IN THE SUPREME COURT OF FLORIDA

DONALD ROBERT KRITZMAN,

Appellant,

v.

CASE NO. 69,058

STATE OF FLORIDA,

Appellee.

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ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT
IN AND FOR SANTA ROSA COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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INITIAL BRIEF OF APPELLANT

I PRELIMINARY STATEMENT

Appellant, Donald Robert Kritzman, was the defendant in the trial court and will be addressed as appellant or by his proper name. Appellee was the prosecuting authority for the First Judicial Circuit in and for Santa Rosa County and will be addressed as the State.

The record on appeal consists of 14 consecutively numbered volumes of pleadings and transcripts. Reference will be by "R" and the appropriate page numbers in parentheses.

All matters were before Circuit Judge George E. Lowrey.

II STATEMENT OF THE CASE AND THE FACTS

A Santa Rosa County Grand Jury returned a two count indictment against appellant, Johnny David Davis, and Timothy Patrick Griffin AKA Kent Alphonse Mailhes. Count one alleged on September 8, 1985, the three committed premeditated murder with a firearm on Mark McKeen and felony murder in the alternative, contrary to section 782.04, Florida Statutes (1985). Count two alleged robbery with a firearm on Mr. McKeen, contrary to

section 812.13, Florida Statutes (1985) (R-1).

Appellant, through counsel, filed numerous pretrial motions generally attacking the death penalty and the vior dire proceedings, (R-5-48), motions to suppress certain tangible evidence on relevancy grounds (R-53-65, 68-74), and motions to sever his trial from Davis (R-4) and Mailhes (R-49-50). These motions, except for limited individual voir dire, were denied (R-773, 775-78, 860, 883, 887).

On February 7, 1986, the State filed a Williams Rule Notice, intending to offer evidence that the defendants escaped from a Louisiana prison on September 7, 1985, that they robbed an elderly man the same day, and that they planned to rob a motel and a laundromat (R-75).

On February 21, 1986, the Friday prior to the Monday trial, Mailhes entered guilty pleas to first degree murder and armed robbery (R-982). After the plea colloquy Judge Lowery was satisfied that Mailhes understood his constitutional rights and freely, voluntarily, and intelligently waived those rights (R-986-87, 999). The Judge ordered his case be submitted to a jury, along with co-defendants' Davis and Kritzman, for a recommendation on punishment (R-989).

On February 24, 1986, jury selection began with all three defendants engaging in voir dire (R-1014).

Appellant moved to sever his trial from that of co-defendant Johnny Davis (R-4). The judge denied the motion (R-773). Prior to opening statements, Davis announced he would be testifying (R-1688-89). Appellant then objected to the State's use of collateral crime testimony about the escape from Louisiana, the

robbery of an elderly man, and subsequent plans to rob a motel and a laundromat (R-1691-2). Davis did not join in the motion (R-1692) but intended to cross-examine Mailhes about these prior matters (R-1694) and would mention this in his opening statement (R-1698). Appellant objected (R-1698). The Court ruled the collateral evidence was admissible (R-1694).

Again appellant requested a severance from Davis on the ground of surprise (R-1725). The judge then implied appellant sought to depose Davis, ruled he had no right to do so (R-1726-1728), and denied the motion for severance (R-1729). During his opening statement, Davis' attorney argued appellant was the triggerman (R-1748-49).

Subsequently appellant renewed his objection to the admission of the deposition of Hubert Jones, the elderly man robbed in Louisiana (R-1722), the State's opening remarks about the collateral acts (R-1737, 1739) and the testimony of the Louisiana prison warden (R-1767). The trial judge took appellant's motion for mistrial under advisement (R-1784), but after Jones' testimony gave the jury a cautionary instruction (R-1785, 1788).

Through a deposition read to the jury, Hubert Jones, age 85, testified he was at his home in Angie, Louisiana on September 7, 1985, when four men came to his house. One man asked to use the phone and pulled it from the wall. Everything went blank (probably from someone hitting him), and he found himself tied up. The men took a .22 caliber pistol, some clothes, $350 cash, and a 1978 red Ford LTD. When shown the pistol and a photograph of the car he identified them. Although he never described appellant's role in this, Mr. Jones did recognize him as being

one of the four men (R-386-398).

Esther McKeen, the victim's mother, was the first witness called by the State. On September 8 her son left the house about 8:15 p.m. She described his attire and identified various state exhibits as her son's watch, a shark's tooth necklace, a billfold, and shoes he had been wearing (R-1760-1764).

Over objection (R-1766) Washington Correctional Institution, Louisiana, warden J. F. Donnelly was permitted to testify that Davis, Kritzman, Mailhes and a Guidry escaped from his prison on September 7, 1985. He identified Davis and Kritzman as the defendants on trial (R-1766-70).

Next Clifford Taylor testified he and some friends were driving down a road to a park and fishing area when a red Ford LTD drove by them. In the nearby woods he spotted a boy's body on the ground. Mr. Taylor shook him, rolled him over, and then saw blood. Detecting a pulse, Mr. Taylor dragged the body to a flatter surface and began administering CPR and mouth-to-mouth resuscitation. His friend, Barry Weaver went for help (R-1790-98). Mr. Weaver added he went to a pay phone at a Piggly Wiggly to await the ambulance to take it to the body (R-1811-13).

Paramedic Robert Bullard testified he received an emergency call at 9:11 p.m. and located a civilian at the Piggly Wiggly. Upon arriving at the park, he located the young white male. An EKG revealed no heartbeat, and there was no respiration. In his opinion the man was dead (R-1819-1822).

Gulf Breeze police officer Tim Johnson put out a BOLO for the automobile described by Mr. Taylor and Mr. Weaver (R-1826).

Bill Robinson was the next witness. Around midnight on

September 8, a neighbor phoned him about an automobile parked outside a rental house he owned. Mr. Robinson drove over to the property and took down the vehicle's tag. On the front passenger's side he spotted a person with shoulder length hair. Then he drove home to telephone the sheriff's department with the automobile's description. Upon returning to his rental property, he spotted the car driving northbound on the highway. When the deputies arrived, Mr. Robinson pointed out the vehicle (R-1832-35).

Santa Rose County Sheriff's Deputies Malcolm Saunders and Roy Cotton were the two officers who apprehended the suspicious vehicle. While on route to the scene Deputy Saunders learned from dispatch that the car was stolen from Louisiana.

Davis was the driver, Kritzman was in the front, and Mailhes was lying in the backseat. Deputy Saunders discovered a revolver in the front passenger side floorboard (R-1837-1860).

After being given his Miranda warnings, appellant denied being in Louisiana (R-1862).

On cross-examination Deputy Saunders admitted there was a cooler and a number of beer cans (R-1863-64).

Deputy Cotton testified the three men gave false names.

Appellant said he had been in Detriot two days before with a man named Jimmy (R-1864-1870).

Crime Scene investigator Chuck Sloan of the Santa Rosa Sheriff's Department collected the three suspects clothing, the revolver, and a wallet (R-1877-82).

When a co-defendant Mailhes began his testimony concerning the events prior to the men's arrival in Florida, appellant

objected (R-1889, 1892, 1901). The jury heard that Mailhes met appellant at the Washington Correctional Institution, Louisiana and that four men escaped from that prison. The men robbed an elderly man in Angie, Louisiana, taking his red Ford LTD. Mailhes believed a fourth escapee, Guidry, whom they later left in Gulfport, Mississippi when he got in a barroom brawl, stole a pistol. The witness and Guidry split over three hundred dollars taken from the old man (R-1890-96).

Defendant Davis drove most of the time until they arrived in Pensacola. At that point the remaining three escapees drove around looking for places to rob. Appellant objected to expected testimony concerning plans to rob a laundromat and a motel and moved for a mistrial. This was denied (R-1900-01).

Mailhes then testified he slept in the backseat until he was awakened when the others picked up a hitchhiker. They offered him a beer. At one point Kritzman leaned over to Davis who was the driver and said something. Mailhes assumed they were planning to rob the hitchhiker. A short time later Davis said he had to go to the bathroom and pulled off the road. Davis, Kritzman, and the hitchhiker got out of the car (R-1903-1906).

Mailhes heard appellant tell the hitchhiker to get on the ground and saw Davis push him. Kritzman demanded money. When the victim said he had none, Mailhes heard four shots. He threw a lug wrench to Davis who struck the shot man with it (R-1907-10). Because another car was coming, Davis and Kritzman got back in the car. Appellant stated he shot the man four times in the head. Mailhes then identified various items the other two took from the victim (R-1911-13).

On cross-examination by Davis, Mailhes indicated Kritzman gave him the money from the robbery of the old man (R-1984). Appellant then established that Mailhes was told by law enforcement if he were not the triggerman, he would not get the electric chair. The State also promised him it would not present any aggravating evidence against him, would not oppose any mitigation, and would forcibly recommend he receive a life sentence (R-1995-1996).

Pathologist Charles McConnell was called to testify that Mark McKeen died as a result of a homicide. The man had four bullet wounds to the head and two blunt force injuries to the scalp and left side of his head. Death was from one of the three bullet wounds and a skull fracture (R-2034-36).

FBI agent Frederick McFaul testified he became involved in the investigation because the death occurred on the Naval Live Oak Reservation, a part of the National Seashore. Defendant Davis told him he knew "nothing about no murder." (R-2063-65, 2077).

Mr. McKeen's girlfriend, Carolyn Walker, identified a photograph of the victim. The night in question he was planning on hitchhiking to her house around 8:00 p.m. She never saw him that night (R-2081-84).

The State called a series of witnesses to establish chain of custody for various exhibits: Donna Ronco [nurse who received a bullet from victim's head](R-2059-60), Dennis Nordstrom [Gulf Breeze Police officer who recovered a beer can from the area near the victim, delivered blood samples from Mailhes and Davis to FDLE and delivered fingerprints from the three defendants to

FDLE](R-2085-90), Katie Burton [a nurse who drew the blood samples](R-2091-2), and Jan Johnson [FDLE crime scene analyst who photographed the crime scene, recovered latent fingerprints and bloodstains from the automobile, a beer can with blood, hair, and fingerprints on it, bullets from the autopsy, a tire tool with bloodstains, a .22 caliber pistol and live rounds, and clothing from the defendants](R-2112-31).

Florida Department of Law Enforcement crime lab analysts then described the results of their tests: Donald Champagne [firearms examiner verified the .22 fired the bullets into the victim's head](R-2155-68), Linda Hensley [hair and fiber expert matched the victim's head hair with hair on the beer can and lug wrench](R-2172-75), Lonnie Ginsberg [serologist who determined human blood was on Kritzman's clothing but not on the others' clothing], (R-2177-84) and Christopher Reiter [fingerprint examiner determined Davis' prints were on beer can found near the victim](R-2221-24).

The State rested (R-2233). Appellant moved for a judgment of acquittal which was denied (R-2234).

Defendant Davis then took the stand in his own defense. Prior to this appellant moved to sever and moved for a mistrial. Both motions were denied (R-2241).

Davis testified he had known Kritzman at two separate prisons over the course of sixteen months (R-2246). After the prison break, the four men involved, himself, Mailhes, Kritzman, and Guidry looked for cars and guns to steal. He described the robbery of the elderly man, how they looked for drugs in Biloxi, Mississippi to get high (R-2246-2261), and then tried to find

some marijuana at Pensacola Beach (R-2271). Kritzman and Mailhes wanted to rob someone, so they waited by a night deposit box. Later the two unsuccessfully staked out a laundromat and a motel (R-2273-2275). This was far more detailed that the testimony elicited by the State from Mailhes on the events from the prison break to the time they picked up a hitchhiker (R-1890-1903).

Kritzman shot the victim, according to Davis (R-2278-2290), and Mailhes hit him with the tire tool he assumed (R-2279-80).

After their arrest Davis related a conversation that appellant "should get his people in Louisiana to go to Griffin's [Mailhes'] people and jump on them..." that he "will get him down the road at Lake Butler." (R-2289)

On cross-examination by the State, the following transpired:

> Q. And then later you gave a false story, "I don't know nothing about no murder."
>
> A. Exactly, because I was under the impression that Tim and all of them and Don had all remained silent and everything else as I....
>
> (R-2310-11).

Appellant objected and moved for a mistrial (R-2311), on the grounds that there was a comment on his right to remain silent (R-2313). He renewed his motion for severance but both motions were denied (R-2315).

In attempting to impeach Davis about a conversation between himself and Kritzman "getting" Mailhes, the State asked

> Isn't it true you said, "When we go to trial, we can just say he hit him with the tire tool when he was still alive."
>
> A. I don't recall that. (R-2324)

Appellant objected, saying that the question was another comment

on his failure to testify. A motion for mistrial was denied (R-2324) as was a severance request (R-2327).

At the conclusion of the State's cross-examination, the judge took a belated prophylactic measure and offered to permit appellant to depose Davis. He would not allow a severance (R-2365). Appellant responded that the deposition would be of no use at that point (R-2366).

When appellant rested without putting on any evidence, the judge inquired when Kritzman's attorney had learned that Davis would testify (R-2379). The judge was satisfied that he did not become aware of this until the Monday of jury selection (R-2387-88). Counsel proffered this changed circumstance mattered because now he had to cross-examine Davis (R-2389). He could not say that it would have changed his decision not to present evidence (R-2391). Due to surprise and antagonistic defenses including references to Kritzman's silence and testimony of collateral acts, appellant moved for a severance (R-2393), which was denied (R-2414).

After closing arguments in which the State and Davis called appellant a cold blooded murderer (R-2471) and an executioner (R-2511-2, 2519), the jury convicted both Kritzman and Davis as charged (R-2578).

The jury was then instructed to return Monday, March 3, 1986, for the penalty phase (R-2582).

The State introduced the perpetuated testimony of former St. Tammany Parish, Louisiana prosecutor Thomas Mull (R-2629). In 1984 Mr. Mull prosecuted Donald Kritzman, whom he identified, for armed robbery of a convenience store in Slidell, Louisiana.

The defendant entered a plea to the armed robbery with a pistol in October of 1984 and was sentenced to nine years at hard labor with the Louisiana Department of Corrections (R-244-246). Mr. Mull also identified various records (R-246, 249-255) which reflected the judgment and sentence for that crime, the prison records, and the various supporting documents from the Louisiana system. Those records were introduced by the state after Mr. Mull's deposition was read to the jury (R-2629).

Kritzman presented testimony from psychiatrist Lewis Perillo, MD about the effects of alcohol on a person. If a person approximately 5'3 1/2" tall and weighing 130 pounds drank nine beers from 10:30 a.m. to 6:00 p.m., by 8:30 p.m. he would have a blood alcohol level of approximately .165 percent. According to the doctor legal intoxication was .1 percent (R-2637-38). At the .15 level a person would have swings of emotion, some memory problems, and would lack coordination. Should the person have a relatively low IQ around 75, Dr. Perillo opined the person's judgment and reason would be affected to a greater degree than that of a normal person (R-2639-40). If the same person consumed twelve beers during the same time, his blood alcohol would rise to .265 percent (R-2640).

On cross-examination Dr. Perillo admitted he had no idea how much Kritzman had had to drink on September 8, 1985 (R-2642).

Clinical psychologist Dan Overlade was the next witness. Dr. Overlade administered various psychological tests. From his results he concluded, Kritzman had an IQ of 72 and a mental age of eleven years, six months which placed him in the lowest four percent of the population. That made him borderline mentally

retarded (R-2642-45).

Diane Sevin, appellant's half sister, testified about his background. Her parents had fourteen children of which appellant was the thirteenth. They split up before Donald was born. Their mother, Marcella Kritzman, now deceased, never married appellant's father. To her knowledge Donald's father never lived with his mother nor provided a father role for the boy (R-2648-51).

Donald's mother was an alcoholic and throughout his childhood suffered from cancer. Because of this, he grew up on his own. There was no male figure in the household. In 1981 his mother died from a heart attack (R-2652-54).

She recalled when Donald was twelve he sold drugs out of the house for several years. He split the money with his mother (R-2655-57).

Finally appellant called Dr. Richard Goldberg, a clinical psychologist, who had administered several tests on Kritzman and reviewed prior prison records. Kritzman had a history of institutionalization in juvenile programs since the age of twelve. He presented a classic picture of a depressed sociopathic personality disorder with very low impulse control (R-2674-78). Because his ability to control impulses was seriously impaired, the addition of alcohol would further decrease his meager abilities (R-2678-79). If a borderline retarded person such as Kritzman had ingested alcohol to the extent his facilities were impaired on September 8, his ability to appreciate the criminality of his behavior would also be substantially impaired (R-2680).

On cross-examination Dr. Goldberg dismissed some prison tests

as aberrant and based on cursory testing methods. A Dr. Pettigrew had only concluded Kritzman was impulsive and violent. There was also one test result placing appellant in the normal range intellectually, but that was contradicted by numerous sub level results (R-2682-85).

In rebuttal the State called law enforcement officers Brown, Saunders, Cotton, and McFaul to establish appellant did not appear intoxicated when they encountered him (R-2716-2723).

Kent Mailhes took the stand to introduce the plea agreement and minimize his participation in the murder. He recognized the judge had the ultimate sentencing decision and knew Judge Lowery had imposed the death sentence on others (R-2703-12). During his closing, his counsel reiterated this theme, urging the jury not to send a message to other criminals - why help out when the state will still kill you? (R-2766-2775).

The State, as promised, sought life for Mailhes. "I am asking you to give him the mercy that Davis and Kritzman denied on behalf of Mark McKeen." IR-2727).

Appellant argued five factors in mitigation: low IQ, alcohol impairment, impulsive behavior, deprived family background, and generally a hard short life (R-2753-61).

After instruction from Judge Lowery (R-2776-2785), the jurors by an 8-4 vote recommended the death penalty (R-96). Both Mailhes and Davis received life recommendations (R-2786-7).

Judge Lowery did not order a pre-sentence investigation but based his findings on the prior proceedings (R-122). He imposed a death sentence on appellant, ruling there were three aggravating factors (capital felony committed by a person under sentence of

imprisonment, prior conviction of a felony involving the use or threat of violence to a person, and capital felony committed during an armed robbery), and two statutory mitigating factors, diminished capacity to appreciate the criminality of his conduct and age of the defendant, and a partially mitigating non-statutory factor, improvished background. These mitigating factors were not sufficient to outweigh the aggravating curcumstances (R-122-131). Appellant received a twelve year guidelines sentence on the armed robbery (R-135).

On July 11, 1986, appellant filed a timely notice of appeal. The public defender, Second Judicial Circuit, was designated to handle the appeal November 12, 1986.

III SUMMARY OF ARGUMENT

In issue one appellant argues that he was denied a fair trial when the co-defendant who had previously entered a guilty plea to murder and who was the State's chief witness against him in the murder prosecution was allowed to participate in the voir dire and selection of appellant's jury. He contends that the trial judge should have severed appellant's case from that of the co-defendant and that the denial of such severance was an abuse of discretion.

In issue two appellant contends that the admission of irrelevant collateral acts improperly placed appellant's character in evidence and denied him a fair trial.

In issue three appellant argues that it was an abuse of discretion for the trial judge to deny his motion for severance from a second co-defendant. That co-defendant in a surprise move opted to testify. He implicated appellant, emphasized collateral bad acts of appellant, and commented on his right to remain silent.

In issue four appellant contends the trial court was without jurisdiction to try appellant for a crime occurring on federal property.

Finally he argues the compounded errors addressed in issues one, two, and three denied him due process and a fair trial. The improper jury selection procedure and commingling of issues properly considered in a bifurcated procedure denied him a fair penalty phase.

IV ARGUMENT

ISSUE I

THE TRIAL JUDGE ERRED IN NOT SEVERING KENT MAILHES' CASE FROM APPELLANT AND IN ALLOWING MAILHES TO PARTICIPATE IN JURY SELECTION WHEN HE HAD PREVIOUSLY ENTERED GUILTY PLEAS, THEREBY DEPRIVING APPELLANT OF DUE PROCESS OF LAW AND A FAIR TRIAL AS GUARANTEED BY THE FOURTEENTH AND SIXTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Appellant acknowledges this is a case of first impression.[1] May a defendant, who entered a guilty plea to first degree murder before his trial and intends to testify at that trial as the state's star witness against the co-defendant, participate in the jury selection of the co-defendant's jury when that jury will decide the co-defendant's guilt or innocence, and penalty recommendation, if guilty, but will only consider a penalty recommendation for the defendant? Such an astonishing scenario emphatically refutes any suggestion that the co-defendant had anything approaching a fair trial. Should a gambler who bet a fortune on team A be the head umpire or referee in the critical game between team A and team B?

Although appellant sought to sever his case from Kent Mailhes' (R-49-50), the judge refused to separate the two cases (R-773). Because of the unique factual circumstances, appellant argues he was denied a fair trial.

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[1] In those few jurisdictions in which juries render advisory or actual sentences for defendants after pleas or trials in non-capital crimes - e.g. Alabama, Indiana, Missouri, Oklahoma, Tennessee, Texas, Virginia - no instances appear in which the jury simultaneously considered the sentence for a co-defendant who was tried with one who entered a plea. Similarly there is no analogous situation in Florida civil law in which, for instance, a co-defendant who admitted liability participated in the damages phase of trial with the other defendants who were contesting first liability, then damages.

Granting or denying a motion for severance is normally a discretionary matter for the trial court. Crum v. State, 398 So.2d 810, 811 (Fla. 1981). Although severances should be liberally granted whenever potential prejudice is likely to arise during trial, on review the appellate court will apply an abuse of discretion test. Menendez v. State, 368 So.2d 1278, 1280 (Fla. 1979). However the fair determination of "innocence or guilt should have priority over relevant considerations such as expanse, efficiency, and convenience." Crum v. State, supra 811. Denial of a severance may so prejudice a defendant so as to deprive him of his right to a fair trial. U.S. v. Lane, 106 S.Ct. 725 (1986). This is appellant's contention.

The facts sub judice are distinguishable from the more common severance scenarios: Bruton v. U.S., 391 U.S. 123 (1968) [confession of non-testifying co-defendant implicates defendant]; McCray v. State, 416 So.2d 804 (Fla. 1982)[antagonistic defenses in which co-defendants testify against one another]; Crofton v. State, 491 So.2d 317 (Fla. 1st DCA 1986)[co-defendants charged as co-conspirators]; and Damon v. State, 397 So.2d 1224 (Fla. 3d DCA 1981)[interlocking confessions by co-defendants].

Here a co-defendant who by all logic and reason should not be on trial because he had pled guilty actively assisted the state in appellant's prosecution. Under the rationale of Crum v. State, supra, the court should have severed the case.

More fundamentally, Kent Mailhes should not have been allowed to participate in the impaneling of Kritzman's jury. By entering a guilty plea, Mailhes was not entitled to contest his guilt or innocence.

> A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment.

Boykin v. Alabama, 395 U.S. 238, 242, 89 S.Ct. 1709, 23 L.Ed. 2d 274 (1969), quoted in part, Williams v. State, 316 So.2d 267 270 (Fla. 1975).

After the plea colloquy Judge Lowery was satisfied Mailhes understood his constitutional rights and freely voluntarily and intelligently waived, among others, his right to a trial and his right to remain silent (R-986-987, 999). This comports with the Supreme Court's requirement that a defendant freely, intelligently, and voluntarily waive his "privilege against compulsory self-incrimination ... the right to trial by jury ... the right to confront ones accusers ..." Boykin at 243.

Additionally if a defendant were promised anything in return for his plea, that information must be revealed. Santobello v. New York, 404 U.S. 257, 261-262, 92 S.Ct. 495, 30 L.Ed. 2d 427 (1971). On February 13, 1986, Mailhes' counsel and the state advised the judge of a plea bargain contract in which there was a sentencing agreement for life. The defendant would testify truthfully against the co-defendants, and the state would not seek the death penalty. Mailhes would not enter his plea until after the others' trial (R-898). Judge Lowery indicated

> I am not in agreement that I ought to defer the taking of the plea and defer the trial of his case because it may be that I would have to try two cases rather than just one. (R-913).

Ultimately when Mailhes did plea, the court acknowledged and questioned him about the plea contract previously discussed (R-990).

Only the appellant and co-defendant Johnny Davis were on trial - Mailhes merely needed to be sentenced.[2] Although the judge could and should have impaneled two separate juries for Kritzman's and Davis' trial on the merits and for Mailhes' advisory sentence,[3] the judge was motivated by efficiency and expediency (R-913).

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2 Section 921.141, Florida Statutes (1985) in part provides:

> If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant.

Although Mailhes did not waive his right to a jury for the sentencing proceeding, had he done so, the judge could have still required the impaneling. State v. Carr, 336 So.2d 358 (Fla. 1976). However, all that remained was Mailhes' right to an "advisory verdict," a "separate evidentiary hearing ... before judge and jury." Proffitt v. Florida, 428 U.S. 242, 248 (1976).

3 Arguably the trial judge could have impaneled two separate juries to simultaneously consider Kritzman's and Davis' trial with Mailhes' sentence recommendation. Feeney v. State, 359 So.2d 569 (Fla. 1st DCA 1978). But see State v. Lambright, 673 P.2d 1 (Ariz. 1983)[such experimentation in capital cases is discouraged]. However for the same jurors to decide what are two separate litigations results in a sixth amendment violation to a fair and impartial trial. See U.S. v. Malloy, 758 F.2d 979 (4th Cir. 1985)[the same juror sat on two separate trials of co-defendants whose cases has been severed]. State v. VanMetre, 342 SE2d 450 (W.Va. 1986). In VanMetre at 452, the West Virginia Supreme Court held

> (the) basic concepts of fairness dictate that every individual has a right to a separate trial at which the primary focus is upon his individual guilt or innocence.
>
> We see little difference in the case where two defendants are being tried jointly and their guilt or innocence decided by one jury and the case where each defendant is tried separately but before members of a jury who sat in the trial of the other.

(cont.)

Nothing would have precluded the State from seeking the death penalty or demanding a trial on Mailhes should he have declined to testify as expected by the State. Brown v. State, 367 So.2d 616 (Fla. 1979). Mailhes rights would also be protected in such an event, for he could withdraw his plea and demand a trial. Davis v. State, 308 So.2d 27 (Fla. 1975). When judicial efficiency is weighed with due process and a right to a fair trial, the latter must be given careful consideration.

A defendant is entitled to due process at all three phases of a murder trial - the guilt phase, the advisory phase, and the sentencing phase. Engle v. State, 438 So.2d 803 (Fla. 1983) citing, Presnell v. Georgia, 439 U.S. 14, 99 S.Ct. 235, 58 L.Ed. 2d 207 (1978). Appellant insists the procedure established by the trial judge deprived him of a fundamentally fair trial in violation of the sixth and fourteenth Amendments to the United States Constitutions.

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[3] (cont.)

> The result in the second trial cannot but be influenced by the result in the first. And even if it is not, the right to a fair and impartial jury is such a basic constitutional right that we should not permit a situation where the appearance of bias would necessarily arise. Obviously, the purpose of choosing three juries to serve in three different trials from the limited panel of twenty was judicial economy. We addressed this point in State ex rel. Whitman v. Fox, supra, and held that "[i]n the criminal law ... an individual's interest in his freedom far outweighs the State's interest in efficiency. (citation omitted).

Because the actual impact of a particular practice on the judgment of jurors cannot always be fully determined, the courts must be alert to factors that may undermine the fairness of the fact-finding process. Estelle v. Williams, 425 U.S. 501, 503 504, 96 S.Ct. 1691, 48 L.Ed. 2d 126 (1976).

What resulted on Frbruary 24, 1986, was a sham proceeding. The state and a purported co-defendant, both with the same goal to fullfil the plea bargain contract, sought to convict the others. Such a bogus process tainted the entire trial from the beginning.

Prior to individual voir dire, the state, appellant, co-defendant Davis, and Mailhes questioned the entire panel. The state asked a general question:

> Very often in a criminal case, especially where you have two or more defendants charged jointly with one crime, sometimes the state will enter into what is known as a plea bargain
> .....
> Are any of you basically suspicious of testimony offered by one defendant against another in a criminal case?

(R-1088-89).

Under normal circumstances such inquiry is proper - i.e. would you automatically disbelieve a witness' testimony simply because .....? Under the theory of anticipatory rehabilitation[4] the state could ask as the prosecutor did

> How many of you people here do not like the idea of the State agreeing not to seek the death penalty on one defendant while seeking it on another defendant when they are all charged with the same crime?
> (R-1091)

---

[4] Lawhorne v. State, 12 FLW 24 (Fla. December 30, 1986).

When Mailhes' attorney then questioned the jury on the same issue (R-1122-1139), the state succeeded in constructing a straw man, tainting the entire trial. A less culpable participant did the honorable thing and confessed - he could still get death but he will tell you about the horrible men who did the dirty deed and still deny their guilt.

> I am in a different position than the others .... My client will not be on trial on the first part, the guilt phase. Mr. Mailhes, I think that it will be shown later on, has entered a plea .... Are any of you who feel that because my client has entered a plea and because my client will testify, and the state will call him to testify in this case, is there anyone here that thinks that, well, "Gosh, he cut his deal and because of that, he is going to be unreliable because of that. He has made a pact."
> (R-1127-28).
>
> Do you think .... that because a person has entered a plea that maybe that they may be more deserving of the penalty then someone else?
> (R-1129)
>
> .... would you tend to automatically reject the testimony of someone that has entered into a plea bargain and the State made certain recommendations as to that person?
> (R-1137)
>
> Would any of you be inclined to recommend the death penalty for someone who has entered into a plea bargain just because of that? (R-1138)

Here the State had an ally not an adversary as an opponent. Even if the State could not bolster the credibility of its chief witness, the witness could do that for the prosecution. Nor would this be to Mailhes' detriment. His sentence all but guaranteed, he could manipulate the proceedings as the sinner seeking redemption. I wasn't the triggerman, but I did wrong,

and I plead with you for mercy. Such a obvious psychological ploy from the beginning prohibits the jurors from fairly and objectively envaluating the evidence.

Throughout the individual voir dire the state and Mailhes continued their farce. Appellant objected to the constant reference to Mailhes plea as a comment on silence saying:

> MR. LOCKLIN: (DEFENSE COUNSEL) I want to ask the Court to instruct both Mr. Rimmer (the prosecutor) and Mr. Terrell (Mailhes' counsel) not to question the jurors specifically concerning the questions that took place yesterday involving pointing out that our clients, mine and Mr. Shelley's have plead not guilty, thereby bringing to their attention that they are exercising their constitutional right and are pointing them out to be the bad guys and this is the good guy. I think this prejudices them and gets them to a point of view in advance.
>
> I think it is appropriate that they be questioned concerning bias, general bias involving co-defendant testimony and also involving plea bargaining. But when you get into the specifics, I think we discussed that yesterday and it is improper and I want to ask that now, and I know that is one of the first questions that David is going to ask, and I will be objecting at that time. I think it is inappropriate. (R-1300-1301).

The improper questioning continued. Ten of the twelve persons ultimately selected as jurors were told by the state one defendant already entered a plea, the state promised a life recommendation, and the state sought death for the other two (R-1166-67, 1174-75, 1181-82, 1285, 1329, 1498-99, 1531, 1563, 1570, 1617). Each juror was conditioned to believe the confessor.

> MR. RIMMER: Ms. Lewis, as you know by now, this is a case in which the defendants are charged with first degree murder and the State is seeking the death penalty on two of the three defendants.

What do you believe about the death penalty, ma'am?

PROSPECTIVE JUROR: Well, I would weigh my decision very carefully.

MR. RIMMER: Do you believe in the death penalty?

PROSPECTIVE JUROR: Yes, sir.

MR. RIMMER: Could you vote to recommend the death penalty?

PROSPECTIVE JUROR: Yes, sir.

MR. RIMMER: Earlier we had explained to you the situation which happens when sometimes the State enters into an agreement with the defendant who pleads guilty and agrees to testify against his co-defendants. We have a situation like that in this case, and the State has agreed not to seek the death penalty. One defendant has pled guilty and will testify and Mr. Locklin indicated to the panel earlier that the defendant has an absolute right not to testify and we cannot force a person to testify. And they can do so if they wish to and this defendnat has decided to testify and pled guilty. And the State is going to ask the jury to recommend life, but the State will continue to seek the death penalty against the other two.

You indicated that you thought you would have problems with this particular concept. How would you feel about that idea where the State makes agreements like that?

PROSPECTIVE JUROR: I would think-- I am not sure why one person would plead guilty of the same act that the other two were being tried for and possibly be sentenced to death for it. (R-1277-78).

Mailhes' counsel then conditioned the other two in a tag team fashion:

MR. TERRELL: And I believe that you also indicated that you have some problems or you would be suspicious about a person who testified with a plea bargain; is that right?

PROSPECTIVE JUROR: Well, I would be suspicious, depending on, until I heard it.

MR. TERRELL: And just to kind of give you a background here with regard to my client, Mr. Mailhes, there will be only that penalty phase proceeding, whether or not it should be recommended that he live or die. Are you aware that there will be some testimony from him? Do you think that your natural suspicion about that would influence you, your decision-making process, on whether or not it should be recommended that he live or die?

PROSPECTIVE JUROR: I think that I should say that I am suspicious in general, but in a particular circumstances, I would have to listen to it. And I would have to just listen to it. And I could not say if I would be immediately suspicious.

MR. TERRELL: Okay. And you notice that he has longer hair and a beard. Would that cause you any difficulty in dealing with him, cause you any difficulties at all in dealing with him?

PROSPECTIVE JUROR: On first impression, yes, but you cannot take that into consideration, somebody's looks. It depends about what they have done or what they have not done, especially when you're dealing with their life. (R-1373-1374).

PROSPECTIVE JUROR: Yes. I just don't feel that a person should get a lesser penalty by plea bargaining. The concept of it just does not seem fair to me. I can accept it, I believe, but I don't agree with it.

MR. TERRELL: Well, do you understand that as to my client, Mr. Mailhes there, that there is that question involved? Do you understand what we have talked about here, about the circumstances of that bargain?

PROSPECTIVE JUROR: Yes, sir I understand.

MR. TERRELL: How does that make you feel?

PROSPECTIVE JUROR: I believe that I would just accept it if that's-- like you said yesterday, sometimes that's the only way to get the testimony, and if that's ture, then that's the way it works, and I would just

have to accept it.

MR. TERRELL: And with regard to a person that does something like that, do you think, or would you have any problem in being requested to consider them differently than possibly other people that may have been involved? For instance, with regard to my client, there will be a penalty phase trial, that second trial. With regard to the other two gentlemen, you know, you have to determine whether or not they are guilty of any kind of crime. If they are found not guilty or if they are found guilty of a lesser offense, then there would be no penalty phase trial as to them, but my client will have a penalty phase trial regardless of what happens to the others. Okay?

PROSPECTIVE JUROR: Yes.
(R-1509-1510)

Appellant concludes he is entitled to a new trial in which the co-defendant cannot participate in appellant's jury selection. This would prevent the variety of errors that, compounded, denied him a fair trial. The State could not improperly use the co-defendant's involvment in voir dire to bolster the credibility of the witness and to dilute the standard cautionary instruction that accomplice testimony should be carefully scrutinized, to comment indirectly on appellant's right to remain silent, to emphasize the state's opinion that Kritzman was the most culpable or it would not have dealt with Mailhes, and to allow the State a de facto increase in peremptory challenges by having Mailhes excuse those jurors who do not favor plea bargaining. Most importantly it would eliminate the deliberate obfuscation of issues created by Mailhes presence. By intermingling the penalty issue, Mailhes' sole contention, with appellant's guilt or innocence determination, the State from the outset had the jury comparing appropriate punishments rather than a fair and impartial evaluation

of the facts which later may result in a penalty phase.

ISSUE II

THE TRIAL COURT REVERSIBLY ERRED IN PERMITTING THE STATE TO INTRODUCE IRRELEVANT AND HIGHLY PREJUDICIAL EVIDENCE REFLECTING UPON APPELLANT'S CHARACTER, WHERE APPELLANT HAD NOT PLACED HIS CHARACTER IN ISSUE, AND IN ALLOWING COLLATERAL CRIME EVIDENCE TO BE INTRODUCED, THEREBY DEPRIVING APPELLANT HIS FOURTEENTH AND SIXTH AMENDMENT RIGHTS TO A FAIR TRIAL.

Florida law has consistently deemed inadmissible evidence tending to show that the accused was arrested, suspected, charged, or convicted of crimes for which the accused was not on trial, the theory being that a jury is bound to be unfairly prejudiced against the accused by reason of their knowledge of the unrelated crime. Marrero v. State, 343 So.2d 833 (Fla. 2d DCA 1977). Accord, Kelly v. State, 371 So.2d 163 (Fla. 1st DCA 1979); Harmon v. State, 394 So.2d 121 (Fla. 1st DCA 1980); Clark v. State, 337 So.2d 858 (Fla. 2d DCA 1976); Whitehead v. State, 279 So.2d 99 (Fla. 2d DCA 1973).

Evidence of other crimes which is relevant to a material fact in issue is admissible unless the sole effect of such evidence is to show an accused's bad character or propensity to commit crime. Williams v. State, 110 So.2d 654 (Fla. 1959). Nevertheless, because of its inherently damning character, the court should closely scrutinize the relevance of the "Williams Rule" evidence before admitting it. And, unless the evidence has substantial relevance, it should be excluded. Ingram v. State, 379 So.2d 672 (Fla. 4th DCA 1980). Accord, Drake v. State, 400 So.2d 1217 (Fla. 1981); Ruffin v. State, 397 So.2d 277 (Fla. 1981).

Moreover, while evidence of similar fact crimes is admissible to prove motive, intent, absence of mistake, common scheme, identity,

or general pattern of criminality, Ashley v. State, 265 So.2d 685, 893 (Fla. 1972), such evidence must tend to establish a material or essential element of the crime charged. Duncan v. State, 291 So.2d 241 (Fla. 2d DCA 1974); Davis v. State, 376 So.2d 1198 (Fla. 2d DCA 1979). If it is offered to prove an issue not contested by the defendant, then that evidence is inadmissible. Marion v. State, 287 So.2d 419 (Fla. 4th DCA 1974).[5] In short, for collateral evidence to be admissible, it must tend to prove a material issue contested by the defense.

> [T]he guilt or innocence of the accused should be established by the evidence relevant to the alleged offense being tried, not because the jury may believe the defendant to be a person of bad character or because he committed a similar offense.

United States v. Taglione, 546 F.2d 194, 199 (5th Cir. 1977). See also Michelson v. United States, 335 U.S. 459 (1948); Panzavecchia v. Wainwright, 658 F.2d 337 (5th Cir. 1981). Further, even if evidence of other crimes meets this relevancy test, considerations of due process and the right to a fair trial preclude the introduction of such evidence from becoming a feature, rather than an incident, of the trial. Williams v. State, 117 So.2d 473 (Fla. 1960).

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[5] Of course, by pleading not guilty the defendant technically contests every element of a charged offense. Such technicality, however, is insufficient to have raised an issue for Williams Rule purposes. See e.g., U.S. v. Ring, 513 F.2d 1001 (6th Cir. 1975) Were it otherwise, Williams rule evidence would be admissible in every case as the perpetrator's identity and intent are always issues the state has to prove.

In Smith v. State, 344 So.2d 915 (Fla. 1st DCA 1977), cert. den., 353 So.2d 679 (Fla. 1977), the Court identified three factors to assist in balancing the relevancy of evidence of a collateral matter against the potential prejudice to a defendant: (1) to what extent is the objectionable evidence relevant?; (2) the necessity of the testimony - importance to the state's case; and (3) the quality of the testimony - was the testimony directly related to the material issues of the case, or was it more inclined to demonstrate the bad character of the accused, thereby unduly prejudicing him? 344 So.2d at 918. The three factor test from Smith is not dissimilar to the principles announced by the Court in Headrick v. State, 240 So.2d 203 (Fla. 2d DCA 1970). The evidence of collateral crime must be clearly and substantially relevant to the case as being tried:

> This is not to say that by our holding here we mean to lay down an abstract concept that in all cases similar fact evidence is admissible, merely because it has some degree of relevancy, however slight, to the facts in issue being tried. If the asserted relevance is illusory, fancied, supposititious, or unsubstantial, the extraneous evidence should not be admitted because the inherent danger to the defendant on trial before a jury is too acute to allow his fate to rest upon such a slender thread of admissibility.

Id. at 205.

The state, over objection (R-1722, 1737, 1739, 1766, 1767, 1784, 1889, 1892, 1900, 1901), presented evidence of collateral acts including the escape from a Louisiana prison (R-1766-70, 1818-90), the robbery of Hubert Jones (R-386-398, 1890-96), and plans to rob other businesses (R-1901-02).

Assuming arguendo that Mr. Jones testimony about the gun

and the car were relevant,[6] the prison break,[7] the debauchery in bars and on the beach, and plans to rob businesses were not.

In introduction of the improper prejudicial evidence in this case undoubtedly requires reversal of appellant's conviction for a new trial. The admission of irrelevant evidence showing bad character or propensity to crime is presumed harmful error, because of the inherent danger that a jury will take it as evidence of guilt of the crime charge. Straight v. State, 397 So.2d 903, 980, (Fla. 1981).[8]

Undoubtedly the state will rely upon Heiney v. State, 447 So.2d 210 (Fla. 1984) to assert that the collateral acts demonstrate a motive for subsequent crimes and to place the entire series of events in context. The logic is faulty and no different from arguing pattern and propensity to commit crime. Presumably most recent prison escapees have no money. The State could not properly argue, for instance, that a defendant on trial for robbery was a drug addict and his motive for robbery was to

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6 Mr. Jones never did say what, if anything, appellant did. When asked, "Do you remember what these four men did to you?,"he responded "No." (R-391)

7 The fact that appellant was incarcerated only had relevance in the penalty phase.

8 The admonitions of the Supreme Court in Gordon v. State, 104 So.2d 524, 542 (Fla. 1958) are particularly apt:

> While it may seem regrettable that a case so extensive and so expensive will have to be re-tried, it should be obvious that under our democratic system of administering justice we cannot measure the rights of men accused and convicted of serious crimes by this standard. Who would want it otherwise?

obtain money for drugs. Conversely a defendant could not attempt to negate his guilt by testifying he lost his job, his wife was pregnant, and the landlord evicted him and was forced to rob the minute market.

Additionally there was no evidence the victim knew appellant was an escapee, that appellant broke out of prison to settle a long standing dispute with the old man or the victim, that appellant was the mastermind behind the collateral acts and intentionally sought out a murder victim in furtherance of this plan. Instead the collateral acts were nothing more than character assassination. Such prejudice served to deny appellant due process and a fair trial.

> The state cannot by some evidential rule permit evidence of all prior crimes 'ha[ving] some bearing, however tenuous, on proving plan or scheme, motive; knowledge, intent, absense of mistake or accident, or identity. (citations omitted) Manning v. Rose, 507 F.2d 889, 894 (6th Cir. 1974).

To be consistent with due process, the other crime must be rationally connected with the charged crime.

For the reasons and authorities cited, appellant seeks a new trial free from the state's improper reliance on bad character evidence.

ISSUE III

THE COURT ERRED IN NOT SEVERING CO-DEFENDANT DAVIS'CASE FROM APPELLANT'S WHEN DAVIS' DEFENSE WAS ANTAGONISTIC, IMPLICATED APPELLANT AND INCLUDED A COMMENT ON APPELLANT'S SILENCE IN VIOLATION OF HIS FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS.

Appellant moved to sever his case from co-defendant Johnny Davis (R-4,1725,2241,2315,2327,2393). Because Davis did not object to the Williams Rule testimony (and encouraged it) (R-1692, 1694,1984,2246-2275), implicated Kritzman as the triggerman (R-1748-49, 2278-80), and commented on appellant's right to remain silent (R-2310), appellant contends the court abused its discretion in not severing the defendants.

In Menendez v. State, supra, the co-defendant's counsel argued that Menendez was guilty but offered no evidence. Under those facts this Court held the co-defendant's assertion did not so prejudice him that the trial judge's denial of severance was an abuse of discretion.

However in Crum v. State, supra, when the co-defendant announced at the beginning of trial that he would testify that Crum committed the murder, it was error not to sever the case. The Fourth and First District Courts of Appeal reached the same results in similar circumstances. Thomas v. State, 297 So.2d 850 (Fla. 4th DCA 1974); Rowe v. State, 404 So.2d 1176 (Fla. 1st DCA 1981).

There is in the case sub judice defendant must stand trial against more than one accuser. However, Kritzman's situation was more egregious than Crum's. Not only did Johnny Davis, the true co-defendant, provide evidence against him, but also, as argued

in Issue I, supra, Kent Mailhes, a pseudo-co-defendant on trial, testified against him. Appellant, then, had to defend against three accusers: the state and the two others indicted for murder.

Secondly Davis' testimony that "Don had remained silent" was a comment on Kritzman's post-Miranda right to remain silent (R-2310). This was improper.

In Sublette v. State, 365 So.2d 775 (Fla. 3d DCA 1979) both the prosecutor and counsel for the co-defendant told the jury during closing argument that Sublette had not testified in his own behalf. Because such reference by the co-defendant infringed upon Sublette's right to remain silent, the Third District reversed the conviction. This follows the rule in DeLuna v. U.S. 308 F.2d 140 (5th Cir. 1962), in which the Court held it was reversible error for a co-defendant to comment on a defendant's silence.

> If an attorney's duty to his client should require him to draw the jury's attention to the possible inference of guilt from a co-defendant's silence, the trial judge's duty is to order that the defendants be tried separately.

Id. at 141.

Similarly the trial judge has a duty to sever co-defendants with mutually antagonistic defenses or when the manifest necessity to protect Fifth Amendment rights arises and to preserve the right to a fair trial. U.S. v. Agviar, 610 F.2d 1296 (5th Cir. 1980).

Because Kritzman and Davis has antagonistic trial strategy including Davis opting to testify and implicate appellant and

because Davis made a comment on his silence, appellant was deprived of his right to a fair trial under the Sixth Amendment and his right to remain silent under the Fifth Amendment. The trial judge's failure to sever the two defendants deprived Kritzman of due process and a fair trial under the Fourteenth and Sixth Amendments.

ISSUE IV

THE TRIAL JUDGE ERRED IN DENYING APPELLANT'S MOTION TO DISMISS FOR LACK OF JURISDICTION OVER EVENTS OCCURRING ON FEDERAL PROPERTY.

At the conclusion of the state's case, appellant moved to dismiss the charges against him, arguing the court was without jurisdiction (R-2234). FBI agent McFaul testified the victim's body was located in the Naval Live Oaks Reservation (R-2064). Appellant introduced a certified copy of the final judgment perfecting title of the Reservation to the United States. This was not refuted by the State (R-2237).

In 1971 the Congress established the Gulf Islands National Seashore. 16 USCA section 459h. Subsection 459h-1 authorized the Secretary of the Interior to acquire the Naval Live Oaks Reservation and subsection 459h-10 appropriated the funds.

Because the testimony established the killing was on federal property, appellant contends the state courts were without jurisdiction to try him. Unlike the situations in Hobbs v. Cochran, 143 So.2d 481 (Fla. 1962) and Ross v. State, 411 So.2d 247 (Fla. 3d DCA 1982), appellant not only alleged the events occurred on federal property but also demonstrated title and authority had shifted to the federal government. Article VI, US Constitution; 16 USCA section 459h et. seq. To show proper jurisdiction, the state must establish beyond a reasonable doubt that the essential elements of the events were committed within the jurisdiction of the state. Lane v. State, 388 So.2d 1022, 1028 (Fla. 1980). This it has not done.

Appellant should be discharged because the trial court did not have the jurisdiction to try him.

ISSUE V

THE CUMULATIVE EFFECT OF THE ERRORS DISCUSSED IN ISSUES I, II, AND III DEPRIVED APPELLANT OF HIS RIGHTS GUARANTEED BY THE UNITED STATES AND FLORIDA CONSTITUTIONS TO A FAIR TRIAL BY AN IMPARTIAL JURY AND TO DUE PROCESS OF LAW.

It has frequently been observed that a defendant is entitled to a fair trial, not a perfect trial. See e.g. Lackos v. State, 326 So.2d 220, 221 (Fla. 2d DCA 1976); Parker v. State, 295 So.2d 312 (Fla. 1st DCA 1974). Appellant, thus far, has had neither.

In Carter v. State, 332 So.2d 120, 126-27 (Fla. 2d DCA 1976), the appellate court wrote:

> While a defendant is not entitled to a perfect trial, he certainly is entitled to a fair and impartial one. See United States Constitution, amend. VI and XIV. We have endeavored to point out in this opinion several errors that occurred during the course of this trial, the accumulation of which improprieties was so great as to warrant a new trial. See Douglass v. State, 1938, 135 Fla. 199, 184 So.756. Any one of these errors standing and considered alone may not be cause for reversal, still when considered collectively and in relation to one another and upon review of the entire record, we are compelled to conclude that the defendant was denied his constitutional right to a fair and impartial trial before a fair and impartial jury. Accordingly, we reverse and remand for a new trial.

In Knight v. State, 316 So.2d 576 (Fla. 1st DCA 1975), the defendant contended that the introduction of irrelevant and prejudicial testimony and prosecutorial comments throughout the course of the trial denied him a fair trial. The appellate court noted that "[s]ome of these . . . comments and testimony were objected to; some were not. When objections were made, some were

sustained; some were not." The court, in reversing for a new trial, wrote:

> As noted previously by this Court, "a defendant in this jurisdiction is not entitled to a perfect trial but is entitled to a fair trial." (Simmons v. Wainwright, Fla.App. 1st 1973, 271 So.2d 464, 466) Sub judice, the comments and actions of the prosecutor rendered the appellant's trial neither perfect nor fair. The State now asserts that because appellant's trial counsel did not object to each improper comment, appellant is now precluded from alleging error on this point on appeal. The Florida Supreme Court, however, has spoken to the type of situation with which we are now faced: "The State points out that in some instances there was an absence of objection in the present trial and in other instances an objection to the improper inferences was sustained. Such absence will not suffice where the comments or repeated references are so prejudicial to the defendant that neither rebuke nor retraction may entirely destroy their influence in attaining a fair trial." (Wilson v. State, Sup.Ct.Fla. 1974, 294 So.2d 327, 328-329). Knight v. State, supra at 578.

Appellant's confrontation rights under the Sixth Amendment were diluted when the chief accuser was permitted to bolster his testimony during voir dire and to excuse persons not favoring plea bargaining. By improperly vouching for this witness through a third party, the State precluded appellant from presenting a defense.

In addition to a "death-qualified" jury, the State obtained a "guilt-qualified" jury. The jury was instructed that Mailhes was guilty, but not as culpable as Kritzman. Both Mailhes and the State could and did peremptorily excuse jurors who did not believe that. This inherent confusion of guilt and penalty issues prevented a fair presentation of the evidence in a proper bifucated trial.

In denying appellant's motion for severance from defendant Davis, the judge noted he tried

> to present all of the defendants impartially to a single jury and have a single jury make a proportionality review, which the Supreme Court undertakes to do, of all three defendants instead of having three separate trials and three separate juries making unrelated and independent recommendations on sentence . . . .
>
> Any experienced defense lawyer and any experienced prosecutor and any trial judge who does circuit criminal work and tries these matters, will readily recognize and understand that you cannot intelligently do a proportionality review of death sentences without doing a review of all first degree murder cases in the jurisdiction that result in conviction . . . .
>
> [T]o the extent that three defendants accused of participation in the same crime can be tried and judged by the same jury, it is always preferable to parcelling them out to three separate determinations because at least there is some consistency and proportionality in the recommendation with respect to those three.
> (R-2411-13).

This comment demonstrates the trial court's complete abuse of discretion in conducting the proceedings. Fla. R. Crim. P. 3.152 provides for severance "to achieve a fair determination of that defendant's guilt or innocence." His view that proportionality has a bearing on the trial is misplaced. Proportionality is a responsibility of the Supreme Court, not a matter for the jury. Herring v. State, 446 So.2d 1049 (Fla. 1984). Instead the jury must be concerned with an individualized sentencing procedure. Lockett v. Ohio, 438 U.S. 586 (1978).

Secondly the judge's logic overlooked two significant facts - Kent Mailhes was not on trial. Although Donald Kritzman went through the motions of a trial, what occurred was a rigged

proceeding. He had to defend against three accusers, all of whom had selected a jury tailored to their needs - get Kritzman. In his concern for efficiency in meting out fair punishment, the trial judge violated the fundamentals of due process. His commingling of guilt and penalty issues transformed a constitutionally approved bifurcated system into an arbitrary witch-hunt.

Not only did the appellant have to defend himself against a multitude of accusers but also against acts not relevant to the determination of guilt or innocence. Both the state and co-defendant over repeated objections (R-1737, 1769, 1767, 1783, 1785, 1788, 2352, 2462) emphasized collateral acts. Despite requests for a cautionary instruction (R-1739, 1785) the judge only gave the standard Williams Rule instruction at the beginning (R-1785, 1788) and end of the trial (R-2444). The acts remained an improper feature of the trial.

Both the co-defendant and the State commented on appellant's post Miranda and trial silence, (R-2310, R-2324, R-2328, 2338) through the testimony of Davis.

Assuming arguendo that either the collateral acts or the comments on silence were harmless error, appellant contends in combination with the entire faulty proceedings, he was deprived of the right to a fair trial.

The sentencing process, as well as the trial itself, must satisfy the requirements of due process. Gardner v. Florida, 430 U.S. 349, 358 (1977); Engles v. State, supra.

Appellant reiterates the arguments made in Issue I, supra, with respect to the penalty phase. By that stage, the State had

constructed such a strong straw man in Mailhes that it would be impossible for appellant to receive anything but a death recommendation. In light of the finding of both aggravating and mitigating factors, the obvious psychological ploys of the state and Mailhes in confusing the issues of guilt and punishment during the guilt phase taint the entire penalty phase.

Although the State may argue this was harmless, the Supreme Court acknowledges "some constitutional rights [are] so basic to [a] fair trial that their infraction can never be treated as harmless error [e.g. coerced confession, right to counsel, right to impartial judge]. Chapman v. California, 386 U.S. 18, 23 (1967).

Following this, appellant insists the jury selection procedure and conduct of the trial was anything but harmless.

> Nothing is more fundamental to the provision of a fair trial than the right to an impartial trial (citation omitted). The imparitality of the jury must exist at the outset of the trial and it must be preserved throughout the entire trial. Miller v. North Carolina, 583 F.2d 701, 706 (4th Cir. 1978).

For the reasons argued and the authorities cited, appellant insists he is entitled to a new trial.

V CONCLUSION

For reasons and authorities cited herein appellant seeks a reversal of his conviction and a new trial. In the alternative he seeks a new sentencing hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand-delivery to the Honorable Robert Butterworth, Attorney General, The Capitol, Tallahassee, Florida and mailed to appellant Mr. Donald Kritzman, #102878, Florida State Prison, Post Office Box 747, Starke, Florida, 32091, on this 12th day of February, 1987.

ANN COCHEU