayne Milton, no sudden provocation, no defensive action by the Defendant. The killing of Terrence Wayne Milton was planned in a cold, calculated and premeditated manner and was carried out in the same way. This aggravating factor exists in the instant case.

(R2554)(A3) The findings do not support the premeditation aggravating factor provided for in Section 921.141(5)(i), Florida Statutes. Jackson's death sentence has been unconstitutionally imposed.

The premeditation aggravating factor requires more than merely proof of the premeditation element for first degree murder. E.g., Hardwick v. State, 461 So.2d 79 (Fla. 1984); Jent v. State, 408 So.2d 1024 (Fla. 1981); Combs v. State, 403 So.2d 418 (Fla. 1981). There must be sufficient evidence to prove beyond a reasonable doubt that the homicide was premeditated in a cold, calculated manner without any pretense of moral or legal justification. Ibid. Moreover, the evidence must be evaluated from the

state of mind of the perpetrator, see, Cannady v. State, 427 So.2d 723,730 (Fla.1983); Mason v. State, 438 So.2d 374,379 (Fla. 1983), and premeditation of some other criminal act which is a part of the same criminal episode is insufficient to support this aggravating factor. Jackson v. State, 11 F.L.W. 609 (Fla. 1986); Hardwick v. State, 461 So.2d 79 (Fla. 1984); Harris v. State, 438 So.2d 787 (Fla. 1983).

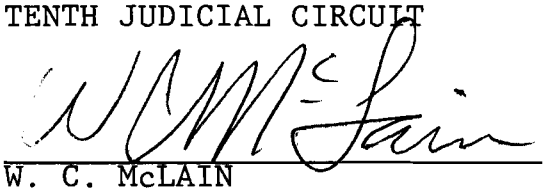
The trial court's finding this aggravating factor is incorrect. First, reliance upon the deliberate concealment of the homicide of Roger McKay is not relevant to the question of whether the homicide of Terrance Milton qualified for the premeditation aggravating circumstances. See, e.g, Herzog v. State, 439 So.2d 1372 (Fla. 1983)(disposal of body irrelevant to issue of whether manner of death was heinous, atrocious or cruel). Concealment of the prior crime was not necessarily a predicate to the second homicide. Second, the facts surrounding the shooting of Terrance Milton show that a dispute over drugs or money preceded the shooting. The evidence does not establish a premeditated plan to kill from the outset. While the killing was deliberate, it was not necessarily preplanned and inevitable from the beginning of the confrontation. Third, Jackson's state of mind at the time of the crime was impaired from the use of narcotics.

CONCLUSION

For the reasons and upon the authorities presented in Issues I through VI, CLARENCE JACKSON, asks this Honorable Court to reverse his case for a new trial. Alternatively, in Issues VII through IX, Jackson asks that his death sentence be reversed for imposition of a life sentence.

Respectfully submitted,

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT



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