IN THE SUPREME COURT OF FLORIDA

EMANUEL JOHNSON, :

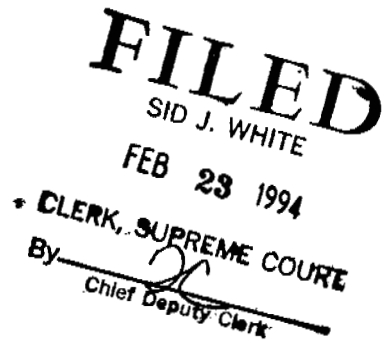
Appellant, :

vs. : Case No. 78,337

STATE OF FLORIDA, :

Appellee. :

_____ :



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

REPLY BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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ISSUE I

THE ARREST WAS ILLEGAL, AND THE JUDGE SHOULD HAVE SUPPRESSED ITS FRUITS.

B. Unsworn arrest warrant

The State's reliance on the good faith exception of United States v. Leon, 468 U.S. 897 (1984), is not pertinent here. The oath requirement in this case was governed not only by the Fourth Amendment but also by Rule of Criminal Procedure 3.120, which requires that arrest warrants be "sworn to before a person authorized to administer oaths." Rule 3.120 does not have a good faith exception. The Leon good faith exception does not apply to statutory protections. State v. Garcia, 547 So. 2d 628 (Fla. 1989) (Leon does not control violations of Florida's wiretap law). Just as the legislature may extend Fourth Amendment protections by enacting a knock-and-announce statute, State v. Bamber, 19 Fla. L. Weekly S47 (Fla. Jan. 20, 1994), so also the Fourth Amendment fortunately does not require this Court to insert a good faith exception in its interpretation of Rule 3.120. Otherwise, the absurd result would be that knowingly false police officer oaths under Rule 3.120 would not be subject to perjury charges while knowingly false defendant oaths under Rules 3.190(c)(4) and 3.850 would be perjurious. No rational justification could exist for this gross inconsistency.

C. Facts omitted from the arrest affidavit

D. Arrest without probable cause

According to the State, "no serious claim can be made that there was lacking probable cause to believe there was a burglary." Brief of Appellee at 16. This is perhaps true but beside the point. The issue was not whether a burglary occurred but whether the police had probable cause to believe that Emanuel Johnson committed it. In this case, the police found Johnson's fingerprints on an outside window but did not tell the judge about the many other fingerprints inside that were not Johnson's. Fingerprints inside the house near the dead body were more probative of guilt than the fingerprints outside. If the police did not have probable cause to arrest the persons who left fingerprints near the body, then they necessarily did not have probable cause to arrest the person who left fingerprints outside the house. They needed more evidence to establish which of these persons, if any, was "probably" the guilty party, particularly since a fingerprint by itself is insufficient evidence of guilt. Further, the police told the judge that the window was the point of entry, even though the point of the entry could have been the front door. In light of these undisclosed facts, the evidence gave rise only to a suspicion of guilt rather than probable cause, and the arrest was therefore illegal.

E. Officer Castro and the fellow officer rule

The State argues that all of the information possessed by officers Lacertosa, Sutton and Redden was automatically imputed to

officer Castro. Brief of Appellee at 20. This statement of law is inaccurate. The law instead requires a sufficient nexus of communication between the arresting officer and the officers with probable cause. In this case, Castro received only minimal information from Redden, and she also told him that the police were waiting for arrest warrants. Judge Owens agreed with Redden that she did not tell Castro to arrest Johnson. All of the officers (except Castro) agreed that he was not supposed to arrest Johnson and that they were waiting for the warrant. The requisite nexus of communication was therefore lacking, because Castro was told not to arrest Johnson. The knowledge of the other officers cannot be imputed to Castro under these circumstances.

ISSUE II

THE CONFESSIONS SHOULD BE SUPPRESSED.

A. Non-compliance with sections 901.16 and 901.17 and obtaining a confession through custodial interrogation without probable cause

The State suggests that the defense did not object on the ground that the officers failed to tell Johnson the cause of the arrest. Brief of Appellee at 25 n.5. The defense, however, expressly elicited testimony from detectives Sutton and Sullivan that they deliberately did not tell Johnson the cause of the arrest, hoping he would discuss the McCahon case as well as White. (M530, 892) Through this cross-examination, the defense argued that the police erred by failing to tell Johnson the reason for the arrest. In addition, as Appellee concedes, the prosecutor expressly addressed the argument in his memorandum of law. (M6922-

23) Accordingly, this argument is preserved, and, by addressing the argument below, the State waived any contention that it is not.

Further, illegally obtained confessions are fundamental error in capital cases. "Admittedly the testimony by the police officer related to that confession was not objected to by appellant's trial counsel, but that should not be conclusive of the special scope of review by this Court in death cases." Elledge v. State, 346 So. 2d 998, 1002 (Fla. 1977). Accord Muehleman v. State, 503 So. 2d 310, 312-13 (Fla. 1987) (legality of arrest and confession considered despite guilty plea with no reservation of right to appeal); Anderson v. State, 420 So. 2d 574, 576 (Fla. 1982). The State's citation of Steinhorst v. State, 412 So. 2d 332 (Fla. 1990), is inapposite since Steinhorst did not deal with an illegal arrest leading to a confession.

On the merits of this issue, substantial authority establishes that awareness of an interrogation's subject matter is relevant to the voluntariness of a waiver of Fifth Amendment rights. See United States v. Burger, 728 F.2d 140 (2d Cir. 1984); Carter v. Garrison, 656 F.2d 68, 70 (4th Cir. 1981); cert. denied 444 U.S. 952 (1982); United States v. McCrary, 643 F.2d 323, 328 (5th Cir. 1981). Although the United States Supreme Court does not require full knowledge of the subject matter of the questioning, Colorado v. Spring, 479 U.S. 564 (1987), it does not forbid states from adopting a different standard. Consequently, the legislative determination in sections 901.16 and 901.17 that suspects must be

informed why they have been arrested is consistent with constitutional law and makes eminent sense.

In this case, the police violated sections 901.16 and 901.17 and deliberately exploited their noncompliance in order to obtain a confession for a crime (McCahon) for which they lacked any cause to arrest. Although the officers testified that Johnson first brought up McCahon's name, he would not have done so had he known that the arrest was solely for White rather than McCahon. This Court cannot permit such purposeful exploitation of illegality to succeed.

B. Noncompliance with section 907.04

The State makes no effort to argue that Johnson was "immediately" delivered into the custody of the sheriff. Accordingly, it implicitly but effectively concedes that (1) Johnson was not "immediately" brought to the jail and thus (2) that section 907.04, Florida Statues (1987), was violated. Having conceded error, the State apparently argues instead that the violation was harmless because "whether Johnson was taken to the Sheriff or the police department" for the interrogation is "immaterial." Brief of Appellee at 27.

The error is not harmless. Section 907.04's requirement that defendants be brought "immediately" to the sheriff's custody if they are not eligible for bail refers to the sheriff's traditional role as supervisor of the county jail. See Florida Rule of Criminal Procedure 3.810 (which is substantially the same as former section 922.01, Florida Statutes (1969), and requires courts, upon

pronouncement of sentence to "forthwith commit the defendant to the custody of the sheriff.") Jails have booking officers, and, as argued at length in case number 78,336, if Johnson had been brought immediately to the jail and booked as section 907.04 required, then the greater protections of the sixth amendment and the section 16 right to counsel would have attached, if they had not attached already.

Further, the booking officer would have advised Johnson under Rule of Criminal Procedure 3.111(c)(1) "of the right to counsel and that if [he was] unable to pay a lawyer, one [would] be provided immediately at no charge" (emphasis added). Johnson would likely have told the booking officer that he could not afford an attorney. Rule 3.111(c)(1) would then have been required the officer to place him "immediately and effectively . . . in communication with the (office of) public defender." The police did not book him immediately in part because they did not want him to know he had this right under Florida law to talk to a public defender who would be available immediately (or in this case at least at first appearances a few hours later). This error was absolutely not harmless, since Johnson's perceptions of his status would have been totally different had the booking officer advised him of this information.

In this respect, then-Judge Grimes' decision in State ex rel. Wainwright v. Booth, 291 So. 2d 74 (Fla. 2d DCA 1974), is highly relevant. In Booth, the sheriff and the Department of Corrections disagreed over who should have custody of the defendants during

their trial for a murder allegedly committed at Sumter Correctional Institution. Citing section 907.04, Judge Grimes held that the sheriff had to take custody of the defendants and could not shift this duty to the Department.

> Persons charged with an offense who are not released on bail are to be delivered into the custody of the sheriff. Fla. Stat. § 907.04 (1971), F.S.A. Thus, it appears that the duties which the respondent has ordered be performed by relator [the Department of Corrections] are really those which rest upon the sheriff.

Id. at 76. A similar conclusion applies here. Just as the sheriff in Booth could not under section 907.04 shift to another agency his responsibility for custody of persons not entitled to bail, so also the city police in this case could not retain Johnson for interrogation when the statute mandated that the sheriff take custody of him because he was not entitled to bail. Accordingly, error occurred, and it was not harmless.

C. The ambiguous desire to get a shot

The State claims that this sub-issue is procedurally barred by a failure to object. Brief of Appellee at 29 n.6. The parties below, however, treated the comment about the shot as a continuation and part of the entire interrogation, since it occurred within a few minutes of the previous portion of the questioning. The defense had no reason to make a separate argument about the comment, since all of the reasons for suppressing the previous statements were equally applicable to suppressing this comment. Further, as explained above, the improper admission of a defendant's incriminating statements is fundamental error in capital cases. Elledge; Muehleman; Anderson. Neither Steinhorst nor

Occhicone v. State, 570 So. 2d 902 (Fla. 1990), now cited by the State on appeal, are pertinent since neither case deals with a defendant's incriminating statements.

On the merits of this issue, the State contends that the comment "clearly" was not part of the continuous chain of events of the interview, but it provides no argument or support for its contention. This bald contention is simply wrong because, given the short time span between the comment and the previous statements, the comment was part of one continuous exchange between the defendant and the officers. Just as in Phillips v. State, 612 So. 2d 557, 559 n.3 (Fla. 1992), Johnson did not start a new interrogation but continued the previous one. Moreover, the previous events tainted this exchange because the cat was already out of the bag and it was the fruit of the poisonous tree.

The State distinguishes Phillips as involving the right to counsel rather than the right to remain silent. The right to counsel, however, had already attached below by the time this comment was made. Moreover, this purported distinction of Phillips misses the point. This Court treated the defendant's statement in Phillips as part of the previous statement because it occurred only a few minutes later with no clear intervening break. This treatment applies regardless of whether the issue arises under the fifth or sixth amendments.

Finally, even if this exchange on the road to the jail was a separable event, new Miranda warnings were then required. From Johnson's perspective, the question was reasonably likely to and

did elicit an incriminating response. Moreover, the detective knew or should have known that clarifying a suspect's request for a shot had the potential to lead to inculpatory evidence.

D. The statement and knife obtained after the police snatched Johnson from the jail.

Quoting the prosecutor's memorandum of law, the State falsely claims that "defense witnesses testified the Defendant was returned to the jail in time to attend the hearings and that persons who do arrive late are frequently added on to the First Appearance Docket." (M6914) Brief of Appellee at 33. No defense witness testified to this effect. The prosecutor apparently referred to deputy clerk Cindy Dunlop's testimony, but she testified only to a lack of knowledge:

> Q: So if a prisoner was brought over to the jail let's say at 8:45 a.m. on October 12th, 1988, is there anything to prevent the jail from bringing him in to first appearance if they are going on?
>
> A: Not that I know of. . . .
>
> A: I can't say specifically in October, but there were times when we had add-ons after we had already gotten the paperwork.

(M965-66)

This testimony did not establish that Johnson was in fact brought back in time to attend first appearances. To the contrary, Dunlop believed that first appearances began that day at 8:30 a.m., and jail records revealed that Johnson was not returned to the jail until 8:46 a.m. (M928, 951-52, 6723) Neither Dunlop nor any other witness testified that defendants ever or normally were brought to first appearances after the hearing had already begun. Indeed,

common sense teaches that jail officials normally would not disrupt the hearing by adding more defendants after it had started. Moreover, Dunlop's testimony about "add-ons" after completion of the paperwork did not entail that defendants were customarily also "added on" after the hearing had begun. Consequently, the State's false claims below and now on appeal that Johnson was brought back in time for first appearances are inaccurate and devoid of evidentiary support.

Furthermore, the booking and first appearance procedure is more than a hurried appearance before a harried judge. An integral part of this procedure is the opportunity for consultation with counsel. The right to counsel would be meaningless if defendants could not first obtain the advice of an attorney before the initial courtroom appearance. Accordingly, Rule 3.111(c) requires the jail booking officer to place the defendants immediately and effectively in communication with their attorney or the local public defender if they request counsel. Similarly, Rule of Criminal Procedure 3.130(c), which governs first appearances, requires the appointment of counsel "**before any other proceedings**" and forbids any "further steps in the proceedings . . . until the defendant and counsel have had an **adequate opportunity to confer**" (emphasis added).

In this case, as part of the routine first appearance procedure, the public defender representative was interviewing clients at the jail in groups by 6:45 a.m., thirty minutes before the police snatched Johnson from the jail, and ninety minutes before the detectives obtained the incriminating statements at 8:15

a.m. The State on appeal simply ignores this unwarranted interference with this important and integral aspect of the booking and first appearance procedure under Rules 3.111 and 3.130--the opportunity for consultation with counsel. The police disrupted the normal procedure and thereby prevented Johnson from talking to his lawyer and appearing before the judge at the proper time.

This interference with the normal course of judicial process distinguishes this case from Harvey v. State, 529 So. 2d 1083 (Fla. 1988), cited by the State. In Harvey, the public defender, in the afternoon and well before first appearances, "took it upon himself, after hearing of Harvey's arrest, to go to the station to see if Harvey needed a lawyer." Id. at 1085. The public defender's actions were voluntary and had no connection with the required first appearance procedure. Under these circumstances, this Court found no violation of Haliburton v. State, 514 So. 2d 1088 (Fla. 1987).[1] By contrast, in this case, the police interfered with the normal first appearance procedure, prevented Johnson from discussing his case with the public defender, and prevented him from going to first appearances. Accordingly, they obtained his statement about the knife illegally.

The State relies heavily on the officers' denials of any intent to keep Johnson from appearing at the hearing. These self-serving denials, of course, were less than credible since every experienced police officer knows or should know about first

[1] Of course, the violation of Haliburton was only one of the many reasons cited in Appellant's brief for suppressing Johnson's statement about the knife.

appearances and what customarily happens at them. The police had no reason to execute the search warrant at that time and could easily have waited until Johnson had had some sleep.

More importantly, the officers' intent was irrelevant. The irreducible facts are that (1) Johnson did not attend first appearances within twenty-four hours of his arrest as Rule 3.130 required, and (2) he made his incriminating statement at the same time he was supposed to be talking to his lawyer as part of the routine first appearance procedure. These facts constituted reversible error regardless of the officers' subjective intent.

Finally, the statement about the knife was in any case the fruit of the poisonous tree, particularly since the cat was already out of the bag. Johnson never would have made this statement absent the prior illegal police actions. Since no clear break in the chain of illegality occurred, this Court must suppress both the statement and the knife.

ISSUE III

A CLERK IMPROPERLY SWORE, QUALIFIED, AND EXCUSED JURORS IN THE ABSENCE OF THE JUDGE.

The State fails to explain or distinguish the clear holding of State v. Singletary, 549 So. 2d 996, 999 (Fla. 1989), that "no questioning of prospective jurors in a criminal case may take place outside the presence of a trial judge." In this case, questioning of prospective jurors did take place outside the presence of a trial judge. Accordingly, reversible error occurred which cannot be harmless.

In this respect, Appellant cites Windsor v. State, No. CR-91-1487, 1993 WL 304515 at *3 (Ala. Crim. App. Aug. 13, 1993), in which the court found that permitting clerks to excuse prospective jurors in violation of Alabama statutes "always constitutes reversible error because a violation of those statutes impinges the integrity of the jury selection process."

In addition, even if the error could be harmless, the State has the burden of establishing harmlessness beyond a reasonable doubt. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). In this case, the State did not establish how many jurors were excused in White and McCahon and hence cannot possibly on appeal show that the error was harmless. Accordingly, reversible error occurred, and this Court must remand for a new trial.

ISSUE IV

THE COURT SHOULD HAVE DISMISSED THE INDICTMENT OR AT LEAST REQUIRED AN EVIDENTIARY HEARING WHEN THE DEFENSE DEMONSTRATED THAT THE GRAND JURY WAS IMPROPERLY QUALIFIED.

Although the judge agreed to consider the motions to dismiss the indictment, although the prosecutor made no objections on timeliness grounds, and although Appellant in his initial brief cited Francois v. State, 407 So. 2d 885 (Fla. 1981), and Herman v. State, 396 So. 2d 222 (Fla. 4th DCA 1981), which are directly on point, the attorney general nevertheless now claims for the first time that the motions to dismiss the indictment were untimely. Appellant, however, continues to rely on Francois and Herman and also now relies on Savoie v. State, 422 So. 2d 308 (Fla. 1982).

> [T]he issue of waiver became moot because the hearing was held and a ruling made on the motion's merits. . . . [O]nce the decision is made to hear the motion on the merits, we find the issue of waiver is no longer before the court. . . . [O]nce the trial judge interrupted the trial and conducted a hearing on the merits of the motion to suppress, waiver was no longer a proper ground for denying the motion.

Id. at 312.

The State's citations of United States v. Mechanik, 475 U.S. 66 (1986), and Porter v. Wainwright, 805 F.2d 930 (11th Cir. 1986), are irrelevant, because Florida rather than federal law controls this issue, and Florida law expressly provides for a challenge to the grand jury panel on the ground that the grand jurors were not selected according to law. § 905.03, Fla. Stat. (1987). The State ignores Appellant's citation of Hick v. State, 130 So. 330 (Fla. 1929), which established this Court's long-held principle that defendants charged with a capital offense have the right to demand strict compliance with the law in the drawing and empaneling of the grand jury, and that violations of this right are reversible error.

In this case, as explained in Appellant's Initial Brief, the grand jury empanelment was contrary to the law because a clerk improperly qualified and swore the grand jurors outside the presence of a judge and did not ask the statutorily required qualification questions. Accordingly, reversible error occurred, and remand is necessary for a new trial.

ISSUE V

THE TRIAL COURT IMPROPERLY DELAYED TRIAL FOR WEEKS AFTER THE JURY WAS SELECTED, TO ALLOW OTHER JURY SELECTIONS AND TRIALS TO OCCUR.

The State stresses the judge's questions to the jurors regarding any publicity they may have seen or read. As explained in Appellant's Initial Brief, however, the judge questioned the jurors only in a leadingly broad manner which made it difficult for them to admit in public that they had not followed the judge's directions. Even more importantly, the delays and surrounding publicity were too great to allow the error to be cured by leading judicial instructions and questions, particularly in a capital case. Courts should not permit any unnecessary delays in capital cases.

The State argues that the defense could have questioned the McCahon jury regarding Johnson's other crimes and any related publicity. This assertion is false with respect to Johnson's trials and convictions in White and Giddens, since those trials and their resulting publicity had not occurred yet. Defense counsel did not have a crystal ball and could not voir dire the jurors about events that had not yet happened. Indeed, defense inquiry about convictions that might not even occur would have been the height of folly.

The State claims that Appellant did not present any newspaper articles published after the McCahon jury selection but before the McCahon trial. Brief of Appellee at 51. The State here seems to claim falsely that no voir dire was necessary because no publicity

occurred after the McCahon voir dire. Defense counsel, however, submitted numerous newspaper articles at the beginning of the McCahon guilt phase on June 3, 1991, which vividly established the lurid publicity surrounding Johnson's cases. These articles had the following headlines published about the White and Giddens trials between the McCahon voir dire and the McCahon trial.

> **Brother Asks Jurors To Let Murderer Live**
> **Jury says killer should be sent to electric chair**
> **Jury says man should die for killing elderly woman**
> **Jurors Recommend Death for Murderer**
> **Panel Votes 8-4 For Death To Killer--Juror: 'Little There to Rehabilitate'**
> **Johnson Convicted of Murder**
> **Johnson Found Guilty of Murder in Stabbing**
> **Defendant Details Fatal Stabbings in Taped Confession**
> **FBI: Hairs Could Be Defendant's**
> **Friend Tells of Finding Body: Sarasota Woman Stabbed Over 20 Times; This is Emanuel Johnson's third trial in connection with a string of attacks in 1988**
> **Man Convicted in Assault, Robbery of Woman**
> **Woman Says Man Convicted In Stabbing Attacked Her: The woman picked the man out of a photo lineup five months after the crime**

(M4814, 8103-14)

In light of this substantial publicity, the judge had no valid reason to delay the trial after jury selection in order to allow other trials to begin. This delay was presumptively unnecessary and prejudicial. McDermott v. State, 383 So. 2d 712 (Fla. 3d DCA 1980); Armstrong v. State, 426 So. 2d 1173 (Fla. 5th DCA 1983). In any event, the defendant showed actual prejudice since he was unable to voir dire the jurors on the later publicity and on his status as a convicted felon. Accordingly, reversible error occurred, and this Court must remand for a new trial.

ISSUE VI

THE JUDGE SHOULD HAVE EXCUSED FOR CAUSE TWO JURORS WHO HAD A PRECONCEIVED OPINION THAT DEATH WAS THE PROPER PENALTY FOR FIRST DEGREE MURDER.

Although the State strains mightily, it cannot ignore or avoid juror Pullman's unambiguous answer that she would automatically vote for death if she was certain of the defendant's guilt.

> Q: [T]he bottom line question is, do you think that they should automatically receive the death penalty if they're definitely guilty of first degree murder?
>
> A: If they're--yes, I do.

(M3647-48) This response was consistent with her other statements that she would not impose death unless she was "absolutely sure" of guilt "without a reasonable doubt." (M3645) She could recommend death only if the State had "good facts, good evidence." (M3646) A person did not have the right to remain alive if "they've taken somebody's life." (M3647) When asked to specify circumstances in which she could recommend life, she mentioned only cases in which the proof was less than certain, for example, if more than one person was involved or the witnesses were not credible. (M3648)

Pullman's responses to the judge's leading questions that she could follow the law did not change this conclusion. Most jurors are exceedingly reluctant to tell a judge that they cannot follow the law. Consequently, as this Court said in Hamilton v. State, 547 So. 2d 630, 633 (Fla. 1989), "[a]lthough the juror in this case stated in response to questions from the bench that she could hear the case with an open mind, her other responses raised doubt as to whether she could be unbiased." Pullman's unambiguously automatic

vote for death necessarily created a reasonable doubt about her eligibility to serve. The judge should have excused her, because this court has long held that jurors must be excused if their statements create a reasonable doubt about their ability to render an impartial verdict. Hamilton; Moore v. State, 525 So. 2d 870 (Fla. 1988); Hill v. State, 477 So. 2d 553, 555 (Fla. 1985); Singer v. State, 109 So. 2d 7 (Fla. 1959).

The State likewise strains and fails to establish that juror Hanaway would keep an open mind. To the contrary, he said he would first vote for death based on a conviction and only then hear the mitigating circumstances. (M3634) He believed in the death penalty if the defendant was found guilty and only then would he go through the mitigating circumstances. (M3638) When squarely questioned whether he could look at the defendant's background, he squarely ignored the question and answered that he believed in the death penalty for premeditated murder. (M3639) He would apply a different standard to the penalty phase and not use the more lenient reasonable doubt standard. (M4052)

In short, he had formed a presumption or preconceived opinion that death was the appropriate penalty which the defense would have to overcome by presenting mitigating evidence. As this Court said in Hill, a "juror is not impartial when one side must overcome a preconceived opinion in order to prevail." 477 So. 2d at 556. His answers certainly created a reasonable doubt of his impartiality. Hamilton; Moore; Hill; Singer. Moreover, he never said clearly that he would follow the law and set aside his personal opinions.

He said only, "I guess I could," or "I would try to," or "That's what the law is for, I guess." Accordingly, the trial court erred by failing to excuse him for cause, and remand is necessary for a new trial.

ISSUE VII

THE DEFENSE PRESENTED A PRIMA FACIE CASE OF RACIAL DISCRIMINATION WHEN, IN CASE AFTER CASE, THE VENIRE DID NOT INCLUDE MORE THAN ONE BLACK.

The State relies on a clerk's testimony for the Giddens voir dire that the jurors were selected randomly by computer. This testimony was totally inadequate to explain the seriously disproportionate percentage of blacks called for jury duty in Johnson's case. In fact, it did not explain it at all. In any case, testimony that a computer randomly selected the names from a list was patently not testimony that the list was properly prepared.

Moreover, the Giddens jury was only the second jury picked. The State presented no evidence whatsoever for the White and McCahon juries, when one hundred jurors were called and only two were black. The records in McCahon and White are devoid of any rebuttal of the defense prima facie case of discrimination. Since no rebuttal was made, error occurred, and remand is necessary for a new trial.

ISSUE VIII

THE TRIAL COURT IMPROPERLY CONSOLIDATED CHARGES, MOVED THE TRIAL DATES FORWARD BY ONE MONTH, DENIED MOTIONS FOR CONTINUANCES, AND FORCED THE DEFENSE TO GO TO TRIAL WHEN IT HAD JUST HAD AN EXPERT APPOINTED AND HAD ONLY RECENTLY RECEIVED DISCOVERY, MERELY TO GIVE THE STATE MORE CONVICTIONS TO USE AS AGGRAVATING CIRCUMSTANCES.

The State carefully overlooks the twin cruxes of this issue. First, at the State's request, the trial judge deliberately disrupted the established case schedule and moved the trial dates forward, thereby depriving defense counsel of time to prepare that he had justifiably relied upon in making his plans. This issue is not merely an improper denial of a defense motion for continuance but also the unjustifiable change to earlier trial dates after the court and the State had induced the defense to rely on the later trial dates. Until he received the late discovery, counsel said he would be ready for White (which was the first case originally scheduled for trial) and objected to moving the trials substantially forward and being forced into trial continuously for two months on four separate cases, particularly when the court changed the schedule solely to create aggravating circumstances for the State's capital cases.

The State argues that "competent trial counsel does not postpone his trial preparation for more than two years on the mere hope that he may prevail on a motion to suppress." Brief of Appellee at 73. The State's allegation here that defense counsel was ineffective, of course, will be useful if any post-conviction proceedings occur. In any case, however, trial counsel was

familiar with local procedures and court dockets, accurately assessed when the cases would normally be scheduled for trial after the suppression hearings were over, obtained a reasonable schedule of cases, and budgeted his time accordingly. He correctly relied on these procedures until the court unreasonably and unexpectedly moved the trial dates forward to create aggravating circumstances. This was error.

Second, the State can hardly claim that the defense was dilatory when the State at the eleventh hour was still amending informations, consolidating charges, and providing discovery in both White and McCahon on the eve and morning of jury selection. Particularly egregious was the prosecutor's violation of Brady v. Maryland, 373 U.S. 83 (1963), when he failed until the last minute to provide exculpatory evidence that Jessie Phillips had bragged of icing McCahon, that Phillips had worn a red shirt the night of the murder (red fibers were found at the crime scene) and that a white man had stabbed McCahon (the defendant was black). The State now belatedly claims that the police happened to mention some of these individuals in deposition, but the police never provided the specific information which was unquestionably important. The police provided the defense with absolutely no reason to investigate these matters further.

The State's argument both at trial and on appeal that defense counsel should somehow have uncovered these matters on his own completely misses the point. Under Florida's discovery rules and Brady, the burden is not on the defense to find evidence but rather

on the State to provide it. In this case, the State did not provide the information, and the denial of the continuance was therefore error.

The State now stresses that it offered to make any of the officers available for depositions. This offer, however, did not cure the error, since the defense was by that time continuously in trial and had no time to take depositions. Moreover, to avoid the State's hearsay objections, the defense needed to find the individuals in question, such as Jessie Phillips. The State's untimely discovery may have made finding Phillips difficult if not impossible, and deposing the officers would have done nothing to solve this problem.

Finally, the State claims that Johnson "was fully able to present at trial his thesis that another perpetrator committed the offense." Brief of Appellee at 75. This claim is flatly false, and the State knows it is false. At the State's request, this Court has violated Johnson's constitutional rights and stricken the appendix to Johnson's initial brief. This appendix included among other things an argument that the trial court erred by excluding the following evidence as hearsay.

> (1) Jessie Phillips had bragged about killing or "icing" McCahon (M5550),
>
> (2) Someone had reported that Phillips had committed the crime (M5327),
>
> (3) Jessie Phillips lived a block away from McCahon's house and, when the police obtained his blue jeans from his sister the next day, the pants appeared to have dried blood on them; Arthur Jones had said that Phillips was wearing blue jeans that night (M5498-5512),

(4) Phillips was wearing a red shirt on the day of the murder, which was relevant because a red fiber was found on McCahon's body (M5584-85),

(5) McCahon's neighbor had heard McCahon scream while she was talking to two men on the night she died (M5551),

(6) A white man and a black man had killed McCahon and a white man had done the stabbing (M5565),

(7) Underwood was white and Phillips was black,

(8) Arthur Jones knew about the criminal activities of Underwood and Phillips on the night McCahon died (M5595),

(9) Daniel Underwood had committed a similar crime at a bar parking lot by assaulting someone with a knife, robbing him, and fleeing the area (M5408-16),

(10) McCahon had called the police to have her boyfriend, Phillippe Samuel, arrested for beating her (M5323),

(11) Daniel Romano had called the police with information about the homicide, but would not say more over the phone, except that Samuel had beaten McCahon and threatened her life (M5535-42),

(12) Richard Berris had information about Samuel, Denise Smith, and their relationship with McCahon (M5598).

As the appendix further pointed out, the prosecution's late discovery had prevented the defense from finding these witnesses and thereby avoiding the hearsay problem. Consequently, under these circumstances, if the State is attempting to argue harmlessness here, it cannot carry its burden of showing beyond a reasonable doubt that the error did not affect the verdict.

ISSUE IX

THIS COURT'S PAGE LIMITS ON BRIEFS HAVE UNCONSTITUTIONALLY DENIED THE APPELLANT HIS RIGHT TO EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL.

The State claims that successful appellate counsel concentrate on their strongest issues and do not argue weaker points. While

some so-called experts do advocate this principle, undersigned counsel disagrees with it--at least in its simplistic form. In any case, it has no application to death appeals. All issues with any chance of success must be argued in a death case.

This principle is further inapplicable here because this Court's unconstitutional page limits on briefs have forced undersigned counsel to delete numerous issues that are not weak. After seven years of appellate experience, undersigned counsel has learned that mediocre and even relatively weak issues are sometimes successful in cases when strong issues turn out to be losers. Consequently, all issues should be raised that have any reasonable possibility of success, even if they are mediocre and sometimes even if they are relatively weak. This Court's page limits have improperly forced undersigned counsel to delete numerous strong and mediocre issues in this category.

Throughout its brief, the State argues that any issues not raised in this appeal are waived, including the issues raised in appeal number 78,336. Undersigned counsel, however, has always assumed that the issues in appeal number 78,336 are also raised in the present appeal, and he certainly has been ineffective if this is not true. Further, undersigned counsel has not willingly waived anything. A waiver, if any, will result solely from the compulsion of State action rather than the Appellant's or undersigned counsel's voluntary choice.

As a result of this Court's unconstitutional page limits, neither of the briefs in these two appeals contains any argument on

the penalty phase, despite the existence of numerous substantial penalty issues. This Court will therefore have failed its statutory responsibility to review all death sentences. § 921.141(4), Fla. Stat. (1987). This mandatory review is integral to Florida's death penalty scheme and formed the basis, in part, of the United State Supreme Court's approval of the death penalty in Florida. Proffitt v. Florida, 428 U.S. 242, 250-253 (1976). An affirmance in this case without consideration of the penalty issues would violate Proffitt and section 921.141(4).

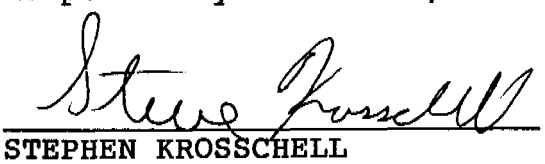
Finally, page 100 of Appellant's initial brief was mistakenly placed at the end of the brief, after the appendix. This page lists several penalty phase issues which Appellant was forced to delete. As Appellant concluded on page 100:

> Because this Court's rules did not allow undersigned counsel to argue these and other issues, his client has been denied the right to effective assistance of counsel on his first appeal of right under the Fifth, Sixth, and Fourteenth Amendments, Evitts v. Lucey, 469 U.S. 387 (1985), and his right to the greater certainty required by the Eighth Amendment in death cases.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert J. Landry, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 21st day of February, 1994.

Respectfully submitted,



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