IN THE FLORIDA SUPREME COURT
TALLAHASSEE, FLORIDA
APPEAL CASE NO. SC05-353

JEFFREY ALLEN MUEHLEMAN,
Appellant

Versus

STATE OF FLORIDA,
Appellee
_____/

Appeal of :
STATE OF FLORIDA v MUEHLEMAN,
CASE NO.: 83-04924CFANO-C, Sixth Judicial Circuit of Florida
UCN: 521983CF004924XXXXNO

APPEAL BRIEF OF APPELLANT

Respectfully Submitted By:

Charles E. Lykes, Jr., Esquire
Counsel for Appellant
501 S. Ft. Harrison Ave., Suite 101
Clearwater, Florida 33756
Telephone: 727-441-8308
Facsimile: 727-442-8562
Email: charles@lykeslaw.com
FBN: 291341

I. TABLE OF CONTENTS

II. TABLE OF CITATIONS

Constitutional Law

Cases

Rules of Procedure

III. STATEMENT OF THE CASE

A. Statement of Facts and the Case.

The facts relevant to this appeal are largely procedural and, with the permission of the Honorable Court, Appellant will combine the statement of the case and facts. The Appellant was convicted in 1984 for the murder of a 97-year-old man during the course of a robbery. He was also sentenced to death. The Appellant was originally permitted to represent himself after the inquiry required by Faretta v California, 422 U.S. 806, 835 (1975) by the original Trial Court, the Honorable Crockett Farnell, who has recently retired from full-time judicial service. Judge Farnell was in active service in June, 2003, when the subject proceeding occurred. After a series of appeals and post-conviction petitions the case and the Appellant were returned to Pinellas County, Florida, for a re-sentencing proceeding.

The order from this Honorable Court returning the case to Pinellas County for a new sentencing hearing was clear in its admonition that

the Appellant should be immediately advised of his right to counsel.(R. 24) In the first hearing regarding this matter Judge Downey, who was then the Administrative Judge but would soon be taking over the division to which this case was assigned, failed to follow this admonition. There were three instances during that hearing in which the subject of counsel came up. (R. 121-122, 123, 126, 128-129) These conversations resulted in little more than confirming that Appellant would continue to represent himself. He asked at his 40 boxes of file material be made available to him while in Pinellas County. The longest substantive discussion about counsel was whether or not there would continue to be standby counsel and whether the office of the public defender would have a conflict. (R. 128-129)

What did occur at that time was the Appellant was misinformed about the possibility of waiving a jury. (R. 124) Since it appeared (and he had not even requested it yet) that his case would not be returned to the original sentencing court FlaRCrimP § 3.700 (c) (2) would not permit the waiver of a jury. The original sentencing Judge

was still an active member of the bench although, at the time of resentencing, in the Civil Division.

The Appellant was never at this hearing specifically told that he had a right to counsel nor was anything in the nature of a Faretta inquiry conducted. In a hearing on January 20 1, 2003, the subject of discovery was discussed but no mention of counsel. On February 12, 2003, there was another discussion about counsel. Even though the State asked for an extensive Faretta hearing the Trial Court seemed satisfied with relying on the earlier determination of Judge Farnell, some 19 years before, that Appellant was confident to represent himself (R. 223).

On January 21, 2003, the Appellant made a motion to have his case reassigned to the original sentencing Court, Judge Crockett Farnell, who was still an active member of the bench. Judge Farnell was then in the Civil Division of the Sixth Judicial Circuit and maintained court in downtown Clearwater, Florida, at the main courthouse complex. (R. 25) Appellant made his motion pursuant to Fla R Jud Ad § 2.050

(b) (2) and (b) (4) and did not cite Fla R Crim P § 3.700 (c) (2).

Appellant's motion was denied by order dated February 7, 2003. (R.24) In the denial the Chief Judge found a distinction between the use of the term "necessary" in FlaRCrimP § 3.700 (c) (1) and FlaRCrimP § 3.700 (c) (2). No legal authority supporting this distinction was cited by the Chief Judge. The Chief Judge went on to provide in his denial (R.27, paragraph 14) that "The assignment of this case is solely within the discretion of the Chief Judge." as though there were no authorities bearing on the issue other than the discretion of the Chief Judge. What was overlooked in this order was the clear requirement of FlaRCrimP § 3.700 (c) (2) that the case be tried to a jury if it was "necessary" that a successor Judge preside over the matter.

At the pretrial hearing on May 16, 2003, or one week before the hearing jury trial was scheduled to begin on May 23, 2003. The State of Florida again pressed for a more complete Faretta inquiry without success, but later that week the Trial Court finally acknowledged that it had to be done.

On May 19, 2003, Judge Downey proceeded to conduct what was intended to be a Faretta inquiry. During the Faretta inquiry conducted at that time the Trial Court first asked a series of questions to which the Appellant made no response. (R.139-141). The Appellant stated that he believed that the Faretta inquiry was "off base" and the Trial Court agreed (R.142, lines 19-21). Following this the inquiry, such as it was, continued with most questions not being answered. The Appellant stated that this matter was a surprise. When the Court pointed out the Constitutional requirement Appellant allowed that, had he known that standby counsel would be the subject, he would have been prepared to discuss the counsel issue with legal authorities ready. The Trial Court did not repeat the inquiry and denied appointment of even standby counsel. (R.141-148).

On June 23-24, 2003 a penalty phase jury trial was conducted. Appellant was, under any reasonable analysis, an unrepresented non-participant. He took no role in jury selection, objection to or cross examination of any evidence, determination of jury selection,

or closing argument. He was even dressed in prison clothes. The jury recommended death by a 10-2 vote.

Following the sentencing hearing the Appellant appeared at a Spencer hearing, still without counsel, and following this, the Trial Court reimposed the death penalty upon the Appellant. (R.101-114).

.

B. Points on Appeal.

POINT ONE - *THE TRIAL COURT FLAGRANTLY DISOBEYED THE ADMONITION OF THIS Honorable Court TO IMMEDIATELY ADVISE THE Appellant OF HIS RIGHT TO COUNSEL AND THIS PREVENTED A PROPER AND SUSTAINABLE RECORD OF PROCEEDINGS.*

POINT TWO - WAS THE APPELLANT ENTITLED TO HAVE HIS CASE REASSIGNED TO THE ORIGINAL SENTENCING COURT FOLLOWING THE RETURN OF THE CASE FOR RESENTENCING?

POINT THREE - WAS THE FARETTA INQUIRY CONDUCTED BY THE Trial Court ADEQUATE TO SATISFY CONSTITUTIONAL STANDARDS FOR WAIVER OF COUNSEL AT A CRITICAL STAGE IN A DEATH PENALTY CASE?

POINT FOUR - IT WAS ERROR FOR THE TRIAL COURT TO PERMIT MEMBERS OF THE OFFICE OF THE STATE ATTORNEY TO ACT AS SURROGATES FOR READING

TESTIMONY FROM Appellant'S ORIGINAL TRIAL TO THE JURY.

POINT FIVE - THE TESTIMONY OF REWIS VIOLATED MARANDA

POINT SIX - EVEN IF NO ONE ERROR ALONE WOULD REQUIRE REVERSAL THE CUMULATIVE EFFECT OF ALL OF THE ERRORS REQUIRES THAT THE MATTER BE REVERSED AND REMANDED.

C. Standard of Review.

Points on One through Three appeal are fundamental errors and, should this Honorable Court determined that such matters were indeed error the Appellant is entitled to relief unless such errors can be shown to be harmless beyond reasonable doubt by the Appellee. Points Four through Six require Appellant to show the errors were not harmless.

IV. SUMMARY OF THE ARGUMENT

The Appellant will first show that the Trial Court deliberately and flagrantly violated the admonition of this Honorable Court to immediately advise the Appellant of his right to counsel in the proceedings. Rather than do this the Trial Court brushed over the issue of counsel and essentially did little more than confirm that the Appellant would continue to represent himself. It had been nearly 20 years since the Appellant had last had a Faretta hearing. Since then the case had been through many twists and turns including direct appeal and post-conviction matters. This Honorable Court clearly wanted a record which reflected first that the Appellant was aware of his right to counsel and second, that any waiver of such right was knowing and intelligent. Because the Trial Court failed to provide this advise the record is clouded with doubt and uncertainty and the case must be returned or proper proceedings . The Appellant will show that his request for the reassignment of his case to the original sentencing court was proper and should have been granted.

Judge Farnell was available within Pinellas County, Florida, and was actively hearing matters in another division at the time. Accordingly, it was not "necessary" to assign the case to a successor Judge as required by FlaRCrimP§3.700(c)(2). Because none of the matters having previously occurred in the case would have created a presumption of vindictiveness on the part of Judge Farnell, and because the Appellant specifically requested that his case be reassigned to the original sentencing judge it was error to permit the case to be heard by a substitute Judge. Such error cannot be said to have been harmless beyond a reasonable doubt. Moreover, such was a presumptive right of the Appellant which could have been accommodated in 2003 but now, since Judge Farnell has retired, it cannot be surely accommodated.

Because this protection of the rule was deliberately denied to the Appellant he is entitled to have his death sentence commuted to life without parole for 25 years.

The Appellant will also show that the Faretta inquiry conducted in his case was insufficient and inadequate for the purpose of

comprising a proper and sufficient waiver of the fundamental right to the effective assistance of counsel as provided by the Sixth Amendment of the United States Constitution. In particular, the Faretta inquiry was conducted in a flippant and cavalier manner and without explanation. From the record it cannot be said that the Appellant understood the significance of the inquiry as it was being conducted and was never given an opportunity to go through a Faretta inquiry which was conducted in an appropriate and adequate manner. Such error cannot be said to have been harmless beyond a reasonable doubt.

Appellant will further show that it was improper to have members of the Office of the State Attorney serve as"readers" of prior trial testimony, particularly that of the jail informant Rewis, who had participated in a stratagem to induce a statement from the Appellant prior to his original trial and proceedings.

Appellant will also show that it was erroneous to permit any reference to a recorded statement obtained by Rewis because this

statement was obtained in violation of Miranda since Rewis was acting as an agent of the state in obtaining the statement and the Appellant was not advised of his Miranda rights at the time of making the statement to Rewis.

Finally, Appellant will show that, even if no one error requires reversal, the cumulative effect of all of these errors does result in a proceeding which is of sufficient doubt and uncertainty to require reversal.

V. ARGUMENT

The Appellant will now present argument in support of his points on appeal including references to the record, citations of authority, and analysis.

A. The Trial Court flagrantly disobeyed the admonition of this Honorable Court to immediately advise the Appellant of his right to counsel and this prevented a proper and sustainable record of proceedings.

When the case was returned to the Trial Court this Honorable Court provided, in boldface type, that the Appellant should be "immediately advised of his right to counsel". There is little room for ambiguity in such an admonition. It is clearly something that should have been done in the very first appearance of the Appellant in the Pinellas County Courts. In that first hearing the subject of counsel was discussed several

times but the discussion always was with the presumption that the Appellant would continue to waive appointed counsel. At no time, prior to the inadequate Faretta hearing, did the Trial Court clearly explain to the Appellant his right to counsel.

After explaining his right to counsel, and ensuring that the Appellant was aware of such rights, it would have been appropriate to have conducted a new Faretta hearing with the appropriate respect for the law. Because this was never done everything that happened following the Trial Court's disregard of the admonition of this Honorable Court is tainted. Appellant attended perhaps a half-dozen pretrial hearings in which significant matters of discovery and a request for the original sentencing Judge were discussed. All of these matters were

addressed by the Appellant without the assistance of counsel and the Appellant professed that his point about restoring the original sentencing Judge to the case was the controlling issue. He was at least correct about his right to the original Judge.

A Trial Court must follow the law and the law includes following orders of controlling Appellate Courts. When such a direct admonition has been given to a Trial Court the failure to follow such admonition should be viewed as plain error. This Honorable Court was clearly desirous of ensuring that the proceedings which were about to occur would no longer be questionable from the standpoint of the counsel Appellant's right to and that the Appellant would not have that issue to complain about.

As will be seen throughout the record of proceedings, the failure to clarify the issue of counsel by immediately advising the Appellant as directed by this Honorable Court, has rendered the entire proceeding unworthy of placing an individual to death. Appellant respectfully submits that the record does indeed demonstrate a flagrant disregard of the guidance of this Honorable Court and that this was an error and that prejudice must be presumed unless it can be shown harmless beyond a reasonable doubt.

That cannot be done for several reasons. For one reason, the Appellant brought his motion to return the case to the original sentencing court under the wrong rule. With standby counsel or some lawyer to consult with he may have used the

correct rule and then he might have prevailed. Even though the Chief Judge cited the correct rule in his denial of the motion, for the reasons that will be set forth below, Appellant will show that the Chief Judge misinterpreted the rule and again, consulting or standby counsel may have made a difference.

Additionally, Appellant proceeded throughout the entire penalty phase jury trial unrepresented and in jail clothes (R. 460) under the erroneous presumption that any participation by him beginning with jury selection and continuing on through the end of the proceeding, would compromise his argument about his right to the original sentencing Court. Accordingly, the proceeding may as well have been conducted *in absentia.* This is another matter which may have been resolved by counsulting or

standby counsel without clouding the record as it is now.

Indeed, this single act of defiance by the Trial Court, in and of itself, has rendered this entire proceeding unworthy of affirmance.

B. Appellant's Request For Assignment of His Case to the Original Sentencing Court Should Have Been Granted.

In the case of Madrigal v State, 683 So2d 1093 (4th DCA, 1996) it was determined that, without some showing of necessity, it was error to permit sentencing by a Judge "other than the one that presided at the trial or plea hearing". This reasoning was expressly adopted by the Second District within the last year in the case of Conroy v State, 933 So.2d 687 (2nd DCA, 2006). These were decided pursuant to FlaRCrimP§3.700(c)(1), which concerns non-capital cases.

In the present case this Appellant had specifically requested

that his case be reassigned so that it could be tried before the original Trial Court. (R. 1-20) His original sentence was the death penalty. It should not require further support to say that the original Trial Court was familiar with the evidence which was presented in the case and was in a much better position to presently evaluate the numerous aggravating and mitigating factors which were at issue since he had is done before.

Even though some 20 years or more had passed since the original proceeding it is reasonable to expect that a Circuit Judge would have some recollection of both the evidence which was presented in the demeanor and attitudes of the witnesses in a matter of significance such as the imposition of the death penalty. It is also reasonable to expect that the review of the trial record by the original Court would be much more meaningful than a first review of the trial record by a new court upon resentencing.

Although Judge Farnell may not have been assigned to the Criminal Division at the time of return of the case for resentencing, he was

still a sitting Judge and active within this Circuit and could have been available to hear the case. (R. 25) He was less than 10 miles away. The reasons offered by the Circuit Chief Judge or declining to request indicate more of a concern for the convenience and authority of the Circuit than for an established right of the Appellant.(R. 24)

It is difficult to understand how the Chief Judge could have construed the rule so as to not require reassignment to the original sentencing Court. FlaRCrimP § 3.700(c)(2) allows sentencing by a successor Judge only when necessary and then requires a trial of the sentencing issue to a jury. The context of the word "necessary" in FlaRCrimP § 3.700 (c)(2) is exactly the same as in FlaRCrimP § 3.700 (c)(1). The Chief Judge apparently rested is decision that there was some different interpretation of this term on the fact that FlaRCrimP § 3.700(c)(2) refers to eight "capital trial" and the Appellant had pled guilty rather than go to a jury trial in his guilt phase.

Appellant is unaware of nor did the Chief Judge supply any authority for this proposition. With respect to the issue of sentencing in either a guilty plea or a guilt phase trial in either capital or noncapital cases the original sentencing Court would have still been required to engage in analysis of the sentencing factors and the facts of the case before rendering a sentence. Accordingly, there really is no logical reason for the fact that the Appellant previously pled guilty to have an impact on the use of the term "necessary" in FlaRCrimP § 3.700 (c)(2).

The record further demonstrates the mis-perception of this requirement by the local courts in this case, including both the Trial Court and the Chief Judge. Neither seemed to notice that the use of a successor Judge would require a jury trial since the potential of the waiver of a jury was discussed throughout. In fact, the Appellant had originally indicated that he was not desirous of a jury and the use of the successor Judge , pursuant to FlaRCrimP § 3700 (c)(2), actually served as an absolute bar to his making that decision.

Appellant would respectfully submit that an error such as this is such a fundamental denial of due process and that it cannot be considered harmless beyond a reasonable doubt. Accordingly, the death sentence must be reversed and commuted to life without possibility of parole for at least 25 years or, alternatively, be returned for yet another resentencing hearing.

Appellant would respectfully submit that there was no reason for excepting the conduct of a penalty phase hearing from the equivalent of a trial. The conduct of a penalty phase proceeding is adversarial, requires the presentation of evidence together with confrontation and cross examination, and resembles a trial in every other respect. Accordingly, Appellant would respectfully submit that the motion should have been granted and that transfer of this case over his objection to a Judge who lacked the familiarity with the case when the predecessor Judge was available and there was no showing of necessity was fundamental error.

C. The Faretta Inquiry Conducted by the Trial Court Was a Sham and Was Inadequate.

It has long been established that the right to counsel is a fundamental right guaranteed by the Sixth Amendment of the United States Constitution and applies to every "critical stage" of a criminal proceeding in which liberty is at stake. This particularly applies

to sentencing proceedings. There simply are no criminal proceedings with more at stake than either the guilt and penalty phases of a death penalty trial.

It is also well established that the inquiry described in Faretta v California, 422 U.S. 806, 835 (1975) must be conducted whenever a criminal defendant undertakes self-representation in a criminal proceeding. Finally, it is established that this Faretta inquiry must be made at each critical stage of a trial or sentencing and upon a retrial for resentencing. In Florida there has been some guidance with respect to this principle. In the case of Potts v State, 865 So.2d 757, 760 (Fla., 1998) it was determined that there were no "magic words" which had to be used

but that the Trial Court must ensure that the Defendant had a general understanding of his rights and that the Defendant was proceeding with his "eyes wide open". (Also please see Wilson v State, 1D05-2953, 1/26/2007).

In the present case the Trial Court did not conduct a valid

Faretta inquiry. It was, instead, a poor facsimile of a Faretta inquiry. The Appellant professed that he did not know why the inquiry was being conducted and did not answer any of the questions. The Trial Court simply observed that he did not respond. No warnings or admonitions were given and at no time was the importance of the proceeding express to the Appellant. In fact, the Trial Court seemed to join the Appellant in demeaning the nature of the inquiry (R. 145-148)

When the inquiry was completed the Appellant asked what had happened and why it had been done. The Trial Court said little more than that he had to do it without explanation and did not inform the Appellant that such was done as a means of ensuring that he was knowingly and intelligently waving a fundamental constitutional right until after it was over, if then.

The conduct of a death penalty sentencing proceeding with a *pro se* Defendant and without establishing a knowing and intelligent waiver of counsel is another fundamental error which requires reversal of

the sentence and commuting it to life without possibility of parole for 25 years or, alternatively, for the conduct of another sentencing proceeding.

In the present case it is clear that the Appellant did not have a realistic grasp or understanding of the issues he was facing. For instance, he appeared to be of the belief that he could allow something to happen, such as the trial of his case before the wrong Judge, that he would be successful in setting this issue up for a appeal rather than to waive his Appellate rights. Alternatively, he seemed to be of the belief that he would be waiving his Appellate rights if he stated anything or participated in any way in the proceedings. He also questioned the skill and allegiance of the attorney's who might be appointed to represent. Again, there are no effort to clarify this.

While one can certainly empathize with the frustration a Trial Court may feel in dealing with an Appellant who may be deliberately trying to provoke the Court by his behavior, it is a requirement that was even well known to the State Attorney that the record would need

to show a valid waiver of counsel. It would have been a simple matter to have gone through the inquiry again after explaining why it was being done at that time or to have at least asked if any of the questions would have been answered differently now that the purpose was and had been explained. The Trial Court not only failed to do that but also joined in diminishing the importance of the inquiry in the first place.

Under these circumstances it would be wrong to allow the death penalty to stand.

The Appellant clearly indicated that he wanted to work with some counsel but was mistrustful of either the Office of the Public Defender or any appointed counsel which was compensated from state funds. Whether or not this fear was reasonable it should not have been skipped over without explanation. The Trial Court actually became a participant in the error by failing to accurately inform the Appellant about matters which would have been proper for him to explain to the Appellant. For instance, the Appellant was laboring under the assumption that his participation would be waiving the

argument he had made regarding the proper Trial Court. The Trial Court not only indicated that his argument "may" be successful but the Trial Court also failed to clarify a clear misunderstanding of the law by the Appellant, that his participation did, indeed, leave this point after he had properly preserve the issue with is numerous motions and objections. Instead the Trial Court just "played along" with this notion.

Travis v. State, 969 So.2d 532 (2nd DCA, 2007) is a very recent reiteration of the requirement or a new Faretta hearing prior to a penalty phase because the penalty phase is a "critical stage" of the proceeding and it is important to document that this requirement has been satisfied.

> In the case of Lamarca v. State, No. SC03-1815 (Fla., 2006) is provided a description of what a proper Faretta inquiry would be. Such is described as follows: In Faretta, the United States Supreme Court recognized that "the Sixth Amendment grants to each criminal defendant the right of self-representation, regardless of consequences." State v. Bowen, 698 So. 2d 248, 250 (Fla. 1997). Nevertheless, because the consequences can be severe, Trial Courts are required to make the defendant "aware of the dangers and disadvantages of self-representation, so that

> the record will establish that '[the defendant] knows what he is doing and that his choice is made with his eyes wide open.'" Hernandez-Alberto v. State, 889 So. 2d 721, 729 (Fla. 2004) (quoting Faretta, 422 U.S. at 835). When the trial transcript reveals that the defendant is "literate, competent, and understanding" and has been apprised of his rights, this Court will uphold the inquiry. Smith v. State, 407 So. 2d 894, 900 (Fla. 1981) (quoting Faretta, 422 U.S. at 835); see also Weaver v. State, 894 So. 2d 178, 192 (Fla. 2004) (recognizing that "[a] Trial Court may not impose counsel on a 'literate, competent, and understanding' defendant who has voluntarily waived his right to counsel"). The penalty phase transcript reveals that these requirements were met in Lamarca's case. The trial judge informed Lamarca that he would be at a "great disadvantage" because he did not have the legal training of the state attorney, and on numerous occasions the judge expressed his disproval of Lamarca's decision. The judge questioned Lamarca about his prior experience in the criminal justice system, recognizing that he had participated in two jury trials prior to this penalty phase, and the judge also considered Lamarca's mental condition, noting that his interactions with Lamarca during the many stages of trial indicated that Lamarca was intelligent and competent. In the end, the trial judge found that Lamarca was intelligent and that he had knowingly and voluntarily asserted his right to represent himself.

It was fundamentally wrong in a death penalty case for the Trial Court to have not informed the Appellant that he had preserved this point for appeal and that he would not get another chance to deal with the evidence of the sentencing phase in the event that he failed with

his Appellate or other extraordinary remedies. Even the State Attorney view that the Trial Court was treading on thin ice and that it would have been appropriate for standby counsel to be present.

Accordingly, contrary to the clear dictates of this Honorable Court, it is clear that the record of these proceedings has done little more than cloud the issue of counsel. Had Judge Downey, as directed by the brief and concise order of this Honorable Court, conducted a thorough and meaningful Faretta inquiry on December 12, 2002, this issue might have been result before it got clouded and obscured with the matter of which judge would preside over the case. Because the nonlawyer Appellant was steering through a series of pretrial hearings on complicated matters without counsel and because he was convinced that any participation during the hearing would waive his argument about the proper Trial Court, it is not possible to say that the Appellant has received the kind of due process of law that ought to be required in order to put a person to death.

Appellant should be allowed a new sentencing hearing which should occur only after a valid and adequate Faretta hearing has been conducted and only after the appointment of standby counsel who would be available to the Appellant in the event of inquiry by the Appellant about his legal rights.

D. It Was Error for the Trial Court to Permit Members of the Office of the State Attorney to Act as Surrogates for Reading Testimony from Appellant's Original Trial to the Jury.

While there are not Florida authorities on the issue, it should not require a legal authority to understand that one of the reasons for having a trial is to permit the trier of fact to evaluate the testimony of the witnesses, including their recall and demeanor, for the purpose of making an informed and fair decision. In the present case there were three prior witnesses who were purportedly unavailable. Two of them were lay witnesses to surrounding facts of the offense. The third was a jail informant who had cooperated with law enforcement and worn a body bug during an encounter with the Appellant (obviously unbeknownst to the Appellant) and had obtained an incriminating

statement.(R. 739-742) The two other lay witnesses were confirmed to have passed on but no records were available of the former jail informant, Ronald Rewis.

All three of these witnesses' testimony were presented to the jury by professional advocates of the State of Florida. In particular, a very distinguished member of the State Attorney's office (James Hellickson) read the testimony of the jail informant, Ronald Rewis, who was the most prejudicial and injurious to the Appellant.

There is an Illinois decision, People v. Miller, 311 Ill.App.3d 772, 725 N.E.2d 48, 244 Ill.Dec. 253 (Ill.App., 2000) , in which it was held to be error for a judge to read prior testimony for the obvious reason that it would present undue weight to the testimony, having come from the individual presiding over the action. It is difficult to distinguish that from having multiple State Attorneys, all of whom are identified as officers of the Court, who work for an elected official, and whose character and demeanor is likely are much divergent from the witnesses they are portraying. The Miller case

provides;

> After the jury's second note, the record is silent as to whether the trial Judge conferred with the attorneys and Defendant and, if so, whether Defendant's attorney objected to the Judge reading the transcript. All that can be gleaned from the record is that the Trial Court had a transcript prepared and then read the transcript to the jury. The transcript itself was not marked as an exhibit, and we have no way to review it to establish even whether it was identical to the Trial Judge's reading. We note there is no record to determine whether the transcript read by the Trial Judge was even certified by the court reporter who presumably transcribed it. There is no record of who prepared the transcript or from what source. Therefore, we cannot be certain that the words read by the Judge were actually the words spoken by B.C. Almost immediately after hearing the Judge read the transcript of what B.C. purportedly said, the jury returned a guilty verdict. Thus, the inference that the jury was persuaded by the Judge's influence to reach a verdict of guilty is inescapable.

Another Illinois decision, People v Willis, 349 Ill.App.3d 1, 811 N.E.2d 202, 284 (Ill., 2004) has reinforced this principle. Citing Miller, and applying Miller to the facts of Willis, the court held:

> In this case, the Trial Court told the jury that Judge Locallo was a "full Circuit Judge." Judge Locallo testified that he had 14 1/2 years' experience as a Judge and that he had presided over a prior proceeding in Willis' case. Judge

> Locallo identified Willis as the man Tanner had previously identified as the shooter. Cross-examination was minor when compared with the direct examination. Furthermore, the evidence against Willis was not overwhelming. In fact, the credibility of the two eyewitnesses was challenged in numerous ways. Under these circumstances, we cannot say that the jury was not influenced to believe Judge Locallo's testimony or that the jury did not give undue weight to the version of events described by Judge Locallo solely because of his position as a Judge, who had 14 1/2 years experience and had previously presided over at least two hearings in Willis' case. See, e.g., People v. Miller, 311 Ill. App. 3d 772, 782 (2000) (noting that where Trial Judge read prior testimony to jury, the court could not "be certain if the jurors were influenced to give greater credibility to B.C.'s testimony because the Judge read it to them"). Thus, we reverse Willis' convictions.

The reading of testimony is a task normally delegated to a court reporter who is perhaps the most neutral and detached person in the proceeding. This is how it is done when testimony is read back during jury deliberations and Appellant is aware of no Authority other than the Illinois authority which suggest that officers of the Court should not engage in this practice.

While it may be true that the unrepresented Appellant did not make an objection to this procedure (he was not objecting to anything

because of his misguided notions about waiving his Trial Court argument) it is also true that he did not stipulate to this procedure, which would seem to be a fair and minimal requirement of allowing this to occur and, about stipulation, the only proper option would be the Court Reporter.

The Appellant, again without making a formal objection, did question the witness representing the unavailability of Mr. Rewis and established that it was possible that the State had not made a significant enough search for Mr. Rewis for him to be formally declared unavailable. Even so, if he was unavailable, to permit him to be portrayed by Mr. Jim Hellickson, a very well regarded and distinguished member of the Office of the State Attorney, was equally prejudicial as having this jail informant testimony read to the jury by the Trial Court.

For this reason the case should be returned for a new sentencing hearing in which this testimony is either read by the court reporter or read by persons stipulated by both parties and not agents of the

opposing advocate.

E. The Testimony of Rewis Violated Miranda.

The right against self-incrimination and to be informed of counsel is a fundamental right. It was decided in the case of US V. Henry, 447 US 264 (1980)

and applied in this jurisdiction in State v. Malone , 390 So. 2d 338 (Fla., 1980) that it is improper for the state to subvert the Miranda protection by recruiting a surrogate (the jail informant who is here) to conduct an interrogation without affording proper Miranda rights.

> Malone argues that his convictions should be reversed and the cause remanded for a new trial because the Trial Court erred in denying his motion to suppress certain incriminating statements made by him to one of his cellmates who, unknown to Malone, was an informer for the State. He concedes that these statements were not coerced and were voluntary, but argues that they may not be used against him because they were deliberately elicited by a State agent in the absence of his counsel and without his being informed of his Miranda rights by the informant.
>
> The informer, who was also a prisoner, first met Malone in the Pinellas County jail in September, 1977. Two and one-half weeks after meeting Malone, the informer met Detective Hazzard who asked him to assist in finding the body of Jessee Woodward by just listening to whatever Malone said about the case and reporting anything he heard about

where the body was located. The informer testified that he did not ask Malone where the body was or in any way interrogate him, but he did suggest a plan to the police by which he might be able to obtain information from Malone as to where Woodward's body was hidden. The plan was to have the informer transferred to another county jail and then to have him come back and visit Malone in civilian clothes. Prior to being transferred, the informer went back to his cell and told Malone that he was being released and assured Malone that he knew a black female attorney whom he would try to retain for Malone. Under the misimpression that the informer would be able to assist him on the outside, Malone then told the informer that he had killed Woodward, that there were several things he wanted the informer to do for him, and that he would tell the informer about them when he returned on visitation day. Some time later, dressed in civilian clothes, the informer returned to the jail, as requested by Malone. Anxious to ensure that he would not be linked with Woodward's body, Malone gave the informer directions to where the body was located and instructed the informer to dispose of the remains. From the directions given by Malone, the police were unable to find the body.

Pursuant to police directions, the informer returned to the jail and told Malone that he was unable to locate the body from the previous directions. Malone then gave more detailed directions, but the police were still unable to find the body. The co-defendant, Freddie Morris, ultimately led the police to the body, which was located in the area described by Malone in his directions to the informer.

In light of the recent pronouncement of the Supreme Court of the United States in United States v. Henry, 447 U.S. 264, 100 S. Ct. 2183, 65 L. Ed. 2d 115 (1980), we hold that Malone's incriminating statements made to the State informant while in custody in the Pinellas County jail should

have been suppressed because these statements made in the absence of counsel, with no prior waiver of counsel, were directly elicited by the State's stratagem deliberately designed to elicit an incriminating statement from Malone. Therefore, the introduction of these statements violated Malone's Sixth Amendment right to the assistance of counsel. Detective Carpenter testified that on several occasions he had advised Malone of his Miranda rights and had attempted to interview Malone regarding the Tanner and Woodward murders but that Malone had refused to be interviewed. It was thereafter that the ruse of the cellmate being released was concocted and employed to derive information from Malone as to the whereabouts of Woodward's body.

In United States v. Henry, the Supreme Court held that Henry's statements to a paid police informant-cellmate were improperly admitted at trial because the government violated Henry's Sixth Amendment right to counsel by intentionally creating a situation likely to induce Henry to make incriminating statements without assistance of counsel. Federal agents had instructed the informant to be alert to any statements made by the federal prisoners regarding charges against them but had specifically directed him not to question Henry or the other prisoners about their charges. Distinguishing the situation before it from one where the "listening post" is an inanimate listening device having no capability of leading the conversation into a particular subject or prompting a reply and from the situation where an informant is placed in close proximity but makes no effort to stimulate conversations about the crime charged, the Supreme Court held that the government agent in Henry was not a passive listener but had had conversations with Henry while Henry was in jail. The Court determined that Henry's incriminating statements were the product of these conversations and explained that, from the fact that the

informer was paid by the government on a contingent fee basis for incriminating information, it could be assumed that he would take some affirmative steps to secure this information. Where the accused is in the company of a fellow cellmate who unbeknownst to him is acting as an informer, the Court declared, the conversation stimulated may elicit information which the accused would not intentionally reveal to a government agent. The Court reiterated its previous pronouncement made in Massiah v. United States, 377 U.S. 201, 84 S. Ct. 1199, 12 L. Ed. 2d 246 (1964), that to have any effect, the sixth amendment must apply to indirect surreptitious interrogations. It further explained that since Henry was unaware that he was talking to a government agent, he could not be held to have waived his right to counsel. Finally, it emphasized the relevancy to its holding of the fact that at the time Henry was engaged in conversation by the government agent, he was incarcerated, and the Court stated:

> While the concern in Miranda was limited to custodial police interrogation, the mere fact of custody imposes pressures on the accused; confinement may bring into play subtle influences that will make him particularly susceptible to the ploys of undercover government agents. The Court of Appeals determined that on this record the incriminating conversations between Henry and Nichols were facilitated by Nichols' conduct and apparent status as a person sharing a common plight. That Nichols had managed to gain the confidence of Henry, as the Court of Appeals determined, is confirmed by Henry's request that Nichols assist him in his escape plans when Nichols was released from confinement.
>
> 100 S. Ct. at 2188.

In the present case, the subterfuge employed by the informer and condoned and participated in by the State

> precipitated the incriminating statements made by Malone. During the at least month-long period of time preceding the informer-cellmate's "release," Malone had not told the informer that he had committed the murder, nor had he ever mentioned the location of Woodward's body. Not until after being informed by the cellmate of the cellmate's impending release, did Malone confess to him that he had killed Woodward and disclose the whereabouts of the victim's body. Because of Malone's confidence which the informant had managed to gain and because Malone felt that the informer could assist him on the outside, Malone confided in the informer and enlisted, he thought, the informer's assistance in disposing of the body. Although it does not definitively appear in the record that the informer gained any benefit from the State for the disclosures he was able to obtain from Malone, it was indirect surreptitious State action which elicited Malone's incriminating statements without assistance of counsel and therefore in violation of Malone's Sixth Amendment right.
>
> Reviewing the record in light of the error of admitting these incriminating statements into evidence, we are unable to conclude beyond a reasonable doubt that the informer's testimony did not influence the jury. Chapman v. California, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). Since we conclude that this error is reversible, we find it unnecessary to resolve Malone's remaining challenges to his convictions and sentences.
>
> Accordingly, the judgments are reversed, and this cause is remanded for a new trial.

That was precisely what happened in this case. Mr. Rewis had cultivated a relationship with the Appellant and the Appellant had

apparently made certain incriminating statements to him. The State of Florida unlawfully subverted this relationship by convincing Mr. Rewis to wear a body bug and to have an encounter with the Appellant in an open area of the jail property. The Appellant fell for this trap and made an incriminating statement which was used against him both in his original trial and also in his penalty phase of June 23-24, 2003.

This is another situation in which standby counsel would have almost certainly avoided a gross prejudicial error. Appellant believed that any objection he made would undermine his argument about the Trial Court assignment and so he neither agreed to accept counsel nor to participate in the penalty phase in any way. The Trial Court exacerbated this situation by refusing to exercise its own discretion to ensure that standby counsel was available.

F. The Cumulative Effect of the Errors Requires Reversal of the Case.

Appellant is of the view that each of the errors described above is sufficient to require the case to be returned for a new proceeding.

This is especially true with respect to the denial of the original sentencing judge and the matters regarding both advising the Appellant of his right to counsel and ensuring a valid waiver of counsel.

However, even if no one error as described above may convince this Honorable Court at the matter must be reversed, it is respectfully submitted that the cumulative effect of those matters which are clearly erroneous not only exacerbated each other but combined to result in a proceeding which must be reversed.

The cases are clear that it is proper to consider such cumulative effect as long as genuine errors and not mere complaints are what are being accumulated.

VI. CONCLUSION

This entire preceding began with the flagrant disobedience of a clear admonition of this Honorable Court to "immediately" ad buys the Appellant of his right to counsel during the penalty phase. Because this was not done numerous other decisions made during the proceedings, including those of both the court and the Appellant, are under a cloud which provides a rain heavy enough to wash away the validity of this proceeding.

The Appellant had requested that his sentencing proceeding be conducted by the original sentencing court. This was required by FlaRCrimP§3.700(c)(2) unless it was "necessary" to reassign the case. Since the original sentencing judge was nearby and available such necessity did not exist and he should have been accorded that request. Instead, the Chief Judge stated that this matter was within his "sole discretion" when, in fact, the Chief Judge must obey the law just like the rest of us. Because this was a deliberate denial of the Appellant's right and further deprived him of the opportunity to waive a jury and

because it can no longer be corrected is sentenced to death must be reversed and commuted to life without parole for a period of 25 years.

To further exacerbate the failure to advise the Appellant of his right to counsel, the Trial Court conducted a Faretta inquiry which was little more than a sham. The Trial Court simply rattled through the inquiries noting that the Appellant refused to answer and once even chimed in agreement to the Appellant's questioning why it was even necessary. This Faretta inquiry occur only a week before the matter was originally set for jury trial. The quality of this inquiry was far short of the guidance provided by the cases.

There were several witnesses who could not be found from the original proceeding and the State chose to present their testimony with the assistance of members of the Office of the State Attorney who read the answers of the witnesses from 20 years ago. The three witnesses included two working-class lay witnesses and a jail inmate. A proper way of reading testimony to jurors is through the use of the original or at least a successor court reporter. This presents

a neutral and detached portrayal of the testimony. As the cases cited above show, the use of court officials undoubtedly had the effect of bolstering the testimony. Moreover, since the Appellant was not participating in the proceeding it cannot be said that he had "stipulated" to this procedure.

Inmate Ronald Rewis (whose testimony was offered through Mr. James Hellickson) had been part of a stratagem to trick the Appellant into making a confession 20 years ago. He had obtained the confidence of the Appellant through his jail contacts and then was placed by the sheriff into an encounter with the Appellant while wearing a body bug so that the Appellant's statement would be known to the police. This statement should not have been permitted to go to the jury and any statement derivative from that should not have been permitted to go to the jury. Because of the Appellant was not represented it is impossible to say that he was aware of this possible objection. Because the Appellant's right to counsel was never clearly communicated to him and was never appropriately waived it would be wrong to hold

this error to have been waived by the Appellant.

WHEREFORE, Appellant prays this Honorable Court enter in order commuting the death sentence to life without parole for 25 years or, alternatively, to set aside the death penalty sentence and remand for a new penalty phase.

Respectfully Submitted:

Charles E. Lykes, Jr., Esquire
Counsel for Appellant
501 S. Ft. Harrison Ave., Suite 101
Clearwater, Florida 33756
Phone: 727-441-8308 Fax: 727-442-8562
Email: charles@lykeslaw.com

_____
FBN: 291341

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing was served upon:

Bill McCollum, Esq.
Office of the Attorney General
Concourse Center # 4
3507 Frontage Road, Suite 200
Tampa, Florida 33607

by ( ) regular Unites States mail or ( ) by hand delivery or ( ) by facsimile and/or by _____ this _____ day of _____, 20____.

_____
Charles E. Lykes, Jr., Esq.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the foregoing brief has been printed in proportional Times New Roman, 14 point type and that, except for quotations, the entire document is double spaced.

Respectfully Submitted.

Charles E. Lykes, Jr., Esquire
Counsel for Appellant
501 S. Ft. Harrison Ave., Suite 101
Clearwater, Florida 33756
Telephone: 727-441-8308
Facsimile: 727-442-8562
Email: charles@lykeslaw.com

FBN: 291341