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IN THE FLORIDA SUPREME COURT

STATE OF FLORIDA,

Petitioner/
Cross-Respondent,

v. CASE NO. 87,545

ANTONIO LEE CRAFT,

Respondent/
Cross-Petitioner.

ON DISCRETIONARY REVIEW
FROM THE FIRST DISTRICT COURT OF APPEAL

BRIEF OF RESPONDENT/CROSS-PETITIONER ON THE MERITS

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IN THE SUPREME COURT OF FLORIDA

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BRIEF OF RESPONDENT/CROSS-PETITIONER ON THE MERITS

I PRELIMINARY STATEMENT

Respondent/Cross-Petitioner was the defendant in the trial court and the appellant in the lower tribunal. He will be referred to by his last name. Craft filed a cross-notice of discretionary review to bring up three other issues in addition to the state's certified question. The state's brief will be referred to as "SB," followed by the appropriate page number in parentheses.

A two volume record on appeal and two short supplemental record volumes will be referred to as "R" followed by the appropriate page number in parentheses. A five volume transcript of a trial held on December 5-8, 1994, concerning first degree murder, armed robbery, and carrying a concealed firearm will be referred to as "T". A one volume transcript of a trial held on

February 1, 1995, concerning possession of a firearm by a convicted felon, will be referred to as "F". The exhibits will be referred to by their exhibit number.

Attached hereto as an appendix is the opinion of the lower tribunal, which has been reported as Craft v. State, 670 So. 2d 112 (Fla. 1st DCA 1996).

II STATEMENT OF THE CASE AND FACTS

Craft accepts the state's recitation at SB 2-3, but will add the following facts which are relevant to Issues II, III and IV.

A. THE MOTION TO SUPPRESS

Craft filed a motion to suppress evidence, alleging that a warrantless search of a garbage can at Craft's residence was illegal (R 411-12).

At the hearing on the motion, investigator John Sanderson testified that on Saturday, January 15, 1994, he and Wendell Hall went to Craft's house at 12:25 p.m., and advised Craft's mother that he had information that Craft had been implicated in a homicide. He asked Craft's mother if they could search the laundry room, because they had information that Craft had washed his clothes, and she orally agreed. They found nothing in the laundry room and left (R 248-50).

She called them because she had some information for them and they returned at 2:30 p.m. As they were leaving, Sanderson

asked her when the garbage man came, and she said Thursday or Friday. He went over and started to search the garbage can. The can was located next to a privacy fence on the outside of the fence.[1] They decided to ask Craft's mother for consent to search the can. She said: "I guess so, y'all would look anyway." (R 252). Wendell Hall presented her with a consent to search form, but she refused to sign it. They went ahead and searched the can (R 250-54).

Upon cross examination, Sanderson testified that he did not have a search warrant at either visit. The lid on the trash can was down when he first went up to it. It was 15 to 20 feet from the can to her front door, and 20 to 25 feet from the can to the street. The can must be put out by the street for the truck with an automatic arm to come by and empty it (R 255-62).

Sanderson looked inside the can before he asked for consent to search it. He did not see anything until he opened the bags up which were inside. Neither officer read the consent to search form to Craft's mother. She also refused to sign a property receipt (R 264-68).

Investigator Wendell Hall testified that as Sanderson lifted the lid to the can, he said they should get permission first. Sanderson closed the lid and asked Craft's mother if she minded

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[1]The state introduced a photo of the can into evidence as state exhibit 1, and it has been transmitted to this Court as part of a supplemental record.

if they looked inside. She said: "I reckon not, you're gonna do it anyway." (R 270). She said the same thing after she refused to sign the consent to search form. The can was visible from the street (R 268-72).

Inside a bag taken from the trash can were bloody clothes and part of a radio that clips onto a belt. These items could not be seen until the bag was opened (R 273-74).

Dorothy Craft, Craft's mother, testified that the first time the officers came they asked what Craft had been wearing on the night of the crime. She gave permission for the police to look through the clothes in the wash room. She did not give them permission to search the garbage can (R 275-78).

Upon questioning by the court, Ms. Craft testified that the can is outside of her fence but still in her yard. It is kept there after it is rolled back from the street so that it does not have to be rolled all the way back to the house (R 286-88).

When the court asked about people walking up and putting something into the can or taking something out of it, she said:

> The way I feel about it, if I got it in my yard, you know, they ain't got no business putting nothing in or taking nothing out of it. (R 288).

She does not allow people to walk up and rummage through her garbage can. If someone did that, she would not want them to do so. The can must be rolled out to the street to be emptied (R 289-90).

The prosecutor argued that the warrantless search was legal because there was no expectation of privacy in the trash can, and because Craft's mother consented to the search (R 290-94). Craft argued against both theories (R 294-97). The court agreed with the state on both theories and denied the motion to suppress (R 298).

B. THE MOTION FOR APPOINTMENT OF NEW COUNSEL

Craft filed a motion for the appointment of new counsel on October 4, 1994, alleging that his assistant public defender was not representing him properly (R 303-305).

A hearing was held on this motion on October 10, 1994. The court asked Craft and his counsel about the allegation that counsel had declined to call three defense witnesses (R 396-400); the allegation that counsel had told Craft he would be found guilty (R 400-402); the allegation that counsel had made insufficient arguments at the suppression hearing (R 402-404); and the allegation that Craft was filing a complaint with the Florida Bar (R 404-407).

At the conclusion of the hearing, the court found:

> Okay. Let's take as to the defendant's motion for appointment of a new trial counsel, that the allegations made are legally insufficient and are without merit, and the defendant's pro se motion will be denied. That means, sir, that the Public Defender's Office will continue to represent you on this charge. (R 407).

Craft was not advised of his right to represent himself.

C. THE TRIAL ON FIRST DEGREE MURDER, ARMED ROBBERY, AND CARRYING A CONCEALED FIREARM

Lumond Lamar McCreary, a resident of Wynnehurst Street, testified that on January 14, 1994, he noticed his go-cart had been stolen. He went to look for it in a wooded area between Wynnehurst and Woodland Streets. He found a dead body instead. He summoned the police and showed them his discovery (T 227-32).

Pensacola police officer Darryl Betts determined the black male was dead and his body was cold (T 233-36). Crime scene technician Clarence Jackson West, Jr., was called to Woodland Park. Photos of the victim and the area were entered into evidence without objection. It looked like the victim had been dragged to the scene, and there was a jacket hanging in a tree. A .25 caliber cartridge, pack of Newport cigarettes, and a single tennis shoe were found on the path and entered into evidence over a relevancy objection. He also took plaster casts of tire marks in the area and noted the victim's socks were clean (T 236-54).

He found another .25 caliber cartridge in the park a month later with the aid of a metal detector (T 332-35). Crime scene technician Carolyn Stephens attended the autopsy and recovered the victim's clothing and two spent bullets from his head (T 260-74).

Sidney Thea Peart testified that she picked Craft up in

her 1987 Acura Integra at 3:30 on January 13, 1994. He was wearing a black jacket, yellow pants, and a burgundy shirt and carrying a gun in a shoulder holster. The gun was silver with a pink handle. She went to work at 6:00 and loaned him her car. He called later that evening and said her car window had been broken out. He brought the car by at 11:00 and the seats were wet and there was blood inside the car. He was wearing different clothes at that time. He said he had gotten into a fight with some men and they broke the window and got blood in the car. He tried to wash the blood off the car seats (T 280-94).

He showed her the clothes he had been wearing, and the pants had a significant amount of blood in the lap area. The next day, she washed her car and found a window for it. The day after that, on January 15, her mother called the police and they came and got the car (T 295-98).

Police officers Perry Kyle Knowles and Doug Baldwin impounded Ms. Peart's car (T 300-303). Knowles interviewed Craft, who initially said he knew nothing about a homicide (T 304-11). Craft then said he had driven the car to LeDrake Brown's house, and loaned it to Sherman Dorsey (the victim), LeDrake, and a man named Rodriguez. Craft said that LeDrake and Rodriguez came back with the car and the window had been broken out (T 311-13).

Craft then said that LeDrake and Sherman were in the car and LeDrake shot the victim twice in the head and disposed of the body before bringing the car back. The gun slid out from under the seat and Craft gave it back to LeDrake. This statement was tape recorded. Knowles turned the case over to the sheriff because it had happened outside the city (T 314-19).

Police officer Michael Bowling was present when Craft was interviewed by officer Knowles, and gave substantially the same testimony (T 345-55). Thomas Bollin replaced the broken window and turned the pieces over to the sheriff (T 324-25), and it was entered into evidence (T 445-46). FDLE lab analyst Laura Rousseau determined the tires of Ms. Peart's car were similar to the ones which had made the tracks in the park (T 336-42).

Deputy sheriff Wendell Hall testified that he and detective Sanderson interviewed Craft on January 15 at 6:00 p.m. Craft stated he, LeDrake Brown, and the victim drove to Robert Keith McNeal's house, where LeDrake shot the victim five times. Craft then said that he and the victim only drove to McNeal's house and the victim fired the gun out the window. Craft grabbed the gun to keep the victim from shooting it again and the gun went off two more times, striking the victim. Craft further stated that he and McNeal drove the victim to the park and dumped him, and that McNeal shot more shots into the

victim. They then cleaned up the car and returned it to its owner (T 357-65).

Investigator John Sanderson testified that he recovered items from the trash can at Craft's house. When the state offered state exhibit 84, a brochure with blood on it, into evidence, Craft objected to the introduction of all of the items based upon his pretrial motion. The court overruled the objection based upon the pretrial motion to suppress and admitted the object (T 371-74).

A Realistic walkman radio, state exhibit 74, and a pink towel with blood, state exhibit 73, both taken from the trash can, were entered into evidence over the same objection (T 374-75).

A membership card in the victim's name, state exhibit 11, a rag with blood on it, state exhibit 75, an empty pack of Newport cigarettes, state exhibit 81, and a business card with blood on it, state exhibit 83, all taken from the trash can, were likewise entered into evidence over Craft's objection (T 375-78). Sanderson related the statements Craft had given him and detective Hall (T 379-96).

Crime scene technician Eric Enquist took fingerprints and palm prints from Robert Keith McNeal (T 413-15). Sharon Bryant, a pawn shop owner in Atmore, Alabama, sold three Larson .25 caliber automatic pistols to Robert Keith McNeal in 1992.

Each was chrome with a pink handle (T 416-18). Adrian Marcus Hardaway, the victim's cousin, identified the victim's jacket, shoe, and walkman radio (T 419-21).

Blood analyst Janice M. Johnson took blood samples, a towel, and one fingerprint from inside of the Acura. In her opinion, the victim was seated in the passenger side of the car and was shot there and the blood dripped down onto the seat and onto the rear seat (T 425-44). She found two Newport cigarette butts in the ashtray (T 544-45).

Serologist Magda Clanton determined that Craft, the victim, and McNeal each had different DNA blood types. She found the victim's DNA blood type in the car, on the brochure from Craft's trash can, on the cartridge found in the park, on the walkman, and on the broken window (T 447-61).

She took cuttings from the pink towel found in the trash can, state exhibit 73-A, and from the business card found in the trash can, state exhibit 83-A. These items were entered into evidence over Craft's objection from the pretrial hearing (T 462-64).

Jacksonville DNA serologist James M. Pollock Jr. found the victim's DNA blood type on the business card and the pink towel (T 465-72). FDLE microanalyst Tanya Clindinen found carpet fibers on the victim's jacket which could have come from the Acura (T 491-96).

Craft's statements to the Pensacola police (T 497-513) and to the Escambia County sheriff's office (T 513-28) were played to the jury. Crime scene analyst Robert Thomas Grant found no blood spatters to indicate that the victim had been shot in the park (T 537-43). Latent print analyst Carl R. Burian could not identify any of the fingerprints from any of the exhibits (T 548-55).

Firearms examiner David Williams testified that the two bullets recovered from the victim could have been fired from the first casing located at the park. The gun was up against the victim's head when it was fired. The car window was broken by shooting from inside the car (T 557-78).

Pathologist Gary Dean Cumberland testified that the victim had five entry wounds in the left side of his head, and three exit wounds on the other side. In his opinion, the wounds could not have been inflicted during a struggle, and could have occurred while the victim was seated in the passenger seat of a car (T 588-605).

Cassandra Toller, Craft's former girlfriend, testified that Craft called her and asked her to tell the police that Keith had committed the crime, but she declined to do so (T 675-80). Craft's motions for acquittal were denied (T 619).

Antonio Lee Craft, age 24, testified that Robert Keith McNeal owed him some money, and allowed Craft to hold a .25

caliber automatic with a pink handle as collateral. He borrowed the car from the girl and drove it to LeDrake Brown's house. The victim walked up and wanted to sell some marijuana. He and the victim drove to McNeal's house and smoked some marijuana. The victim shot the gun through the passenger window. Craft grabbed for the gun and it went off two more times. Craft wanted to take the victim to the hospital, but McNeal said to take his body to the park. They washed and vacuumed the car and McNeal kept the gun (T 682-701).

After a charge conference (T 638-71), and closing arguments (T 724-79), the jury was instructed without objection (T 781-818). The court recognized that Craft had objected to all of the items taken from the trash can (T 819-20).

D. THE TRIAL ON POSSESSION OF A FIREARM BY A CONVICTED FELON

Prior to the separate trial on the charge of possession of a firearm by a convicted felon, Craft asked that the state be prohibited from presenting any evidence about the murder (F 4). The prosecutor stated she would not go into any great detail about the murder, but the evidence that the victim had been shot was relevant to prove the charge (F 4-5). The judge stated Craft's statements would say that the man had been killed, and he did not see how the firearm charge could be isolated, but he offered to inform the jury that this was the only charge for which Craft was on trial (F 5). The prosecutor

offered to mark out the murder charge on the exhibits (F 6).

Pensacola police officer Darryl Betts described finding the murder victim in the park (F 18-20). Crime scene technician Clarence Jackson West, Jr., described finding the .25 caliber cartridge on the path in the park, and the jacket hanging in a tree. He also found another cartridge later with the aid of a metal detector (F 21-25). Adrian Hardaway, the victim's cousin, identified the murder victim's jacket (F 26-27).

Crime scene technician Carolyn Stephens attended the autopsy and recovered two spent bullets from the murder victim's head (F 28-30). When the prosecutor wanted to introduce three autopsy photos, the court stated:

> Let me tell you what I don't want this case to get involved in, I don't want this to center around the murder case. I want this case centered around the firearm's case. (F 31).

Sidney Thea Peart testified that she picked Craft up in her car on January 13, 1994. He was wearing a black jacket, yellow pants, and a burgundy shirt and carrying a gun in a shoulder holster. The gun was silver with a pink handle. She went to work at 6:00 and loaned him her car. When he returned it the seats were wet and there was blood inside the car and her car window had been broken out. He was wearing different clothes at that time (F 33-38).

Detective John Sanderson recovered the broken window (F 45-46). Firearms examiner David Williams testified that the two bullets recovered from the victim could have been fired from the first casing located at the park. The gun was up against the victim's jacket when it was fired. The car window was broken by shooting from inside the car (F 47-56).

Clerk of court employee Sharon Flowers brought four case files to court, and testified that there were prior convictions in Craft's name for attempted burglary, possession of burglary tools, auto theft, and grand theft. The prior judgments and sentences were entered into evidence (F 58-64).

Janice M. Johnson took Craft's fingerprints (F 67-69). Fingerprint examiner Charles Richards determined that Craft's fingerprints were on the prior judgments and sentences (F 69-74).

Police officer Michael Bowling was present when Craft was interviewed by officer Knowles, and gave a taped statement (F 76-79). Police officer Perry Kyle Knowles interviewed Craft, whose story changed several times. He took a taped statement of the final version (F 80-83). The tape given to Bowling and Knowles was played to the jury (F 93-110).

Craft's counsel requested that the court give a limiting instruction to the jury (F 110-11), and the judge cautioned the jury as follows:

> Ladies and gentlemen, let me tell you before this next statement is played, I previously read to you the charges concerning Mr. Craft. Mr. Craft is on trial today for possession of a firearm by a convicted felon. You're not to not to be concerned with the -- the murder charge or anything like that. Mr. Craft -- that is not an issue as far as you're concerned. It's a one-count information of possession of a firearm by a convicted felon. And that's all we're trying today. You're not to be concerned about any other charges (F 111-12).

Deputy sheriff Wendell Hall testified that he and detective Sanderson, homicide detectives, interviewed Craft on January 15, whose story changed several times. He took a taped statement of the final version (F 83-87). Investigator John Sanderson testified that he was present when Craft admitted he had a gun (F 88-91). The tape given to Hall and Sanderson was also played to the jury (F 112-27). The state introduced prior testimony Craft had given in court (F 91-93).

Cassandra Toller, Craft's former girlfriend, testified that Craft called her and asked her to tell the police that another man named Keith had committed the murder, but she declined to do so (F 128-30).

Craft did not testify. After the jury returned its guilty verdict, the court then informed the jury Craft had been convicted of first degree murder (F 161-62).

III SUMMARY OF THE ARGUMENT

Craft will argue in this brief that the certified question must be answered in the negative, and the state's request for relief must be denied. The state's theory of the case was that Craft possessed one gun. He was holding it as collateral for a loan; it was a .25 caliber firearm with a pink handle; he concealed it in a shoulder holster; he showed to the girl who had loaned him the car; and he used it to shoot the victim. Under these circumstances, Craft could not have been convicted and sentenced on both carrying a concealed firearm and possession of a firearm by a convicted felon.

This Court has expressed its intent that a defendant cannot be punished twice for the same firearm offense. This Court has also expressed its intent that a defendant cannot be punished twice for two offenses which share the same core. Although this state follows the Blockburger test, the statute does not prohibit these results. The opinion of the lower tribunal on this point must be approved.

Craft will also bring three trial issues to this Court, since this Court has jurisdiction to reverse on other issues when it accepts review of a certified question. Feller v. State, 637 So. 2d 911 (Fla. 1994).

Craft's motion to suppress should have been granted. He had moved to suppress incriminating evidence found in the

garbage can at his home, which was illegally searched by the police without a warrant.

The trial court ruled that the warrantless search of the garbage can was legal because there was no expectation of privacy in the trash can, and because Craft's mother consented to the search. The lower tribunal rejected Craft's argument against the former, and did not address the latter.

The lower courts seemed to believe that Craft had no reasonable expectation of privacy in the garbage can because it was in front of his house and outside of a fence. But cases from other jurisdictions hold that one does not give up his expectation of privacy until the garbage can is placed on the curb for pick-up. Here, it was still in the yard and Craft's mother did not approve of people rummaging through her garbage can. Both objective and subjective expectations of privacy were present.

The other basis for the trial court's upholding the warrantless search is equally erroneous. The judge believed that Craft's mother consented to the search even though she refused to sign the consent to search form and even though she had merely acquiesced to the authority of the police when they asked her for consent.

As to Issue III, Craft moved to have new counsel appointed to represent him, because he believed Mr. France was not

representing him adequately, but the judge disagreed after hearing from Craft and his attorney. The lower tribunal agreed that the lower court's inquiry into Craft's complaints about his lawyer did not go far enough, but held that the error was harmless. The lower tribunal used the wrong test for harmless error. It is Craft's position that the error can never be harmless, because we cannot know what effect the failure of the judge to fully inquire into Craft's complaints against his lawyer had on his lawyer's performance. Further, it is Craft's position that he did nothing to waive the error.

As to Issue IV, Craft moved to exclude evidence of the murder at the beginning of the separate trial on the possession of a firearm by a convicted felon charge. The judge ruled some evidence of the murder was admissible to prove that Craft had possession of the gun. But the state engaged in overkill, because the homicide became a feature of the firearm trial.

The lower tribunal found no merit to this issue, probably because it was not well-preserved. However, Craft requests that a new trial be awarded in the interest of justice and to prohibit such prosecutorial overkill.

The state brought forth almost all of the witnesses from the homicide trial and re-tried the homicide trial, including all of the unnecessary details about the murder and the bloody exhibits from the homicide trial. A new trial is warranted.

IV ARGUMENT

ISSUE I

WHEN A DEFENDANT COMMITS SEPARATE OFFENSES DURING THE SAME CRIMINAL EPISODE, EACH INVOLVING A FIREARM, BUT EACH HAVING SEPARATE AND DISTINCT ELEMENTS, THE DEFENDANT MAY NOT BE CONVICTED AND SENTENCED FOR EACH CRIME. [The Certified Question]

The state's theory of the case was that Craft possessed one gun. He was holding it as collateral for a loan; it was a .25 caliber firearm with a pink handle; he concealed it in a shoulder holster; he showed to the girl who had loaned him the car; and he used it to shoot the victim. Under these circumstances, Craft could not have been convicted and sentenced on both carrying a concealed firearm and possession of a firearm by a convicted felon. The opinion of the lower tribunal on this point must be approved.

This Court has expressed its intent that a defendant cannot be punished twice for the same firearm offense. In State v. Stearns, 645 So. 2d 417 (Fla. 1994), the defendant entered a plea to both armed burglary with a firearm and carrying a concealed weapon. On appeal, the Fifth District held that he could not be convicted of both offenses, because armed burglary was a continuing offense and the burglary was enhanced to a more serious felony by the firearm element. Stearns v. State, 626 So. 2d 254 (Fla. 5th DCA 1993). This Court approved the holding of the Fifth District:

> We agree with the district court that armed burglary is a continuing offense. Thus, our recent decision in *State v. Brown*, 633 So. 2d 1059 (Fla. 1994), resolves the case now before us. In *Brown* we held that a defendant could not be convicted and sentenced for two crimes involving a firearm that arose out of the same criminal episode. *Brown* at 1060-61. In the instant case, therefore, double jeopardy bars the state from convicting and sentencing Stearns for two offenses involving a firearm that arose out of the same criminal episode.

645 So. 2d at 418; emphasis added.

The case relied upon by the Court, State v. Brown, 633 So. 2d 1059 (Fla. 1994), had held that the defendant could not be convicted and sentenced for use of a firearm in the commission of a felony where he was also convicted of attempted first degree murder with a firearm.

Here, Craft was convicted of both carrying a concealed firearm and possession of a firearm by a convicted felon because he had one firearm. Both are continuing offenses.

In A.J.H. v. State, 652 So. 2d 1279 (Fla. 1st DCA 1995), the delinquent child was convicted of carrying a concealed firearm. He was also convicted of possession of a firearm by a minor, as well as possession of a firearm by a delinquent child. The latter is the juvenile version of possession of a firearm by a convicted adult. The lower tribunal vacated the convictions for carrying a concealed firearm and possession of a firearm by a minor on authority of State v. Stearns, *supra*.

Accord: M.P.C. v. State, 659 So. 2d 1293 (Fla. 5th DCA 1995).

Likewise, in Brown v. State, 670 So. 2d 965 (Fla. 1st DCA 1995), the defendant was convicted of attempted robbery with a firearm, carrying a concealed firearm and possession of a firearm by a minor. Because the firearm element was common to all three crimes, the lower tribunal vacated the convictions for carrying a concealed firearm and possession of a firearm by a minor on authority of State v. Stearns, *supra*.[2]

Likewise, in Maxwell v. State, 666 So. 2d 951 (Fla. 1st DCA 1996), *rev. pending*, case no. 87,290, the defendant was convicted of possession of a short-barreled shotgun, possession of a firearm by a convicted felon and carrying a concealed firearm for having one gun. The lower tribunal reversed two of the convictions on authority of State v. Stearns, *supra*.

This Court has also expressed its intent that a defendant cannot be punished twice for two offenses which share the same core. In Sirmons v. State, 634 So. 2d 153 (Fla. 1994), the defendant was convicted of auto theft and robbery with a weapon when he took a car from the victim at knife point. The court held:

> [T]hese offenses are merely degree variants of the core offense of theft, The degree factors of force and use of a weapon aggravate the underlying theft offense to a

[2]The court also certified the same question as in the instant case, but the state chose not to pursue it.

> first degree felony robbery. Likewise, the fact than an automobile was taken enhances the core offense to grand theft. In sum, both offenses are aggravated forms of the same underlying offense distinguished only by degree factors. Thus, Sirmons' dual convictions based on the same core offense cannot stand.

Id. at 154; emphasis added. Here, the core element is the firearm. When Craft, who was a convicted felon, concealed it, the state would say that he committed two crimes. He did not, since they are aggravated forms of the core element.

In Thompson v. State, 585 So. 2d 492 (Fla. 5th DCA 1991), the defendant was convicted of both fraudulent sale of a counterfeit controlled substance and felony petit theft when he sold a piece of fake cocaine to a police officer. Although the elements of the two offenses were different, and so dual convictions were not prohibited by Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932) and §775.021(4), Fla. Stat., the court found that dual convictions were not authorized because they were both in the nature of theft offenses.

The court reasoned that the sale statute was really a specific type of theft by fraud, which was also prohibited by the general theft statute. The court held:

> At present, Florida's criminal code still retains specific theft statutes regarding particular property or practices, such as the fraudulent practices defined in Chapter 817. It appears that the specific

> statutory offense of theft, such as those contained in Chapter 817, are different degrees (or more specific descriptions) of the general statutory offense of theft defined in Chapter 812. Accordingly, an act of criminal fraud should be prosecuted either under Florida's Anti-Fencing Act or under a more specific statute contained in Chapter 817, if applicable, but the legislature did not intend for the same act of criminal fraud to be prosecuted under both statutes as separate offenses. All specific theft by fraud offenses are theoretically subsumed in the general Anti-Fencing Act, not in terms of comparing the essential elements of each offense, but in substance and by definition, since the Anti-Fencing Act broadly encompasses and proscribes these criminal frauds.

Id. at 494; footnotes omitted; emphasis added.

This Court approved this decision, and specifically said that it agreed with the analysis that this sale was a theft crime. State v. Thompson, 607 So. 2d 422 (Fla. 1992).

The application of Thompson and Sirmons to the instant case is obvious. The two chapter 790, Fla. Stat., felonies of which Craft was convicted are nothing more than aggravated types of weapons offenses, with the core element of a firearm. The Legislature did not intend for one to be prosecuted under both statutes.

Although this state follows the Blockburger test, and we have §775.021(4), Fla. Stat., on the books, these do not prohibit this argument. The discussion in Anderson v. State, 669 So. 2d 262 (Fla. 5th DCA 1995), *question certified*, 21 Fla.

L. Weekly D666 (Fla. 5th DCA Mar. 15, 1996), is helpful to rebut the state's Blockburger argument.

There the defendant was convicted of perjury in an official proceeding and giving false information in support of an application for bail. He had lied about the reason he was late to court. The court held he could not be convicted of both offense for making one falsehood, even though the two statutes contained different elements. The important part of the opinion is the realization that the core element (telling a lie in court) need not be a crime:

> That the common core shared by two offenses does not itself have to be a crime in order for the offenses to be degrees of the same offense is shown by the supreme court's decisions in *Goodwin v. State*, 634 So. 2d 157 (Fla. 1994) and *Thompson v. State*, [650 So.2d 969 (Fla. 1994)]. Because of the cryptic language used in section 775.021(4), the phrase "degrees of the same offense as provided by statute" has required construction. "Degrees of the same offense" is not limited to "third degree," "second degree" or "first degree;" it appears to mean the scope or extent of crimes identified anywhere in the Florida Statutes that are essentially varieties of the same core offense. These are "degree factors" and they are different from "degrees of crime." *See also Sirmons v. State*, 634 So. 2d 153 (Fla. 1994), *Chapman v. State*, 625 So. 2d 838 (Fla. 1993).
>
> In *Goodwin*, the court held that vehicular homicide and unlawful blood alcohol level manslaughter (UBAL manslaughter) were "aggravated forms of a

> single underlying *offense* distinguished only by degree factors." 634 So. 2d at 157 (emphasis added). Yet, the only "core offense" shared by these two statutory crimes is killing someone while operating a motor vehicle. Causing a death while operating a motor vehicle is not a crime in and of itself. Only the addition of the various aggravating factors listed in these statutes elevates such deaths to the status of a crime.
>
> Similarly, in the recent *Thompson* decision, the supreme court found that, based on a single sexual act, a defendant could not be convicted of sexual battery on a physically incapacitated victim in violation of section 794.011(4)(f), Florida Statutes (1991), and sexual activity while in custodial authority of a child in violation of section 794.041(2)(b), Florida Statutes (1991). The court held that the two offenses were "distinguished only by degree elements" within the meaning of *Sirmons* and *Goodwin*.

Id. at 264; footnotes omitted; underlined emphasis added.

The same is true in the instant case. The core element, possession of a firearm, is not a crime, and whether one conceals it or is a convicted felon creates the different degrees of crime. The Anderson court concluded:

> Even if the foregoing effort to find a path through the statute and case law is wrong, we conclude, as have many other appellate judges of this state, that the legislature "could not have intended" that by telling a single lie at a single hearing--that he was late for an earlier court appearance because he had to take his girlfriend's child to the hospital--Anderson committed two third degree felonies. *See Goodwin*, 634 So. 2d at

> 157-158 (Grimes, J., concurring); *Chapman v. State*, 625 So. 2d 838, 839 (Fla. 1993); *Thompson*, 585 So. 2d at 494; *Kurtz*, 564 So. 2d at 522-523. The legislature plainly intended to punish the making of a false statement in an official proceeding. It is only due to the overlap of these two statutes at the point where the false statement designed to gain release is made during sworn testimony in a bail hearing that both statutes apply. Even absent the rule of lenity, it does not appear to have been the legislature's intent in enacting these statutes to transform this event of making one false statement into two discrete crimes. We accordingly vacate the conviction for violation of section 903.035(1)(a), Florida Statutes.

Id. at 265; emphasis added.

The application of Anderson to the instant case is obvious. The core element in Craft's two crimes is a possession of a firearm, which by itself is not a crime. They become crimes by the addition of different elements. The Legislature did not intend to punish both separately.

The same result must follow in the instant case, on either the Stearns theory or the core offense (Sirmons/Anderson) theory, or both. The certified question must be answered in the negative, and the opinion of the lower tribunal, which vacated the judgment and sentence for carrying a concealed firearm, must be approved.

ISSUE II
THE TRIAL COURT ERRED IN DENYING THE MOTION TO SUPPRESS EVIDENCE.

This Court has jurisdiction to reverse other errors when it accepts review of a certified question. Feller v. State, *supra*. The trial court ruled the warrantless search of the garbage can was legal because there was no expectation of privacy in the trash can, and because Craft's mother consented to the search. The lower tribunal rejected Craft's argument against the former, and did not address the latter:

> [W]e find that the trial court did not err in making the factual determination that there was no reasonable expectation of privacy as to the contents of a garbage can left outside a privacy fence. *See U.S. v. Hedrick*, 922 F.2d 396 (7th Cir. 1991), *cert. denied*, 502 U.S. 847, 112 S. Ct. 147, 116 L. Ed. 2d 113 (1991). We, therefore, affirm as to issue one.

670 So. 2d at 113.

Entered into evidence at trial, over Craft's renewed objections from the motion to suppress, were the following items from the trash can: state exhibit 11, a membership card of the victim (T 376); state exhibit 73, a pink towel with blood on it (T 375); state exhibit 73-A, a cutting from the pink towel (T 464); state exhibit 74, the victim's walkman radio (T 375); state exhibit 75, a rag (T 377); state exhibit 81, an empty pack of Newport cigarettes (T 377); state exhibit 83, a business card with blood (T 378); state exhibit 83-A, a

cutting from the business card (T 463); and state exhibit 84, a brochure with blood on it (T 374). The judge recognized that Craft had objected to all of the items taken from the trash can (T 819-20).

These items were critical to the state's case, because they showed that the victim's property and blood were found in Craft's garbage can.[3] Their admission into evidence constituted harmful reversible error. Specifically, serologist Magda Clanton determined that the victim's DNA blood type was on the brochure and on the walkman (T 447-61). Serologist James M. Pollock Jr. found the victim's DNA blood type on the cuttings from the business card and the pink towel (T 465-72).

A. CRAFT RETAINED AN EXPECTATION OF PRIVACY IN THE GARBAGE CAN.

As the police were leaving Craft's house on Saturday, January 15, 1994, they asked Craft's mother when the garbage man came, and she said Thursday or Friday. They went over and started to search the garbage can. The can was located next to a privacy fence on the outside of the fence. They went ahead and searched the can without a warrant (R 250-54).

The state introduced a photo of the can into evidence as

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[3]Moreover, a pack of Newport cigarettes was found in the park close to the victim's body (T 247), and two Newport cigarette butts in the ashtray of the car in which the victim was killed (T 544-45).

state exhibit 1, and it has been transmitted to this Court as part of a supplemental record. It shows a large black can with wheels, such as those used by the City of Tallahassee. It shows a wooden fence in back of it, but no estimate of the height of the fence may be made.

The lid on the trash can was down when the police first went up to it. It was 15 to 20 feet from the can to her front door, and 20 to 25 feet from the can to the street. The can must be put out by the street for the truck with an automatic arm to come by and empty it (R 255-62). Inside a bag taken from the trash can were bloody clothes and part of a radio that clips onto a belt. These items could not be seen until the bag was opened (R 273-74).

Dorothy Craft, Craft's mother, testified that the can was outside of her fence but still in her yard. It is routinely kept there after it is rolled back from the street so that it does not have to be rolled all the way back to the house (R 286-88). When the judge asked about people walking up and putting something into the can or taking something out of it, she said:

> The way I feel about it, if I got it in my yard, you know, they ain't got no business putting nothing in or taking nothing out of it. (R 288).

She does not allow people to walk up and rummage through her garbage can. If someone did that, she would not want them

to do so. The can must be rolled out to the street to be emptied (R 289-90).

The state relied at trial on California v. Greenwood, 486 U.S. 35, 108 S.Ct. 1625, 100 L.Ed.2d 30 (1988), for the proposition that Craft had no expectation of privacy in the contents of the garbage can. The case is not on point and is easily distinguishable. There, a drug trafficker left plastic trash bags on the curb in front of his house for the garbage man to pick up. A police officer had the collector pick up the bags and turn them over to the police.

The court held that the defendants' trash bags would be constitutionally protected if they showed a subjective expectation of privacy which society would accept as objectively reasonable, under the teachings of Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). The court held that they had no expectation of privacy because they had left the bags on the side of the street, where they were accessible to the public, and where they expected the trash collectors to come by and pick them up.

Not so in the present case. Craft's mother testified that the large garbage can was on her property in her front yard, 20 to 25 feet from the can to the street. The can must be rolled out to the street for collection. The officers testified that the lid was down, and the inculpatory items inside the can were

enclosed in paper bags, so that one who lifted the lid could not see what was inside.

Because Craft's trash can was on Craft's property, 20 to 25 feet from the street, not on the street and ready for collection, with the lid closed, and with the objects inside concealed in paper bags, society should be willing to recognize an objective expectation of privacy in the can. The fact that the can was outside the fence should not matter, because it was still in Craft's yard. It was left there only for convenience, so that it did not have to be rolled all the way back to the house every week after it was emptied.

To rule otherwise would give a wealthy homeowner with a garbage can outside of a fence in the middle of the front yard of a large estate more of an expectation of privacy than a poor person with a small front yard. The expectation of privacy should not depend on how wealthy a person is or how large their front yard is.

Moreover, because Craft's mother testified that she did not approve of people coming up and rummaging through her can, she further expressed a subjective expectation of privacy. Also, a subjective expectation of privacy was expressed because the can's lid was left closed, and the objects inside were concealed in paper bags and could not be seen even if one opened the lid. California v. Greenwood is not on point.

The lower tribunal relied on United States v. Hedrick, 922 F.2d 396 (7th Cir. 1991), *cert. denied*, 502 U.S. 847, 112 S. Ct. 147, 116 L. Ed. 2d 113 (1991). This case too is distinguishable. Mr. Hedrick placed his garbage cans on his driveway, where he expected the garbage service to pick them up. Here, Craft or his mother had to roll the can out to the street, and the garbage men did not come into the yard.

Post-Greenwood cases from other jurisdictions are in accord. They generally hold that once garbage is placed at the curb for collection, the owner relinquishes any expectation of privacy under the federal constitution. *See, e.g.*, Moran v. State, 644 N.E.2d 536 (Ind. 1994) (at curb); People v. Hillman, 834 P.2d 1271 (Colo. 1992) (at curb); State v. DeFusco, 620 A. 2d 746 (Conn. 1993) (at curb); State v. Hempele, 576 A.2d 793 (N.J. 1990) (at curb); State v. Rydberg, 519 N.W.2d 306 (N.D. 1994) (in alley); United States v. Comeaux, 955 F.2d 586 (8th Cir. 1992) (in alley); United States v. Scott, 975 F.2d 927 (1st Cir. 1992) (outside curtilage); United States v. Trice, 864 F.2d 1421 (8th Cir. 1988) (at curb).

On the other hand, if the garbage is close to the house and not placed out at the curb for collection, then the owner retains a reasonable expectation of privacy. Craft demonstrated an objective expectation of privacy in the instant case, because his garbage can was located on the curtilage of

his house, and a subjective expectation because Craft's mother did not want people rummaging through it. The motion to suppress should have been granted.

B. CRAFT'S MOTHER DID NOT CONSENT TO A SEARCH OF THE GARBAGE CAN.

As the police were leaving Craft's house on Saturday, January 15, 1994, they asked Craft's mother when the garbage man came, and she said Thursday or Friday. They went over and started to search the garbage can. Then they decided to ask Craft's mother for consent to search the can, or if she minded if they searched the can. She said: "I guess so, y'all would look anyway" (R 252), or "I reckon not, you're gonna do it anyway." (R 270). They presented her with a consent to search form, but she refused to sign it. They went ahead and searched the can without a warrant (R 250-54).

Dorothy Craft testified that she did not give them permission to search the garbage can (R 275-78).

Craft has standing to challenge the validity of his mother's consent, especially because her consent was invalid. Bumper v. North Carolina, 391 U.S. 543, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968). A warrantless search is per se unreasonable unless the consent obtained from the third party is proper. Morse v. State, 604 So. 2d 496 (Fla. 1st DCA 1992).

It is equally well-settled that a submission or an acquiescence to the apparent authority of the police to search

is not free and voluntary consent. Florida v. Royer, 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983). Relevant to that determination is whether the person knew she had the right to refuse to consent. Racz v. State, 486 So. 2d 3 (Fla. 4th DCA 1986).

Here, Craft's mother did not freely and voluntarily consent to a search of the trash can, even though she had agreed to allow the police to look in the laundry room. She evinced her feelings as to the trash can by saying: "I guess so, y'all would look anyway" (R 252), or "I reckon not, you're gonna do it anyway." (R 270). Significantly, after that verbal exchange, she refused to sign the consent to search form.

In State v. Hall, 537 So. 2d 171 (Fla. 1st DCA 1989), the defendant's car was stopped by the police. The officer told the defendant they believed there were drugs in the car, and said "hand me the drugs." *Id.* at 172. The court agreed with the trial court that the defendant's silent act of handing over the drugs was not voluntary because he had acquiesced to the officer's authority.

Likewise, in Edwards v. State, 532 So. 2d 1311 (Fla. 1st DCA 1988), *review denied*, 542 So. 2d 990 (Fla. 1989), the defendant and some other men were standing under a tree when a bag of cocaine fell from the tree. The police officer took the defendant and the other men to the police station, where the

officer asked the defendant: "You don't mind if we go ahead and do a thorough search of you?" The defendant said nothing but stood up so that the officer could pull his pockets inside out. The court held that the defendant's silent actions were not consent but rather mere acquiescence to police authority.

Here, we have more than silent acquiescence to police authority from Craft's mother. We have her affirmative action in not signing the consent form and in saying that the police might as well go ahead and search, both of which indicated her lack of consent. Compare Freeman v. State, 559 So. 2d 295 (Fla. 1st DCA 1990), in which the court held consent was voluntary because the police had not given the defendant the impression that the search would be done regardless of the defendant's refusal to consent.

In State v. Brown, 558 So. 2d 1054 (Fla. 2nd DCA 1990), the police obtained arrest warrants for the defendant, a high school student. They took him into custody at school and arrested him at the police station, where his mother was present. The police and his mother then went to his mother's home to recover the gun used in the shooting. She signed a consent to search form and allowed the officer to go into the defendant's bedroom and recover the gun under the mattress.

The majority of the appellate court held the consent to search was valid, because the mother had voluntarily

accompanied the officers to her home and had permitted the search. Not so in the instant case. Even though Craft's mother allowed the officers to search her laundry room, she denied them access to the garbage can.

In Gonzalez v. State, 578 So. 2d 729 (Fla. 3rd DCA 1991), the police went to the defendant's home and asked his wife if they could talk to her. She let them in and they did a brief room-to-room protective sweep. They then had her sign a consent to search form. The trial judge found the consent to be valid.

On appeal, however, the court disagreed and held that her consent was not voluntary because the police had already demonstrated that they could search her house without a warrant and without consent. In the instant case, detective Sanderson had already lifted the lid of the trash can when detective Hall suggested they had better get Ms. Craft's consent to search it, so it is reasonable to infer from the record and from Ms. Craft's comments that she, just like Ms. Gonzalez, believed she did not have the right to refuse to consent.

The police cannot create their own exigent circumstances and use consent as a substitute for a warrant. Soldo v. State, 583 So. 2d 1080 (Fla. 3rd DCA 1991).

It must be remembered that the search of the garbage can occurred on January 15 at 2:30 p.m., after Craft had been taken

into custody and after the police had been to the house at 12:25 p.m., looking for Craft's bloody clothes in the laundry room. There is no reason why the police could not have obtained a search warrant for the house and its curtilage, including the garbage can, when they found no bloody clothes two hours earlier, but where they had information, probably from Ms. Peart, that Craft's clothes were bloody when he returned her car on the night of the murder.

For all of these reasons, Craft's mother's consent to search the garbage can was not voluntary. The evidence seized therefrom should have been suppressed.

ISSUE III
THE TRIAL COURT ERRED IN DENYING CRAFT'S MOTION FOR THE APPOINTMENT OF NEW COUNSEL.

This Court has jurisdiction to reverse other issues when it accepts review of a certified question. Feller v. State, *supra*. The lower tribunal agreed that the lower court's inquiry into Craft's complaints about his lawyer did not go far enough, but held that the error was harmless:

> [W]hile we find that the trial court erred in failing to inform the defendant as to his right of self representation after hearing defendant's motion to discharge counsel based on incompetence (*see Bodiford v. State*, 21 Fla. L. Weekly D9 (Fla. 1st DCA Dec. 18, 1995)), we find that such an error was harmless in light of the overwhelming evidence of guilt and the later representations by defendant's

> counsel in defendant's presence that he did not desire to represent himself. *See Parker v. State*, 570 So. 2d 1053 (Fla. 1st DCA 1990), *rev. denied*, 581 So. 2d 1309 (Fla. 1991).

The lower tribunal used the wrong test for harmless error. It is Craft's position that the error can never be harmless, because we cannot know what effect the failure if the judge to fully inquire into Craft's complaints against his lawyer had on his lawyer's performance.

Craft filed a motion for the appointment of new counsel on October 4, 1994, alleging that his assistant public defender was not representing him properly (R 303-305).

A hearing was held on this motion on October 10, 1994. The court asked Craft and his counsel about the allegation that counsel had declined to call three defense witnesses (R 396-400); the allegation that counsel had told Craft he would be found guilty (R 400-402); the allegation that counsel had made insufficient arguments at the suppression hearing (R 402-404); and the allegation that Craft was filing a complaint with the Florida Bar (R 404-407).

At the conclusion of the hearing, the court found:

> Okay. Let's take as to the defendant's motion for appointment of a new trial counsel, that the allegations made are legally insufficient and are without merit, and the defendant's pro se motion will be denied. That means, sir, that the Public Defender's Office will continue to represent you on this charge.

(R 407).

The lower court's inquiry into Craft's complaints about his lawyer did not go far enough. Although the court heard from Craft and counsel and found no grounds to discharge counsel, the law requires the judge to take another step -- he must advise the defendant that if he discharges counsel, he may be required to represent himself.[4]

At the beginning of the trial on the first degree murder, armed robbery, and carrying a concealed firearm, Craft stated he did not wish to proceed to trial with Mr. France, but the court said he would, and referred back to the previous hearing (T 1-2). Craft declined to participate in part of jury selection (T 11-17).

The seminal case in this area is Nelson v. State, 274 So. 2d 256 (Fla. 4th DCA 1973), and Nelson does not hold that the failure to make a complete inquiry can be harmless error.

A. THE LOWER TRIBUNAL USED THE WRONG TEST FOR HARMLESS ERROR.

The lower tribunal held in the instant opinion that the error "was harmless in light of the overwhelming evidence of guilt." This is not the test for harmless error. The proper

[4]The state argued below that Craft had not expressed enough discomfort about his lawyer's effectiveness to even require an inquiry. The lower tribunal's citation to Bodiford v. State, 665 So. 2d 315 (Fla. 1st DCA 1995), indicates that it rejected the state's argument.

test is stated in State v. Diguilio, 491 So. 2d 1129 (Fla. 1986):

> The harmless error test, as set forth in *Chapman [v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)] and progeny, places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction. *See Chapman*, 386 U.S. at 24, 87 S.Ct. at 828.
>
> * * *
>
> The test is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test. Harmless error is not a device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence. The focus is on the effect of the error on the trier-of-fact. The question is whether there is a reasonable possibility that the error affected the verdict. The burden to show the error was harmless must remain on the state. If the appellate court cannot say beyond a reasonable doubt that the error did not affect the verdict, then the error is by definition harmful.

491 So. 2d at 1135, 1139; emphasis added.

B. THE ERROR CANNOT BE HARMLESS.

Craft's position is that the error could never be harmless, because it is impossible to determine whether appellant was prejudiced by the failure to conduct a complete inquiry into counsel's performance. If counsel was in fact

incompetent, the validity of the entire proceeding was thrown into doubt, and no one can say if the outcome would have been different if he had been provided competent counsel.

In addition, the lower tribunal has created conflict with Graves v. State, 642 So. 2d 142 (Fla. 4th DCA 1994). There the defendant, much like Craft, filed a pro se motion to discharge his attorney before trial. The judge refused to hear the motion. The court rejected the state's argument that the error was harmless in light of the overwhelming evidence of guilt:

> We reject the state's assertion that we should find this failure to hold a *Nelson* inquiry harmless error. Yes, it does appear that the evidence against defendant was, in the state's word, "overwhelming". But trial counsel himself sought a last minute continuance on the grounds that his conference with the defendant on the night before trial began disclosed the existence of a witness to the event, an employee of the state correctional institution, and that counsel needed the additional time to interview the witness and prepare for trial.
>
> We thus cannot say beyond a reasonable doubt that the immensity of the trial evidence of guilt was not the result of the very thing about which defendant complained in his pretrial motion to discharge counsel. In this sense, we simply disagree with any suggestion in *Parker v. State*, 570 So.2d 1053 (Fla. 1st DCA 1990), *rev. denied*, 581 So.2d 1309 (Fla. 1991), and *Kott v. State*, 518 So.2d 957 (Fla. 1st DCA 1988), that a one-sided presentation of evidence

> of guilt by the state will save the failure to inquire if counsel was deficient in pretrial preparations.

642 So. 2d at 144; emphasis added.

In addition, the lower tribunal has created conflict with Burgos v. State, 667 So. 2d 1030 (Fla. 2nd DCA 1996). There the defendant, much like Craft, filed three pro se motions to discharge his attorney before trial. The judge never held an adequate Nelson hearing on any of them. The Second District held the error could not be harmless.

C. CRAFT DID NOT ACQUIESCE TO THE ERROR.

The lower tribunal also relied upon "later representations by defendant's counsel in defendant's presence that he did not desire to represent himself." There are two problems with the court's reliance on counsel's statement: Craft's silence cannot be construed as a waiver of his constitutional right to represent himself; and the court failed to consider that Craft had tried to express his displeasure with his attorney twice after the Nelson hearing on October 4, 1994.

The statement to which the court referred occurred at the beginning of testimony in the murder trial, two months later. In the interim, at the beginning of voir dire of the trial on the first degree murder, armed robbery, and carrying a concealed firearm, Craft stated he did not wish to proceed

to trial with Mr. France, but the court said he would, and referred back to the previous Nelson hearing (T 1-2). Craft declined to participate in part of jury selection (T 11-17). The judge believed he had made an adequate inquiry two months earlier, and made no inquiry into appellant's position at trial. Moreover, Craft's request to be co-counsel at trial (T 199-200) was given no consideration at all by the judge. It was summarily denied by the judge as a legal impossibility; the prosecutor, the judge, and defense counsel discussed the matter, with absolutely no input from Craft; and it could have been viewed as a last-ditch attempt by Craft to again voice his complaints to the judge in the only manner available to him.

Even though counsel informed the judge that Craft did not wish to represent himself, no one ever asked Craft if that was true. We cannot view Craft's actions as a repudiation of the desire to represent himself, because Craft was never fully advised of that option. Moreover, we cannot infer a waiver of that constitutional right from a silent record. Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). Craft, not being trained in courtroom procedure, brought the matter to the court's attention in the only ways he knew how -- by declining to participate in jury selection and by asking to be co-counsel. Once the judge was

placed on notice that Craft was still not satisfied with his attorney, he should have reopened the Nelson inquiry on both occasions at trial.

Thus, the lower tribunal's position that the error was harmless or somehow waived is erroneous. Craft urges this Court to approve Graves, *supra*, overrule Parker v. State, 570 So.2d 1053 (Fla. 1st DCA 1990), *rev. denied*, 581 So.2d 1309 (Fla. 1991), and hold that the failure to conduct a complete Nelson inquiry cannot be harmless error.

ISSUE IV

THE TRIAL COURT ERRED IN ALLOWING THE HOMICIDE TO BECOME A FEATURE OF THE TRIAL FOR POSSESSION OF A FIREARM BY A CONVICTED FELON.

This Court has jurisdiction to reverse other issues when it accepts review of a certified question. Feller v. State, *supra*, even though the lower tribunal found no merit to it.

Prior to the separate trial on the charge of possession of a firearm by a convicted felon, Craft asked that the state be prohibited from presenting any evidence about the murder (F 4). The prosecutor stated she would not go into any great detail about the murder, but the evidence that the victim had been shot was relevant to prove the charge (F 4-5). The judge stated Craft's statements would say that the man had been killed, and he did not see how the firearm charge could be isolated, but he offered to inform the jury that this was

the only charge for which Craft was on trial (F 5).

The state could have proven the firearm charge with four witnesses and less than 30 pages of testimony --

(1) Ms. Peart, who saw Craft with the gun before she loaned him her car (F 33-41); (2) Sharon Flowers, the clerk of the court with the prior judgments and sentences (F 58-64); (3) Janice Johnson, who rolled Craft's fingerprints (F 67-69); and (4) Charles Richards, the expert who found Craft's fingerprints on the prior judgment and sentences (F 69-74).

In addition to these four witnesses, the state brought forth almost all of the important witnesses from the homicide trial and re-tried the homicide in the firearm case -- (1) Pensacola police officer Betts, who described finding the murder victim in the park (F 18-20); (2) Crime scene technician West, who described finding the .25 caliber cartridge on the path in the park, the jacket hanging in the tree, and another cartridge later with the aid of a metal detector (F 21-25); (3) Adrian Hardaway, the victim's cousin, who identified the murder victim's jacket (F 26-27); (4) Crime scene technician Stephens, who attended the autopsy and recovered two spent bullets from the murder victim's head (F 28-30); (5) Firearms examiner Williams, who testified that the two bullets recovered from the victim could have been

fired from the first casing located at the park. The gun was up against the victim's jacket when it was fired. The car window was broken by shooting from inside the car (F 47-56); (6) Police officers Bowling and Knowles, who took Craft's first taped statement (F 76-79; 80-83); (7) Deputy sheriffs Hall and detective Sanderson, who took a taped statement of the final version (F 83-87; 88-91); (8) Prior testimony Craft had given in court (F 91-93); and (9) Cassandra Toller, Craft's former girlfriend, who testified that Craft called her and asked her to tell the police that another man named Keith had committed the murder, but she declined to do so (F 128-30).

When the prosecutor wanted to introduce three autopsy photos, even the judge knew the murder was becoming a feature of the trial:

> Let me tell you what I don't want this case to get involved in, I don't want this to center around the murder case. I want this case centered around the firearm's case. (F 31).

In addition to the above witnesses, the state introduced physical evidence from the homicide, including: a photo of the dead body, state exhibit 3-D (F 20); a photo of his jacket, state exhibit 3-M, and the jacket itself, state exhibit 13 (F 24); one of the three autopsy photos mentioned above, state exhibit 12-A (F 32); bullets recovered from the victim's head,

state exhibits 31 and 32 (F 30); and the broken window from the girl's car, state exhibit 86 (F 46).

In addition to the above witnesses and physical evidence, the state introduced Craft's two taped statements, state exhibit 20 and 20-A (F 79; 87) which contained all of the unnecessary details about the murder, and which were played to the jury (F 93-110; 112-27).

It is true that Craft's counsel requested that the court give a limiting instruction to the jury (F 110-11), and the judge cautioned the jury as follows:

> Ladies and gentlemen, let me tell you before this next statement is played, I previously read to you the charges concerning Mr. Craft. Mr. Craft is on trial today for possession of a firearm by a convicted felon. You're not to not to be concerned with the -- the murder charge or anything like that. Mr. Craft -- that is not an issue as far as you're concerned. It's a one-count information of possession of a firearm by a convicted felon. And that's all we're trying today. You're not to be concerned about any other charges (F 111-12).

But that instruction did nothing to "unring the bell" that the jury had already heard. The jury must have been wondering throughout the trial what happened to the murder charge, for after it returned its verdict, the court then informed the jury Craft had been convicted of first degree murder (F 161-62).

Although the issue is not well-preserved, because Craft

did not move for a mistrial during the trial when the homicide became a feature, Craft requests that a new trial be awarded in the interest of justice.

The analogy to the Williams Rule cases is obvious. Evidence of other crimes is admissible if it is relevant to prove a fact in issue. §90.404(2)(a), Fla. Stat.; and Williams v. State, 110 So. 2d 654 (Fla. 1959). Here, the prosecutor asserted and the judge agreed that the homicide was relevant to show that Craft had a gun. However, if the prejudicial value of the evidence outweighs its probative value, it should be excluded. §90.403, Fla. Stat.; and Bryan v. State, 533 So. 2d 744 (Fla. 1988).

Moreover, the collateral crime evidence cannot be allowed to become a feature of the trial -- that is, it becomes more important than the crime for which the defendant is actually on trial. Williams v. State, 117 So. 2d 473, 475-76 (Fla. 1960):

> Inasmuch as evidence of the later crime was admissible only because of its relevancy to the identity of the accused and the murder weapon and the similarity of the pattern defined in the two incidents, the question then arises whether or not the state was permitted to go too far in introduction of testimony about the later crime so that the inquiry transcended the boundaries of relevancy to the charge being tried, and made the later offense a feature instead of an incident. (emphasis added).

See also State v. Lee, 531 So. 2d 133, 137 (Fla. 1988): "The improper collateral crime evidence was given undue emphasis by the state and was made a focal point of the trial."

Even though Craft did not make this argument below, reversal is required when unpreserved prosecutorial overkill deprives a defendant of a fair trial. *See, e.g.*, Pacifico v. State, 642 So. 2d 1178 (Fla. 1st DCA 1994). Craft deserves that remedy here.

V CONCLUSION

Based upon the foregoing, this Court should answer the certified question in the negative and approve the decision of the lower tribunal. In addition, this Court should reverse all of the judgments and sentence and grant Craft new trials because the motion to suppress should have been granted, because an insufficient Nelson inquiry can never be harmless error, and because the prosecutor was guilty of overkill.

Respectfully Submitted,

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Cross-Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to James W. Rogers and Vincent Altieri, Assistant Attorneys General, by delivery to The Capitol, Plaza Level, Tallahassee, Florida, and by mail to Respondent/Cross-Petitioner, this 28 day of May, 1996.

P. DOUGLAS BRINKMEYER

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,	:	
Petitioner/ Cross-Respondent,	:	
v.	:	CASE NO. 87,545
ANTONIO LEE CRAFT,	:	
Respondent/ Cross-Petitioner.	:	
	:	

APPENDIX TO BRIEF OF RESPONDENT/CROSS-PETITIONER ON THE MERITS

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

P. DOUGLAS BRINKMEYER
ASSISTANT PUBLIC DEFENDER
LEON COUNTY COURTHOUSE
SUITE 401
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(904) 488-2458

ATTORNEY FOR PETITIONER/
CROSS-RESPONDENT

1

Angele H. NICHOLS, et al., Appellants,

v.

Helen C. PATTERSON, etc., Appellee.

No. 95–850.

District Court of Appeal of Florida, Fifth District.

March 1, 1996.

Rehearing Denied March 28, 1996.

Appeal from the Circuit Court for Orange County; George A., Sprinkel, IV, Judge.

R. Lee Dorough of Whitaker & Dorough, P.A., Orlando, for Appellant.

George E. Carr of O'Neill, Chapin, Marks Liebman, Cooper & Carr, Orlando, and Kimberly M. Reid of Blair & Cooney, Tavares, for Appellee.

PER CURIAM.

AFFIRMED. *Anicet v. Gant*, 580 So.2d 273, 275, 277 (Fla. 3d DCA), *rev. denied*, 591 So.2d 181 (Fla.1991); *Mujica v. Turner*, 582 So.2d 24, 25 (Fla. 3d DCA), *rev. denied*, 592 So.2d 681 (Fla.1991).

PETERSON, C.J., and DAUKSCH and COBB, JJ., concur.

2

Antonio Lee CRAFT, Appellant,

v.

STATE of Florida, Appellee.

No. 95–671.

District Court of Appeal of Florida, First District.

March 5, 1996.

Rehearing Denied April 10, 1996.

After he was convicted of murder and carrying a concealed weapon, defendant was convicted in the Circuit Court, Escambia County, Frank Bell, J., of possession of firearm by convicted felon as a result of the same incident, and he appealed. The District Court of Appeal, Wolf, J., held that: (1) court did not err in making factual determination that there was no reasonable expectation of privacy as to contents of garbage can left outside a privacy fence; (2) error in not informing defendant of his right of self-representation was harmless; but (3) defendant could not be convicted of both carrying a concealed weapon and possession of weapon by convicted felon based on the same incident.

Vacated, and question certified.

1. **Searches and Seizures ⇐28**

Trial court did not err in making factual determination that there was no reasonable expectation of privacy as to contents of garbage can left outside privacy fence.

2. **Criminal Law ⇐641.10(2), 1166.10(2)**

Court erred in failing to inform defendant as to his right of self-representation after hearing defendant's motion to discharge counsel based on incompetence, but error was harmless in light of overwhelming evidence of guilt and the later representations by defendant's counsel in defendant's presence that he did not desire to represent himself.

3. **Criminal Law ⇐29(15)**

Defendant could not be convicted of both carrying concealed weapon and possession of weapon by convicted felon based on same incident.

An appeal from the Circuit Court for Escambia County, Frank Bell, Judge.

Nancy A. Daniels, Public Defender, P. Douglas Brinkmeyer, Assistant Public Defender, Tallahassee, for appellant.

Robert A. Butterworth, Attorney General, Douglas Gurnic, Assistant Attorney General, Tallahassee, for appellee.

APPENDIX

WOLF, Judge.

[1] Craft (defendant) was found guilty of first-degree murder and carrying a concealed firearm. In a subsequent trial arising out of the same incident, he was found guilty of possession of a firearm by a convicted felon. Defendant raises four issues on appeal: (1) Whether the lower court erred in denying appellant's motion to suppress evidence; (2) whether the lower court erred in denying appellant's motion for appointment of new counsel; (3) whether the lower court erred in allowing the homicide to become a feature of the trial for possession of a firearm by a convicted felon; and (4) whether the lower court erred in imposing judgments and sentences on both firearm offenses. We find no merit as to issue three, and affirm without discussion. As to issue one, we find that the trial court did not err in making the factual determination that there was no reasonable expectation of privacy as to the contents of a garbage can left outside a privacy fence. *See U.S. v. Hedrick*, 922 F.2d 396 (7th Cir.1991), *cert. denied*, 502 U.S. 847, 112 S.Ct. 147, 116 L.Ed.2d 113 (1991). We, therefore, affirm as to issue one.

[2] As to issue two, while we find that the trial court erred in failing to inform the defendant as to his right of self representation after hearing defendant's motion to discharge counsel based on incompetence (*see Bodiford v. State*, 665 So.2d 315 (Fla. 1st DCA 1995)), we find that such an error was harmless in light of the overwhelming evidence of guilt and the later representations by defendant's counsel in defendant's presence that he did not desire to represent himself. *See Parker v. State*, 570 So.2d 1053 (Fla. 1st DCA 1990), *rev. denied*, 581 So.2d 1309 (Fla.1991).

[3] As to issue four, we are required to vacate the conviction for carrying a concealed firearm for the reasons set forth in *Brown v. State*, 21 Fla.L.Weekly D10 — So.2d. —— (Fla. 1st DCA Dec. 18, 1995). We again certify the question previously certified in *Brown:*

WHEN A DEFENDANT COMMITS SEPARATE OFFENSES DURING THE SAME CRIMINAL EPISODE, EACH INVOLVING A FIREARM, BUT EACH HAVING SEPARATE AND DISTINCT ELEMENTS, MAY THE DEFENDANT BE CONVICTED AND SENTENCED FOR EACH CRIME?

BOOTH, J., concurs.

BENTON, J., concurs in result.

R.R. DONNELLEY & SONS COMPANY, Appellant,

v.

Lawrence H. FUCHS, Executive Director of the Department of Revenue of the State of Florida, and Department of Revenue of the State of Florida, Appellees.

No. 95–769.

District Court of Appeal of Florida, First District.

March 5, 1996.

Printing firm sought refund of sales taxes by arguing that sales tax statute violated constitutional right to freedom of press and equal protection of laws. The Circuit Court, Leon County, L. Ralph Smith, Jr., J., denied firm's request for refund, and firm appealed. The District Court of Appeal, Wolf, J., held that: (1) sales tax statute did not facially violate printing firm's constitutional right to freedom of press, and (2) sales tax statute did not violate printing firm's constitutional right to equal protection of law.

Affirmed.

1. Constitutional Law ⇐90.1(8)
Taxation ⇐1212.1

Sales and use tax exemption for purchase of machinery and equipment used to start operations which manufactured taxable