IN THE SUPREME COURT OF FLORIDA

CASE NO. 83,485

RONALD SMITH,

Appellant,

v.

THE STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT,
11TH JUDICIAL CIRCUIT, IN AND FOR DADE COUNTY

CORRECTED REPLY BRIEF OF APPELLANT
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ARGUMENTS AND CITATIONS OF AUTHORITY

I. THE TRIAL COURT REVERSIBLY ERRED IN DENYING SMITH'S CHALLENGES FOR CAUSE TO JURORS LEON, BROCHE, AND FORSHT.

The state contends that, because Smith identified only two jurors against whom he wished to exercise additional peremptory strikes, the proper denial of any two out of these four cause challenges would defeat this issue. The state is wrong. All that ***Trotter v. State,*** 526 So.2d **691** (Fla. 1991), requires is the erroneous denial of a challenge for cause, exhaustion **of** peremptory challenges, request for an additional peremptory challenge, and the identification of one objectionable juror. 526 So.2d at 695. Smith exhausted his peremptory challenges, asked for additional ones, and identified two jurors whom he wished to strike. If the trial court erroneously denied only one of the following four challenges, then Smith is entitled to relief because **an** objectionable juror served whom he otherwise would have struck.

A. Juror Nieves. Mr. Smith concedes that the trial court's erroneous denial of **his** challenge for cause against juror Nieves was harmless.

B. Juror Leon. The state answers that juror Leon's responses did not establish that he **is** more inclined to believe police testimony than civilian testimony but only that he would believe the testimony of any witness under oath, including law enforcement officers. The state apparently concedes that a juror who is biased in favor of the credibility of police testimony is not qualified to serve but alleges that the following passage demonstrates Leon's qualification:

> You said something about the truth. I don't know that it's the law enforcement officer. **He's** under oath. He **is** supposed to tell the truth. (T.2879).

This murky passage does not dispel the substantial doubt about Leon's impartiality, arising from **his** persistently-articulated belief that police **officers are** more credible than civilian witnesses:

Leon: Like I said yesterday,' anyone can lie, but I would be inclined to believe what the police officer would say.

Defense Counsel: I believe you did say that you had an inclination to believe police officers.

Leon: Yes, I do.

Defense Counsel: Why is that?

Leon: Well, you have to believe a police officer is representing justice and that he, I don't believe, that he would lie. (T.296869).

Leon's last words on the subject resolve any question about his qualification to serve:

Defense Counsel: [Y]ou stated to me that you would believe police officers to the extend [sic] they would testify a little more than other people. . . . [T]he question becomes whether the wearing of the badge makes the person more believable; if you believe that? Do just say it?

Juror Leon: Yes. (T. 2989-3000).

Neither the trial judge nor the prosecutor even attempted to rehabilitate Leon from this unambiguous declaration of bias in favor of police witnesses. The state's characterization of Leon's responses as establishing only his belief that no witness, whether police or civilian, is likely to lie under oath is perfectly ridiculous. Smith's unopposed motion to strike juror Leon for cause should have been granted.

C. **Juror Broche.** The state answers that juror Broche, also, believed that police officers were no more likely than civilian witnesses to tell the truth under oath, based on his remark, "Just like if you sit there and give me your testimony, I would probably believe what you say too as a citizen." (T.3746). The state has quoted this remark entirely without context. (AB 24). What followed immediately upon that remark established Broche's bias in favor of police credibility:

Defense counsel: Is it your feeling that the police officer, it would be harder for police officers to lie because he is a police officer?

Juror Broche: I think so.

Defense counsel: And because he is a sworn police officer?

'The day before, in response to a question by defense counsel whether he'd "be more inclined to believe the officer," Juror Leon answered: "I believe the officer who is under oath would be saying the truth. Unless you can prove that he is lying[,] I would believe the officer." (T.2878-79).

Juror Broche: I believe so, that is a profession. (T.3746-47).

The state also relies on the following response as demonstrating Broche's qualification:

> Prosecutor: Do you think if the judge would give you [instructions on evaluating the credibility of a witness] you'd be able to listen to them and apply them fairly to a police officer the same as any other witness who might take the stand and testify?
>
> Mr. Broche: I think I could. (T.323 1-32).[2]

Significantly, the prosecutor refused to accept precisely the same answer to the same question from another juror because, as the prosecutor explained, the answer evinced equivocation. (T. 2586-87). The prosecutor required instead an unequivocal expression of that juror's ability to follow the judge's instructions. (rd.).

Finally, the state relies upon Broche's laconic response ryes, sir" (T.3745)] to the trial judge's coercive effort to rehabilitate this juror -- who, 10 different times before had expressed his bias in favor of police credibility. Such "salvage efforts" are ineffectual to rehabilitate a juror who has persistently expressed a disqualifying bias. (IB at 22-23, 29-30). Illustrating this point, immediately after the trial judge ceased his salvage efforts, juror Broche recurred to his bias:

> Defense counsel: Is it your feeling that . . . it would be harder for police officers to lie because he is a police officer?
>
> Mr. Broche: I think so. (T.3746-47).

No one even attempted to rehabilitate Juror Broche from this final expression of his belief in the super-credibility of police testimony. Clearly there remains a reasonable doubt about this juror's ability to be fair.

D. Juror Forsht. The state denies that juror Forsht knew some state witnesses and that

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[2]The state has omitted from its brief the colloquy immediately preceding this exchange which clearly reveals the juror's bias:

> Prosecutor: Do you think there is a possibility that a police officer could ever take the stand and may be untrue about his testimony?
>
> Broche: I don't think so.
>
> Prosecutor: Do you think there is a possibility that could happen?
>
> Broche: I[t] could but. (T.3232).

one was in Forsht's employ. Where Forsht said that he employed 200 off-duty police officers, (T.2305), and there were 91 law enforcement officers listed as prospective witnesses, (T.2360-62), it is difficult to understand what else Forsht meant by the following remarks:

> Defense counsel: And I am assuming that because of [having been Marshall of the Southern District of Florida for 11 years], that brought you into contact with every type of law enforcement agency in Dade County?
>
> Mr. Forsht: Yes, it did.
>
> Defense counsel: Are you familiar at all with any of the officers even in a remote way?
>
> Mr. Forsht: Yes.
>
> Defense counsel: Now, you indicated that you knew some of them. Are there any that you know particularly well, more so than others?
>
> Mr. Forsht: No. I have a man that moonlights for me on off-duty situations. (T.2704).

III. THE TRIAL COURT ERRED IN PERMITTING THE PROSECUTOR TO EXERCISE A PEREMPTORY CHALLENGE AGAINST AFRICAN-AMERICAN JUROR ALSTON FOR REASONS THAT WERE NOT NEUTRAL, RECORD-SUPPORTED, OR WERE OTHERWISE PRETEXTUAL.

A. Smith has Preserved this *Issue* for Review? ***In State v. Slappy***, 522 So.2d 18 (Fla. 1988), this court held that a party seeking to strike a juror over objection that the strike is racially discriminatory must provide a clear and reasonably specific racially neutral and legitimate reason for exercising the strike. The trial court cannot merely accept this reason at face value; it must evaluate the reason, as it would any disputed fact, to ensure that the reason is (a) race-neutral; (b) record-supported; and (c) non-pretextual. 522 So.2d at 22-23. A party opposing a strike under ***Slappy*** must apprise the court of one of these bases for objection, then renew the objection prior to the swearing-in of the jury. *E.g.*, ***Joiner v. State,*** 618 So.2d 174, 176 (Fla. 1993).

As soon as the prosecutor proffered his reasons for striking Alston, defense counsel objected

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[3] In ***Austin v. State,*** Case No. 94-778, 21 FLW D1723 (Fla. 3d DCA July 3 1, 1996), the appeal of co-defendant Austin's conviction, the court held that the strike of juror Alston was not pretextual and if it was, objection was not preserved. Judge Green, concurring in the result, found that the strike was pretextual, but the issue unpreserved. Rehearing is pending.

to the reasons as pretextual, by invoking two of the five factors identified in ***Slappy*** as probative of pretext: (1) the alleged group bias was not shown to be shared by the subject juror; and (2) the prosecutor's examination of the juror was perfunctory. ***Id., 522*** So.2d at 22. (T.3776-77).

The state argues that neither the trial court nor this court can note record evidence of pretext unless it was expressly argued by trial counsel even where, as here, trial counsel objected to the reasons as pretextual and argued some record evidence of pretext. Specifically, the state has said that because defense counsel did not ***argue Slappy*** factor (5) -- that the proffered reason is equally applicable to unchallenged jurors -- neither the trial court nor this court can note such evidence in the record. The state concedes that this court has never held this but reasons that, unless it is confronted at trial with such an allegation, it has insufficient opportunity to demonstrate why an apparently similar unchallenged juror is actually dissimilar to the juror whom it has stricken.

There are two defects in this reasoning: **(1)** The state can do on appeal what it would have done below -- argue record evidence that the unchallenged juror is in salient respects dissimilar to the stricken juror. (2) More importantly, ***Slappy*** puts the burden on the trial court to critically examine the record for evidence of pretext where a party opposing a strike objects that a proffered reason is pretextual. ***State v. Slappy, 522*** So.2d at 23.

By objecting to the strike of Alston under ***Slappy,*** objecting to the prosecutor's reasons as pretextual, and renewing the objection prior to the jury's swearing-in, Mr. Smith did all that Florida law requires to preserve this issue for review. The state has accordingly cited case law from other jurisdictions for the proposition that Mr. Smith was required to do more. (AB 3 1 n. 1 S). But in the cases cited by the state, the party opposing the strike made no argument at all in the trial court that the proffered reasons were pretextual. See ***also Melbourne v. State,*** 21 FLW S358 (Sept. 5, 1996)(party opposing strike made no objection to state's reason for it). Clearly, where, as in ***Melbourne***, the opponent never objects that the reason is pretextual, the burden of persuasion has not been met. In this case, in contrast, defense counsel contemporaneously objected that the

prosecutor's reasons were pretextual. The issue is thus fully preserved.

B. Juror Alston's Avowed Inclination to Err on the Side of Life. The state answers that jurors Ruiz and Prater, who served on the jury, never "said anything remotely resembling Alston's comment." (AB at 33). As Judge Green noted in ***Austin,*** "[d]efense counsel . . . questioned Ms. Alston and eight other jurors individually about their feelings regarding the legislature's preference for 'an error on the side of life.' All nine of these venirepersons stated that they agreed with the legislative intent as enunciated by defense counsel." (Emphasis in original). Jurors Ruiz and Prater were among these venirepersons. (T.2940-43, 3712). Although juror Alston reiterated the principle, instead of noting her assent to it in some other way, (T.3713-14), this did not distinguish her answer from those of the others. The fact that the prosecutor did not challenge Jurors Prater and Ruiz or the other veniremembers who, like Alston, expressed agreement with the legislature's preference for an error on the side of life, reveals the pretextual character of the strike against Juror Alston.

C. Juror Alston's Occupation as a Guidance Counselor. Contrary to the state's contention, and as revealed by the excerpts above, Juror Alston's statement that she would err on the side of life was not in response to questioning whether her occupation would affect her evaluation of mitigating evidence, but in response to questioning whether she could follow a jury instruction to err on the side of life. The prosecutor asked her no questions designed to elicit occupational bias against imposition of the death penalty, and she did not otherwise evince any sign of bias. To the contrary, she said she would have no hesitation understanding and applying the court's penalty phase instructions. (T-3246, 3249, 3425-27, 3504). Just like ***Slappy***, this is a case in which the prosecutor's reason is pretextual because: (1) the prosecutor did not question the juror whether her occupation gave rise to bias; and (2) there is no other record evidence that the juror shared the putative occupational bias. ***Sappy,*** 522 So.2d at 22.

D. Juror Alston's Asserted Citation to Oprah Winfrey. As the state correctly

argues, because defense counsel did not object to this reason based on the absence of any record support, Mr. Smith's objection to this particular reason is not preserved for review.

E. Miscellaneous Factors. The state answers that it had previously stricken only one other African-American juror, Ms. Moultry, and that at the conclusion of voir dire, it had unused peremptory challenges it could have exercised against African-American jurors who served on the panel. The state has omitted to mention its effort to strike a third African-American juror, Johnson. Mr. Smith objected that its strike of Johnson was racially discriminatory and, subsequent to a ***Neil*** inquiry, the trial court disallowed the strike. (T.3750-53).

Furthermore, the question under ***Slappy*** is not whether every black venire member has been excused because of race, but "whether any juror has been so excused, independent of any other."[4] ***State v. Slappy, 522*** So.2d at 21; ***Hall v. Daee,*** 602 So.2d 572, 575 (Fla. 1992). The state's argument that its stock of unused peremptory challenges establishes its freedom from bias in striking juror Alston was dismissed by the court in ***Jones v. Ryan, 987*** F.2d 960, 972-973 (3rd Cir. 1993) as "a ***non sequitur*** and unavailing," because of its "marginal impact . . . [in] determining whether a prosecutor exercised peremptory challenges in a racially discriminatory manner."

Iv. THE TRIAL COURT'S FAILURE TO PROVIDE RELIEF WHEN THE DEFENDANT BECAME ILL WITH THE FLU, SLEPT IN COURT, AND SUFFERED OTHER ADVERSE SIDE EFFECTS FROM HIS ILLNESS AND JAIL ADMINISTERED MEDICATION VIOLATED HIS CONSTITUTIONAL RIGHTS.

A. Right to Presence. The state asserts that (1) Mr. Smith was not absent from the proceedings because his illness wasn't serious enough to have compromised his right to presence;

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[4]The only three of the 15 seated jurors who can be identified as African-Americans are Johnson, Williams, and Whitted-Miller. The prosecutor tried to strike Johnson, but the trial court disallowed the strike pursuant to the Defendant's ***Neil/Slappy*** objection. (T.3753). Mr. Smith challenged Williams and Whitted-Miller for cause, Williams **because** he was a school friend of the victim's brother and Whitted-Miller because her sister is a police officer. (T.3785). But the court denied these challenges and denied Smith's requests for additional **peremptory strikes. (T.3785-86; 3940-41).**

and (2) even if Mr. Smith was absent, the absence was voluntary because he had effectively waived his right to presence. The state apparently concedes that if Mr. Smith was involuntarily absent, his absence occurred during an essential stage of the trial, and to his prejudice.

1. **Mr. Smith was Absent During Days Nine and Ten of Jury Selection.** The state's point here is that Mr. Smith's illness was not serious enough to have affected his ability to assist counsel because: (a) he never mentioned feeling sick until day nine, when he went to the clinic and received his medication (AB at 40); (b) there is no record evidence that his illness affected his ability to assist counsel on day nine (AB at 44); (c) there is no record evidence that he felt sick at all on day ten (AB at 42); and (d) the trial judge said Mr. Smith's illness did not affect his ability to select a jury. (AB at 43).

a. **Mr. Smith Mentioned Feeling Ill Prior to Day Nine of Jury Selection.** Day nine was Tuesday, October 19th. Defense counsel informed the court the first thing Tuesday that Mr. Smith had reported being ill four days earlier -- Friday, October 15th, the eighth day of jury selection.[5] (T.3386). When Mr. Smith was brought to court on Tuesday morning, he told the judge that he had tried to go to the clinic over the weekend, to no avail. (T.3390-91).

b. **The Record Establishes that Mr. Smith Fell Asleep, or was Otherwise Impaired in His Ability to Assist Counsel, During Day Nine of Jury Selection.** At the start of day nine, defense counsel informed the court that, based on her discussions with Smith that morning, she had concluded that his mental faculties were too impaired by illness to assist in jury selection. (T.3396-97). By mid-morning, counsel reported that Smith had thus far that day been unable to assist because of his illness. (T.3440). After the lunch break, during which Smith was diagnosed with

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[5]Two days before this -- day six of jury selection -- Mr. Smith fell asleep in court, and sought unsuccessfully to waive his presence to avoid prejudicing the prospective jurors against him. (T.2805-06). It is far more reasonable to infer that this fatigue was attributable to onset of the flu, which he reported two days later, than to "simple boredom," as the state suggests. (AB at 40). This inference is fortified by the fact that, for the first five days of jury selection, Mr. Smith actively assisted counsel. (T.3440).

the flu and administered medication,[6] counsel again noted that Smith was impaired by illness. (T.3485-86). Counsel emphasized that Smith's illness derogated from his right to presence:

> At the present time he cannot interact with us as far as discussions and decisions and I know the presence is important but it's got to be more than just a body in the court. room. it has to be a mind . . . (T.3488).

That afternoon, Smith fell sound asleep, snoring so loudly that it was audible throughout the courtroom, and Smith's counsel periodically had to awaken him. (T.3805). Later that afternoon, defense counsel was forced to explain Smith's unconsciousness to the venire. During a late afternoon recess, defense counsel renewed the motion to recess, noting that Smith could not stay awake because of the Sudafed drowsy formula tablets administered some hours earlier. (T.3558-59). Thus, contrary to the state's assertion, there was abundant record evidence of Mr. Smith's sleeping or other impairment on day nine.

c. **The Record Establishes that Smith's Illness Persisted on Day Ten of Jury Selection.** Although Smith told the judge at the start of day ten that he felt better, by noon counsel reported that Smith had relapsed, vomiting his lunch, and renewed the motion to recess until Smith regained his ability to assist counsel. (T.3636, 3696). The state seizes upon Smith's apparent assistance to counsel in exercising a peremptory challenge to Juror Faria as evidence that his illness had not really affected him on day ten.' (AB at 43). Clearly, record evidence of a moment of lucidity or exertion during day ten does not negate the abundant record evidence of

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[6]The state's assertion that Smith was given an "unspecified quantity of an over-the-counter decongestant," is wrong. (AB at 44-45). The nurse testified that he'd been given drowsy-formula Sudafed. (T.3485-86). Defense counsel noted on day 11, that two days earlier he'd been given four tablets of the drowsy-formula Sudafed. (T.3803-04). There is no way to know whether Mr. Smith was given "plain ole" Tylenol, as opposed to Tylenol Cold and Flu formula. (AB at 42, n. 23). However, the nurse said he'd been given "Tylenol, cough and stuffy nose." (T.3485). It is most reasonable to infer that, consistent with his diagnosis, Smith was administered the cold and flu formula. In any case, the soporific effects of the Sudafed drowsy formula were alone sufficient to account for his unconsciousness. (IB at 42 n. 16).

[7]Counsel noted, in striking Juror Faria, that the defendant was "trying to follow as best he can." (T.3763).

unconsciousness and other incapacity.

d. The Trial Judge's Findings Regarding Smith's Demeanor in Concluding that He was Mentally Present Fail to Establish Smith's Ability to Assist Counsel. The judge's findings about Smith's demeanor are completely contradictory, and thus provide a highly unstable foundation for the state's conclusion. On the one hand, the judge found that Mr. Smith was "awake," "'alert," and "intelligent"; on the other hand, the judge acknowledged that he was asleep and snoring during day nine. (T.3804-05).

The trial court's interaction with Smith consisted almost exclusively of its questions whether he would waive his presence in exchange for medical treatment, and Smith's monosyllabic responses. (T.3392-3393). ***See Campbell v. State,*** 488 So.2d 592 (Fla. 2d DCA 1986). Defense counsel, in contrast -- who sat by Smith, attempted to interact with him, and had to physically awaken him periodically -- was in a superior position to gauge the effects of Smith's illness and medication on his capacity to assist counsel. See Richard J. Bonnie, THE COMPETENCE OF CRIMINAL DEFENDANTS: BEYOND *DUSKY* AND *DROPE*, 47 U.of Miami L. Rev. 539, 553 (Jan. 1993).

2. **Mr. Smith was Involuntarily Absent During Days Nine and Ten of Jury Selection.** The state answers that Mr. Smith waived his right to be present because his lawyers at one point said they didn't mind if he left, and because he later agreed to absent himself in exchange for medical treatment. Smith replies that his lawyers could not waive his right to be present and that he agreed to be absent only because the trial judge refused to recess the proceedings and provide him access to medical treatment unless he personally waived his right to be present. This was not a valid waiver, because it was coerced by the threat of withholding medical treatment.

As soon as Smith came to court on October 19, he told the judge that he had the flu. (T.3391). When the judge asked "if it's your desire not to be here," Smith did not assent, but simply said "I want to go to the clinic." (*Id.*). Defense counsel agreed to waive Smith's presence, for the purpose of a clinic visit, but as the prosecutor pointed out, counsel could not waive his

client's right to be present. ***Francis v. State,*** 413 So.2d 1175 (Fla. 1982). When the judge asked Smith personally to waive his right to be present, Smith declined. (T.3392). After consulting with Smith, counsel asked for a one-day recess for Smith to receive medical treatment and to recuperate. (T.3392). It was only when the court refused that counsel moved "[i]n the alternative, [to] proceed in his absence." (T.3392). But the court would not permit Smith to go for treatment unless he personally indicated, on the record, his waiver:

> The Court: He has to say that. Mr. Smith has to himself say that he is waiving the right to be present during this jury selection and waive any appellate issues as they might relate to this matter. (T.3392-93).

It was only then that Smith capitulated. (T.3393). The prosecutor immediately alerted the judge to the invalidity of this waiver:

> I don't know that the court can force him to be in the position that he's agreeing to be in. . . **[C]onsidering the type of case we have[,][s]omeone will eventually say why did't you just take the hour or two and get medication and then start.** (T.3394).

But the trial judge was determined to proceed in spite of Smith's condition. He refused to accept Smith's "'waiver" and he refused to permit Smith to receive medical treatment until the noon recess. (T.3394-95). Defense counsel, again, requested a recess because it was clear that Smith could not assist in jury selection:

> Based on my conversation with Mr. Smith this morning his illness has such an effect on his mental state that if the court as you have done denies a request to recess so he can get better, the affect [sic] on his mental state because he's ill and he's feverish, he's unable to assist us in any aspect of the case. (T.339697).

Thus, far from making a knowing, intelligent and voluntary waiver of his right to be present, Smith repeatedly advised the court that he was incompetent to participate and repeatedly pleaded for a recess within which to recover his capacity to participate. Prior to the jury's swearing in, Smith renewed his objections. Not surprisingly, the trial court failed to certify a knowing, intelligent and voluntary waiver of Mr. Smith's right to presence at jury selection. See ***Coney v.***

State, 653 So.2d 1003, 1009 (Fla.), *cert.denied*, 116 S.Ct. 315 (1995).[8]

B. Right to Competency Evaluation. The state answers that there were no reasonable grounds to believe Mr. Smith was not competent to proceed. (AB at 44-45). As discussed *in* detail above, Mr. Smith was not merely drowsy, but was sound asleep and snoring as a result of being administered four tablets of a drowsy formula. Under the trial court's observation to the contrary, it cannot seriously be denied that a criminal defendant's unconsciousness at trial comprises a meaningful impairment of his right to defend himself. The cases cited by the state (AB at 45) are distinguishable, because there was no record evidence in those cases that illness or medication rendered the defendants unable to assist counsel.

The state's effort to contrast this case with those cited by Mr. Smith, (IB at 49-50), is unsuccessful. The asserted basis for contrast is that these other defendants suffered from mental illness for which they were prescribed psychotropic medications, while Mr. Smith suffered ***only*** from the flu for which he was administered only non-prescription medications. The fact that the origin of Mr. Smith's incapacity was physical rather than mental, and was on the whole less exotic,[9] is no basis for contrast. The only salient point is that, in Smith's and the comparison cases, illness, medication, and courtroom conduct gave rise to reasonable grounds to believe that the defendant was unable to assist counsel. It would not matter, for the purpose of the trial court's duty, whether

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'Alternatively, if his "agreement" to absent himself in exchange for immediate medical treatment were a valid waiver, it was retracted when the trial court refused to permit him immediate medical treatment and when, upon his return from the clinic some hours later, he moved repeatedly to recess the trial. (T.3485-86, 3558-59, 3696).

[9]The state emphasizes that Mr. Smith was suffering only from a "common flu." (AB at 39, 42). As anyone who has suffered the flu can attest, there is nothing "common" about it. The flu "is a serious viral infection that can send even the healthiest of people to bed for a week . . . Approximately 20,000 Americans die of the disease each year." AMERICAN HEALTH, Sept. 1996, V. 15, n. 7, p. 23. Unlike a cold, which does not involve muscle aches or fever, and does not require medical attention, the flu is "accompanied by fever, chills, 'malaise,' headache, cough, muscle and joint pain," for which "fever-reducers, rest and fluids" are prescribed. HEALTH NEWS, Oct. 1995, v. 13, n. 5, p. 8.

Mr. Smith's unconsciousness was caused by a blow to the head, rather than the flu and medication. *See, e.g. Holmes v. State, 494* So.2d 232 (Fla. 3d DCA 1986)(defendant's deafness gave rise to duty to inquire into his competence, court noting "'A defect that impairs a defendant's comprehension or hampers his ability to consult with his counsel effectively, whether arising from physical or mental impairment, may lead to a finding of incompetence.").

To proceed against a defendant who lacks the present ability to recognize and communicate relevant information to counsel is not only unfair, it undermines society's independent interest in the dignity and reliability of its criminal process. Bonnie at p. 552. The bar against trying the incompetent defendant is therefore "fundamental to an adversary system of justice." ***Drope v. Missouri,*** 420 U.S. 162, 172 (1985). It is impossible to imagine that if the assistant attorney general were suddenly afflicted with the flu and administered sleep-inducing medication, that he would not seek and this court would not grant him a brief delay within which to recover his ability to fight effectively for affirmance of Mr. Smith's death sentence. All that Mr. Smith had asked was a day to recover so that he could fight effectively for his life. The trial judge's failure to protect his rights, by either inquiring into his competency or recessing the trial to permit him to recover, cannot be countenanced.

V. THE TRIAL COURT ERRED IN FAILING TO SUPPRESS MR SMITH'S SUPPOSED CONFESSION ELICITED THROUGH COUNSELLESS CUSTODIAL INTERROGATION AFTER SMITH HAD ALREADY BEEN INDICTED AND APPOINTED COUNSEL.

A. State's Violation of Mr. Smith's Constitutional Right to Counsel. The precise issue raised by the instant case was recently considered by the Arkansas Supreme Court in ***Bradford v. Arkansas,*** 927 S.W.2d 329, 325 Ark. 278 (1996). In ***Bradford,*** the defendant was arrested for murder. ***Id.*** at 330. Following two interrogation sessions, both preceded by Miranda warnings, the defendant gave statements indicating progressively more involvement with the murder but ultimately blaming a companion. Following a probable cause hearing, a municipal

court judge appointed the public defender to represent the defendant, apparently unbeknownst to the public defender and the defendant. *Id.* at 33 1. Shortly after this hearing, the defendant was again advised of her Miranda rights, waived those rights, and gave a third, more detailed statement admitting even greater involvement in the crime. *Id.*

Addressing the defendant's motion to suppress statements, the court first held that she had never requested counsel prior to either of her three statements and that those statements were voluntary. *Id.* at 332-33. Regarding the defendant's sixth amendment challenge to her third statement, the court stated the issue as follows:

> [W]hether the municipal court's appointment of counsel at the probable cause hearing curtailed subsequent police interrogation though neither police officers nor Bradford were aware of the appointment and though Bradford waived her *Miranda* rights before the third interrogation[?]

Id. at 333. The court answered the question in the affirmative and reversed the defendant's conviction and death sentence. *Id.* at 33 5.

Analyzing the issue, the court looked to *Michigan v. Jackson*, *475* U.S. 625, 106 S.Ct. 1404 (1986). There, the defendants in the two consolidated cases had requested and been appointed counsel at arraignment. *Id.* at 626-28, 106 S.Ct. at 1406. One defendant, however, was not advised of the appointment; neither defendant had an immediate opportunity to consult with counsel. *Id.* Both defendants, without the advice of counsel, waived Miranda rights and gave confessions. *Id.*

After stressing that the protection provided by the sixth amendment right of counsel is greater than the right to counsel that a defendant must be afforded pursuant to Miranda, the Court noted:

> Indeed, after a formal accusation has been made - and a person who had previously been just a "suspect" has become an "accused" within the meaning of the Sixth Amendment - the constitutional right to the assistance of counsel is of such importance that the police may no longer employ techniques for eliciting information from an uncounselled defendant that might have been entirely proper at an earlier stage of their investigation.

Id. at 632, 106 S.Ct. at 1409. Rejecting the state's assertion that a defendant's request for counsel

at arraignment (when the sixth amendment takes effect) should not bar any further uncounselled police interrogation like a defendants pre-arraignment request for counsel under ***Edwards v. Arizona,*** **451** U.S. 477, **101** S.Ct. 1880 (1981), the Court observed:

> In construing respondents' request for counsel, we do not, of course, suggest that the right to counsel turns on such a request. See ***Brewer v. Williams, 430*** U.S. [387,] at 404, 97 S.Ct. [1232,] at 1242 ("[T]he right to counsel does not depend upon a request by the defendant"); ***Carnley v. Cochran, 369*** U.S. 506, 5 13, 82 S.Ct. 884, 888 . . . (1962)("[I]t is settled that where the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend on a request").

Jackson, 465 U.S. at 633 n. 6, 106 S.Ct. at 1409 n. 6. The Court ultimately held that, "if police initiate interrogation after a defendant's assertion, at an arraignment or similar proceeding, of his right to counsel, any waiver of the defendant's right to counsel for that-police initiated interrogation is invalid." ***Id.*** at 636, 106 S.Ct. at **1411.**

Applying this law, the ***court*** in ***Bradford*** held that, just like the situation where the sixth amendment right to counsel has attached and a defendant requests counsel, if the sixth amendment right to counsel has attached and a defendant is ***appointed*** counsel, "an ordinary waiver of Miranda rights will not suffice to validate a subsequent confession." ***Id.*** at 334. The court held that it is irrelevant that a defendant is unaware that counsel has been appointed. ***Id.*** It noted that in ***Jackson,*** defendant Bladel, whose post-appointment confession was suppressed, was also unaware of the appointment. ***Id.*** Moreover, the court held that the fact that the interrogating police officers were unaware of the appointment was also irrelevant. ***Id.*** " . . . Sixth Amendment principles require that we impute the State's knowledge from one state actor to another." ***Id. at 333 (citation*** omitted). The court explained:

> Once counsel was appointed by the court, knowledge of the appointment was imputed to police officers, and they were under an affirmative obligation to respect it. Just as a police officer who wishes to initiate an interrogation during the custody stage must determine if a request for counsel has been made . . . , simple diligence requires that police officers take pains to learn whether counsel was appointed at a probable cause hearing.

Id. ***Accord Holloway v. State,*** 780 S.W.2d 787 (Ct.Crim.Appls.Tx. 1989)(holding that defendant who had been indicted and appointed counsel, but who never requested counsel, was incapable of waiving his constitutional right to counsel before he submitted to counselless interrogation).

Particularly in light of this court's commitment to the doctrine of primacy and the more expansive protection this court recognizes under article I, section 16's right to counsel, see ***Traylor v. State,*** 596 So.2d 957, 961-70 (Fla. 1992), this court should apply the reasoning of ***Bradford*** and ***Holloway*** and hold that Mr. Smith was fully protected from counselless interrogation when he was arrested on May 2nd and interrogated thereafter by FDLE Agent Cornelius and Detective Romagni. Mr. Smith had already been indicted. (R. 1-7). He was no longer merely "a suspect;" he was now "an accused." ***Jackson,*** 475 U.S. at 632, 106 S.Ct. at 1409. The adversarial positions of the State of Florida and Mr. Smith had fully solidified. ***McNeil v. Wisconsin,*** 501 U.S. 171, 177-78, 111 S.Ct. 2204, 2209 (1991). Thus, Mr. Smith was guaranteed that he did not have to stand alone against custodial interrogations which, absent counsel, would most certainly derogate from his right to a fair trial. ***See Andersun v. State, 420*** So.2d 574, 576 (Fla. 1982).

Additionally, Mr. Smith's right to counsel was no longer one in theory alone. The court had already appointed counsel to represent him. (T. 125-27, 1035-38; SR2.68-83).[10] See Fla. R. Crim. P. 3.11 l(a). Indeed, his appointed counsel had already accepted the appointment (T. 125-27; R.721) and entered a written plea of not guilty and demand for discovery on behalf of Mr. Smith. (R. 17; SR2.86-87). Once Mr. Smith had been appointed counsel, "a distinct set of constitutional safeguards aimed at preserving the sanctity of the attorney-client relationship [went into] effect. ***Patterson v. Illinois, 487*** U.S. 285, 290 n. 3, 108 S.Ct. 2389, 2393 n. 3 (1988). Although the interrogating officers claimed they had no knowledge that Mr. Smith had been indicted, ***but see***

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[10]The page numbers referenced in SR2 are those contained in Supplemental Volume 2 of the Record on Appeal, pages 68-112, filed by the Clerk of the 1 lth Judicial Circuit Court on November 26, 1996.

and appointed counsel, such knowledge is imputed. A quick call to the prosecutor or review of the court file would have disclosed both facts. (R.721; SR2.82-87). Thus, by the time of Mr. Smith's interrogation, his right to counsel had been fully effectuated and was operating to protect him from counselless interrogation.

The state argues that Mr. Smith's position, that following the appointment of counsel, a defendant "need not do anything" to invoke his right to counsel and secure protection from counselless interrogation, conflicts with decisions of the United States Supreme Court and this court. (AB at 47). The state fails to cite any such United States Supreme Court case. Indeed, ***Michigan v. Jackson*** fully supports Smith's argument. ***See Bradford.***

The state urges that this court rejected Mr. Smith's position in ***Traylor v. State***, *596* So.2d 957 (Fla. 1992). To the contrary, ***Traylor*** supports Mr. Smith's argument. The state recites that, "although Traylor's § 16 rights had attached, his statement did not require suppression because 'Traylor had not retained or requested counsel' on the charge, and his waiver of counsel was knowing and voluntary." (AB at 47-48). The state's statement concerns a Florida offense about which Traylor was interrogated but for which he had not requested, *nor been appointed*, counsel. On the other hand, with regard to a counselless statement elicited through custodial interrogation regarding an Alabama offense for which Traylor had been appointed counsel, notwithstanding Traylor's otherwise valid waiver of his Miranda right to counsel, *id., 596* So.2d at 970-72, this court agreed that Traylor's confession had to be suppressed. "The confession to the Alabama murder that was obtained by Florida police through police-initiated questioning after counsel was appointed was thus obtained in violation of Section 16 and was inadmissible in the Florida proceeding." *Id.* at 972. "Florida police were constitutionally barred from initiating any crucial confrontation with him on that charge in the absence of his lawyer for use in a Florida court." ***Id.***[11]

[11]The state quotes ***Phillips*** v. ***State***, 612 So.2d 557, 559 n. 2 (Fla. 1992), for the proposition that "[r]egardless of when the [§ 16] right attaches, the defendant must still invoke the right in order to be protected." (Al3 at 48). This statement is *obiter dictum*. Ultimately, this court held that a

This court has even held that a defendant's uncounselled confession must be suppressed, for violation of the sixth amendment right to counsel, where police interrogation followed the filing of an indictment (and hence the initiation of adversary proceedings), even though counsel had been neither appointed nor formally requested. In ***Anderson v. State, 420*** So.2d 574 (Fla. 1982), the defendant was arrested in California and charged with murder. *Id.* at 575. Florida law enforcement officers interviewed him regarding a Florida murder. Following a second interview, the defendant was indicted in Florida for first-degree murder. The officers went to Minnesota to retrieve the defendant and bring him to Florida to stand trial. *Id.* At that time, the defendant was not represented by counsel but indicated he expected to receive appointed counsel in Florida. *Id.* at 576. During the car trip to Florida, after being advised of his *Miranda* rights, *id.* at 578 (Boyd, J., dissenting), the defendant confessed to the Florida murder. *Id.* at 575.

Agreeing that the police deputies' interrogation of the defendant violated his sixth amendment right to counsel, this court noted that upon being indicted in Florida, the defendant's right to counsel had attached: "[A]n 'accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial."' *Id.* at 576 (citation omitted). Although the defendant indicated that he expected to receive appointed counsel in Florida, he apparently never requested an attorney prior to or during the drive to Florida. Nonetheless, this court held that the officers' interrogation violated his right to counsel." *Accord* ***Sobczak v. State, 462*** So.2d 1172 (Fla. 4th DCA 1984), *rev. denied*, 469 So.2d 750 (Fla. 1985).

Anderson indicates that the interrogation of Smith would have been illegal even if counsel

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statement elicited through uncounselled, police-initiated interrogation, that followed the appointment of counsel, had to be suppressed. The same result is required in the instant case.

[12]The court noted that the four-day car ride prevented compliance with Fla. R. Crim. P. 3.130(b) which required that the defendant be taken before a judicial officer within 24-hours of his arrest and advised of his right to counsel. *Id.* at 576.

had not already been appointed. Indeed, Cornelius's and Romagni's interrogation is even more offensive than the interrogation in ***Anderson*** because counsel already had been appointed. To answer this point, the state, for the first time, challenges the validity of the court's appointment of counsel. (AB at 52-54). The state never objected below. Indeed, it appears that, although the state was not represented on April 5th when the trial judge formally appointed William Robinson to represent Smith, (T. 125-27), it was represented on April 4th when Mr. Smith's public defender was recognized by the court, announced a conflict of interest, and the trial court indicated it intended to appoint Mr. Robinson as Mr. Smith's counsel. (R. 15, 17; SR2.68-81). On April 10, 1991, the state served Mr. Smith's counsel with its Amended Discovery. (SR2.84-85). Thus, the state waived any objection to the appointment of counsel.

Even ignoring the waiver, the state's argument misses the point. From at least April 4, 1991, the court's act in recognizing the public defender as Smith's attorney and appointing attorney Williams as substitute counsel, at a point subsequent to the initiation of adversary proceedings, announced to the State of Florida and all its agents that from that point forward, it could only communicate to Mr. Smith through counsel. This directive fully applied to Cornelius, Alvarez, and Romagni. Although they claimed they had no knowledge of the appointment of counsel, they easily could have discovered it. In any event, knowledge of the appointment is imputed to them. ***See Bradford,*** 292 S.W.2d at 334.[13]

The state urges that even if Mr. Smith were deemed to have "invoked" counsel by virtue of the trial court's appointment of counsel, his initial statement to Romagni is admissible because he initiated this contact. (AB at 54-55). The state's argument concerns only Mr. Smith's brief

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[13]The state argues at length that, prior to making the statements that Mr. Smith sought to suppress, he waived his sixth amendment/section 16 right to counsel. (AB at 48-50). However, once counsel was appointed Mr. Smith, "Florida police were constitutionally barred from initiating any crucial confrontation with him on [the pending] charge in the absence of his lawyer for use in a Florida court." ***Traylor***, 596 So.2d at 972. Under these circumstances, any purported waiver of Mr. Smith's right to counsel was invalid. ***Bradford,*** 927 S.W.2d ***at 334.***

statement to Romagni upon their first contact, that Smith was not the leader, (T.5572-73), and not the fruits of the subsequent three hour interrogation. (T.5588-5608)(AB at 54-55).

As the Court held in ***Rhode Island v. Innis***, ***446*** U.S. 291, 100 S.Ct. 1682 (1980), interrogation includes the functional equivalent of interrogation including any "practice that the police should know is reasonably likely to evoke an incriminating response from a suspect." ***Id.*** at 301, 100 S.Ct. at 1689-90. ***See Glover v. State, 677*** So.2d 374 (Fla. 4th DCA 1996). In the instant case, Romagni's conduct toward Mr. Smith, at the time of their original contact, constituted the functional equivalent of interrogation. Mr. Smith was in custody. He had already been interrogated by Deputy Cornelius. He knew he had been arrested based on Miami murder charges. Detective Romagni's sole purpose for going to Tallahassee was to interrogate Smith. (T.941). Romagni had advised Smith that he was a homicide detective from Miami and that he was "there for a statement or to talk about the investigation." (T.943). This prompted Smith's statement. Thus, Mr. Smith's brief statement to Romagni, preceding the formal interrogation, must also be suppressed.

B. **No Valid Waiver of Mr. Smith's *Miranda* Rights.** The state does not answer Mr. Smith's charge that any Miranda waiver was invalid based on his interrogators' failures to advise him that he had been indicted for murder about which they sought to interrogate him. Certainly an event of this significance, which converted Mr. Smith from a "suspect" to an "accused," and constituted the initiation of adversary proceedings between the state and himself, was a fact that was absolutely essential for Mr. Smith to consider before he could validly waive his rights. See ***Patterson v. Illinois, 487*** U.S. 285,295, 108 S.Ct. 2389, 2396 (1988).

A Miranda waiver is invalid if the product of intimidation, coercion, or deception, or the defendant was not fully aware of the nature of the rights being abandoned and the consequences of their abandonment. E.g., ***State v. Mallory***, ***670*** So.2d 103, 106 (Fla. 1st DCA 1996). Withholding information may render a waiver invalid if the silence might affect the defendant's

ability to understand the nature of the rights he is waiving and the consequences of abandoning them. *Id*. Certainly, knowing that he had already been indicted and, thus, nothing he could have said could prevent the formal filing of charges, affected Mr. Smith's ability to understand the nature of the rights he was waiving and the consequences of abandoning them. This omission invalidated any waiver.

While it may be true that "police are not required to try and convince a defendant that he needs counsel," (AB at 55), this does not mean that the police were not required to advise Mr. Smith that he had already been appointed counsel. The omission here was not simply failing to advise ***Mr.*** Smith that ***an*** attorney had called him. ***See Moran v. Burbine***, *475* U.S. 4 19, 416-17, 100 S.Ct. 1135, 1138-39 (1986). Instead, this omission concerns the officers' failure to advise Mr. Smith that the court had appointed him a legal representative and that, but for Mr. Smith's initiation of any statements, the state and the law enforcement officers interrogating him could only address him through counsel. Indeed, the appointment of counsel disentitled them from interrogating Mr. Smith at all. Although the officers claimed that they did not know counsel had been appointed, it was incumbent upon them to determine whether Mr. Smith had counsel prior to any interrogation.

VI. THE TRIAL COURT REVERSIBLY ERRED BY FAILING TO SEVER MR SMITH FROM HIS CODEFENDANTS.

To support its argument that the trial court's procedures protected Mr. Smith's confrontation rights, the state materially misstates the law, It claims "[t]he principles of ***Bruton*** are not applicable when the co-defendant's confession does not refer to the defendant." (AB at 57). Although acknowledging the open question in ***Richardson v. Marsh,*** 481 U.S. 200,211 n. 5, 107 S.Ct. 1702, 1709 n. 5 (1987), whether a codefendant's confession is admissible where the defendant's name has been replaced with a symbol or neutral pronoun that does not necessarily eliminate any reference to his or her existence, and that the redacted confessions of Austin and Bryant fell into this category, the state puffs that "all jurisdictions to consider [this] question have concluded that redactions that substitute the defendant's name with neutral pronouns eliminate the Confrontation

Clause problem." (*Id.*).

Contrary to the state's assertion, numerous decisions have held that substitution of a symbol or neutral pronoun for a defendant's name in a co-defendant's confession, even coupled with jury instructions, is inadequate to protect a defendant's confrontation rights.[14] Indeed, to the extent Florida courts have considered whether a *Bruton* error may occur where a codefendant's confession is redacted and the defendant is incriminated by contextual implication alone, it would appear that they have answered this question in the affirmative.[15]

In the recent case of ***People v. Fletcher***, 13 Cal.4th 45 1, 917 P.2d 187 (1996), the California Supreme Court addressed the question, whether editing a non-testifying co-defendant's confession to substitute pronouns or other neutral terms for the defendant's name, invariably suffices to avoid violation of the defendant's confrontation rights. The court specifically granted review to address the issue reserved in ***Richardson.*** *Id.* at 456. The court concluded that the efficacy of such redactions must be determined on a case-by-case basis in light of the other evidence presented at trial. "The editing will be deemed insufficient to avoid a confrontation violation if, despite the editing, reasonable jurors could not avoid drawing the inference that the defendant was the co-participant designated in the confession by symbol or neutral pronoun." *Id.*

In ***Fletcher,*** a woman was shot and killed in her car as she encountered two men near a freeway on-ramp. *Id.* at 457. The victim was with members of her immediate family. The

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[14]*E.g.*, ***United States*** v. ***Foree***, 43 F.3d 1572, 1578 (1 lth Cir. ***1995); United States v. Hoac***, ***990*** F.2d 1099, 1106-07 (9th Cir. 1993); ***United States v. Long,*** 900 F.2d 1270, 1279-80 (8th Cir. 1990); ***United States v. Bennett, 848*** F.2d 1134, 1141-42 (1 lth Cir. 1988); ***United States v. Petit,*** 841 F.2d 1546, 1555-56 (1 lth Cir.), ***cert.denied, 487 U.S.*** 1237 (1988); ***United States v. Pickett***, 746 F.2d 1129, 1132-33 (6th Cir. 1984); ***Clark v. Maggio, 737*** F.2d 471, 476-478 (5th Cir. 1984), ***cert.denied***, *470 'U.S.* 1055 (1985).

[15]*See, e.g.,* ***Bryant v. State, 565*** So.2d 1298, 1303 (Fla. 1990); ***Nelson v. State, 490*** So.2d 32, 34 (Fla. 1986); ***Delgado v. State, 574*** So.2d 1129, 1130 (Fla. 3d DCA), ***rev.denied***, 591 So.2d 631 (Fla. 1991); ***Mims v. State, 367*** So.2d ***706*** (Fla. 1st DCA 1979); ***Mathews v. State, 353*** So.2d 1274, 1276 (Fla. 2d DCA 1978); ***Cook v. State, 353*** So.2d ***911, 914*** (Fla. 2d DCA 1977), ***rev.denied***, *362* So.2d 1053 (Fla. 1978).

evidence established that shortly after the shooting, Fletcher and co-defendant Moord appeared at the apartment of an acquaintance, near the on-ramp. ***Id.*** As the men left shortly afterwards, the acquaintance saw Fletcher pick up a gun that had dropped from his jacket. ***Id.*** at 458. The two men next appeared at an apartment of Fletcher's former girlfriend where they spent the night. Fletcher told his ex-girlfriend that "something had happened and that he hoped no one was dead." ***Id.*** Shoe prints consistent with shoes linked to both men were discovered at the scene of the murder. Id. Fletcher made a statement to an inmate incriminating both himself and Moord. At a joint trial following the denial of Moord's motion to sever, the statements of Fletcher, who did not testify at trial, redacted so that any reference to a second person was replaced by a pronoun or other neutral reference, was introduced through the inmate's testimony. ***Id.***

The court observed that the crucial inquiry was "whether the jurors can reasonably be expected to obey the [limiting] instruction." ***Id.*** at 465. It explained that this depended upon "how directly and how forcefully the co-defendant's confession incriminates the non-declarant defendant" ***Id.*** The court recognized that even when a pronoun or other neutral term is substituted for the defendant's name, this will not invariably insure that the average juror will be able to obey an instruction to disregard the confession when considering the non-declarant's guilt. "A confession redacted with neutral pronouns may still prove impossible to 'thrust out of mind' . . . if, for example, it contains . . . information that readily and unmistakably identifies the person referred to as the non-declarant defendant." *Id.* at 465-66 (quoting ***Richardson v. Marsh,*** 481 U.S. at 208, 107 S.Ct. at 1707-08). "[W]here any reasonable juror must inevitably perceive that the defendant on trial is the person designated by pronoun or neutral term in the co-defendant's confession, an assumption that a limiting instruction could be successful in dissuading the jury from entering on to the path of inference . . . would be little short of absurd." ***Id.*** at ***466*** (quoting ***Richardson)***

Adopting a case-by-case approach, the ***Fletcher*** court also analyzed the practical

considerations which the ***Richardson*** court noted impacted on extending ***Bruton v. United States,*** 39 1 U.S. 123 (1968), to confessions that incriminate non-declarant defendants only when considered in the context of other evidence introduced at the joint trial. *Id*. at 463-64, 466-67. In ***Richardson,*** the Court indicated that, if "contextual linkage" (evidence extrinsic to the statement identifying the defendant referenced by the pronoun or other neutral term) is considered in determining whether severance is necessary, **(1)** there may be no way to effectively redact a confession; (2) the trial judge's task in deciding the severance issue will become significantly more difficult; and (3) severance, with its attendant burdens on the justice system, will be required more often. ***Richardson, 481*** U.S. at 209-10, 107 S.Ct. at 1708; see ***Fletcher***, 13 Cal.4th at 464.

Regarding the viability of redaction, the ***Fletcher*** court emphasized that effective redaction was still possible providing that it eliminated not only all references to the non-declarant's name, but also to the non-declarant's existence. *Id*. at 467. In cases where this could not be accomplished, a simple redaction substituting pronouns and neutral terms for the non-declarant's name would be adequate where the confession was not "powerfully incriminating" on the issue of the non-de&rant's guilt. *Id*. Regarding the difficulty of the judge's task in deciding the severance issue, the ***Fletcher*** court noted that the trial court could preview the evidence to be presented at trial by reviewing preliminary hearing transcripts and other materials and that any pretrial ruling could be reconsidered at trial. *Id*. at 467. Finally, regarding any increased drain on limited judicial resources resulting from fewer joint trials, the ***Fletcher*** court responded that considering contextual implication would not eliminate or even greatly reduce the utility of redaction as a solution. *Id*. at 468. Additionally, the court noted that where effective redaction is impossible or unacceptable to the prosecution, alternatives to separate trials, such as joint trials with dual juries or joint but bifurcated trials, wherein a jury would consider the guilt of the non-declarant defendant first, and then consider the non-testifying co-defendant's confession and guilt, would adequately protect a non-declarant defendant's confrontation rights while avoiding the perceived disadvantages of

severance. *Id*. at 468 and n. 5.

In view of this analysis, the ***Fletcher*** court observed that "the 'contextual implication' approach provides a practical accommodation of the competing interests at stake -- the non-declarant's constitutionally protected rights under the Confrontation Clause and the interests of the state in the fair and efficient administration of the criminal justice system." *Id*. at 469. The court, thus, held that "editing a non-testifying co-defendant's extrajudicial statement to substitute pronouns or similar neutral terms for the defendant's name will not invariably be sufficient to avoid violation of the defendant's Sixth Amendment confrontation rights. Rather, the sufficiency of this form of editing must be considered on a case-by-case basis in light of the statement as a whole and the other evidence presented at the trial." *Id*. at 468.

Mr. Smith submits that, under the sixth amendment confrontation clause, or under article I, section 16, and consistent with this court's commitment to the primacy doctrine, this court should expressly adopt a case-by-case, "contextual implication" approach for determining ***Bruton*** violations. This approach presents the best accommodation of a non-declarant defendant's constitutional confrontation rights and the interests of the state in the efficient administration of the criminal justice system. Indeed, as stated ***supra***, this appears to be the approach adopted implicitly by this court, and explicitly by the lower courts of appeal. Significantly, the courts of this state are already familiar with trying ***cases*** to dual juries. *E.g.*, ***Thompson v. State,*** 615 So.2d 737, 739 and nn. 1 & 2 (Fla. 1st DCA 1993); ***Velez v. State, 596*** So.2d 1197, 1199-1200 (Fla. 3d DCA 1992).

Although the state asserts that Mr. Smith was not even incriminated through contextual implication, (AB at 59), it has not supported this assertion. On the other hand, Mr. Smith has set out in substantial detail the direct and forceful manner in which he was incriminated by Austin's and Bryant's confessions. (IB at 58-60). Austin's and Bryant's redacted statements, with their numerous inexplicable references to "someone," "one," and "some other," and the written statements which clearly revealed typographical alterations, "dr[e]w the jury's attention to the fact

that a name was omitted and invite[d] the jury to fill in the blank . . . ." ***Lang, 900*** F.2d at 1280; ***Clark, 737*** F.2d at 746-47. Because Smith's own post-arrest statement interlocked with these so closely, the answer to the jury's speculation about the unidentified person was clear. Clearly, Smith was one of the members of the group incriminated by Austin's and Bryant's numerous references to "they."[16] See ***Bennett, 848*** F.2d at 1141-42; ***Fletcher***, 13 Cal.4th at 469. In case the jury did not understand that Austin's and Bryant's confessions incriminated Mr. Smith, the state clarified this point during closing argument. (IB at 68-69). See ***Bennett,*** 848 F.2d at 1142. Where Austin's and Bryant's confessions confirmed, in all essential respects, Smith's alleged post-arrest statement, their confessions were "enormously damaging." ***Cruz v. New York,*** 481 U.S. 186, 192, 107 S.Ct. 1714, 1718 (1987); ***Preston*** v. State, 641 So.2d 169 (Fla. 3d DCA 1994). Clearly, based on the redactions and trial contexts of Austin's and Bryant's confessions, the jury would logically, and was highly likely to, have concluded that the "someone," and one member of the "they," referenced in Austin's and Bryant's confessions was Smith.

The state argues that any ***Bruton*** error was harmless. (AB at 62-63). It has, however, failed to sustain its burden of proving harmlessness beyond all reasonable doubt. The state relies on the testimony of Knolden and Glass. These witnesses admitted participation in the crimes against the two victims and testified to save their skins. They were both highly biased and devastatingly impeached at trial. This court cannot reasonably conclude that no juror would have had reasonable doubt regarding Smith's guilt if presented only their testimony. Likewise, it cannot be said that Smith's alleged post-arrest statement would have eliminated all reasonable doubt The facts gave rise to an inference, and Smith's counsel argued, that the testimony regarding his post-arrest statements was a lie. Moreover, even if this court concludes that there would be no doubt regarding

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[16] *E.g.*,(R.921 (Q: "What was the reason **they** wanted to get tape?" A: "To tape the people **up."** Q: "Do you know why **they** wanted to tape the people up?' A: "Yes. **They** wanted to kill them.") R.945 ("While we were doing that, **they** was robbing the guy, searching him, and then after **they** searched him, **they** made him get in the trunk.")).

Smith's post-arrest statements, they did not admit to the premeditated murder of which he was convicted. This was the theory the state argued and upon which it relied for Mr. Smith's conviction. Thus, the evidence fails to sustain the state's burden of proving harmlessness beyond reasonable doubt. ***See, e.g., Bryant v. State,*** 565 So.2d 1298 (Fla. 1990); ***Roundtree v. State, 546*** So.2d 1042 (Fla. 1989); ***Preston v. State,*** 641 So.2d 169 (Fla. 3d DCA 1994);

VIII. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING MR SMITH'S MOTIONS FOR MISTRIAL BASED ON THE PROSECUTOR'S MISCONDUCT IN CLOSING ARGUMENT.

A. **Prosecutor's Comment on Smith's Exercise of Right to Silence.** In ***Knight v. State,*** 672 So.2d 590 (Fla. 4th DCA 1996), the court reversed the defendant's conviction based on the prosecutor's misconduct during closing argument. The improper arguments were so egregious that reversal was required despite the lack of contemporaneous objections to several of the improper comments. The court found improper, as comments on the defendant's right to remain silent, the prosecutor's "numerous references to the 'uncontradicted testimony' of the police officers" and his statement, "God forbid you should believe a police officer whose testimony went uncontradicted by these Defendants who told you specifically what happened in this case." ***Id.*** at 591. These comments were far less poignant than the ones about which Mr. Smith complains.

The cases cited by the state, (AB at 72-73), are entirely distinguishable. ***In Dufour v. State,*** 495 So.2d 154 (Fla. 1986), the court explained that the context of the prosecutor's statement, "nobody has come here and said Mr. Miller's testimony was wrong, or incorrect, or that that was not the deal he was offered," ***id.*** at 160, indicated only that no one had contradicted Miller's testimony about the deal he received for testifying against the defendant, a matter about which the defendant had no direct knowledge. ***Id.*** Additionally, the statement, "you haven't . . . heard any evidence that. . . Dufour had any legal papers in his cell with him," ***id.,*** "merely referred to the lack of any evidence on the question" and constituted "invited response." The statement in ***White v. State,*** 377 So.2d 1149 (Fla. 1980), though apparently approved by this court, was isolated.

Additionally, the cases upon which this court relied in approving a prosecutor pointing out that there is no evidence on a certain issue all preceded ***David*** v. ***State***, 369 So.2d 943 (Fla. 1979), where this court adopted the "fairly susceptible" test.

The prosecutorial comments which Mr. Smith criticizes went far beyond commenting on the "absence of evidence." The prosecutor did not merely state there was no evidence; he repeated twice: "did **anyone** get up here" (T.5734) in reference to testimony only Smith could have provided. "Was there a single individual witness who suggested that actually took place?" Only Smith could have made any such suggestion. The prosecutor later emphasized Smith's failure to "get up here and say": "is there a word that says that Romagni's version . . . was incorrect . . . ." The only "word" could have been that of Smith. The prosecutor's rhetorical question pointedly highlighted Smith's failure to testify. Later in his argument, the prosecutor repeated, for a third time, that there was "not one word of evidence, not a single bit of testimony" to contradict McDermott's and Romagni's testimony that they questioned Smith properly. (T.5806). These comments were "fairly susceptible" of being interpreted by the jury as a comment on Mr. Smith's failure to testify.

B. Prosecutor's Use of Codefendants' Confessions to Convict Smith. In an effort to ameliorate the prosecutor's improper closing argument, the state urges that the prosecutor never ***intended*** to use Bryant's and Austin's confessions against Smith. (AB at 74). The state's argument highlights why severance was essential. While the state may speculate as to the ***intent*** of the prosecutor, his argument leaves no doubt that its ***effect*** was to urge the jury to find Mr. Smith guilty based upon his codefendants' confessions.

The prosecutor effectively argued Smith's guilt from Bryant's statement. He argued, as critical evidence of premeditation, that Bryant **knew** when **"they"** (read: **Smith and the others)** said that **they** (read: **Smith and the others)** were going to get the tape to tape the people up that **they** (read: **Smith and the others)** were going to kill them (read: the victims)." (T.5749). **"Is that**

enough time to premeditate when **they** (read: **Smith and the others)** put people back in the trunk and drive around town?" If "they" had any other meaning here, Mr. Smith never had the opportunity to establish it because he never had the opportunity to cross-examine Bryant. Nonetheless, the prosecutor effectively argued from Bryant's statements that Smith premeditated the victim's murder.

The state urges that, because the prosecutor discussed the defendants and their statements individually, his use of Bryant's statement was not an attempt to use it against Smith. (AB at 74). If this were true, why did the prosecutor not argue: **"[Bryant]** knew when **[he]** said **[he]** [was] going to get the tape to tape the people up that **[he]** [was] going to kill them. Is that enough time to premeditate when **[he]** put people back in the trunk and drove around town?' (T.5749-50). Although it may have been too late to correct the inadequate redactions which should have eliminated all references to "they" but ultimately constituted direct accusatory statements against Smith, the prosecutor could have used "he" in his argument instead of "they." Clearly the prosecutorial arguments referenced on pages 68-69 of the initial brief constituted an improper use of Mr. Smith's non-testifying codefendants' confessions against him. Because Mr. Smith never had an opportunity to cross-examine these codefendants, he was defenseless against the damning argument against him based on their confessions.

The state seems to urge that, because the improper arguments Mr. Smith cited derive from only 14 of 100 pages of transcript, they could not have been improperly intended. Had the prosecutor been truly after the defendants, he would have carried his improper statements throughout the entirety of his closing arguments. This argument is without merit. Any single comment could have been intended to improperly prejudice Mr. Smith. Mr. Smith has pointed to two important segments of the prosecutor's argument where he specifically addressed the issue of premeditation. In the third segment, the prosecutor bootstrapped his claim that **"everybody** admitted that there was a robbery plan and that **they** all were a part of it," with his argument that

Mr. Smith should be held accountable on all nine counts. (T.5818). These were certainly significant arguments against Smith. The fact that there were at least three instances of this type of improper argument, and not just one, amply demonstrates the prosecutor's improper purpose. Without regard to the prosecutor's intentions, his comments were improper, highly prejudicial, and, when considered with the other improper arguments, require reversal.

IX. THE TRIAL COURT ABUSED ITS DISCRETION IN EXCLUDING CRUCIAL, DEFENSE POLYGRAPH EVIDENCE AT THE PENALTY PHASE.

Mr. Smith moved to admit polygraph examinations into evidence. (IB at 73). He offered the testimony and evidence he sought to introduce. His proffer fully preserved this issue for review. See § 90.104, Fla. Stat."

Courts continue to recognize the increasing reliability of polygraph tests and the propriety of admitting them under limited circumstances. In ***State*** v. ***Santiago,*** Case No. 95-3829, 21 FLW D2053 (Fla. 4th DCA Sept. 18, 1996), the court reviewed the mounting statistics indicating the reliability of polygraph examinations and the growing trend to admit them into evidence. Ultimately, the court held this evidence inadmissible. The court certified, however, the question whether the results of polygraph tests continue to be ***per*** se inadmissible. This court should overrule prior caselaw and recognize the admissibility of polygraph examination evidence, at least under the limited circumstances indicated in recent caselaw.

In another recent case with striking similarities to the instant case, the court in ***Rupe v. Wood***, 93 F.3d 1434 (9th Cir. 1996), affirmed the district court's vacation of the defendant's death penalty based upon the trial court's failure to admit important polygraph evidence. Rupe was

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[17] ***Correll v. State***, 523 So.2d 562 (Fla. 1988), cited by the state, (AB at 77), does not support its waiver argument. In ***Correll*** the state offered evidence of electrophoresis which its experts testified was routinely used and had been admitted into evidence in numerous jurisdictions. Although the court briefly criticized the defense for failing to bring its challenge to this routinely admitted evidence pretrial, the court ultimately reached the merits.

convicted and sentenced to death for killing two bank tellers during a robbery. ***Id.*** at 1437. "The evidence against Rupe was strong." ***Id.*** Rupe's bloody checkbook was found on the bank counter. He had approached one of the investigating officers, approximately 40 minutes after the bodies were found, and told him that he had been in the bank that morning. Over the next several days, Rupe confessed. He later recanted his confession. He testified at trial that he and a friend had gone to the bank two days before the murders to rob it, but that he could not go through with it. He testified that on the day of the murders, as he was leaving the bank, he saw his friend in the parking lot with a green satchel. Rupe claimed he had lent his friend his pistol. He claimed that his false confession stemmed from his guilt for having planned the robbery and loaned his friend his gun. *Id.*

Rupe's friend was the state's principal witness. He admitted discussing the robbery with Rupe but denied any involvement. He claimed that after the robbery, Rupe stashed the green satchel with the money and the murder weapon in his (the friend's) garage. The friend admitted that he had spent some of the money and then threw the murder weapon under a bridge where police later recovered it. Before trial, the friend was polygraphed. He denied participation in the robbery and lying about throwing the pistol under the bridge. The polygrapher originally determined that the friend was untruthful but later found that the results were inconclusive. The trial court denied Rupe's attempt to introduce this polygraph evidence at both the guilt and penalty phases of his trial. ***Id.*** at 1438.

Considering, ***inter alia***, the broad rules of admissibility at the penalty phase of a capital case, ***id.*** at 1439-40, the court held that exclusion of this evidence violated the defendant's constitutional rights. The court held that the evidence could not be excluded because it was not "wholly unreliable evidence." ***Id.*** at 1440. It agreed that the evidence was relevant to show that Rupe did not play as great a role in the offense as the prosecution claimed he had. The court continued that, since relative culpability was an appropriate mitigating factor, the polygraph was

relevant to demonstrate what role the defendant's friend played in the defendant's crimes. Furthermore, the court agreed that the error in excluding the polygraph evidence was not harmless. "[T]here is a reasonable probability that, had the evidence been admitted, it would have substantially influenced at least one juror's balancing of aggravating and mitigating factors." ***Id.*** at 1441. Thus, the court affirmed the district court's vacation of the defendant's death penalty.

As in ***Rupe***, at the very least, the exclusion of the polygraph evidence from the penalty phase violated Mr. Smith's constitutional rights. The evidence was relevant to the nature of the crime. Additionally, not only did it establish that key witness lied about the role he played in the offense, it devastatingly impeached Knolden's credibility with regard to all of his testimony. Finally, it was relevant to the defendants' relative roles in the offense, a matter Mr. Smith was entitled to present as non-statutory mitigating evidence. Although the state may have been able to challenge the reliability of this evidence, (AB at 78), any such challenge would not have rendered it "wholly unreliable." Because this evidence undermined the state's entire theory of relative culpability, its exclusion cannot be deemed harmless.

X. THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO SEVER MR. SMITH FROM HIS CODEFENDANTS FOR PENALTY PHASE PROCEEDINGS.

The state argues that any detriment Mr. Smith suffered from a joint penalty phase was not because his mitigation was substantially less than that of his codefendants but, instead, because his mitigation "'paled in comparison to the aggravation proved against him." (AB at 83). The state's argument only proves Mr. Smith's point. Each of the aggravating circumstances listed by the state which the trial court found with regard to Mr. Smith, with the exception of the number of prior violent felony convictions, applied as well to each of Mr. Smith's codefendants. Thus, though the defendants stood on approximately equal footing with regard to the aggravating factors, the gross disparity with regard to mitigation, which the jury could not have helped but compare, denied **Mr.** Smith an individualized sentencing.

The state acknowledges that "severance may be granted . . . when failure to do so would deny the defendant a "fair determination" of the issues by the jury." (AB at 84). The state quotes from ***Espinosa v. State, 589*** So.2d 887 (Fla. 1991), where this court stated:

> A type of evidence that can cause confusion is the confession of a defendant which, by implication, affects a codefendant, but which the jury is supposed to consider only as to the confessing defendant and not as to the others. A severance is always required in this circumstance.

Id. at 891 (citation omitted). The state next refers to "general rules" that apply "in the non-***Bruton*** context" and urges that the application of these rules defeat Mr. Smith's penalty phase severance claim. (AD at 85).

The state refuses to acknowledge the "***Bruton*** context" of the penalty phase. Not only was Mr. Smith afflicted by the prosecutor's arguments that the jury should find aggravating circumstances, and sentence Mr. Smith to death, based on evidence admitted against his codefendants but excluded as to him, (IB at 81), but the jury was also tainted during the penalty proceedings by all of the evidence introduced during the guilt phase, admitted as to Mr. Smith's codefendants but excluded as to him, as it concerned the defendants' relative roles in the offense. On the facts of this particular case, neither the order of the prosecutor's argument, nor the occasional reminders that "the defendants were to be treated separately," (AB at 85), could avert the jury's improper consideration of evidence and argument only allowed as to Smith's codefendants, against him. Thus, the trial court's failure to grant severance in the penalty phase also constituted reversible error.

XI. THE PROSECUTOR'S PENALTY PHASE CLOSING ARGUMENT WAS IMPROPER AND REVERSIBLE.

Attempting to counter Mr. Smith's argument that the prosecutor improperly argued evidence admitted only against his codefendants against him, the state urges that the prosecutor's argument that Smith looked over the water at Gibbs and returned to the car "laughing and joking about how she was kicking and bobbing in the water," was based on Smith's own statement. (AB at 86). The

record belies the state's contention. The only statement attributed to Smith was his response, "Gee," upon seeing Gibbs bobbing in the water. The record fails to indicate he said this "in a humorous manner, which caused his codefendants to laugh." (AB at 86). Smith's statement reflects only that his codefendants began to laugh "while they were observing the female in the water bobbing . . . ." (T.5600). On the other hand, in his statement, Bryant said that, upon seeing Gibbs hit the water, "he" started laughing, saying, "look at her, look at her." (T.4527). Clearly, Austin's statement, which was excluded as to Smith, was one basis for the prosecution's argument to impose the death penalty against Smith.

XII. THE TRIAL COURT ERRED IN FINDING SUFFICIENT EVIDENCE TO ESTABLISH THE PECUNIARY GAIN AND AVOIDING ARREST AGGRAVATORS.

A. The Evidence was Legally Insufficient to Establish Gibbs's Murder was for Pecuniary Gain. The state's argument is unsupported by the law. In support of the pecuniary gain aggravator, it urges that "the ***only*** reason Gibbs was initially abducted was in furtherance of the robbery." (AB at 87). Even if the kidnaping were motivated by a desire for pecuniary gain this says nothing about the motivation for the murder. Likewise, even if the "abduction lead in inexorable sequence to [Gibbs's] death," this, too, does not establish "a pecuniary motivation for the murder." The fact that Mr. Smith shared in the proceeds of the robbery does not constitute even persuasive evidence that the murder was motivated by pecuniary gain.

The cases cited by the state (AB at 87) are all distinguishable. In these cases, it appears that the murders were contemporaneous with, or followed immediately, the robberies and/or thefts. In the instant case, all of the testimony indicates that murder was never contemplated at the time the victims were robbed and abducted. Indeed, the murder most reasonably appears to have been an afterthought that did not occur to any of the defendants until some four hours after the abduction, immediately before Gibbs was killed. Even if the events of the evening are characterized as "one continuing transaction," this, too, does not prove a pecuniary motivation for the murder.

B. The Evidence was Legally Insuffkient to Establish Gibbs's Murder was to Avoid Arrest. No evidence identified by the state establishes beyond reasonable doubt, "that the killing's dominant or only motivation was the elimination of a witness." There was no evidence that Gibbs bad identified Glass. (IB at 85). The statement at the bridge that the "problem" was at an end was ambiguous and failed in any way to indicate whether it reflected intent. The cases cited by the state (AB at 88-89) are all distinguishable. While in some of these the courts stated that there was "no reasonable inference," or "no logical reason," but that the murder was to eliminate a witness, in the instant case, the delay and the statements of all defendants negate any such inference or logical reason. Additionally, Mr. Smith sought to explain, but was prohibited from explaining, the group's otherwise inexplicable conduct through an expert on group violence and contagion. For these reasons, this aggravator is not sufficiently supported by the evidence.

The error in finding these aggravators was hardly harmless. The jury rejected the death penalty for Mr. Smith's two codefendants who participated equally in all offenses. With regard to Mr. Smith, three of 12 jurors voted against the death penalty. In the absence of these two aggravating circumstances, there is a reasonable possibility that the sentence would have been life.

Respectfully submitted,

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