IN THE SUPREME COURT OF FLORIDA

RAYMOND THOMPSON,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

APPEAL NO. 69,352

(CASE NO. 85-899CFA)

ON APPEAL FROM THE CIRCUIT COURT,
SEVENTEENTH JUDICIAL CIRCUIT, BROWARD
COUNTY, FLORIDA - CRIMINAL DIVISION

APPELLANT'S INITIAL BRIEF

JANE D. FISHMAN, ESQ.
Counsel for Appellant
8243 Northwest Eighth Place
Plantation, Florida 33324
(305) 473-2613
Florida Bar No. 300561

TABLE OF CONTENTS

4

TABLE OF CASES

STATUTES

PRELIMINARY STATEMENT

Appellant, RAYMOND THOMPSON, was found guilty of first degree murder by a jury on June 5, 1986, (R.Vol.21, 3161). After a full sentencing proceeding on June 20, 1986, the jury recommended that Appellant be sentenced to life imprisonment (R.2896).

Notwithstanding the jury's recommendation of life, the trial judge sentenced Mr. Thompson to die in the electric chair (R.3340-3351). It is from this judgment and sentence of the Circuit Court, Seventeenth Judicial Circuit, Broward County, Honorable Stanton S. Kaplan presiding, that Mr. Thompson now appeals. This Court has jurisdiction pursuant to Art.V, Section 3(b)(1), Fla.Const.

In the court below, the State of Florida was the prosecution and Appellant was the defendant.

All references are to the record on appeal and are designated by "R." followed by the appropriate page numbers.

STATEMENT OF TEE CASE AND FACTS

In June, 1981, Appellant had a safe installed in the floor of the woodworking shop of Jimmy Savoy (R.1561-2, 1577, 1952). Savoy was an old friend and associate of Appellant (R.901). Friendship notwithstanding, in August, 1981, Savoy rented a jackhammer and dug up his friend's safe (R.1791, 825-6). Savoy sold his business suddenly and fled South Florida with Appellant's safe containing $600,000; Savoy bought himself a brand new gold Camaro in Jacksonville to make his escape (R.1407-10, 873).

On August 24, 1981, Jimmy Savoy met with his son Richard in Massachusetts. The father told his son that he was in trouble, that he had stolen a safe, and that he needed a locksmith to open the safe. Richard Savoy told his father that he wanted no part of his crime; Jimmy Savoy never spoke to his son Richard again (R.1515, 1518).

Carole McLoughlin, Jimmy Savoy's former girlfriend, testified that Savoy left Florida suddenly in late August, 1981, after selling his business (R.1409-1410). Savoy called McLoughlin several times, and on September 26, McLoughlin met Savoy at a hotel in Pompano (R.1410-1414, 1417). McLoughlin claimed that Savoy was very nervous and afraid. He refused to rent or buy a place to live in his own name, so he paid $30,000 cash for a trailer and put it in her name (R.1417-1421). Notwithstanding Savoy's supposed terrible fear of being found, he returned to Florida one month after his theft, bought a trailer near some of his former associates, and went to the same

neighborhood bar nearly every day (R.1432, 1529). According to McLoughlin, she visited Savoy at his Boca trailer every other weekend and he telephoned her several times during each week. She spoke to Savoy on March 7, 1982; when she arrived for her weekend visit she found Savoy gone, newspapers on his lawn from Tuesday, March 9, through Friday, March 12, and Savoy's belongings in the trailer (R.1425, 1429). Although McLoughlin never saw or heard from Savoy again, she heard from Jevel Woods, Savoy's neighbor, that Woods saw Savoy at the trailer in May, 1982, (R.1456, 2262-2264). After that conversation with Mrs. Woods, Carole McLoughlin withdrew all the money from the joint bank accounts that Jimmy Savoy had opened for them (R.460).

Bobby Davis, also known as Bobby Vegas, Bobby Allan, Bob Grant, Brad Meyers and Dean Davis (R.1063), worked for Appellant on and off for several years. In the spring of 1984, when his wife was subpoenaed to appear before a federal grand jury, Davis was worried that he was about to be prosecuted for several crimes he committed. He considered fleeing the country, but elected instead to go to the FBI with his promise to solve the Savoy disappearance and other open cases (R.987, 1029-1034).

Davis' decision to go to the FBI rather than flee the country turned out to be a sound investment for Davis. In exchange for his promise to implicate Raymond Thompson, Davis was permitted to plead guilty to three counts of second degree murder with a sentencing promise of no more than ten years on each count, to run concurrently (R.1014, 1156-1157).

In addition, Davis and his wife were supported by the

federal government. Mrs. Davis received more than $36,000 in subsistence. Also included in Davis' bargain were travel and moving expenses, food, a car and insurance, expense money and even the cost of housing Davis' dog in a kennel (R.1037-1045).

In exchange for cash and a lenient sentence that resolved all of his outstanding charges, Bobby Davis testified that he, Bobby Stephens, Pat Menillo and Appellant killed Jimmy Savoy (R.960). At trial, Bobby Davis told this story:

In September, 1981, Ray Thompson told Davis that Jimmy Savoy had stolen his money. Appellant said he wanted to find Savoy and kill him (R.900, 902). Davis testified that Pat Menillo and Scott Errico were trying to find Savoy for Appellant (R.902).

Menillo and Errico thought they had found Savoy in Massachusetts. According to Davis, he and Appellant flew to Boston based on Menillo and Errico's call, but when they got there, they found not Savoy, but his son (R.903, 917).

Davis said that they all returned to Florida in late September and that, a few weeks later, Appellant found a card at his door from the FBI saying that the FBI knew that Savoy had stolen Appellant's money and that Appellant wanted to kill Savoy (R.905).

Notwithstanding the FBI's communication to Appellant, Davis testified that at that time Appellant told Davis that Appellant was putting an "open contract" out on Jimmy Savoy's life (R.925-926, 1081).

Robbert Tippie, also known as Bobby Dania, testified that he saw Appellant in July, 1981, and that Appellant told him that

Savoy had stolen his $600,000. Bobby Dania asked Appellant if he thought he'd get the money back. According to Dania, Appellant said, "I don't give a shit about the money. I just want the son of a bitch dead.' (R.1690-1691). Shortly thereafter, Dania said, Appellant offered a man at the race track $100,000 to find Savoy (R.1693). In exchange for this testimony, Tippie/Dania received immunity from all state and federal prosecutions, cash and direct benefits worth more than $67,000 for 1985 and for January to April, 1986, and training, job placement and a new identity as part of the witness protection program (R.1697, 1707-1713, 1716).

Bobby Davis, apparently, heard no more about Jimmy Savoy until March, 1982, when he received a telephone call from Bobby Stephens, also known as Bobby Weasel (R. 926, 1698, 2040).

Stephen8 ran a "chop shop", occasionally did some work at Appellant's marina, and, with his wife, often baby-sat for Mr. Thompson's young son, Charlie Boy (R.926, 2139-2140, 2151-2152). Stephens testified against Appellant in exchange for a plea to kidnapping and second degree murder with a 10 year sentence; several other state and federal charges were also disposed of by this plea. Bobby Davis told Stephens that Jimmy Savoy stole $600,000 from Appellant and that Appellant was looking for Savoy (R.2040, 2150). In March, 1982, Bobby Stephens telephoned Bobby Davis to tell Davis that he had seen Jimmy Savoy at the Cricket Club, a small bar near Stephens' West Boca home and near Savoy's mobile home (R.926-927, 2039-2040).

At this point, Davis' and Stephens' stories begin to differ from each other and from their own prior statements. Davis' said

at trial that he then notified Ray Thompson, Pat Menillo and Scott Errico and that Davis, Menillo and Errico went to the Cricket Club the next night. They met Stephens there, saw that Savoy was there and then planned a car accident so they could grab Savoy. Bobby Stephens then went home while Davis, Menillo and Errico stayed to wait for Savoy (R.926-929).*1

According to Stephens, however, after he called Bobby Davis he went home. Davis came to his home that night to see him, but they didn't go to the bar (R.2041, 2095). Bobby Davis left Stephens' home but returned at nine the next morning, picked Stephens up and drove him to a bar in Hallandale. There Stephens met with Appellant, Davis, Menillo, and Errico. He told them he thought he'd seen Savoy but wasn't sure if it was him. Davis then drove Stephens back to West Boca and then left. Davis then returned again that night with Menillo and Errico and they all went to the Cricket Club (R.2042-2044, 2095-2098).

At the Cricket Club, Menillo and Errico confirmed that the man was Savoy. They and Davis waited for Savoy to leave the bar. When Savoy came out and got into his Camaro, Menillo and Errico left the parking lot ahead of him in their Chevette. Davis followed Savoy in his Seville (R.929).

At a stoplight, Bobby Davis ran his car into Savoy's. When they got out of their cars to inspect the damage, Errico grabbed

---

1/ In his previous statements to the police Davis told a different story - that when he got Stephens' phone call he took a taxi right to the Cricket Club, called Menillo and Errico to meet him and they kidnapped Savoy on the first night, without any involvement by Appellant (R.1067, 1099). See, infra, Point I, page 17, for further discussion of this issue.

Savoy and dragged him into Davis' cat. Davis and Menillo were armed with guns, Errico with a knife. They parked the Chevette in a nearby lot, Savoy's Camaro by the side of the road, and then drove back to Bobby Stephens' house (R.930-932, 2044).

Bobby Stephens raid that Davis woke him at four a.m. (R.2044). Davis, Errico, and Menillo took Savoy into Stephens' back bedroom (R.947, 2045). They tied Savoy's hands and feet; when Savoy tried to escape, Bobby Stephen8 threatened him with his gun (R.2046-2047).

The next day Appellant came to Stephenr' house to talk to Savoy (R.2047-2048, 951). Savoy told Appellant that he stole his money, but claimed that it had in turn been stolen from him by a prostitute in South Carolina. According to Bobby Davis, Appellant did not believe Savoy and told Savoy that he would be killed if he didn't return the money and he "could die easy or hard" (R.951). Davis then said that Appellant told him to bring Savoy to Appellant's house, to put him on the boat for the night, and they would kill Savoy the next day (R.952-953). Appellant left Bobby Stephens' house after 45 minutes. After Appellant had left, Bobby Davis instructed Stephens, Errico and Menillo to take Savoy to Appellant's boat, which they did (R.2048-2049, 954).

Bobby Davis guarded Jimmy Savoy down below on the boat that night. The next morning Davis, Bobby Stephens, Pat Menillo, and Appellant took the boat out. Davis had tied Savoy up with ropes; Pat Menillo brought weights and chains which Davis wrapped on to Savoy (R.954-956, 958). Bobby Stephens drove the boat, a 28 foot Scarab, with Appellant and Pat Menillo standing alongside him

throughout (R.2049,2051-2052, 2101, 2103). Bobby Davis remained below with Savoy, but claimed that Appellant also came below to again question Savoy and to order Davis to beat Savoy (R.956-958).

Bobby Davis brought Savoy topside when Bobby Stephens stopped the boat (R.958, 2052-2053). At this point, Bobby Davis' testimony differs radically from Bobby Stephens'. Bobby Davis claimed that he and Pat Menillo stood on either side of Jimmy Savoy with Savoy leaned out over the side of the boat and Appellant behind him. According to Davis, Appellant said "so long, motherfucker", took Davis' gun because he himself was unarmed, and shot Savoy in the back of the head. Davis and Menillo threw the weights overboard and watched Savoy sink (R.959-961).

Bobby Stephens, on the other hand, testified that Davis, Menillo and Appellant were all standing around Savoy when Stephen8 heard a shot. Before the shot, Stephens saw Bobby Davis with Davis' gun. After the shot, when Stephens looked up, he again saw Bobby Davis with the gun. Davis then broke the gun down and threw the pieces overboard. Stephens never saw Appellant with the gun (R.2054-2055, 2123-2124, 962-963).

Stephens drove the boat back to Appellant's house. Appellant asked Stephens to get rid of Savoy's car so Stephens decided to cut it up and dispose of the pieces. Steve Chiappa rented torches and brought them to Stephen8 who cut the car into fifty small pieces which he dumped in various canals. Stephens dumped the large pieces - the engine block, the transmission and

the rear end of the car - about 600 pounds of machinery, in the Johnson Road canal (R.2060, 2057, 2059, 2061, 2104-2105, 964-970, 1789).

In May, 1984, Bobby Davis went to the FBI to work out his deal for testifying against Ray Thompson. In addition to giving numerous, often inconsistent statements, Davis agreed to wear a wire and go see Mr. Thompson in January, 1985, in the hope of eliciting an incriminating statement from him. In that conversation Davis told Appellant that he was asked about Savoy. Appellant asked Davis what he was all excited about and told Davis not to worry, that the police were just shooting in the dark. They then talked about a truck that Davis had borrowed from Appellant, unrelated to the Savoy investigation (R. 2018, 2020, 2024).

Based on Bobby Davis' specific statements to the authorities concerning where in the ocean Savoy's body was left, where the large parts of Savoy's car were dumped, and where the car was torched apart, a widespread investigation for physical evidence was conducted. Bobby Stephens' house was searched, the FBI vacuumed Stephens' garage to test trace evidence, canals were dragged, and pilots and divers searched the pinpointed areas of the ocean for weeks. Notwithstanding this extensive, repeated investigation, no part of Savoy's car was ever found in any canal, the FBI found not even a trace of evidence of Savoy's car in Stephens' garage, nor did the police ever find any trace of the metal chains Savoy was allegedly bound with. Nor has any trace of Savoy's body ever been found (R.1088-1090, 1173, 1289-

1299, 1307-1312, 1328-1340, 1401, 1543-1545, 1814-1817, 1827-1833, 1836-1848, 1849-1853, 1858, 1873-1885, 1887-1890, 2079-2081, 2105, 2138, 2246-2248). Thus, not a single shred of physical evidence was introduced to corroborate Davis' story.

Jewel Woods, Savoy's neighbor at the trailer park testified that she saw Savoy in May, 1982 (R.2262). In addition, Ann Chiappa, a friend of Appellant's and of Jimmy Savoy's, testified that she saw Savoy in late December, 1982 at funeral services for Appellant's seven-year-old son, Charlie Boy, who died when he was hit by a car (R.2320,2322-2323).

QUESTIONS PRESENTED

Whether the trial court erred in denying Appellant's motion for a new trial where the state failed to disclose critical Brady material to the defense?

Whether the trial court erred in allowing extensive testimony of other crimes and bad acts by Appellant which served only to prove his propensity to commit this crime?

Whether the trial court's failure to dismiss the charge8 against Appellant put Appellant in jeopardy twice, in violation of the state and federal constitutions?

Whether the trial court was without jurisdiction over a homicide committed on the high seas?

Whether the trial court erred in overriding the jury's recommendation of life imprisonment where a reasonable basis for that recommendation appears in the record and the facts suggesting the death penalty are not so clear and convincing that reasonable people could not differ?

Whether the death penalty is unconstitutional on its face or as applied in this case?

SUMMARY OF ARGUMENT

As to the trial:

Appellant is entitled to a new trial because the State's failure to disclose critical Brady material - a sworn affidavit of the State's star witness inconsistent with his trial testimony - undermines any confidence in the outcome of Appellant's trial.

Appellant is also entitled to a new trial because the trial court improperly allowed extensive testimony as to bad acts and uncharged crimes to be received in evidence making it likely that the jury may have convicted Appellant of this crime because of inadmissible evidence tending to show his bad character or propensity of other crimes.

Appellant is entitled to a reversal of his conviction and a dismissal of the charge8 against him because this trial violated the constitutional protections against double jeopardy. Appellant's first trial was aborted when a state police witness deliberately violated the trial court's order not to mention other homicides that Appellant was alleged to have committed. Where the government provokes a mistrial to gain an advantage over a defendant, retrial is barred by the double jeopardy clauses of the United States and Florida constitutions.

As to the death sentence:

There was no reason for the trial judge to override the jury's recommendation of life imprisonment. The jury's recommendation is entitled to great weight and the facts relied

on by the trial judge to support the death penalty are not so clear and convincing that reasonable people could not differ.

The death penalty is unconstitutional on its face and as applied in this particular case.

POINT I

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR A NEW TRIAL DUE TO THE STATE'S FAILURE TO DISCLOSE BRADY MATERIAL TO THE DEFENSE

Shortly after his indictment in this case, Appellant filed, on February 12, 1985, a demand for discovery pursuant to Rule 3.220, Fla.R.Crim.P. requesting, inter alia, written or recorded statements, or the substance of oral statements, of any co-defendants, and, any exculpatory evidence, including any written or oral statements of any person. See, R.2984, 3003, 3008, 3322, 3295. And, of course, pursuant to Rule 3.220, after demand by a defendant, the prosecutor must disclose the names, addresses and all statements of every person including co-defendants, known to the prosecutor to have information relevant to the charges, or to any defense. Pursuant to Rule 3.220(f) the prosecutor's obligation is a continuing duty.

On October 23, 1985, the State's star witness, Bobby Davis swore to an affidavit in support of the State's request for the extradition of the co-defendant Scott Errico (R.3324, 3312). That affidavit, although known to the State, clearly discoverable, and certainly within the scope of Appellant's demands for discovery and for Brady material, was never turned over to the defense. It was only discovered after the trial in this case through the efforts of Appellant's trial counsel (R.3327).

In spite of the State's clear breach of the discovery

requirements of the Florida Rules of Criminal Procedure, the trial court simply denied Appellant's motion for a new trial. The court did not conduct the evidentiary hearing mandated by law to determine the cause for the breach, the prejudice to the defense and the appropriate sanctions. Richardson v. State, 246 So.2d 771 (Fla.1971). The failure to comply with Richardson is, of course, per se reversible. Brown v. State, ___ So.2d ___, 12 FLW 577 (Fla. Nov. 12, 1987); State v. Hall, 509 So.2d 1093 (Pla. 1987).

In addition, the prosecutor's obligation is not merely statutory, but is a constitutional duty under the due process clause to produce evidence favorable to the accused, which tends to exculpate him or which tends to indicate bias, interest or inconsistent statements on the part of a witness. Brady v. Maryland, 373 U.S. 83 (1963); United States v. Agurs, 427 U.S. 97 (1976); Giglio v. United States, 405 U.S. 150, 154 (1972); United States v. Bagley, 473 U.S. 667 (1985). Notwithstanding its statutory and constitutional obligation, the State in the instant case failed to disclose to the defense this prior sworn statement of its star witness, Bobby Davis. On that ground, Appellant is entitled to a new trial. Miller v. Wainwright, ___ F.Supp. ___ (Mem.Op. Case No. 83-849-Civ-T-13)(M.D.Fla. Nov. 13, 1987).

In Miller, the State withheld impeachment and exculpatory material from the defense. The evidence withheld in Miller was two police reports; one suggested that the crime was committed at a time other than that sworn to by the eyewitnesses and the other repeated a statement by the main eyewitness that she said she

possibly dreamt the crime. This latter statement was similar to another statement by the same witness that the defense did have available to it at trial. Nevertheless, the federal district court held:

> When guilt or innocence may turn on the reliability of a witness, the state has a duty under Brady to disclose evidence affecting the credibility of the witness. Moore v. Kemp, 809 F.2d 702 (11th Cir. 1987). The State's case rested almost entirely on the credibility of the eyewitnesses. The physical evidence linking Miller and Jent to the crime was negligible. The Court finds that the very real threat to the credibility of one or more of the state's witnesses in this case is sufficient to undermine the Court's confidence in the outcome of petitioners' trials. Moreover, whether the State could attempt to rehabilitate [the eyewitness'] testimony, information that one of the State's key witnesses may have dreamed her testimony is of such an impeaching character that it requires disclosure under Brady. What weight to give [the eyewitness'] prior pre-custody statement is a question for a jury and not this Court.

Mem.Op. at 15.

Similarly, disclosure of the affidavit in this case was essential and the State's failure to disclose it deprived Appellant of a fair trial. The testimony of Bobby Davis was the critical evidence against Appellant, without which Appellant could not have been convicted in this case. No evidence of a body was introduced, no gun was introduced, no confession of Appellant was introduced; no evidence that Appellant shot James Savoy was ever introduced against Appellant other than Bobby Davis' testimony. In view of the critical nature of Davis' testimony, the prejudice to Appellant by the State's failure to turn over the affidavit in question is extreme. That affidavit, when examined in the context of Davis' trial testimony and his other pre-trial statements, sworn and unsworn, reflects directly

on Davis' truthfulness and reliability.

As the United States Supreme Court has said,

> The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend.

Napue v. Illinois, 360 U.S. 264, 269 (1959). As that Court noted in United States v. Bagley, 473 U.S. 667, 676 (1985), impeachment evidence, such as this affidavit, is indeed evidence favorable to an accused under Brady ". . . so that, if disclosed and used effectively, it may make the difference between conviction and acquittal." Therefore, the Court held in Bagley that where there is a "reasonable probability" - one that undermines confidence in the outcome - that if the evidence had been disclosed, the result of the proceeding would have been different, the failure to disclose is reversible error.

That reasonable probability is present in this case, as to a number of issues raised in the affidavit, just as it was found to be present in Miller.

First, in the affidavit, Davis swore that when he heard from Bobby Stephens that Savoy was found at the Cricket Club, that he called Errico and Menillo then. The three of them went to the club that same night and planned and executed the kidnapping of Savoy that same night. According to this affidavit and other of Davis' early statements, the kidnapping of Savoy was accomplished without any involvement by Appellant.

This, of course, directly contradicted Davis' trial testimony on a most critical issue: Appellant was, of course,

sentenced to life imprisonment for this kidnapping of Savoy. Certainly, a sworn inconsistent statement by the State's star witness that established that Appellant was not involved in that kidnapping would obviously be evidence helpful to the defense.

Second, in his affidavit, Davis swore that Appellant told him that Savoy stole about $500,000. The amount of money that Davis said Appellant told him was in the safe Savoy stole became a critical issue of Davis' credibility. At trial, Davis insisted that he had always maintained that the safe contained just over $400,000 (R.949, 1054, 1063, 1069).

There was some contradicted temtimony that Davis previously told Bobby Stephens and an FBI agent that there was $600,000 in the safe (R.1657-1658, 1876, 1893, 1916-1917, 2150). However, that testimony could not be nearly as effective in challenging Davis' credibility as his own sworn inconsistent statement would have been if it had been turned over to the defense as mandated by law. The affidavit would have enhanced the effective cross examination of Davis on yet a third point. In the affidavit Davis swore that he, Stephens, Menillo annd Appellant took Savoy out on the boat. While this was technically consistent with his trial testimony, it was directly inconsistent with his sworn testimony before a federal grand jury and with statements he made on two other occasions as to who was on the boat (R. 1083, 1086-1087). See Miller, Mem.Op. at 14-15. The affidavit would have been additional evidence that Bobby Davis would swear to anything that it was expedient for him to swear to on any given day.

Certainly, this affidavit establishing perjurious statements

by Davis would have enabled the defense to conduct a far more effective cross examination of Davis.*2 Without Davis' prior sworn statement, the defense was unable to fully and effectively establish Davis' motives to lie and his complete lack of credibility. Of course, the defense did argue this point most ardently and skillfully; had the defenre had the benefit of this affidavit to prove that Davis committed perjury, the jury would likely have reached a different conclusion.

In Arango v. State, 497 So.2d 1161 (Fla.1986), this Court reversed the finding of the trial court and ordered a new trial because of a similar due process, Brady violation, In Arango, a pistol was found which supported Arango's claimed defense, but the defense was never advised of its existence. The prosecutor then vouched for the quality of his evidence and demeaned the defense in his closing. This Court held that the suppressed evidence was material and that there was a reasonable probability that had the evidence been disclosed to the defense the rerult of the trial would have been different.

Here, too, the suppressed evidence war material and, as shown above, there is a reasonable probability that had the evidence been disclosed as the law required, the result would have been different. Certainly, there is no legal distinction in

---

2/ Several other statements in the affidavit were also inconsistent, directly or by implication, with Davis' trial testimony and would have enabled the defense to effectively cross examine Davis if the affidavit had been turned over to them as required by law. See, e.g. R.3325, paragraph II compared to 2046-2047 (re Savoy's attempted escape), and 3325, paragraph 16 compared to 956, 1088 (re Davis' ability to pinpoint the location/distance of the boat). See, also, R.3303-3308.

this regard between physical evidence such as the gun in Arango and the impeaching affidavit in this case. See, Boshears v. State, 511 So.2d 721 (Fla.App. 1st DCA 1987); Cipollina v. State, 501 So.2d 2 (Fla.App. 2d DCA 1986); Giglio v. United States, supra, 405 U.S. 150.

As the United States Supreme Court noted in Giglio, where, as here, the reliability of a particular witness may be determinative of guilt or innocence, the Brady rule applies to the nondisclosure of impeaching evidence, to insure a fair trial through full and effective cross-examination. The sixth amendment right to confront witnesses contemplates not just cross-examination, but effective cross-examination where the parties have all discoverable statements of the witness available for use in impeaching the witness'credibility. Davis v. Alaska, 415 U.S. 308, 318 (1974).

In the instant case, Raymond Thompson was deprived of a fair trial. He was denied the opportunity for full, effective cross examination of the State's critical witness against him by reason of the State's refusal to obey the discovery requirements of Florida law and the constitutional requirement of due process. The failure to turn over the October, 1985, affidavit of Bobby Davis, which was material and substantially impeached Davis' credibility, undermines any confidence in the outcome of Appellant's trial. Therefore, Appellant is entitled to a new trial.

POINT II

THE TRIAL COURT ERRED IN PERMITTING THE STATE'S WITNESSES TO TESTIFY TO BAD ACTS OF THE DEFENDANT WHICH MERELY WENT TO HIS PROPENSITY TO COMMIT A CRIME

It is, of course, improper for a jury to base a guilty verdict on the conclusion that the defendant probably committed the crime charged because the evidence showed him to be of bad character or with a propensity toward crime. Straight v. State, 397 So.2d 903, 908 (Fla.1981); Johnson v. State, 432 So.2d 583 (Fla.App. 4th DCA 1983); Weitz v. State, 510 So.2d 1060 (Fla.App. 4th DCA 1987). For that reason, evidence of bad acts or criminal activity which are not charged is inadmissible when its purpose is to show bad character. Florida Statutes, Section 90.404(2)(a).

In this case, the trial court erroneously permitted several witnesses to testify to other crimes and bad acts by Appellant.

A. Testimony of Threats to Savoy and His Family.

Among the uncharged bad acts testified to were that threats were made to various members of the Savoy family, impliedly by Appellant or at Appellant's behest. See R.914-915, 925, 1230-1232, 1473, 1476, 1488, 1492-1494, 1513-1514, 1519. As is obvious from the record, this was not a single, isolated reference, but a continuing course of testimony, all received over Appellant's objection. The overwhelmingly prejudicial nature of this testimony is apparent, yet it served no probative purpose which outweighed its prejudicial nature.

B. Testimony About Witness Protection Programs.

Nor was the testimony of threats the only bad act testimony improperly admitted. The trial court also permitted various

witnesses to testify to the fact that Savoy sought to enter the witness protection program or that the witness himself entered that protection and relocation program (R.828, 831-833, 990, 1182, 1716). This testimony served no legitimate or probative purpose other than to improperly suggest to the jurors that Appellant must be a very frighteningly dangerous man and, therefore, they should believe that he committed this crime. The trial court erred in allowing this evidence in over Appellant's objection.

C. Testimony Regarding Huge Sum8 Of Money.

The State also was permitted to introduce, over Appellant's objection, testimony from several witnesses that they saw Appellant with huge sums of money (R.891, 1688-1689, 1703-1706, 1954, 2033). The State argued that it was necessary to introduce this testimony to show that at the time of the crime Appellant would likely have had $600,000 in a safe for Savoy to steal. However, that was a fact that was never in issue, tangential to the real issues in the case, and, obviously, highly prejudicial. The inescapable conclusion for the jury to reach from this testimony was that Appellant must be engaged in some illegal business to generate that kind of money and, therefore, probably committed this crime as well. Further, this testimony should have been excluded because there was no attempt by the witnesses to restrict their testimony to the time when the theft took place, in or about August, 1981. Rather, over objection, witnesses were allowed to testify to seeing Appellant with lots of cash as early as 1978 and as late as 1982. Clearly, this

testimony was not probative of whether Appellant had cash in 1981; rather, it was highly prejudicial and should have been excluded.

Even if the testimony concerning how much cash Appellant had was arguably admissible, the other testimony regarding huge amounts of money should have been excluded. Over Appellant's objection, Bobby Davis was allowed to testify that the first payment he received from Appellant as an employee was $15,000 (R.887) and that Appellant always paid cash for everything, owned several houses and "all the boats that we used" (R.896). In addition, Bobby Dania (Tippie) testified that he made several hundred thousand dollars working for Appellant (R.1718). This testimony had the unquestionable impact of convincing the jury that Appellant had committed other crimes and bad acts besides the crimes charged. This testimony was an open invitation to the jury to convict Appellant for this crime because he was a terrible person engaged in lots of other criminal acts.

D. Testimony Concerning Alcohol and Drug Abuse.

The effect of this testimony was further exacerbated by all the witnesses' testimony concerning alcohol and drug abuse when they worked for or partied with Appellant, and the guns and other weapons they kept. See, R.1101, 1106, 1152, 1197, 1200, 1206-1207, 1718, 1719, 1955-1958. This testimony, especially when taken with the testimony of cash and boats indicated to the jury that Appellant was a big time drug smuggler and impermissibly allowed the jury to conclude that Appellant probably committed this crime because that's what drug smugglers do.

E Testimony About Other Homicides:

This was not the only evidence of uncharged crimes that was improperly admitted, however. Prior to trial, the state sought permission to use evidence of two other homicides it alleged Appellant committed as Williams rule proof. After extensive argument, the trial court ruled that no such evidence could be introduced. Each of the cooperating, co-defendant witnesses was permitted to say, however, that his plea bargain was contingent on his testifying truthfully in this case and in other cases, without mentioning those cases in detail for Appellant's involvement in them. While such testimony might be ruled innocuous, on its own, it becomes more prejudicial in light of the other evidence of bad acts improperly admitted. Further, the vague description of "other cases" was improperly detailed by several witnesses.

FBI Agent Parrish, who first met Bobby Davis and listened to hi6 story, testified that he told Davis that the FBI doesn't investigate murders, in the plural (R.1640). In addition, Robert Tippie (Bobby Dania) testified that his plea bargain was based on his testifying truthfully in this case and in two other homicides (R.1697). Further, in the tape of the conversation between Appellant and Bobby Davis played for the jury, Davis said to Appellant that police had come to Davis' home asking about the murders, again the plural (R.2018). The trial court denied Appellant's notions for mistrial based on this evidence.

However, the court's denial of the mistrial is inexplicable in view of the fact that it was identical testimony by Agent

Shomers - testimony concerning homicides, in the plural - that the court found warranted a mistrial at the first trial. See, R.752.

* * *

When looked at individually and in its totality, the conclusion is unavoidable that all of this improperly admitted evidence of uncharged crimes may have predisposed the jury to find Appellant guilty of the crime charged. The evidence of bad acts in this case is pervasive, rooted in the prosecution's admitted belief that it would have been perfectly proper to prove an entire drug smuggling operation in this case. See, eg, R.1706.

The State's wishing it so, however, can not make it so. This is not a case like Sims v. State, 444 So.2d 922 (Fla.), cert.denied, 104 S.Ct. 3525 (1983), where a vague and isolated reference by a witness to the defendant's "mug shot' was held to be harmless. By contrast, the evidence of bad acts and uncharged crimes admitted in this case may surely have convinced this jury that Appellant was very likely guilty of serious, substantial, other crimes and, therefore, very likely guilty of this crime as well. A conviction thus obtained violates Appellant's right to a fair trial and due process of law, and should be reversed.

POINT III

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO DISMISS ON DOUBLE JEOPARDY GROUNDS

The double jeopardy clauses of the United States and Florida Constitutions protect a defendant's valuable right to have his trial completed by a particular tribunal. Wade v. Hunter, 336 U.S. 684, 689 (1949). It is for that reason that the double jeopardy clause bars a retrial when the government intentionally provokes a request for a mistrial so as to afford the prosecution a more favorable opportunity to convict the defendant. United States v. DiFrancesco, 449 U.S. 117 (1980); Divans v. California, 434 U.S. 1303 (1977).

In the present case, at the first trial the State's first witness was Special Agent David Shomers of the Florida Department of Law Enforcement, the lead case agent in this case. Although Shomers was instructed to refer only to the Savoy murder case, and not to any other murders, Shomers disregarded that instruction and mentioned "homicides" in plural. That deliberate testimony forced Appellant to move for a mistrial, which was granted (R.751-752, 3117-3121).

The circumstances surrounding this testimony and mistrial establish that this was an intentional act by the State in order to improperly gain an advantage against Appellant once his defense was made manifest. Shomers is, of course, an experienced law enforcement officer knowledgeable about this case. Simply put, Shomers knew better than to have made this kind of "mistake" unintentionally. In addition, the State made no secret of the

fact that they were using the respite they gained by the declaration of the mistrial to prepare the case so as to better meet Appellant's defense (R.753-761, 3121).

Since the state's action intentionally provoked the mistrial in order to obtain a more favorable opportunity to convict Appellant, the double jeopardy clauses of the federal and etate constitutions barred retrial of Appellant. Divans V. California, supra. Therefore, the trial court erred in failing to grant Appellant's notion to dismiss.

POINT IV

THE TRIAL COURT WAS WITHOUT JURISDICTION OVER A HOMICIDE COMMITTED ON THE HIGH SEAS

All the evidence at trial showed that this crime was committed not in Broward County, but on the high seas outside of Florida's territorial jurisdiction. Therefore, under 18 U.S.C. Section 7, the federal government had exclusive jurisdiction to try Appellant for this crime.

Even if Florida had concurrent jurisdiction over this offense under Section 910.005(2), Florida Statutes (1977), this court made it clear in Keen v. State, 504 So.2d 396, 399 (Fla. 1987), that the court must properly instruct the jury that it must find that an essential element of the crime occurred within Florida in order to sustain a conviction in a case of a homicide on the high seas.

There is no such clear finding in the instant case. Instead of the explicit instruction approved in Keen, the trial court in this case merely instructed the jury that the State need only prove, to a reasonable certainty, that the crime was committed in Broward County, Florida (R. 3150). This instruction was clearly insufficient under Keen. It reduced the State's burden considerably by relieving the State of its obligation to prove every essential element of the crime beyond a reasonable doubt, including that some essential element of the crime occurred in Broward County.

Since this erroneous instruction went to the most fundamental issues of the court's jurisdiction and the burden of proof in a criminal case, the error can not be waived or harmless.

POINT V

THE TRIAL COURT ERRED IN OVERRIDING THE JURY'S RECOMMENDATION OF LIFE SENTENCE AND IMPOSING THE DEATH PENALTY

In Tedder v. State, 322 So.2d 908, 910 (Fla.1975), this Court set down the standard for reviewing sentences in capital cases in language that is very apt in this case:

> A jury recommendation under our trifurcated death penalty statute should be given great weight. In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ. That is not the situation here.

On the facts of this case it was improper for the trial court to override the jury's recommendation of a life sentence. Where, as here, there is a reasonable basis in the record to support a jury's recommendation of life, an override is improper. Any valid, mitigating factors which can be discerned from the record that may have been the basis for the jury's recommendation are sufficient. Where the jury could reasonably base its recommendation on these factors, an override is error. Ferry v. State, 507 So.2d 1373, 1376 (Fla.1987); Fead v. State, 512 So.2d 176, 178 (Fla.1987).

There was a full sentencing hearing in this case. The prosecutor was permitted to introduce, over Appellant's objection, the certified copy of a judgment convicting Appellant of rape in 1950, 36 years before the sentencing hearing (R.2688, 2699). The prosecutor introduced no other evidence of aggravating circumstances.

A. The Evidence in Mitigation

The defense presented a number of witnesses in mitigation. Dr. Arthur Stillman, a psychiatrist, testified that he examined Appellant and found him to be suffering organic brain damage as a result of Appellant's extensive use of cocaine, alcohol and other drugs over the previous 5 to 10 years (R.2708, 2713). Dr. Stillman found that Appellant had memory loss; weak concentration; minimal frustration tolerance; limited, juvenile insight and judgment; and could not reason abstractly (R.2709-2712). In all, Dr. Stillman concluded, Appellant's capacity to appreciate the criminality of his conduct at the time of the crime was substantially impaired. Appellant suffered from paranoidal grandiosity, extreme stress which led to two serious heart reactions, and, in March, 1982, was living and acting under severe mental and emotional disturbance (R.2715-2716, 2719).

The evidence of Dr. Stillman alone was sufficient to reasonably be believed by the jury and to be the basis for the jury's recommendation of life. However, there was even more evidence presented in mitigation on which the jury could have, and did, reasonably rely in recommending a life sentence.

Appellant's aged mother and father testified to how Appellant went to work as a youngster to help support them and their younger children during the Depression (R.2781, 2797). They both also told the jury about their grandson, Charlie Boy's, death, and how it devastated Appellant, causing him to leave his life in Florida and move to his parents in Illinois for comfort (R.2782, 2798).

In addition, two of Appellant's sisters testified that Charlie Boy was Appellant's life and that he was devastated by the child's death. They both were aware that Appellannt had a drinking and drug problem; they discovered it in 1981 and it was exacerbated by Charlie's death (R.2826-2827, 2840-2842). Both sisters fear for their parents and for Appellant's stepson, Joey, if Appellant were executed (R.2827-2828, 2840-2841).

Ray Thompson's stepson, Joseph Faliodice, also testified. He was 16 years old at the time and said that Ray raised him the past 14 years and was the only dad he ever knew. Joey was home with Ray when they heard that someone was hit by a car down the street. Together, they went to see the accident and found Charlie, dead. Joey said that his dad got hysterical and was never the same again (R. 2812-2815, 2818).

Joey, who now lives with Appellant's brother, was vaguely aware that his dad had a cocaine habit before Charlie died, though Appellant tried to hide it from Joey. However, after Charlie died, Joey was sure that Ray had an acute drug problem (R.2817-2818, 2819).

On this record, then, both statutory and non-statutory mitigating factors are present. Under Florida Statute Section 921.141 the evidence in the guilt and penalty phases showed that:

First, the victim, James Savoy, was a participant in the Appellant's conduct in that his theft of Appellant's $600,000 set all the events in motion. Savoy was not an innocent victim, as were the victims so thoroughly brutalized in Wasko v. State, 505 So.2d 1314 (Fla.1987); Hansbrough v. State, 509 So.2d 1081

(Fla.1987); Amazon v. State, 487 So.2d 8 (Fla.1986)), and other cases. Yet in each of those cases, this Court reversed the trial judge's override of the jury's recommendation of life, and should do so in this case.

Second, Appellant was under the influence of extreme mental or emotional disturbance, was acting under duress, and, his ability to appreciate the criminality of his conduct was substantially impaired, all due to his drug and medical history, according to Dr. Stillman. As this Court noted in Fead v. State, 512 So.2d 176, 178 (Fla.1987):

> This Court frequently has reversed jury overrides where the jury could have found alcohol or drug abuse as a mitigating circumstance. Huddleston v. State, 475 So.2d 204, 206 (Fla.1985); Cannady v. State, 427 So.2d 723, 731 (Fla.1983); Phippen v. State, 389 So.2d 991, 993 (Fla.1980); Buckrem v. State, 355 So.2d 111, 113-14(Fla.1977). In Amazon v. State, 487 So.2d 8 (Fla.), cert.denied, U.S. ___, 107 S.Ct. 314, 93 L.Ed.2d 288 (1986), for instance, we held improper an override where, among other mitigating factors, there was 'some inconclusive evidence that [appellant] had taken drugs the night of the murders' along with 'stonger' evidence of a drug abuse problem.

Here, too, there was just that kind of evidence that Appellant had a serious drug problem at the time of the crime. Appellant told Dr. Stillman that he was using the enormous amount of at least one ounce of cocaine every two weeks, together with marijuana, quaaludes and ten to twenty drinks of alcohol every day (R.2708-2709). And at the guilt phase, both Bobby Stephens and Bobby Davis testified to their own and to Appellant's drug and alcohol abuse.

Thus, the jury could have reasonably concluded that Appellant acted under duress, extreme emotional or mental

disturbance, or was substantially impaired in his ability to recognize the criminality of his conduct and the trial judge's override of their recommendation was improper.

A third statutory mitigating factor present on this record was Appellant's age at the time of the crime. While the judge refused to consider this as a statutory factor, believing that the statute was meant to apply only to juveniles or the very elderly, the judge did allow this to be argued to the jury. See, Huddleston v. State, 475 So.2d 204, 206 (Fla.1985). Therefore, whether it is a statutory or non-statutory mitigating factor, this jury could have weighed the evidence and reasonably concluded that Appellant's age of fifty-two was a mitigating circumstance. This is especially true in this case in light of Dr. Stillman's evidence that due to his prior drug abuse and his heart condition Appellant's life span has been drastically shortened and he can be expected to live only nine or ten more years (R.2720).

Other, non-statutory mitigating factors established in the record were Appellant's loving and loved status in his family. As a child growing up in the Depression Appellant did without education to help feed his parents and brothers. As an adult he helped to care for his younger siblings and aging parents. Most of all, Appellant was a devoted loving parent to his son and stepson and suffered the incomparable tragedy of losing his young son. These are certainly mitigating factors that the jury was entitled to consider. This jury weighed this evidence, together with all the other evidence, and it could have reasonably been

the basis for its recommendation of life. See, Thompson v. State, 456 So.2d 444 (Fla.1984); Fead v. State, 512 So.2d 176, 179 (Fla.1987). That being the case, the trial judge's override was improper.

Another non-statutory mitigating factor in the record is the disparity of the death penalty to the sentences received by the co-defendants in this case. Bobby Davis received a ten year sentence for murder, Bobby Stephens received a fifteen year sentence for murder and Bobby Sheer and Bobby Tippie both received full immunity. It is, of course, proper for the jury to consider the substantial inequality in the sentences received by the co-defendants, compared to Appellant facing the death penalty. Thus, sentencing inequality is a legitimate basis for a jury to consider. Since this jury undoubtedly considered that in coming to its recommendation of life, that recommendation should not have been overridden. Thompson v. State, 456 So.2d 444 (Fla.1984); Brookings v. State, 495 So.2d 135, 143 (Fla.1986).

Closely related to this factor of sentencing inequality, is the issue of the respective roles of the co-defendants in a homicide. The only testimony that Appellant was the shooter in this case came from Bobby Davis; Bobby Stephens, on the other hand, swore that he only saw the gun in Bobby Davis' hands immediately before and immediately after the shooting, and could not say who shot Savoy.

Certainly, it is perfectly appropriate for a jury to question the relative roles of the co-defendants. It is reasonable to conclude that this jury arrived at the

recornmendation of life in part based on the conflicting, inconclusive evidence of who the shooter was. See, Malloy v. State, 382 So.2d 1190 (Fla.1979); Wasko v. State, 505 So.2d 1314, 1318 (Fla.1987).

On this record, then there was more than ample evidence of statutory and non-statutory mitigatinng factors on which the jury reasonably based its decision to recommend a life sentence. The trial judge should not have overridden that recommendation.

B. The Aggravating Circumstances

The judge's sentencing order in support of his override relied on five aggravating factors. First, the trial judge relied on Appellant's 1950 Illinois conviction for rape, for which Appellant received a three year prison term (R.3340). This so-called aggravating factor, a man's conduct 36 years earlier, ought not serve as a basis for his execution when he is well over 50 years old. That conviction is too remote, as a matter of law and propriety, to justify the electrocution of Appellant.

The second, fourth and fifth aggravating factors outlined by the trial judge are duplicative in that the judge's conclusions rest on the same facts. Those factors asserted by the trial judge were that the crime was committed while Appellant was engaged in the commission of a kidnapping, the crime was especially heinous, atrocious or cruel, and that the crime was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification (R.3341-3343). The facts relied on by the trial judge for finding each of these factors were that Savoy knew he was in trouble as soon as he

stole Appellant's money and so feared for his life from the time of his theft, that Appellant let the word out on the street that he was looking for Savoy, that Appellant kidnapped Savoy and held him overnight, that Appellant told Savoy he would be killed while questioning him, and, that Appellant shot Savoy in the head and Davis threw him overboard.*3 Of course, a trial judge may not use the same essential facts to support more than one aggravating circumstance. Riley v. State, 366 So.2d 19, 21 (Fla.1978); see also, Thomas v. State, 456 So.2d 454, 459 (Fla.1984).

The third aggravating factor asserted by the trial judge was that the crime was committed for pecuniary gain. This aggravating factor is simply not supported by the record. Aggravating circumstances must, of course, be proven beyond a reasonable doubt. Williams v. State, 386 So.2d 538 (Fla.1980); Parker v. State, 458 So.2d 750 (Fla.1984). In this case all the witnesses swore that Appellant wanted revenge; Bobby Tippie testified, in exchange for full immunity, that Appellant said, "I don't give a shit about the money. I just want the son of a bitch dead", when Tippie asked Appellant if he thought he'd get his stolen money back (R.1691).

The evidence in the guilt and sentencing phases simply did not establish that the crime was committed for pecuniary gain. In Phippen v. State, 389 So.2d 991 (Fla. 1980), this Court

---

3/ We cannot know from the general verdict if the jury found all the same facts to be true. The jury may have convicted Appellant on the felony murder theory as an aider and abettor if they found that Davis was indeed the kidnapper and triggerman. Since that would be a reasonable conclusion on this record, it is clearly improper for the trial judge to substitute his view of the facts.

vacated the death sentence imposed by the trial judge overriding the jury's recommendation of life. In Phippen, the defendant shot his mother four times and his stepfather six times after an argument in which his stepfather demanded that the defendant pay a sixty-four dollar bill he had charged to his parents' credit card account. On those facts, this Court held the finding that the murders were committed for pecuniary gain was "patently erroneous," since there was ". . . no evidence that [Phippen] murdered his parents in order to relieve himself of that debt." 389 So.2d at 994.

Similarly, in this case, there is absolutely no evidence that Savoy was killed so that Appellant could collect the debt that Savoy owed to him. On these facts that would be obviously impossible since all the evidence was that Savoy never said where the money was, other than to say it was stolen from him by a prostitute. Therefore, this aggravating circumstance was improperly found.

C. The Jury's Reasonable Basis for Recommending Life

Appellant maintains that all of the aggravating circumstances were improperly found and considered by the trial court. However, even if this Court finds that some aggravating circumstances were properly found, the trial judge's override of the jury's recommendation of life was nonetheless improper.

As shown earlier, there was more than sufficient mitigating evidence in the record on which the jury could have reasonably based its recommendation of life. The mere fact that the trial judge chose to view that evidence in a light different than did

the jury does not establish that the facts suggesting a death sentence are so clear and convincing that reasonable people could not differ. Since that standard of Tedder has not been met, the death sentence must be vacated.

As this Court noted recently in Fead v. State, supra, 512 So.2d at 179, the limited question before this Court is whether a jury of reasonable people, after hearing and weighing all the evidence, could conclude that death was the inappropriate penalty for Appellant. Appellant maintains that they could reasonably so conclude on this record.

The trial judge, however, argued that the jury's conclusion was unreasonably based, not on the evidence, but only on the fact that Appellant was well represented by outstanding trial counsel. It was the contention of the court below that the jury's recommendation of life was based on the emotional appeal of trial counsel. In short, the trial judge seems to suggest that because Appellant was represented by a very skillful lawyer, who did his job perfectly well, that the jurors must have been bamboozled by defense counsel's skill, hoodwinked into betraying their oath to weigh and consider all the evidence, and tricked by mere oratory to put their duty aside and blindly adopt wholesale one lawyer's argument. In this, the trial judge was wrong for several reasons.

First, trial counsel's remarks, although conceededly persuasive, were addressed to legitimate mitigating factors that any jury in a capital case is not only entitled, but obligated, to consider. It is not inappropriate, as the court below

apparently thought, for the sentencing jury to consider the defendant on trial as a human being who is bound to his family and how that family will suffer if he is executed. See, Fead, supra, 512 So.2d at 179; Thompson v. State, 456 So.2d 444, 448 (Fla.1984).

Second, the law is loathe to presume that any jury fails or refuses to follow its instructions. Sound public policy dictates that absent a clear showing on the record of jury misconduct, all juries should be presumed to act in accordance with their oath. Otherwise, the most fundamental protection of the criminal justice system - the jury of one's peers - will be endangered, Surely, if only a trial judge's saying a jury was hoodwinked by eloquence is enough to make it so, and to set aside that jury's determination, then it will not be long before the sanctity of a jury verdict in all criminal cases will be compromised and the constitutional protection of a jury trial will be lost.

Third, the trial judge's assumption that the jury put aside its obligations and was swayed only by trial counsel's eloquence to recommend life is questionable when examined in the context of the entire trial. Appellant readily concedes that his trial counsel was eloquent, persuasive, impassioned and articulate, as the trial judge found (R.3348). In fact, trial counsel exhibited those qualities at every stage of the proceedings in this case. If, as the trial judge contended, counsel's skills were so exceptional as to be the sole basis for the jury's recommendation of life, one is left to wonder why counsel's "uniquely persuasive" skills were not more availing at the time the jury

considered the Appellant's guilt of the crimes charged.

In fact, while it is very true that defense counsel was at all times articulate, effective and persuasive, he was by no means the only persuasive lawyer in this courtroom. The prosecutor at trial, Kelly Hancock, is a nationally known lawyer, having successfully prosecuted such celebrated cases as State v. Roswell Gilbert. An examination of Mr. Hancock's plea to the jury that it recommend death for Appellant reveals that it, to, was a very persuasive, very eloquent, and, in its own way, very emotional closing.

Mr. Hancock reminded the jurors of their oath to follow the law and reminded them that the death penalty was an option of the law. He very persuasively argued the facts of the crime and the aggravating circumstances. Then, Mr. Hancock brought all his authority as an agent of the State to bear when he said that it is usually a difficult and unpleasant decision for the State to recommend the death penalty but that, in this case, the State had no hesitation whatsoever in recommending death (R.2861-2862).

The prosecutor concluded his impassioned plea to the jury for a death recommendation with the very emotional charge that if the jury was concerned about the death penalty they should remember that "someone in this courtroom believed in capital punishment - the defendant when he took Savoy out there." (R.2863).

In short, the prosecutor in this case was equally as persuasive and articulate as defense counsel. It cannot be said that this jury acted in total defiance of its oath and

instructions in adopting one persuasive lawyer's arguments over another's. Rather, it is far more reasonable - and just - to conclude that the jury weighed all the evidence, considered all the arguments of both lawyers and properly discharged its obligations with its fair and reasoned conclusion recommending life imprisonment.

No valid rason exists in this record to justify the trial judge's override of that recommendation or his denigration of the mitigating factors the jury considered. As this Court held in McCaskill v. State, 344 So.2d 1276, 1280 (Fla.1977), "Juries are the conscience of our communities." Their recommendation of life is to be followed unless the facts mandate the death penalty with such clarity and conviction that no reasonable person could differ. The facts in this case do not meet that standard. The override was improper and Appellant's sentence of death must be vacated.

POINT VI

THE DEATH PENALTY PRESCRIBED IN FLORIDA STATUTE SECTION 921.141 IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED IN THIS CASE

Florida's death penalty is unconstitutional. The imposition and carrying out of the death penalty under this statute violates Appellant's constitutional rights to life, privacy and to be free from cruel and unusual punishment. In Furman v. Georgia, 408 U.S. 238 (1972), the United States Supreme Court found the death penalty to be cruel and unusual punishment, in violation of the eighth amendment, due to arbitrariness. Because of the lack of standards to guide juries in deciding on punishment, the Court found the death penalty to be unconstitutional in its operation.

In the instant case the arbitrariness condemned in Furman is present and requires a finding that the death penalty is unconstitutional as applied. Appellant's sentence of death must be vacated.

After Appellant was convicted of the charges in this case, he was tried in federal court on an indictment alleging racketeering, tax, drug smuggling and other charges. See R.3244-3294. One of the predicate acts of racketeering alleged in count II of the indictment was the kidnapping and murder of James Savoy. The other predicate acts alleged in count II were also alleged elsewhere in the indictment as substantive acts. Of the nineteen counts submitted to the jury against Appellant, the jury convicted him of eighteen - every one except the one alleging that Appellant murdered Savoy (R.2916-2918, 2922-2925).

Thus, a federal jury acquitted Appellant of the same conduct

which the State now seeks to electrocute Appellant for. Here two reasonable, disinterested juries have reached two opposite and inconsistent verdicts as to Appellant's guilt or innocence of the murder of James Savoy.

On these particular facts - a case where no body has ever been found in spite of specific directions to the alleged murder site, where none of the heavy metal chains alleged to have been used to drown the victim were ever recovered, where no safe, no money and no gun were ever recovered, where not a trace of Savoy's car parts or paint has ever been recovered, all despite extensive searching by the State, and where one jury has acquitted Appellant of this same homicide - it would be unconstitutionally arbitrary, capricious, and a deprivation of due process and equal protection of the law, to uphold the death sentence. Therefore, Appellant's sentence of death must be vacated.

CONCLUSION

For the reasons set forth above, Appellant's conviction should be REVERSED and the charges against him should be dismissed, or, in the alternative, this Court should order a new trial.

In the alternative, the sentence of death must be REVERSED and a sentence of life imprisonment should be imposed.

Respectfully submitted,

JANE D. FISHMAN, ESQ.
8243 Northwest Eighth Place
Plantation, Florida 33324
(305) 473-2613
Florida Bar No. 300561

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Appellant's Initial Brief has been furnished by mail to Deborah Guller, Assistant Attorney General, Attorney General's Office, 111 Georgia Avenue, Room 204, West Palm Beach, Florida 33401, this 11th day of December, 1987.

By: Jane D. Fishman
JANE D. FISHMAN, ESQ.