IN THE SUPREME COURT OF FLORIDA

CASE NO. 80,278

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

CORRECTED

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 Two Counts of Attempted First Degree Murder (R. 1).

The Indictment was signed by the "Vice Foreperson of the Grand Jury (R. 3).

The Defense filed a Motion to Suppress Defendant's Confessions, Admissions and Statements (R. 47), which Motion was denied (R. 49).

Following a trial jury, the Defendant was found Guilty as charged as to Counts I and II and Guilty of Aggravated Battery as to Count III (R. 284)

Upon completion of the Defendant's Sentencing Hearing, the Jury voted seven (7) to five (5) to impose the death penalty upon the Defendant (R. 286)

The Defendant was subsequently sentenced to death.

This appeal follows.

STATEMENT OF THE FACTS

At the Defendant's Motion to Suppress, the following testimony was heard:

Officer Milton Hull testified that he saw the Defendant in the general area of a drug detail surveillance in which the witness participated on March 30, 1989 (T. 235). On that night, Officer Hull also came into contact with Terrance Ison and Lee Curgil who had been arrested (T. 236). Lee Curgil was in possession of a .357 Magnumrevolver (T. 236).

Officer Hull contacted the Defendant on April 1, 1989 as the Defendant was seated on his grandmother's porch. Officer Hull told the Defendant that ... there were some homicide investigators that wanted some information, that he may (have) knowledge of some murder that took place down souther" (T. 238). Hull asked the Defendant "if he were willing to go there, I would take him there, and everything, and then I would bring him back" (T. 238-239). Hull then contacted detectives who responded to his call and picked up the Defendant (T. 240).

Gregg Smith testified that he was a homicide detective investigating the Lee Arthur Laurence homicide (T. 248) when certain people were categorized as potential witnesses, and other people were categorized as suspects in the case. He was supposed to locate and interview these people (T. 246). The Defendant and

Terrance Ison were "brought in" for questioning (T. 248). The Defendant was then turned over to Detective Borrego for questioning (T. 249).

Detective Thomas Romagui testified that he was asked by Detective Borrego to witness the signing of a Miranda form (T. 253) and that he witnessed the Defendant sign the Miranda form (T. 254).

Detective Danny Borrego testified that he was investigating the deaths of Lee Arthur Laurence and Tequila Larkins and the shooting of Marshall King (T. 258). Detective Borrego was advised that the Defendant either had information or was a suspect in the murders (T. 259).

The Defendant agreed to go with the witness; the Defendant was advised of his Miranda rights (T. 261, 263). The witness' further testimony was that the Defendant's Miranda form was signed at 7:30 P.M., and that the a formal statement was taken from the Defendant at 1:43 A.M. (T. 269). The Defendant was interviewed during the intervening six hours (T. 270).

Detective Borrego stated that he took the Defendant took on location and that the Defendant pointed out the scenes of the murdered (T. 272). The Defendant described how the shootings took place(T. 273). When the Defendant was arrested, he confessed to the killings (T. 277). The witness testified that he had obtained positive identification of the Defendant in the Larkins case (T. 285). The witness told the Defendant that Newsome was in the other room (T. 286).

Detective Borrego testified that the Defendant began to make admissions to the crimes after the first 10-15 minutes into the interview T. 287). Further, the Defendant found some errors in his written statement, which the Defendant corrected (T. 294).

The Defendant said in his statement that when "G" contacted him to commit the crime, the Defendant's instructions were to spray the store with bullets (T. 229). To aid him in spraying the store, the Defendant hired Rodney Newsome and "Boopie" (T. 233, 234). The Defendant was to "spray up, shoot it all up so the cops come investigate". (T. 231).

The three men did not make any arrangements regarding how they were going to carry out the Defendant's instructions to "spray" the store (T. 235). The trio went to "G's" house, got the guns and went to the Victim's store (T. 236). Initially, the Defendant was going to do the shooting, but Boopie said he wanted to do it, so it was decided that Boopie would do the shooting (T. 239).

The Defendant entered the Victim's store, purchased a Corona beer, and was paying for it when he heard shots T. 242). After the shots, the Defendant ran out of the store firing the gun (T. 242). He saw a man lying on the ground T. 242). The Defendant testified that he shot the gun without aiming it at anyone (T. 243). The Defendant did not shoot at the Victim (T. 244).

The Defendant testified on his own behalf that he was arrested at his house (T. 298). He was told that the police wanted to ask

him some questions (T. 298). The detective touched the Defendant on the shoulder, told the Defendant to come with him to answer some questions (T. 299). The Defendant was then taken to the police station to a room where he was questioned by Detective Borrego (T. 300). The Defendant was told that "If I would be cooperated with him, I would not get the electric chair " (T. 301).

At page 302 of the trial transcript, the following testimony was shown:

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

Mr. Badini: Why?

Defendant: 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.

At page 305 of the same transcript, the following was shown:

Mr. Badini: What did they tell you about this Miranda form?

Defendant: I can't remember, but it wasn't clear, whatever they telling me.

Mr. Badini: Did you do anything?

Defendant: Signed the papers, yes.

Mr. Badini: What about recording the statement, did she, the court reporter, read to you the statement:

Defendant: 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.

Mr. Badini: You signed it when they told you to sign?

Defendant: 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.

At page 306 of the transcript:

Mr . Badini: When was the first opportunity you had to call your family?

Defendant: When I got through signing their papers.

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

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

Mr. Badini: Did you speak to your family?

Defendant: 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.

From the time the Defendant was taken into custody until he was booked, the Defendant had not slept for 16 to 18 hours (T. 306).On cross examination, the Defendant testified that he was told that if he tried to run, the police would shoot him (T. 315). The Defendant also testified that he was hit with telephone books (T. 315).

The Defendant's Motion to Suppress was denied. (T. 325).

The Defendant testified that he was punched in the chest and the arms during questioning (T. 302). He stated that after they punched him, and he stated that he would not talk, the police told the Defendant that they had detectives at his mother's house(T. 302). This scared the Defendant (T. 320). "I was in fear for my family (T.302). "...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. ...[T]hey kept coming into the room and punching me: (T. 302).

The Defendant asked to speak with him family, but he was told "To wait until after what they were doing was over with" (T. 303).

The Defendant testified that when he signed the Miranda form "I can't remember, but it wasn't clear, whatever they were telling me" (T. 305). "...I was still in fear that my family -- all I wanted to do was sign the papers, and just talk to my family "(T. 305).

When the Defendant testified about signing the sworn statement, he stated that "I was scared because I still didn't know what had happened to my other 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 " (305).

The Defendant was allowed to call him family when he was booked into the jail (T. 306). The Defendant was told that Rodney cooperated; the defendant heard Rodney's voice (T. 307).

On cross-examination, the Defendant stated that he was hit with telephone books (T. 315).

at trial, the following testimony was elicited:

Johnnie Lee Williams testified on behalf of the state that on March 20, 1989, he saw a Chrysler New Yorker outside his mother's house (t. 934).

The witness approached the car and saw that one person was seated in the driver's seat; the witness spoke to the driver, but driver rolled up the car window and did not respond to the witness (T. 937). As the witness walked over to Lee's Grocery Store which was nearby his mother's house, the witness heard gunfire coming from the grocery store (T. 940). The witness then saw two males running from the parking lot of the store (T. 940). Other than the fact that the males were wearing Army fatigues, the witness could not describe them (T. 941). One of the men was carrying an Uzi (T. 941). The witness saw the Chrysler pick up the two men and the car headed north (T. 941).

Juanita Meyers testified that she was working at Lee's Grocery Store on March 20, 1989 (T. 945). As the witness went to throw out trash, she heard shooting (T. 951). She testified that two men shot at the Victim (T. 952-953). The First man shot at the Victim with an Uzi (T. 952). " He shot the Victim from his head all the way down to the feet " (T. 955). The second man shot at the Victim with a revolver (T. 953).

Josias Dukes was on his way to Lee's Grocery on March 20, 1989 when he saw a man on the phone at the game room (T. 964). When

the Victim came out of the grocery and headed towards the garbage cans in the parking lot, the witness heard shots ring out (T. 974). The man at the phone fired at the Victim with the Uzi (T. 975). The Victim fell, and the second man came from within the store, and fired twice at the Victim while on the ground (T. 978). The man with the Uzi fired at the Victim lying on the ground several times (T. 989). The man carrying the Uzi also fired at the witness (T. 982). The witness identified the man carrying the Uzi from a police photo lineup(T. 987).

Bernard Williams testified that he went to Lee's Grocery on March 20, 1989 to see Juanita Meyers (T. 994). The witness saw the Victim walking from his van back to the store(T. 997). As the witness watched the Victim walk into the front of the store, he was shot in the back (T. 999. The witness saw the Victim being shot twice by a man carrying an Uzi (T. 1000) The man with the Uzi stood over the Victim and shot him again (T. 1001). The man with the Uzi came over to the witness and shot him again in the stomach (T. 1003).

Valerie Briggs testified that she worked at Lee's Grocery on March 20, 1989 (T. 1015). When the witness went to the back of the store to get Windex and paper towels, she bumped into a black male wearing Army fatigue(T. 1020). The man had a beer in his hand (T. 1020). the man gave the witness $20.00 to pay for the beer(T. 1023). When the witness was ringing up the sale at the cash register, she heard shots (T. 1025). The man left after the

witness heard the shots ring out. The shots were different from the first shots she had heard (T. 1026).

Gerald Reicharet, Crime Scene Investigation Bureau, examined the scene at Lee's Grocery on March 21, 1989 (T. 1032). The witness found a $20.00 bill and a beer bottle at the scene of the crime (T. 1033).

Officer Raymond Haar, Metro Dade Police Department, went to the scene of the crime on March 20, 1989 (T. 1034). The witness saw the Victim (T. 1045).

Officer George Clifton, Metro Dade Police Department, testified that on March 25, 2989 he spoke to David Ingraham because the witness had been informed that Mr. Ingraham was standing near the Chrysler on the night of the crime (T. 1055).

Kenneth Bodel testified that he works at the Turf Motel located at 7000 N. W. 27th Avenue (T. 1058). The witness testified that he had obtained a registration card for the motel stating that Termaine Tift stayed at the motel on March 20 to March 22, 1989 (T. 1061).

Officer Richard Scott, Metro Crime Scene Investigation Bureau, testified that he went to the crime scene, and that he took photos at the scene (T. 1062, 1065). The witness found 20 casings, eight (8) projectiles, and five (5) projectile fragments T. 1075). The witness saw that the Victim had been injured by gunshots to both legs, the back and the head area (T. 1078). The witness found that

the Victim had a Smith & Wesson 9 mm semi-automatic in his waistband (T. 1080). The witness collected the Victim's clothes (T. 1084).

Steven Reynolds testified that on March 30, 1989, the Defendant was at Scott Projects. The Defendant gave the witness a .357 magnum (T. 1089). The witness was arrested with that gun on the night of March 30, 1989 (T. 1093). While he was in jail, the witness received a telephone call from the Defendant (T. 1092).The Defendant was also arrested on the same night as was the witness. (T. 1092). The Defendant told the witness that "If I have any problem, call him ". (T. 10923).

The Defendant told the witness that the gun was involved in a murder (T. 1094). The Defendant signed the note that he sent to the witness "Ronnie Boo" (T. 1094). According to the witness, the gun he possessed when he was arrested had been involved in a murder (T. 1094).The witness identified the Defendant as the man who had given him the .357 magnum (T. 1096). The witness saw a man named David carrying an Uzi with the Defendant on the night of the crime (T. 1097).

Officer Michael Owens, Metro Dade Police Department, testified that he arrested Reynolds on March 30, 1989 at Scott Projects (T. 1103). Reynolds was carrying a gun (T. 1104).

Officer Kim Haney, Metro Dade Crime Scene Investigation Bureau, arrived at 2245 N. W. 71st Terrace and found an Uzi in the bedroom of the apartment she examined (T. 1108).

Detective Mike Byrd, Metro Dade Investigation, impounded some clothing at that location on April 6, 1989 (T. 1115).

Termaine Tift testified that he knows Rodney Newsome and the Defendant (T. 1119). The witness saw a man named Bob in March, 1989. He saw Bob at Shirley Newsome's house with the Defendant and Rodney Newsome (T. 1125). The witness took Shirley Newsome to the store (T. 1125). The Defendant told the witness that Bob was his partner (T. 1126). One night in March, 1989, Bob asked the witness if he wanted to make some money "killing an old pop and the son" (T. 1133).

When the Defendant, Rodney and David left the area, the three men left in the Chrysler New Yorker (T. 1134). The men went into Ronnie Boo's house; after they came out of the house, Ronnie Boo had money (T. 1136). The witness then took the Defendant and Rodney to the motel to register them (T. 1137).

Dr. Dubruskey, a veterinary doctor, testified that he removed a bullet from a pit bull(T. 1155).

Dennis Moss testified that he knew the Victim (T. 1150. The witness identified the Victim from pictures (T. 1159).

Mabel Gonzalez testified that she works for Garcia National Guns (T. 1161). She testified that Valerie Urbez purchased an Uzi (T. 1165).

Enrique Cuxart testified that he is a driver for the Humane Society (T. 1165). The witness took the wounded pit bull to the Humane Society for care to its wound (T. 1165).

Detective Rex Remley, Metro Dade Police Department, testified that he went to the crime scene T. 1170). He had the wounded dog removed and taken to the Humane Society (T. 1171). A projectile taken from the dog was given to the witness (T. 1171). The witness contacted the Defendant and asked him to come to the police station (T. 1174). Later that same day, the witness came in contact with Steven Reynolds (T. 1175). Steven Reynolds gave the witness a piece of paper which contained writing (T. 1175). The witness showed Steven Reynolds a photo lineup and Reynolds identified the Defendant (T. 1177).

Gary Dewal testified that in March, 1989, he was selling drugs in Perrine (T. 1181). The witness knew Bobbie Lee Robinson and sold drugs with him (T. 1182). The witness stated that Bobbie Lee Robinson had an Uzi (T. 1183). Bobbie Lee told the witness that he gave the Uzi to the Defendant (t. 1185). According to the witness, Bobbie Lee Robinson believed that the Victim had had Bobbie Lee's brother killed the previous year (T. 1198).

James Carr, Metro Dade Firearms Examiner, testified that in his that in his opinion the bullet he examined was fired from a .357 magnum (T. 1216). The witness stated that 20 casings were fired from the Uzi (T. 1222). The bullet fragments taken to the Medical Examiner's Office were fired from the Uzi (T. 1226).

Detective Sal Garrafallo, Metro Dade Police Department, testified that he was the lead detective on the case (T. 1245).

The witness met Rodney and found the Uzi at Rodney"s house (T.1247). The Uzi was registered to Bobbie Lee Robinson's wife (T. 1251).

Milton Hall, Metro Dade Police Department, testified that he asked the Defendant to talk to the detectives (T. 1254). The Defendant agreed to go with he detectives and got in the car with them (T. 1256).

Detective Daniel Borrego, Metro Dade Police Homicide Detective, testified that he met with the Defendant on April 1, 1989 (T. 1260). He took the Defendant to the police station (T. 1262). The witness gave the Defendant his Miranda rights (T. 1264). He told the Defendant that the Defendant was a suspect in the Victim's murder (T. 1264). The Defendant confessed to the murder (T. 1265). The Defendant told the witness that he knew Bobbie Lee Robinson (T. 1271). The Defendant told the witness that he was hired by "G" to spray the store (T. 1272). The witness stated that the Defendant told the witness that Rodney and David were with him (T. 1273). The witness was told by the Defendant that the Defendant had a .357 magnum and that David had an Uzi (T. 1279). The Defendant's statement made to the witness was read at this time (T. 1282). Detective Borrego took the Defendant to the location of the crime (T. 1308).

The Defendant pointed out everything for the witness (T. 1308). Gary Dewal was the "G" who hired the Defendant to commit the crime (T. 1313). The Defendant stated that Gary Dewal was "G" (T. 1316). The Defendant told the witness that he was firing his

gun as he ran because he wanted to get away (T. 1318).

Michael Fisten, Metro Dade Police Department, testified that he went to the Defendant's mother's house (T. 1326). The Defendant's mother consented to the search (T. 1327). The witness impounded some clothes (T. 1327).

Dr. Roger Middleman, Medical Examiner for Dade County, testified that he performed the autopsy on the Victim (T. 1335). The witness recovered fragments and projectiles from the Victim (T. 1353). The Victim died from multiple gunshot wounds (T. 1356).

The Defendant's motion to have the jury instructed on third degree felony murder were denied (T. 1361-2).

On May 19, 1992, a hearing regarding juror misconduct was held. Mr. David Finger testified that he was seated at a table in the courthouse cafeteria with other attorneys when the group was approached by one of the jurors sitting in on the instant case. The juror inquired regarding how much time a defendant would spend incarcerated on a life sentence. One of the attorneys present answered the juror's question. The juror was dismissed from the panel.

Upon further questioning, it was discovered that some of the jurors discussed the names of the various defendants due to stated confusion about their names. Defendant's Motion to Strike and Motion for Mistrial were denied. (T. 1385). A third juror testified that he and another juror had discussed that the

Defendant had "admitted his guilt with white paper". (T.1388). Defendant's Motion to Strike and Motion for Mistrial were denied (T.1399).

At closing argument, the prosecution commented on the Defendant's trying to blame the murder on Gary Duval by the Defendant testifying the Gary Duval hired the Defendant to commit the crime (T.1445). The prosecution stated that, "you can't own up to his own involvement in this case". Upon completion of the defendant's trial the jury voted seven (7) to five (5) to impose the death penalty upon the defendant (R.286).

At the defendant's Sentencing Hearing held on May 21, 1992, the following testimony was elicited and evidence entered:

A certified copy of the Indictment and Judgment in the defendant's second murder case was entered into evidence (S.T.9).

A certified copy of the Information, Judgment and Sentence in the defendant's Attempted Murder case was also entered into evidence (S.T.10).

Tramine Tift testified that he saw the defendant and Bobby Lee Robinson leave the area (S.T.11). Later, when he saw the defendant, the defendant had money (S.T.13). The witness was told by the defendant that the defendant had gotten the money for killing "Sugar Mama" down south in a wash house (S.T.13). The witness was also told by the defendant that Bobby Lee Robinson had hired him to kill "Sugar Mama" because Robinson thought she was trying to take over the drug trade, also because Robinson thought

the Victim "had something to do with his brother's death" (S.T.14). The defendant told the witness that he shot another man in the mouth (S.T.14).

Marshall King testified that on March 5, 1989, he saw the defendant and the defendant shot him (S.T.19, S.T.21). The witness did not know the defendant personally, but he had seen him before on March 3, 1989 (S.T.22).

Jerry Bridges testified that on March 11, 1989, he and his wife were at the Sparkle City Laundromat (S.T.30,33). The witness stated that at 9:00 P.M., "Sugar Mama" the victim, locked the door of the laundromat (S.T.33). A man came to the door, and the victim unlocked the door for the man (S.T.34). It was then that the man burst into the laundromat (S.T.34). The victim and the man began to fight, and the man punched the victim (S.T.35). The victim fell, and while the victim was on the ground the man pulled a gun and shot her three or four times (S.T.36,37). The witness testified that he felt small pieces of bullets hit his foot (S.T.38).

Detective Danny Barrego, Metro-Dade Police Department, testified that he connected the Larkin, King and Lawrence shootings (S.T.43). On April 1, 1989, he met with the defendant (S.T.45). The defendant agreed to talk to him about the three murder cases (S.T.45).

The defendant's statement regarding the King shooting was entered into evidence (S.T.46). The defendant's statement was read (S.T.48,49).

The defendant took the witness to the location of the King shooting and pointed out the witness where the shooting took place (S.T.60). The defendant then gave the witness a statement regarding the Larkins shooting (S.T.60). The defendant's statement was entered into evidence (S.T.61), and then read before the court (S.T.62-78).

Wanda Jones, the defendant's cousin, testified that the defendant had always cared about making other people happy (S.T.86). The witness stated that whenever she had a problem, the defendant had always tried to make her feel better (S.T.87).

Lamont Ferguson, the defendant's brother, testified that the defendant has been "like a fathter" to him because the witness' natural father had a"drinking problem" (S.T.89). The defendant contributed financially to the family (S.T.90). the defendant took care of his grandmohter (S.T.90). And that the Defendant did not a reputation for violence; rather the defendant tried to make "stuff happy for everbody".

Rose Cooper, the defendant aunt, testified that the defendant had cared for his grandmohter who suffered from Parkinson's disease (S.T.95). She stated that the defendant had

been very caring with his grandmother, attending to all her basic needs during her illness (S.T.96). The witness did not know what could have happened to change the defendant because "he loved people" (S.T.98).

Wilhemina Ferguson, the defendant's mother, testified that the defendant was reliable and that she counted on him to a considerable extent because the defendant's father was an alcoholic and was not around to help her (S.T.101). The defendant helped her financially (S.T.lO1). the defedantwas not violent (S.T.103), the witness' ex-husband fought with her and beat the defendant, who was not his son, on one occasion (S.T.107).

The defendant testified that he was deprived of being with his natural father (S.T.llO). He believed that the jury's decision was the best decision they could have made because "it's not right taking a life" (S.T.113). The defendant testified that he had much trauma in his life recently (S.T.119). His best friend died, a cousin was shot in 1978, an uncle died from AIDS, another counsin was killed for no apparent reason and the slain cousin's children were burned to death in a fire (S.T.120). The defendant was strongly affected by these incidents; he had no one to whom to turn and "everbody was coming to me with thier problems" (S.T.120). The defendant stated that he knew that there was many "emotional things wrong" with him (S.T.124).

The sentencing hearing was concluded.

This appeal follows.

SUMMARY OF THE ARGUMENT

The trial court erred by 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 by preponderance of the evidence that Defendant's confession was freely and voluntarily given.

The trial court erred by imposing the verdict rendered by a jury which had improperly discussed evidence some indicated the defendant's guilt before actually deliberating over the defendant's guilty.

The trial court erred by aggravating the defendant's sentence based on the factor that the Defendant created a great risk of harm/death to many persons,

The trial court erred by sentencing the Defendant to the death penalty where the other equally culpable codefendant involved received a lesser sentence.

Because of the above, the trial court's ruling must be reversed and this cause remanded for the proper proceedings.

ARGUMENT

I

THE TRIAL COURT ERRED BY FAILING TO GRANT THE DEFENDANT'S MOTION TO SUPPRESS HIS CONFESSION

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. 301). 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 results from the Defendant's belief that he will receive a lighter sentence by

so doing is erroneous. See, Bradley 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.302) The police hit the Defendant with their elbows (T.302). On cross-examination, the Defendant stated that he was hit with telephone books (T. 315.). The police told the Defendant that if he tried to run that they would shoot him (T, 315).

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. Harrsion 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.

II

THE TRIAL COURT ERRED BY FAILING TO MAKE A FINDING BY PREPONDERANCE OF THE EVIDENCE THAT THE DEFENDANT's CONFESSION WAS VOLUNTARILY MADE 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.

III

THE TRIAL COURT ERRED BY IMPOSING THE VERDICT RENDERED BY A JURY WHICH HAD IMPROPERLY DISCUSSED EVIDENCE IN THE CASE AND THE DEFENDANT'S GUILT

In the instant case, the trial court erred by imposing a sentence rendered by a jury which had improperly discussed the Defendant's guilt and evidence given in the case. The trial court erred by failing to declare a mistrial after it heard testimony from the jurors that they had improperly discussed the case amongst themselves.

Juror "Blanca" testified that the jurors discussed the names of the codefendant and the witnesses (T.1382). Juror Gomez testified that he and another juror agreed that the Defendant admitted his guilt because of writing which was entered into evidence against the Defendant. See page 1387,1388.

Juror Gomez testified that, "We have talked about that the person that got shot. We said it pretty traumatic, the bullet wounds in him.... Yesterday everybody was talking about other things. Some lady said, I don't think we should be discussing this matter anymore, so everyone stayed quiet." (T.1388).

Juror Gomez further testified that, "There has been discussion that in a way that he had admitted his guilt in a way, with that white paper".... "Everybody is saying that nobody is

admitting he is guilty, but the are confused in a way because no one can ask questions,.... There is a little confusion there." (T.1388,1389).

Inquiries from the jury must be answered in open court after notice has been given to the prosecution and to the defense. See, Caldwell v. State, 490 So. 2d 340 (Fla. 2d DCA 1977). In the instant case, the jurors discussed the questions of the identity of some of the parties outside of the courtroom. Any questions regarding the case should have been addressed to the trial court before prosecution and defense counsel.

Where statements by a juror are of such a nature that they could influence another juror the law presumes that the Defendant has been prejudiced. See, puss vs. State, 95 So. 2d 594 (Fla. 1957). In the case at bar, twa jurors opined that the Defendant " had admitted his guilt in a way, with that white paper" (T. 1388). It is the right of the defendant to have a jury deliberate his guilt or innocence by a jury that is free from any distractions or improper influences. This right must be closely guarded.

Under the circumstances, the trial court was obligated to declare a mistrial. Questioning of the jurors should have made it clear to the trial court that the jury was not impartial. See, Duran0 vs.State, 262 So. 2d 733 (Fla. 3d DCA 1972). Every person

charged with a crime is entitled to a fair trial before an impartial jury of his peers. See, U.S.A. vs. Eaffnev, 676 F. Supp. 1544 (M.D. Fla. 1987).

The procedural aspects of a trial that affect substantial rights of the defendant must be strictly observed, in view of the necessity that the accused receive a fair and impartial trial as guaranteed by the Constitution. See, Holzapfel vs. State, 120 So. 2d 195 (Fla. 3d DCA 1960). See, also Alfonso vs. State, 443 So. 2d 176 (Fla. 3d DCA 1983).

The trial court's ruling denying Defendant's Motion for Mistrial should be reversed, and the cause remanded for a new trial.

IV

THE TRIAL COURT ERRED IN AGGRAVATING THE DEFENDANT'S SENTENCE BASED ON THE FACTOR THAT THE DEFENDANT CREATED A GREAT RISK OF DEATH TO MANY PERSONS.

The Defendant submits that the court's sentence based on its finding that the Defendant's acts created a great risk of death to many persons was an error.

The Court refers to the fact that Josias Dukes was outside in a phone booth when the defendant shot at the victim. However, Mr. Dukes' testimony was that the man who fired at him was the man who carried the Uzi (S.T.982). The defendant Ronnie Johnson was identified as the man who carried the revolver during the shooting: he was not the man carring the Uzi. The witness did not testify that the defendant shot in the witness' direction. While the witness was being shot at by the man with the Uzi, the defendant was standing "a couple of yards away. . . in the parking lot" (S.T.984).

The Court also refers to the fact that Bernard Williams suffered serious gunshots wounds. However, Mr. Williams testified that the man who shot him in the back twice was the man carrying the Uzi (S.T.lOOO). Mr. Williams testified that he did not see a second person in the parking lot when the shooting occurred (S.T.

1001). He sensed that a second person was there (S.T.lOO1). After the witness had been shot, he saw a man carrying an uzi leave the parking lot. (S.T. 1009, 1010).

Valerie Briggs testified that she hit the floor during the shooting because the "shots sounded very close" (S.T. 1025). When the shooting began, the second man (defendant) was in the store, and then went outside(S.T. 1025).

In Kampoff vs. State, 371 So. 2d 1007 (Fla. 1979), this Court discussed the applicability of this factor as follows:

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. The Court stated that there must be more than a mere possibility that harm will come to many person. Rather the court reasoned that in order for this aggravating factor to be taken into account, the likelihood or high probability of harm to many persons had to exist. Josias Dukes testified that as the victim walked towards his store, the witness was shot from behind. The man who shot the witness was the man with the uzi; this man also shot several times into the victim's body. The defendant did not fire shots at the witness. Bernard Williams also testified that he was shot twice by the man with the uzi. Juanita Myers testified that the defendant fired several shots towards the store. (S.T.

956). At that time, Bernard Williams, and Josias Dukes, and Juanita Myers were outside of the store (S.T. 949). Ms. Briggs was the only witness who was inside the store; this witness testified that when the shooting began, she slid under the last aisle in the back of the store (S.T. 1028).

In the case of Diaz vs. State, 513 So. 2d 1045 (Fla. 1987), this court reasoned that although the defendant carried a gun with a silencer, that he fired shots during the robbery over the head of a patron, that the shot ricocheted off a rotating glass, then ricocheted off the mirror finaaly lodging in the women's dressing area, did not create great risk of danger to many people. In so stating the court found that such a result was not highly probable.

The defendant did not shoot wildly in the direction of the ohter witnesses. He did shoot into the victim's body. this did not create a danger to other persons, At the time, when the defendant shot at the fornt of the store, the only person in the store was Valerie Briggs.

The great risk of death created by the capital felon's actions must be to "many" persons. Kampoff vs. State, supra., creating a great risk of danger must be based on a highly probability not a mere possibility or speculation. Lusk vs. State, 446 So. 2d 1038 (Fla. cert. denied 469 U.S. 873, 105 S. Ct. 229, 83 L. Ed. 2d 158 (1984); Francios vs. State, 407 So. 2d 885 (Fla. 1982), cert. denied, 458 U.S. 1122, 102 S. Ct. 3511, 768 L. Ed. 1384 (1982).

[A] person may not be condemned for what might have occurred. See, White vs. State, 403 So. 2d 331 (Fla. 1991). An aggravating circumstance cannot be a sustaining factor, it can only sustain that which has occurred.

In Coney vs, State, 653 So. 2d 1009 (Fla. 1995), the defendant appealed the fact that his sentence had been aggravated on the basis of the defendant having created great risk to many persons during the commission of the crime. In affirming the court found that this one factor was insufficient for reversal in light of the fact that there had been four other aggravating factors considered by the court. In the instant case, no ohter aggravating factors weer considered. The defendant's sentence was aggravated to the death penalty on the basis of this one factor and it is submitted that this factor did not exist as interpreted by the Florida Supreme Court.

As discussed above in this argument, the defendant did not shoot into the building occupied by several persons. One person was in the building when the defendant shot at it. Also as previously discussed, this Honorable Court says that many persons must be more than one person. In the instant case, only one person, Valerie Briggs, was in the building at the time the defendant shot at it (S.T. 1028). The agrument is not being made here that to endanger even one life is an excusable act. However, the argument is being made that as per the cases on the use of creating great risk to

many persons as an aggravating factor to support the death penalty, the risk must be to many persons. One person simply is not many persons. Further, Ms. Briggs testified that she slide under the counter when the shots began at which time the defendant was in the store. When the defendant shot at the store front, Ms. Briggs was under the counter. The case law also states that the risk of danger must be probable not a mere possibility.

In Williams vs. State, 574 So. 2d 136 (Fla. 1991), this Honorable Court held that this instant factor is properly found, only when, beyond any reasonable doubt, the actions of the defendant created an immediate and present risk of death for many persons. In Williams vs. State, supra., where the defendant was found guilty of shooting a bank guard in the presence of several customers, the court reversed the lower court ruling on same issue because there was no evidence that the defendant had indiscriminately shot at others. Here in the case at bar, there is no evidence that the defendant shot indiscriminately at others. Testimony was given that he shot at the body of the victim, Laurence, and the man who shot at Bernard Williams was not the defendant.

It is submitted that the risk-to-many-persons part of the factor did not exist and the probability of great danger also did not exist. In view of the facts in this case, the court's aggravation of the defendant's sentence to the death penalty based

on his acts having creating a great risk of harm to many persons was an error.

The defendant submits that the aggravating factor of the defendant creating a great risk of danger to many persons did not exist. The defendant shot at the victim, into the victim's body. When he shot in the direction of the store, one person was in the store. It has been previously held that fact that two persons were in the immediate proximity to a murder victim is insufficient to establish this aggravating factor. See, Alvin vs. State, 548 So. 2d 1112 (Fla. 1989). See, Lucas vs. State, 490 So. 2d 943 So. (Fla. 1986); Bello vs. State, 547 so. 2d 914 (Fla. 1989).

In the instant case, the advisory jury recommended the death penalty. As here where the penalty of death which is the supreme penalty, was sought, all caution and consideration must be given to the imposition of such a harsh penalty.

In Jackson, supra., the Supreme Court held that in order for the aggravating factor of "having created risk of death to many persons" to stand, it must be proven beyond a reasanable doubt. It is submitted that this was not the situation before the trial court . The cases are replete with language to the effect that the risk cannot be a mere possibility; it must be a high probability. In Jackson, supra., the trial court enhanced the defendant's sentence reasoning that the blazing car Jackson had set afire could have killed firemen had the gas tank exploded while the firemen

attempted to extinguish the fire. This court reversed. While it may be argued that the chain of events may well have lead to the death of several firefighters, the principle of foreseeability is not applicable when considering this factor. It is submitted that foreseeability is a negligence concept which has no place in a consideration of the intent to create great harm. It is submitted that the existence of high probability is required because what could have been foreseen is insufficient to hold a defendant culpable for knowingly having created great risk of harm/death to many persons. Appellant's actions did not create great risk of death to many persons. No testimony was elicited that supported a scenario wherein Appellant was reported recklessly shooting the .357 magnum he carried that day. The defendant shot into the prone Laurence's body. Josias Dukes' testimony was that the man who shot at the store front was the man carrying the Uzi. Appellant carried a .357 magnum that day. Appellant did not create a great risk of harm/death to many persons on the day the Laurence was shot to death.

Because of the above arguments and cases presented, this cause must be remanded for a new penalty phase/resentencting.

V

THE TRIAL COURT ERRED BY SENTENCING THE DEFENDANT TO THE DEATH PENALTY WHERE THE TWO OTHER CODEFENDANTS RECEIVED LESSER SENTENCES FOR THEIR INVOLVMENT IN THE CRIME

When the trial court sentenced Codefendant Ingraham to life imprisonment and subsequently sentenced the defendant to death, the trial court committed reversible error. There can be no question here about whether or not Defendant Johnson failed to receive equal justice in this instance. The answer is a resounding "yes".

The defendant was sentenced to death for his participation in the crime where his role in causing the Victim's death was no greater than his codefendant's was. Appellant's codefendant was sentenced to life imprisonment for his participation in the killing. Notwithstanding this fact, Appellant was subsequently sentenced to the death penalty. Contrary to what happened in Jackson vs. State, 599 so. 2d 103 (Fla. 1992) where the death penalty was imposed on one defendant before the other received life imprisonment, in the case at bar, Appellant received his sentence after his codefendant had.

There can be no reasonable explanation for the disparity in the sentences between the two codefendants. That being the case, Appellant's death penalty sentence must be vacated and Appellant's sentence reduced to life imprisonment.

The disparate treatment of these codefendants whom the jury could have found equaly culpable serves as a basis for reduction of the Defendant's Death Sentence to sentence of Life Imprisonment. Jackson, supra.

At the Defendant's Motion to Suppress hearing, testimony wa selicited which established the David Ingraham had already fired several bullets into the victim before the defendant came out of the Victim's store. When the defendant heard shots, he came out running with a .357 magnum in hand. The Victim was already lying on the ground outside of the store.

Testimony did not establish that the shots fired from the defendant's weapon caused caused the victim's death. Since both Codefendants Johnson and Ingraham are equally culpable, the disparate sentences resulting in the death penalty for Codefendant Johnson and life imprisonment for Codefendant Ingraham are a violation of the Defendant's rights to due process and equal protection.

In the instant case, at the Defendant's Sentencing hearing, various witnesses testified that the defendant was not a violent person. In fact, he had been the family member other members relied on for help and emotional support. The defendant had no prior history of violent crime.

In Jackson vs. State, supra., reversal was found necessary on two bases: that there was no proof beyond a reasonable doubt that the defendant was guilty of the murder of his two children, and that Jackson and his codefendant received disparate sentences.

In the instant case, testimony was given that the Defendant shot at Laurence's body after Laurence had been shot many times by Ingraham with an Uzi. There was no expert testimony given that established beyond a reasonable doubt that it was Defendant Johnson's .357 Magnum that dealt the killing shot to the victim.

In Scott vs. Dugger, 604 So. 2d 465 (Fla. 1992), the court held that in a death case where codefendants are equally culpable and one codefendant receives death and the other does not, that death sentence is subject to review. It is submitted that in the instant case, both codefendants are equally culpable. Codefendant felled the Victim with not one shot, but many shots from his Uzi. How can it be supported by any reasonable, logical argument that Appellant should receive the death penalty while Ingraham is allowed to live.

Nothing will breathe life back into the Victim. There is no argument being made here that Appellant is not responsible for the Victim's fate. It is being submitted, however, that because Appellant's culpability being no greater than Codefendant Ingraham, Appellant Johnson should not receive the death penalty.

The death penalty is the supreme punishment; it is irreversible, and on the scales of justice, Appellant's death sentence is heavily tipping the scales in favor of unjustice.

In Scott vs. Dugger, supra., the trial court stated that it would not have sentenced the Defendant Scott to death if the cofendant, who was subsequently sentenced to life, had received his sentence before Scott.

In the instant case, the fact pattern is exactly opposite with regard to the sentencing. Codefendant Ingraham was sentenced to life imprisonment before Johnson was sentenced to death. As in Scott vs. Dugger, supra., such error requires reversal. The Appellant in the case at bar did not receive equal treatment with his co-conspirator and codefendant, Ingraham.

Where such a disparity in sentencing occurs involving two equally culpable codefendants, it is indefensible to rule that one defendant should spend life imprisonment and the other defendant should die.

The trial court's imposition of the death sentence upon the Appellant should be reversed, and vacated.

CONCLUSION

Based on 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 26 day of May, 1996.

Respectfully submitted,

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