IN THE SUPREME COURT OF FLORIDA

JOHN BRUCE VINING,
Appellant,
vs.
STATE OF FLORIDA,
Appellee.

CASE NO. 75,915

APPEAL FROM THE CIRCUIT COURT
IN AND FOR ORANGE COUNTY
FLORIDA

REPLY BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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* Appellant relies on the argument set forth in the initial brief as to these points on appeal.

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REPLY BRIEF OF APPELLANT

PRELIMINARY STATEMENT

The state disputes that the clerk distributed copies of Vining's Interstate Agreement on Detainers ("IAD") request to the assigned judge and to the state attorney's office. (AB1)[1] In that regard, the clerk testified as follows:

> Q. (Defense Counsel) I show you some paperwork that I removed out of the file. Do you recognize that?
>
> A. (Deputy Clerk Worthum) Yes.
>
> Q. And can you tell me what you recognize that paperwork to be?
>
> A. An agreement on detainer.
>
> Q. And do you see your handwriting anywhere on that paperwork?
>
> A. Right, it is my handwriting on the right side of this.

[1] (AB) refers to the answer brief of appellee.

Q. Can you tell me what was written in your handwriting?

A. This document would go -- we would refer to the judges involved, send a copy to the state attorney, the intake division, a copy to the division, whatever number it would be. This would be division 17. And a copy to extradition.

Q. **Okay. So the notations listing Judge Baker or division 17, state attorney, and intake in your handwriting to show who you sent it to**?

A. **That's correct.**

Q. **Okay. You would have xeroxed a separate copy for each person?**

A. **Yes, that's correct.**

Q. **And what day would that have been done on?**

A. **This was clocked in July 6th at 8:11, so the clerk's office -- we like to do it within twenty-four hours. The top notch would be about forty-eight hours we would like to turn all the mail in.**

Q. **So within twenty-four to forty-eight hours you would have made the copies and they would have gone out into the mail?**

A. **That's correct.**

(R1688-89).

After the judge prepared the written findings of fact indicating that no copy of Vining's request was in the state attorney's file, the prosecutor belatedly admitted that there **was** a copy in his file, but **he** (that prosecutor) could not personally say where it came from:

DEFENSE COUNSEL: Perhaps if we could have the state get the copy of the other

> file that has it, I guess it might be a file Simone Rosenburg prepared. Perhaps she would know when the state received it, Judge.
>
> PROSECUTOR: Your Honor, I don't wish to reopen the hearing.
>
> THE COURT: I understand it ought to be correct. I was going on what my recollection was. And what I understood you said was you had a copy of this. But you did not have any -- you didn't show any receipt from the clerk. And that you didn't -- that you had somebody go over to the file, and make a copy of it. That's a piece of paper you were holding in your hands.
>
> PROSECUTOR: Yes sir. **I did not represent, that I recall, I do not wish to represent that my file didn't have a copy. I don't know where it came from. Earlier than that one we waived in our hands.** But I don't know -- I can't say it came from the clerk. I know it didn't come from the defendant. It is addressed to the Sheriff. But there is one in there. Now, what I argued to you was it really makes no difference, because if the defendant will perfect it, he will be able to prove that he had sent the thing and when he did, and that the tolling was there. Regardless of when he sent it or how.

(R1824-25).

Below, the state argued **solely** that the IAD request should be denied because the time limits were tolled when Vining filed multiple motions. (R1674-1677) The state did **not** dispute that both time considerations (the 180 day and 120 day periods) applied. The state conceded that it had, through prosecutor Rosenberg's actions, triggered the 120 day provision of the IAD and that ". . . the speedy trial rule in this case under **the IAD**

would have run . . . on one of two days, either December 29, or January 8, <u>is the State's contention on how you would set it</u>." (R1675-76)

The state did **<u>not</u>** claim that it had not had actual notice of Vining's IAD request, and the trial court's finding in that regard is totally contrary to the evidence, not only because of the above belated admission by the prosecutor but also because Assistant State Attorney Simone Rosenberg's signature is all over Vining's IAD paperwork. (R2338-2339).

The finding that the court did not have actual notice of Vining's request is also unsupported by the record, in that Judge Miller's signature is on Vining's IAD request (R2338), a copy of Vining's request was properly filed in the court file and Judge Baker's finding of no actual notice to the court is qualified by his observation that he never looked in the court file until January 16, 1990. (R2344, para. 12).

POINT I

THE TRIAL COURT ERRED IN DENYING VINING'S MOTION TO DISMISS DUE TO THE STATE'S VIOLATION OF THE INTERSTATE AGREEMENT ON DETAINERS.

The state argues that "The extensive motion practice by defense counsel tolled the time limits for bringing Vining to trial." (AB2) The state's position is untenable. Simply said, in order to prepare for trial, both parties must file motions to frame the issues. Twenty pre-trial motions in a capital case hardly qualifies as "extensive" motion practice, especially where the majority of the motions were geared toward the death penalty. The state can show no prejudice in the way that the motion practice occurred here. Certainly no delay was caused by defense motions and, more importantly, Vining was at all times available to stand trial.

According to the state, a defendant who has applied for the protections of the IAD must simply await trial and file no motions lest he be deemed to have "tolled" the 180 day time period. Such is not the law under the clear language of the Interstate Agreement on Detainers, which expressly provides:

> **ARTICLE VI**
> **Tolling. Limitations**
>
> (a) In determining the duration and expiration dates of the time periods provided in Articles III and IV, the running of said time periods shall be tolled **whenever and for as long as the prisoner is unable to stand trial**, as determined by the trial court having jurisdiction of the matter.

> (b) No provision of this agreement, and no remedy made available by this agreement, shall apply to any person who is adjudged to be mentally ill.

Section 941.45, Article VI.

None of Vining's motions rendered him "unable to stand trial." The motions filed by Vining are the following:

> Alternative Motion to Vacate Death Penalty (R2237-38)
>
> Motion to Preclude Challenge for Cause (2239-40)
>
> Motion for List of Prospective Jurors in Advance of Trial (R2241)
>
> Motion for Additional Peremptory Challenges or to Declare Fla. Statute 913.08(1)(a) Unconstitutional (R2242-43)
>
> Motion in Limine regarding Grand Jury (R2244-45)
>
> Motion to Declare Section 921.141(5)(h), Florida Statutes, Unconstitutional (R2246-56)
>
> Motion to Dismiss Indictment or to declare that Death is not a Possible Penalty (R2257-58)
>
> Motion for Individual and Sequestered Voir Dire (R2259-61)
>
> Motion to Declare Florida Statute 921.141 Unconstitutional (R2262-66)
>
> Motion for Juror Questionnaire to Suppl. Voir Dire (R2267-68)
>
> Motion to Impanel Second Sentencing Jury (R2269)
>
> Motion to Produce Criminal Records of State Witnesses (R2270-71)
>
> Motion for Evidentiary Hearing (R2272-73)

Motion for Statement of Aggravating Circumstances (R2274-76)

Motion for Statement of Particulars (R2277)

Motion to Suppress Tainted Testimony and Evidence. (R2279-91)

Motion in Limine Re: Williams Rule Evidence (R2292-93)

Motion to Prohibit In-Court Identification by Witness Whose Memory has been Hypnotically Refreshed (R2294-95)

Motion to Prohibit State from Calling Hypnotist and Tainted Witness (R2299-2300)

Motion for Individual and Sequestered Voir Dire (R2308-2322)

Motion to Discharge Based on the Interstate Agreement on Detainers (2328-30)

Significantly, none of the above motions in any way caused a continuance in the proceedings or suggested that Vining was not mentally competent to proceed to trial. See Baxter v. Downey, 16 FLW D430 (Fla. February 8, 2d DCA 1991)(by requesting competency examination defendant tolled time for speedy trial under Fla.R.Crim.P. 3.191); Taylor v. State, 557 So.2d 138 (Fla. 1st DCA 1990)(defendant's speedy trial rights not violated where counsel, though objected to by defendant, required continuance to provide competent representation); State v. Abrams, 350 So.2d 1104 (Fla. 4th DCA 1977)(speedy trial rule waived where defense counsel requested continuance in defendant's absence).

The decisions relied on by the state at trial to argue that the filing of motions tolls the times within which to be

tried under the IAD are totally inapposite, for in those cases defense motions for continuance were filed.

On appeal, the state relies solely on language in United States v. Nesbitt, 852 F.2d 1502, 1516 (7th Cir. 1980) to argue that filing motions tolls the time limits under the IAD. AB at 8. A careful reading of that decision shows that Nesbitt filed motions to obtain different counsel and later, when representing himself, obtained a continuance when arguing his own motions. Further, he fought extradition proceedings from Indiana to Nebraska. The federal government, well before expiration, timely moved to toll the IAD time while the Nebraska charges were litigated. Nesbitt, 852 F.2d at 1507-8. The court noted that, after the speedy trial again began running, Nesbitt filed a pro se motion seeking appointment of new counsel and, over a month later, filed a motion to proceed pro se. Nesbitt, 852 F.2d at 1508. These motions were discussed as follows:

> In the case at hand, we hold that both the district court's grant of a continuance on September 30, 1986, as well as the periods of delay occasioned by the multiple motions filed on behalf of the defendant, operate to toll the running of Articles III and IV as to the court's September 30, 1986, motion hearing, at the latest.

Nesbitt, 852 F.2d at 1516. The court previously observed, "On September 30, 1986, the court initiated hearings on all motions then pending. This hearing was resumed on August 27th **upon the defendant's motion.**" Nesbitt, 852 F.2d at 1508 (emphasis added). Clearly, the continuance granted Nesbitt on September 30, 1986,

rendered Nesbitt unavailable for trial under the IAD. Here, however, Vining was at all times available for trial.

The real flavor of the state's argument comes through at page 10 of the answer brief, where the state asserts, "Even assuming arguendo that the provisions of the IAD were violated in this case dismissal of the indictment is not warranted under the clearly intended purpose of the IAD and the circumstances of this case. The IAD amounts to nothing more than a statutory set of procedural rules which clearly do not rise to the level of constitutionally guaranteed rights." (emphasis added) In plain terms, the state argues that it should be allowed to violate laws passed by the Florida Legislature because they are not constitutional rights.

The failure of the state to adhere to duly-enacted statutory time constraints results in an absolute barr to further prosecution of the defendant, irrespective of guilt. For instance, violation of Section 775.15, Fla. Stat. (1989) by the state creates an absolute bar to prosecution even when raised on direct appeal after a defendant has been tried and found guilty. See Mead v. State, 101 So.2d 373, 375 (Fla. 1958) ("It was incumbent on the state not only to prove that the Appellant perpetrated the crime but that he did so within two years of the filing of the information[.]")(emphasis added). See also United States v. Williams, 615 F.2d 585, 590 (3d Cir. 1980)("Although an IAD violation may have little if no bearing on the prisoner's guilt or innocence, nonetheless Congress chose to make the

defense absolute when the Government violates the act[.]").

The state's attempt to link the jury's determination of Vining's guilt with its own violation of the IAD statute is similar to Saadam Hussein attempting to link his invasion of Kuwait to resolution of the Palestinian question in Israel. The concerns are quite separate, and it is difficult enough for a court to isolate and consider legal issues in the judicial vacuum that due process requires without having the state urge that statutes can be violated with impunity by the state because the defendant has been found guilty --- the ends justify the means. Where, as here, the Florida Legislature has enacted an absolute statutory barr that prohibits late prosecution, a defendant's guilt is an irrelevant consideration.

For that reason, there can be no "harmless error analysis" where the state violates prosecution requirements expressly specified by statute. The state's violation of the time requirements set forth by Section 91.45 require that the conviction be reversed and that Vining be returned to Georgia custody.

POINT II

THE TRIAL COURT VIOLATED THE DICTATES OF GARDNER V. FLORIDA, AND DENIED DUE PROCESS OF LAW, THE RIGHT TO CONFRONT WITNESSES, AND EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION BY SENTENCING THE DEFENDANT TO DEATH BASED ON INFORMATION NOT PRESENTED IN OPEN COURT.

The state "questions the ethics" of raising the instant issue on appeal where "The letters of the trial judge in the record demonstrate clear knowledge on the part of defense counsel of the judge's undertaking." (AB at 15, emphasis added). The letters do **not** show that defense counsel had clear knowledge of the judge's active independent investigation and, even assuming such knowledge, it is respectfully submitted that defense counsel cannot waive a defendant's fundamental right to be present when evidence is presented against him.

The state contends, "Due to lack of objection and acquiescence and tacit agreement by defense counsel, there is no Gardner issue in this case. That appellate counsel may not have a meeting of the mind with trial counsel does mot (sic) create an appellate issue." (AB at 15). In reply, Vining respectfully submits that there is no disagreement or lack of communication between the undersigned and Vining's trial counsel, and that an appellate issue of fundamental proportions exists due to the denial of due process that occurred here.

THE LETTERS

The undersigned has consulted with trial counsel in reference to this issue and it is respectfully submitted that the letters do not reveal in any way whatsoever the extent of the trial judge's independent investigation into the irrelevant matters that, for the first time, were revealed in the sentencing order. The letters which the trial court mailed to the respective parties counsels are appended hereto as Appendix A. Those letters constitute an after-the-fact revelation that attempts were made to secure certain items. The letter does not state that the judge would continue his efforts until he succeeded in his quests and investigations. Certainly, defense counsel could not anticipate even in light of these letters that Judge Baker would actively investigate the matter on his own.

NO PERSONAL WAIVER BY DEFENDANT

The undersigned will not belabor the well-established law that a personal waiver from the defendant is required for there to be a waiver of fundamental rights.

> The question of a waiver of a federally guaranteed constitutional right is, of course, a federal question controlled by federal law. There is a presumption against the waiver of constitutional rights (citations omitted), and for a waiver to be effective it must be established that there was "an intentional relinquishment or abandonment of a known right or privilege." (citation omitted).

Brookhart v. Janis, 384 U.S. 1, 4 (1966).

This Court has held that a defendant can voluntarily

waive his presence during a critical stage of his or her capital trial:

> A capital defendant is free to waive his presence at a crucial stage of the trial. Peede v. State, 474 So.2d 808 (Fla. 1985). Waiver must be knowing, intelligent, and voluntary. Francis v. State, 413 So.2d 1175 (Fla. 1982). Counsel may make the waiver on behalf of a client, **provided that the client, subsequent to the waiver, ratifies the waiver either by examination by the trial judge, or by acquiescence to the waiver with actual or constructive knowledge of the waiver**. See State v. Melendez, 244 So.2d 137 (Fla. 1971).

Amazon v. State, 487 So.2d 8, 11 (Fla. 1986)(emphasis added). Applying that standard to these facts, it is clear that there is no effective waiver by Vining of the right to be present and to confront the evidence considered by the trial judge when deciding what sentence to impose.

Because the trial judge improperly conducted an active investigation outside of the courtroom in the absence of the defendant and later used the information he developed in deciding whether to impose the death penalty, Vining was denied his rights to due process, confrontation of evidence/witnesses and effective assistance of counsel guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments and Article 1, Sections 9, 16, 17 and 22 of the Florida Constitution. The death sentence must accordingly be reversed and the matter remanded for a new sentencing proceeding.

POINT III

THE TRIAL COURT ERRED IN ALLOWING THE STATE TO PRESENT HYPNOTICALLY-TAINTED TESTIMONY.

The state argues that the trial court found no mind altering experience that would make the witnesses susceptible to suggestion in the manner described in Stokes v. State, 548 So.2d 188 (Fla. 1989). (AB at 29) To support this premise, the state cites the record on page 1139. There, the judge stated:

> JUDGE BAKER: Now, I've -- I'm not a good candidate for hypnosis, as I understand it; but I'm told I don't -- I can't get many profound benefits from it. Some people say there are profound benefits, and I don't get them at all. But when I read this case, I think I can understand that there may be some sleep-like state, trance-like state, which we know from side shows at carnivals and old Mister Mesmer years ago who popularized it in kind of a vaudeville act that he took around the country. And it came to be known as mesmerizing.
>
> But I want you to -- I want the record -- I think it's only fair that the record reflect that, as I listen to these people, what they are talking about is a state of concentration which I can appreciate as one that I have, just out of curiosity, tried myself as a harmless enterprise and didn't do anything except help somewhat in relaxation. That's the reason its suggested; and I don't believe any of these people were in -- from what they say, I can identify them as having an experience which concentration that is not mind-altering, that is not -- does not make you susceptible to suggestion in the way its described in that Stokes case.
>
> Now, there may be such a state, but these people aren't describing being in such a state. I've never been in such a state that anybody could suggest anything to me that -- the only thing it

> did, and I found it, oh, just kind of an interesting experience. It would be like -- I don't know. I can't compare it to anything except something very insignificant. And so I do bring that experience to this and that understanding.

(R1139-40)

From this, it is clear that, Judge Baker did **not** use the standard prescribed by this Court in Stokes. Instead, based primarily on his own experimentation with hypnosis, Judge Baker required that a witness be affected to the extent that he or she qualifies for a "vaudeville" show before finding the testimony inadmissible. Clearly, this is not the correct standard.

The witnesses in this case underwent hypnosis sessions and, try as the state might, calling those sessions "relax and recall" or "progressive relaxation techniques" or anything else does not alter the fact that an experienced police hypnotist, using a Chevault's Pendulum, conducted sessions whereby the state of awareness/ perception of the witnesses was altered so as to enhance their recall. Being cognizant of the legal ramifications of the procedure (R1738), the police obtained as much information from the witnesses prior to the hypnosis sessions. The sessions were unrecorded and attended by investigators having extensive knowledge of this case. (R1738) According to the hypnotist, the difference between what was done here and hypnosis ". . . is the intent, as far as I'm concerned, and what I am trying to do with the person." (R1734) The test set forth in Stokes does not concern in any way whatsoever what the intent of the hyptonist was.

The record affirmatively establishes that the procedure employed by the hypnosist "altered the state of awareness" of the witnesses. Pursuant to Stokes, the testimony concerning the witnesses' recollection during and after the hypnosis sessions should have been suppressed upon timely and specific motion. Because it was not, the convictions must be reversed and the matter remanded for a new trial.

CONCLUSION

Based on the argument and authority previously set forth, this Court is respectfully asked for the following relief:

POINT I: To reverse the conviction and order the dismissal of charges due to the violation of the IAD.

POINTS II AND VII: To reverse the death sentence and remand for resentencing due to the Gardner violation and the failure to properly consider valid non-statutory mitigation.

POINT III: To reverse the conviction and remand for retrial due to the violation of Stokes v. State.

POINT IV: To reverse the conviction and remand for retrial due to the unconstitutional jury selection procedure.

POINTS V AND VIII: To vacate the death penalty and remand for a new penalty phase because of improper aggravation and argument which makes the death recommendation unreliable.

POINTS VI AND IX: To reverse the death penalty and declare Section 921.141, Florida Statutes unconstitutional.

Respectfully submitted,

JAMES B. GIBSON
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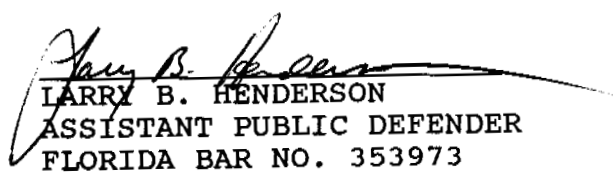
SEVENTH JUDICIAL CIRCUIT



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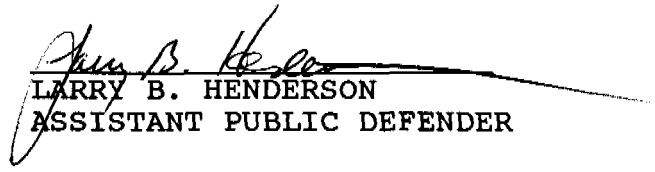
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Robert A. Butterworth, Attorney General, 210 N. Palmetto Avenue, Suite 447, Daytona Beach, Florida 32114 in his basket at the Fifth District Court of Appeal and mailed to John Bruce Vining, #929133, P.O. Box 747, Starke, Fla. 32091 on this 8th day of March, 1991.



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