IN THE SUPREME COURT OF FLORIDA

CASE NUMBER: 73,143

RIGOBERTO SANCHEZ-VELASCO,

Appellant,

vs.

THE STATE OF FLORIDA

Appellee

****

ON APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT, CRIMINIAL DIVISION IN AND FOR DADE COUNTY, FLORIDA

HONORABLE ALLEN KORNBLUM

****

INITIAL BRIEF OF APPELLANT

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INTRODUCTION

This is a direct Appeal from a judgment of guilt and sentence of death in the trial court (lower tribunal). The Appellant, Rigoberto Sanchez-Velasco, was the Defendant and the Appellee, the State of Florida was the Plaintiff in the lower tribunal.

In this brief the Appellant will be referred to variously by name, as the Appellant, or as the Defendant. The Appellee will be variously referred to as the prosecution, the prosecutor, or the State.

The symbol "TR" will designate references to the transcript of the trial, evidentiary hearings, or sentencing hearing. The symbol "R" will designate references to the Record on Appeal.

STATEMENT OF THE CASE

A four count indictment was filed on January 13, 1987, charging Rigoberto Sanchez Velasco with first degree murder, and sexual battery on Katixa Encenarro (hereafter referred to as Kathy), strong arm robbery and burglary. (R 1-3a)

The office of the Public Defender was appointed to represent Mr. Sanchez, and he was arraigned on January 16, 1987, apparently standing mute to the charges.[1]

A Motion by the State to order the Defendant to submit blood, hair and saliva samples was filed on January 26, 1987. (R 29-30).

On or about January 12, 1988, the Public Defender declared a conflict of interest. The court discharged the Public Defender and appointed private counsel. (See docket sheet attached to this brief).

A defense Motion to Preclude the Systematic Use of Peremptory Challenges and Challenges for Cause to Prospective Jurors Who Express their Objection to the Imposition of the Death Penalty was filed on March 14, 1988. (R 85) The Court denied the Motion on March 22, 1988. (R 86)

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[1] These items have not been included in the Record. In fact the entire docket sheet was not included. Also missing from Appellant's copy of the Record were the title sheet, the entire table of contents, and the official numbering of the transcript. Undersigned counsel, in the interest of time and justice has collected the missing items to expedite this appeal rather than moving the Court for their production. The docket sheet is attached as an Appendix to assist the Court.

A Motion to Suppress Oral and Written Admissions, Statements and Alleged Confessions was filed on March 18, 1988. (R 87-93) This Motion was denied on August 3, 1988. (TR 272)

Trial by jury was held on August 8-12, and August 16-19, 1988. (TR 553-2529) The jury returned verdicts of guilty as charged to first degree murder and sexual battery. They found the Defendant guilty of grand theft, a lesser included charge in Count III strong arm robbery, and they found the Defendant not guilty as to Count IV, burglary. (R 233-237)

The Advisory Sentencing Hearing was held on August 19, 1988. (TR 2530-2899) The jury returned an advisory verdict of death, by a vote of 8-4. (TR 2803)

Sentencing was held on September 23, 1988. The Defendant was adjudicated guilty on Counts I, II, and III of the Indictment. The Court sentenced the Defendant to be put to death for murder; to life imprisonment for sexual battery, to five years in State Prison for grand theft, each if these sentences to be consecutive. (TR 2896-97)

Motion for New Trial was filed on August 26, 1988. (TR 256-259) and denied on September 23, 1988. (TR 2813)

Notice of Appeal was timely filed on September 30, 1988. (R 261) Undersigned counsel was appointed as Special Public Defender to represent Appellant in this appeal. (R 260)

STATEMENTS OF THE FACTS

In the early morning hours of December 13, 1986, the Hialeah Police were called to the apartment of Maria Molina. (TR 1422) Ms. Molina's eleven (11) year old daughter, Kathy, had been found dead when Ms. Molina returned home around 3 a.m. (TR 1425) Three people had one or both keys to the locks on the apartment door; Ms. Molina; the Defendant, Rigoberto Sanchez Velasco, who was living at the apartment: and an ex-roommate named Marlene. (TR 1445) Ms. Molina and Mr. Sanchez were lovers. (TR 1447, 1449)

Ms. Molina worked the evening shift in a cafeteria. On the night of December 12, 1986, Kathy was left at home watching television. She was left in the care of Mr. Sanchez with orders for Kathy to go to the apartment of a neighbor, Maria Ramos Gonzalez, later in the evening. (TR 1451) Ms. Molina learned in telephone conversations with Mr. Sanchez that Kathy had stayed in her own apartment and gone to sleep. When Ms. Molina returned she found her deceased daughter alone in the apartment. (TR 1463) A fur coast was missing. Jewelry which Kathy had earlier been wearing was also missing. (TR 1467)

Ms. Molina's former husband, who was Kathy's father and his new wife resided in the Miami area and Kathy lived in her father's custody while Ms. Molina and another daughter spent a year in jail for conspiracy to traffic in marijuana. (TR 1485-86, 1488)

The neighbor, Maria Ramos Gonzalez, had been a girlfriend of the Defendant at one time. Ms. Gonzalez lived with Alexis Ramos, who at one time had been the boyfriend of Ms. Molina and who had previously violently attacked Ms. Molina (TR **1516-17).**

The next evening police officers went looking for Mr. Sanchez at various addresses of friends learned through Ms. Molina. They did not find him but left word to contact the officers if he showed up. (TR **1612-1615)**

A friend of Sanchez named Gilberto, telephoned the lead detective, John Gonzalez, twice to set up a place where the officers could confront Mr. Sanchez. Detectives moved in on a hotel in Miami Beach, (TR **1617)** (This hotel was far from the jurisdiction of the Hialeah Police.)

The Defendant was in a car with three other people. All were ordered out of the car at gun point. (TR **1619)**

The Defendant was placed under arrest allegedly for the theft of a stereo from his friend Gilberto. (TR **416)** A few minutes later the Defendant was "unarrested" but was not free to leave according to the officers. (TR **424)**

The Defendant was removed to the Hialeah Police Department. He made various statements in the car on the way to the station and made a detailed recorded statement at the police station regarding the murder. (TR **1637-1640)** These oral and recorded statements were the subject of a Motion to Suppress which was denied by the Court below. (TR **1623)** The taped

statement given in Spanish was played for the jury during the trial. The jurors were also given an English transcript of the statement. (TR **1641)** Mr. Sanchez allegedly led police officers to another area where the jewelry belonging to the murder victim was supposed to be. No jewelry was recovered. (TR **1625)**

During the playing of the tape at trial, Mr. Sanchez interrupted the trial proceedings by speaking out in English regarding his feelings against the police detective's testimony. (TR **1628-29)** The Court ordered a psychiatric evaluation of the Defendant. (TR **1689)** The defense moved for a mistrial which was denied. (TR **1696)**

At the inception of the trial, perspective jurors were voir dired initially from a list of printed questions prepared by the Court and handed to each juror to read and answer orally.

The defense objected to question 13 which asked:

At TR **560**

> Do you have any philosophical, or religious or conscious scruples against the infliction of the death penalty in a proper case?

The Court overruled the defense objection which had as its basis lack of conformity with standards set by the United States Supreme Court. Each juror read the question and answered it.

Later, during jury selection all jurors, who had opposition philosophically to the death penalty were excused for cause. (TR **1082, 1095, 1099, 1146)**

After a jury panel was accepted by both sides and while alternates were being chosen, the Court reopened the twelve seat panel for back-striking and reverted to the original peremptory challenges for use on the alternates. Defendant objected (TR 1135-36, 1142,1148)

During the trial, expert testimony was received regarding sperm cells gathered from the vagina of the victim which were consistent with the blood type of the Defendant (TR 2019) but also consistent with 34% of the male population. (TR 2092) A hair retrieved from the buttocks of the victim was consistent with the pubic hair of the Defendant taken by sample from the Defendant. (TR 2035) PGM factors in the sperm, which narrows the comparison, could not be identified in the sperm gathered from the victim. (TR 2020, 2047)

The Medical Examiner's testimony placed the victim's death between the hours of 6 p.m. and midnight on December 12, 1986. (TR 2074) Cause of death was stipulated to as strangulation. The stipulation by State and Defense also stated that the sexual battery occurred prior to the victim's death. The Medical Examiner could not testify with complete certainty as to what item was used to strangle the victim. (TR 2124)

The defense presented no evidence or testimony. (TR 2214)

The jury returned verdicts of guilty as to murder in the first degree, sexual battery and grand theft (as a lesser included offense of strong arm robbery). The jurors found the

Defendant not guilty of burglary. (TR **2507-08)**

The sentencing phase commenced with testimony again by the Medical Examiner who stated that the victim died a "slow death" over a period of three-five **(3-5)** minutes. (TR **2606-08)** The possibility that the victim had fainted or lost consciousness was also raised and the doctor affirmed that possibility. (TR **2611)**

Dr. Haber, a psychologist testified for the defense that the murder did not appear to be a planned **or** organized event (TR **2661)** and that the Defendant appeared emotionally disturbed. (TR **2664)** The doctor summarized his findings at TR **2666:**

> There are many adjectives that 1 would use, but it's not--it does not reflect organized thinking, good planning, premeditation type things. It seem like an impulsive, violent outburst of a person tainted with some disorder. This is just not normal. That's the only way I can put it.
>
> Q. Someone who perhaps is impaired but not impaired to the point where he meets the legal test of insanity?
>
> A. I'd say that's a fair way to put it.

The Defendant, against the advice of counsel, elected to address the jury himself in a rambling statement in which he informed them that he had been previously convicted of three non-violent crimes. (TR **2705-2736)**

The State relied on two aggravating circumstances: that a sexual battery was committed during the commission of the homicide, and that the murder was especially heinous atrocious or cruel. (TR 2541) Defendant requested that because of the vague

nature of the definitions of these terms, that the jury not be allowed to consider whether the murder was especially heinous, atrocious, or cruel. The Court denied the defense request. (TR 2551, 2556) The defense highlighted two mitigating circumstances: that the crime was committed while the Defendant was under the influence of extreme mental or emotional disturbance, and that the capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. (TR 2791)

The jury recommended a sentence of death by a vote of 8-4. (TR 2803) The Court sentenced Mr. Sanchez to the death penalty on September 23, 1988. (TR 2897)

SUMMARY OF ARGUMENT

The Defendant was illegally arrested by police officers outside their own jurisdiction, witout probable cause, for the felony of grand theft allegedly committed days earlier. The officer "unarrested" the Defendant by removing his handcuffs. However, he remained in a detained status for questioning regarding a murder. There was no probable cause at that time for an arrest for the murder. He was then transported to the Hialeah Police Department without being Mirandized. He made statements during the ride to the station, was finally Mirandized at the station and gave a recorded statement. All of these statements should have been suppressed as having been the product of the illegal arrest.

At trial all potential jurors were asked an inappropriate question regarding their own philisophical view of the death penalty. All jurors with death scruples were eliminated for cause as jurors. The Court changed its jury selection procedure at the point when a panel had been tendered by both sides, and then literally began the selection process anew at a point where the Defendant had one remaining peremptory challenge.

The Court failed to order a mistrial after a psychotic outburst by the Defendant. The Court erroneously sentenced the Defendant to the death penalty after giving improper consideration to an aggravating statutory factor which was not

supported by the evidence, giving consideration to a non-statutory aggravating factor, and failing to find two appropriate mitigating factors.

The judgment and sentence must be vacated and the cause remanded for a new trial.

ARGUMENT
THE GUILT PHASE

I. THE COURT ERRED IN DENYING THE MOTION TO SUPPRESS CONFESSIONS ADMISSIONS AND STATEMENTS.

Hialeah Police came to Miami Beach to find the Defendant on the day after the murder. They had asked the Defendant's friend and roommate, Gilberto Estrada, to let them know if he heard from the Defendant. (TR 452).

Estrada called one of the officers and stated that the Defendant had moved out of his house and had taken Estrada's stereo with him. (TR 348) In a second telephone call, Estrada told a Hialeah officer that the Defendant would be arriving at a particular address. (TR 350) This address was located in the jurisdiction of a different police dept, Metro Dade Police. (TR 356).

Four or more detectives in plain clothes, and unmarked vehicles, but wearing plastic ID badges, and with guns drawn approached the car in which the Defendant was one of four occupants. (TR 351-352). All of the occupants were ordered out of the car. Each was subjected to a patdown search. (TR 411)

At the time of this confrontation, according to testimony of the officers, they considered the Defendant either a suspect or a witness in the murder investigation. (TR 393). In fact, the lead officer stated that he considered anyone who knew the victim to be a suspect. (TR 3940)

The lead officer further stated that he planned to talk

to the Defendant, and then to arrest him for the felony of grand theft of Estrada's stereo. (TR **401)** Estrada had never called the police to report the theft of his stereo. He never told these Hialeah Police Officers that he wished to file charges against the Defendant. (TR **408)**

The officers placed handcuffs on the Defendant and arrested him. (TR **416)** The record does not reflect whether the Defendant was told what he was arrested for, but the arresting officer testified that the officers had <u>not</u> arrested the Defendant for murder, and had arrested him for grand theft. (TR **416)**

The officers learned that the stereo was valued at under $300. They called the office of the state attorney and were advised that they had no basis for the grand theft arrest. The officer's testimony in the pre-trial suppression hearing clearly states that the police, "did not have enough to arrest the Defendant for grand theft or probable cause to arrest him for murder." (TR **420-21)**

The lead officer stated it was his own belief that the Defendant was guilty of murder. (TR **416)**

Thus, the Defendant was "unhandcuffed", but was definitely not free to leave. Both testifying officers agree that he was still being detained. "I wouldn't have allowed him to leave.: (TR **424)** And at TR **408:**

Q **A** decision was made to quote, unarrest him?

A That's right.

Q The handcuffs were taken off?

A Yes.

Q Now, was Rigoberto Sanchez-Velasco at that time free to leave?

A No, he wasn't.

Q Did you read him Miranda, knowing that he wasn't free to leave?

A No.

Q Did you have a Miranda card with you?

A Probably.

The Defendant was then told that the police were investigating a case involving Kathy Encenarro and asked if he would talk to them. The Defendant allegedly replied by saying he would talk to them in Hialeah. (TR 456) Although the Defendant was continuously under detention by the officers from the time he got out of the car, he was never read Miranda Rights until he was brought to the Hialeah Police Station.

During the time he was in the police car being transported to the station, with three officers in the car, (TR 1748) the Defendant allegedly made incriminating statements including information regarding jewelry taken from the murder victim. The officers were led by the Defendant to another location (also outside of their jurisdiction) where this jewelry was to be found. No jewelry was recovered. During all of that time, no Miranda warnings were given, (TR 422) and the officers allege that they asked the Defendant no questions, but sat silently in their car (TR 427).

At the police station, Miranda Rights were read. Two statements were taken from the Defendant; one unrecorded and one recorded.

The lower tribunal, in its oral order denying Defendant's Motion to Suppress his statements, made a finding that the statements were all voluntarily made; that the Defendant voluntarily entered the police car and went to the Hialeah Police Station of his own volition, even though the Defendant was not free to leave and was detained (TR 541); that there was probable cause to arrest for grand theft and probable cause to arrest for murder, in spite of the officers' own realization that they had no probable cause to arrest for either charge. (TR 533) No finding was made on the record as to whether the arrest was valid outside the officers' jurisdiction, or whether the chain from an invalid arrest was broken by merely uncuffing the arrestee.

The Court below erred in its findings and missed several important points which, if addressed, would lead a reasonable jurist to order suppression of both the informal and recorded statements.

A. THE ARREST OUTSIDE THE OFFICERS'JURISDICTION.

The leading case, Phoenix v. State, 455 So.2d 1024 (Fla. 1984), sets the standard for validity of arrests made by "foreign" police. Officers outside their own jurisdiction are accorded a common law right to make the same arrest a citizen may make. The officer must observe the commission of a felony, or

must have probable cause to believe and does believe the person arrested is guilty of a felony.

In the instant case, the officers on advice of the State Attorney, realized that they did not have probable cause for a felony arrest for grand theft. They had a receipt for the value of a stereo of $180, and they had a non-victim, a friend who made no report of this alleged theft which had occurred many days prior and who did not wish to prosecute. The officers also realized that they did not have probable cause for an arrest of the Defendant for murder. Their fact finding at this early time consisted of knowledge that the Defendant may have been the last known person to see the victim and that he had keys to the victim's apartment.[2]

[2] It is reasonable to believe that with probable cause for murder, experienced officers would have hastened to get an arrest warrant.

Without probable cause for either arrest, the arrest is invalid. Even if the arrest is valid, Phoenix states that officers, acting as citizens, cannot assert their official position for any purpose other than making the arrests. They cannot misuse the powers of their office to do more than a citizen could do. In the instant case, the officers had a purpose far beyond the Defendant's arrest. They wanted to interview Rigoberto Sanchez about the murder, and they told him that. He was not free to leave even after being uncuffed. Citizens cannot detain other citizens and question them about crimes. This was no simple arrest situation! Under Phoenix, this was an invalid arrest.

B. THE LACK OF A BREAK BETWEEN THE ILLEGAL ARREST AND THE CONFESSION.

Wong Sun v. United States, **371** U.S 771, 83 S.Ct. 407, **9** L.Ed 2d 441 **(1963),** provides that all evidence flowing from a tainted detention must be suppressed. Taking a person into custody on less than probable cause for arrest is a violation of the Fourth Amendment of the United States Constitution. Confessions obtained during such detention are inadmissible even if the Fifth Amendment is complied with by use of Miranda Rights, unless there has been a sufficient break between the illegal arrest and the confession. The burden to show there was such a break lies with the prosecution. Dunaway v. New York, 442 U.S. 200, **99** S.Ct. 2248, **60** L.Ed.2d 824 **(1979).**

In the instant case, once the Defendant was ordered from the car, he was never free again from his custodial status. The testimony of every officer stated that cuffed or uncuffed, he was never free to leave the officers' custody. The prosecution failed to establish *any* break with the original arrest. The test to be used is whether a reasonable person would have concluded that he was free to leave. Michigan V. Chesternut **486** U.S. _____, **108** S.Ct. **1975, 100** L.Ed.2d. **565 (1988).** The police officers in this situation knew that Sanchez could not leave. They obviously imparted this to Sanchez.

C. THE FINDING THAT THE DEFENDANT VOLUNTARILY WENT WITH THE POLICE OFFICERS.

The finding of the lower tribunal that Sanchez voluntarily accompanied the officers to the station is based on the substance of the recorded statement of the Defendant. The Court made a finding concerning credibility of the officers based on portions of the Defendant's statement in which he said that he had contemplated suicide and had thought of calling the police. (TR 531) Neither of these remarks corroborates the police contentions. More importantly, the Court is precluded from such "bootstrapping". The translated statement of the Defendant was entered into evidence for a limited purpose in the pre-trial hearing; to show that portion where Miranda Rights were read and discussed, and not for the substance or content of the entire statement. (TR 377)

What is at issue in a Motion to Suppress Hearing is not whether the substance of the statement made is credible, but whether it was given voluntarily, and/or not derived through a chain of illegal procedures.

The fact that a statement is made voluntarily with Fifth Amendment protection by use of Miranda warnings is not in and of itself enough to purge the taint of an illegal arrest. Lanier v. South Carolina, 474 U.S. 25, 106 S.Ct. 297, 88 L. Ed.2d. 23 (1985).

In summary, without the confession and oral statements, the remaining circumstantial evidence leaves many reasonable doubts. The hair sample and semen sample while consistent with the samples taken from the Defendant do not pinpoint the Defendant as the perpetrator. (See facts of the Case)

The officers had no probable cause to arrest Rigoberto Sanchez. Even though they may have removed his handcuffs, they never released him from custody. Therefore, there was a continuous chain stemming from his illegal arrest. The officers exercised their police powers of custodial investigation outside of their jurisdiction, compounding the reasons the arrest was illegal. Finally, the Court made findings based on facts not in evidence and beyond the scope of the pre-trial hearing. Statements of the Defendant which should have been suppressed were admitted at his trial. This Court should overturn the guilty verdict and remand this case for a new trial.

II. ERRORS COMMITTED DURING JURY SELECTION WERE SO EGREGIOUS AS TO CAUSE REVERSAL AND REMAND FOR A *NEW* TRIAL.

A. THE COURT ERRED IN OVERRULING DEFENDANT'S OBJECTION TO A "DEATH QUALIFIED" JURY; THE COURT ERRED IN PERMITTING THE STATE TO STRIKE FOR CAUSE ALL PROSPECTIVE JURORS WHO EXPRESSED OPPOSITION TO THE DEATH PENALTY; THE COURT USED AN IMPROPER BASIS FOR QUESTIONING JURORS REGARDING THEIR FEELINGS ABOUT THE DEATH PENALTY.

Mr. Sanchez was entitled to a jury which is neutral with respect to guilt; the right to an impartial jury is guaranteed by the Sixth Amendment to the Constitution and the fundamental right to due process under the Fourteenth Amendment. Lurner v. Louisiana, 379 U.S. 466, 85 S.Ct. 596,13 L.Ed.2d 424 (1965).

The exclusion of all jurors who are opposed by their own philosophy to the death penalty produces a jury which is biased in favor of conviction. In Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770,20 L.Ed.2d. 776 (1968), the Court held that a jury which is limited to those who had no objections to the death penalty produced a jury "uncommonly willing to condemn a man to die." Id. at 521.

Whether this bias carries over into willingness to find guilt has been the subject of numberous studies.[3] The studies concur that a jury which excludes those who could not impose the death penalty is likely to be conviction prone.

The question then becomes one of whether exclusion of an entire segment of the population from jury duty in capital cases, that is those who generally object to the death penalty, can ever insure the accused of an impartial jury of his peers drawn from a cross-section of the community. Common sense indicates that this would not be an impartial jury under Adams v. Texas, 448 U.S. 38,100S.Ct.2521,65 L.Ed.2d 581 (1970). (Exclusion of jurors who would not state that mandatory death would not affect their deliberations on any issue of fact was held improper.)

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[3] Goldberg, Toward Expansion of Witherspoon: Capital Scruples, Jury Bias, and Use of Psychological Data to Release Presumptions in the Law, 5, Harv. Civ. Right-Civ.Lib.L.Rev. 53 (1970); Bronson, On the Conviction Proneness and Representativeness of the Death Qualified Jury: An Empirical Study of Colorado Veniremen, 42 U.ColoL.Rev. 1 (1970); White, The Constitutional Invalidity of Convictions Imposed by Death-Qualified Juries, 58 Cornell L.Rev. 1176(1973); Jurow, New Data on the Effect of a "Death-Qualified" Jury on the Guilt Determination Process, 84 Harv.L.Rev. 567 (1971) Zeisel, Some Data on Juror Attitudes Toward Capital Punishment (1968).

If we were to adhere to the same standard for the election or appointment of judicial candidates to the bench, we would eliminate some eminently qualified judges. The citizenry would be making a prejudgment that a judge who is himself philisophically and morally opposed to the death penalty could never enforce it.

No clearer example can be drawn than in the case at bar. In the Court's final sentencing order (at R. 252) the Court states its own opposition to the death penalty:

> Though the Court concurs with the advisory sentence and recommendation of the jury, in so doing the Court does not agree that it is ever appropriate for the State to kill a human being. If there was any other way for society to be forever protected from someone like Rigoberto Sanchez-Velasco it certainly would be preferred over the death penalty.
>
> Though there is certainly much biblical precedent for the death penalty, and though a majority of people favor the death penalty, this Court deems it inappropriate for a civilized society to deliberately kill any human being.

The Court erred in allowing the removal for cause of all perspective jurors who shared the same general feelings that the Court held.

The error began by the Court asking each potential juror an inappropriate question, objected to by Appellant:

> Do you have any philisophical, moral, religious or conscientious scruples againt the infliction of the death penalty in a proper case?

The appropriate question to be posed to potential jurors in capital cases is clearly articulated in Wainwright v. Witt, 469 **U.S.412,105** S.Ct. **844,83** L.Ed2d **841 (1985):** "Would the juror's views on capital punishment prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oaths?"

There is a fine line between the infringement of an accused's right under the Sixth and Fourteenth Amendment to trial by an impartial jury and the State's right to exclude jurors" who would frustrate administration of the State's death penalty scheme" Witherspoon supra. However, in the case at bar, the jurors had planted in their minds from the outset that the questions regarding the death penalty had to do with their own philosophy, morals, or religion. No attempt was ever made to erase that idea and supplant it with the correct standard from Wainwright.

Counsel for Mr. Sanchez tried to show the Court this standard, but the State insisted the question as posed was proper:

At TR **561-63**

THE COURT: As long as this question is in the conformity with Witt and Witherspoon, that's the way it will be.

MR. HIRSCHHORN: I don't think Witt uses the philosophical.

MR. MENDELSON: It says any reason.

THE COURT: You have any objection if we take it out, the word philosophical?

MR. HIRSCHHORN: I object to death qualifying juries anyway.

THE COURT: I want to know if the State would object to deleting any portion of that question?

MR. MENDELSON: Yes, Judge, we would object to taking out philosophical.

THE COURT: Your (sic) satisfied it's in accordance with the Supreme Court cases?

MR. CORNELY: Witherspoon followed and adopted by Witt, Judge.

THE COURT: Mr. Hirschhorn's objection is noted.

MR. HIRSCHHORN: I do have a copy of Witt in here and I don't see in here--

MR. MENDELSON: They might not say specifically philophical. They say if the juror has any reason why they cannot properly follow the Court's instructions when it comes to the death penalty issue, it should be stricken for cause, any reason would include a philosophical reason.

THE COURT: All right.

Then it`s going to be given as it is and the Defense is--

MR. HIRSCHHORN: Judge, that standard is, the test is at 105 Supreme Court 852 riding from Wainwright versus Witt, quote, "We therefore take this opportunity to clarify our decision in Witherspoon and to reaffirm the above quoted stardard from Adams as the proper standard for determining when a prospective juror may be excluded for cause because of his or her view on capital punishment.

That standard is whether the jurors would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.

That's the standard, Judge.

THE COURT: ALL right.

MR. MENDELSON: Versus being philosophical, moral, religious, or otherwise.

THE COURT: I want you to put on the record whatever you want, Mr. Hirschhorn.

MR. HIRSCHHORN: I did.

THE COURT: All right.

The objection is overruled and the questions will be proposed to the jurors as Court's Exhibit Number 1.

The judge in the instant case would have had to eliminate himself from hearing the case if an affirmative answer to the question posed became the cornerstone for elimination for cause.

The error became compounded as jury selection continued. Counsel for Defendant made a valid attempt to set the proper standard for eliminating jurors:

At TR 1074-75

> I specifically asked this juror and all these jurors, whether her views or their view on the death penalty would prevent or substantially impair the performance of his or her duties as a jurors in accordance with the Court, with the jurors' instructions and the jurors' instructions and the jurors' oath.
>
> That was a direct quote from Wainwright versus Witt, 469 U.S. 410, 105 Supreme Court, 844 at page 852. It's a direct quote and each of these jurors who expressed a consciencious objection to the imposition of the death penalty all said that even though they held those views, it would not prevent or substantially impair their performance of their duties as a juror in accordance with their instructions and their oaths, and that's the language right out of Witt---
>
> THE COURT: Well, you know, this is the first opportunity I have had in this context to consider Witt and Witherspoon and my understanding has been and always was, that if the jury responded such that as is quote in Witt from Witherspoon, (sic)

it's unmistakably clear that they would automatically vote against the imposition of Capital Punishment without regard to the evidence that might be developed, then they're not qualified to serve on this jury.

MR. CORNELY: That's exactly correct, Judge.

(Emphasis added)

The State was wrong. This was not correct. In fact Wainwright at p.426 states that it is error for the Court to focus on whether answers on Voir Dire indicate that the juror would "automatically" vote against the death penalty. Wainwright clearly dispenses with reference to automatic decision making.

Further, Wainwright unequivocally highlights the fact that that case and its' predecessors Witherspoon and Adams are not grounds for challenging prospective jurors. Rather they are meant as a limitation on the State's power to exclude.

By the time of the final questioning of the several jurors who were then excused due to their philosophical views, the taint of the original erroneous question was firmly implanted. The questioning was skewed toward eliminating them because of their view. The questioning became badgering to get them to articulate the "automatically vote against standard", rather than trying to put any limitation on the State's power to exclude an entire segment of the population.

In summary, "plant a turnip, get a turnip" says a song from a famous musical play. The erroneous question "planted a turnip" in the minds of death-scrupled jurors that because they acknowledged their own philosophy, they could not be true to the jury oath. The wrongful standard caused a lopsided jury. Finally, we are left with the question of whether such a jury brings a bias toward finding guilt. When in doubts we turn to our Constitution. The Sixth and Fourteenth Amendment to the Constitution mandate that an accused be given a trial by an impartial jury. All doubts should be decided in favor of that right of the accused.

B. THE COURT ERRED IN CHANGING ITS "BACK-STRIKING'' PROCEDURE AFTER A JURY PANEL HAD BEEN TENDERED BY BOTH SIDES.

As jury selection began, the Court announced the procedure it would use concerning backstrikes, peremptory challenges and acceptance of the jury.

At TR 557

> Otherwise all challenges will be reserved until we come side bar and after both sides have completed voir dire examination and then I will start with the State, asking the State to either accept, pass or reject on the first juror. Then I will ask the Defense to do the same thing and when we have 12 jurors from the top of the venire who are not challenged and you have either used or waived your backstrikes, the first 12 will be our jurors.

I think that we should have at least two alternate jurors.

After two days of jury selection, the following colloquoy took place:

At TR **1135-36**

MR. HIRSCHHORN: We are going to excuse Mr. Fuentes, Your honor.

THE COURT: Mr. Fuentes, all right.

That's Number **9.**

Number **32,** Ludmila Hemphill, State?

MR. CORNELY: Accept.

THE COURT: Defense?

MR. HIRSCHHORN: Accept.

THE COURT: All right.

Any backstrikes?

MR. CORNELY: Defense?

I guess the record should reflect we have spent about an hour and a half in the challenging process, primarily because of discussions with experts and the Defendant.

MR. HIRSCHHORN: We tender.

THE COURT: All right.

Any further backstrikes?

That's it? Okay.

> I assume that therefore all the remaining challenges that both the State and Defense have are waived and our jury will be Mattie Hallback, Henry Houston, Ronald Nickels, Richard Cox, David Sherwood, Christina Porrus, Richard Scariott, Eli Price, Willie Mae Jones, Neyda Oporto, Dolly Thomas and Ludmila Hemphill.

At this juncture the Defendant had one challenge remaining and the State had seven. The Court announced these were considered as waived.

Alternate juror selection commenced. All parties agreed that there would be a peremptry challenge for each alternate; in other words each side had two to use in selecting two alternates. (TR 1142) The Court reiterated, "--- even though you have some (challenges) left over, they don't count on the alternates."

A few minutes later all of the remaining prospective jurors had been excused without seating two alternates. Defendant had utilized both of his alternate challenges and had accepted the last available panel member. The State had rejected that person. The Court was summoning additional panelists from the jury pool. The State inquired whether these "fresh recruits" were available as alternates only. The Court replied:

> "I think that we would have to keep them open, the entire thing, which would mean that the Defendant would have one more peremptory challenge and the State has whatever it has left." (TR 1148)

The Defendant objected vehemently, stating that he had planned his challenges carefully and now having used all but one he was subjected to the State reopening the entire process. In essence he was "sandbagged". The State backstruck half of the already tendered panel. When the defense continued to object, the Court gave each side one additional challenge. (TR **1375)** The Court became completely confused with its own procedures. Jury selection had become a kind of musical chairs game with the State dropping previously accepted jurors and moving up new recruits during a third day of selection:

> The Court: "I don't know where we are at, or what you are talking about. I don't know what your are talking about. Just be quiet for a minute so I can figure it out." (TR **1373)**

It is true that case law states that a juror may be challenged at anytime until he is sworn. This body of law evolved to protect the right of the accused to obtain an impartial jury. The cases began over 100 years ago with O'Connor v. State, **9** Fla. 215 **(1860)** which held, "if the prisoner, at any time before any juror was or jurors were sworn, had retracted his desire to challenge him or them, it was his right to do so until the whole of his peremptory challenges were exhausted" (emphasis added)

Jackson v. State 464 So2d 1181 (Fla. **1985),** addresses the refusal of the Court to allow any backstrikes and chastises the Court for that decision. Also in Rivers v. State **458** So2d **762** (Fla. **1984),** this Court admonished the lower court for refusal to allow any backstriking, thus forcing the lawyers to

accept each juror not challenged at the first opportunity.

These illustrations differ markedly from the instant case. Here, an entire panel had been accepted, and the Court had announced that any left over peremptory challenges were waived. A separate set of challenges for use on alternate jurors had been given and that process was near completion. Everyone had lived under one set of rules for two full days, when suddenly the Court changed the rules at the behest of the State who had kept the Court from swearing in the panel which had been tendered. (TR 1152) The State was game-playing and the Court erred in acceding to this ploy. The Court could have proceeded with its original plan, or awarded 10 new challenges, or convened a new panel. No cure was utilized. The Defendant was deprived of a basic right and accordingly, a new trial is essential.

III. THE TRIAL COURT ERRED IN FAILING TO GRANT A MISTRIAL FOLLOWING THE DEFENDANT'S OUTBURST DURING TRIAL.

As the first week of trial drew to a close, the translation of the alleged confession was being read aloud to the jurors by the prosecutor. (TR 1678) Suddenly, the Defendant began to yell at the Court that the police officer conducting the confession interview had lied. (TR 1679) The Court told the Defendant to stop and repeatedly asked the baliff to remove the

jury. The Defendant continued his outburst in a rambling fashion. (TR **1679-1681)**

One can clearly picture the frantic atmosphere even on the cold printed page of the trial transcript; the logistics of moving twelve jurors from their seats to the jury room while the Defendant continued to harangue the Court. Even when the jurors left the courtroom, it is apparent that they could still hear the Defendant:

> Proseuctor: "They can hear everything, Judge." (TR **1681)**

The Defendant's outburst was conducted in broken but understandable English. (TR **1686)** Throughout the trial at least one Spanish interpreter had been translating the complete proceedings into Spanish for the Defendant.

Defense counsel moved immediately for a mistrial. (TR **1686)** The Court denied this Motion. (TR **1696)** The Court stated that it "didn't think the Defendant could cause his own mistrial." (TR **1689)** The State also stated such a viewpoint. "____it would probably be difficult for the Defendant to create his own mistrial." (TR **1682)**

Case law holds the exact opposite opinion. A Defendant may well be the cause of his own mistrial. The Court lists in State ex rel. Dato v. Himes, **184** So **244** (Fla. **1938)** one circumstance for granting a mistrial is "**where** the prisoner by his own misconduct places it out of the power of the jury to investigate his case correctly ---"

In Adkins v. D.C. Smith, 205 So2d 530 (Fla. 1967), the Court entered an order for a mistrial when a Defendant charged with first degree murder improperly walked out of the courtroom while the judge was talking with a juror.

In Strawn v. State ex rel. Anderberg, 332 So2d. 603 (Fla.1976) the Court declared a mistrial after defense counsel told the jurors that the Defendant would answer any questions the jurors cared to ask him. The Court stated: "I regard it as a highly inappropriate procedure.--- And you're asking it in the presence of the Jury so contaminates this trial that I am at this time declaring a mistrial."

These cases illustrate the fact that a legally sufficient reason for a mistrial can be caused by the defendant and/or the defense. The manifest necessity for the mistrial can come from anything that destroys the guarantee of a fair trial. In the instant case, the bizarre behavior of the Defendant seems more destructive of this guarantee than the examples that resulted in mistrials in the cases quoted above. The Defendant's behavior was so disconcerting to the Court, whose experience in trial observation is lengthy, that the Court immediately ordered psychiatric evaluations of the Defendant. (TR1691) The Defendant's behavior was so outrageous that the Court instructed the Defendant if it happened again the Court would have the Defendant bound and gagged for the rest of the trial. (TR 1683)

The Court admitted that the chance for a fair trial had greatly dissipated when he told the Defendant, "you, yourself

have impaired my ability to assure that you get a fair trial and any further outburts by you will only worsen the matter." (TR 1694) If the Court was this shocked, one can only guess what a shattering experience this was to jurors who have little or no courtroom experience! No curative instruction could erase the mental image of a man accused of a murder, ranting and raving at the police officer in the courtroom.

It is absolutely true that the trial judge is the one who has discretion to decide if a mistrial is necessary and "that substantial justice cannot be attained without discontinuing the trial." Adkins, supra. However, "In the conducting of a complicated criminal trial, he (the Court) finds it necessary to rule many times, and like the referee in an athletic contest, must rule quickly. Generally speaking, he has neither time, convenient library, not a staff to research each legal and evidentiary question with which he is confronted in a fast moving trial." Strawn, supra. In some of today's most popular athletic contests the referees have "instant replay" on tape so that they may quickly correct judgment calls made under duress and from disadvantaged viewpoints. Trial courts don't have "instant replay", but they do have courts of review who can look at the judgment call from a clearer vantage point.

In the instant case, the jurors were distracted from their task of sifting evidence. Their natural inhibitions surrounding a criminal case were heightened. We cannot know whether they directed their attention back to the trial or

whether it was riveted on the Defendant, waiting and watching for further bizarre behavior. If there is a question as to the jurors ability to remain fair-minded, that jury should be dismissed.

We do know that the Court's own attention had been diverted to observation of the Defendant before the outburst. "I have seen this sort of thing building for the past two days." Defense Attorney: "No one told me." (TR 1681)

Monday morning quarterbacking may indicate that the Court should have addressed with counsel its observations of the Defendant. Maybe the destructive outburst would have been diverted. We are, however, stuck with the reality of what did occur. The correct decision should have been the granting of a mistrial, followed by a new trial with an untainted jury. Instant replay mandates that this case be ramanded for a new trial.

THE PENALTY PHASE

IV. THE COURT IMPOSED THE DEATH PENALTY BY IMPROPERLY APPLYING *AN* AGGRAVATING CIRCUMSTANCE NOT PROVEN BEYOND A REASONABLE DOUBT, BY UTILIZING A NON-STATUROTY AGGRAVATING CIRCUMSTANCE AND BY FAILING TO WEIGH THE MITIGATING CIRCUMSTANCES.

In Florida, no Defendant can be sentenced to death unless the aggravating factors outweigh the mitigating factors. Alvord v. State, 322 So2d 533 (Fla 1975). Since the aggravating factors set forth in Fla. Stat. § 921.141(6) actually delineate those capital crimes in which the death penalty is applicable, they must be proven beyond a reasonable doubt before being considered by the judge or jury. State v. Dixon, 283 So2d 1 (Fla. 1973). The statutory aggravating factors are exclusive. No other circumstances may be used to tip the balance in favor of death. Miller v. State, 373 So2d 882 (Fla. 1979).

In imposing the death penalty in this case, the trial court violated those principles by relying on an aggravating circumstance not established by the evidence.

A. THE AGGRAVATING CIRCUMSTANCE THAT THE CAPITAL FELONY WAS ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL.

Defendant had objected to the use of this aggravating factor because of the vague nature of the terms and relied on the recent decision Maynard v. Cartwright, 484 U.S. _____, 108 S.Ct. 1853, 100 L.Ed. 2d 372 (1988); in which the Oklahoma statutory aggravating circumstance, containing the same wording as Florida's, was found to be unconstitutionally vague absent a narrowing construction.

The lower court, in the instant case, overruled the objection and decided that if a definition is given for these terms the veil of vagueness is pierced. The Court then defined

for itself and the jury the terms of heinous, atrocious, or cruel to be "the conscienceless or pitiless crime which is unnecessarily tortuous to the victim", allegedly based on Profitt v. Florida., 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976).

The trial court rejected the use of the limiting construction (TR 2569) designed by this Court in State v. Dixon, 283 S.2d. 1,9 (Fla. 1973), which was this Court's first decision on Florida's death penalty statute:

> ---It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the cpaital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies- the conscienceless or pitiless crime which is unnecessarily tortuous to the victim.

Accord Simmons v. State, 419 So.2d. 316 (Fla. 1982); Herzoq v. State, 439 So2d 1372 (Fla. 1983).

The jury had to formulate its advisory decision based on a partial definition. The Court also utilized this vague description.

Second, the jury and the Court considered testimony of the Medical Examinier objected to bv the Defendant. (TR 2578, 2582) This testimony concerned the sexual battery. Admitted with the testimony was a photograph during the autopsy showing a laceration in the victim's vagina. Since there had already been a stipulation that the murder occurred during the

commission of the sexual battery, this aggravating circumstance had already, in essence, been agreed to. No further evidence was necessary to establish it.

This evidence was accepted even though its prejudicial value far outweighed any probative input as to circumstances concerning the cause of death. This evidence was clearly relied on by the Court below in its sentencing order. (R 249)

The especially henious, atrocious or cruel standard (hereafter referred to as HAC) has been analyzed on numerous occasions in Florida. In weighing this circumstance, the Court failed to consider the applicable situations as a comparison to the instant case.

For instance, prior holdings have illustrated where HAC does not apply. Teffeteller v. State, 439 So.2d. 840 (Fla. 1983): "The criminal act that caused death was a sudden single shot from a shotgun. The fact that the victim lived for a couple of hours in undoubted pain and knew that he was facing imminent death, horrible as this prospect may have been does not set this senseless murder apart from the norm of capital felonies." Accord Jackson v. State, 502 So.2d. 409 (Fla. 1986), (A fatal shot was fired and the victim died a few minutes later.) Jackson v. State, 451 So2d 458 (Fla. 1984), where the victim was shot in the back, placed in the trunk of the car where he was conscious for some time begging for his life, and then was shot several more times. The Court in Jackson stated that once a victim becomes unconscious, further acts contributing to his death

cannot support a finding of heinousness, relying on Herzog v. State, 439 So2d 1372 (Fla. 1983) in which the victim was beaten by the Defendant, suffocated with a pillow and then strangled with a telephone cord.

The Court illustrates in Buenoano v. State, 527 So2d 194 (Fla. 1988) that type of crime which does meet the HAC standard. Systematically poisoning one's husband over a period of time, refusing to take him to the hospital, observing the effects of the poisoning (nausea, vomiting hallucinations) until he finally dies "is an unusual manner and method of committing a homicide".

In examining what has been adjudged a "garden variety" killing in this state and what fills the bill as HAC and then comparing the instant case, there is simply no way that the facts of the instant case can rise to the level of especially HAC. The testimony of the State's only witness in the penalty phase placed the time that the victim lived after the choking began to between 3 and 5 minutes. (TR 2607-08) The possibility that the victim lost consciousness within 30 seconds was also stated. (TR 2610-11)

The aggravating circumstance of especially heinous, atrocious, or cruel cannot apply in this case.

B. THE NON-STATUTORY AGGRAVATING CIRCUMSTANCE

The court below showed in its order that it improperly used a non-statutory aggravating circumstance.

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> All of the evidence, including the Defendant's own testimony, demonstrates that the Defendant has an evil mind. It seems that he has a super ego and is either unable to accept what he has done or has rationalized his acts as being justified. He believes he is the only one who is fair, just and right and that he is being persecuted by the police who he says lied and abused him.
>
> There was no evidence of such abuse.
>
> The Defendant's testimony in the penalty phase and his outburst in the guilt phase demonstrated a tendency to lash out at anyone who opposed him.

This type of diagnostic finding for which there is no evidentiary support cannot be relied on. See Miller v. State, **373** So2d 882 (Fla. **1979).** It is clear from the trial judge's sentencing order that he considered as an aggravating factor the Defendant's allegedly dangerous mental state.--- The aggravating circumstances specified in the statute are exclusive and no others may be used---.) Accord Elledge v. State, 346 So2d **998** (Fla. **1977).**

C. THE FAILURE TO WEIGH THE MITIGATING CIRCUMSTANCES.

The trial court erred by not weighing the two mitigating circumstances regarding mental condition of the Defendant. Fla.Stat. S921.141 (6)(b), and (f). The error was compounded by the court's application of the wrong standard in determining whether the mental factors would be found or weighed.

The Court believed that since the Defendant was legally sane, these factors were inapplicable. (Dr. Haber could not say that the Defendant was insane. R 249).

All of the mental factors in mitigation were specifically designed to cover mental disorders which fall short of legal insanity. See State v. Dixon, 283 So2d 1 (Fla. 1973). "§ 921.141 (6)(b) is easily interpreted as less than insanity, but more than the emotions of an average man, however inflamed."

> Mental disturbance which interferes with but does not obviate the defendant's knowledge of right and wrong may also be considered as a mitigating circumstance. Fla. Stat. § 921.141 (7)(f), F.S.A. Like subsection (b), this circumstance is provided to protect that person who, while legally answerable for his actions, may be deserving of some mitigation of sentence because of his mental state. at p.10.

Jones v. State, 332 So2d 615 (Fla. 1976); Mines v. State, 390 So2d 332 (Fla. 1980). Ferguson v. State, 474 So2d 208 (Fla. 1985); are all cases in which the trial court had improperly used a "sanity" type analysis in rejecting the mitigating circumstances.

The legislative purpose behind these mitigating circumstances is to allow for some mitigation of sentence for persons exhibiting mental disorders short of legal insanity.

The evidence of appellant's extreme mental and emotional disturbance was substantial. Dr. Haber testified that the Defendant was suffering from an emotional disturbance even though he was sane to a legal standard (TR 2665); " the crime was

an impulsive violent outburst of a person tainted with some disorder. This is just not normal". (TR 2666); Defendant spent one and one-half years in a psychiatric hospital in Cuba at age 16.

(TR 2668)

Dr. Marina testified at the sentencing hearing that the Defendant showed "disorganization, confabulation, lack of logic in train of thought" (TR 2825) "Not necessarily in touch with reality," (TR 2827) and (TR 2831), "evidence of organic brain damage---impairments in brain disfunction" (TR 2833-341, emotionally only five or six years old" (TR 2834)," has a personality disorder, not capable of keeping his feelings from being acted out." (TR 2835) This goes directly to § 921.141 (6)(f).

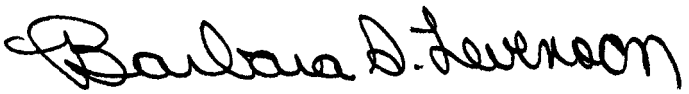
Of course, the judge and jury had their own eye-witness evidence of the Defendant's mental problems. His outburst during trial and his bizarre, rambling, disoriented statement to the jury during the penalty phase certainly called for the weighing of the named mitigating circumstances.

In summary, only one aggravating circumstances should have been weighed; the stipulated to sexual battery during the murder. The especially heinous, atrocious, or cruel circumstance must be discounted. Both mitigating circumstances derserved weight. Accordingly, this Court must vacate the death setence and remand to the trial court for resentencing.

CONCLUSION

For the reasons given and upon the authorities cited, Appellant respectfully requests that this Honorable Court reverse the judgment and sentence of the lower Court.

Respectfully submitted,



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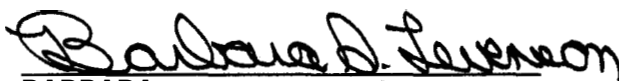
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief was furnished by mail this 17th day of February, 1989, to the Office of the Attorney General, 401 Northwest Second Avenue, Suite 820, Miami, Florida.



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