SUPREME COURT OF FLORIDA

MARK A. DAVIS

APPELLANT, pro se,

V.

STATE OF FLORIDA

APPELLEE,

CASE NO. 70,551

PRO SE COMPANION BRIEF

ON APPEAL FROM THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT IN AND FOR PINELLAS COUNTY, FLORIDA

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STATEMENT OF THE CASE

THE FOLLOWING SYMBOL WILL BE USED IN THIS BRIEF TO REFER TO THE RECORD (R - PAGE NUMBER)

IN THE EVENING HOURS OF JULY 1, OR EARLY MORNING HOURS OF JULY 2, 1985 ORVILLE LANDIS (HEREINAFTER "LANDIS") WAS MURDERED AND ROBBED, (R - 906) PURSUANT TO AN INVESTIGATION MARK DAVIS (HEREINAFTER EITHER "APPELLANT" OR "DEFANDANT", WAS ARRESTED ON AUG. 6, 1985, IN ILLINOIS (R - 1262) ON SEPT. 18, 1985 APPELLANT WAS INDICTED FOR MURDER IN THE FIRST DEGREE, ROBBERY AND GRAND THEFT, (R-8) APPELLANT PROCEEDED TO TRIAL FROM JANUARY 13, 1987 TO JANUARY 20, 1987. THE JURY FOUND APPELLANT GUILTY OF ALL THREE CHARGES, (R-220), RECOMENDING THE DEATH PENALTY, (R - 1592) ON JANUARY 30, 1987 JUDGE THOMAS PENICK SENTENCED APPELLANT TO DEATH FOR THE FIRST DEGREE MURDER, (R - 1643) THE JUDGE FURTHER ORDERED THAT IF ANY APPELLATE COURT OVERTURNED THE SENTENCE, APPELLANT WOULD BE AUTOMATICALLY SENTENCED TO LIFE IN PRISON WITH 25 MINIMUM MANDATORY YEARS, (R - 1644) FOR THE ROBBERY WITH A WEAPON, THE JUDGE SENTENCED APPELLANT TO LIFE IN PRISON CONSECUTIVE TO THE SENTENCE FOR MURDER, (R - 1643) FOR GRAND THEFT, THE SENTENCE CONSISTED OF 5 YEARS CONSECUTIVE TO THE LIFE SENTENCE FOR THE ROBBERY, (R - 1645) THEREUPON APPELLANT FILED HIS TIMELY NOTICE OF APPEAL TO THE SUPREME COURT, (R - 275)

STATEMENT OF THE FACTS

ON JULY 1, OR JULY 2, 1985, LANDIS WAS MURDERED AND ROBBED. (R-906) ON SEPT. 18, 1985, APPELLANT WAS INDICTED FOR MURDER IN THE FIRST DEGREE, ROBBERY, AND GRAND THEFT. (R-8) APPELLANT PROCEEDED TO A JURY TRIAL FROM JAN. 13, 1987 TO JAN. 20. 1987. THE JURY FOUND DEFANDANT GUILTY OF ALL THREE CHARGES. (R-893-894)

PRE-TRIAL MOTIONS NOT RULED ON BY THE COURT (R-141) (R-156) AT THE COMMENCEMENT OF THE GUILT PHASE APPELLANT REQUESTED THAT THE POWERS PREVIOUSLY GRANTED (R-556-557) TO HIM AS CO-COUNSEL BE UPHELD AND THAT HE BE ALLOWED TO PARTICIPATE IN TRIAL MATTER BY VOICING OBJECTIONS, AND PARTICIPATING IN BAR ARGUMENTS (R-886) TRIAL JUDGE DENIED THIS (R-891-892) SAYING HE WOULD ALLOW ONLY ONE ATTORNEY FROM EACH SIDE (R-891-892) AND APPOINTED APPELLANTS ATTORNEY TO REPRESENT HIM AT SUCH BAR DISCUSSIONS. THE RECORD WILL REFLECT NUMEROUS TIMES THE STATE UTILIZED BOTH MEMBERS OF THEIR PROSECUTION TEAM.

FURTHERMORE DURING THE TIME CHALLENGES FOR CAUSE AND PEREMPTORY CHALLENGES WERE EXERCISED APPELLANTS COUNSEL WAIVED APPELLANTS PRESENCE (R-764) THE RECORD DOES NOT REFLECT THAT THE APPELLANT KNOWINGLY WAIVED HIS RIGHT TO BE PRESENT NOR ACQUIESCED IN HIS COUNSELS ACTIONS ACTIONS.

THE PROSECUTIONS COMMENTS ON THE DEFANDANTS

FAILURE TO TESTIFY (R-1389, 1401, 1404, 1409, 1421) ALSO THE PROSECUTION ELICITED TESTIMONY FROM STATE WITNESSES THAT INADVERTLY PUT DEFANDANTS CHARACTER INTO ISSUE (R- 1118, 1119, 1197, 1198, 1199, 1200, 1204). FURTHER MORE THE PROSECUTIONS COMMENTS ONCE DURING THE QUESTIONING OF A WITNESS BY APPELLANTS COUNSEL (R-1235) AS TO THE APPELLANT NEVER BEING OFFERED A LIFE SENTENCE, ALSO DURING CLOSING THE PROSECUTION COMMENTED ON THE APPELLANTS DOING HIS OWN LEGAL RESEARCH IN THE JAIL CALLING HIM A JAILHOUSE LAWYER (R-1420) AND FURTHERMORE INFERRING UPON THE JURY THAT HIS DEFENSE WAS PLANNED AND THOUGHT OUT IN THE JAIL (R-1420) WHEN TESTIMONY BY LAW ENFORCEMENT SHOWS IT WAS NOT (R-1275).

SUMMARY OF THE ARGUMENT

APPELLANTS GUILT PHASE WAS MARRED BY FIVE ERRORS WHICH DENIED THE APPELLANT A FAIR TRIAL. PRIOR TO TRIAL APPELLANTS PRO SE MOTIONS FOR A PRIVATE INVESTIGATOR AND FOR RETAKING OF DEPOSITIONS WERE NOT RULED ON OR HEARD BY THE COURT, YET THE RECORD REFLECTS THEY RECIEVED THEM, THERE BY DENYING THE APPELLANT MEANINGFUL PRE-TRIAL PREPARATIONS IN HIS DEFENSE.

THE JUDGE WOULD NOT ALLOW THE APPELLANT TO ACT AS CO-COUNSEL AS TO THE POWER GRANTED TO HIM BY NOT ALLOWING APPELLANT TO VOICE HIS OBJECTIONS OR PARTICIPATE IN EXAMINATION THEREBY EFFECTING APPELLANTS DEFENSE. ALSO THE TRIAL JUDGE WENT ONE STEP FURTHER STATING THAT ONLY ONE PERSON FROM EACH SIDE COULD ADVERTLY PARTICIPATE IN TRIAL MATTER AND BAR DISCUSSIONS, THEREBY DENYING THE APPELLANT HIS RIGHT WHICH WAS PREVIOUSLY GRANTED UNDER FLORIDA CONSTITUTION ARTICLE 1, SECTION 16 TO BE HEARD IN PERSON, BY COUNSEL, OR <u>BOTH</u> ... FURTHER MORE THE COURT HEARD AND EXERCISED PEREMPTORY AND CAUSE CHALLENGES IN THE APPELLANTS ABSENCE. DURING THIS TIME ELEVEN OF THE JURY WHO RENDERED VERDICTS WERE SEATED. THE APPELLANTS ABSENCE AT THIS VERY CRITICAL STAGE OF HIS JURY TRIAL, CITING, <u>FRANCIS</u>, IS ERROR. THE RECORD DOES NOT SHOW THAT THE APPELLANT KNOWINGLY WAIVED HIS PRESENCE NOR DOES IT SHOW HE ACQUIESCED IN HIS COUNSELS ACTIONS. APPELLANTS COUNSEL WAIVED HIS PRESENCE AND THE RECORD DOES NOT SHOW ANY CONSENT BY APPELLANT NOR SUBSEQUENT RATIFICATION, FOR HIS COUNSELS ACTIONS.

FURTHER MORE PROSECUTIONS COMMENTS ON THE DEFANDANTS FAILURE TO TESTIFY IS AGAINST HIS FIFTH AMENDMENT RIGHT AFFORDED TO HIM BY THE U.S. CONSTITUTION AND IS A SERIOUS ERROR. IT CANNOT BE ASCERTAINED HOW SUCH COMMENTS INFECTED THE JURY. PROSECUTION ALSO COERCED TESTIMONY FROM A STATE WITNESS THAT PUT APPELLANTS CHARACTER AT ISSUE, THEREBY ALLOWING THE JURY TO DRAW INFERENCES UPON SUCH WHICH WERE NOT AT ISSUE. THE PROSECUTIONS COMMENT DURING EXAMINATION OF A WITNESS BY APPELLANT AS TO THEIR PRE-TRIAL PROCEEDINGS OF NEVER OFFERING A LIFE SENTENCE IS ERROR FOR IT IMPROPERLY LET THE JURY KNOW THEIR FEELINGS AS TO PUNISHMENT AND THIS TOOK PLACE IN THE GUILT PHASE. FURTHERMORE THE PROSECUTION BROUGHT IN FACTS THAT WERE NOT IN EVIDENCE BY TRYING TO MAINTAIN THE APPELLANTS DEFENSE WAS FORMULATED IN THE JAIL AND THAT HE WAS A JAILHOUSE LAWYER, TRUE FACT AS TO THE APPELLANTS THEORY WAS ACTUALLY BROUGHT OUT IN PROSECUTIONS OWN WITNESS FROM LAW ENFORCEMENT THAT THE THEORY WAS A STATEMENT AT THE TIME OF HIS ARREST IN 1985. THEREFORE COUPLED WITH COMMENTS ON HOW APPELLANT WAS DOING HIS OWN RESEARCH WHICH WAS HIS RIGHT AND DUTY AS CO-COUNSEL WAS IMPROPER.

WITH THESE ERRORS OCCURING AT GUILT PHASE THE TRIAL BY JURY WAS MARRED AND IT IS WITHOUT A DOUBT IMPOSSIBLE TO CONCLUDE THE OUTCOME OF THIS TRIAL WAS NOT EFFECTED BY THESE ERRORS. THEREFORE APPELLANT REQUESTS THIS COURT TO REVERSE HIS CONVICTION AND REMAND THE CAUSE FOR NEW TRIAL.

ISSUES ON APPEAL

I. THE TRIAL COURT ERRED IN LIMITING THE SCOPE OF THE DEFANDANTS RIGHT TO ACT AS CO-COUNSEL

II. THE TRIAL COURT ERRED IN HEARING AND RULING ON CHALLENGES IN THE DEFANDANTS ABSENCE

THE RIGHT TO BE PRESENT DURING ALL CRITICAL STAGES ATTACHES TO THE EXERCISE OF CAUSE CHALLENGES IN THE DEFENDANTS ABSENCE

A. UNDER FRANCIS, THE DEFANDANTS ABSENCE AT THIS CRITICAL STAGE OF HIS TRIAL BY JURY CONSTITUTES REVERSIBLE ERROR

III. COMMENTS ON A DEFANDANTS FAILURE TO TESTIFY IS SERIOUS ERROR

ANY COMMENTS BY THE PROSECUTION ON ACCUSED FAILURE TO TESTIFY IS A VIOLATION OF THE U.S. FIFTH AMENDMENT

IV. IT WAS A PROSECUTORIAL ERROR FOR THE STATE TO ELICIT TESTIMONY WHICH PLACED THE DEFANDANTS CHARACTER AT ISSUE

V. IMPROPER COMMENT BY THE PROSECUTOR IS SERIOUS ERROR

THE TRIAL COURT ERRED IN LIMITING THE SCOPE OF THE DEFANDANTS RIGHT TO ACT AS CO-COUNSEL

THE FLORIDA CONSTITUTION IN ARTICLE I, SECTION 16 STATES IN PERTINENT PART THAT A DEFANDANT HAS THE RIGHT TO CONFRONT AT THE TRIAL, ADVERSE WITNESSES, TO BE HEARD IN PERSON, BY COUNCIL, OR BOTH.

AS DISCUSSED ABOVE THE DEFANDANT IN THIS CASE WAS PREVIOUSLY GRANTED THE RIGHT TO BE CO-COUNSEL ON MARCH 12, 1986 (R-123) THE RECORD WILL ALSO REFLECT THAT IN OPEN COURT ON MARCH 12, 1986 (R-556-557) THAT THIS MOTION WAS GRANTED ON THE EXPLICIT GROUNDS OF ACTING AS CO-COUNSEL DURING TRIAL MATTER AND THE RIGHT TO FILE PRO SE MOTIONS FOR ARGUMENT WITH THE COURT.

FURTHERMORE DURING ARGUMENT AT THE BEGINNING OF TRIAL IN THE CASE SUB JUDICE THE DEFANDANT REINSTATED HIS INTENTIONS TO ACT AS CO-COUNSEL (R-886) PREVIOUSLY GRANTED TO HIM, AT THIS TIME THE DEFANDANT STATED HE WOULD LIKE TO BE PRESENT DURING BENCH CONFERENCES TO ARGUE POINTS OF LAW (R-887) THE TRIAL JUDGE AT THE TIME RULED (R-891) THAT ONLY ONE ATTORNEY FROM EACH SIDE WOULD BE ALLOWED TO APPROACH THE BENCH, ALSO STATING THAT THE DEFANDANTS ATTORNEY WILL REPRESENT DEFANDANT AT SUCH CONFERENCES, AND THE SAME DECISION IS CONCEDED BY THE TRIAL JUDGE CONCERNING QUESTIONING AND CROSS EXAMINATIONS OF WITNESSES (R-892) IN ADDITION THE STATE

VOICES THEIR CONCERN AS TO WETHER THE JURY SHOULD HAVE KNOWLEDGE OF THE DEFANDANTS RIGHT TO BE CO-COUNSEL (R-894) THEREFORE THE RECORD REFLECTS (R-904) THAT MR. JAMES COMMENCED OPENING ARGUMENTS FOR THE STATE, MR. JAMES ALSO QUESTIONED THE FIRST TWO WITNESSES PRESENTED BY THE STATE FIRST WITNESS COMMENCING ON (R-908) SECOND WITNESS COMMENCING ON (R-914)... IMEDIATELY FOLLOWING, THE THIRD WITNESS WAS CALLED AND EXAMINATION WAS DONE BY THE SECOND MEMBER OF THE PROSECUTION TEAM (R-916) Ms. McKEOWN. FOLLOWING THAT AT A LATER TIME IN TRIAL (R-1011) MR. JAMES IS ONCE AGAIN ALLOWED TO EXAMINE THE WITNESS AND DURING THAT SAME WITNESSES DIRECT EXAMINATION THE RECORD WILL REFLECT AT (R-1013) MS. McKEOWN ALSO HAD THE WITNESS UNDER EXAMINATION.... ONCE AGAIN ALSO DURING THE EXAMINATION OF THIS SAME WITNESS MR. JAMES IS ONCE AGAIN ALLOWED TO QUESTION THIS SAME WITNESS (R-1016) THE RECORD ALSO REFLECTS (R-1029 - 1030) THAT DURING BAR DISCUSSIONS BOTH ATTORNEYS FOR THE STATE WERE ALLOWED AT THE BAR TO ARGUE LAW.

BRIEFLY WE'RE TRYING TO SHOW AREAS OF EXAMINATION AND RE-DIRECT EXAMINATIONS THAT WERE DONE BY BOTH MEMBERS OF THE PROSECUTION TEAM, EITHER WITH A SINGLE WITNESS OR INDIVIDUAL WITNESSES. WHEREAS THE DEFENSE WAS HELD TO THE TRIAL JUDGES PREVIOUS RULING REFLECTED BY THE RECORD AT (R-892). AREAS OUTLINED HERE ARE REFERRING TO INDIVIDUAL PAGE NUMBERS OF RECORD THAT REFLECT THE AREAS WHERE THE JUDGES RULING WAS VIOLATED BY THE PROSECUTION.

(R-886) MR. JAMES DOES THE OPENING ARGUMENTS FOR THE PROSECUTION FOLLOWING THAT, IN LIGHT OF THE JUDGES RULING MR. JAMES SHOULD HAVE BEEN ACTING ATTORNEY FOR THE PROSECUTION FOR THE DURATION, HOWEVER VIOLATIONS OF THAT RULE START ON (R-916) WHEN Ms. McKEOWN BEGINS QUESTIONING OF A WITNESS... AND THE SWITCHING OF ATTORNEYS BY THE PROSECUTION PROCEEDS THROUGHOUT THE COURSE OF THE TRIAL AT (R-1011), 1013, 1017, 1029, 1030, 1033, 1037, 1057 1164, 1177, 1185, 1257, 1283.) THE RECORD FURTHER SHOWS THAT CLOSING ARGUMENT WAS DONE BY Ms. McKEOWN (R-1386)

THE APPELLANT WOULD ALSO ADD THAT HE WAS DENIED THE RIGHT TO VOICE OBJECTIONS (R-892) AS OUTLINED IN HIS MOTION TO ACT AS CO-COUNSEL. FURTHERMORE THE APPELLANT WISHES TO ADD FURTHER TO THIS COURT THAT MEANINGFUL ACCESS TO THE COURT WAS DENIED HIM BY THE TRIAL COURT SURROUNDING TWO MOTIONS THAT WERE FILED WITH THE COURT AFTER HIS MOTION FOR CO-COUNSEL WAS GRANTED (R-556-557) APPELLANT REQUESTING A HEARING DATE BE SET (R-140) ON HIS MOTION TO HIRE A PRIVATE INVESTIGATOR (R-141), THE TRIAL JUDGE RELAYED THIS MOTION TO THE PUBLIC DEFENDERS WITHOUT ACTION (R-135) BY THE COURT. THE APPELLANT ALSO CHOSE TO EXERCISE HIS RIGHT OF CO-COUNSEL GIVEN TO HIM BY THE COURT IN FILING AN ADDITIONAL, MOTION TO SUPPRESS AND ORDER RETAKING OF DEPOSITIONS (R-156) WHICH WAS CONSEQUENTLY NEVER ARGUED IN OPEN COURT EVEN THOUGH THE RECORD REFLECTS THEM RECEIVING IT.

AS A RESULT THE DEFANDANT WAS DENIED DUE PROCESS

OF LAW AND A FAIR TRIAL, FOR INFORMATION THAT COULD HAVE BEEN OBTAINED BY A PRIVATE INVESTIGATOR WAS DENIED TO HIM, AND THE RIGHT OF BEING CO-COUNSEL AND THE POWERS AFFORDED TO HIM AS CO-COUNSEL (R-556-557) WERE DENIED TO HIM THROUGHOUT THE COURSE OF HIS TRIAL. IT IS IMPOSSIBLE BEYOND A REASONABLE DOUBT TO WEIGH THESE CAUSES AND CONCLUDE THAT IT DID NOT EFFECT THE OUTCOME OF THIS TRIAL, THEREFORE THE APPELLANT ASKS THIS COURT THAT HIS CONVICTION BE REVERSED AND REMANDED FOR NEW TRIAL.

THE TRIAL COURT ERRED IN HEARING AND RULING ON CHALLENGES FOR CAUSE AND PEREMPTORY CHALLENGES IN THE DEFANDANTS ABSENCE

THE RIGHT TO BE PRESENT DURING ALL CRITICAL STAGES ATTACHES TO THE EXERCISE OF CAUSE CHALLENGES AND PEREMPTORY CHALLENGES TO POTENTIAL JURORS

AS DISCUSSED ABOVE, THE SIXTH AMENDMENT RROVIDES THAT "IN ALL CRIMINAL PROSECUTIONS, THE ACCUSED SHALL ENJOY THE RIGHT... TO BE CONFRONTED WITH THE WITNESSES AGAINST HIM" THE CONFRONTATION CLAUSE, WHICH IS APPLICABLE TO THE STATES VIA THE FOURTEENTH AMENDMENT, POINTER V. TEXAS, 380 U.S. 400, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965), ENCOMPASSES THE VERY BASIC RIGHT OF A DEFANDANT TO BE PRESENT AT EVERY CRITICAL STAGE OF HIS TRIAL, LEWIS V. UNITED STATES, 146 U.S. 370, 13 S. Ct. 136, 36 L. Ed 1011 (1892) OR AT EVERY STAGE "WHERE FUNDAMENTAL FAIRNESS MIGHT BE THWARTED BY HIS ABSENCE," FRANCIS V. STATE, 413 So. 2d 1175 (FLA. 1982)

FLORIDA RULE OF CRIMINAL PROCEDURE 3.180 (A)(4) SPECIFICALLY GUARENTEES THE RIGHT OF THE DEFANDANT TO BE PRESENT "AT THE BEGINNING OF THE TRIAL DURING THE EXAMINATION, CHALLENGING, IMPANELING, AND SWEARING OF THE JURY" IN FRANCIS V. STATE, SUPRA, THIS COURT RECONIZED THAT JURY

SELECTION WAS ONE OF THE ESSENTIALS STAGES OF A CRIMINAL TRIAL WHERE A DEFANDANTS PRESENCE IS MANDATED THIS COURT HELD THAT THE EXERCISE OF PEREMPTORY CHALLENGES WAS A CRUCIAL STAGE OF THE PROCEEDING.

> " ~~THE~~ EXERCISE OF PEREMPTORY CHALLENGES HAS BEEN HELD TO BE ESSENTIAL TO THE FAIRNESS OF TRIAL BY JURY AND HAS BEEN DESCRIBED AS ONE OF THE MOST IMPORTANT RIGHTS SECURED TO A DEFANDANT.. IT IS AN ARBITRARY AND CAPRICOUS RIGHT WHICH MUST BE EXERCISED FREELY TO ACCOMPLISH ITS PURPOSE. IT PERMITS REJECTION FOR REAL OR IMAGINED PARTIALITY AND IS OFTEN EXERCISED ON THE BASIS OF SUDDEN IMPRESSIONS AND UNACCOUNTABLE PREJUDICES BASED ONLY ON THE BARE HABITS OR ASSOCIATIONS. IT IS SOMETIMES IRRELAVENT TO LEGAL PROCEEDINGS OR OFFICIAL ACTION, SUCH AS THE RACE, RELIGION, NATIONALITY, OCCUPATIONS OR AFFILIATIONS OF PEOPLE SUMMONED FOR JURY DUTY. FRANCIS V. STATE AT 1178, 1179.

IN FRANCIS, THE DEFANDANT WAS EXCUSED BY THE COURT TO GO TO THE REST ROOM, UPON FRANCIS' RETURN TO THE

COURT ROOM HIS ATTORNEY ACCOMPANIED THE PROSECUTOR THE JUDGE AND COURT REPORTER TO THE JURY ROOM FOR THE EXERCISE OF PEREMPTORY CHALLENGES. THE DEFANDANT HAD NOT GIVEN HIS EXPRESSED CONSENT TO HIS ATTORNEY TO PEREMPTORILY CHALLENGE POTENTIAL JURORS IN HIS ABSENCE. THE RECORD DID NOT AFFIRATIVELY DEMONSTRATE THAT FRANCIS ACQUIESCED IN HIS COUNSELS ACTION UPON HIS COUNSELS RETURN TO THE COURT ROOM FOLLOWING THE EXERCISE OF PEREMPTORY CHALLENGES.

THE COURT HELD THAT THE DEFANDANTS SILENCE WHEN HIS COUNSEL AND THE OTHERS RETIRED TO THE JURY ROOM OR WHEN THEY RETURNED FROM IT, DID NOT CONSTITUTE A WAIVER OF HIS RIGHT TO BE PRESENT. THE COURT FURTHER HELD THAT THE STATE HAD FAILED TO SHOW THAT FRANCIS HAD MADE A KNOWING AND INTELIGENT WAIVER OF HIS RIGHT TO BE PRESENT, CITING, SCHNECKLOTH V. BUSTAMONTE, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed 2d. 854 (1973) AND JOHNSON V. ZERBST, 304 U.S. 4058, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). DETERMING THAT FRANCIS' ABSENCE WAS NOT VOLUNTARY THE COURT REVERSED HIS FIRST DEGREE MURDER CONVICTION, VACATED HIS DEATH SENTENCE, AND REMANDED THE CAUSE FOR NEW TRIAL

NOT ONLY MUST THE DEFANDANT BE ALLOWED TO BE PRESENT TO DISCUSS WITH HIS COUNSER THE EXERCISE OF PEREMPTORY CHALLENGES, BUT HE MUST ALSO BE PRESENT WHEN THE CHALLENGES ARE EXERCISED, WALKER V. STATE,

438 So. 2d 969 (FLA 2 DCA 1983) IN WALKER, THE TRIAL JUDGE, PROSECUTOR, AND DEFENSE ATTORNEY RETIRED TO ANOTHER ROOM, OUT OF THE JURYS PRESENSE, FOR THE EXERCISE OF PEREMPTORY CHALLENGES. DEFENSE COUNSEL CONVEYED TO THE JUDGE THE DEFANDANTS REQUEST THAT HE BE ALLOWED TO BE PRESENT AT THAT TIME, AFTER ASCERTAINING THAT THE DEFANDANT HAD BEEN CONSULTED AS TO THE CHALLENGES, THE JUDGE DENIED THE REQUEST, ON APPEAL, THE WALKER COURT REJECTED THE STATES CONTENTION THAT THE EXERCISE OF PEREMPTORY CHALLENGES WAS A "MECHANICAL FUNCTION" RATHER THAN A CRITICAL STAGE

> "IT MAY INVOLVE THE FORMULATION OF ON-THE-SPOT STRATEGY DECISIONS WHICH MAY BE INFLUENCED BY THE STATE AT THE TIME... ON THE OTHER HAND, THE EXERCISE OF PEREMPTORY CHALLENGES IS "ESSENTIAL TO THE FAIRNESS OF THE TRIAL BY JURY" AND WE CANNOT APPROVE THE ERRONEOUS EXCLUSION OF THE DEFANDANT UNLESS WE ARE SATISFIED BEYOND A REASONABLE DOUBT THAT THE ERROR WAS HARMLESS.

THE WALKER, COURT HELD THAT THE INVOLUNTARY ABSENCE OF THE DEFANDANT WITHOUT WAIVER BY CONSENT OR SUBSEQUENT

RATIFICATION WAS REVERISBLE ERROR, AND THE COURT ORDERED A NEW TRIAL.

FLORIDA RULE OF CRIMINAL PROCEDURE 3.350 LIMITS THE NUMBER OF POTENTIAL JURORS THAT A DEFANDANT MAY EXCUSE PEREMPTORILY. THIS LIMIT MAKES THE CHALLENGE FOR CAUSE THAT MUCH MORE CRITICAL.

IN THE CASE SUB JUDICE THE APPELLANTS COUNSER USED PEREMPTORY CHALLENGES AND CHALLENGES FOR CAUSE IN THE SECURING OF ELEVEN OF THE JURORS WHO RENDERED VERDICTS IN THIS CASE, DURING APPELLANTS ABSENCE.

IT IS CLEAR THAT THE APPELLANT DID NOT WAIVE HIS RIGHT TO BE PRESENT AT THIS CRITICAL STAGE OF HIS TRIAL BY JURY. THE RECORD WILL SHOW AT (R-764) THE WAIVER WAS MADE BY COUNSEL FOR THE APPELLANT, THE RECORD DOES NOT SHOW THAT THE APPELLANT KNOWINGLY WAIVED HIS RIGHT TO BE PRESENT, NOR ACQUIESCED IN HIS COUNSERS ACTIONS. THE APPELLANT WAS ESCORTED BY COURTROOM SECURITY FROM THE COURTROOM FOR THE PURPOSE OF USING THE LAVATORY, IN THE APPELLANTS ABSENCE WITHOUT HIS KNOWLEDGE APPELLANTS ATTORNEY WAIVED HIS RIGHT TO BE PRESENT (R-764) AND PROCEEDED TO EXERCISE PEREMPTORY CHALLENGES AND CHALLENGES FOR CAUSE, WHICH RESULTED IN ELEVEN OF THE ACTUAL JURY MEMBERS WHO RENDERED VERDICTS IN THIS CAUSE.

AS A RESULT, UNDER FLORIDA RULES OF CRIMINAL PROCEDURE 3.180 (A)(4), CITING, FRANCIS V. STATE 413 So. 2d 1175 (FLA. 1982) APPELLANT IS ENTITLED TO HAVE HIS CONVICTION REVERSED AND REMANDED FOR NEW TRIAL.

COMMENTS ON A DEFANDANTS
FAILURE TO TESTIFY IS SERIOUS
ERROR

ANY COMMENT BY PROSECUTION
ON ACCUSED FAILURE TO TESTIFY
IS A VIOLATION OF THE U.S.
FIFTH AMENDMENT

DUE TO THE APPELLANTS MINIMAL ACCESS TO THE WRIT ROOM (LAW LIBRARY) APPELLANT HAS BEEN PERMITTED HE CANNOT PROVIDE LEGAL ARGUMENT TO THESE ISSUES, HOWEVER APPELLANT WILL POINT OUT AREAS OF THE RECORD THAT REFLECT THESE ERRORS.

(R-1388)(LINE 25) " THE DEFANDANT HAS ,, (R-1389) .. THE SAME POWER TO SUBPOENA WITNESSES. IF HE CHOSE HE COULD HAVE CALLED ANY WITNESSES IN HIS BEHALF, SO LET HIM TRY TO HAVE YOU THINK WE'RE HIDING SOMETHING, WE CERTAINLY ARE NOT."

(R-1401)(LINES 13-16) "NOW THERE HAS BEEN NO EVIDENCE IN THIS TRIAL, AT LEAST THAT I HAVE HEARD, THAT THE DEFANDANT BROUGHT THAT KNIFE WITH HIM "

(R-1404)(LINES 11-19) " DID YOU AT ANY POINT IN TIME HEAR MR. WHITE IMPEACH THOSE LADIES ON THE STATEMENTS THIS DEFANDANT MADE TO THEM ? DO YOU THINK FOR ONE MINUTE IF THE DEFANDANT HADN'T MADE THOSE

STATEMENTS AND THEY REPORTED THOSE --- REPORTED THOSE STATEMENTS TO THE POLICE THAT NIGHT ON JULY 2ND WHEN THE MURDER WAS DISCOVERED, DON'T YOU THINK HE WOULD HAVE BEEN STANDING THERE, IMPEACHING, DID THE COPS SAY THIS? HE DIDN'T. HE COULDN'T."

(R-1409)(LINES 5-7) "ONCE HE CONCEDED HE WAS DRINKING, BUT SO WHAT? TO THE EXTENT HE CAN'T TELL YOU, AND I CAN'T SPECULATE".

(R-1421)(LINES 16-21) "ALL OF THOSE STATEMENTS MADE BY THAT DEFENDANT HAVE NOT BEEN CHALLENGED ONCE BY THE DEFENSE IN THIS CASE. THEY HAVEN'T BEEN CHALLENGED BECAUSE THE DEFANDANT MADE HIS INTENT CLEAR ALL DAY LONG AS TO WHAT HE WAS GOING TO DO WITH THE VICTIM IN THIS CASE".

ANY COMMENT WHICH IS FAIRLY SUSCEPTIBLE OF BEING INTERPRETED AS A COMMENT ON SILENCE SHOULD BE TREATED AS SUCH AND THEREFORE THE APPELLANT SHOULD HAVE HIS CONVICTION REVERSED AND REMANDED FOR NEW TRIAL.

IT WAS PROSECUTORIAL ERROR
FOR THE STATE TO ELICIT
TESTIMONY WHICH PLACED
THE DEFANDANTS CHARACTER
AT ISSUE

DUE TO MINIMAL ACCESS TO THE WRIT ROOM (LAW LIBRARY) APPELLANT HAS BEEN PERMITTED HE CANNOT PROVIDE LEGAL ARGUMENT TO THESE ISSUES, HOWEVER APPELLANT WILL POINT TO AREAS OF THE RECORD THAT REFLECT THIS ERROR

(R-1418)(LINE 25) "BUT HE AND THE (R-1419)(LINE 1) DEFANDANT WERE BOTH BIKER TYPES."

(R-1197)(LINE 25) "AND HE ALSO WAS A BIKER, TOLD ME HE WAS (R-1198)(LINE 1).. A BIKER KNEW I HAD A BIKE".

(R-1198)(LINES 21-23) "ONE OF THOSE WINGS BEING CHARLIE WING WHICH IS A VERY CLOSED SECURITY WING FOR HIGH RISK AND VIOLENT PEOPLE___"

(R-1199)(LINES 21-25) "COFFEE IS LIKE CONTRABAND INSIDE THE OTAC TRUSTEES WORK IN THE KITCHEN HAVE ACCESS TO INSTANT COFFEE AND GROUND COFFEE IT WAS SMUGGLED TO OTHER TRUSTEES WHO WOULD DISTRUBE IT. MARK DRANK COFFEE, I WOULD GET HIM COFFEE AND HE WOULD SELL COFFEE ON HIS WING. (R-1200)(LINE 1) THAT WAS A WAY OF MAKING A LITTLE BIT OF MONEY ON THE SIDE IN THERE."

(R-1204)(LINES 13-18) AND CHARLIE WING GOES --- OFF A CHARLIE WING ... THERE ARE OTHER LITTLE WINES, ALL OF THEM PODS. CHARLIE WING IS MOSTLY ALL LOCKDOWN PODS, IN ADDITION TO THE PODS GOING OFF TO THE RIGHT, STRAIGHT DOWN THE HALLWAY ARE SINGLE CELLS WITH THE WHOLE PLACED WALLED, THREE WALLS, LITTLE SHOWER AND COT. MARK WAS MOVED TO ONE OF THOSE CELLS."

THE DEFANDANTS CHARACTER WAS NOT AT ISSUE AND FOR THE JURY TO HAVE HEARD THESE COMMENTS, THUS ENABLING THEM TO DRAW AN INFERENCE UPON THEM CONSTITUTES REVERSIBLE ERROR, THERE THIS COURT SHOULD REVERSE THE CONVICTION AND REMAND FOR NEW TRIAL.

IMPROPER COMMENTS BY
PROSECUTION IS SERIOUS
ERROR

DUE TO THE MINIMAL ACCESS TO THE WRIT ROOM (LAW LIBRARY) APPELLANT HAS BEEN PERMITTED HE CANNOT PROVIDE LEGAL ARGUMENT TO THIS ISSUE, HOWEVER APPELLANT WILL POINT OUT AREAS OF THE RECORD THAT REFLECT ERROR.

(R-1235)(LINES 14-15)... HE WAS NEVER OFFERED LIFE IN PRISON.

(R-1420)(LINES 22-25)" THE FACTS YOU HEARD IS FROM A JAILHOUSE LAWYER. WELL THERE SITS ONE, HE IS BUSY ON HIS DEFENSE IN THIS CASE, DOING HIS LEGAL RESEARCH, LISTENING TO SCUTTLE-BUTT AT THE JAIL TO SEE WHAT DEFENSES WORK, WHAT DEFENSES DIDN'T WORK, TO DECIDE WHATS THE BEST DEFENSE FOR HIM IN THIS CASE. AND WHAT DID HE THINK THE BEST DEFENSE WAS? THE OLD MAN IS A QUEER AND MADE A SEXUAL ADVANCE"!

THE COMMENTS ON THE DEFANDANTS CHARACTER ARE ERROR AND FURTHERMORE THE PROSECUTIONS COMMENTS ON FACTS NOT IN EVIDENCE, (R-1420) AS TO WHAT" HE THOUGHT HIS BEST DEFENSE WAS.... IS ALSO SERIOUS ERROR LETTING

THE JURY DRAW AN INFERENCE THAT THE THEORY WAS FORMULATED IN THE JAIL PRIOR TO TRIAL ... WHEN IN FACT THE RECORD SHOWS AT (R-1275) VIA QUESTIONING BY THE PROSECUTION OF THE WITNESS, THIS THEORY WAS IN FACT A STATEMENT TO LAW ENFORCEMENT AT THE TIME OF HIS ARREST.

THE APPELLANT ASKS THAT IN LIGHT OF THIS ISSUES HIS CONVICTION SHOULD BE REVERSED AND REMANDED FOR NEW TRIAL.

CONCLUSION

IN CONCLUSION OF THE INSTANT CASE THE APPELLANT HOPES AND PRAYS THAT THIS HONORABLE COURT WOULD ACCEPT THE MERITS OF THESE ERRORS AND REVERSE AND REMAND CAUSE FOR NEW TRIAL.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT A TRUE AND CORRECT COPY OF THE FORGOING HAS BEEN FURNISHED BY U.S. MAIL TO ROBERT J. LANDRY, ESQUIRE, ASSISTANT ATTORNEY GENERAL, 1313, TAMPA STREET, EIGHTH FLOOR TAMPA, FLORIDA 33602 THIS 12 DAY OF APRIL 1989.

MARK A. DAVIS PRO SE
APPELLANT

Mark A. Davis

MARK A. DAVIS #106014
FLORIDA STATE PRISON
P.O. BOX 747
STARKE, FLORIDA 32091

NOTE TO CLERK;

THE TOP IS THE ORIGINAL AND ENCLOSED YOU WILL FIND SEVEN ~~ADDITIONAL~~ COPIES OF APPELLANTS "PRO SE COMPANION BRIEF" TOTAL OF EIGHT.

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Thank You
Mark A. Davis

IN THE SUPREME COURT OF FLORIDA

MARK A. DAVIS,

Appellant,

vs.

Case No. 70,551

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE PINELLAS COUNTY CIRCUIT COURT

SUPPLEMENT TO INTITAL BRIEF OF APPELLANT

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SUMMARY OF THE SUPPLEMENTAL ARGUMENT

The guilt phase of the Appellant's trial was marred by the introduction into evidence of photographs marked as State Exhibit No. 11A and the video tape marked as Exhibit No. 13. The photographs and video tape were of such an inflammatory and prejudicial nature that even the most impartial juror's perceptions would be tainted. The introduction of this evidence constitutes a reversible error requiring a new trial.

SUPPLEMENTAL ISSUE ON APPEAL

V. INTRODUCTION OF PHOTOGRAPH EXHIBIT #11-A AND THE VIDEO TAPE CONSTITUTES REVERSIBLE ERROR DUE TO THEIR INFLAMMATORY NATURE

V. INTRODUCTION OF PHOTOGRAPH EXHIBIT #11-A AND THE VIDEO TAPE CONSTITUTES REVERSIBLE ERROR DUE TO THEIR INFLAMMATORY NATURE

During the guilt phase of the trial, the State introduced photographs marked as Exhibits 11A through K (R-1656-1666), which depicted the victim's injuries (R-1105).[1] In addition, the State introduced a video tape Exhibit No. 13, (R1096-1102), which, like the photographs, shows Landis' injuries.[2] Introduction of the video tape and photograph marked Exhibit No. 11A is reversible error due to their inflammatory nature.

A court should receive photographs in evidence with great caution. Beagles v. Florida, 273 So.2d 796 (Fla. 1st DCA 1973). The basic test for determining whether pictures of murder victims should be admitted is relevancy, although necessity may be a consideration when numerous cumulative photographs of gruesome nature are offered. Henninger v. Florida, 251 So.2d 862 (Fla. 1971). Consequently, if there is a choice, less inflammatory pictures should be chosen as evidence over the more gruesome ones. Gould v. Florida, 312 So.2d 225 (Fla. 1st DCA 1975).

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[1]Defendant's counsel objected to photograph Exhibit No. 11A on the grounds it was inflammatory and redundant (R-998).

[2]Defendant's counsel objected to the videotape on the grounds it was inflammatory and redundant (R-1076).

The video tape was a horror movie which defies accurate description in this brief. Initially, the camera focuses on the corpse of the victim who is laying face down on a pool of blood in bed. The camera zeroes in on the examiner's hands as she points out, touches, and runs her fingers over the wounds. Next, the corpse is turned over. The doctor proceeds to examine the gaping neck wounds. At this point, the victim's face looks particularly disturbing, as the right eye is swollen and purple, and the mouth open. In addition, the corpse is bathed with blood which the examiner has to wipe off with her hand to make the injuries more visible. The photograph marked as Exhibit No. 11A depicts the victim's head as described above.

Neither the photograph marked as Exhibit No. 11A nor the video tape should have been shown to the jury due to their inflammatory and prejudicial nature. This error is compounded by the fact that the video tape is merely cumulative since it does nothing but basically present the same images as the photographs. Under Gould, the court should have chosen the less inflammatory photographs over the video instead of permitting a lengthy and repetitive parade of horrors. By itself, introduction of the video tape constitutes reversible error on account of the prejudice it would arouse in any juror's mind. Coupling of the video tape with the photographs truly bombards the jury with gory images surely to taint even the most impartial juror's perceptions.

CONCLUSION

In the instant case, the judge allowed inflammatory and prejudicial photographs together with a video tape of the victim into evidence as State's Exhibits 11A and 13. Under Gould, the Court should have withheld from evidence the more inflammatory photographs, as well as the videotape, and only allow into evidence, if anything, the less inflammatory pictures, As a result of this reversible error, Appellant requests this Court order a new trial,

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished, by U.S. Mail, to ROBERT J. LANDRY, ESQUIRE, Assistant Attorney General, 1313 Tampa Street, Eigth Floor, Tampa, Florida 33602, this 17 day of April, 1989.

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