IN THE SUPREME COURT OF FLORIDA

ANDREW LEE GOLDEN,

Appellant,

CASE NO. 78,982

v.

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE TENTH JUDICIAL CIRCUIT
IN AND FOR POLK COUNTY, FLORIDA

# SUPPLEMENTAL BRIEF OF APPELLANT

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## ARGUMENT

APPELLANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO COUNSEL WHEN HE WAS PRECLUDED FROM ATTORNEY-CLIENT COMMUNICATIONS DURING A CRITICAL TRIAL RECESS.

Appellant contents that his right to counsel under the state and federal constitutions was denied when he was prohibited from any communication with his attorney "with regard to his testimony" during the break between his direct and cross-examination. Alternatively, he contends his attorney's agreement with this unconstitutional deprivation of the right to the assistance of counsel was ineffectiveness which is apparent on the record and requires reversal.

At the conclusion of Mr. Golden's direct examination, the trial court recessed for lunch, and the following transpired:

MR. AGUERO: Judge, I would only ask the Court to instruct counsel and Mr. Golden -- counsel may know, but Mr. Golden probably doesn't -- he is now on the witness stand and in between direct and cross-examination. Any discussion with regard to his testimony at this point would be improper.

MR. SMITH: Judge, I instructed Mr. Golden of that when we took the break at 11:00 --

THE COURT: Very well.

MR. SMITH: -- when he was still on direct.

THE COURT: All right. Thank you, sir.

(R 2579).

A criminal defendant has the right to communicate with his trial attorney between his direct and cross-examination. In Amos v. State, 618 So. 2d 1580 (Fla. 1993), this Court reversed a capital conviction in part for this very reason:

> After defense counsel concluded his direct examination of Amos, the prosecution requested a luncheon recess. Defense counsel objected. The trial court granted the request for a recess and the prosecution asked that "Vernon be reminded he cannot talk to his attorney, because he is on the stand, because I am concerned that Vernon will approach Craig [defense counsel] on his own." Defense counsel objected to the prohibition and the court noted that he had "never understood the rules" and asked whether there was case law on this issue. The prosecution advised that "[t]here is case law on it right on point." The trial judge then granted the prosecution's request to prohibit Amos from speaking to his counsel. The prosecutor was correct that there is case law on point, but it is contrary to her position.

Id. at 161. In Bova v. State, 410 So. 2d 1343, 1344-45 (Fla. 1982), this Court held:

> no matter how brief the recess, a defendant in a criminal proceeding must have access to his attorney. The right of a criminal defendant to have reasonably effective attorney representation is absolute and is required at every essential step of the proceedings. Although we understand the desirability of the imposed restriction on a witness stand, we find that to deny a defendant consultation with his attorney during any trial recess, even in the middle of this testimony, violates the defendant's basic right to counsel. Numerous courts have reached a similar conclusion.

Accord Thompson v. State, 507 So. 2d 1074 (Fla. 1987) (consultation prohibited during 30-minute recess). As pointed out in Thompson v. State, 507 So. 2d at 1075, there are many legitimate reasons for attorney-client communications at this critical

juncture.[1]

This right was violated below by the trial court's approval of the prosecutor's requested prohibition. Just as in this Court's recent decision in Amos, 618 So. 2d at 161, this error was prompted by the prosecutor's improper and erroneous advice to the court that such communication would be improper.

Alternatively, if this Court concludes that this error was waived by the actions of the defense attorney - which the State will undoubtedly argue - Appellant would make two responses. First, Appellant would argue that the right to counsel, unlike many other trial errors, cannot be waived by trial counsel but can only be made personally by the defendant. See, e.g., State v. Craig, 237 So. 2d 737, 740 (Fla. 1970) ("The determination of the need for counsel is the defendant's prerogative.") Further, any such waiver must be knowing, intelligent, and voluntary. Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 3d 694 (1966); Johnson v. Zerbst, 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938). Given the improper recitation of the law by the prosecutor and the trial attorney's agreement with that statement, Appellant cannot be faulted for not knowing it was erroneous. One of the most fundamental precepts of the Miranda warnings is that a defendant cannot exercise, or waive, a right which he does not know exists.

Second, if trial counsel's actions here waived this critical

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[1]Of course, this right is subject to the exception that the attorney may not improperly "coach" a client's testimony.

error, Appellant would argue that the record reflects that the attorney's actions were based on ignorance of the law, not strategy, and that this record documents ineffective assistance of counsel sufficient for reversal by this Court.

If the State argues that this error was harmless, Appellant would ask that this Court consider the weakness of this circumstantial evidence case, the lack of preparation which is apparent from Mr. Golden's cross-examination testimony, and the debilitating (and unique) spectacle of his own attorney making him apologize to the prosecutor in front of the jury. In Thompson v. State, 507 So. 2d at 1075, this Court addressed a factually similar situation:

> Thompson's credibility was a crucial issue in his trial. The state was granted a thirty-minute recess for the sole purpose of researching ways to impeach him regarding a subsequent arrest which his lawyer had apparently advised him would be inadmissible. Thus, Thompson was denied the guidance and support of his attorney when he needed it most (i.e., when the state was preparing for a major attack on his credibility). This denial left Thompson nervous, confused, and may have contributed to his performance on cross-examination. We are not in a position to say with any certainty that a consultation with his attorney at this juncture would have made any difference. Had the attorney-client consultation been allowed, defense counsel could have advised, calmed, and reassured Thompson without violating the ethical rule against coaching witnesses. Because of the possible effect of this ruling on the perception of Thompson's credibility and the importance of his credibility to his theory of defense, we cannot say there is no reasonable possibility that the error did not affect the jury verdict. Thus, the error is harmful.

As a second alternative argument, Appellant asserts that this error, in conjunction with the errors raised in Issues V, VIII, IX, and X of the Initial Brief of Appellant, combined to

deprive him of a fundamentally fair trial and due process of law.

Again, this was precisely the situation in Amos v. State, 618 So. 2d at 163:

> This is a circumstantial evidence case. None of the eyewitnesses to any of the incidents could actually place the gun in Amos's hand. It is the State's theory that Amos killed Bragman because of his position at the time of altercation in stealing Bragman's truck. While we might conclude in a different case that the errors we have identified are harmless, we find that, when taken collectively, we cannot find them harmless beyond a reasonable doubt.

## CONCLUSION

Appellant must be discharged based on the insufficiency of the evidence. Alternatively, Appellant is entitled to have a new trial or, at the minimum, to have his death sentence vacated.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing has been furnished by U. S. Mail to Assistant Attorney General Mary Leontakianakos, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32399-1050, and Mr. Andrew Golden, #365791, Union Correctional Institution, Post Office Box 221, Raiford, Florida, 32083, on this 3rd day of September, 1993.

GWENDOLYN SPIVEY