IN THE SUPREME COURT OF FLORIDA

CASE NO. 79,383

RONNIE JOHNSON,

Appellant,

-versus-

THE STATE OF FLORIDA,

Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR DADE COUNTY

INITIAL BRIEF OF APPELLANT

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INTRODUCTION

The appellant was the defendant and the appellee the prosecution, State of Florida, in the lower court. The parties will be referred to as they stood in the trial court. The record on appeal will be referred to by the letter "R". All emphasis is added unless otherwise indicated.

STATEMENT OF THE CASE

The defendant was charged by indictment with the crimes of First Degree Murder and Armed Burglary (R. 1).

The defendant proceeded to a jury trial wherein he was found guilty as charged (R. 66-67).

The jury then returned an Advisory Sentence recommending the death penalty by a note of 9 to 3 (R. 92).

The trial court thereupon sentenced the defendant to Death (R. 108-117).

This appeal follows.

STATEMENT OF THE FACTS

Prior to the trial of this Cause, the trial court had a hearing on the defendant's Motion to Suppress Statements (R. 44). At that hearing:

Metro Officer Milton Hull testified that on March 30, 1989, he had participated in a drug surveillance during which the defendant was brought to his attention (R. 45). Officer Hull also came into contact with Terrace Isan and Lee Curgil (R. 46). Lee Curgil was found in possession of a .357 Magnum (R. 46).

On April 1, 1989, Officer Hull drove to where the defendant was sitting on the front porch of his (defendant's) grandmother's house (R. 48). Officer Hull "told him (defendant) that there was some homicide investigators that wanted some information, that he (defendant) may (have) knowledge of some murder that took place down south" (R. 48). Officer Hull told the defendant "if he was willing to go there, I would take him there, and everything, and then I would bring him back" (R. 48-49). The defendant said, "Okay" (R. 49). The defendant told his grandmother that "he was going to take care of something" (R. 49). The homicide detectives then responded to pick the defendant up (R. 49).

Detective Gregg Smith testified that detectives investigating the Lee Lawrence homicide had a meeting and "At that meeting,

certain names were categorized as potential witnesses, and other suspects in the case, and these were the people that we were supposed to locate and interview" (R. 56). The defendant was transported to the Team Police Office and then "turned over" to Detective Borrego (R. 59). The defendant was told that "We were investigating a homicide, and that we wish to speak to him concerning that investigation" (R. 61). The defendant didn't say that he didn't want to talk to him or that he (defendant) didn't want to go downtown (R. 61).

Officer Thomas Romagni testified that he was at the homicide office on April 1, 1989 (R. 63) and witnessed the defendant sign a Miranda Rights form (R. 64).

Detective Danny Borrego testified that on March 31, 1989, he received information that the defendant was involved in a drug sting arrest in which Lee Curgil was arrested with a weapon which was found to be used in the shooting of Lee Arthur Lawrence (R. 69). When he met the defendant, he told the defendant that he would be transporting him (defendant) to the homicide office (R. 71). At the homicide office, Detective Borrego advised the defendant of his Miranda Rights (R. 73, 76). After advising the defendant of his Miranda warning, Detective Borrego began to question the defendant about some of the homicides that he was investigating in South Dade (R. 76). The defendant gave a statement as to the three incidents (R. 81) and "agreed to go with

us on location, and point out the three different sights of the shootings, and specifically describe for us how they occurred" (R. 82). The defendant then made corrections on his recorded statement (R. 84). The defendant was arrested when he confessed to the killings (R. 87).

Detective Borrego testified that he "probably" had probable cause to charge the defendant "From the information we received from the witnesses in the Tequila Larkins case" (R. 93). Initially, the defendant denied any involvement in the shooting instances (R. 94). After the first 10 or 15 minutes of the interview, the defendant began to make admissions (R. 97).

The defendant testified at the motion hearing (R. 107).

When Officer Hull approached him:

He wanted to ask me some questions, and I asked him what was the question, what question it was, but he had some questions. He said he wanted to question me. I asked about what. He never said about what. He just said he wanted to question me, and he wanted to question me, and I said: For what? And he said to come here. He approached."

(R. 108)

and,

"Touched me on the shoulder, on the arm, told me to come with him, and to answer some questions. I said: No. But since he was there, I didn't feel I had nothing to hide. I came with him. He stopped me, and touched me on the shoulder.

(R. 109).

The defendant was not given a chance to call his grandmother or mother or anybody in his family (R. 109).

Detective Borrego told the defendant "that I was the one in these cases. Really, I was the one that was driving the car, and Rodney told them that I was driving the car, and I was the one who did it" (R. 111).

Detective Borrego told the defendant "If I would be cooperated with him, I would not get the electric chair" (R. 111).

and,

First, they asked me questions, and they were telling me that Rodney told him, and I said that Rodney didn't and punched me (R. 111).

and,

In the chest and arms.

Okay, after they did that, they say you still not going to tell us, I'm telling you, I'm not talking to you about this, and I got scared.

They said we got detectives at your mother's house, and that makes me real scared.

Q: Why?

A: That's the time when the police officers came and kicked in the house, the wrong house, and take her, she was asleep. I was in fear for my family.

(R. 112)

and,

Q: What else was the detective telling you?

A: Other than I could get the electric chair, if I don't cooperate with them, he was telling me, and he was telling me to be cooperative with us. Later they punched me, they hit me with their elbows, coming with their elbows, so I still would tell them that I didn't know about it. I guess what they wanted to hear was that, and they kept coming into the room and punching me.

(R. 112)

and,

Q: Did you tell him you wanted to speak to any of your family?

A: Yes.

Q: What did they tell you?

A: To wait until after what they were doing was over with.

Q: Did they ever tell you that your family tried to reach you?

A: No.

(R. 113)

After being taken to the crime scene and before signing the written statement, the defendant was sleepy and was sleeping.

(R. 114)

When Detective Borrego explained the Miranda form to him "it wasn't clear, whatever they were telling me" (R. 115).

The defendant signed the statement:

Yes, but I was still in fear that my family -- all I wanted to

do was sign the papers, and just talk to my family.

Q: You signed it when they told you to sign?

A: Yes.

I was scared because I still didn't know what had happened to my mother and two brothers. They had detectives at my house. I don't know what type of punishments they were going through. I don't know if they hurt my family.

(R. 115)

As to his physical maintenance, the defendant testified:

Q: How many hours had you been awake from the time they picked you up and booked you into the Dade County Jail?

A: Must have been 16 or 18 hours already out on the streets.

Q: Did he give you anything to eat or drink?

A: No.

(R. 116)

As to speaking to his family the defendant testified:

Q: When was the first opportunity you had to call your family?

A: When I got through signing their papers.

Q: Did they let you call your family from the station, or was this after you were booked?

A: They let me call them when I was there, when I was booked.

Q: Did you speak to your family?

A: That was about 11:00 o'clock in the morning.

They picked me up at 5:30 in the afternoon, and this was about

7:30, from 5:30 to 7:00 o'clock I was in their custody.

Q: That's when you learned your mother was very concerned about you?

A: Yes.

She had been calling, and they didn't tell her -- I don't know what they told her, and they never let me make contact, and I couldn't talk to her. They never told me that she was trying to contact me because I did want to talk to her.

(R. 117)

As to any possibility of the defendant leaving, he testified:

One time they told me that if I tried to run out of the homicide office they would shoot me, and that made me more scared.

(R. 125)

At the conclusion of the argument of both parties, the trial court ruled:

The Court: All right.

As to the motion, the motion to the confession, denied.

This was done at the homicide office. The Miranda Warning is sufficient. **Nothing suggests a waiver of the constitutional rights.**

(R. 135)

At the trial of this cause, during Voir Dire, the prosecution examined jurors as to their beliefs/feelings concerning the death penalty. During the questioning of Juror Williams:

Mr. Bagley: How about you Mrs. Williams.

Mrs. Williams: I prefer not.

Mr. Bagley: You prefer not to sit as a juror and make a recommendation for the imposition of the death penalty.

Is that what you are saying?

Mrs. Williams: Right.

Mr. Bagley: Is that based upon philosophical religious, or moral grounds?

Mrs. Williams: In the Bible it says, Thy shall not kill.

So I don't think I would want to go along with the program.

Mr. Bagley: So are you saying you are opposed to the imposition of the death penalty?

Mrs. Williams: Yes.

Mr. Bagley: It doesn't matter what type of case is presented as to aggravated and mitigating factors.

For example, if the State presented the aggravating factors that show this first degree murder is worse than other types of first degree murder cases you would not be able to consider that, and enlight of the mitigating factors impose the death penalty?

Mrs. Williams: It depends on how it goes.

Mr. Bagley: But what I am trying to understand is what you are saying, that you are imposed to the death penalty because the Bible says you shall not take a life.

I am giving is a synopsis.

That is what you are saying on one hand, but on the other hand, but I can listen to what the aggravating factors are as well as the mitigating factors and if I think the aggravating factors

out weigh the mitigating factors then I can recommend the death penalty?

Mrs. Williams: I didn't say that.

I prefer not.

Mr. Bagley: What I am trying to find out for certain -- I am not trying to put words in your mouth, I know you prefer not to, you may prefer not to be here, you may prefer to be at work or at home.

I think you said you were retired.

The question is, maybe you prefer to be somewhere else.

I am sure if you are selected as a juror based upon your oath you are going to judge the facts and apply the law given by His Honor and arrive at a lawful verdict.

What I need, even though you may prefer not to recommend the death penalty, would you be able to do so?

Mrs. Williams: No.

Mr. Bagley: You would not be?

Mrs. Williams: No.

(R. 503-504)

The next inquiry as to Mrs. Williams concerned his familiarity with firearms:

Mr. Bagley: Mrs. Williams. I believe you had your hand up.

You own some guns?

Mrs. Williams: A riffle and a .357 magnum.

Mr. Bagley: Thank you.

(R. 525)

and,

Mrs. Williams, you have a license?

Mrs. Williams: Yes, sir.

(R. 526)

Mrs. Williams next came up when he was challenged for Cause at Jury Selection:

The next person I would have to move for cause is Mr. Williams, he clearly pointed out based upon religious grounds that the Bible says that one shall not take a persons life. There is no question in his mind no matter what the aggravating factors are.

The Court: How about that one?

Mr. Badini: I believe that he should say -- I think unfortunately the State has indicated when someone has said that specifically he will not under any circumstances follow the Courts instruction.

I think that is the person(s) opinion one way or the other and are not grounds for throwing people off, unless they said I am not voting one way or the other, I am voting this way. I am not or I am participating this way.

The Court: I think I tend to agree with Mr. Williams, he said he just did not want to participate in any discussion.

I will sustain that challenge for cause.

Anything else?

(R. 543)

At the trial of this Cause, the following testimony was presented:

Jury Briggs testified that on March 11, 1989 he was at the Sparkle City Laundromat washing clothes with his wife (R. 608). The victim, Tequila Larkins, locked the front door while he and his wife were still washing clothes (R. 610).

Then, a man came to the door and asked for change (R. 609-610). Ms. Larkins then got her keys (R. 610). Then the man barged in the door and "They started arguing and then started physically fighting (R. 612). The man "was hitting very hard in her face" (R. 612). Ms. Larkins fell (R. 613). Then, "she went down on the floor and he got on top of her" (R. 618). "At that point of time he pulled out a gun" (R. 619). "I heard three to four shots, simultaneously" (R. 619).

Mr. Briggs identified the defendant as the man he saw (R. 620).

Q: Why don't you look at the back of that photograph and see what exactly you wrote down and tell the members of the jury what you wrote down.

A: This guy that I am sure 80 percent was wearing a hat so that knocked out 20 percent.

Q: The 20 percent because he was wearing a hat knocked off 100 percent identification?

Are you sure today that was the person you saw in the Sparkle City Laundromat striking Sugar Mama and pull out a gun in which you heard shots?

A: Yes, sir.

(R. 623)

After the incident, Mr. Briggs was shown a photo lineup (R. 621). Mr. Briggs selected a photo (R. 622) being about 80% sure (R. 623). Briggs testified:

On cross-examination, Mr. Briggs testified that he had been shown the photographic lineup again, the week before trial (R. 637), by the State Attorney, without any police officers being present. Briggs testified "I seen them with the State Attorney to make sure that this was the right person" (R. 637).

Mr. Briggs again acknowledged that when he initially viewed the photo lineup on March 11, 1989, he was 80% sure that the photograph number 3 (defendant) was "similar to the man who you thought committed the murder" (R. 638-639).

On the Redirect examination, the prosecution again elicited that Mr. Briggs had come to the prosecutor's office" last week (R. 639), had viewed the photo lineup (R. 640), and had been asked "To pick out the guy that I think was in the Laundromat at that time" (R. 640). Briggs again testified that he did "pick out the person (he) believe(d) was the person who shot Sugar Mama (Larkins)" (R. 640). Briggs testified that no one showed him that photo lineup between March, 1989 and when he came to the prosecutor's office, "over two and a half years later" (R. 640).

Following Mr. Brigg's testimony, the parties went sidebar:

Mr. Badini: Your Honor, at this time the defense is going to move for mistrial due to Mr. Briggs' testimony throughout this. He never made a positive identification of the defendant, he was only approximately 80 percent sure.

The prosecutor intervened in this case with an out of Court identification of the defendant.

This is a violation of the Richardson Rules. He never revealed that to the defense, the only thing the defense knew was that there was one showing of these photographs on April 1, 1989, and that he indicated he was approximately 80 percent sure, which was brought out by the testimony.

We now find out about a week ago the prosecutor stepped out of the boundaries and began an investigation.

The Court: Ladies and gentlemen, we have some matters to discuss outside your presence. I would ask you to step inside the jury room, which is located right behind you.

[Thereupon, the following proceedings were had outside the hearing of the jury.]

The Court: We will have a Richardson Hearing. You are talking about the second showing?

Mr. Badini: Yes, on April first, there was detective Rembly and Detective Borrego that showed a series of photographs to the witness, and at that time he said photograph number three was similar to the person he thought committed the homicide, he wasn't sure.

The expression 80 percent had been used.

He mentioned there was a difference in facial hair, and he wasn't positive. He had not made a positive identification.

The detective deposition, the detective stated clearly that he did not make a positive identification of this man.

Of course he can say now that that is the man now, but two and a half years ago we had a secondary identification.

Now, that has to be disclosed to the defense.

Any time there is an identification of the defendant made out of Court it really opens up a whole series of questions because the prosecutor now becomes an investigator.

The prosecutor in trying to prepare his case is now refreshing somebody's memory that was already in evidence because he identified him once before, et cetera.

Just going to his testimony, he is now re-showing him the line-up and his first expression was he told me that these were the photographs.

He has a duty to disclose that.

The Court: Your contention is that up until the second showing the best you are aware of was the witness could only make an 80 percent---

Mr. Badini: Now, we have a positive identification. He failed to retell that to me. This is the second course. We have had the prosecutor engaging themselves in out of Court identification procedure, and this opens up a tremendous problem because we did not have previously a positive I.D.

A lot of times you have a previous positive I.D., you are saying, well, you already positively identified him. So I haven't done anything wrong. They have a problem.

If I had known about this I would have taken his deposition again, because I am sitting here saying there is always a

possibility he is going to, but I have an 80 percent man here. Now I don't have an 80 percent man, now I have two out of Court identifications.

The first one, and now the second one, that is positive.

The Court: Let me hear from the State.

Mr. Bagley: Judge, his testimony is still consistent.

First of all, showing him this photographic line-up is not different then me showing him a copy of a sworn statement and his deposition that he gave.

The Court: There is no question in my mind that you can go over an individuals testimony.

Mr. Bagley: That is exactly what I did, I showed him this, see if you recognize, see if he recognized his writing on the back. That is all.

Now there is a discovery violation?

I submit now, first of all, there is a case, Bush v. State, I can get the case, it is a Florida Supreme Court case which states that this is not a discovery violation.

What you have is an issue for counsel to express during cross examination, and this is what this witness did testify to, consistent to what he said in the depo, to what he said in the sworn statement.

The Court: Last week, whatever it was that you remember testifying to, look at the photographs and say, oh wait a minute, before I was only 80 percent, but now I am a hundred percent sure.

Mr. Bagley: No, he stuck to the same testimony he gave.

The writing on the back of State Exhibit No. 4 when he testified he said I was 80 percent sure, 20 percent is knocked off because he was wearing a hat. He didn't say anything different in Court today other then looking at the defendant and saying now that that is the guy.

The Court: Okay.

Mr. Badini: Judge, it is not consistent, the testimony he gave to the officers was not because he is wearing the hat, that is how he got his 20 percent, because in his testimony to the officer he now says that there was a difference in the length of the hair, the head hair of the particular man.

He found a convenient way to explain the 20 percent.

I am troubled because now I have a second out of Court I.D.

When you have an out of Court identification, particular Judge, it is one of those situations that must be disclosed to the defendant, there is no ifs and, or buts about it, it has to be disclosed.

The Court: What is the citation on the case?

Ms. Brill: I can get it, it is a Florida Supreme opinion, it came out in '85 or '86. I can get it for you, though.

The Court: Let's take a brief recess and we will take a look at it.

Mr. Bagley: Can we have a brief recess?

[Thereupon, there was a brief recess, after which the following proceedings were had.]

The Court: Taking a look here at the Bush decision and

reconsidering, I will deny the motion for mistrial.

I am not sure a Richardson Violation occurred here since all that transpired at the pretrial conference that Mr. Bagley had with showing him a photographs and telling him to look at it.

Mr. Badini: That is what we don't know, they had a duty to disclose that and he became a witness. The rules are very clear.

The Court: I can't say.

Mr. Badini: We don't become a witness unless we have proper chance to do the discovery to determine that it is to surprise you.

You have a person who did not have a positive I.D. and now you have a positive out of the Court identification.

The Court: I am looking at Bush v. State, which is a Florida Supreme Court decision, 416 So. 2nd 936, wherein the investigator stated in his deposition that a witness had never identified any photographs and then at trial he identified, he had looked at the photographs.

It was noted not to be Richardson Hearing.

Mr. Bagley: If I showed him a different photographic line-up other then what he viewed by the police, then I would say he has a point, but what I showed him was the same photographic line-up.

Mr. Badini: I am lost. I am showing the photographs as to a medical examiner.

The Court: The first keloid.

Mr. Badini: Judge, I am going to take exception to this particular case because you have to look to the facts of this particular case.

In this case the defense took the deposition prior to trial of a police investigator. According to the deposition, or at least what the defendant said was that the police investigator said that the defendant, Bush, had not been identified in any photographs. On the stand the officer said no, that is not so.

The way you ask the two questions are confusing, and therefore you have got confusing answers.

He always had identified the photographs.

Then the Court said it was not required for them to inform of a change of testimony. Here we don't have a quote, change of testimony, because the witness stands at his own peril when he changes testimony on the stand.

In any case the witness may change testimony, and it is the duty of the individual swearing before and say oh, by the way, we are going to change testimony in this case, we created a new set of facts.

If the change of testimony was no, I got confused Mr. Badini when you asked me the questions about the 80 percent and I thought you said it was 80 percent of the face that I saw or something to that effect.

This is the inconsistency and he realized what was inconsistent.

By the way, he got your question mixed up in this case.

He participated in a pretrial identification prior, that is the whole total factual basis which has nothing to do with the Bush decision, Judge.

It is clearly a Richardson decision, Judge, because the strategy was 80 percent. Now I have 100 percent.

The Court: Deny the motion for mistrial.

Let's bring the members of the jury back in.

(R. 643-651)

Debra Riggins testified that she had known Tequila Larkins (R. 652) for 16 years and identified a photograph of Tequila Larkins at the Dade County Medical Examiners Office (R. 652).

Metro Officer Jim Furrott testified that he responded to the initial call "as a shooting" (R. 655). He saw an older gentleman coming out of the laundromat with a gun in his hands (R. 656). He also saw the victim on the ground inside the laundromat (R. 659).

Metro Officer Gregory Carter arrived at the scene (R. 663). He found Ms. Larkins laying inside the laundromat (R. 664). He went to assist Ms. Larkins (R. 666). Firs rescue arrived and attempted to treat Ms. Larkins (R. 668).

Captain Kurly Williams of the Dade County Fire Department arrived at the scene (R. 671) and found that Ms. Larkins had been wounded in the back and the head (R. 672). Fire rescue attempted to treat Ms. Larkins but found that she was dying (R. 672). A helicopter attempted to transport Ms. Larkins to Jackson Memorial Hospital (R. 674).

Metro Officer Luciano Sanchez was assigned to the crime scene (R. 675). He took pictures of Ms. Larkins at Jackson Memorial Hospital (R. 675).

Officer Kim Haney of Metro was a crime scene investigator who responded to the scene. She took photographs and made sketches of the crime scene (R. 679). She collected bullet fragments (R. 691). She found projectile ricochet marks (R. 700).

Dr. Jay Barnbardt was the medical examiner who reviewed the autopsy done on Ms. Larkins by Dr. Mary Confey (R. 709). Dr. Barnhardt testified that Ms. Larkins died of a gunshot wound to the chest (R. 717).

Metro firearms examiner Roy Freeman received projectile and fragments from the medical examiner (R. 729). He determined that the projectile was .44 caliber (R. 730). Mr. Freeman was unable to state whether all the fragments had been fired from the same gun (R. 756).

Officer Milton Hall testified that, on March 31, 1989, he contacted the defendant (R. 764):

I got out of a marked police car and I asked, I said -- I don't know, he remembered me from a previous occasion. I had talked to him before.

I said, look, I want to talk to you for a second.

He responded to my car where I was standing.

I told him, I got a couple of investigators from my department that want to talk to you about something.

I said, if it is all right with you they want to take you down to the Police Department for questioning.

(R. 765)

Officer Hall called some detectives who drove by and the defendant got in their car (R. 766).

Metro homicide detective Danny Borrego had responded to the scene of the crime (R. 769). he was the lead homicide investigator (R. 769).

On April 1, 1989, he showed a photographic lineup (including the defendant's picture) to Jerry Briggs, who had been at the Laundromat (R. 776):

After viewing the line-up, he picked number three, which is the photograph of the defendant, Ronnie, as the person he saw there that night.

(R. 776).

a: Did he write anything on back of it?

A: Yes, I asked him if there was any difference in the appearance of the photograph of the defendant from the way he appeared that night.

He told me that the difference was he had a baseball cap or hat of some sort on the night of the homicide, which he was not wearing in this photograph.

Therefore, he wrote on the back of the photograph, he put

down, this guy, I am sure, 80 percent, he was wearing a hat, so that knocked off 20 percent.

Based on his identification he then signed it and put the date on it and time that I witnessed the lineup.

(R. 777)

Detective Borrego came into contact with the defendant on April 1, 1989:

I asked him if he would accompany us to the Metro Dade Homicide Office in order to interview him.

(R. 779)

The defendant agreed to go with him (R. 779).

At the homicide office:

I told him that he was a suspect in connection of the murder of Tequila Larkins.

(R. 782)

Detective Borrego also advised the Defendant of the Defendant's constitutional rights (R. 782). The defendant initialed the Rights form (R. 785). The defendant signed the Rights form (R. 786).

Detective Borrego testified that the defendant then gave an oral inculpatory statement (R. 787).

Detective Borrego testified that the defendant gave a sworn statement which Detective Borrego read to the jury (R. 790-808).

Detective Borrego testified that the defendant took him to the Laundromat and explained how the crime had occurred (R. 809-811).

Detective Borrego testified that the defendant was not given

an opportunity to speak to his family during the time the defendant was at the police station (R. 831).

Termain Tift testified that he knew the defendant (R. 841) and had spoken to the defendant in "the early part of March, 1989" (R. 842). The defendant inquired as to whether Tift wanted to make some money "killing someone" (R. 843). They were to go "Down South" to do the killing. Tift declined (R. 843).

Later, one evening in March, after the defendant had left the projects with "Bob", Tift saw the defendant. The defendant had money. The defendant said that he had gone down south to a wash house and had shot someone call Sugar Mama because "he thought that she had something to do with the killing of Bob's brother" (R. 846-847). Bob had paid the defendant for the killing of Sugar Mama (R. 847).

The prosecution rested (R. 861).

Following the defendant's convictions, the jury convened for the death penalty phase of his trial. At that penalty phase:

The state introduced into evidence a certified copy of the information, judgment and sentence as to the defendant's conviction for attempted first-degree murder in another case (R. 973).

Detective Borrego testified that the defendant gave a sworn statement as to the attempted murder of Marshall King (R. 975) and

that Statement was read to the jury (R. 977).

Marshall King testified to the incident in which he was shot by the defendant (R. 995).

Valerie Bridges was at the laundromat with her husband Jeff Bridges in the instant case (R. 1001). Ms. Bridges saw Ms. Larkins on the floor and a man beating her (R. 1102-1003). Ms. Bridges then heard gunshots (R. 1004).

Walter Hills testified that he had been in the back of the laundromat (R. 1008), a man had entered and then he heard shots (R. 1009).

The state rested (R. 1012).

Rose Cooper is the defendant's Aunt (R. 1013). She described the defendant as a "gentle, loving person** (R. 1014). She testified both that the defendant was emotionally attached to his family and that the defendant contributed financially to his family (R. 1015). She also testified that the defendant's natural father was not around as the defendant was growing up (R. 1015).

The defendant's brother, Lamont Ferguson, testified (R. 1020). The defendant's stepfather had a drinking problem (R. 1020):

It was my father, he had a drinking problem. He couldn't get

a job because of the drinking problem. He never could keep it.

So when Ronnie got older, he was providing our family.

(R. 1021)

Darren Wood, a cousin of the defendant (R. 1025) testified that the defendant had the nickname "Ronnie Boo" because he was a "crybaby" (R. 1025). Mr. Wood testified:

It was just hard for most of the family here because we came up without a father or fathers, you know, drinking problems.

(R. 1026)

The defendant's stepfather and another family member, A.J., had drinking problems (R. 1026).

The defendant was a member of church family (R. 1027).

Trubia Cooper is the defendant's cousin (R. 1030). She testified that prior to March, 1989 there were both deaths in the family and the death of a close friend that affected the defendant:

Well, the guy that got kill was Ron's close -- he was close to Ronnie, and I remember when the guy got killed Ronnie was upset about it. He made a statement to me and my husband, that he told his friends don't go with those guys because those guys were bad guys.

(R. 1031)

Bernadette Hargrett, the defendant's ex-girlfriend, described

him as "loving, joking" (R. 1034).

Wilhemina Ferguson, the defendant's mother testified as to the defendant's stepfather:

> "...the reason that we are not together, he has a drink problem and sometimes we got into arguments and I didn't feel that was a good environment."
>
> (R. 1037)

The defendant met his natural father only briefly (R. 1040).

The defendant contributed to the family:

When I was out of work, Ronnie was working. Before Ronnie would buy anything for himself, he would make sure that me and his brother was being taken care of.

As a matter of facts, last Christmas, before he was arrested, he was working at a food warehouse and he gave me his whole paycheck. I told him that we didn't need anything.

This is Ronnie. If Ronnie had a dollar and I needed this dollar, then it was mine. If his brothers needed anything, it was theirs. He always put people before him. He always put everybody before himself.

(R. 1041)

As to deaths affecting the defendant:

Q: During that period of time in '87 and '88, your mother passed away. Is this correct?

A: April 5th, 1989.

Q: Prior to that, had she been disabled for a long time?

A: Yes. She had Parkinson's Disease, and sometimes she

couldn't move and couldn't talk by herself and I had to work. so my mother passed away during that period of time, after she got ill and couldn't be by herself. And the two kids sometimes were with her.

I would come home in the afternoon and Ronnie would have done bathing the grandmother and he had cooked and fed his brothers and everything.

He didn't care. He would put her in the bathtub and give her a bath and put on her clothes and feed her and take her to bed. See, there were days when I got home and everything was done.

Q: Did you have other people that passed away in the family?

A: Prior to that, the brother died on October 21st, 1988. That was his uncle, because my other brother -- we talked on the phone. But the one that passed away on October 21st of 1988, he was the only uncle that Ronnie knew.

Q: Did he have a problem, too?

A: No.

Q: Was anybody else in the family, any other member who passed away that were close to Ronnie?

A: A friend that passed away. His friend's name was Hank, and it was April 28, 1988.

Him and Ronnie, they were like brothers. Ronnie slept at his house and stayed and slept at his house and vice verse, and when Hank passed away -- as matter of fact, the night that -- the day before the funeral came along, Ronnie and a friend of his slept in the car outside the funeral home.

He didn't feel he should have left Hank in the funeral home by himself and he slept outside in the car the day of the funeral.

When they opened his casket, Ronnie -- we had to catch him when they opened the casket, it was like he went -- he wanted to take Hank with him.

When we finally got him away from Hank, he took off and went down the street. A lot of his friends called him. He couldn't got to the graveyard. When he got there, he wanted to get into the casket with Hank because Hank would not be able to leave then.

I would go into his bedroom with food, I would go into his room with food and it was like he couldn't eat his food or drink his drink.

Q: Prior to his friend's death, did he ever exhibit these signs before?

A: No.

Q: How long did these things last?

A: Well, Hank died on April, and his uncle died in October. Ronnie had been coping with his uncle's death, and then his friend's death. And my uncle died.

It was very, very hard to cope with the deaths. He had just lost his best friend, the only one, the only uncle that he knew of had also died.

He was going through a very difficult period of time. It was like everyone he knew, people that he grew up with, they were dying, leaving us.

Mrs. Ferguson didn't think that the defendant ever recovered from his uncle's death (R. 1043).

The defendant testified on his own behalf:

"You haven't heard anybody's testimony. Right now, I am twenty four. I was raised in a broken home. My stepfather -- I met my father when I was thirteen. My stepfather -- I met my father when I was thirteen. I love him because I am part of him, and I love my stepfather also, but my father, my father wasn't really my stepfather, he wasn't really a father figure because he had a drinking problem.

Somehow, in life, I went through a lot of emotional problems. My family didn't know because I hid a lot of it through life, a lot of things were happening.

(R. 1051)

and,

Nobody would understand. Everyone thought I was happy. I went through a lot of times seeing other people with their fathers every time, and with my mother and with my stepfather - when she got married, I cried about that.

(R. 1054)

and,

I got one brother, which is seven years younger, and I got another brother sixteen years younger, and me. I have no big brothers.

I grew up wanting a big brother and a father. I was deprived of my own daddy.

(R. 1054)

and,

I never understood peer pressure. There was a lot of things going on in my life I don't understand.

(R. 1055)

and,

I tried to make a change, started going to Mac Arthur. Okay, then things started getting slack in the family, in the household.

There were certain things that my mother had to uphold and she couldn't do it.

Q: Like what?

A: Well, so I had to step up and be the father and the big brother.

Q: How old were you?

A: Seventeen.

Q: Did you want to be the father?

A: I had no choice but to be the father.

Q: Was there a father there?

A: A father -- 1 was the father.

Q: You went into that role?

A: Yes .

Q: Were you still a happy-go-lucky guy that everyone says you are?

A: Yes. I went through problems. I didn't let them see, I couldn't let them see I was going through problems.

What I was going through, it ain't nothing for me. But I didn't want my family to know.

Q: Why didn't you talk to anyone.

A: It's hard for me to talk about it. It's hard for me to talk about it now.

(R. 1058)

The defendant refused to talk about the death of his friend, Hank (R. 1058).

The jury returned an advisory verdict recommending the imposition of the death penalty by a vote of 9 to 3 (R. 92).

The trial court thereafter sentenced the defendant to Death (R. 108-117).

This appeal follows.

STATEMENT OF THE ISSUES

I

WHETHER THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS

II

WHETHER THE TRIAL COURT ERRED IN STRIKING JUROR WILLIAMS FOR CAUSE IN THE ABSENCE OF A THROUGH AND SEARCHING INQUIRY AS TO HIS ABILITY TO CONSIDER THE IMPOSITION OF THE DEATH PENALTY

III

WHETHER THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR MISTRIAL WHEN, DURING TRIAL, THE DEFENSE HAD LEARNED THE KEY IDENTIFICATION WITNESS HAD MADE A SUBSEQUENT MORE POSITIVE IDENTIFICATION OF THE DEFENDANT WHICH HAD NOT BEEN DISCLOSED

IV

WHETHER THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR MISTRIAL WHICH WAS BASED UPON THE UNAUTHORIZED TARING OF NOTES BY JURORS

V

WHETHER THE CLOSING ARGUMENT OF THE PROSECUTION, BY IMPLYING AN UNPROVEN INTENT TO COMMIT ANOTHER MURDER, DENIED THIS DEFENDANT A FAIR TRIAL

VI

WHETHER THE TRIAL COURT ERRED IN FINDING AS AN AGGRAVATING FACTOR THAT THE DEFENDANT KNOWINGLY CREATED A GREAT RISK OF DEATH TO MANY PERSONS

SUMMARY OF THE ARGUMENT

The trial court erred in denying the defendant's Motion to Suppress on the grounds that the confession of the defendant was not knowingly, freely and voluntarily given. The confession was erroneously admitted into evidence in the absence of a specific judicial finding that it was freely and voluntarily given.

The trial court erred in striking Potential Juror Williams for Cause in the absence of a showing that the potential juror was irrevocably committed to vote against the death penalty regardless of the facts and circumstances that might emerge at trial.

The trial court erred in denying the defendant's Motion for Mistrial when, during trial, the defense learned that, a week before trial, the only identification eyewitness made a positive identification of the defendant to the prosecutor and the prosecutor failed to disclose that fact to the defense before trial.

The trial court erred in denying the defendant's Motion for Mistrial which was based upon the unsanctioned, unauthorized and unguided taking of notes, during trial, by the jury.

The defendant was denied a fair trial when, during closing argument, the prosecution made a comment that implied an unproven intent by the defendant to kill the only identification witness, Mr. Briggs.

The trial court erred in finding as an Aggravating Sentencing Factor that the defendant knowingly created a great risk of death to many persons, a finding which was unsupported by penalty phase evidence.

ARGUMENT

I

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS

A. Voluntariness

The trial court erred by admitting into evidence the Defendant's confession where the Defendant's confession was not voluntarily given to the police. The Defendant testified that Detective Borrego promised him that "If I would be cooperated with him, I would not get the electric chair". (T. 111). A specific promise of leniency was made to the Defendant to get him to make a confession.

The police made a promise to the Defendant that they knew could not be fulfilled in order to obtain the Defendant's confession. To be free and voluntary, the statement or confession must not be extracted ... "nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence". See Bram v. United States, 168 U.S. 532, 18 S.Ct. 183 42 L.Ed. 568 (1897). See also, State v. Charon, 482 So.2d 392 (Fla. 3d DCA 1985); Frazier v. State, 107 So.2d 16 (Fla. 1958). The police led the Defendant to believe that if he cooperated with them by confessing to the crime that he would not receive the death

penalty. The statements made by the police were calculated to mislead the Defendant as to his true position. In Fillinger v. State, 349 So.2d 714, (F.a. 2d DCA 1977), the court found that a confession had been induced by a promise of leniency and was therefore inadmissible. The court stated that if the accused is induced to confess by language which amounts to a threat or a promise of some benefit, that confession may be untrustworthy and should be excluded. See also, Hawthorne v. State, 377 So.2d 780 (Fla. 1st DCA 1979).

The Defendant's true position was not one that could be determined by the police at that stage in the case, and they could have had no intentions in making those promises to the Defendant other than to mislead him in order to obtain a confession. Any questioning by police officers which in fact produces a confession which is not the product of a free intellect renders that confession inadmissible. See, Townsend v. Sain, 372 U.S. 293, 308, 83 S.Ct. 745, 754, 9 L.Ed.2d 770 (1963).

The court stated in Bram v. United States, supra.

A confession can never be received in evidence where the prisoner has been influenced by an threat or promise; for the law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner . .."

Additionally, it was the Defendant's testimony that he was told that detectives were at his mother's house and that he was not allowed to communicate with his mother until after he had signed the confession and had been booked. Defendant's testimony was that

he signed the confession while not knowing about the safety of his mother and family. It was also the Defendant's testimony that on a previous occasion, the police had mistakenly kicked in the door to his mother's house and that the Defendant was afraid for his mother's safety. An accused's emotional condition when giving such statements may have an important bearing on their voluntariness. Breedlove v. State, 364 So.2d 495 Fla. 4th DCA 1978). See also, Rickard v. State, 508 So.2d 736 (Fla. 2d DCA 1987).

Coercion that vitiates a confession can be mental as well as physical and the question is whether the accused was deprived of his free choice. Garrity v. New Jersey, 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed.2d 562. See also, Collins v. Wainwright, 311 So.2d 787 (Fla. 4th DCA 1975). A confessing defendant should be entirely free from the influence of hope or fear. Mills v. State, 320 So.2d 14 (Fla. 4th DCA 1975). In Jarriel v. State, 317 So.2d 141 (Fla. 4th DCA 1975), the admission of the statement which was the result of direct or implied promises was held to be reversible error.

The Defendant's confession should be suppressed if the declarations of those present are calculated to delude the prisoner as to his true position. See Taylor v. State, 596 So.2d 957 (Fla. 1992); and Thomas v. State, 456 So.2d 454 (Fla. 1984). It must be shown that the confession or statement was voluntarily made in order for that confession to be admissible in evidence. See, Brewer v. State, 386 So.2d 232 (Fla. 1980). In the instant case, the police told the Defendant that if he confessed, he would avoid the

death penalty, The admission of a confession which resultsfrom the Defendant's belief that he will receive a lighter sentence by so doing is erroneous. See, Bradlev v. State, 358 So.2d 849 (Fla. 4th DCA 1978).

Further into his testimony, the Defendant stated that he was punched in the chest and the arms during questioning (T.112) The police hit the Defendant with their elbows (T.112). On cross-examination, the Defendant stated that he was hit with telephone books (T. 125). The police told the Defendant that if he tried to run that they would shoot him (T. 125).

It is the right of the accused to be tried by a legally constituted court, not by a kangaroo court. Hence when officers wring confessions from the accused by force and violence, they violate some of the most fundamental, basic, and well-established constitutional rights which every citizen enjoys. p. 102

William v. United States, 71 S. Ct. 576 See also, Chambers v. State of Florida, 309 U.S. 227, 60 S.Ct. 472, 84 L.Ed. 716.

The statement obtained by the police from the Defendant was obtained in violation of his privilege against self-incrimination guaranteed by the Fifth and Sixth Amendments to the United States Constitution and the due process clause of the Fourteenth Amendment. The Defendant was hit, threatened and deprived of communication with his family. He was kept for 16 to 18 hours in fear. It is established that in order to render a confession

voluntary or admissible, the mind of the accused should at the time it is obtained or made be free to act uninfluenced by fear or hope. Harrisson v. State, 12 so. 2d 307 (Fla. 1943).

The Defendant's rights and privileges to be free of punishment without due process of law were violated, his right and privilege to be secure in his person while in the custody of the State of Florida were abused, and his right and privilege to freedom from deprivation of liberty without due process of law were taken away. Defendant's right to be immune from illegal assault and battery while being held in police custody, to be tried by due process of law and to be punished according to the law were taken from him. The Defendant was entitled to voluntarily confess **to** the **crime at issue;** he was not obligated to confess under duress so that the police could finish their investigation.

In the instant case, the Defendant was placed in a state of fear for his safety and for the safety of his family. He was threatened, battered, and isolated. The court erred in allowing the Defendant's confession to be submitted as evidence for consideration by the jury. The trial court's ruling admitting the Defendant's confession into evidence should be reversed.

B.

THE TRIAL COURT ERRED BY FAILING TO MAKE A FINDING BY PREPONDERANCE OF THE EVIDENCE THAT THE DEFENDANT's CONFESSION WAS VOLUNTARILY WADE BEFORE SUBMITTING IT TO THE JURY AS EVIDENCE

In the instant case, the court failed to make a specific finding that the Defendant had confessed voluntarily. The court

simply denied the Defendant's Motion to Suppress stating "Nothing suggests a waiver of the constitutional rights". Where as in this case, controversy exists over the voluntariness of the Defendant's confession, the trial court must find that the confession was voluntary before submitting it to the jury. When the confession is admitted into evidence by the court over defense objection, the record must reflect with unmistakable clarity" that by a preponderance of the evidence, the confession was voluntary. If independent review of the record does not show that the court's finding of the voluntariness of the Defendant's confession was made with such clarity, then the court has committed reversible error. See Rice v. State, 451 So.2d 548 (Fla. 2d DCA 1984).

In the case at bar, the court failed to make a finding that by a preponderance of the evidence, the state had proved that the Defendant's confession was voluntarily made. The facts here raise questions as to whether or not the Defendant was induced to confess in the belief that as he had been told, he could avoid the death penalty by confessing.. The court's mere denial of the Defendant's Motion to Suppress is circular in that a confession is not voluntary because the court state that it is so. It is the court's obligation and responsibility to set forth the facts upon which the court has based its decision, i.e, that he state has met its burden of proof via specific findings of fact. See, McDole v. State, 283 So.2d 553 (Fla. 1973).

However, although such factual controversy did exist, when the court denied the Defendant's Motion to Suppress, it failed to make

a finding for its decision that would be independently reviewable. Such action by the court renders its decision subject to reversal.

The court's statement that nothing suggests a waiver of the constitutional rights as a basis for its denial of the Defendant's Motion to Suppress is insufficient. The court has a duty to make a clearly unmistakable finding that the Defendant's confession was voluntary. Additionally, the state has a burden to prove the voluntariness of the confession by a preponderance of the evidence. By failing to make its finding that the state had met it burden on the confession suppression issue, the court left no record for an appellate court to review and precluded the appellate court from examining this important issue.

It cannot be left up to the trial court to summarily preclude review of this issue. The Supreme Court has stated that a specific finding of voluntariness is necessary to ensure that a judge has properly met the requirement of admitting a confession only after the state has met its burden of proving that the confession was voluntarily made. McDole v. State, supra. See also, Greene v. State, 351 So.2d 941 (Fla. 1977).

The court erred in failing to specifically state the findings upon which it based its denial of the Defendant's Motion to Suppress the confession. In failing to make a specific finding of voluntariness, the trial court committed reversible error.

II

THE TRIAL COURT ERRED IN STRIKING JUROR WILLIAMS FOR CAUSE IN THE ABSENCE OF A THROUGH AND SEARCHING INQUIRY AS TO HIS ABILITY TO CONSIDER THE IMPOSITION OF THE DEATH PENALTY

Juror Williams stated that she would prefer not to sit as a juror and make a recommendation as to whether a fellow human being should live or die (R. 503-504). Juror Williams stated that while she was opposed to the death penalty (R. 504) that "It depends on how it goes" (R. 503) as to whether she would be able to consider the Death Penalty.

When the Jury Selection took place out of the Jury Venire's presence, the State moved to excuse Mrs Williams for cause, a stating:

The next person I would have to move for cause is Mr. Williams, he clearly pointed out based upon religious grounds that the Bible says that one shall not take a person's life. There is not question in his mind no matter what the aggravated factors are.

(R. 543)

The defense objected to the Cause Challenge:

I believe that he should say -- 1 think unfortunately the State has indicated when someone has said that specifically he will not under any circumstances follow the Court's instruction.

I think that is the person's opinion one way or the other and are not grounds for throwing people off, unless they said I am not

voting one way or the other, I am voting this way. I am not or I am participating this way.

(R. 543)

Without further examination of the disputed juror to competently, thoroughly and with finality determine whether or not she could abide by the Court's instructions with reference to her consideration as to whether the Death Penalty should be imposed, the Court ruled:

I think I tend to agree with Mr. Williams, he said he just did not want to participate in any discussion.

I will sustain the challenge for cause.

(R. 543)

The appellant submits that the pertinent criteria for a cause challenge is not whether a potential juror "prefers" to sit on a death case. If that were the criteria no "death" jury could be selected as only those who are biased towards the death penalty and who would automatically and recommend that penalty would "prefer" to serve on a "death" jury and such a juror would be subject to a Cause challenge by the defense.

In the case of Witherspoon v. State of Illinois, 391u.s. 510, 885 Ct. 1770 (1968), the United States Supreme court, in considering this issue, stated:

A man who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him by

the State and can thus obey the oath he takes as a juror. But a jury from which all such men have been excluded cannot perform the task demanded of it.

(R. 1775)

and,

> Called of all who harbor doubts about the wisdom of capital punishment - of all who would be reluctant to pronounce the extreme penalty - such a jury can speak only for a distinct and dwendling minority.
>
> If the State had excluded only those prospective jurors who stated in advance that they would not even consider returning a verdict of death, it could argue that the resulting jury was simply "neutral" with respect to penalty. But when it swept from the jury all who expressed conscientious or religious scruples against capital punishment and all who opposed it in principle, the State crossed the line of neutrality. In its quest for a jury capable of imposing the death penalty the State produced a jury uncommonly willing the condemn a man to die.

(R. 1776)

and,

> Specifically, we hold that a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to

the death penalty or expressed conscientious or religious scruples against its inflection. No defendant can constitutionally be put to death at the hands of a tribunal so selected.

(p. 1777)

In the case of Grev v. Mississippi, 107 S. Ct. 2045 (1987), a potential juror was excused for cause by the trial court. In reversing that defendant's conviction, the United States Supreme Court stated:

In Witherspoon, this Court held that a capital defendant's right, under the Sixth and Fourteenth Amendments, to an impartial jury prohibited the exclusion of venire members "simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. 391 U.S. at 522, 88 S. Ct. at 1776. It reasoned that the exclusion of venire members must be limited to those who were "irrevocably committed... to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings," and to those whose views would prevent them from making an impartial decision on the question of guilt.

(p. 2051)

and,

It is important to remember that not all who oppose the death penalty are subject to removal for cause in capital cases; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law, Lockhart v. McCree, 476 U.S. 162, 176, 106 So. Ct. 1758, 90 L. Ed. 2d 137 (1986).

The State's power to exclude for cause jurors from capital cases does not extend beyond its interest in removing those jurors who would "frustrate the State's legitimate interest in administering constitutional capital sentencing schemes by not following their oaths." Wainwriuht v. Witt, 469 U.S. 423 105 So. Ct. at 851. To permit the exclusion for cause of other prospective jurors based on their views of the death penalty unnecessarily narrows the cross section of venire members. It "stack(s) the deck against the petitioner. To execute (such a) death sentence would deprive him of his life without due process of law." Withersaoon v. Illinois, 391 U.S., at 523 885 Ct. at 1778.

(p. 2052)

and,

Although Davis was not cited in the Mississippi Supreme Court's majority opinion in the present case, this Court in Davis surely established a per se rule requiring the vacation of a death

sentence imposed by a jury from which a potential juror, who has conscientious scruples against the death penalty but who nevertheless under **Witherspoon** is eligible to serve, has been erroneously excluded for cause.

(p. 2052)

This Honorable Court has also addressed the same question of exusals for cause in a capital case.

In **Fitzpatrick** v. State 437 So. 2d 1072 (Fla. 1983), this Court noted:

> "A man who opposes the death penalty, no less then the one who favors it, can make the discretionary judgment entrusted to him by the State and can thus obey the oath he takes as juror." **Witherspoon** v. Illinois, supra (emphasis added). Witherswoon requires that veniremen who oppose the death penalty be excused for cause only when irrevocably committed before the trial to voting against the death penalty under any circumstances or where their views on capital punishment would interfere with finding the accused guilty. We find that the same standard should be applied when excusing for cause a veniremen who is in favor of the death penalty. A judge need not excuse such a person unless he or she is irrevocably committed to voting for the death penalty if the defendant is found guilty of murder and is therefore unable to follow the judge's instructions to weigh the

aggravating circumstances against the mitigating circumstances.

(p. 1076)

In Stamper v. Muncie, 944 F. 2d 170 (4th Cir. 1991), the instant question was considered in a Habeas Corpus proceeding and the Court stated:

> Under Withersaoog, prospective jurors cannot be excused from jury service on the ground of their opposition to the death penalty unless such jurors make it unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilty.
>
> (p. 176)

It is obvious that in the instant case potential juror Williams was not excused either because of an unmistakably clear assertion that s(he) would automatically vote against the imposition of capital punishment without regard to the evidence or that he(r) attitude toward the death penalty would prevent an impartial decision as to the defendant's guilt. There is no showing that potential juror Williams was "irrevocably committed to voting against the death penalty**. The appellant respectfully submits that a "preference " not to sit on the jury is not "cause" to excuse based upon an attitude toward the death penalty. What

citizen would "prefer" to sit on a jury and sit in judgment as to whether someone should live or die?

The jury composition in this case, as in all death cases, was critically important, It cannot be overlooked that the advisory verdict was 9 to 3. If potential juror Williams were not unjustly excused, it is conceivable that his/her presence and argument to the other jury members may have changed the advisory verdict sufficiently to result in a recommendation for a life sentence.

In this case, on these facts, the appellant submits that it was error to excuse potential juror Williams for "cause" and that his sentence, if not his conviction and sentence, must be Reversed and this Cause remanded for appropriate proceedings.

III

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR MISTRIAL WHEN, DURING TRIAL, THE DEFENSE HAD LEARNED THE KEY IDENTIFICATION WITNESS HAD MADE A SUBSEQUENT MORE POSITIVE IDENTIFICATION OF THE DEFENDANT WHICH HAD NOT BEEN DISCLOSED

There is no question that Jerry Briggs was the State's key witness, as only Jerry Briggs was an eyewitness able to make an identification of the man who came to the Laundromat, came in, beat Ms. Larkins and ultimately shot her. No other witness physically identified the appellant as the assailant and put him at the scene. Subsequent to the crime, Mr. Briggs made a photo identification of the defendant concerning which he was only 80 percent sure of the defendant's identity:

This guy that I am sure 80 percent was wearing a hat so that knocked out 20 percent.

(R. 623)

On cross-examination, the defense learned for the first time that Briggs had been shown the photographic lineup again the week before trial (R. 637), by the prosecutor without any police officers being present. Mr. Briggs testified (with reference to the photos in the photo lineup) that:

I seen them with the State Attorney to make sure that this was the right person.

(R,. 637)

On Briggs' redirect examination, Briggs' again stated that he had gone to the prosecutor's office "last week" (R. 639), had viewed the photo lineup (R. 640) and had been asked "To pick out the guy that I think was in the Laundromat at that time" (R. 640). Briggs testified that he did "pick out the person (he) believe(d) was the person who shot Sugar Mama (Larkins)" (R. 640).

The defense moved for a mistrial stating:

Your Honor, at this time the defense is going to move for mistrial due to Mr. Briggs' testimony throughout this. He never made a positive identification of the defendant, he was only approximately 80 percent sure.

The prosecutor intervened in this case with an out of Court identification of the defendant.

This is a violation of the Richardson Rules. He never revealed that to the defense, the only thing the defense knew was that there was one showing of these photographs on April 1, 1989, and that he indicated he was approximately 80 percent sure, which was brought out by the testimony.

We now found out about a week ago the prosecutor stepped out of the boundaries and began an investigation.

(R. 644)

The prosecution argued that Briggs's testimony was consistent (R. 646) and that all it did was go over Brigg's testimony with Briggs (R. 646-7).

The trial court denied the defendant's motion for mistrial, stating:

I am not sure a Richardson violation occurred here since all the that transpired at the pretrial conference that Mr. Bagley had with showing him the photographs and telling him to look at it.

(R. 649)

The defense argued that the defendant was prejudiced:

It is clearly a Richardson decision, Judge, because the strategy was 80 percent. Now I have 100 percent.

(R. 651)

The defendant submits that the trial court erred in not granting his Motion for Mistrial.

The prosecution disclosed the results of the first photo lineup to the defense. Those results were that Mr. Briggs was 80 percent sure of a photo lineup identification of the defendant. The prosecution's duty to disclose was continuing. It's duty applied to all witnesses and evidence which it would present at trial. See, **Lowery** v. State, 610 So. 2d 657 (Fla. 1st DCA 1992).

In the case of **Neimeyer** v. State, 378 So. 2d 818 (Fla. 2d DCA 1980), the state failed to disclose to the defense before trial new testimony from the medical examiner that "would eviscerate appellant's defense".

The court found that there was a discovery violation as "the assistant state attorney admitted that he was-alerted six or seven days before trial to the possibility that Dr. Newab might testify to information bearing critically on appellant's defense which was not included in her autopsy report, and which was at least arguably inconsistent with statements she made during her deposition; yet

the defense was not warned of this possibility, even though the trial date was rapidly approaching. Under these circumstances we hold that the state's failure to inform the defense of the new information until the eve of trial was a violation of the discovery obligations imposed on the state by Florida Rules of Criminal Procedure 3.220(f).

(p. 821)

The court found prejudice, stating:

> We are compelled to reverse. In doing so, we observe that at the very least, the circumstances before the trial judge did not establish nonprejudice to appellant. On the contrary, it seems apparent to us that appellant was prejudiced by the tardiness of the state's disclosure. The defense was unable to combat Dr. Newab's testimony because the defense's expert had not examined the victim's body, and neither the autopsy report nor the deposition of Dr. Newab indicated damage to the spinal cord.
>
> The defendant's conviction was Reversed.

In the case of Jones v. State, 514 So. 2d 432 (Fla. 4th DCA 1987):

> The state filed a (discovery) response and identified Hendley as one of its witnesses and apparently furnished appellant with a sworn statement given by Hendley shortly after the shooting. In the statement, Hendley related

> that the victim said, "Man, you done shot me." During opening statement, the prosecutor told the jury that Hendley would testify that the victim said, "...Red, not (se) me." Appellant moved for a mistrial claiming a discovery violation.
>
> (P. 433)

and,

> Appellant had deposed Hendley approximately three weeks before trial. The state attorney attended the deposition. The colloquy between the court and counsel does not clearly establish when the state first became aware of the change in Hendley's testimony except the state knew of the change in the witness's testimony for at least a week before trial. The trial court denied the motion for mistrial.
>
> (p. 433)

The court found the state had violated its continuing duty to disclose evidence to the defense and held "that the state's failure to inform the defense of the new information until the eve of trial was a violation of the discovery obligations imposed on the state by Florida Rules of Criminal Procedure 3.220(f)" (p. 434).

The Court reversed that defendant's conviction stating:

> We think the court in Neimeyer correctly concluded that once discovery has been made to a defendant that the state has a continuing duty under Rule 3.220(f) to notify the defendant of a substantial and material change in the report or as in this case a witness statement containing

an important factual scenario. Therefore, we hold that a material discovery violation occurred when the state did not inform appellant that the witness Hendley would testify that the decedent identified appellant as the person who had shot the decedent.

(p. 435)

In the case of Walker v. State, 573 So. 2d 1075 (Fla. 4th DCA 1991), the Court reversed due to discovery violations relating to photographs:

In this case the entire defense was based on mistaken identity. The photographs which were not revealed to defense counsel until trial were fatal to that defense.

(p. 1075)

In the case of Raffone v. State, 483 So. 2d 761 (Fla. 4th DCA 1986), the Court reversed due to a discovery violation when the prosecution failed to timely provide a supplemental crime lab analysis report as the "new evidence impacted on the defense strategy which had been planned after receipt of the first report."

In Hasty v. State, 599 So. 2d 186 (Fla. 5th DCA 1992), the defendant's conviction was reversed due to a discovery violation occurring when he was not timely provided a "presumptive test" report.

The defendant respectfully submits that the prosecutor's failure to apprise the defense of an identification procedure which

that prosecutor arranged, instigated, conducted and had full knowledge concerning was a discovery violation. See, also, White v. State, 585 So. 2d 1050 (Fla. 4th DCA 1991); Gant v. State, 477 so. 2d 37 (Fla. 3d DCA 1985).

The defendant submits that because the discovery violation affected how his defense was conducted (80 percent sure vs. "positive"), the state's failure to disclose prejudiced his ability to prepare for trial. See, Butler v. State, 591 So. 2d 265 (Fla. 4th DCA 1991); Sun v. State, 18 Fla. L. Weekly D2660 (Fla. 4th DCA 1993).

The defendant additionally submits that the trial court erred by not requiring the State to show that the defendant had not been prejudiced by the state's failure to comply with discovery once the violation had been brought to the trial court's attention, See, Smith v. State, 500 So. 2d 125 (Fla. 1986); Williams v. State, 513 So. 2d 684 (Fla. 3d DCA 1987).

The defendant submits that a new trial should be granted because there was a discovery violation which prejudiced his defense and defense strategy when a new source/instance of his identification with a hereto unknown degree of certainty was revealed to him in the midst of trial.

In the alternative, the defendant submits that a new trial should be granted due to the trial court's failure to require the state to show that the defense was not prejudiced by its nondisclosure, discovery violation.

The defendant's convictions must be Reversed.

IV

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR MISTRIAL WHICH WAS BASED UPON THE UNAUTHORIZED TAKING OF NOTES BY JURORS

During the trial of this cause, the defense noticed that some jurors were taking notes (T. 861). As there had apparently been no court authorization or guidance as to the taking of notes, the defendant moved for a mistrial which was denied (T. 863).

The defendant is aware that the taking of notes by jurors is within the sound discretion of the trial court. See, Kelly v. State, 486 So. 2d 578 (Fla. 1986); Myers v. State, 499 So. 2d 895 (Fla. 1st DCA 1986); United States v. Rhodes, 631 F. 2d 43 (5th Cir. 1980).

In the instant case, however, the trial court failed to provide any guidance, any instruction or to insure that the views or judgment of one juror did not rise above/become more weighed than/or obliterate the views or judgments of one or more of the other jurors simply because a juror had taken "notes" which may not have been accurate, through or unbiased.

In a capital case, a great deal of concern and caution is expended to insure a fair method of choosing unbiased deciders of a person's fate. When so much care is taken as to whom to seat the defendant submits that it is unjust not to consider how, after he or she is seated, that person will discharge his (or her) responsibilities as a juror. The concern is even greater in a

capital case where not only guilt or innocence, but life itself is decided. Did **"notes"** lend a false weight to any juror or jurors opinion? Certainly these notes were unauthorized. Certainly they were not specified or given bounds. The jurors were not advised on what appropriate use, if any (does the best note taker rule?) that **"notes"** could or should play in their deliberation. The advisory verdict as to this defendant was 9 to 3, **"with** notes@'. Without **"notes",** would the recommendation have been life?

In the absence of a guided, fair and reasoned policy as to the taking of **"notes",** the defendant submits that the allowance of these unsanctioned materials into the jury room, materials created solely to effect and shape the judgments of these jurors constituted reversible error.

V

THE CLOSING ARGUMENT OF THE PROSECUTION, BY IMPLYING AN UNPROVEN INTENT TO COMMIT ANOTHER MURDER, DENIED THIS DEFENDANT A FAIR TRIAL

During closing argument, the prosecution commented as to Mr. Briggs, its only identification witness:

Basically he described the defendant, but he doesn't give you a full description of the defendant until the point when that door is opened and the defendant burst in and started punching on Tequila Larkins. Because his eyes were fixated.

What was the other thing he said?

He said look, I went into a shock, this thing happened so unexpectedly.

By the way, when something is happening so quickly, so unexpectedly, do you immediately jump and run to the assistance of someone in a situation like that?

Frankly I think Mr. Briggs is very fortunate that he did not because he may not have been here this week to testify.

(R. 913-914)

There was no evidence that the man who burst in intended any harm to Mr. Briggs or took any action towards Mr. Briggs. The prosecutor's thought that "Mr. Briggs is very fortunate that he did not because he may not have been here this week to testify" is irrelevant. Such a comment was outside the scope of the instant charges. Such a comment had no basis in fact. Such a comment

implied an unproven intent to kill anyone and everyone. Such a comment was uttered and intended to prejudice this defendant in the eyes of the jury by improperly implying that the intruder (whom Briggs identified as the defendant) **was/would about to** commit **murder to silence a witness.**

In the case of Gleason v. State, 591 So. 2d 278 (Fla. 5th DCA 1991), **that court considered a similar situation:**

The prosecutor made various improper and inflammatory statements in final argument. Among those are:

> The state contends the defendant not only controlled the **victim.** He controlled witnesses, You have seen the witnesses he had brought in. Apparently there is one witness he couldn't control. Where is Morgan?
>
> I would bet a few witnesses used more than alcoholic beverages on May 18th and May 12th.
>
> That's where you have what (---) saw that **night, him** pulling her back to that van. **To do what? To commit** another felony? To **commit** another sexual battery? Maybe he didn't get finished off . . . or was he going to try to lessen the chance of detection of the felony that had already been committed.
>
> The defense, especially in cases like this, attack the **victim.** We talked about TV shows and the expectations. That's why they've got to attack the **victim.**

The clear implication is that the accused has committed ~~other~~ crimes and possibly was about to commit murder to silence the

witness. These indefensible comments are fundamentally unfair and cause reversal. See, Stokes v. Wet n' Wild. Inc., 528 So. 2d 181 (Fla. 5th DCA 1988).

The judgment is reversed and this cause remanded for a new trial for battery and false imprisonment.

(p. 279)

As in Gleason, there was no justifiable reason for the comment. As in Gleason, the clear implication of the prosecutor's comment was that the defendant possibly was about to commit murder to silence the witness (Briggs). As in Gleason, the defendant's convictions and sentences must be Reversed.

VI

THE TRIAL COURT ERRED IN FINDING AS AN AGGRAVATING FACTOR THAT THE DEFENDANT KNOWINGLY CREATED A GREAT RISK OF DEATH TO MANY PERSONS

In its Sentencing Order (R. 111) the trial court stated:

B. The defendant Knowingly created A Great Risk Of Death To Many Persons

Four people, plus Tequila Larkins, were in the laundromat when the defendant broke in and began shooting. People were forced to hit the floor and take whatever cover was available. Sixteen bullet fragments were later found in the laundromat. In his confession, the defendant admitted that he was at one point trying to shoot he's way out. At least one witness stated that he could feel shots hitting hear his feet as he lay crouched on the floor, Unquestionably, the defendant created a great risk of death to many persons.

(R. 113)

The defendant questions this finding by the court,

The defendant's confession as to Tequila Larkins was not read to the advisory jury,

Marshall King was not at the laundromat.

Mr. Bridges testified that she heard gunshots and her husband "threw me on the floor and laid on top of me" (R. 1004).

Walter Hill testified that he "heard a shot fired, and I ducked down by the washing machine" (R. 1009).

In the case of Kampff v. State, 371 So. ed 1007 (Fla. 1979), this Court discussed the applicability of this factor and stated:

When the legislature chose the words with which to establish this aggravating circumstance, it indicated clearly that more was contemplated than a showing of some degree of risk of bodily harm to a few persons. "Great risk" means not a mere possibility but a likelihood or high probability,

The great risk of death created by the capital felon's actions must be to "many" persons. By using the word "many", the legislature indicated that a great risk of death to a small number Of people would not establish this aggravating circumstance. We hold that the trial court erred in finding that the appellant created a great risk of death to many person.

(p. 1010)

Likewise, this court in White v. State, 403 So. 2d 331 (Fla. 1981), rejected a finding that this factor had been established, stating:

We agree with defendant's assertion that a person may not be condemned for what might have occurred. The attempt to predict future conduct cannot be used as a basis to sustain an aggravated circumstance.

(P. 337)

In Diaz v. State, 513 so. 2d 1045 (Fla. 1987), this Court considered this factor and stated:

We agree with Diaz that the court erroneously found the aggravating factor that he knowingly caused great

risk of danger to many person. This must be based on a high probability not a mere possibility or speculation Lusk V. State, 446 So. 2d 1038 (Fla.), Cert. denied 469 U.S., 873 105 S. Ct. 229, 83 L. Ed. 2d 158 (1984); Francois v. State, 407 So. 2d 885 (Fla. 1981), cert. denied, 458 U.S. 1122, 102 S. Ct. 3511, 78 L. Ed 2d 1384 (1982). The court based its finding on the fact that Diaz carried a gun equipped with a silencer: that during the robbery he fired the gun over the head of patron Robbins; that the shot ricocheted off a rotating glass ball centered over the stage where Petterson was dancing: and that the bullet then ricocheted off a mirror, and finally became lodged in the women's dressing area. It is not highly probable that a single shot fired toward the ceiling will ricochet and, in doing so, create great risk of danger to many people.

(p. 1049)

The defendant respectfully submits that the evidence presented at the sentencing/penalty phase does **not** establish this aggravating factor. The defendant submits, therefore, that his sentence of Death must be Reversed and this Cause Remanded for a New Penalty Phase at which this factor will not be argued to an advisory jury or considered by the trial court in pronouncing sentence. The advisory sentence was 9 to 3. It is conceivable that the improper presentation of and argument as to this non-existent aggravating factor swayed the minds of enough members of the advisory jury so

that a death recommendation was returned. When the ultimate penalty is sought, the ultimate care must be afforded as the circumstances surrounding its imposition.

This cause must be Remanded for a new Penalty Phase/Resentencing. See, also, Bello v. State, 547 So. 2d 914 (Fla. 1989); Alvin v. State, 548 So. 2d 1112 (Fla. 1989) and Lucas v. State, 490 So. 2d 943 (Fla. 1986).

CONCLUSION

Based upon the foregoing facts, arguments and authorities, the appellant Respectfully submits that his convictions must be Reversed, Sentences Vacated and this Cause Remanded for appropriate proceedings.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by mail to the Office of the Attorney General at Post Office Box 013241, Miami, Florida 33102, on this 27 y of July, 1994.

Respectfully submitted,

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