IN THE SUPREME COURT OF FLORIDA

JESSIE JOSEPH TAFERO,

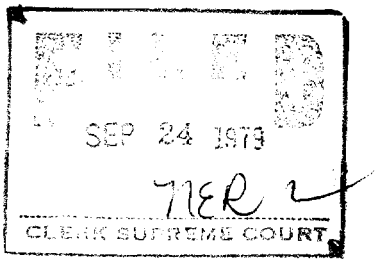
Appellant

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 49,535



INITIAL BRIEF OF APPELLANT

On Appeal From the Circuit Court of the 17th Judicial Circuit of Florida, In and For Broward County.

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PRELIMINARY STATEMENT

This cause arose in the Criminal Division of the Circuit Court, Seventeenth Judicial Circuit of Florida, In and For Broward County; and is on direct appeal to this Court pursuant to Article V, Section (3)(b)(1), Florida Constitution. Appellant was the defendant below and will be referred to as he appears before this Court.

In the brief the symbol "R" followed by the volume number will be used to refer to the main transcript of record consisting of nine (9) volumes. The symbol "S" will designate the one volume supplemental transcript of record containing seventy-two (72) pages. The symbol "SR" followed by the volume number will denote the supplemental record which contains four (4) volumes.

STATEMENT OF THE CASE

On March 4, 1976 an indictment was filed charging Appellant, Sonia Jacobs and Walter Norman Rhodes, Jr. with two counts of first degree murder, one count of robbery and one count of robbery and one count of kidnapping(RI 1-3). Appellant appeared for arraignment on March 8, 1976 was adjudicated insolvent and the Office of the Public Defender was appointed to represent Appellant(R I 4); the assistant public defender waived arraignment and the court entered pleas of not guilty on all counts(RI 4). However, since the assistant public defender had not consulted with Appellant about arraignment and Appellant did not fully understand the proceedings(SR IV 4-7); Appellant then expressly stood mute and the court entered not guilty pleas (SR IV 7).

Appellant was tried separately from the co-defendants. Trial by jury commenced, over objection(R I 56-57 ; R III 4-7), on May 10, 1976 and on May 17, 1976 after deliberating five hours the jury returned verdicts of guilty as to all four counts(R I 100; R II 150-153; S 37). Appellant was adjudicated guilty on all counts (R I 100; R II 154-157; S 43-45).

The penalty phase of the trial was held the next day, May 18, 1976 (R II 158, S 45). The jury returned an advisory sentence of death as to counts I and II(R II 159, 167-167A, S 61). The trial court then sentenced Appellant to consecutive sentences of death for counts I and II and to concurrent sentences of life imprisonment for counts III and IV(R II 160, 168-171, S 64-66). On May 20, 1976, the trial judge filed his written sentence and findings of fact relating to the death sentence(R II 172-176).

STATEMENT OF THE FACTS

The eyewitness testimony consisted of two truck drivers who were

present at the I-95 rest area at the time of the incident. The first witness was Pierce M. Hyman, a driver for Pilot Frightways(R III 14). Mr. Hyman was parked approximately 150 feet directly behind the vehicles which were facing north(R III 18-19). From his truck, Mr. Hyman saw the trooper bent over in the open door of the Camaro(R III 21). Behind the trooper he saw a man wearing a T-shirt(the Canadian constable) (R III 22-23). A man(Walter Rhodes) was standing in front of the Camaro (R III 23-24). The trooper then went around the front of his car and used the radio(R III 24-25). The trooper then returned to the Camaro (R III 25).

There was a man sitting in the driver's seat of the Camaro who had a goatee, wearing a brown jacket(Appellant) who had gotten out of the Camaro before the trooper returned(T III 25-26). The man in the brown jacket(Appellant)* walked over to the grass "like he was stretching." The man then walked back between the cars and leaned on the front fender of the Camaro(R III 27). The trooper then grabbed the shoulder of Appellant, pulled Appellant's arm behind his back and pushed him to the hood of the patrol car(R III 29). The "fellow in the T-shirt" pushed Appellant further over the hood of the car, holding Appellant's arm behind his back(R III 29) and pointed it back and forth between Rhodes and Appellant who was still being held over the hood with his arm "up around his back"(R III 30).

The trooper then turned to his right toward the Camaro. One shot was fired and he turned to the left toward his car away from the Camaro (R III 31). Then "there were several shots fired in rapid succession"(R III 31). While the shots were fired, Rhodes remained

*Mr. Hyman testified that he thought he could identify the man in the brown jacket but in response to the prosecutor's question, he stated he could not see the man in the courtroom(R III 27-28). However, as will be discussed later, the subsequent testimony indicates that the man in the brown jacket was Appellant.

in the front of the Camaro with his hands up and Appellant began scuffling with the Canadian who was holding Appellant over the hood of the trooper car(R III 32-33). Mr. Hyman said the shots "appeared" to come from "out of the back of the Camaro"(R III 33). Rhodes then got in the driver's seat of the patrol car(R III 33). Appellant opened the passenger door of the trooper's car and reached toward the Camaro and there was a baby handed out. A male and a female got out of the Camaro and got into the back seat of the trooper's car(R III 34). The trooper car then pulled out. He never saw Appellant bend over the trooper and get his gun(R III 57).

The second eyewitness was Robert McKenzie, a tractor-trailer driver for Food Fair/Pantry Pride(R III 59). When he pulled into the rest area at 7:10 A.M. the trooper was between the cars talking to a man with a beard and a brown jacket(Appellant)(R III 62-63). A man in a T-shirt was standing next to the trooper(R III 64). Rhodes was standing in front of the Camaro(T III 65). Appellant pointed to the bushes and went over to the tree("I guess he had to go to the bathroom" (R III 69). Appellant came back between the cars and began talking with the trooper again. Appellant sat down in the Camaro and then stood up and had a suitcase that he placed on top of the car(R III 71-72). The trooper "snatched the suitcase" and threw it into the back seat of his car(R III 72-73).

Mr. McKenzie then began pulling out of the rest area because he wanted to know who was in the Camaro(R III 73-74). In the car he saw someone with long hair and a blue shirt(Sonia Jacobs)(R III 74). He watched through his rearview mirror and saw the trooper begin to search Appellant. Appellant jumped back and they began to swing at each other -- the trooper swung first(R III 75). The trooper got Appellant's arm behind his back and pushed him over the car. The "guy with the white shirt" took over holding Appellant(R III 76). The trooper pulled his

gun and pointed at both Appellant and Rhodes(R III 76-77). Appellant was still being held by the Canadian over the trooper car with his hands behind his back(R III 76-77). The trooper used his radio and then returned to the rear of his car and swung at Rhodes(R III 79,92). The trooper turned and pointed his gun at Appellant and the Canadian who was holding him(R III 80).

Mr. McKenzie came as close as 50 feet from the cars(R III 84,91). He then heard some "fast shots." The trooper fell instantly and "the other guy"(the Canadian) fell right behind him. Rhodes ran between the cars to the door of the trooper car(R III 81). When the shots were fired Rhodes had his hands up(R III 81) and Appellant was being held with his hands behind his back by the Canadian(R III 81,94). Appellant turned around after the shots were fired(R III 81, 95). The Canadian had ahold of Appellant, pushing him against the trooper car, with Appellant's left arm behind his back(R III 94). Appellant turned after the shots had been fired(R III 95).

The only other witness to testify regarding the events at the scene of the alleged homicides was the co-defendant, Walter Norman Rhodes, Jr. Mr.Rhodes had entered pleas to substantially reduce charges in return for his testimony against Appellant and Sonia Jacobs Linder(R III 12). Rhodes testified that Appellant called him a week before the alleged incident and asked Rhodes to meet him(R IV 241). Appellant asked Rhodes to give him, his wife, and two children a ride and asked if they could stay at Rhodes' apartment in Fort Lauderdale(R IV 241-242). According to Rhodes, for the next several days he and Appellant drove around Miami to various places "selling dope, and what have you" (R IV 248). They eventually exchanged a rental car for a Camaro owned by Steve Addis(R IV 256-258). Rhodes stated that on February 19, 1976 they went to Miami but whoever they went to see was not home, so at Rhodes' suggestion, they went to the rest area on I-95, arriving at 2:00 A.M.(R IV 265-267). They slept in the Camaro.

Rhodes testified that he woke up when the trooper was looking through the window, "mumbling something" and opening the door(R IV 267-268). When he opened the door, the trooper immediately bent down and picked up the nine millimeter pistol that Rhodes had been wearing (R IV 269-270). The trooper placed the gun on the front seat of his vehicle(R IV 272).

According to Rhodes, he noticed Appellant pass a nine millimeter pistol between the bucket seats "to the rear, toward Sonia"(R IV 274). The trooper called Rhodes over to his car and asked who his probation officer was(R IV 275). The trooper then told Rhodes to stand in front of the trooper's car(R IV 276). The man in plain clothes with the trooper was standing near the left rear window of the Camaro(R IV 272, 277, 280). According to Rhodes the man stood by the Camaro "the whole time"(R IV 277).

According to Rhodes the trooper then "violently" told everybody to get out of the car and "bring all of your weapons"(R IV 280). Rhodes testified that when Appellant got out he and the trooper began scuffling and the trooper was trying to get Appellant against the trooper's car (R IV 281-282). One of the Appellant's hands was on the top of the trooper's car and the other hand was being held behind his back(R IV 282). Then "Irwin[the Canadian] must have grabbed him because [Appellant] was still up against the car"(R IV 283). The trooper pulled out his gun(R IV 283).

The trooper then used his radio from the passenger side of his car (R IV 284). Rhodes testified that he saw Appellant and the trooper scuffling(R IV 285). He said he did not notice Irwin(the Canadian) during the struggle(R IV 285). The testimony of Rhodes was that the fight moved out between the cars and Appellant had both his hands on the trooper's right arm which held the gun(R IV 285).

Rhodes stated that he then heard two shots and "the second one was

a distinctly loud boom, not like the nine millimeter ... "(R IV 286). Rhodes testified that he turned around and saw the trooper who was "frozen" with his gun in his right hand which was "hanging down" (R IV 286). He said Ms. Linder looked scared and had a nine millimeter pistol in her hand(R IV 286). According to Rhodes Appellant went to the Camaro and took the gun out of her hand; he leaned back against the driver's seat and fired up at an angle. Rhodes said Appellant fired four shots at the trooper(R IV 287) and then fired two shots at Irwin. Rhodes got in the driver's seat of the trooper car(R IV 289). According to Rhodes, Appellant picked up the trooper's gun and picked up shell casings from the pavement(R IV 290-291). Ms. Linder was getting out of the Camaro and into the trooper's car(R IV 291).

Rhodes said that there had been no discussion of or intent to take the trooper's car or gun at the time they pulled into the rest area, when they were in rest area, or during the shooting(R IV 301-203). They never talked about or planned to take the gun or car. Rhodes had lost count of the number of felony convictions he had, but he had been on the wrong side of the law most of his juvenile and adult life (R IV 310).

Dr. Abdullah Fattah performed the autopsies(R III 192). The trooper(Phillip Black) had four gunshot entrance wounds(R III 194) and the cause of death was gunshot wounds of the head and neck(R III 195). Mr. Irwin received two gunshot wounds(R IV 204).

The crime scene processor, Detective Harold Hoke, testified that when he arrived, the door of the Camaro was closed. The driver's window had been shattered and there was glass inside the car and on the ground outside(R III 141). He found one shell casing outside the car located two feet in front of the right front tire(R III 148,179) and two inside the Camaro.

William Munroe testified regarding atomic absorption tests. Mr. Munroe's conclusion regarding the swabs taken from Appellant was that

the results of the tests were "consistent with subject having handled an unclean or recently discharged weapon"(R V 545). Sonia Linder's test results were consistent with having handled an unclean or recently discharged weapon(R V 546).

Rhodes' test results revealed that "the concentrates and distribution patterns of the metals" were consistent with Rhodes "having discharged a weapon"(R V 546).

Mr. Munroe testified that if Rhodes had been wounded by a lead pellet in the back of the hand, his conclusion might be altered(R V 547-548). The remaining residue, he said, would be indicative of having handled an unclean or recently discharged weapon(R V 548). If Ms. Linder had washed her hands, the results could be affected(R V 550). Regarding Appellant, he testified that if his hands were forced open in order to take the swabs, that "might" affect the results of his tests (R V 551). However, a person could not rub off one metal without also removing others(R V 557). Paul Weber stated that they had to force Appellant's hands open in order to take the swabs(T V 508) and that he saw Ms. Linder put her hands in the toilet before the swabs were taken (R V 509).

Joseph Marhan processed the trooper vehicle(T IV 359). He removed a fishook-type barb from the weather strip of the right rear window (R IV 360-361) and found a copper fragment in the space between the windshield and left side of the hood(R IV 371). The right windshield trim of the vehicle had a hole in it(R IV 373).

In general the allegations regarding the kidnapping charge were that after Rhodes, Ms. Linder, the children and Appellant drove away in the trooper's vehicle, they left I-95 and stopped at a condominium complex and switched cars by requiring a man to accompany them in his Cadillac (R IV 293). According to Rhodes, he grabbed a gun, went over to the man, told him they wanted to "borrow" his car, pointed the gun and the

man handed the keys to Rhodes(R IV 294). Rhodes then "took off for the Cadillac"(R IV 294). According to Rhodes, Appellant, Ms. Linder and the kids were then coming and "grabbed the old man" and told him they had to get the baby to the hospital(R IV 295). Rhodes got in the driver's seat and they drove west, then north and then east where they saw a roadblock (R IV 296-297). Rhodes tried to go around the roadblock but shots were fired and he was wounded in the leg and hand(R IV 297-299).

The alleged victim, Leonard Levinson, lived at Century Village in Deerfield(R V 403). He said a man got out of the passenger door, he had a weapon, and told him he had a sick child and wanted to use his car(R V 408-409). The man with the gun got in the backseat with Mr. Levinson said the woman had a briefcase which she handed to Appellant who put it on the floor(R 410-411).

They were then caught in a "traffic jam"(R V 421), they swerved and the car stopped and then were surrounded by the police(R V 422).

Gary Green, the Palm Beach Sheriff's Office crime scene investigator processed the Cadillac(R V 578-579). Mr. Green also searched the attache case where he found two handguns(R V 583-586), a holster (R V 590), and an electronic Taser weapon(R V 587-588). In a purse, he found an unloaded weapon and a bag with seeds(R V 587).

Over defense objections, Heikki Ruttanen, Appellant's parole officer, was allowed to testify(R IV 350-353) that Appellant was paroled in June of 1973 and the last time he saw him was January, 1974(R IV 356-357). He stated that a parole warrant had been issued but had never been served and he did not know if Appellant was aware of the issuance of the warrant(R IV 358).

Near the end of the evidence, the prosecutor informed the court that he had a new witness, a federal prisoner in the "witness-marshal program" who had been given a new identity so "we don't know where he lives, or anything about him"(R VI 635). The Court allowed defense counsel to

speak with the witness for thirty minutes(R VI 637). Appellant objected to the testimony as going to the character of the Appellant(R VI 638), and requested further time to investigate the substance of the testimony, especially to locate other persons mentioned by the witness(R VI 638). Further, Appellant had a witness which he would need time to locate, who would testify that Appellant was not with the witness at that time (R VI 638-639). The trial court overruled the objection and allowed the witness to testify(R VI 640).

The witness, Ellis Marlowe Haskew, testified that Appellant(R VI 641) was at his apartment in North Miami, at 1:30 A.M. New Years of 1976 (R VI 641-642) and that Appellant mentioned that he had no intention of returning to prison(R VI 642). Appellant later renewed his request for adjournment to locate the persons referred to by Haskew(R VIII 359).

ARGUMENT

POINT I

APPELLANT WAS DENIED A FAIR TRIAL BY THE INHERENTLY PREJUDICIAL ATMOSPHERE SURROUNDING THE PROCEEDINGS BELOW AND BY THE REFUSAL OF THE TRIAL JUDGE TO IMPLEMENT PREVENTATIVE OR REMEDIAL ACTIONS.

There are essentially two aspects of the facts which impact on Appellant's fair trial right. The first aspect concerns those factors which vividly indicate the community prejudice against Appellant. The second aspect includes those incidents that reached directly into Appellant's trial and were prejudicial to Appellant.

The legal principles involved are first that the atmosphere was "inherently prejudicial" requiring a new trial and secondly that the trial judge faced with this charged atmosphere, failed to properly exercise his discretion by refusing to employ the requested preventative and/or curative remedies.

I. The Pervasive Setting

Appellant's trial was undertaken in an explosive atmosphere. The circumstances first came to light at his first appearance hearing

when Appellant stated that he had been beaten and denied any opportunity to try to contact a lawyer[1] since his arrest(about 24 hours)(SR II 2-3). By the time of his next first appearance hearing on March 5, 1976, Appellant's treatment in the jail resulted in his express request for medical attention(SR III 3) Appellant also renewed his request to make telephone calls and the court granted his request(SR III 3).

The severe nature of his treatment in the jail caused him to file a motion for protective order(RI 10-11) and a motion for medical services. The trial judge personally went to the jail and ordered that Appellant be taken to an oral surgeon(SR IV 9) and an optamologist(SR IV 10,19). The trial judge sternly warned the sheriff that he expected Appellant to be protected from such unprovoked attacks by the officers and that he did not expect anymore problems from "that type of action"(SR IV 19-20).

Appellant testified regarding the ordeal he had been put through. On his first evening in the jail two officers came to his cell, opened the door, and told him to come out; Appellant responded that he did not wish to talk with anyone(SR IV 13-14). The officers dragged him from his cell, threw him against the wall, and stripped him naked(SR IV 14) and then alternated taking pictures of each other with their hands around Appellant's throat and then "just beat me up"(SR IV 14). Appellant displayed fingerprints to the court that were still left in his neck from that night six weeks earlier(SR IV 14). Appellant was also struck by an officer with a flashlight while he was asleep(SR IV 15) and slashed in the face by an officer with an aerial torn from a television, requiring immediate medical attention and leaving a scar (SR IV 15-16). Appellant was constantly being harrassed by the police who told him he was going to die, and taunted him with "Zzzz", referring to the electric chair(SR IV 16).

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[1]Appellant requested a lawyer immediately after his arrest. See e.g. (SR I 8)

The actions of the officers indicate the widespread and deeply held attitudes against Appellant. A trial conducted in a mob-dominated atmosphere denies due process of law.[2]

We recognize that the officers' and jailers' actions do not alone demonstrate the unfairness of Appellant's trial; however, such a "lynch-mob" psychology by the police reflected the overall attitude of the community and as will be seen that attitude was not allowed to abate.

II. Appellant Attempted Preventative Measures

The setting that faced Appellant for his trial was prejudicial wherein his guilt and death sentence were presumed. The pretrial incidents at the very least should have awakened the trial judge to the danger and caused him to seek protective actions. This did not happen, the atmosphere did not abate during trial but in fact the pressure became more intense.

There had been intensive pretrial publicity in this case. It was a sensational case.[3] Of nineteen prospective jurors asked about publicity in this case, all except one had read about it in the newspapers (R VII-VIII). Appellant filed a motion to sequester the jury because this case "has obtained extra-ordinary publicity heretofore and the reasonable expectation for additional publicity is substantial"(R I 58). The trial judge denied the motion: "I never have sequestered a jury" (R III 8). The sequestration of the jury was an obvious remedy that could have assured a fair trial in a capital case of this nature. Cf. Dobbert v. State, 328 So2d 433, 440(Fla 1976); Fla.R.Crim.P. 3.370. Indeed sequestration is a preferred remedy when there are indications

[2] See Frank V. Mangum, 237 U.S. 309,335(1914); Shepard v. Florida, 341 U.S. 50(1951); cf. United States v. Georvassilis, 498 F.2d 883(6th Cir.1974); [beatings and assaults by guards constitutes cruel and unusual punishment].

[3] Courts have noted that a high degree of publicity always attends the death of a police officer. See Lloyd v. District Court of Scott County, 201 NW. 2d 720(Iowa 1972).

that a fair trial could be threatened. See ABA Standards, Fair Trial and Free Press, Statement on Matters §d; State ex rel Miami Herald Pub. Co. v. McIntosh, 340 So2d 904, 910(Fla 1976).

The trial court conducted no "careful and determined inquiry into the need for sequestration". See McArthur v. State, 351 So2d 972, n.2 (Fla 1977). With no inquiry it cannot be said that the trial judge's discretion was exercised reasonably.

Appellant again sought preventative measures by moving for at least an additional ten peremptory challenges beyond the ten initially allowed by the trial judge(R III 11). The trial court denied the motion with the right to renew it(R III 11-12). After exhausting the ten allowed peremptory challenges, Appellant again renewed his motion (R VIII 234). The court allowed each side three additional challenges (R VIII 234). Appellant utilized the three challenges(R VIII 255, 281) and accepted the jury only "on the basis of the court's previous ruling" (R VIII 319). Additional peremptory challenges could have guarded against the denial of a fair trial. Cf. Dobbert v. State, supra(32 challenges allowed); Hoy v. State, 353 So2d 826(Fla 1978)(40 challenges allowed); Meade v. State, 85 So2d 613, 615 Fla(1956). The trial judge thus again failed to take adequate and reasonable protective actions requested by Appellant. See, e.g., Sheppard v. Maxwell, supra, 384 U.S. at 363.

III. Publicity and Prejudice During Trial

What happened during trial was irregular, improper, inexcusable, and prejudicial -- and the error was furthered by the trial court's failure to take proper preventative or corrective actions. Several events occurred during the trial which were too coincidental to ignore or pass over as being mere happenstance. Rather, their concurrence with the time of trial indicates a calculated pattern of pressure through state action -- or at the very least extremely poor judgment. Regardless, the

"coincidence" of events as wholly unjustified and greatly contributed to an inherently prejudicial atmosphere in which the trial was conducted.

The courthouse flag was being flown at half-mast in memory of the deceased officers(R IV 347, 349). The courthouse flag is located where the unsequestered jury enters and exits the courthouse. Indeed, the flag did come to the attention of at least one juror who inquired about it(R IV 347). Appellant moved for a mistrial or in the alternative an adjournment until the prejudice had subsided(R IV 349). Further discussion later revealed that "they", the jury, had also inquired of the bailiff regarding the flag(R IV 355). Appellant again renewed his motions which were again denied(R I V 353-335).

On the next morning Appellant renewed his motion for mistrial or adjournment based upon the flag and other additional matters(R V 448-455). On the preceeding day, the Chief of Police Association had held a "memorial" ceremony for fallen policeman in Broward and Dade Counties that was widely reported in the media(R V 449). The most outrageous action was effectuated by the chief law enforcement officer of Florida, Attorney General Robert Shevin.

Attorney General Shevin, perhaps by coincidence or not, came to Broward County during the midst of the trial to make two highly publicized speeches. These speeches were reported on the front page of the local section of the May 13, 1976 edition of the Fort Lauderdale Sun-Sentinel, the major newspaper serving the area(R V 449). The newspaper quoted Mr. Shevin at length about the tragedy of police officers being killed on the job and calling for swift and harsh punishments. While these are proper subjects for the Attorney General to discuss in another context, his remarks were inexcuseable because of the timing and locale, and further because his remarks were also directed specifically to this case.

Attorney General Shevin effectively implied Appellant's guilt when

he referred to the "Turnpike murders" and stated that they could not have occurred if the accused(Appellant) had been required to serve one-third of his sentence before being eligible for parole(R V 450-451).

The articles relating to Mr. Shevin's speeches, to the memorial service, and to the events of the trial were all on the front page of the local section of the county's largest newspaper. Their impact on a unsequestered jury should not have been ignored, but it was effectively ignored by the trial court. The trial judge conducted only a brief en banc inquiry of the jury(R V 456). The Court denied the motions apparently believing that there was no evidence that the jury had read anything R V 452).

IV. The Legal Standards Demonstrate the Unfairness of Appellant's Trial.

A decision in a case must be "induced only by evidence and argument in open court" and not by "any outside influence, whether of private talk or public print." Patterson v. Colorado ex rel. Attorney General, 205 U.S. 454, 462, 27 S.Ct. 556, 51 L.Ed. 879(1907). See also Adjmi v. State, 154 So2d 812(Fla 1963).

There are two areas of review in the present case. The first focuses specifically on the actions of the trial court; when instances arose that threatened Appellant's right to a fair trial, the court failed to apply the correct standards or appropriate remedies. See, e.g., Sheppard v. Maxwell, 384 U.S. 333, 363, 86 S.Ct. 1507, 16 L.Ed.2d 600(1966)

The second area of review is effectuated at the appellate level. Since such a basic constitutional right is involved, the controlling decisions provide that this Court must perform "an independent evaluation of the circumstances" where, as here, there is an indication of prejudicial outside influences. Such a determination must be made by viewing and weighing the "totality of the circumstances." See. e.g. Sheppard v. Maxwell, supra 384 U.S. at 362; United States ex rel. Doggett v. Yeager,

472 F2d 229, 239(3d Cir 1973); Johnson v. Beto, 337 F.Supp. 1371(S.D. Tex 1972); Corona v. Superior Court of Sutter, 24 Cal.App. 3d 872,101 Cal.Rptr. 411(3d Dist Ct. 1972).

The test for evaluating the fairness of a trial is whether there is a "reasonable likelihood" that prejudicial outside influences interfered with the right to a fair trial. Sheppard v. Maxwell, supra, 384 U.S. at 363. When "inherently prejudicial" circumstances are present, it is not necessary(nor in most cases even possible) for a defendant to show a nexus between the prejudicial factors and the jury's verdict. E.g. Turner v. Louisiana, 379 U.S. 466,473, 85 S.Ct. 546, 13 L.Ed.2d 424 (1965); Estes v. Texas, 381 U.S. 532, 538-544, 85 S.Ct. 1628, 14 L.Ed. 2s 543(1965); Maine v. Superior Court of Mendicino County, 66 Cal Rptr. 724, 438 P.2d 372(1966). See generally ABA Standards, Fair Trial and Free Press§3.2(c).

Courts have recognized distinctions between publicity or other factors that occurred during trial as opposed to prior to trial and have considered the length of time between publicity and the actual trial. See e.g., Johnson v. Beto, 337 F.Supp.1371(S.D.Tex.1972). Generally, publicity occurring some time prior to trial has been found to present less of a threat to the fairness of a trial than publicity and other outside actions continuing during trial. For example, in Murphy v. Florida, 421 U.S. 794(1975), the court was faced with news articles that occurred at least seven months prior to trial. The court reaffirmed the "totality of the circumstances" test[Id. at 799] but upheld the conviction because of the long time period between the trial and the publicity, noting that there was no evidence that the general atmosphere surrounding the trial was inflammatory. Id. at 802.

Unlike Murphy the present case does not involve only pure publicity occurring months before trial. The prejudicial events were timed to

occur during Appellant's trial and as such must be subject to stricter review. See United States v. Williams, 568 F2d 464,468(5th Cir.1978). In the present case there are clear indications of a biased community attitude as well as specific prejudicial incidents taking place during the trial itself. The circumstances surrounding the trial and sentencing of Appellant show that the fundamental due process guarantee of a fair trial was not achieved in the present case.[4]

However, there is a further error in that once the trial judge became aware of the prejudicial events during trial, he did not conduct an individual voir dire of the jurors. After requests for a mistrial or continuance had been denied, the trial court conducted only a general en banc inquiry of the jury(R V 456). Such inquiry was insufficient.[5] An individual voir dire of the jurors is called for where, as in this case, the judge is confronted with serious threats to a fair trial. See ABA Standards, Fair Trial and Free Press, §3.5(f); The State Trial Judge's Book, ch.22, p. 274(2d ed. 1969). Where such a threat exists, an individual voir dire is a condition precedent to the exercise of trial court's discretion. See, e.g., United States v. Herring, 568 F2d 1099, 1106(5th Cir.1978)["we are unwilling to speculate

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[4]It also must be considered that the issue-at-bar concerns not only the substantive offense, but also the penalty proceedings. The outside influences, also improperly affected the determination of Appellant's ultimate sentence of death -- in effect the present issue deals with the fairness of two trials. The death sentence also demands a stricter standard of review. It is uniformly recognized that the death sentence is "profoundly different" than any other form of punishment. Lockett v. Ohio, 438 U.S. 536,98 S.Ct. 2954, 2965(1978); Gregg v. Georgia, 428 U.S. 153, 187 97 S.Ct. 2909, 49 L.Ed.2d 859(1976); State v. Dixon, 283 So2d 1(Fla 1973). Basic due process of law guarantees govern the death-sentencing process. Gardner v. Florida, 430 U.S. 349,358, 97 S.Ct. 1197. When a "life is at stake" the courts must be "particularly sensative to insure that every safeguard is observed." Gregg v. Georgia, supra.

[5]Indeed the court's inquiry did not even focus on the issue-at-hand which involved the articles reporting on Mr. Shevin's speeches and the police memorial(R V 450-456). The inquiry asked only if the jury had read articles regarding this case, not thereby including the articles which were inherently prejudicial.

on the extent of whatever prejudice existed"]; State v. Clay, 7 Wash. App. 631,501 P2d 603(1972); Crowe v. State, 441 P2d 90,93(Nev. 1968); Commonwealth v. Johnson, 440 Pa. 342,269 A.2d 752(1970); People v. Cox, 74 Ill.App.2d 342, 220 N. W. 2d 7, 10(1966). Individual interviews are necessary because they "[tend] to overcome reluctance to speak out." See United States v. Accardo, 298 F.2d 133, 136 (7th Cir. 1962); cf. Irvin v. Dowd, supra, 366 U. S. at 728. General inquiries and admonitions by the court are insufficient as are general denials by the jury as a whole. State v. Clay, supra; People v. Cox, supra, 220 N. E. 2d at 9-10; Forsythe v. State, 12 Ohio Misc. 2d 99, 230 N.E. 2d 681, 686 (1976); United States v. Accardo, supra.

The trial court below applied an incorrect legal standard in requiring Appellant to prove that jurors had actually been influenced by the prejudicial atmosphere and events (R V 452). The burden is to demonstrate that jurors were not improperly influenced. See, e.g., Rideau v. Louisiana, 373 U. S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663(1963); Turner v. Louisiana, supra. United States ex rel Doggett v. Yeager, 472 F.2d 229, 239(3d Cir 1973). The probability of prejudice in this cause was great--the setting was highly charged, the newspaper coverage was dominantly displayed and was plainly prejudicial, and the jurors did observe and inquire about the courthouse flag. Appellant's fair trial rights should not be left to chance. See People v. Cox, supra, 220 N.E. 2d at 10.

POINT II

THE EVIDENCE OFFERED BY THE PROSECUTION WAS IN MATERIAL CONFLICT AND WAS INSUFFICIENT AS A MATTER OF LAW TO SUPPORT THE CONVICTIONS.

The independent eyewitness testimony of two citizens demonstrates plainly that Appellant, Jesse Joseph Tafero, took no part in the shooting that resulted in the deaths of the officers. Both the legal standards regarding sufficiency of the evidence and the "interest of justice" standard applied to a capital case [Fla.R.App.P. 9.140(f); Tibbs v. State 337 So2d 788(Fla 1976)] mandate that Appellant's convictions be set aside.

The theory of premeditation can only be supported in this case on some competent finding that Appellant personally fired the shots at the decedents--there is no basis in the record for an aider and abettor theory for premeditation. Rhodes never testified as to any prior discussion regarding the shooting and indeed affirmatively stated that there was no prior talk about anything--not the shooting and not alleged theft of the weapon or car (R IV 301-304). There was clearly no prior scheme to effectuate the deaths of the officers. Accordingly any theory of premeditation must rest on competent evidence that Appellant actually personally did the shooting and formed a premeditated design.[6]

The only witness to testify that Appellant took part in the shooting was Rhodes, the co-defendant who entered into a plea agreement in return for his testimony. Rhodes admitted that he had been

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6 See Ryals v. State, 112 Fla.4, 150 So.132 (Fla 1933); Casey v. State, 266 So2d 366(Fla 1st DCA 1972); Gilday v. State, 168 So2d 205 (Fla 3 DCA 1964); Hutchinson v. State, 309 So2d 184 (Fla 1st DCA 1975).

convicted of so many felonies that he had lost count(R IV 309-310). Rhodes' credibility is further weakened by the fact that he had the same possible motive to shoot these persons as the state proposed that Appellant had. He was in violation of his parole,and was a felon in possession of a weapon (R IV 310). Rhodes' testimony in exchange for a plea should be scrutinized more closely than other such pleas because of its nature. Testimony in exchange for a plea is often self-serving and unreliable. E.g. United States v. McCallie, 554 F.2d 770(6th Cir.1977). In evaluating the trustworthiness of Rhodes' testimony this Court must also consider the unique power of the death penalty to coerce pleas and testimony and the life or death inducement for testifying falsely.[7]

The testimony of the only two disinterested witnesses demonstrates virtually without conflict between them that Appellant fired no shots. Both witnesses were truck drivers who had clear unobstructed views of the entire incident. Pierce M. Hyman was parked directly behind the tropper's vehicle at a distance of about 150 feet(R III 18) and he remained in the elevated cab of his truck where he viewed the events (R III 20-21). He testified that at the time of the shooting Appellant was pushed over the patrol car with his hand held behind his back by the Canadian(R III 29-32, 52-55). The shots appeared to have come from the back of the Camaro(R III 5-6). Robert McKenzie also parked behind the two cars(R III 62) and saw the events well(R III 91). He drove as near as fifty feet from the cars to get a closer view(R III 73-75, 81,91). Mr. McKenzie also saw Appellant pushed over the patrol vehicle with his arm twisted behind his back by the Canadian when the shots were fired

7The death penalty is a profoundly different from any other punishment. Lockett v. Ohio, 438 U.S. 604(1978). The uniquely coercive nature of the death penalty has been noted often. See Green v. United States, 355 U.S. 184, 193(1957)(incredible dilemma); Fay v. Noia, 372 U.S. 391,440 (1963)("Russian Roulette");Pope v. United States, 392 U.S. 651(1968); Corbitt v. New Jersey, ___U.S. ___,99 S.Ct. 493(1979);United States v. Jackson, 390 U.S. 570(1968).

(R III 76-78,81,94) and only after the shots had been fired did he see Appellant turn around(R III 81,95).

Rhodes' testimony that after some initial shots Appellant went to the Camaro and received a firearm from Ms. Jacobs and then shot the officers is directly contradictory to the testimony of the two separate disinterested eyewitnesses. Such plain conflict together with his record and motives,render Rhodes' testimony unworthy of belief.[8]

The physical evidence is also inconsistent with Rhodes' story and is more consistent with either Rhodes or Sonia Linder firing the fatal shots. Rhodes claimed that Appellant fired the shots while squatting down at the bottom door ledge of the Camaro, leaning against the front seat and firing upward(R IV 287-288,333). The medical examiner testified that the shots entered downward into the decedents(R III 198-210). The shots, he said, may have been fired from an angle higher than the decedent's heads; and in the case of the decedent Irwin would have had to have been fired from well above him if his head were upright(R IV 209) --which Rhodes said it was(R IV 336). This downward trajectory is less consistent with Appellant squatting on the ground as Rhodes claimed than with himself standing up or Sonia Jacobs knelling inside the car. The physical evidence is not inconsistent with someone else firing the shots and does not show that Appellant fired the shots.

It is clear that the prosecution is bound by its evidence and

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8There were other direct conflicts between Rhodes' testimony and that of the independent witnesses that present further indicia of unreliability. For example both eyewitnesses saw Appellant during the conversation with the trooper walk away to some bushes in the rest area and come back(R III 26,69,71) and Rhodes' story never mentioned this fact even though he gave his story in great detail. Also Rhodes claimed that he was never in front of the Camaro(R IV 276,278,313-314) but both eyewitnesses saw him in front of the Camaro(R III 23,32,37-38, 65,68,70,78). Rhodes said two or three shots were fired then a pause while Appellant went over to the Camaro and then the rest of the shots were fired(R IV 286-287,290), and Mr. Hyman said one shot was fired, there was a short pause and then a rapid fire(R III 31-54) and Mr. McKenzie heard no pause in the shooting(R III 81). Moreover, Rhodes' credibility is further eroded because under the facts as he described them, Rhodes was not guilty of any involvement in the murder, except possibly accessory after the fact--yet he pled guilty to two second degree murder

that evidence can be so conflicting as to create reasonable doubt as a matter of law. Majors v. State, 247 So2d 446,447-448 (Fla 1st DCA 1971). The court in Majors held that because some of the prosecution witnesses had stated that the defendant had killed the victim and others testified it was a co-defendant, the state was bound by its evidence and that this evidence created reasonable doubt as a matter of law. 247 So2d at 447-448. See also Weinstein v. State, 269 So2d 70,76 (Fla 1st DCA 1972); Hodge v. State, 315 So2d 507(Fla 1st DCA 1975); Jackson v. State, 12 Okl. Cr. 446, 158 P. 292(1916); State v. Haynes 64 Idaho 627,135 P.2d 300 (1943); State v. Douglas, 278 So2d 485 (la. 1973).

The only other theory upon which Appellant could have been convicted of first degree murder is felony-murder with the robbery of which Appellant was convicted being the underlying felony. Appellant was convicted of robbing Mr. Black of a firearm and vehicle after the death of Mr. Black (R II 152).

There was no robbery. It should be stated at the outset that Appellant does not contend that if someone kills another in order to take his property that this person is not guilty of robbery. What Appellant does contend is that force must be used with the intent to facilitate a taking, and if not, only a larceny is committed. If a homicide is committed and then property is taken as an afterthought, this cannot be the basis of a robbery conviction but only a larceny. Here, the prosecution has not proven any intent to take property prior to the homicide.

The courts have consistently held that the use of force or of putting fear is an essential element of the crime of robbery. Holland v. State, 319 So2d 577(Fla 1st DCA 1975); Stephens v. State, 92 Fla.

8.(cont'd) counts with the consent of the state, thereby Rhodes admitted perpetrating the killings by the act described in Fla.Stat. §782.04(2). The state is bound by its plea with Rhodes; however the state allowed Rhodes to testify falsely as to his total lack of involvement.

43, 109 So 330(1926); Montsdoca v. State, 84 Fla.82, 93 So.157(1922); Fla.Stat. §812..13(1)(1977). At the time of the robbery, the defendant must have the intent to kill or harm if resisted. Arnold v. State 83 So2d 105(Fla.1955); Ex Parte Wilson 153 Fla.459, 14 So2d 846(Fla 1943). The cases in this state upholding the robbery of a person after death are based upon a finding of an intent to rob before death and upon the fact that the killing was in furtherance of the robbery. See, e.g. Ellis v. State 281 So2d 390(Fla 1st DCA 1973); Larry v. State 104 So2d 352(Fla 1958); Leiby v. State 50 So2d 529(Fla 1951).

In the present case the testimony of Rhodes negates any possibility of a finding of a prior intent to rob(R IV 301-304). There was no evidence introduced which in any way indicated that Appellant had formed any intent to steal the gun or car or that the killing was in furtherance of such a plan.[9] The only basis for a finding of intent is by inferring it from the fact that the gun and car were taken after the killing. It is much more logical to infer that the killing occurred for reasons wholly unrelated to the subsequent theft of the weapon and vehicle and that thus the alleged thefts were merely an afterthought. See People v. Pack, 34 Ill. App.894, 341 N.E. 2d 4,8(1976). Here, where the evidence points even more strongly to innocence than guilt, Appellant's robbery conviction can not stand and can not be the basis of a felony-murder theory.[10]

Appellant's kidnapping conviction is also invalid as a matter of law due to the direct conflicts in the prosecutions's evidence. Rhodes stated that it was he who held a gun on Mr. Levinson and forced him to

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[9]Of course the evidence is not conclusive that Appellant took the gun or intended to take the vehicle. The eyewitnesses never saw Appellant pick up anything(R III 57) and saw Rhodes run to the driver's side of the patrol car immediately after the shots were fired(R III 33,81,95).

[10]It must be noted that Sonia Jacobs was acquitted of the Robbery count and the Robbery count was dropped against Rhodes.

give them his car(R IV 294, 304-305). Rhodes never said anything to imply that Appellant ever held a gun on Mr. Levinson. Levinson's testimony directly contradicted this(R V 409-411). The state is bound by its evidence and this evidence creates reasonable doubt, as a matter of law. If Rhodes was holding the gun on Mr. Levinson it is possible thatAppellant was merely an unwilling bystander to the whole affair. Appellant's active participation was not proven beyond a reasonable doubt.

Therefore, the evidence was insufficient and the interests of justice require a new trial.

POINT III

APPELLANT WAS DENIED THE DUE PROCESS OF LAW BY THE TRIAL COURT'S FAILURE TO EXCLUDE THE TESTIMONY OF ELLIS MARLOWE HASKEW OR TO GRANT A CONTINUANCE TO ALLOW TIME FOR INVESTIGATION AFTER A CLEAR VIOLATION OF THE RULES OF DISCOVERY BY THE STATE.

The prosecution is required to file the names and addresses of all persons who have information which may be relevant to the offense. Fla.R.Crim.P. 3.220(a)(i). This rule was violated by the late filing of witness in the present case.

Ellis Marlowe Haskew's name was not on any witness list until the opening day of trial, May 10th(SR I 84). Prior to the first day of trial, Appellant had no knowledge of Mr. Haskew or any of the matters to which he would testify. On May 6th, Appellant filed a motion for continuance due to the state's piecemeal listing of witnesses up to and including May 3(R I 56-57). On May 10th after additional witnesses had been listed, including Haskew, Appellant renewed his motion for continuance(R III 3-7, 12). The trial judge made no inquiry into the circumstances surrounding the state's failure to list the witnesses or the prejudice to the defendant from his failure(R III 6).

Appellant's attorney was only allowed to speak with Mr. Haskew for thirty minutes on the morning immediately before Haskew was to testify (R VI 637). After speaking with Mr. Haskew, he unsuccessfully moved alternatively to be given a continuance to investigate matters brought up in Haskew's testimony or to exclude his testimony(R VI 637-640). Haskew had claimed to be at a party with Appellant and five other persons(R VI 638). Appellant needed time to interview these persons and a rebuttal witness who would testify that he was not at the party (R VI 638). Appellant also needed time to investigate Haskew's background and credibility.

If the State fails to comply with the discovery rules it is incumbent upon the trial court to make an inquiry into all of the surrounding circumstances. Richardson v. State, 246 So2d 771(Fla. 1971); Ramirez v. State, 241 So2d 744(Fla. 4th DCA 1970). Kilpatrick v. State, ___So2d___(Fla 1979) Case No. 51,894, Opinion filed July 27, 1979. See also Grant v. State, 354 So2d 8(Fla 4th DCA 1977). Smith v. State, 353 So2d 205(Fla 2d DCA 1977). Bradford v. State, 278 So2d 624(Fla 1973). The focus of the inquiry must be on the ability of the defendant to prepare for trial. Richardson v. State, supra, at 775; Holman v. State, 347 So2d 832(Fla 3d DCA 1977). The circumstances establishing non-prejudice to the defendant affirmatively appear in the record. Richardson v. State, supra at 775. See also Carnivale v. State, 271 So2d 793(Fla 3d DCA 1973). Bradford v. State, supra. Frazier v. State, 336 So2d 435(Fla 1st DCA 1976). The burden is on the state to show that there has been no prejudice. Cumbie v. State, 345 So2d 1061(Fla 1977). Lavigne v. State, 349 So2d 178(Fla 1st DCA 1977).

The placing of a witness on a witness list so late that the defendant is prejudiced in his preparation must trigger a Richardson

inquiry. Rembert v. State, 284 So2d 428(Fla 3d DCA 1973). Lightsey v. State, 350 So2d 824(Fla 2d DCA 1977). The inability to depose a witness until shortly before trial can also trigger a Richardson inquiry. Anderson v. State, 314 So2d 803(Fla 3d DCA 1975).

An adequate inquiry would have revealed that the state knew of Marlowe Haskew months before his trial; Marlowe Haskew was taken into custody by Florida Department of Criminal Law Enforcement(FDCLE) officials on February 25, 1976. United States v. Diecidue, 448 F.Supp. 1011, 1014(M.D. Fla. 1978).[11] We know now for example that Haskew's attorney's fees were being paid for by the FDCLE over a three month period which would include the time of the trial in the present case. The state attorney is held to be in constructive possession of all materials had by FDCLE. Antone v. State, 355 So2d 777,778(Fla 1978); State v. Coney, 272 So2d 550(Fla 1st DCA 1973), aff'd, 294 So2d 82 (Fla 1974). The state violated the discovery rules by failing to turn over Haskew's name until the morning of the trial and further by failing to reveal that his attorney's fees were being paid by the state.

An adequate inquiry by the judge would have revealed great prejudice to Appellant by allowing Haskew to testify without time to investigate his testimony. Haskew claimed that Appellant had told him that he was a parole violator who had no intention of returning to prison(R IV 642,643). He claimed that Appellant had talked about the operation of the Taser gun and that Appellant tried to sell him guns

[11] By motion Appellant has requested this court to take judicial notice of the Diecidue federal case and to consider the record in Antone v. State, 353 So2d 777(Fla 1978). Both of these cases involve the same witness, Marlowe Haskew, and his credibility and relationship with Florida law enforcement authorities during the precise period of time involved in the present case.

(R IV 642). Haskew also claimed Appellant had told him that he carried several guns with him at all times(R 642). The significance of Haskew's testimony is clear. The prosecutor reemphasized it in his closing argument and described this testimony as "important"(R IX 403).

The prejudice from Haskew's testimony and the need for time to try to rebut it is apparent. Appellant had no chance to locate any of the other five persons who were at this party according to Haskew (R VI 638). He also was not given an opportunity to locate a witness who would place him somewhere else that night(R VI 638). The only impeachment evidence brought out was that Haskew had been previously convicted of four or five felonies(R VI 643). The total cross-examination of Haskew consisted of two pages(R VI 643-645). In United States v. Diecidue, supra the defendants had adequate opportunities to investigate Haskew and were able to impeach him much more thoroughly. In Diecidue, Haskew was cross-examined for 350 pages. 448 F.Supp. at 1019. Sufficient time to investigate Haskew's testimony and background would have resulted in the extensive impeachment of Haskew and possibly in the direct contradiction of his testimony.

Therefore, Appellant was denied due process of law by the state's violation of the discovery rules and the trial judge's failure to make an inquiry into this violation or to take any action to remedy the violation.

POINT IV

APPELLANT WAS DENIED DUE PROCESS OF LAW BY THE STATE'S FAILURE TO PRODUCE EVIDENCE WHICH IS MATERIALLY FAVORABLE TO THE ACCUSED.

The state can not withhold evidence that is materially favorable to a defendant[Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 2d 215(19630] and materially favorable evidence can be direct or impeachment evidence. Antone v. State, 355 So2d 777,778(Fla 1978);

Williams v. Dutton, 400 F.2d 797, 800(5th Cir.1968).

Here, the state failed to reveal that Marlowe Haskew's attorney's fees were being paid by the Florida Department of Criminal Law Enforcement(FDCLE). See Point III, supra. Also the state failed to reveal other significant factors regarding Haskew. See United States v. Diecidue, supra, at 1019. This information certainly would have been important to the evaluation of Haskew's credibility, by showing his motive for testifying against Appellant. This case is similar to Antone, in which this Court reversed and remanded the same violation, involving the same witness. Therefore, Appellant was denied due process of law by the state's failure to reveal materially favorable evidence.

POINT V

APPELLANT WAS DENIED THE DUE PROCESS OF LAW BY THE INTRODUCTION OF COLLATERAL FACT EVIDENCE THAT WAS NOT LOGICALLY OR LEGALLY RELEVANT AND THAT WAS PREJUDICIAL TO APPELLANT.

The rule which requires the relevancy of evidence admitted into trial is fundamental and well-defined. The effect is to exclude collateral evidence which might excite prejudice or be misleading. The policy reasons underlying this rule involve some of the most fundamental principles of our criminal justice system, including the right to a fair trial and the the presumption of innocence. See, e.g. Watkins v. State, 121 Fla. 58, 163 So.292(1935); Marion v. State, 287 So2d 419(Fla 4th DCA 1974); Michelson v. United States, 335 U.S. 469(1948); United States v. Taglione, 546 F2d 194,199(5th Cir.1977).

In its landmark decision in Williams v. State, 110 So2d 654 (Fla 1959), this Court discussed the issue of relevancy with regard to evidence of collateral crimes and propounded the rule that the test of admissibility is relevancy. Recently, the broad rule of inclusion established in Williams, supra, has been further defined. See

Marion v. State, supra, at 421.

The prosecution through use of various witnesses assaulted Appellant's character with testimony that had little or no relevancy to any point that was at issue. The testimony served no purpose but to confuse the jury as to what their limited fact-finding role was, and to persuade them to judge Appellant not on the charges for which he was indicted but instead on the basis of his character or propensity. The State first offered evidence of Appellant's bad character in its opening statement. The prosecutor, over objection(R VIII 328), stated that he was going to mention Appellant's parole status, that he had drugs in his car, and that he said he would never go back to prison (R VIII 328). It is clear from the very beginning that the state intended to put Appellant's character on trial.

Rhodes continued the attack on Appellant's character and was allowed, over objection, to testify that Appellant was on parole (R IV 300), and that he was allegedly in violation of his parole(R IV), that Appellant and Rhodes were driving around Miami selling marijuana and cocaine(R IV 248-249,259), and that they allegedly carried guns and various types of ammunition with them at all times (R IV 243-245), 250-251, 259, 262-264, 269-271). Rhodes was also allowed to testify that Appellant carried a "Taser" gun(R IV 243-245). Finally, Rhodes was allowed to describe the people that he and Appellant had supposedly visited as "shady characters"(R 269). This type of inflamatory character attack occupied a major portion of Rhodes testimony and had almost no probative value to any issue in this case.

The testimony of several other witnesses consisted solely of attacks on Appellant's character. Heikki Riuttanen, Appellant's parole officer, was allowed to testify, over objection, that Appellant was on parole,

and allegedly in violation of that parole for failing to submit reports (R IV 349-353, 356-258). Haskew testified, over objection, that he was at a party with Appellant at least five weeks before the incident and they had a discussion about Taser guns, various types of ammunition and Appellant's parole status(R VI 635-645, 650-651).

The prosecution attempted to justify the admission of this prejudicial evidence by alleging it proved motive(R IV 233-235). Appellant argued that the state did not have to prove motive, but the trial court overruled the objection stating that absence of motive is something the jury can consider(R IV 235).

In this case, motive was even less important than in most first-degree murder cases since the prosecution was proceeding on theories of felony murder and premeditation. Since intent to kill is not an issue in felony-murder prosecution, the question of motive was wholly irrelevant under one of the State's two theories of prosecution.

Even if the collateral evidence was marginally relevant to an issue at Appellant's trial, the voluminous amount of collateral evidence constituted "prosecutorial overkill". In Williams v. State, 117 So2d 473(Fla.1960)(hereinafter referred to as Williams II) this Court noted that evidence of a collateral crime may be admissible but that the prosectuion could go too far in introducing evidence of other crimes. Id. at 475. Recent decisions have required the trial court to balance the probative value of the evidence against its prejudicial effect. Smith v. State, 344 So2d 915(Fla. 1st DCA 1977); Josey v. State, 336 So2d 119(Fla. 1st DCA 1976); Dodson v. State, 334 So2d 305(Fla. 1st DCA 1976); Colbert v. State, 20 So2d 853(Fla. 1st DCA 1975). Thus, evidence which is relevant to material issue is still inadmissible of its prejudicial effect outweighs the probative value. The Court in Smith listed three factors to be weighed in determining whether or not

"Williams Rule" evidence should be admitted:

> "One factor is the issue of relevancy itself, to what extent is the objectionable evidence relevant? ... a second factor is the necessity of the testimony. How important is the testimony to the State's case?... A third factor might be termed 'quality of testimony.' Was the testimony directly related to the material issues of the case, or was it more inclined to demonstrate the bad character of the accused, thereby unduly prejudicing him" 344 So2d at 918.

Applying the Smith test to the case at bar, the necessity of the "Williams Rule" evidence to the state's case is very limited. If the State based its case on the felony-murder theory the whole question of intent and thus the evidence would have been irrelevant. Even if proceeding on the theory of premeditation, the law in Florida would clearly allow the inference of intent from the circumstances of the shooting. Hill v. State, 133 So2d 68(Fla.1961). Thus, the proper evidence of premeditation should have come only from the two disinterested state's eye-witnesses, the ballistics evidence, and the testimony of Rhodes. The evidence as to Appellant's parole status, whether or not he carried guns or sold drugs had marginal relevance at best to any issue.

The evidence was also very weak in terms of the "quality of testimony" test. All of the alleged motive evidence introduced would apply to Rhodes and Sonia Linder as well as Appellant.[12] Thus, the prejudicial collateral evidence brought the jury no closer to the ultimate question of who was responsible for the killings.

Finally the prejudicial "Williams Rule" testimony permeated the entire trial in such a way that it became a "feature rather than an incident". Williams II, supra, at 475. Three different witnesses were

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[12]For example Rhodes admitted at trial that he too was on parole, was in violation of that parole, and that he was equally involved in the drug sales in Miami(R IV 248,310-311). Jacobs too was implicated in the drug sales and in the possession of guns(R IV 243-244,249).

allowed to testify that Appellant was on parole and that he was allegedly in violation of his parole(R IV 233-235, 349-355, 356-358; R VI 642).

Appellant's alleged involvement with weapons was also played up in such a way as to become a feature of the trial. Rhodes was allowed to testify that Appellant allegedly owned two nine millimeter pistols. He testified in detail about the Taser gun(R IV 244-245), despite the fact that the weapon had no relation to the actual killing. Rhodes also testified that Appellant had special ammunition marked "for police use only"(R IV 250-251), and that Appellant praticed his shooting at a target range(R IV 263-265).

Moreover, the prosecutor was allowed to demonstrate the Taser by having it fired in the courtroom into a lifesized dummy(R VI 687) -- and the loudness of the firing was such that the prosecutor apologized for it(R VI 687). This firing was allowed despite the fact that no witness ever discussed the firing of the Taser during the incident and certainly the Taser was in no way connected to the deaths.

The "prosecutorial overkill" of Appellant's alleged association with guns was continued with Ellis Marlowe Haskew who testified that Appellant allegedly offered to sell him teflon-coated bullets and that he had talked with Appellant about the Taser(R VI 635-645, 650-651). See also Point III, supra.

This collateral evidence about Appellant's association with guns was unnecessary to the state's case. The prosecution was able to introduce extensive testimony about the weapons, ammunition, and spent shells found at the crime scene(R III, 147-149, 153-154). With the shell casings, ammunition, and weapons, the state was also able to introduce testimony as to what weapons Rhodes, Linder and Appellant were carrying at time of their apprehension(R V 463-465). The crime scene investigator was allowed to testify as to what he found at the crime scene (R V 578-605). Appellee was, thus, able to introduce more than enough

legitimate evidence to establish the nature and type of weapons that were found at the scene of the crime and in the car when the defendant's were stopped. Likewise, the evidence about Appellant's alleged possession and sale of drugs was also unnecessary and overplayed until it became a feature of the trial. See, e.g. Akers v. State, 352 So2d 97(Fla 4th DCA 1977).

The character evidence in his case not only violated Appellant's due process right to a fair trial on the question of guilt or innocence but also greatly prejudiced him on the question of sentence. This Court in Williams II, supra recognized the special danger of collateral offense evidence in cases involving the possibility of the death penalty. 117 So2d at 476.

The unnecessary and repeated use of "Williams Rule" testimony by the prosecution denied Appellant a fair trial and denied him due process of law on both the question of guilt and on the question of penalty.

POINT VI

APPELLANT WAS DENIED DUE PROCESS OF ALW UNDER THE FACTS OF THIS CASE WHERE THE STATE WAS ALLOWED TO PROCEED SIMULTANEOUSLY ON THE DUAL THEORIES OF PREMEDITATION AND FELONY-MURDER.

It has long been established that criminal defendants are entitled to adequate notice of the specific charges against them. Cole v. Arkansas, 333 U.S. 196, 201(1948); In re Oliver, 333 U.S. 257,273 (1948). This principle has been used to invalidate indictments that are not broad enough to cover the theory that the state was proceeding on [Watson v. Iago 558 F2d 330(6th Cir.1977)], indictments which are unnecessarily confusing,[United States v. Lembo, 184 F2d 411(3rd Cir. 1950)], and indictments which are too broadly constructed and, thus, do not clearly notify the defendant what he must defend against. United States v. Robinson, 495 F2d 30(4th Cir.1974).

Appellant acknowledges that this Court has previously held it is not a denial of due process to allow the state to prosecute under a felony murder theory where the Indictment charges premeditated murder. However, under the facts of this case, Appellant was denied due process of law by allowing the state to proceed on theories of felony murder and premeditation.

This Court has directly considered this issue in only one case where the defendant received the death penalty under the present capital felony statute. Knight v. State, 338 So2d 201(Fla 1976). In the Knight case, the the defendant clearly acted alone and, thus, there was no doubt that the state was alleging that the defendant was the cause of the death of the victim.

Appellant, however, was originally charged with two co-defendants. Thus, the State could have been proceeding on either on theory that Appellant was an aider and abettor or on a theory that Appellant actually caused the death of the victim. This was especially prejudicial in light of the fact that the state's evidence was actually contradictory as to who killed the victims. See Point II, supra.

Because of the unique facts of the instant case, the three co-defendants and the contradictory testimony of the State's witnesses, the failure of the Indictment to give Appellant notice of the nature of Appellees case against him greatly prejudiced Appellant in preparing his defense. Appellant attempted to cure this by a Motion for Statement of Particulars which requested Appellee to clarify whether it was alleging Appellant actually commited the offense or was an aider and abettor(RI 15). Appellee's answer was not at all responsive to this part of the motion(SR I 28-29). Thus the present case is completely unlike Knight v. State, supra, where there were no co-defendants and it was clear from the start that the prosecution was proceeding on the theory that the defendant alone deliberately killed the victims.

By proceeding on both theories Appellant was additionally prejudiced in that the State was allowed to introduce highly inflammatory evidence which would be clearly irrelevant and inadmissible to a theory of felony murder. See Point V, supra. The result is that Appellee was allowed to introduce a great deal of highly prejudicial and inflammatory testimony which would have been clearly inadmissible to a theory of felony murder.

This Court's recent opinion in State v. Pinder, ___So2d___(Fla.1979), Case No. 55,369, Opinion filed July 5, 1979, highlights additional prejudice. In determining the validity of an indictment the federal court's have held:

> "The established test is that the Indictment...must enable him to plead an acquittal or conviction in bar of any future prosecution for the same offense". U.S. v. Guthartz, 573 F2d 225,227(5th Cir.1978). Accord, Hamling v. United States, 418 U.S. 87(1974); Battle v. State, 365 So2d 1035(Fla. 3d DCA 1979); State v. Smith, 240 So2d 807(Fla.1970).

In Pinder, this Court held that under the double jeopardy clause of the fifth amendment, a defendant cannot be convicted of first degree felony murder and also be convicted of the underlying felony that was used in the felony murder prosecution. Appellant, however, does not know whether his conviction for first degree murder bars a conviction for any of the other felonies charged in the Indictment. Thus, under the test set forth to determine the validity of an indictment, Appellant was not given sufficient notice and was thus denied due process of law.

Appellant was also denied due process of law during the sentencing phase of his trial. Knight v. State, supra was decided before the decisions in Gardner v. Florida, 430 U.S. 349(1977) and Presnell v. Georgia, ___U.S.___,99 S.Ct. 235(1978), which both explicity recognize that, the entire sentencing in a capital case is subject to the commands of due process clause. Allowing the state to proceed on both felony murder and premeditated murder prejudiced Appellant in the sentencing

phase of his trial in two ways. First, Appellant had no way of determining whether he was being accused of participating in the actual shooting of the victims or merely as an aider and abettor. See Point XIII D, infra. Secondly, by not having notice as to what theory he was prosecuted under Appellant did not know what type of evidence to present during the sentencing phase of his trial. If Appellant had known under what theory he had been prosecuted, he might have been able to present evidence in mitigation accordingly.

The prejudicial effect of allowing the state to proceed on theories of felony murder and premeditated murder permeated Appellant's entire trial and requires a reversal of his conviction and death sentence.

POINT VII

APPELLANT'S PERSONAL RIGHT TO PARTICIPATE FULLY IN OWN DEFENSE WAS UNCONSTITUTIONALLY RESTRICTED BY THE TRIAL COURT.

The issue-at-bar involves the restriction by the Court of Appellant's right to participate fully in his own defense. It was apparent from the outset of these proceedings and should have been apparent to the trial judge that Appellant intended to actively participate in his own behalf. At his first court appearance Appellant moved for authority to contact witnesses(SR II 2) and at his next appearance he moved the court for medical attention and renewed his motion to contact witnesses by telephone -- this latter motion was granted(SR III 3). Therefore from the start it was plain that Appellant did not want to be a mere bystander to his defense. Subsequently, Appellant cosigned six pretrial motions with his appointed counsel.[13] Additionally, Appellant filed a number of

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13On March 11, 1976 four motions were filed that were signed by Appellant and by his counsel; Motion for Medical Service(R I 8-9); Motion for Protective Order(R I 10-11). Motion for Defendant to Contact Certain Witnesses by telephone(R I 12); Motion for authority to Take Depositions,, Issue subpoenas and Employ Investigator(R I 13-14). Two cosigned motions were filed on April 7, 1976: Motion to allow Defendant Visitation and uncensored Communication with co-defendents(R I 31-32);Motion for Appointment of Attorney to Represent Defendant in Matters Concerning Children (R I 29-30).

pro se motions prior to trial. Most of these motions were considered on their merits and ruled upon by the trial court; others of these motions were apparently ignored since no ruling appears in the record.[14] In ruling on these various motions, the trial court made no mention or objection that Appellant was proceeding pro se or was actively participating on his own in his defense. Rather, the court apparently reached the merits of the motions(albeit in some instances without a hearing).

Such a posture is consistent with the applicable law. In Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562(1975):

> The right to defend is given directly to the accused for it is he who suffers the consequences if the defense fails.
>
> The counsel provision supplements this design. It speaks of the 'assistance' of counsel, and an assistant, however, expert, is still an assistant. The language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant -- not an organ of the State interposed between an unwilling defendant and his right to defend himself personally. [Emphasis supplied] 422 U.S. at 810-820.

Thus the right to participate fully in one's own defense is a personal right. Indeed the Florida Constitution, Article I, Section 16 provides

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14On April 8, 1976, Appellant filed a Motion to Grant State Remedy or Return Property relating to the seizure of property and legal materials from his cell(R I 33-40) and he filed a Motion to Grant Access to Materials to aid in his Defense(R I 41-42). These motions were apparently never heard or ruled upon. On May 10, 1976 Appellant filed four pro se motions. Motion to Compel Court Appointed Attorney to File this Defendant's Motions(R I 63-65); Motion to Produce Grand Jury Testimony(R I 66-68); Motion for Use of Law Library(R I 69-71); Motion for Disqualification of Trial Judge(R I 72-74). These four motions were all ruled upon and denied by the trial court, although no hearing was held even after Appellant's express request for such a hearing(R I 76; R VIII 324-325,329). Appellant also filed a pro se Motion to Suppress Evidence on May 11, 1976(R I 82-83) and a Motion to Allow this Defendant to Give First Phase of Closing Argument to the Jury on May 17,1976 (R I 102); this latter motion was denied without a hearing(R VIII 357).
Appellant also attempted to file a pro se motion in this Court but it was refused; Appellant then lodged a "Letter of Notification" with this Court.

that an accused has the "right to be heard in person, by counsel or both ...", thus recognizing the personal right of the accused.[15]

Appellant was denied the full opportunity to prepare his case or to participate in its preparation -- despite the fact that his requests were reasonable. From the time of his arrest Appellant had requested that he be allowed to contact witnesses by telephone and to contact a lawyer(SR II 2-3). Appellant's request was finally granted on March 5, 1976(SR III 3) although the jail officials never allowed him to make such calls(SR IV 11). The need to contact and locate witnesses immediately after the incident cannot be overemphasized-- the evidence in the present case was in sharp conflict. Appellant renewed his motion to contact witnesses by written motion filed March 11(R I 12) in which it was requested that Appellant be allowed to make ten local telephone calls to contact witnesses. This motion was denied(R I 28, SR IV 12). Appellant had the right to participate in his defense and thus to secure witnesses in his own behalf. Cf. Washington v. Texas, 388 U.S. 14 (1967). It was error to deny him his reasonable request. Cf. Mitchell v. Untreiner, 421 F.Supp. 886, 895-6(N.D.Fla 1976).

15In Tait v. State, 362 So2d 292(Fla 4th DCA 1978) the court held that this provision of the constitution grants an accused the right to act as co-counsel. The court ruled that where an accused makes plain from the "outset" his intention to participate in his defense, he must be allowed that right; of course a trial judge does retain control of the case to prevent undue disruption or disturbances. In the present case there is absolutely nothing to indicate that Appellant was intending to be or was disruptive -- indeed the record shows that Appellant was respectful, polite, and orderly(E.g. R VIII 329, SR II 2-3, SR III 3, SR IV 3-4). This Court has accepted certiorari on a certified question in Tait and it is currently pending before this Court in Case No. 55, 354. Regardless of whether Tait is fully upheld by this Court, there is no question that the personal right of an accused to participate in his defense is well recognized and at the very least it is within the discretion of the court. By the court's actions in the present case, it was clear that Appellant had been(or thought he had been) accepted as a full participant in his case. The Georgia Supreme Court has also held that under the State constitution an accused has a right to act as co-counsel. See Burney v. State, ___S.E.2d___(Fla 1979); Case No. 34,749, Opinion filed July 3, 1979; Jackson v. State, 254 S.E. 2d 739(Ga.App. 1979).

The seizure from his cell of Appellant's legal papers also limited Appellant's right of full participation and access to the courts. DeWitt v. Pail, 366 F.2d 682(9th Cir.1966); Sigafus v. Brown, 416 F.2d 105(7th Cir.1969). The trial court's apparant refusal or neglect to rule on Appellant's pro se motion for return of property (R I 33-40) further highlights the limitations on Appellant's full right to participate in his own defense.

Appellant was also denied access to materials necessary to prepare and investigate his case. By pro se motion Appellant requested simply that he be allowed to obtain sketching materials so that he could diagram the scene to correlate the voluminous evidence in this case (R I 41-42). Appellant was an eyewitness to the incident and his recollections graphically stated would certainly have assisted him in preparing his defense--especially considering the conflicting nature of the state's evidence. No allegations of security needs or proper maintenance of the jail were put forth in opposition to Appellant's motion. Indeed the motion was apparently never considered by the trial court.

Appellant, who was in effect acting as co-counsel, was prohibited meaningful access to the law library. Appellant's motion for use of the law library asked only for 60-90 minutes of research per week in the library located in the same building (R I 69-71). The motion was denied with absolutely no findings(R Viii 325) and thus security requirements cannot be utilized as a justification. Access to legal materials is essential to the meaningful preparation of a defense--especially for an accused who is fully participating in his case. As recognized in Mitchell v. Untreiner, supra;

> "The lack of access to a law library...deprive[s] the inmates of the Escambia County jail of effective assistance of counsel [and] the ability to assist in the preparation of a defense...in violation of the Sixth and Fourteenth Amendments." 421 F.Supp. at 895-896. See also Bounds v. Smith, 430 U.S. 817

(1976); United States v. Bynum, 566 F.2d 914,918 (5th Cir.1978); cf. Wolfish v. Levi, 573 F2d 118, 133(2d Cir 1978).

In a further attempt to prepare his case Appellant moved to be allowed confidential communication with his co-defendants(R I 31-32). This motion was apparently not ruled upon but a later request by defense counsel during trial was denied(R VIII 360). The co-defendants were witnesses and Appellant therefore had a right to communicate with them and thereby exercise his right to secure witnesses in his behalf. See Washington v. Texas, supra. Absent any viable governmental interest in prohibiting such communication there can be no basis for denying the pretrial detainee the right to prepare fully his defense. Nothing exists in the record and the trial judge made no findings (R VIII 360) indicating any reason to prohibit Appellant from communicating with his co-defendants. Without such a finding it was an abuse of discretion to prohibit communication. In United States ex rel Wolfish v. Levi, 439 F.Supp.114(S.D.N.Y.1977) it was recognized:

> "Except for the unavoidably burdensome incidents of confinement, pre-trial detainees have an elementary right to prepare for trial. The right must include for them, as it does for people on the outside, reasonable freedom to confer with codefendants." Id. at 142.[16]

Therefore, Appellant's right to participate in his own defense was limited each time he tried to exercise it. The restriction of his ability to prepare his defense was broad and such restriction without reason was an abuse of discretion. Cf. Herring v. New York, 422 U.S. 853, 857-858(1975).

An additional indication of the denial of Appellant's right of full participation is the pretrial conference that was apparently held immediately before trial. The record indicates that there in fact was

16The Wolfish case was reviewed on appeal and eventually reversed by the U.S. Supreme Court. Wolfish v. Levi, 573 F.2d 118(2d Cir.1978); Bell v. Wolfish, ___U.S.___,99 S Ct 1861(1979). However, the holding regarding communication with co-defendants was not discussed in the appellate opinions.

such a conference(R VIII 324) at which Appellant was excluded(R VIII 325). The record does not reveal the issues that were resolved but the context of the discussion indicates that it may have dealt with Appellant's pro se motions(R VIII 324). Appellant had a right to notice and to be at the pretrial conference -- especially if substantive issues were resolved and since Appellant was exercising his right to participate in his defense of this capital case. Cf. Lewis v. United States, 146 U.S. 370(1892). See also Judicial Conference of U. S. "Handbook of Recommended Procedures for the Trial of Protracted Cases", 25 F.R.D. 351, 399-400(1960); West, "Criminal Pre-Trials - Useful Techniques," 29 F.R.D. 436(1962).

At trial Appellant was also denied his right of participation by the refusal of the trial court to allow him to present the first phase of closing argument(R I 98; R VIII 357). Appellant made his request by written motion filed in open court(R I 102-103). It is significant that the trial court made no finding that Appellant's presentation of closing argument would be disruptive or hinder the court process in any way. Closing argument is an essential element of an effective defense and is essential to a fair trial. See, E.g. Herring v. New York, supra, 422 U.S. at 858. The denial of that right constitutes reversible error. E.g. Floyd v. State, 90 So2d 105(Fla 1956); Ruffin v. State, 195 So2d 26(Fla 3d DCA 1967)(involving pro se closing argument). A defendant who has exercised his right to conduct his defense has the same right to make a closing argument. Herring v. New York, supra, at n. 18. Thus, Appellant had that right, and to deny him that right without any stated reasons denied the effective assistance of counsel, the right to a fair trial, and violated the due process of law. See Jackson v. State, 254 S.E. 2d 739(Ga. App 1979).

We recognize the power of a trial court to ensure the orderly

progress of the trial and that certain limitations may be imposed. However, in the present case the trial judge made no findings and Appellant's requests were reasonable and practical.

One further aspect of this issue remains: the right of Appellant to represent himself pro se. Appellant had made clear from the outset his limited acceptance of the right to counsel; that is, he made clear his desire to participate fully in his own defense. Cf. Tait v. State, supra Just prior to trial Appellant filed a "Motion to Compel Court Appointed Attorney to File this Defendant's Pro Se Motions" (R I 63-65). At that point or certainly when Appellant moved to present closing argument, the trial court was or should have been on notice of the clear indications that Appellant may have desired to proceed pro se. The right of an accused to represent himself is of course a basic constitutional right inherent in the sixth amendment. Faretta v. California, supra. With the record clear from the outset that he desired to fully participate in his defense, the trial court should have conducted a hearing to determine whether Appellant waived his fundamental constitutional right to represent himself. See Williams v. State, 337 So2d 847 (Fla 2d DCA 1976). A waiver of a fundamental constitutional right of course cannot be found from a silent record. Johnson v. Zerbst, 304 U.S. 458(1938). With the ambiguity that existed in the record, it was error for the trial court to fail to conduct an inquiry to determine if Appellant voluntarily and intelligently waived his right of self representation.

Accordingly Appellant's right to participate in a meaningful way in his own defense was unconstitutionally restricted by the trial court.

POINT VIII

THE TRIAL COURT ERRED BY REFUSING TO RESCUE HIMSELF WHERE APPELLANT BELIEVED HE COULD NOT RECEIVE A FAIR TRIAL

Appellant's pro se motion to disqualify the trial judge(R I 72-74)[17]

17 Appellant was acting as co-counsel and the trial judge heard and decided Appellant's pro se motions on their merits. Thus, Appellant's motion cannot be defeated solely because it was made pro se. See Point VII, supra.

reveals another consideration in viewing the overall nature of the trial. The trial judge did not recuse himself(R VIII 325). Appellant's motion stated that the trial judge had been a highway patrolman, as was the deceased in the present case and that the judge was on personal terms with state witnesses. The motion also alleged that the judge could not act fairly in he case because he had presided over the case of the co-defendant who was allowed to plead guilty to second-degree murder in return for his testimony.

The importance of impartiality and its apparance by the judge has often been stressed by the courts. E.g. State ex rel Arnold v. Revels, 113 So2d 218,233(Fla 1st DCA 1959). The basis of Florida's recusal motion is to prevent "the creation of 'an intolerable adversary atmosphere' between the trial judge and the litigant." Bundy v. Rudd, 366 So2d 440, 442(Fla 1978). While it is conceded that Appellant's pro se motion to disqualify the trial judge did not meet all of the technical procedural requirements,[18] it did present critical substantive merit; an "adversary atmosphere" did exist. Motions to disqualify or recuse a judge are not to be defeated for reasons of technical insufficiency. See State ex rel Davis v. Parks, 141 Fla 615, 194 So 613, 614(1939); Mank v. Hendrickson, 195 So2d 574(Fla 4th DCA 1967); State ex rel Jensen v. Cannon, 166 So2d 625(Fla 3rd DCA 1964).

The test for the motion for disqualification should have been whether Appellant's motion demonstrated a well-grounded fear that he would not receive a fair trial at the hands of the trial judge. The test is thus the fear in Appellant's mind, not whether the judge was actually capable of giving Appellant a fair trial. See State ex rel Brown v. Dewell, 131 Fla 566,179 So 695, 697(1938); Crosby v. State, 97 So2d 181(Fla 1957); State ex rel Aguiar v. Chappell, 344 So2d 925 Fla 3d DCA 1977).

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18 The lack of technical sufficiency perhaps was excusable since Appellant was denied access to law books. See Point VII, supra.

Appellant's knowledge of the trial judge's status as a former highway Patrolman, and his belief that the judge personally knew several of the state's witnesses, constituted a well-grounded fear that he would not receive a fair trial. At the very least, Appellant was in an "adversary atmosphere" which contributed to and was consistent with the prejudicial community atmosphere facing Appellant.

POINT IX

THE TRIAL COURT ERRED IN REFUSING TO ALLOW APPELLANT TO RECALL ROBERT MC KENZIE AND WALTER RHODES FOR THE PURPOSE OF IMPEACHMENT.

The right to recall witnesses is normally a matter within the sound discretion of the trial court. However, it is clear that this discretion is not absolute and that it can be reversible error to deny a defendant the right to recall a witness; Hahn v. State, 58 So2d 188, 191(Fla 1952); Johnson v. State, 55 Fla 46, 46 So154(1908); Peterson v. State, 95 Fla 925, 117 So227 (1928).

Appellant unsuccessfully moved to recall state's witness McKenzie at the close of Appellee's case (R VI 703) and renewed the motion just prior to closing argument. Appellant proffered that Mr. McKenzie would testify that he saw no movement by Appellant during the shooting (R VIII 357-358). The purpose of recalling Mr. McKenzie was to lay a predicate to contradict and thus, impeach the testimony of Rhodes that Appellant did the actual shooting.

Rhodes, however, was called as a witness after Mr. McKenzie had already testified. Defense counsel did not know specifically to what Rhodes would testify, and thus, was not able to lay the proper predicate during the original cross-examination of Mr. McKenzie.

Appellant also moved to recall Rhodes to lay a predicate to impeach him about the ownership of an attache case (R VIII 358). The issue of the control and ownership of the attache case was a major issue in the case. The attache case was offered into evidence and an officer testi-

fied that it had been found in the back seat of the Cadillac (R V467-468). Detective Green, testifying as to the contents of the attache case, described in detail its contents (R V 588-590). The attache case and its contents had been made a major feature of the case by the prosecution.

Realizing the importance the ownership of the attache case was playing in the trial, Appellant, after Rhodes had already testified, located a new witness who would testify that she had seen Rhodes on at least two different occasions in the week preceeding the shooting, that Rhodes was carrying the attache case, and that he was in control of it (R VIII 358). However, the trial court denied Appellant's motion to recall Rhodes (R VII 358-359).

This Court has long recognized the special importance of full cross-examination in a capital case. Coco v. State, 62 So2d 892(Fla 1953); Coxwell v. State, 361 So2d 148(Fla 1978).

Additionally, this Court has previously held on several occasions that failure to allow the defense to recall a witness is reversible error. Johnson v. State, supra; Peterson v. State, supra; Hahn v. State, supra. These cases strongly suggest that the trial judge's discretionary power to allow the defendant to recall witnesses should be liberally granted. In Johnson v. State, supra, the witness had testified to seeing the defendant in the vicinity of a homicide with a shotgun in his hand. The defendant tried to recall him to impeach him by showing that he had only heard about the gun but had not actually seen it. This Court stated:

> "There is nothing...to justify the refusal. There is nothing to indicate that the attorneys for the defense were dilatory or trifling with the Court ...Human life was involved, and we cannot conceive why the court should have sought to apply so narrow a rule of procedure." Id. at 155.

In Peterson v. State, supra, the defendant attempted to recall an accomplice who had been the prosecution's key witness to lay the foundation for impeaching his testimony. This Court stated:

> "This motion was made at the close of the state's testimony. Although defendant's counsel had neglected his opportunity to lay this predicate while the witness was on the stand, and admitted his oversight, yet in view of the great caution with which the testimony of an accomplice should be received, and the close scrutiny to which his testimony should be subjected, especially in a case of this kind where a human life was at stake we are convinced that the court was in error in denying this motion..." (Emphasis supplied). 117 So at 228.

In Hahn v. State, supra, the defense attempted to recall the only witness to the killing for purposes of impeachment. 58 So2d at 189-191. The opinion discussed at length the court's discretion to allow the defense to recall a witness and when this discretion should be exercised. Id. at 191.

By not allowing Appellant the opportunity to lay the predicate to impeach the testimony of the lay prosecution witness, and in restricting cross-examination, the trial court committed error which denied Appellant due process of law and requires reversal of his conviction.

POINT X

THE TRIAL COURT ERRED BY REFUSING TO GRANT THE INDIGENT APPELLANT AUTHORITY TO TAKE A POLYGRAPH EXAMINATION.

Appellant prior to trial moved to be administered a polygraph examination (R I 61-62; R III 10). The trial court denied the motion (R I 59, R III 11). Appellant placed no restrictions whatsoever on the conduct of the test or on the use of the test and agreed to waive any objections to the admissibility of the results (R I 61-62). However, due to the fact that Appellant had previously been declared indigent the only way he could have been administered a polygraph examination would be for the court to authorize it. Rhodes had been given a polygraph and the results had been made public. Appellant had the right to the same investigative tool.

Additionally, the trial court's denial of Appellant's motion denied the due process of law during the sentencing phase of his trial. In Green v. Georgia, ___U.S.___, 99 S. Ct. 2150(1979), the United States Supreme Court held that not giving the defendant, during the sentencing

phase of his capital trial, the opportunity to introduce hearsay evidence that he was not present when the victim was killed denied the defendant a fair trial on issue of punishment, despite the fact that the evidence was inadmissible under Georgia law as hearsay testimony. Similarly, in the present case by not allowing Appellant the opportunity to take a polygraph, the trial court prevented him from presenting evidence to a critical issue in the punishment phase of his trial. See Lockett v. Ohio, 438 U.S. 586, 604-605(1978).

POINT XI

APPELLANT WAS DENIED DUE PROCESS OF LAW BY THE IMPROPER EXCLUSION OF ONE VENIREMAN DUE TO HER VIEWS ON CAPITAL PUNISHMENT.

The standard for the exclusion of veniremen because of their views on capital punishment was developed by the United States Supreme Court in Witherspoon v. Illinois, 391 U.S. 510(1968) which established that the death penalty may never be constitutionally carried out where a venireman is excluded for voicing general objections to or conscientious or religious scruples against the death penalty. Id at 522-523. The court further explained the intended scope of their opinion by stating that the decision has no bearing on a state's power to exclude veniremen who make it:

> "Unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt. Id. at n. 21. (Emphasis in original).

The Court was concerned that a system which strikes all persons with doubts about the death penalty does not express the values and attitudes of the community. Id. at 519-520.

The United States Supreme Court has reaffirmed several times the Witherspoon decision which forbids exclusing veniremen who only voice general objections to the death penalty. Boulden v. Holman, 394 U.S. 478 (1969); Maxwell v. Bishop, 398 U.S. 262(1970); Mathis v. New Jersey, 403

U. S. 946(1971) (and companion cases). In Davis v. Georgia, 429 U.S. 122(1976), the Court held that the improper exclusion of one juror is per se reversible error. Id. at 122-123.

In the present case one venireman was improperly excluded. Mrs. Garretson stated: "Judge, I don't think I can wrestle with the capital punishment thing." (R VII 24). She was excused without any further questions and without objection from either side. The venireman never said she would automatically vote against the death penalty or that the death penalty would affect her opinion as to the defendant's guilt. Her comments do not even approximate the sort of unambiguous opposition to capital punishment required by Witherspoon.

The error cannot be avoided because defense counsel failed to object. The question of waiver "must depend, in each case, upon the particular facts and circumstances surrounding that case," Johnson v. Zerbst, 304 U.S. 458, 464(1938). However, a few general legal principles are clear. "The question of waiver of a federally guaranteed constitutional right is, of course, a federal question controlled by federal law." Brookhart v. Janis, 384 U.S. 1, 4(1966). Under federal law, waiver is "an intentional relinquishment or abandonment of a known right or privilege" Johnson v. Zerbst, supra 304 U. S. at 464, and is not lightly to be presumed, Aetna Insurance Co. v. Kennedy, 301 U. S. 389, 394(1937); Brookhart v. Janis, supra, 384 U. S. at 4. Inferred waivers of constitutional rights are disfavored, Barker v. Wingo, 407 U.S. 514,525-526 (1972), and "courts must indulge every reasonable presumption against the loss of constitutional rights," Illinois v. Allen, 397 U.S. 337,343 (1970). The Supreme Court has held that Witherspoon error is fundamental and cannot be waived:

> "A sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by exclusing veniremen for cause simply because they voiced general objections to the death penalty (Emphasis supplied). 391 U.S. at 522.

In fact the United States Supreme Court has reversed a number of death sentences despite the lack of contemporaneous objections to cause chal-

lenges. See, e.g., Boulden v. Holman, supra; Maxwell v. Bishop, supra; Wigglesworth v. Ohio, 403 U. S. 947(1971); Harris v. Texas, 403 U.S. 947 (1971). Significantly in Harris and Wigglesworth the lower court decisions had held Witherspoon error waived because of the absence of timely objection. See State v. Wigglesworth, 248 N.E.2d 607(Ohio 1969); Harris v. State, 457 S.W. 2d 903(Texas 1970).

Additionally this Court has long recognized the responsibility in capital cases to review all possible prejudicial error, regardless of an express objection. "In appeals where the death penalty has been imposed, we feel it is our duty to overlook technical niceties in the interests of justice" Wells v. State 98 So2d 795, 801(Fla 1957).[19]

Therefore, Appellant's death sentence was rendered in violation of his right to due process of law and must be reversed.

POINT XII

A

APPELLANT WAS DENIED DUE PROCESS OF LAW BY THE STATE'S FAILURE TO NOTIFY THE DEFENDANT, PRIOR TO TRIAL, OF THE AGGRAVATING CIRCUMSTANCES IT INTENDED TO PROVE IN THIS CASE.

Criminal defendants have a right to notice of the specific charges against them [Cole v. Arkansas, 333 U. S. 196, 68 S.Ct.514, 92 L.Ed. 644(1948] and this requirement applies at the penalty phase of a capital trial. Presnell v. Georgia, ___U.S.___, 99 S.Ct.235,58 L.Ed.2d 207(1978).

There is a greater need for reliability on the question of sentencing in a capital case. Woodson v. North Carolina 428 U.S. 280,304-305(1976). The need for notice and for time to prepare for the sentencing phase is also greater than any other case. The death sentencing process is subject to due process requirements. Gardner v. Florida, 490 U.S.349,358(1977).

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[19] See also:Failure to object to improper prosecutorial remarks. Grant v. State, 194 So2d 612(Fla.1967); Pait v. State 112 So2d 380(Fla 1959); Singer v. State, 109 So2d 7(Fla 1959); Failure to object to lack of premeditation definition, Anderson v. State, 276 So2d 17(Fla 1973); Failure to object to improper discussion of parole with the jury; Burnette v. State, 157 So2d 65(1963); Failure to object to lack of jury instruction on receiving confession with great caution Harrison v. State, 149 Fla 365, 5 So2d 703(1942).

A defendant is entitled to a full and fair opportunity to rebut material which is introduced. The ability to prepare an effective defense against aggravating evidence requires adequate notice of the aggravating circumstances which the State is seeking to prove. Just as it would be an impossible burden, and a violation of due process, to force a criminal defendant to defend against charges not alleged in a charging document, it is likewise an impossible burden, and a violation of due process under Gardner, supra, to force a defendant in a capital case to defend against aggravating circumstances of which he receives no notice.

Appellant moved to dismiss the indictment in the present case because of a variety of problems with the constitutionality of Florida death penalty statute (R I 43-48). Appellant specifically raised the vagueness and lack of notice provided by the statutory aggravating circumstances (R I 45-47).

Of the three states whose death penalty statutes have been upheld by the United States Supreme Court only Florida does not give a defendant notice of the aggravating circumstances that the State intends to prove. In Texas, the statute limits capital murder to five separate classes. See Vernons Ann. Texas Penal Code, §19.030. The Texas courts have held that notice, prior to trial, of those aggravating circumstances which the State intends to prove is mandatory to ensure due process and thus "in order to fully apprise the accused of the charge against him." [Emphasis supplied]. Jurek v. State, 522 S.W. 2d 934,941 (Tex.Ct.Crim. App. 1975). In Georgia, the need for notice has been recognized by statute. Georgia law specifically requires that notice, not only of the aggravating circumstances, but of any evidence to be used in aggravation, be given to the defendant prior to trial. Ga. Code Ann. §27-2534. The Ohio statute precludes consideration of the death penalty unless one of the aggravating circumstances is alleged in the indictment. Ohio Rev. Code Ann. §2929.03.

The importance of the statutory aggravating circumstances is beyond

dispute; they "actually define those crimes...to which the death penalty is applicable in the absence of mitigating circumstances. As such, they must be proved beyond a reasonable doubt before being considered by judge or jury." State v. Dixon, 283 So2d 1,9(Fla 1973). The U. S. Supreme Court noted that the proof of at least one statutory aggravating circumstance seemed to be required. Proffitt v. Florida 428 U.S. 242, 250 n.8(1976). Proof of aggravating circumstances is absolutely essential to the question of sentence. Therefore, the proof of aggravating circumstances must be accomplished in a manner which comports with the requirements of due process. Notice has always been held to be an essential component of due process. Cole v. Arkansas, supra; Morgan v. United States, 304 U.S. 1, 58 S.Ct. 773,82 L.Ed. 1129(1938); cf. Presnell v. Georgia, supra.

In Florida, defendants are given no notice, prior to trial, of what aggravating circumstances the State intends to prove. This forces the defendant to enter the sentencing phase of the trial with no idea of what he must defend against.

Appellant was denied due process of law in sentencing phase of his trial. The failure to notify Appellant of the aggravating circumstance which the State intended to prove made it impossible for him to adequately prepare for the sentencing proceeding. Therefore, Appellant's death sentence is invalid and must be reversed.

B

THE TRIAL COURT HAD NO JURISDICTION TO IMPOSE A DEATH SENTENCE BECAUSE THE INDICTMENT FAILED TO ALLEGE ANY AGGRAVATING CIRCUMSTANCES

The right to a charging document setting forth the nature of the charges has long been held to be a right of Florida criminal defendants. Art. 1, §15 Fla. Const. A defect in the indictment deprives the court of jurisdiction to hear the case. Black v. State, 360 So2d 142(Fla 2nd DCA 1978); Rimes v. State, 101 Fla.1322,133 So 550(1931). In a variety of situations it has been held that an aggravating factor which enhances

punishment must be alleged in the indictment or information. Section 775.087(2), Florida Statutes (1977) states that a defendant can be required to serve a minimum of three years for carrying a firearm while committing certain enumerated crimes. It has been held that the allegation that the defendant carried a firearm must be contained in the indictment. Arthur v. State, 351 So2d 60 (Fla 4th DCA 1977).

The requirement that the information allege aggravating circumstances has also been applied to the burglary statute. Section 810.02, Florida Statutes (1977) provides that it is a first degree felony punishable by life imprisonment if the accused is armed or if he makes an assault during the commission of the offense. In Averheart v. State, 358 So2d 609 (Fla 1st DCA 1978) the court held that a defendant could not be sentenced to life imprisonment where neither of the aggravating circumstances was contained in the information.

In addition, the robbery statute also requires that aggravating circumstances be alleged in order to obtain an enhanced sentence. Section 812.13, Florida Statutes (1977) defines a robbery committed while the offender is carrying a firearm or other deadly weapon as a first degree felony punishable by a maximum sentence of life imprisonment. The court in Chapola v. State, 347 So2d 762(Fla 1st DCA 1977) held that the charging document must allege use of a deadly weapon to allow a sentence of life imprisonment. In Chapola the State had argued that the defendant had notice of the aggravating circumstances and this was adequate. The court rejected this argument even though the defendant knew that the State would introduce evidence that he was carrying a deadly weapon and he did not attack the sufficiency of the information. Id. at 763. Thus, alleging aggravating circumstances in the charging document is a jurisdictional requirement and is a necessary prerequisite to the court sentencing a defendant to a greater punishment. The allegation of aggravating circumstances is not only necessary to give notice to the defendant, [See Point XII A, supra], it is also an absolute

jurisdictional requirement.

Thus, the trial court was without jurisdiction to impose a sentence of death upon Appellant. Appellant's death sentence is invalid.

POINT XIII

THE EXECUTION OF APPELLANT'S DEATH SENTENCE WOULD DEPRIVE HIM OF LIFE WITHOUT DUE PROCESS OF LAW AND SUBJECT HIM TO CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE FLORIDA AND UNITED STATES CONSTITUTIONS:

A

THE EXTREME PENALTY WAS ASSESSED AGAINST APPELLANT ON THE BASIS OF AGGRAVATING CIRCUMSTANCES THAT WERE IMPROPER AND/OR WHICH WERE NOT PROVEN BEYOND A REASONABLE DOUBT.

It is axiomatic that aggravating circumstances must be proven beyond a reasonable doubt before being considered by the judge or jury. State v. Dixon, 283 So2d 1, 9(Fla 1973). This Court must reweigh the evidence and undertake an independent analysis to determine whether the imposition of the death penalty is warranted. See, e.g., Songer v. State, 322 So2d 481,489 (Fla.1975); Proffitt v. Florida, 428 U.S.242, 253 (1976). This Court's independent review will demonstrate that several of the aggravating circumstances found in this case are legally and factually improper.

The trial court found the offense to be especially heinous, atrocious, and cruel (R II 174-175). This aggravating circumstances is limited to those cases where the capital felony was accompanied by additional acts designed to torture the victim. State v. Dixon, supra at 9. In this case both killings involved a series of rapid shots with no additional acts designed to torture the victims. An instantaneous and painless death from gunfire, without any additional acts, does not fall within the aggravating circumstances of heinous, atrocious and cruel. E.g. Cooper v. State 336 So2d 1133,1141(Fla 1976). Riley v. State, 366 So2d 19, 21 (Fla 1979). Menendez v. State 368 So2d 1278, 1281-1282(Fla 1979). Kampff v. State, 371 So2d 1007(Fla 1979); Fleming v. State, ___So2d___ (Fla 1979), Case No. 50,005, Opinion filed

June 14, 1979.

Additionally, this Court has overturned findings of this aggravating circumstance in cases with comparatively more of a basis for a finding than the present case. See E.g., Swan v. State, 322 So2d 485 (Fla 1975)[the victim was beaten and then was bound and gagged so tightly that she would choke if she tried to free herself]; Tedder v. State, 322 So2d 908 (Fla 1975) [the defendant allowed the victim to languish]; Halliwell v. State, 323 So2d 557(Fla 1975)[victim beaten to death with an iron bar].

The trial court also found that Appellant knowingly created a great risk of death to many persons (R II 173-174). The judge based this finding on the fact that Appellant was convicted of a kidnapping which took place after the capital felony and that he was in a car which ran through a roadblock after the capital felony (R II 173-174). This factor cannot be supported either legally or factually.

As a matter of law, neither the kidnapping nor the running of the roadblock can be considered in aggravation because they are not sufficiently connected to the capital felony. This circumstance is expressly limited to "conduct surrounding the capital felony." Elledge v. State, 346 So2d 998,1003-1004(Fla 1977). In Elledge this Court invalidated the trial judge's consideration of the events surrounding another murder which was committed in furtherance of an escape in his finding of great risk of death. Thus, in the present case, neither the kidnapping nor the running of the roadblock are sufficiently connected to the capital felony to be legally considered in aggravation.

Even assuming that the kidnapping and the running of the roadblock are sufficiently connected to the capital felony to be legally considered in aggravation, neither of these incidents factually establishes that Appellant knowingly created a great risk of death to many persons. The alleged kidnapping falls far short of establishing this aggravating circumstance. The only person who could possibly have been

endangered by this act was Mr. Levinson. Endangering one person clearly does meet the "many persons" language of the statute. See Kampff v. State, 371 So2d 1007,1009-1010 (Fla 1979). It is doubtful if Appellant endangered even Mr. Levinson. The prosecution's only two eyewitnesses to this event directly conflicted as to whether Appellant held a gun on Mr. Levinson. Rhodes testified that he held the gun on Mr. Levinson while this was contradicted by Levinson (R IV 294, R V 409). Moreover, Appellant assured Mr. Levinson that he would not be harmed (R V 413-415).

The running of the roadblock also fails factually to establish that Appellant knowingly created a great risk of death to many persons. Both Rhodes and Mr. Levinson testified that Rhodes was driving (R IV 297, R V 422). Rhodes testified that he saw the roadblock and did not know what to do and decided to try to run the roadblock (R V 422). It is clear that the decision to run the roadblock was a split second decision made solely by Rhodes.

The trial judge also improperly used the same conduct to establish two separate aggravating circumstances. The judge found that the killings of the police officers were committed to avoid arrest and to hinder the enforcement of laws (R II 174). This Court has condemned the application of two separate aggravating factors which arise out of the same aspect of a defendant's conduct. E.g. Provence v. State, 337 So2d 783,786 (Fla 1976). The improper doubling condemned in Provence is similar to that which took place here. Here, the fact that the police officers were allegedly killed to avoid arrest would, under the trial judge's reasoning, automatically invoke the additional aggravating factor of the hindrance of lawful governmental functions. Thus, the same aspect of a defendant's conduct would always establish two aggravating circumstances which is improper under Provence.

The judge also found that this capital felony was committed by a person under sentence of imprisonment (R II 173). The judge based this finding on the fact that Appellant was on parole (R II 173). This

aggravating factor was designed primarily to punish prison murders, as the death penalty is the only additional punishment which could be imposed upon a person in prison. This Court has at least impliedly recognized that this circumstance should be limited to persons actually in prison. In Ford v. State, 374 So2d 496, Case No. 47,059, Opinion filed July 18, 1979 the defendant was on probation and this Court rejected the trial judge's finding that he was under sentence of imprisonment. This rationale applies equally to a person on parole.

Even if Appellant's parole status is relevant this fact was already considered in the finding that this offense was committed to avoid lawful arrest and thus be returned to prison for an alleged parole violation. Thus, the same aspect of Appellant's conduct was used to establish two aggravating factors.[20]

Therefore, several of the aggravating factors were improperly found and were not proven beyond a reasonable doubt. Accordingly, Appellant's death sentence is irreparably tainted. If any of a trial judge's findings regarding aggravating circumstances are invalidated, then the case must be remanded for resentencing. Elledge v. State, 346 So2d 998, 1003 (Fla 1977). This case falls precisely within the Elledge holding in that although the trial judge did not expressly find any statutory mitigating circumstances he "weighed" the mitigating factors, using the exact same language concerning the weighing of mitigating circumstances that this Court quoted in Elledge (R II 175).

B

THE EXTREME PENALTY OF DEATH WAS IMPOSED UPON APPELLANT ON THE BASIS OF THE FLORIDA STATUTE WHICH UNCONSTITUTIONALLY LIMITS THE CONSIDERATION OF MITIGATING FACTORS: THE SENTENCING JUDGE LIMITED CONSIDERATION OF NON-STATUTORY FACTORS.

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[20]For this Court's information it should be noted that Appellant's prior convictions(Dade Cir.No's 67-4835,67-5284S,67-5285) were challenged on post-conviction relief wherein Appellant attempted to present the sworn statements of another person admitting the offense and exculpating Appellant. The denial of post-conviction relief is currently on appeal in the Third District Court of Appeal (Case No. 79-1121). This challenge is relevant both to the trial judge's "parole" finding and to his finding of prior convictions for violent crimes.

The judge and jury in a capital case must consider as an independent mitigating factor any evidence in mitigation which in any way relates to the defendant's character or record, the circumstances of the offense, or the appropriateness of the penalty. Lockett v. Ohio, 438 U.S. 586 (1978). When the United States Supreme Court upheld the Florida statute it was on the assumption that the statutory mitigating factors were not exclusive. Lockett v. Ohio, supra, at 606-607; Proffitt v. Florida, supra, 428 U.S. at n.8.

However, subsequent to Proffitt v. Florida, supra this Court explicitly held that the list of statutory mitigating factors is exclusive and that no mitigating factors may be considered other than those listed in the statute. Cooper v. State, 336 So2d 1133,1139 (Fla 1976). At the very least a critical ambiguity or uncertainty exists in the Florida scheme which prevents the Florida statute from being consistently and evenhandedly applied at either the trial or appellate level.

This Court attempted to deal with the inconsistency between Cooper and Lockett by "performing a remarkable job of plastic surgery" on Cooper. Shuttlesworth v. Birmingham, 394 U.S. 147, 153(1969). This Court said in a brief opinion denying rehearing in Songer v. State, 365 So2d 696(Fla 1978) that " in Cooper, this Court was concerned not with whether enumerated factors were being raised as mitigation, but with whether the evidence offered was probative." Id. at 700. This Court also listed a number of cases in which this Court had approved a trial court's consideration of non-statutory mitigating factors. Id.

Songer does not adequately deal with Appellant's challenge to §921.141 under Lockett. First, Cooper does not say what Songer says it does. Cooper states explicitly that the mitigating circumstances in §921.141 are exclusive, and that "we are not free to expand the list." 336 So2d at 1139. Nor do the other cases cited in Songer say what they are alleged to say. All that were decided prior to Lockett plainly involved only statutory mitigating factors. Second, Songer's reinterpretation of Cooper leaves §921.141, unconstitutional under Lockett.

Songer approved of the exclusion of testimony concerning prior employment of a defendant. This exemplifies a far narrower concept of proper mitigation than Lockett will countenance. Thus, Appellant contends that the Florida Statute is still being unconstitutionally applied under Lockett.[21]

In this case the judge failed to consider the fact that there is considerable doubt as to whether Appellant actually killed anyone. See Point II supra. Appellant may be innocent of first-degree murder or may only be guilty under a felony-murder theory and may not be the actual cause of death. The judge failed to consider this factor anywhere in his sentencing order (R II 176). This factor is clearly a relevant consideration to the question of penalty. Green v. Georgia, ___U.S.___, 99 S. Ct. 2150(1979). The judge also limited the jury to the statutory mitigating factors (S56).

Thus the Florida statute is unconstitutional because it limits mitigating circumstances and this limitation was improperly applied to Appellant.

C

THE EXTREME PENALTY WAS IMPOSED WHERE THE TRIAL JUDGE FAILED TO INQUIRE INTO APPELLANT's WAIVER OF THE RIGHT TO PRESENT MITIGATING EVIDENCE IN THE SENTENCING PHASE OF HIS TRIAL

A defendant's right to present evidence in mitigation in the penalty phase is an essential element in Florida's capital sentencing scheme. State v. Dixon, 283 So2d 1, 7-8(Fla 1976). A waiver of a fundamental right requires: "an intentional relinquishment or abandonment of a

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[21] In the recent case of Ford v. State, supra, this Court again indicated that it considered mitigating factors to be limited to those in the statute. In Ford while it had not "overlooked" the nonstatutory mitigating factors, this Court felt duty-bound to apply only the "aggravating and mitigating circumstances duly enacted by the representatives of our citizenry..." ___So2d at ___. (Emphasis supplied).

Moreover, the legislature amended chapter 921 in its last session in order to conform with Lockett [Laws of Florida, Ch 79-353[thus indicating that the original legislative intent had been to limit mitigating factors which could be considered.

known right or privilege" [Johnson v. Zerbst, 304 U. S.458,464 (1938)] and the court must make an inquiry as to whether the waiver is voluntary and intelligent. Boykin v. Alabama, 395 U.S. 238,242(1968). There must be a personal inquiry of the defendant and assurances of counsel are not enough. McCarthy v. United States, 394 U.S. 459,467(1968); United States v. Vera, 514 F.2d 102(5thCir.1975).

In this case the judge merely relied on the assurance of counsel that Appellant did not wish to present mitigating evidence and did not ever address any questions to Appellant (S 54). In Lamadline v. State, 303 So2d 17(Fla 1974) this Court held that even though a defendant pled guilty, there must be a separate inquiry as to whether the defendant wished to waive the penalty hearing before an advisory jury. 303 So2d at 19-20. The record must show that the defendant "voluntarily and intelligently" waived this right and a silent record is inadequate to show such a waiver. 303 So2d at 20. The waiver of the right to present evidence at the penalty phase is just as serious as the waiver of the penalty phase and the advisory jury. Thus, a similar personal inquiry of the defendant is required.

Therefore, Appellant was denied due process of law by the judge's failure to inquire personally of Appellant regarding the circumstances of his waiver of the right to present evidence in mitigation.

D

THE EXTREME PENALTY ASSESSED AGAINST APPELLANT WAS DISPROPORTIONATE TO THE OFFENSE AND IS A DENIAL OF EQUAL PROTECTION.

The evidence here fails to prove that Appellant was the triggerperson See Point II, supra. The death sentence is a disproportionate and unnecessary penalty for a person who did not actually cause the death of another. This Court has reviewed four cases where it was clear that the defendant had not participated in the killing of the victim. Slater v. State, 316 So2d 539(Fla 1975); Purdy v. State, 343 So2d 4 (Fla 1977); Huckaby v. State, 343 So2d 29(Fla 1977); Shue v. State, 366 So2d 387

(Fla 1978). This Court affirmed all four convictions and reversed all four death sentences. In Slater, this Court explicitly recognized that whether a defendant is the triggerperson is a crucial factor to be weighed in the ultimate question of sentence. Also, doubt as to which person was the cause of death is a factor to be weighed in favor of life. In McCaskill and Williams v. State, 344 So2d 1276 (Fla 1976) this Court reversed both appellants' death sentences relying on the fact that it was unclear who had killed the victim. Id. at 1280. In Taylor v. State, 294 So2d 648(Fla 1974) this Court overturned the appellant's death sentence relying on the fact that the evidence at least raised the "possibility" that Taylor had not fired the fatal shot. Id. at 652.

In Coker v. Georgia, 433 U.S. 584(1977) the Court held that the death penalty is: "an excessive penalty for the rapist who, as such, does not take a human life." [Emphasis supplied] Id. at 598. Recent concurring opinions of Justices White and Marshall would recognize this rationale in the felony murder situation. Lockett v. Ohio, supra, 438 U.S. at 619-620,624-628. Justice White pointed out that there has not been an execution of a non-triggerperson since 1955 and further recognized:

> "[T]he conclusion is unavoidable that the infliction of death upon those who had no intent to bring about the death of the victim is not only grossly out of proportion to the severity of the crime but also fails to significantly contribute to acceptable goals of punishment. Id. at 626.

In this case, Appellant's death sentence is also in violation of the equal protection clause. Here, the evidence pointed just as strongly to someone other than Appellant having killed these persons. See Point II, supra. Yet, Rhodes was allowed to plead to second-degree murder for this offense while Appellant faces death in the electric chair (R IV 329-330). In Slater v. State, 316 So2d 539(Fla 1975) this Court overturned the Appellant's death sentence because his co-defendant had received life imprisonment stating that: "Defendants should not be treated differently upon the same or similar facts." 316 So2d at 542.

Therefore, Appellant's death sentence is disproportionate to the nature of the offense and in violation of the equal protection clause.

E

THE EXTREME PENALTY WAS ASSESSED ON THE BASIS OF THE FLORIDA CAPITAL SENTENCING STATUTE WHICH IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED DUE TO LACK OF ANY STANDARD FOR WEIGHING THE AGGRAVATING AND MITIGATING FACTORS.

The Florida capital sentencing statute provides no standard of proof for determining if the aggravating circumstances outweigh the mitigating evidence. Although this Court has held that the aggravating circumstances must be proven beyond a reasonable doubt there is no standard for determining the ultimate question of the relative weight of the aggravating and mitigating circumstances. State v. Dixon, 283 So2d 1, 9(Fla 1973). Both the Florida Statutes and the Standard Jury Instructions say that a death sentence is legal if the aggravating circumstances "outweigh" the mitigating circumstances. §921.141(2) Fla. Stat. (1977); Fla.Std. Jury Instr. (Criminal) Preliminary Instructions in all Capital Cases(1975). Thus, the fact that the aggravating circumstances outweigh the mitigating evidence is an essential element of a legitimate death sentence.

In Mullaney v. Wilbur, 421 U.S.684, 95 S.Ct. 1881, 44L.Ed.508(1975) the Court held that the prosecution must prove every "essential element" of the crime. The reasonable doubt standard is "indispensable" when a person's life or liberty is at stake. In Re Winship, 397 U.S. 358, 364 (1970). The reasonable doubt standard is essential to maintain the confidence of the community in the accuracy of our capital sentencing procedure.

The courts must consider all evidence in mitigation in determining the propriety of the death sentence. Lockett v. Ohio, supra. 438 U.S. at 604-5. The imposition of the death penalty is "profoundly different from all other penalties; and thus calls for a "greater degree of reliability." Id. It would be "unthinkable" for the jury to be left

with inadequate guidance in the penalty phase. Gregg v. Georgia, 428 U.S. 153, 192(1976). A jury instruction that the fact that the aggravating circumstances outweigh the mitigating evidence must be proven beyond a reasonable doubt is necessary to avoid the "wanton and freakish" imposition of the death penalty condemned in Furman v. Georgia, 408 U.S. 238, 309-310 (1972) (Stewart, J. concurring).

Therefore, Appellant was denied due process of law and his death sentence must be reversed and remanded.

F

THE EXTREME PENALTY WAS ASSESSED AGAINST APPELLANT PURSUANT TO FLORIDA'S CAPITAL SENTENCING STATUTE WHICH IS UNCONSITTUTIONAL ON ITS FACE AND AS APPLIED.

The death sentence statute in Florida is unconstitutional on its face because there is no legitimate penological justification for capital punishment. There is no definitive evidence that the death penalty is a deterrent superior to lesser punishments. See Bowers, Executions in America, 19-20, 134-135, 137-163, 193-196(1974).

Further, the capital sentencing statute in Florida is being unconstitutionally administered and applied. Florida's capital sentencing statute must fall because this Court has failed "to perform its function of death sentence review with a maximum of rationality and consistency." Proffitt v. Florida, supra, 428 U.S. at 258-259.

Thus, the statute must fall because it is incapable of being applied evenhandedly. The decisions show clearly that the enumerated aggravating circumstances are overbroad and vague, despite this Court's holding to the contrary in its anticipatory ruling in State v. Dixon, supra. A review of the cases decided by this Court both before and after Proffitt conclusively demonstrate that the death penalty is being arbitrarily applied.

Florida's death penalty is also arbitrarily and discriminatorily applied. The death penalty is disproportionately applied to poor persons, males and persons with white victims. See Crime in Florida, 1976

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XIV

THE TRIAL, ADJUDICATION, AND SENTENCING OF APPELLANT FOR ROBBERY CONSTITUTED DOUBLE JEOPARDY.

The evidence regarding premeditation was directly in conflict and therefore was insufficient as a matter of law as to Appellant. See Point II, supra. Likewise, the evidence regarding a robbery was wholly and legally insufficient even if the state's allegations are believed (See Point II, supra). Moreover Appellant was given no notice of the theory upon which the state was proceeding in order to support the first degree murder convictions. See Point II, supra. However, assuming only for argument that the lack of any notice was proper, and assuming only for this issue that the evidence regarding the alleged theft of the trooper's weapon and vehicle legally constituted a "robbery", Appellant's conviction and sentence for robbery violated the double jeopardy clause and must be vacated. See State v. Pinder, 375 So2d 836 (Fla 1979), Case No. 55,369, Opinion filed July 5, 1979.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests this Honorable Court to Vacate the Judgment and Sentence of the Trial Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Honorable Benedict P. Kuehne, Assistant Attorney General, Room 204 Elisha Newton Dimick Building, 111 Georgia Avenue, West Palm Beach, Florida, by mail/courier, this 21st day of September, 1979.

Of Counsel