IN THE SUPREME COURT OF FLORIDA

DONNIE DEMONT PHILLIPS,

Petitioner,

v. CASE NO.: 78,730

STATE OF FLORIDA,

Respondent.

ANSWER BRIEF OF RESPONDENT

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

SUZANNE G. PRINTY
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR #308633

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(904) 488-0600

COUNSEL FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS (Continued)

TABLE OF CITATIONS (Continued)

OTHER AUTHORITIES

IN THE SUPREME COURT OF FLORIDA

DONNIE DEMONT PHILLIPS

Petitioner,

v. CASE NO.: 78,730

STATE OF FLORIDA,

Respondent.

_____/

ANSWER BRIEF OF RESPONDENT

PRELIMINARY STATEMENT

Petitioner, Donnie Demont Phillips, will be referred to herein as "Phillips". Respondent, State of Florida, will be referred to herein as "State". References to the record on appeal will be by the use of the symbol "R" followed by the appropriate volume and number(s).

STATEMENT OF THE CASE AND FACTS

The State accepts the statement of the case and facts included in Phillips's initial brief as essentially correct, to the extent it is relevant, with the following additions:

During voir dire, the State elicited the following information from the jurors for whom peremptory challenges were issued:

Victoria Tillery knew Phillips and his girlfriend and had gone to school with Phillips. She had been charged and convicted of petit theft and placed on probation in Walton County in August of 1988. (Even though Tillery had stated she had been prosecuted in Walton County, neither the court nor the attorneys recalled the county in which she was convicted when discussing her challenge.) (R Vol. VIII, pp. 1220, 1221, 1245, Vol. I, pp. 1397, 1453).

Cora Wilson had six children, two of whom still resided in DeFuniak Springs. One of Ms. Wilson's sons, who is the same age as Phillips, had been prosecuted by the attorney representing the State in the case before this court. Both the prosecutor and Ms. Wilson were aware of this fact. (R Vol. VIII, pp. 1248, 1326, Vol. IX, pp. 1413).

Linda Paul stated that she knew Phillips from school, and that she knew his daughter, his brother and his girlfriend. Most

importantly Ms. Paul stated that Phillips should not receive the death penalty unless the State could prove that he actually "pulled the trigger" to kill the victim. (R Vol. VII, pp. 1225-1226; Vol. IX, p. 1398-1299, 1403).

David Amason stated that he had been arrested for trespassing, but that the charges had been dropped. Mr. Amason also stated that he is a Correctional Officer at the Okaloosa Correctional Institute, and that he is the brother-in-law of the manager of the liquor store robbed in this case. (R Vol. VIII, pp. 1247, 1250, 1293).

Randy McInnis stated that his brother had been convicted of bad check charges in Okaloosa County. (R Vol. VIII, p. 1244).

After the defense objected to the State's peremptory challenges, the following transpired:

> MR. ADKINSON: Judge, my reason for Victoria Tillery is that during voir dire she had stated that she had been the defendant in a petit theft case. And I feel, for that reason, and that's the reason for my striking her, that that would be a valid reason for doing so ,
>
> In regard to Linda Paul, my reason for that was in voir dire she said that she could not give the death penalty to someone that we didn't establish pulled the trigger. And while that's not a reason for cause, I feel it's a reason that I can excuse her, because it may affect her, I feel it may affect her in deciding the guilt or innocence in this case, because he could still get the death penalty on a felony murder case. And that's my reason for striking Linda Paul.

* * *

MR. ADKINSON: Another reason on her, too, was that she [Victoria Tillery] also knew the defendant and she went to school with the defendant. I'm concerned about her knowledge or her relationship with the defendant in this case. And the same would apply for Linda Paul.

* * *

MR. ADKINSON: I'm finished with Linda Paul. Do you have any response to Linda Paul?

MR. THOMAS: What, what was your gravamen of Linda Paul?

MR. ADKINSON: Again, she also went to school with the defendant. She knows the defendant. She knew the defendant's daughter. She also stated that she could not give the death penalty, recommend the death penalty, unless we prove that he actually pulled the trigger in this case.

MR. THOMAS: But, then, I believe she made a follow-up response where she said, "If the law was such and I was instructed by the judge, I would carry out the law," and that's the reason why the judge did not throw her out for cause.

MR. ADKINSON: As far, as far as determining the guilty or innocence. But as to the death penalty, she said she could not recommend death if we didn't establish that he pulled the trigger. And we're not going to be able to establish exactly that he pulled the trigger in this case. And that's my reason for striking her.

* * *

MR. ADKINSON: Okay. And Cora Lee Wilson, Your Honor, the reason for my challenge of Cora Lee Wilson was, if the court recalls, her son is Craig Wilson, who I know --

MR. THOMAS: Judge, I'm gonna object right there to what the prosecutor does or does not personally know. That's totally irrelevant, what he knows about this case.

MR. ADKINSON: May I finish?

MR. THOMAS: Yes. I'm sorry.

MR. ADKINSON: He's been to prison, I think she knowledged, and I know I was the prosecutor in his case, and she further acknowledged that fact.

MR. THOMAS: But, didn't she --

MR. ADKINSON: And that's the reason I'm striking Cora Lee Wilson, because I have, in fact, prosecuted her son I know on at least one occasion, and I think twice. And she said she also knew that I was the prosecutor of those cases.

(R Vol. IX, pp. 288-293).

In response to the Defense's objection, and the State's response, the court ruled that the State had a factual basis for the challenges, and allowed the challenges to stand. (R Vol. IX, p. 288-294). Contrary to the Statement of the Facts in Phillips's Initial Brief (IB p. 12) David Williams of the Department of Law Enforcement testified that a Smith and Wesson .38 caliber revolver could have shot the bullets involved if that revolver had been rebarreled with the barrel of a Taurus, Rossi, Astra, Charter Arms or High Hunter revolver. (R Vol. 11, pp. 399-401). In his initial brief, Phillips states that Officer Fred Mann testified that he interviewed Phillips twice on May 13, 1989. (IB p. 4). Phillips fails to state, however,

that the second statement in which Phillips admitted that he willingly participated in the robbery of the victim, was initiated by Phillips himself. (R Vol. VII, pp. 1036). Phillips also fails to inform the court that each of his recorded statements, made from May 11 through the 13, was preceded by a signed waiver of his right to remain silent and of his right to the presence of counsel while being questioned. (State's Ex. 24-29). Finally, Phillips also fails to inform the court that his second statement was given despite the fact that he was not only reminded of his right to remain silent and to the presence of legal counsel, but was also reminded that he had been appointed counsel. (R Vol. VII, p. 1036, 1107).

SUMMARY OF ARGUMENT

The trial court did not err in allowing the State to use its peremptory challenges to strike three black prospective jurors. Once the objection was made, the State presented sufficient race-neutral reasons to justify the challenges. Recognizing those reasons as sufficient and supported by the record, the court did not err in allowing the State's challenges to stand.

The trial court did nat err in admitting Phillips's out of court statement to law enforcement, even though Phillips did not have counsel present while the statement was made. Even though Phillips had been appointed counsel at his first appearance, neither his Sixth Amendment right to counsel nor his right to counsel under Article 1, section 16 of the constitution of the State of Florida had attached at first appearance or at the time the statement in question was made. As Phillips had no right to the presence of counsel through either the or Sixth Amendment or through Article I, section 16, and as Phillips's right to due process was not violated, admission of his voluntary statement was not error.

The trial court also did not err in granting the State's motion in limine thereby ruling inadmissible Poston's proposed testimony that Corbett confessed the robbery and murder to him. The statement was hearsay, and did not qualify as an exception as it was not corroborated as trustworthy by surrounding

circumstances. In addition, the statement was irrelevant as applied to Phillips, and was properly ruled inadmissible on that ground as well.

Finally, the trial court did not err in denying Phillips's motion in limine thereby allowing the admission of a single photograph of the body. Photographs, even gruesome photographs, are admissible if relevant. Here, the photograph was relevant to show the victim's lack of clothing, the location of the body, and nonfatal injuries inflicted to the victim.

ISSUE I

WHETHER THE TRIAL COURT ERRED IN NOT UPHOLDING DEFENSE COUNSEL'S OBJECTION TO THE STATE'S PEREMPTORY CHALLENGE TO THREE PROSPECTIVE JURORS.

The State agrees that the defense counsel met the first requirement of **State** v. **Neil,** 457 So.2d 481 (Fla. 1984), and State v. Slappy, 527 So.2d 18 (Fla. **1988).** However, the second prong of **Neil** and Slappy, failure on the part of the State to show that the "questioned challenges were not exercised solely upon the basis of race," **Neil, p. 488**, was clearly not met.

In his examination of the State's rationale for the challenges exercised, Phillips claims only that the challenge was based on reasons equally applicable to a juror who was not challenged. The reasons given for the peremptory challenge for prospective juror Tillery, that she had previously been convicted of petit theft, and that she knew the defendant, were racially neutral. Stephens **v.** State, 15 F.L.W. 897 (Fla. 1st DCA **1990).** Phillips claims that those reasons were equally applicable to juror Amason. However, Phillips incorrectly **bases** his claim on the statement that Amason had been convicted of the crime of trespassing. The record clearly shows that Amason was not convicted, but was merely charged with trespassing and that the charges were, in fact, dropped. Unlike petit theft, trespassing is not related to the robbery offense with which Phillips was charged. The record also shows that Amason was a

corrections officer at Okaloosa Correctional Institute, that he was the brother-in-law of the manager of the **store** which Phillips was accused of robbing, and that, unlike Tillery, he did not know Phillips. Clearly, it cannot be said that the reasons given to challenge Tillery, conviction of theft, one of the offenses with which Phillips was charged, was equally applicable to Amason. The reasons given for striking Tillery were clearly not applicable to Juror Amason.

Similarly, Phillips claims that the reason to challenge Cora Wilson, the fact that Phillips's prosecutor himself had successfully prosecuted Wilson's son two or three times, was equally applicable to Juror McInnis. Although McInnis did have a brother who had been jailed for "bad checks,'' the brother had not been prosecuted by the very attorney arguing for the State **as** had Wilson's son. Had the same assistant state attorney not prosecuted Wilson's son, the argument before this Court may have been closer. However, as Wilson's son was prosecuted by the very attorney for the State in the case for which Wilson was being examined for jury duty, a fact which she acknowledged, **and** as the child which had been **prosecuted** was of the approximate age of Phillips and lived in DeFuniak Springs, clearly, again, the reasons given to challenge Ms. Wilson were racially neutral and were not equally applicable to Juror McInnis.

The State's basis for exercising a peremptory challenge to prospective Juror Linda Paul was likewise not racially based.

Ms. Paul indicated on vois dire that she could not vote to impose the death penalty unless the State could prove that the defendant was personally responsible for the death of the victim, that Phillips "pulled the trigger." In this case, Phillips had been charged with felony murder and the State would not prove that he had "pulled the trigger," yet the State was seeking the death penalty. "Ambivalence toward recommending a sentence of death and opposition to the death penalty are race neutral and acceptable grounds for excusing a prospective juror.'' Holton v. State, 16 F.L.W. S136, 137 (Fla. January 15, 1991). Ms. Paul had also stated on voir dire p. 63 that she knew Phillips and his daughter. These two reasons were racially neutral, and were properly found to be so by the trial court. Lennon v. State, 560 So.2d 308 (Fla. 1st DCA 1990) and Holton, supra.

Phillips's claim that the trial court did not make a complete evaluation of the credibility of the State's rationale for exercising its challenges is also in error. After the trial court questioned whether he could leave a challenged prospective juror on the panel, defense counsel argued and fully explained the court's duty in this regard, The court then made a determination based on the record, finding that the State had a factual basis for the challenges in the record, thereby denying Phillips's objection.

The trial court is granted broad discretion in determining whether peremptory challenges are racially based. Reed v. State, 560 So.2d 203 (Fla. 1990). As no abuse of that discretion has been shown in this case, this Court should affirm the trial court's ruling on Phillips's objection here.

ARGUMENT

ISSUE 11

WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS AND ALLOWING THE ADMISSION OF THOSE STATEMENTS AT TRIAL.

Phillips claims that the admission of his voluntary statement at trial was a violation of his 6th amendment right to counsel as well as the right to counsel guaranteed by Article I, § 16 of the Constitution of the State of Florida.

The sixth amendment to the U.S. Constitution states, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence. Constitution of the United States, Article [Vl] (E.S.).

Although the language quoted above does not specifically say when the right "to have the assistance of counsel" attaches, the United States Supreme Court has said repeatedly that

> until such time as the government has committed itself to prosecute, and . . . the adverse positions of government and defendant have solidified the Sixth Amendment right to counsel does not attach. **Moran v. Burbine, 475 U.S. 412,** 432, **89** L.Ed.2d **410, 428, 106** S.Ct. **1135** (1986), quoting **United** States **v. Gouveia, 467** U.S.

> **180, 189, 81** L.Ed.2d **146,** 104 S.Ct. 2294 **(1984)** and **Kirby v. Illinois, 406 U.S.** 682, 689, 32 L.Ed.2d **411,** 92 S.Ct. 1877 (1972).

In this case, the statement at issue was made after Phillips had been arrested, and **after** he had made his first appearance in court. At first appearance, he had been appointed counsel, pursuant to Fla.R.Crim.P. 3.130(c)(1). Phil**lips** himself concedes that appointment of counsel at first appearance probably does not constitute the attachment of the right to counsel afforded by the Sixth Amendment. Phillips is correct in this concession.

As previously stated, the sixth amendment right to counsel attaches at the "initiation of adversarial judicial proceedings." **Michigan v. Jackson,** 475 U.S. 625, 629, 89 L.Ed.2d **631, 638,** 106 S.Ct. **1404** (1986), quoting **United States v. Gouveia, 467 U.S. 180,** 187, 188, 81 L.Ed.2d **146, 104 S.Ct.** 2292 (1984). As also stated by the United States Supreme Court,

> [A] person is entitled to the help of a lawyer at or after the time that judicial proceedings have initiated against him -- whether by way of formal charge, preliminary hearing, indictment, information, or arraignment. Brewer **v. Williams, 430 U.S. 387,** 398, 61 L.Ed.2d **424,** 97 S.Ct. **1232** (1977) quoting **Kirby v. Illinois, 406 U.S. 682, 689,** 32 L.Ed.2d **411,** 417, **92 S.Ct.** 1877 (1972).

The facts in the case before this Court raises the question of whether first appearance constitutes an adversarial judicial

proceeding in which the government has committed itself to prosecute.

The time at which adversary judicial proceedings commence is a question of state law. Moore v. Illinois, 434 U.S. 220, 228 (1977). Article 1, Section 15(a) of the Florida Constitution provides:

> No person shall be tried for capital crime without presentment or indictment by a grand jury, or for other felony without such presentment or indictment or an information under oath filed by the prosecuting officer of the court . . . (E.S.)

This Court has held that adversary proceedings do not commence until formal charges have been filed. Keen v. State, 504 So.2d 396 (Fla. 1987). This court has also held that a person has no right to counsel at a pre-indictment line up. Perkins v. State, 228 So.2d 382 (Fla. 1969); Chaney v. State, 267 So.2d 65 (Fla. 1972); Ashford v. State, 274 So.2d 517 (Fla. 1974); and Lynch v. State, 293 So.2d 44 (Fla. 1974).

Here, Phillips claims that his right to counsel "attached" when counsel was appointed at first appearance. First appearance is held pursuant to Rule 3.130, Fla.R.Crim.P., and is to be held within 24 hours of arrest. At first appearance the individual has been arrested but not formally charged by indictment or information under oath by the prosecuting attorney. The purpose of the first appearance is to have a

magistrate inform the arrested person of the offenses for which he was arrested, of his right to remain silent, his right to counsel, and of his right to communicate with counsel, family or friends. At first appearance, the magistrate is also to set bond or other conditions of release. Further, if the necessary proof is available, and the person was not arrested pursuant to the issuance of a warrant, companion rule 3.133(a)(1) also requires the magistrate to determine probable cause to detain the arrested person. If the proof necessary to determine probable cause is not available, no warrant was issued for his arrest, and the arrested person is not released at first appearance, rule 3.133(a)(1) requires a non-adversary probable cause determination to be held before a magistrate within 72 hours from the date of arrest.

Before its amendment in 1975, In re Florida Rules of Criminal Procedure, 309 So.2d 544 (Fla. 1975), Florida's process in which criminal charges were brought was challenged in a series of Federal cases culminating in Gerstein v. Pugh, 420 U.S. 103, 43 L.Ed.2d 54, 95 S.Ct. 854 (1975). Those pre-amendment rules, in all but capital cases, allowed a person to be charged through a prosecutor's information without a determination of probable cause. In examining Florida's standards and procedures for arrest and detention, the Gerstein v. Pugh Court stated that the standards and procedures for arrest and detention have been derived from the Fourth Amendment

and its common law antecedents to protect the rights of a person not to be unreasonably seized without probable cause.

The Gerstein v. Pugh Court further held that the adversary safeguards of "'counsel, confrontation, cross examination, and compulsory process/or witnesses' . . . are not essential for the probable cause determination required by the Fourth Amendment." **Gerstein** v. Pugh, 43 L.Ed.2d at 68 & 69. The Court stated further:

> The sole issue is whether there is probable cause for detaining the arrested person pending further proceedings. This issue can be determined reliably without an adversary hearing. Id.

Accordingly, the Court ruled that

> [B]ecause of its limited function and its nonadversary character, the probable **cause** determination is not a "critical stage" in the prosecution that would require appointed counsel. Id. 43 L.Ed. p. 70.

In reaching this conclusion, the court identified "critical stages" as

> those pretrial procedures that would impair defense on the merits if the accused is required to proceed without counsel.

Like the probable cause determination, the other two procedures performed at first appearance, determining pretrial release and informing the arrested person of his rights to

silence, to counsel, and to communicate with counsel, friends and family, are not ones that would "impair defense on the merits" if no counsel were provided. Accordingly, those procedures are likewise not adversarial or "critical stages" as defined by Gerstein v. Pugh, and would likewise not require counsel to be appointed pursuant to the Sixth Amendment.

Another reason that the first appearance is not a "critical stage" of prosecution is that not all persons arrested are required to appear at first appearance. Only those "who [were not] previously released in a lawful manner" at the time of first appearance are required to appear. Fla.R.Crim.P. 3.130(a). Moreover, not all arrested persons in custody are entitled to a post-arrest probable cause determination at first appearance or within 72 hours of arrest. As stated in Rule 3.133(a)(1), "this [nonadversary probable cause determination] shall not be required when a probable cause determination has been previously made by a magistrate and an arrest warrant issued for the specific offense for which the defendant is charged."

Further, even if he is in custody and arrested without a warrant Florida rule of Criminal Procedure 3.133(a)(3) specifically states that the arrested person need not be present at the probable cause determination. A proceeding which is not required for every arrested person and which can be held outside the presence of the arrested person cannot be considered a

critical stage at which the arrested person's "right to be heard by counsel" attaches.

Although Phillips was appointed counsel at first appearance, that appointment was to protect his rights not to be seized without probable cause and to reasonable bail. That appointment was not the Sixth Amendment appointment to assist the accused in adversary judicial proceedings. At the time of the appointment, no charges had been made by information or indictment. The state had not "committed itself to prosecute" and the adversary positions had not solidified. He had not been formally charged and was therefore not an "accused." Moreover, the proceedings, as demonstrated, did not constitute ''adversary judicial proceeding." They were not a "critical stage" in the prosecution and did not require representation by appointed counsel. Accordingly, Phillips had no Sixth Amendment right to counsel at the time of first appearance. As that right to counsel had not "attached," the inculpatory statement he made subsequent to first appearance was admissable even though that statement was made outside of the presence of counsel. Keen v. State, supra; and Moran v. Burbine, 475 U.S. 412, 89 L.Ed.2d 410, 106 S.Ct. 1135 (1986).

Phillips also claims that his right to counsel guaranteed by Article I, Section 16 of the Florida Constitution was also violated in the admission of the inculpatory statement. Relying on State v. Douse, 448 So.2d 1184 (Fla. 4th DCA 1984) and Sobczak

v. State, 462 So.2d 1172 (Fla. 4th DCA, 1984), Phillips claims that Florida Rule of Criminal Procedure 3.130 pravides that the right to the assistance of counsel "attaches" as early as the defendant's first appearance.

Rule 3.130 makes no such statement. That rule states that where practicable, the magistrate is to determine prior to first appearance whether the arrested person is able to afford counsel, and if he desires counsel. Where the Magistrate determines that the arrested person is entitled to court appointed counsel, counsel is to be appointed. Although appointed by the court, counsel at first **appearance** is not provided to satisfy the right to trial counsel under the Florida **and** federal Constitutions.

As previously demonstrated, first appearance in Florida does not rise to the level of a "critical stage" or "adversary judicial procedure" at which the Sixth Amendment right to counsel attaches. Counsel at first appearance is provided to ensure the arrested person is not detained without probable cause. Florida's constitution is even more clear in specifying what proceedings rise to the level of "prosecution" specified in Article I, Section 16, thereby triggering the requirement for the appointment of counsel provided by that section.

Article I, Section 16 states:

> **Section** 16. Right of **the** accused and of victims. -

> (a) In all criminal prosecutions the accused shall, upon demand, be informed of the nature and cause of the accusation against him, and shall be furnished a copy of the charged, and shall have the right to have compulsory process for witnesses, to confront at trial adverse witnesses, to be heard in person, by counsel or both ... (E.S.)

To determine the meaning of "criminal prosecution" and "accused", which are legal terms of art, and of the time at which the right to counsel and other Section 16 rights attach, that section must be read in pari materia with Section 15, entitled Prosecution for Crime; offenses committed by children. That section states, in pertinent part:

> No person shall be tried for capital crime without presentment or indictment by a grand jury, or for other felony without such presentment or indictment or an information under oath filed by the prosecuting officer of the court....(E.S.).

Based on these two sections, prosecution for a criminal offense does not begin and the Section 16 right to counsel does not attach until the person has been indicted by the grand jury or the information under oath has been filed by the prosecuting attorney.

Moreover, Section 15 addressing procedures required to initiate criminal prosecution speaks of the subject as a "person." Importantly, the section immediately following, section 16, requires that the person (suspect) become "the

accused." The only conclusion that can be reached, reading these two sections together, is that prior to filing of the information, the state has not initiated the prosecution and the subject is simply a "person." Whereas, once the prosecution has been initiated, by indictment or information, the person becomes an "accused" with the rights specified in section 16, including the right to counsel.

As previously stated, Phillips relies on State v. Douse, supra and **Sobczak v. State, supra** to state that a criminal rule of procedure, Rule 3.130, enlarged the provision of the constitution specifying the event which triggers the section 16 right to counsel.

State v. Douse involved the admission of a taped statement made between the defendant, **Douse,** and a law enforcement offices. The statement was made after arrest and first appearance, at which Douse was **represented** by retained counsel, and **before** an information was filed. Although the Douse Court recognized Douse had no Sixth Amendment right to counsel, the court stated that Article 1, Section 16 guaranteed the right to counsel at all criminal prosecutions, and that Rule 3.130 states that the right to the assistance of counsel "attaches" as early **as** first appearance. In **Sobczak** v. **State,** relying on **Douse,** the **Fourth** District similarly extended the Section 16 right to counsel, holding the results of a lineup held after first appearance and before an information had been filed was inadmissable as it was

held outside the presence of counsel. Both decisions are contrary to the plain terms of the Florida Constitution and to case law from this Court.

It is clear that

> a constitutian, in the American sense, is a written document totally superior to the operations of government. As such, neither our legislature, by statutes, nor our courts, through decisions, can amend the Florida Constitution.
>
> **Bernie v. State, 524 So.2d 988, 994** (Fla. 1988). (Concurring opinion; footnote omitted).

The constitution cannot be amended by procedural rule. The Florida Constitution, as adopted by the people of this state, specifies that the right to be heard by counsel provided in Article 1, §16 takes effect only upon commencement of the criminal prosecution, and that criminal prosecutions may be initiated only upon presentment or indictment by a grand jury or the filing of an information. Neither the legislature nor the judiciary can amend the Florida Constitution to provide otherwise.

Therefore, the procedure at which that right "attaches" contrary to specification of the provisions of Article 1, Sections 15 & 16 cannot be made or altered by procedural rules. As recently stated by this Court, to do so "would be arrogating to ourselves, not merely the power of the legislature to make

laws, but the power of the people to change the constitution." Chiles v. Children, 16 FLW S708 (10/29/91).

Chiles is a fecund statement of the omnipotent principle of constitutional interpretation, namely, that the constitution belongs to the people who adopted it, not to lawyers, judges, legislatures, other elected officials, pressure groups, and other special interests. The people of Florida have explicitly spoken in Section 15 on what separates a suspect from an "accused," a legal term of art signifying an information or an indictment, and in Section 16, what constitutional rights an "accused" has and when those rights attach. Specifically, those rights "attach" when a mere suspect becomes an accused by virtue of a charging document by the constitutionally authorized agents of the state, i.e., grand jurors and state attorneys. It is not for this Court through its constitutional rulemaking authority to override the explicit will of the people set out in Article I, Sections 15 and 16.

Phillips had no right to counsel under Article I, Section 16 at the time of his uncounseled statement, prior to his becoming an "accused". His statement, therefore, was properly admitted by the trial court.

Finally, Phillips also claims that based on this Court's decision in Haliburton v. State, 514 So.2d 1088 (Fla. 1987), the actions of the law enforcement officers and admission of

Phillip's statement violated the due process provision of Article I, Section 9 of the Florida Constitution. In Haliburton, after the appellant had been arrested for burglary, but before indictment, information or first appearance, Haliburton was advised of his rights and was questioned four times. At the last question period Haliburton gave an inculpatory statement which was recorded and submitted to the jury. On that same day Haliburton's sister hired an attorney who arrived at the police station immediately before the last question period. The attorney asked to speak to Haliburton but was not allowed to do so despite a Circuit Court Judge's order to the contrary. Haliburton was not advised of the presence of the attorney at any time. This Court held that the refusal af the police officers to inform Haliburton of the presence of "an identified attorney actually available to provide at least initial assistance and advice" constituted a violation of the due process requirement of Article 1, Section 9. Id., p. 1090. In doing so, this Court differentiated the actual **presence** of an attorney from an abstract offer to call some unknown lawyer. Id.

More recently in Harvey v. **State**, 529 So.2d 1083 (Fla. 1988), a public defender, requested by neither the Appellant nor his family, **asked** to speak with Harvey after his arrest but was refused access. This Court held that Harvey's inculpatory statements made without the presence of counsel were admissable at trial and did not violate Article 1, Section 16. Like

Haliburton, Harvey was not advised of the presence of the attorney. This Court distinguished Haliburton by stating that in that case a specific attorney hired by Haliburton's family was refused permission to speak to his client despite a court order to do so and despite his actual presence on the scene. Haliburton is inapposite on its facts. None of the critical factors present there were present in this case.

Accordingly, Phillips's voluntary, pre-indictment statement was properly admitted by the trial court.

ISSUE III

WHETHER THE TRIAL COURT ERRED IN EXCLUDING OUT OF COURT STATEMENTS. (Restated)

Phillips claims that the trial court erred in excluding the testimony of Terry Poston as to certain statements allegedly made by Rick Corbett. Phillips's theory is that the statements were admissible through the hearsay exception allowing statements against the interest of the declarant when the declarant is unavailable to testify and the surrounding circumstances corroborate the trustworthiness of the statements. A correct statement of the pertinent statutory provision follows:

> **90.804** Hearsay exceptions; declarant unavailable. (2) Hearsay exceptions. - The following are not excluded under s. 90.802, provided the declarant is unavailable as a witness:
>
> (c) Statement against interest.--A statement which at the time of its making, was so far contrary to the declarant's pecuniary or proprietary interest or tended to subject him to liability or to render invalid a claim by him against another, so that a person in the declarant's position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is inadmissible, unless corroborating circumstances show the trustworthiness of the statement.
>
> A statement or confession which is offered against the accused in a criminal action, and which is made by a codefendant or other person implicating both himself and the accused, is not within this exception.

At trial the court considered the State's motion in limine to exclude Poston's testimony regarding statements made to him by Rick Corbett. Admissability of the out-of-court statements pursuant to s. 90.804(2)(c) hinges upon presentation of the applicable elements to prove that the statement falls within the hearsay exception. That burden fell to Phillips, the party desiring the admission of the statements. Phillips had to show: 1) that the declarant, Corbett, was unavailable to testify; 2) that the statements were made contrary to Corbett's interests; and 3) that the surrounding circumstances corroborated the trustworthiness of the statements. Assuming, for the purpose of argument, that elements one and two were accepted as true by the court, the surrounding circumstances were not sufficient to corroborate the trustworthiness of the statements. Hill v. State, 549 So.2d 179 (Fla.1989); Ard v. State, 458 So.2d 379 (Fla. 5th DCA 1984).

The circumstances surrounding the two statements tying Corbett to the crimes did not corroborate the trustworthiness of the statements: those statements were made to no one other than Poston; the statements were made when both Corbett and Poston had been drinking alcohol and smoking marijuana and were very likely under the influence of those drugs; no one else heard Corbett make the alleged statements to Poston; and Poston's reaction to viewing the body in its partially decomposed state may have affected his ability to hear, understand, and remember

Corbett's statements. Contrary to Phillips's claim that the surrounding circumstances corroborated the trustworthiness of the statements, very clearly the circumstances do the opposite and corroborate the very lack of trustworthiness the hearsay rule was adopted to avoid. Without evidence of surrounding circumstances corroborating the trustworthiness of the hearsay statements, the statements were properly excluded. Walker v. State, 483 So.2d 791 (Fla. 1st DCA 1986).

In addition, the statements appear to have been excluded on the grounds of relevancy. Had the statements that Corbett committed the robbery and shot the victim, and that the victim decomposing body expressed Corbett's feelings about life, been admitted, those statements would only have implicated Corbett in the crime. At trial the defense argued that the statements showed Corbett's depraved state of mind which, in turn, would somehow justify Phillips's acts. As the statements did not even address Phillips, those statements had little probative value, and were, at best, remotely related to the defense's theory of innocence.

Absent an abuse of discretion, an appellate court will not overturn a trial court's decision on the admission of evidence when the trial court has weighed the probative value of the evidence against its prejudicial effect. State v. McClain, 508 So.2d 1259, 1261 (Fla. 4th DCA 1987).

Accordingly, in this case, absent a showing that the trial court's ruling was arbitrary, unreasonable ок fanciful, the trial court's ruling as to the admissability of Corbett's statements as either irrelevant or as inadmissible hearsay must not be disturbed by this Court. Blanco v. State, 452 So.2d 520 (Fla. 1984), cert.den., 105 S.Ct. 940, 469 U.S. 1181, 83 L.Ed.2d 953, and Canakaris v. Canakaris, 382 So.2d 1197 (Fla. 1980).

ISSUE IV

WHETHER THE COURT ERRED IN ADMITTING ONE PHOTOGRAPH SHOWING THE VICTIM'S ENTIRE BODY. (Restated)

The test for admissibility of photographs is relevancy, not, according to Phillips, necessity. Bush v. State, 463 So.2d 196 (Fla. 1985). Adams v. State, 412 So.2d 850 (Fla.), cert. denied, 454 U.S. 1022, 102 S.Ct. 556, 70 L.Ed.2d 418 (1981).

The photograph in issue[1], the full photograph of the victim's body, state's exhibit 20-F, was used by the State to show the location of the body, the fact that the body was clothed only in tennis shoes, the decomposition of the body, and the other injuries inflicted on the victim. (R Vol. I, pp. 84, 190; Vol. 11, p. 293). In addition, the defense made extensive use of the photograph in an attempt to impeach the testimony of the State's pathologist, Dr. Ed Kielman. (R Vol. II, pp. 259-293).

The Florida Supreme Court has stated:

> The test of admissibility of photographs in situations such as this is relevancy and not necessity. Photographs are admissible where they assist the medical examiner in explaining to the jury the nature and manner in which the wounds were inflicted. Bush v. State, 463 So.2d 196, (Fla. 1985), citing Weltz v. State, 402 So.2d 1159, 1163 (Fla.

---

[1] The court ruled inadmissible three of the four photographs of the victim's body the State had attempted to admit.

1981), and Bauldree v. State, 284 So.2d 196, 197 (Fla. 1973).

In **Henderson v. State, 468** So.2d 196 (Fla. 1985), the Court stated:

> We find that the photographs, which were of the victims' partially decomposed bodies, were relevant. Persons accused of crimes can generally expect that any relevant evidence against them will be presented in court. The test of admissibility is relevancy. Adams v. **State, 412 So.2d D850 (Fla.), cert. denied** 454 U.S. 1022, 102 S.Ct. 556, 70 L.Ed.2d 418 (1981). Those whose **work** products are murdered human beings should expect to be confronted by photographs of their accomplishments. The photographs were relevant to show the location of the victims' bodies, the amount of time that had passed from when the victims were murdered to when their bodies were found, and the manner in which they were clothed, bound and gagged. It is not to be presumed that gruesome photographs will so inflame the jury that they will find the accused guilty in the absence of evidence of guilt. Rather, we presume that jurors are guided by logic and thus are aware that pictures of the murdered victims do not alone **prove** the guilt of the accused. We therefore conclude there was no error in allowing the photographs into evidence.

As in Henderson, the photograph here was relevant to the location, the elapsed time between the date of death and the body's discovery, the lack of clothing, and to the non-fatal injuries inflicted in addition to the gunshot wounds to the head. **The** photograph was properly admitted.

Phillips relies on Czubak v. State, 570 So.2d 925 (Fla. 1990), for the proposition that excessively gruesome photos are inadmissible. Yet in Czubak, the rationale of the Court was primarily the post mortem damage inflicted to the body by two dogs left in the house with the body. As the particularly gruesome nature of the photographs resulted from the ravages of the animals rather than the defendant, the photographs inserted an irrelevant and particularly shocking element into the evidence and were properly ruled inadmissible.

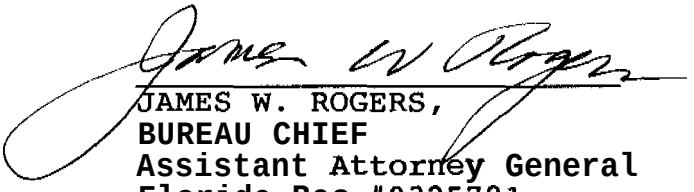
In this case, the non-fatal injuries depicted in the photograph were inflicted by the murderers, not animals; the absence of clothing was corroborative of other evidence (the clothes found in the jug); and the photograph showed the actual location and position in which the body was found. The facts of this case are clearly unlike those in Czubak. Accordingly, absent showing of abuse of discretion by the trial court, this court must find that the photograph in question was properly admitted.

CONCLUSION

For the reasons stated herein, the decision of the First District Court of Appeal must be upheld and Phillips's conviction affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



JAMES W. ROGERS,
BUREAU CHIEF
Assistant Attorney General
Florida Bas #0325791

SUZANNE G. PRINTY
Assistant Attorney General
Florida Ear #308633

DEPARTMENT OF LEGAL AFFAIRS
The Capitol
Tallahassee, FL 32399-1050
(904) 488-0600

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. Mail to John C. Harrison, P.A., Past Office Box 873, 12 Old Ferry Road, Shalimar, Florida 32579, this 12th day of December, 1991,

SUZANNE G. PRINDY
Assistant Attorney General