IN THE SUPREME COURT OF FLORIDA

CASE NO. 61,176

MANUEL VALLE,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

* *

AN APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH
JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA
CRIMINAL DIVISION

* *

BRIEF OF APPELLEE

JIM SMITH
Attorney General
Tallahassee, Florida

PENNY HERSHOFF BRILL
Assistant Attorney General
Ruth Bryan Owen Rohde Building
Florida Regional Service Center
401 N. W. 2nd Avenue (Suite 820)
Miami, Florida 33128
(305) 377-5441

TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS
CONTINUED

TABLE OF CITATIONS
CONTINUED

TABLE OF CITATIONS
CONTINUED

TABLE OF CITATIONS
CONTINUED

TABLE OF CITATIONS
CONTINUED

TABLE OF CITATIONS
CONTINUED

TABLE OF CITATIONS
CONTINUED

TABLE OF CITATIONS
CONTINUED

TABLE OF CITATIONS
CONTINUED

TABLE OF CITATIONS
CONTINUED

TABLE OF CITATIONS
CONTINUED

TABLE OF CITATIONS
CONTINUED

TABLE OF CITATIONS
CONTINUED

OTHER AUTHORITIES

INTRODUCTION

The appellant was the defendant in the court below. The appellee, the State of Florida, was the prosecution. In this brief, the parties will be referred to as they appear before this court. The symbol "R" will be used to designate the record on appeal and the symbol "T" will be used to designate the transcript of trial proceedings. The symbol "SR" will be used to designate the appellant's supplemental record. All emphasis has been supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

The appellee accepts the appellant's Statements of the Case and Facts as being a substantially true and correct account of the proceedings below. The appellee respectfully notes the following omissions or areas of disagreement:

1) On May 12, 1978, the appellant plead guilty to count four of the indictment, auto theft. (R. 1216).

2) In its written order, denying the appellant's Motion to Suppress Admissions and Confessions, the trial court made the following findings of facts:

1. The Court finds that following his arrest by Officers Rodriguez and Twiss of the Deerfield Beach Police Department the defendant was fully advised of his rights by Officer Rodriguez. At that time, Manuel Valle told Officer Rodriguez that he was willing to waive his rights and speak to the police without an attorney being present. This initial free and voluntary waiver of his constitutional rights were never retracted by the defendant Manuel Valle.

2. The Court finds that at no time did the defendant ever assert his constitutional rights to remain silent or to have counsel present or in any way invoke any of his constitutional rights under the decision in Miranda v. Arizona, 384 U.S. 436 (1966).

3. The Court finds that the defendant never requested an attorney. Instead, the Deerfield Beach Police, on their own initiative, gratuitously telephoned attorney Lisa Kahn of the Broward Public Defender's Office and placed the defendant in telephonic contact with her.

4. Based upon a totality of the circumstances, this Court is convinced that the defendant consulted with attorney Lisa Kahn and heard the advice she gave him, but that he freely and voluntarily, and with full knowledge of the situation and of his rights, made a knowing and intelligent decision not to follow the advice she gave him.

5. Based upon the totality of the circumstances, this Court is convinced that the defendant never intended to and did not invoke his rights to remain silent and to counsel through Lisa Kahn. The

Court does not believe that Manuel Valle ever affirmatively advised Lisa Kahn that he desired to invoke his rights and the Court finds that Lisa Kahn's request to Lieutenant Giuffreda of the Deerfield Beach Police Department, that he and his officers not speak to the defendant without first calling her, was not reflective of the true wishes of the defendant.

6. The Court believes the testimony of Detective Wolf concerning the events surrounding the taking of the defendant's confession in this case. The Court finds that Detective Wolf was unaware that Valle had spoken to an attorney until after Valle himself advised him of this fact. In this regard, the Court specifically finds that Manuel Valle's statement to Detective Wolf was that he (Manuel Valle) had spoken with Lisa Kahn and that she told him not to say anything or sign anything. Based upon the totality of the circumstances, this Court is convinced that Manuel Valle meant this simply to be a statement of what had occurred and did not intend this statement to be an invocation of his constitutional rights.

7. The Court also specifically finds, based upon a totality of the circumstances, including the demeanor of the witnesses before the Court, that when Detective Wolf responded to the foregoing statement by Manuel Valle by telling him that it was his constitutional right to refuse to speak with the detective and by making the polite and innocuous statement that the detective had come to Deerfield Beach hopefully to talk to him, this did not constitute further interrogation or questioning within the meaning of the Miranda decision

as interpreted in Rhode Island v. Innis, 446 U.S. 291 (1980).

8. The Court also finds that Manuel Valle's immediate subsequent statement to Detective Wolf, to the effect that he had always cooperated with the police in the past, not only constituted a free and voluntary waiver of his rights, but is indicative of the fact that it always was his intention, from the first moment he was arrested and read his rights by Officer Rodriguez, to cooperate and make a statement.

9. The Court further finds that the defendant's subsequent written waiver of his constitutional rights was freely, knowingly and voluntarily executed by Manuel Valle, that Manuel Valle made a knowing and intelligent waiver of his rights and that he freely and voluntarily first spoke with Detective Wolf and then freely and voluntarily made a formal written confession.

(R. 1054-56)

3) In addition to those findings of facts in the trial court's order denying the motion to suppress, the following facts are also pertinent:

A. Lieutenant Giuffreda of the Deerfield Beach Police Department told Lisa Kahn that none of his officers would speak to the appellant (T. 235), but that she would have to contact the Broward County Sheriff's Department herself. (T. 234). No specific mention was made of the Dade County Police Officers.

B. After being briefed by the Deerfield Beach Police, Detectives Wolf and Major then proceeded to the interview room where they were introduced to the appellant. (T. 188). They identified themselves and Detective Wolf told the appellant that they were from Dade County and that they wished to speak to him about the incident, if he was willing to do so. (T. 189).

C. After Detective Wolf stated to the appellant that it was his constitutional right not to speak and that they came there hopefully to speak to him, if he wanted to (T. 223), the appellant replied that he had cooperated with the police in the past and was willing to do so at that time. (T. 190).

D. Detective Wolf then advised the appellant that they could make no deals or promises and that if they were going to talk to each other, they would have to go over the constitutional rights warning form first. (T. 190). The appellant then stated that he was willing to talk with Detective Wolf. (T. 190). Detective Wolf then went over the form, point by point, and the appellant initialed each of the points on the form, including, the advisements as to his right to counsel, and signed the form. (T. 190-93) Appellant was then interviewed for two and one-half hours, during which time appellant never requested the presence of an

attorney. (T. 195-96). After a twenty to twenty-five minute break, a formal written statement was taken. (T. 197) Prior to the written statement, Detective Wolf again went over the same rights waiver form. Appellant did not request the presence of an attorney or request to speak to an attorney. (T. 197).

4) At trial, the State introduced into evidence the police tape of Officer Pena's broadcast in which he said "I'm shot. I'm shot. I'm shot." (T. 971). The appellant was unequivocally identified by Officer Gary Spell, the only eyewitness to the murder of Luis Pena and himself a victim of the attempted first degree murder alleged in the second count of the indictment. Officer Spell's testimony concerning the shooting itself was that the appellant walked very slowly back to Officer Pena's patrol car, positioned himself at the window and then raised and aimed the pistol at Luis Pena. (T. 985-86). Spell, who demonstrated what he saw the appellant do for the jury (T. 987-91), repeatedly stated that the appellant aimed and fired the weapon from a position on the side of Officer Pena's door. (T. 986). Further evidence of appellant's guilt included the physical evidence in the case, primarily appellant's latent fingerprints lifted from the camaro and from Pena's patrol car. (T. 1091).

5) In his oral statement to Detective Wolf, the appellant stated that when he saw Officer Pena's police vehicle following him, he commented to Felix Ruiz, "God, he's going to stop me." (T. 1125).

6) On March 24, 1981, the mandate from this Court, reversing the appellant's initial conviction was received by the clerk of the circuit court. (R. 1). On April 10, 1981, the trial court formally appointed Mr. Rosenberg, as a special assistant public defender to assist the Public Defender's Office in representing the appellant.(R. 55-57L). On July 8, 1981, the appellant first filed his motion to dismiss the indictment based on the invalidity of the grand jury. (R. 445). In his written motion, appellant did not challenge the selection of the grand jury foreperson. Appellant's trial was scheduled to begin on July 29, 1981. On July 22, 1981, the trial court denied appellant's motion to dismiss. (R. 1210).

7) In the evidentiary proffer that was attached to the Appellant's Motion to Dismiss the Indictment, there were references to the depositions of seventeen circuit court judges that were used by the state in rebuttal in the case of State v. Timberlake, Case No. 77-29728. (R. 610, 612).

8) After, the juror, Ms. Ladd was initially questioned she told the baliff that she wanted to say something, that she was too nervous to say before. (T. 746). The following colloquy then occurred:

> THE BAILIFF: Miss Ladd wants to say something that she had forgotten about before.
>
> MR. ADORNO: Who is she, the one from Key West?
>
> THE COURT: Shall we get it over with now?
>
> [Whereupon, Juror 425D, Miss Nancy Ladd, was called to the stand and questioned as follows:]
>
> THE COURT: Yes, ma'am?
>
> MISS LADD: I don't know, but I was up here, I was like really nervous, and I was thinking of all the questions that you asked me. I wanted to say, like when I heard about the capital punishment and all that, I believe in it, I just don't know if I could do it. What you are saying about the second half of the trial and as far as could I make a decision and everything like that, I just don't believe that I personally could sentence anyone to death, and I just, since you were asking so many questions about the second part, I thought you might want to know that.
>
> THE COURT: Do you want additional voir dire?
>
> MR. ADORNO: I do.
>
> THE COURT: Have a seat up here, ma'am.
>
> MR. ADORNO: Miss Ladd, I thank you for bringing that to our attention.

MISS LADD: You get so nervous.

MR. ADORNO: Are you calm now or do you want a couple of more minutes?

MISS LADD: I am as calm as I am going to be.

MR. ADORNO: Please tell me what your opinion is as far as your concern? Are you concerned about the second phase?

MISS LADD: Well, like I say, I believe in capital punishment, okay, and there's no problem there, but when I am really in here in seeing the defendant and everything and knowing what he looks like, I don't know if I personally could sentence anyone to death.

MR. ADORNO: You believe in it, but you do not want to be a party to someone who potentially could be sentenced to death? That is basically what you are trying to tell me?

MISS LADD: Basically.

MR. ADORNO: This feeling that you have that you have expressed to us, is it of such a degree that first of all that it might affect you from the first part? In other words, we only get to the second part after the first part.

MISS LADD: No, I don't think so.

MR. ADORNO: So you could give me, on behalf of the State, a fair trial on the first part?

MISS LADD: Yes.

MR. ADORNO: Even though that is the first prerequisite? In other words, only if he is convicted of first degree murder is there the

potential to have a jury recommend and the Court to sentence him to death.

MISS LADD: Yes, the first part, you know, I can handle.

MR. ADORNO: Let us go to the second part. Is it your feeling to such an extent that if I get up here in front of the twelve members of the jury and you are number twelve and I am telling you what I believe the evidence has shown and what the law is and what I believe is the appropriate recommendation as being death under the facts of the case, am I really only arguing to eleven?

MR. ROSENBERG: Objection to the form of the question.

THE COURT: Overruled.

MISS LADD: I couldn't do it.

MR. ADORNO: So you are telling me that there is no way I am going to be able to present to you by way of evidence anything that will get you to recommend anything other than life and make you consider to vote for a recommendation of death?

MISS LADD: I can't say there is nothing, you couldn't do, but I mean, you would have a lot to overcome before you would be able to convince me.

MR. ADORNO: Okay.

MR. ROSENBERG: Miss Ladd, if the Court instructed you in the first case as to the law to be followed, you said you would have no problem if the State met its burden of proving guilt to convict. Is that right?

MISS LADD: Yes.

MR. ROSENBERG: If the Court instructed you as to the second phase that it was seeking a recommendation from the jury and that that recommendation was a majority recommendation from the jury and it was not necessarily unanimous as it is required in the first phase and that under the law your recommendation is a majority and merely a recommendation of the sentence and imposition of any sentence, and judgment is up to the Court and not the jury, would you be able to follow those instructions?

MISS LADD: You mean that if the jury ended up with guilt, the Judge still decides?

MR. ROSENBERG: What I am asking you is if you went through the guilt or innocence phase and you on the jury voted guilty and go to the second phase and in the second phase what the Court is seeking from you is a recommendation, and that recommendation is between life or death, and the Court instructs you that there are other factors to take into consideration in returning that recommendation and the Court instructs you that that recommendation is to be made by a majority of you, the jury, and the Court instructs you that that recommendation is advisory only, that the Court may not follow that in the final sentence and judgment, but that the Judge may do what he wishes, would you be able to follow those instructions?

MISS LADD: No, because I would still see it as me.

MR. ROSENBERG: Are there any circumstanes under which you would be able to return or recommend to the Court the death penalty?

MISS LADD: You know, I can't think there are none, but offhand I can't think of anything. You know, I mean, I don't know about the case or anything like that, but I just don't know if I could do it.

MR. ROSENBERG: Nothing further.

THE COURT: Thank you, ma'am. We appreciate your calling this to our attention. Come back tomorrow at 8:45 upstairs and we will let you know whether we need your services or not.

[Whereupon, Juror 425D was excused from the stand.]

MR. ADORNO: State would challenge Miss Ladd for cause.

MR. SCHERKER: Objection, Judge. Her last statement was that she could not say.

THE COURT: Her last statement was that she could not imagine any circumstances.

MR. SCHERKER: She said she could not say there were none.

THE COURT: Grant State motion.

MR. ADORNO: For the record, she also volunteered to come back in here and bring it to our attention. She was obviously upset and distraught and nervous by this whole area of questioning.

(T. 746-51).

9) At trial, the medical examiner, Dr. Wright testified that Officer Pena had died from drowning, due to the gunshot wound to the neck. (T. 1228). He testified that the

bullet went through the carotid artery which supplies all the blood to the right side of the head, (T. 1226), that Officer Pena was able to make gutteral sounds, but that in attempting to breath, he was taking blood into his lungs. (T. 1228). At the sentencing phase, Dr. Wright testified that because Officer Pena was conscious for ten to fifteen minutes, before death, he would be able to feel pain. (T. 1398). Dr. Wright described the pain as a deep, visceral pain, due to the injury to the visceral nerves in the neck. (T. 1399). Dr. Wright testified that because the visceral nerves involve something wrong with the important vital structures, they are handled somewhat differently by the brain and have a somewhat different reaction in the body, that being the worst pain that one could have. (T. 1399).

10) During cross-examination of Dr. Toomer, Dr. Toomer stated that at anytime there is a premeditated killing, that the person is suffering under extreme emotional disturbance. (T. 1443).

11) The appellant's wife testified that she still loved him and would wait for him. (T. 1468).

12) Dr. Smith testified that the appellant was not schizophrenic, depressed or anxious, but had showed themes of aggressiveness. (T. 1476).

13) Eurvie Wright testified that as far as he was concerned the appellant was rehabilitated. (T. 1497).

14) The proffered testimony at the sentencing hearing of Robert Dignazia was that Mr. Dignazia was a consultant in the police field with past experience as a deputy sheriff, and chief of police, (T. 1499), who would have testified that appellant's death would not serve as a deterrent for other police killings. (T. 1500, R. 1069). John Buckley was a consultant on correctional matters, who had been a sheriff, and taught courses on law and justice (T. 1506), who would have testified that the appellant was a model prisoner. (T. 1507, R. 1074-75). Mr. Buckley's testimony would be based upon his meeting with the appellant for 3 1/2 hours, reading Officer Spell's deposition, as well as considering the opinions of Dr. Toomer and Dr. Fisher, that the appellant was not a violent person. (R. 1073, 1074). Mr. Buckley also offered the opinion that the appellant was one of the best mannered and best type of inmate to have, like all lifers. (R. 1074).

15) At the sentencing hearing, appellant did not proffer the names or testimony of any other witness. The judge allowed the appellant the opportunity to proffer the testimony of the excluded witnesses outside his presence. (T. 1509-10). At the sentencing, after the jury had recommended death, the appellant filed copies of the transcript

of the proffer. (T. 1568). The State objected on the grounds that the testimony was taken at a day and time of which the State was not notified (T. 1568), and therefore the State had not been given an opportunity to cross-examine the witnesses to determine their competency to testify as experts. (T. 1570-71). The trial court then indicated that he had reviewed the proferred testimony of Mr. Buckley, Mr. McClendon, and Dr. Fisher, found them to be irrelevant (T. 1569), and stated that there would have been at least one of them that he would not have qualified to testify. (T. 1571).

Mr. McClendon was an assistant administrator for prison industries in Ohio, (R. 1079), who would have testified that the appellant would of been a model prisoner because he was a loner in prison, would tend towards the mainstream, follow the rules and stay out of trouble. (R. 1084-86). Dr. Brad Fisher, was a clinical correctional psychologist (R. 1092), who would have testified that appellant was under the influence of extreme mental and emotional disturbance at the time of the incident (R. 1103), and that because of his lack of violent behavior while in prison, appellant would not be a danger to inmates. (R. 1109). Dr. Fisher's testimony was not proferred for the purpose of showing that the appellant acted under the influence of extreme mental disturbance or whether his ability to conform his conduct to the essential

requirements of the law were substantially impaired, but for the purpose of showing that appellant was a model prisoner.

16) After the prosecutor's argument during the sentencing hearing, the appellant only objected by renewing his objections as outlined in his motion in limine, regarding the arguments concerning atarocious and cruel, subsection 5A, and the instruction on the advisory nature of the jury's recommendation. (T. 1530). The appellant did not object to any comments concerning Officer Pena's wife or children. The trial court asked the appellant if he was asking for any kind of relief. The appellant replied only that he was renewing his objections. (T. 1530).

17) During the Appellant's opening statement, counsel for the appellant stated:

> Valle looks at Officer Spell's face, and he knew that Spell had seen it happen. He knew that Ruiz had shot Pena and that there was an armed police officer, Officer Spell, who is in a car who could see that his partner had been shot. He got the gun, discharged a shot, two, and then he took aim at Officer Spell. He, Manuel Valle, took aim at Officer Spell and fired at him, and I think the same deputy chief medical examiner, will testify that had Officer Spell not been wearing that bullet-proof vest, that he would not be here today to tell the story.
>
> (T. 939-40).

During closing argument, appellant's counsel stated as follows:

> It is proof that Officer Pena is dead. It is proof that someone killed Officer Pena. There is no proof necessary for who attempted to kill Gary Spell. He did, and the judge is going to instruct you that if you find him guilty of that, the judge can sentence him up to life imprisonment for that.
>
> (T. 1316-17).

18) Prior to sentencing, the State and appellant stipulated as to the severed Count III, possession of a firearm by a convicted felon, that is, they stipulated to the prior adjudications for forgery, uttering a forged instrument, and receiving stolen property, and that appellant had violated his probation. (T. 1550). The trial court found the appellant guilty of Count III. (T. 1550).

POINTS INVOLVED ON APPEAL

Appellee respectfully rephrases appellant's Points on Appeal as follows:

I

WHETHER THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION TO SUPPRESS INCRIMINATING STATEMENTS WHERE THE APPELLANT NEVER INVOKED HIS RIGHT TO COUNSEL OR HIS RIGHT TO REMAIN SILENT BUT RATHER FREELY AND VOLUNTARILY MADE THE STATEMENTS AFTER A KNOWING AND INTELLIGENT WAIVER OF HIS CONSTITUTIONAL RIGHTS?

II

A. WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO DISMISS THE INDICTMENT WHERE (1) LATINS ARE NOT A COGNIZABLE, DISTINCT CLASS, (2) WHERE THE APPELLANT FAILED TO PRESENT ALLEGATIONS SUFFICIENT TO ESTABLISH A PRIMA FACIE CASE OF UNDERREPRESENTAION, AND (3) WHERE ANY ERROR IN THE COMPOSITION OF THE GRAND JURY WOULD BE HARMLESS WHERE THERE HAS BEEN A CHANGE IN THE PROCEDURE UTILIZED IN SELECTING THE GRAND JURY?

B. WHETHER THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION TO STRIKE THE PETIT JURY VENIRE WHERE THE APPELLANT FAILED TO PRESENT ALLEGATIONS SUFFICIENT TO ESTABLISH A CASE OF UNDERREPRESENTATION?

III

WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR MISTRIAL, WHERE THE TESTIMONY THAT APPELLANT HAD RATHER NOT ANSWER ONE QUESTION DURING HIS CUSTODIAL QUESTIONING WAS NOT ELICITED AS A

POINTS INVOLVED ON APPEAL CONTINUED

COMMENT ON THE APPELLANT'S INVOCATION OF HIS RIGHT AGAINST SELF-INCRIMINATION?

IV

WHETHER THE SENTENCE OF DEATH WAS PROPERLY AND APPROPRIATELY IMPOSED?

A. WHETHER THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S OBJECTION TO THE EXCLUSION FOR CAUSE OF JUROR LADD?

B. WHETHER THE TRIAL COURT ERRED IN EXCLUDING CUMMULATIVE, IRRELELEVANT, AND INCOMPETENT TESTIMONY THAT THE APPELLANT WOULD BE A MODEL PRISONER?

C. WHETHER THE JURY'S RECOMMENDATION OF DEATH WAS IMPERMISSIVELY TAINTED?

D. WHETHER THE TRIAL COURT ERRED IN ACCEPTING THE JURY'S RECOMMENDATION AND IMPOSING A SENTENCE OF DEATH?

V

WHETHER ANY ERROR SHOULD AFFECT THE CONVICTIONS FOR ATTEMPTED FIRST DEGREE MURDER AND POSSESSION OF A FIREARM BY A CONVICTED FELON?

ARGUMENT

I

THE TRIAL COURT DID NOT ERR IN DENYING THE APPELLANT'S MOTION TO SUPPRESS INCRIMINATING STATEMENTS WHERE THE APPELLANT NEVER INVOKED HIS RIGHT TO COUNSEL OR HIS RIGHT TO REMAIN SILENT, BUT RATHER FREELY AND VOLUNTARILY MADE THE STATEMENTS AFTER A KNOWING AND INTELLIGENT WAIVER OF HIS CONSTITUTIONAL RIGHTS. (Restated).

It is well established that the ruling of a trial court that a confession was freely and voluntarily made comes to an appellate court clothed with a presumption of correctness. In testing the accuracy of those conclusions, the appellate court must interpret the evidence and all reasonable deductions and inferences which may be drawn therefrom in the light most favorable to the trial court's conclusions. This court is not at liberty to substitute its views of the credibility or weight of conflicting evidence, as that is for the trial court, and that ruling should not lightly be set aside. Stone v. State, 378 So.2d 763, 770 (Fla. 1979); State v. Nova, 361 So.2d 411, 412 (Fla. 1978).

Appellee submits that in the instant case, ample and substantial competent evidence exists to support the trial court's finding that the appellant's oral and written statements had been freely and voluntary given after appellant had made a knowing and intelligent waiver of his

constitutional rights. The facts as found by the trial court and supported by the record are as follows.

The appellant was arrested by Officers Rodriguez and Twiss of the Deerfield Beach Police Department, at which time appellant was fully advised of his rights by Officer Rodriguez. (R. 1054, T. 288). At that time, the appellant told Officer Rodriguez that he was willing to waive his rights and speak to the police without an attorney present. (R. 1054, T. 288). Without being requested to do so, and as part of their police procedure, Lieutenant Giuffreda of the Deerfield Beach Police Department, telephoned attorney Lisa Kahn of the Broward Public Defender's Office and placed the appellant in telephone contact with her. (R. 1054, T. 232, 234). Ms. Kahn advised the appellant not to speak to anyone and to contact her if anyone tried to interrogate him. (R. 1054, T. 245). Ms. Kahn then requested that neither Lieutenant Giuffreda or any of his officers speak to the appellant without first calling her. (R. 1055, T. 235). Lieutenant Giuffreda told Ms. Kahn that none of his officers would speak to the appellant (T. 235), but that she would have to contact the Broward County Sheriff's Department. (T. 234). No specific mention was made of the Dade County police officers. The trial court specifically found that it did not believe that the appellant had ever affirmatively advised Ms. Kahn that he desired to invoke his rights. (R. 1055).

Approximately one hour later, Dade County police officers, Detectives Wolf and Major received a briefing from the Deerfield Police Officers, but Detective Wolf was not informed at that time that the appellant had been placed in contact with the Public Defender. (R. 1055, T. 219). Detectives Wolf and Major then proceeded to the interview room where they were introduced to the appellant. (T. 188). Detectives Wolf and Major identified themselves and Detective Wolf told the appellant that they were from Dade County and that they wished to speak to him about the incident, if he was willing to do so. (T. 189). At this point, the appellant informed Detective Wolf that he had spoken with Lisa Kahn and that she had advised him not to talk to anyone or sign anything at that time. (R. 1055, T. 189). Detective Wolf responded by telling the appellant "that was his constitutional right and that if he didn't want to speak to him or talk about the incident, he had the right to remain silent." (R. 1055, T. 190). Detective Wolf then told the appellant that he had come up there hopefully to speak to him, if <u>he</u> wanted to. (R. 1056, T. 223). The appellant replied by stating "that he had several experiences with police officers in the past on previous arrests and <u>that he had cooperated in the past and was willing to do so at that time</u>." (R. 1056, T. 190).

Detective Wolf then advised the appellant that they could make no deals or promises and that if they were going to talk to each other, they would have to go over the constitutional rights warning form first. (T. 190). The appellant then stated that he was willing to talk with Detective Wolf. (T. 190). Detective Wolf then went over the form, point by point, and the appellant initialed each of the points on the form, including, the advisements as to his right to counsel, and signed the form. (T. 190-93). Appellant was then interviewed for two and one-half hours, during which time appellant never requested the presence of an attorney or requested to speak to an attorney. (T. 195-96) After a twenty to twenty-five minute break, a formal written statement was taken. (T. 197). Prior to the written statement, Detective Wolf again went over the same rights waiver form. Appellant did not request the presence of an attorney or request to speak to an attorney. (T. 197).

Based on those facts the trial court made the following findings that the appellant made a knowing and intelligent decision not to follow the advise given by Lisa Kahn, that Ms. Kahn's request to Lieutenant Giuffreda of the Deerfield Police Department, that he or his officers not speak to the appellant without first calling her, was not reflective of the true wishes of the appellant, and that the appellant's statement to Detective Wolf that he had spoken to Ms. Kahn

and that she told him not to say anything or sign anything was simply a statement of what had occurred and did not intend this statment to be an invocation of his constitutional rights. The trial court further found that Detective Wolf's statement to the appellant that it was his constitutional right not to speak with him, and that he had come to Deerfield Beach hopefully to speak to the appellant did not constitute further interrogation or questioning, and that the appellant's response that he had always cooperated with the police in the past was indicative of the fact that it was his intention, from the first moment that he was arrested and read his rights, to cooperate and make a statement. (R. 1055-56).

Appellant contends that his statements were obtained in violation of the requirements of Miranda v. Arizona, 384 U.S. 436 (1966).[1] The appellee submits that the appellant is laboring under a misapprehension both of law and fact.

[1]It is important to note that appellant does not contend that his confession was involuntary in any manner and he alleges no violation of his Sixth Amendment right to counsel as occurred in Brewer v. Williams, 430 U.S. 387 (1977). As pointed out in Brewer, a defendant's Sixth Amendment right to counsel accrues "at or after the time that judicial proceedings have been initiated against him." 430 U.S. at 398. See also Kirby v. Illinois, 406 U.S. 682 (1972). In the instant case, judicial proceedings had not been initiated against the appellant at the time he gave his statement. Waiver of Miranda rights and waiver of counsel once it has attached are distinguishabale and should be judged separately. United States v. Brown, 569 F.2d 236 (5th Cir. 1978)(en banc). In the present case, the Court is concerned solely with the Miranda waiver.

A. Appellant Never Invoked His Right To Remain Silent

Appellant alleges that his statement to Detective Wolf that he had spoken with Lisa Kahn and that she had told him not to make any statements or sign anything, constituted an invocation of his right to remain silent. Thus, the initial issue to be determined is if the appellant's statement concerning what Ms. Kahn had advised him, was an invocation of his right to remain silent.

It is well established that when an accused indicates in any manner, that he wished to remain silent or to consult with an attorney, interrogation must cease. Miranda v. Arizona, supra at 473-74, 444-45. Appellee submits that under the totality of the circumstances it is readily apparent that the appellant never invoked his right to remain silent. Appellee submits that the appellant's statement coupled with his immediate subsequent statement, that he had been arrested on numerous occasions in the past and had always cooperated with the police viewed together with the fact that at no time did appellant request that the questioning cease or ever ask to speak with an attorney or Ms. Kahn, was not an exercise by the appellant of his right to remain silent. To the contrary, the appellant was informing the officers that he wished to cooperate and to waive those

rights despite advise of counsel. See, e.g. Thompson v. State, 235 So.2d 354 (Fla. 3d DCA 1970); cf. United States v. Rodriguez-Gastelum, 569 F.2d 482 (9th Cir. 1978); Ashley v. State, 264 So.2d 685 (Fla. 1972). A defendant has as much right to waive his right to be silent as he has to insist on the right. Franklin v. State, 324 So.2d 187 (Fla. 1st DCA 1975). Furthermore, the law accords a defendant the opportunity to voluntarily change his mind and talk to police officers. Witt v. State, 342 So.2d 497 (Fla. 1977), Thus, appellee submits that even if appellant's statement was somehow an invocation of his right to remain silent, the circumstances that followed clearly showed that appellant had voluntarily changed his mind.

Appellee submits that appellant's statement constituted at most an equivocal assertion of his right to remain silent. As such, Detective Wolf was not prohibited from initiating further communication for the purpose of clarifying the appellant's intentions. See, e.g. Nash v. Estelle, 597 F.2d 513 (5th Cir.)(en banc) cert.den., 444 U.S. 981 (1979); United States v. Rodriguez-Gastelum, 569 F.2d 482 (9th Cir. 1978)(en banc); United States v. Weston, 519 F.Supp. 565 (W.D. N.Y. 1981); Waterhouse v. State, __So.2d___, Case No. 59,765, Fla., opinion filed February 17, 1983 [8 F.L.W. 81]. Thus, Detective Wolf's statement that "that was his constitutional right," (T. 190) and that he was there "hopefully

to speak with him," (T. 223) was not interrogation within the meaning of Rhode Island v. Innis, 441 U.S. 291 (1980), but rather statements to the appellant to clarify his intentions. See Cannady v. State, __So.2d___, Case No. 59,974, Fla., opinion filed February 27, 1983 [8 F.L.W. 90].

Furthermore, the appellee submits that as the trial court found, Detective Wolf's statements were polite and innocuous, such as a police officer should not know were reasonably to elicit an incriminating response. Detective Wolf merely told the appellant that he was there hopefully to speak with him. The officers applied no physical or psychological pressure on the appellant and there was no coercion, badgering or overreaching on their part. After appellant orally informed Detective Wolf that he wished to make a statement, they did not immediately begin questioning, but instead, first had the appellant review a written waiver form which he clearly understood, initialed and signed. (T. 190-93). See, e.g., State v. Holt, 354 So.2d 888 (Fla. 4th DCA 1978); Rhome v. State, 222 So.2d 431 (Fla. 3d DCA 1969). Only then did Detective Wolf proceed to take the appellant's statements. Further, Detective Wolf's statements that no deals could be made, but that appellant would have to first execute a constitutional rights warning form (T. 190), was not interrogation. See, e.g. United States v. Rieves, 584 F.2d 740, 745 (5th Cir. 1978) (statement that officer would make known to the court any

cooperation on defendant's part was not interrogation). Thus, it is clear that Detective Wolf "scrupulously honored" the appellant's invocation of his right to remain silent.

B. Appellant Never Invoked His Right To Have Counsel Present

As with his right to remain silent, appellant asserts that he invoked his right to counsel when he told Detective Wolf that he had consulted with Lisa Kahn and she had advised him not to speak to anybody or sign anything at that time. (T. 189-90).[2] Thus, it is again important to first determine if the appellant's statement concerning what Ms. Kahn had advised him, was an invocation of his right to counsel.

As stated supra, appellee asserts that this statement by appellant was only a statement as to what had occurred and was not intended to be an invocation of his right to counsel. Furthermore, appellee submits that at best the statement would be an equivocal request to consult with counsel. As such, Detective Wolf was not prohibited from

[2]Appellant also asserts that by his telling Lisa Kahn that he would follow her advise, that he had invoked his right to counsel. Appellee submits that any agreements between the appellant and counsel which are not specifically communicated to the police are irrelevant in determining whether the police scrupulously honored his right to counsel. See, e.g., White v. Finkbeiner, 611 F.2d 186 (7th Cir. 1979); Hyde v. Massey, 592 F.2d 249 (5th Cir. 1979).

initiating further communication for the purpose of clarifying appellant's request. Nash v. Estelle, supra.

In Waterhouse v. State, supra this Court recently held that a defendant's statements to police officers that "I think I want to talk to an attorney before I say anything else "and "I think I'd like to talk to my attorney. Would you all come back tomorrow?", were equivocal requests to consult with counsel and as such the officers did not act improperly in visiting the defendant and questioning him further about his two equivocal statements expressing possible interest in seeing an attorney. 8 F.L.W. at 82. This Court distinguished Edwards v. Arizona, 451 U.S. 477 (1981) on the basis that the defendant did not express a desire to deal with the police only through counsel. Id. Appellee submits that the same distinction is present in the instant case, where the appellant not only did not express a desire to deal with police only through counsel, but stated that he had always cooperated with the police in the past.

Similarly in Cannady v. State, supra, this Court held that the statement "I think I should call my lawyer" made by a defendant during questioning after he had begun to confess and cry, was a situation in which the defendant was both requesting an attorney, but at the same time confessing, and thus the police officer's asking the defendant if he wanted

to talk, was not interrogation, but rather was an attempt to clarify the defendant's wishes. 8 F.L.W. at 91. See also United States v. Rodriguez-Gastelum, supra, (where defendant stated that he would talk to officer with an attorney, to which officer asked if defendant wanted to talk without an attorney, to which the defendant replied, "that's fine," was viewed as an attempt by the officer to clarify the defendant's prior statement, and defendant's answer was held to be a waiver); Blasingame v. Estelle, 604 F.2d 893 (5th Cir. 1979)(where defendant at arraignment stated he would like an attorney because he could not afford one, police were not barred from subsequent station house interrogation so long as the officer did not act improperly and defendant failed to request presence of counsel). Thus, appellee submits that the appellant's statement concerning Lisa Kahn was equivocal at best, and Detective Wolf statements to the appellant were an attempt to clarify his desires as to counsel, and were not prohibited.

Appellant also asserts that Lisa Kahn's instructions to Lieutenant Giuffreda not to question the appellant without her being present and his subsequent agreement as to his officers, was somehow the legal equivalent of a request for counsel made by the appellant himself. This is simply not true. The determination of the need of counsel is the defendant's perogative. State v. Craig, 237 So.2d 737 (Fla.

1970). The State cannot force a person to be represented by counsel any more than it can deny counsel. Clowers v. State, 244 So.2d 140 (Fla. 1971). Thus, just as Lisa Kahn had no right to waive the appellant's constitutional rights to counsel, without his consent, she had no right to unilaterally invoke his rights.

United States v. Wedra, 343 F.Supp. 1183 (S.D. N.Y. 1972), the federal trial court decision upon which the defendant relies to establish this novel proposition is inapposite. In Wedra, the defendant was already indicted and had retained counsel who advised the police not to question him in his absence. The police officer to whom he spoke affirmatively assured him that his client would not be questioned and in reliance upon such assurance he left the station house. Subsequently, the police did question Wedra, without first notifying his counsel, and over his explicit statement that he did not want to make any statement and ultimately obtained statements from him.

In Wedra, unlike the case at bar, an indictment had already been returned against the defendant at the time he was questioned. Thus, it is obvious that the holding quoted by appellant at page 39-40 of his brief was based upon the fact that the continued questioning of the defendant out of the presence of his counsel was violative of his Sixth Amendment rights which attached at the time of filing of the

indictment. See Kirby v. Illinois, supra; Brewer v. Williams, supra; Massiah v. United States, 377 U.S. 201 (1964). As pointed out supra, these rights are not implicated in the case at bar. Furthermore, the federal courts have held that where the prosecution uses a statement made by the defendant during interrogation conducted in the absence and without the knowledge of the attorney, a constitutional question is not present. Rather it may be a violation of the canons of ethics, but reversal of the defendant's conviction is not required. Moore v. Wolff, 495 F.2d 35 (8th Cir. 1974); United States v. Thomas, 474 F.2d 110 (10th Cir. 1973); Coughlan v. United States, 391 F.2d 371 (9th Cir. 1965).

Appellee further submits that even if the appellant's rights to counsel were invoked, the totality of circumstances clearly shows that the appellant waived that right. In Brewer v. Williams, supra, the United States Supreme Court took pains to point out that even where judicial proceedings have been commenced against a defendant and that defendant is represented by counsel, he still may, without notice to counsel, waive his right under the Sixth and Fourteenth Amendment. 430 U.S. at 405-406. Consequently, it is also clear that a defendant may waive his Fifth Amendment rights under Miranda without notice to counsel. Coughlan v. United States, supra. See also Kimble v. State,

372 So.2d 1014 (Fla. 2d DCA 1979); Monroe v. State, 369 So.2d 962 (Fla. 3d DCA 1979).

Appellee submits that even if Ms. Kahn's instruction to Lieutenant Guiffredo could be considered an invocation of appellant's Miranda rights, this did not taint his subsequent confession. The right to talk or to remain silent is the defendant's and no mechanical application of Miranda should prevent the informed, voluntary and free exercise of that right. Michigan v. Mosley, 423 U.S. 96 (1975); United States v. Cavallino, 498 F.2d 1200 (5th Cir. 1974); Franklin v. State, 324 So.2d 187 (Fla. 1st DCA 1975); Nunez v. State, 227 So.2d 324 (Fla. 4th DCA 1969). In the case at bar, more than one hour passed between appellant's conversation with Lisa Kahn and the arrival of the Dade County Police officers. During the interval of time no attempt was made to interrogate the appellant and he was not subjected to any coercion, intimidation or pressure. Nor was he held incommunicado and forbidden from talking with an attorney. The fact that appellant had spoken with an attorney who advised him to keep quiet only tends to support the State's contention that he made a knowing and voluntary waiver of his rights. See, e.g., United States v. Brown, supra; Palmes v. State, 397 So.2d 648 (Fla. 1981); Ashley v. State, 264 So.2d 685 (Fla. 1972); James v. State, 263 So.2d 284 (Fla. 2d DCA 1972).

In Biddy v. Diamond, 516 F.2d 118 (5th Cir. 1975), the court held that a person may voluntarily speak without an attorney present, even though he knows one will be on the way upon request, if the police actions are not compelling. Thus, even where the defendant knew that she need not speak until her attorney arrived, there was no legal impediment to voluntary statements. 516 F.2d at 123. See also United States v. Green, 433 F.2d 946 (5th Cir. 1970). Further in United States v. Monti, 557 F.2d 899 (1st Cir. 1975), the court held that a defendant could waive his right to counsel even after meeting and conferring with counsel.

In Jennings v. State, 413 So.2d ~~29~~ 24 (Fla. 1982) this Court held that a suspect can waive the presence of counsel even though he has indicated a prior desire to have counsel if the waiver is not coerced, is freely given, and is a continuation of the original dialogue. Id. at 27. A waiver by a defendant of his constitutional right to consult with or have an attorney present does not require an express statement or disavowal and may be inferred by the language, acts, conduct and demeanor of the defendant. United States v. Cavallino, 498 F.2d 1200 (5th Cir. 1974); State v. Craig, supra; Nunez v. State, 227 So.2d 324 (Fla. 4th DCA 1969); Fowler v. State, 263 So.2d 202 (Fla. 1972). This is true even where a defendant has invoked his Miranda rights. Michigan v. Mosley, 423 U.S. 96 (1975); North Carolina v.

Butler, 441 U.S. 369 (1975); Witt v. State, 342 So.3d 497 (Fla. 1977).

In the instant case, the State not only proved a waiver by conduct, but established that the appellant had made an express oral waiver as well as a written one. Thus, in view of the totality of the circumstances, it is respectfully submitted that the trial court's denial of the motion to suppress was not clearly erroneous, and in fact, is clearly supported by the evidence.

Finally, appellee would submit that even if it was error to admit the appellant's statements into evidence, such error was clearly harmless, in light of the overwhelming evidence. The appellant was unequivocally identified by Officer Gary Spell, the only eyewitness to the murder of Luis Pena and himself a victim of the attempted first degree murder alleged in the second count of the indictment. Officer Spell's testimony concerning the shooting itself was that the appellant walked very slowly back to Officer Pena's patrol car, positioned himself at the window and then raised and aimed the pistol at Luis Pena. (T. 985-86). Spell, who demonstrated what he saw the appellant do for the jury (T. 987-91), repeatedly stated that the appellant aimed and fired the weapon from a position on the side of Officer Pena's door. (T. 986). Further evidence of appellant's guilt

included the physical evidence in the case, primarily appellant's latent fingerprints lifted from the camaro and from Pena's patrol car. (T. 1091). Thus, due to the overwhelming nature of the evidence of appellant's guilt, any alleged errors, would not warrant a reversal of appellant's conviction. Milton v. Wainwright, 407 U.S. 371 (1972); Harrington v. California, 395 U.S. 250 (1969); Chapman v. California, 386 U.S. 824 (1967); Sullivan v. State, 303 So.2d 632 (Fla. 1974).

II

A. THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION TO DISMISS THE INDICTMENT WHERE(1) LATINS ARE NOT A COGNIZABLE, DISTINCT CLASS, (2) THE APPELLANT FAILED TO PRESENT ALLEGATIONS SUFFICIENT TO ESTABLISH A PRIMA FACIE CASE OF UNDERREPRESENTATION, AND (3) WHERE ANY ERROR IN THE COMPOSITION OF THE GRAND JURY WOULD BE HARMLESS WHERE THERE HAS BEEN A CHANGE IN THE PROCEDURE UTILIZED IN SELECTING THE GRAND JURY.(Restated)

Appellant contends that the trial court erred in denying his Motion to Dismiss the Indictment predicated upon the composition of the grand jury, and that evidence attached to his motion and the State's refusal to offer rebuttal evidence. Appellee submits that the allegations are without merit upon a careful examination of the record and the substantive law.

At the outset, appellee would note that although the mandate from this Court reversing the appellant's prior conviction in the instant case was received by the trial court on March 24, 1981 (R. 1), and counsel was formally appointed on April 10, 1981 (R. 55-57L), appellant did not file what was an essentially a "form" motion and exhibits from a hearing conducted on April 28, 1978,[3] until July 8, 1981. A hearing was not held on the motion until July 22, 1981

[3]The appellant adopted the documents from the case of State v. Emery Timberlake, circuit case no. 77-29728.

(R. 1210), only one week before trial. Thus, appellee submits that the appellant failed to "diligently pursue" his objections to the grand jury. Appellee asserts that the practice of the appellant's counsel was similar to that condemned by this court in Francois v. State, 407 So.2d 885 (Fla. 1981). In Francois, this Court stated that it could not condome the tactics of defense counsel who waited until just before trial to press the claim of grand jury illegality, in hopes of upsetting the conviction on appeal. Id. at 889. Appellee submits, that likewise, this Court should not condone the appellant's dilatory tactics and should refuse to consider this issue on appeal.

Appellee further submits that the appellant's objection to the indictment was untimely. Although, the trial court allowed the appellant to file its motion at the time he did so, appellee asserts that the motion was so dilatory as to be untimely. The policy behind requiring a timely and seasonably made objection is sound and is found in a discussion of the fundamental issue of jurisdiction as discussed by the United States Supreme Court in Keizo v. Henry, 211 U.S. 146, 149 (1908):

> These well settled principles are decisive of the case before us. Disqualificatons of grand jurors do not destroy the jurisdiction of the court in which an indictment is returned, if the court has jurisdiction of the cause and of the person, as the trial court had in this case...The indictment, though voidable, if the objection is seasonably taken, as it was in this

> case, is not void. . .the objectio may be waived, if it is not made at all or delayed too long. This is another form of saying that the indictment is a sufficient foundation for the jurisdiction of the court in which it is returned, if jurisdiction otherwise exists. [Emphasis added][citations omitted].

Thus, because the grand jury is only a device by which the trial court acquires jurisdiction, the appellant's delay of almost four months to file what was in effect a "form" motion which required no additional discovery on appellant's part was untimely and should be viewed as a waiver, and the matter herein should be at an end. See, e.g., Francis v. Henderson, 425 U.S. 536 (1976).[4] However, appellee submits that even if appellant has not waived his objections to the composition of the grand jury, the appellee submits that the trial court did not err in denying his motion to dismiss the Indictment.

The appellant, a white, Latin male was indicted by a grand jury and charged with first degree murder, attempted first degree murder, possession of a firearm by a convicted felon and auto theft. (R. 14-24A). In a pre-trial motion, the appellant moved to dismiss the indictment on the basis that there was substantial underrepresentation of blacks, latins and women on the grand jury venire which denied him

[4]Appellee would also submit that appellant's plea of guilty to Count IV of the indictment, (R. 1216) waived all challenges that he may have had to the composition of the grand jury which indicted him.

due process and equal protection of the law. (R. 445).[5] Attached to the motion was the transcript of an evidentiary hearing before the Honorable N. Joseph Durant in the case of State v. Timberlake, held on April 28, 1978.[6] The trial court in the instant case denied the appellant's motion. (R. 1210-1211).

1. Latins Are Not a Cognizable Distinct Class

It is well established that in order to establish a prima facie case of discrimination in the selection of jurors a defendant must show that the group allegedly discriminated against "is one that is a recognizable, distinct

[5]The appellant has alleged standing in footnote 14 of his brief. Appellee submits that appellant has no standing to challenge the grand jury venire on the grounds of underrepresentation of blacks and women. A challenge to the composition of a state grand jury, unlike a challenge to a State petit jury, involves only the Fourteenth Amendment Equal Protection Clause. A State defendant does not have a Fifth Amendment right to a grand jury. Hurtada v. California, 110 U.S. 516 (1884), but does have a Sixth Amendment right to a petit jury that represents a fair-cross section of the community. That right has been incorporated in the Fourteenth Amendment Due Process Clause. Duran v. Missouri, 439 U.S. 357 (1979); Taylor v. Louisiana, 391 U.S. 145 (1968). Thus, because of this distinction, when a state chooses to proceed by a grand jury, it must proceed within the constraints imposed only by the Equal Protection Clause of the Fourteenth Amendment. Castaneda v. Partida, 430 U.S. 482, 509-510 (1977)(Powell, J. dissenting); Beal v. Rose, 532 F.Supp. 306, 311 (M.D. Tenn. 1981); Villafare v. Manson, 504 F.Supp. 78, 82 n. 6 (D. Conn. 1980); Barnson v. State, 371 So.2d 680, 681 n. 2 (Fla. 3d DCA 1979).

[6]Included in that transcript are references to the State's rebuttal evidence of the depositions of seventeen circuit court judges.

class, singled out for different treatment under the laws, as written or as applied." Castaneda v. Partida, 430 U.S. 482, 494 (1977). Appellee submits that Latins are not such a recognizable group.[7]

In Hernandez v. Texas, 347 U.S. 475 (1954), the Supreme Court listed several factors as contributing to its finding that Mexican-Americans were a cognizable group in Texas. First the residents of the community, in their attitudes, distinguished between whites and Mexican-Americans; second participation of Mexican-Americans in business and community groups was marginal; third, until 1955, Mexican-American's were required to attend special schools; and fourth, Mexican-Americans were confined to separate restaurant and toilet facilitates throughout the community. 347 U.S. at 479-480. See also Foster v. Sparks, 506 F.2d 805, 820 (5th Cir. 1975)(Appendix, An Analysis of Jury Selection Decisions by Honorable Walter P. Gewin). Appellee submits that none of these factors are present in the instant case in regards to Latin-Americans.

[7]Appellee recognizes that the Supreme Court has held Mexican-Americans to be a recognizable group, Castaneda v. Partida, supra; Hernandez v. Texas, 347 U.S. 475 (1954), but has never recognized Latin-Americans as such.

In the transcript of the 1978 evidentiary hearing, there is testimony from one Amaury Cruz, who was the chief translator for Dade County. He asserted that Latins were different because of the fact that they did not speak English, but Spanish and that they do not understand the functioning of the local government. (R. 472, 476). He also asserted that Latins enjoyed a different type of food and entertainment (R. 478-79), but that was because of the language barrier. (R. 489). Mr. Cruz testified that he did not know the respective unemployment rates of literate Latins and literate Anglo-Saxons (R. 495) and admitted that people of Spanish origin are not relegated to go to special schools or use separate restaurant and toilet facilities. (R. 496).[8]

Appellee submits that Mr. Cruz' testimony is insufficient to establish that Latins were a cognizable class that had been singled out for different treatment under the laws, as written or applied. See Hernandez v. State, 397 So.2d 435, 436 (Fla. 3d DCA 1981). There has been no showing that Latins are so distinct from the rest of society, that their

[8]Mr. Cruz testified that the creation of the Department of Latin Affairs by Dade County and that the fact that Dade County was officially designated as bilingual in 1973 indicated the acknowledgment by Dade County of the difficulties met by Latins. (R. 472). However, it should be noted that on November 5, 1980 Dade County in effect rescinded its bilingual designation. Metropolitan Dade County Code, Ordinance No. 80-128.

interests cannot be adequately represented by other members of the grand jury panel. United States v. Potter, 552 F.2d 901, 904 (9th Cir. 1977).

In United States v. Rodriguez, 588 F.2d 1003 (5th Cir. 1979), the Fifth Circuit held that where "Latins" are composed of persons of such national origins as Cubans, Mexicans, and Puerto Ricans," it cannot be said that they possess such similar interests that they constitute a cognizable group. 588 F.2d at 1007. Appellee submits that the same reasoning is applicable in the instant case where all of appellant's statistics and perentages on voter registration are based on the classification of Latins as those people of Spanish origin who were born in Colombia, Chile, Cuba, Honduras, Mexico, all South American Countries, all West Indies countries, Puerto Rico, Spain and Venezuela. (R. 466) and his census statistics for the percentages of the group in the total population are based on defining Spanish origin as those who come from Cuba, Mexico and Puerto Rico. (R. 501). Although a common denominator in these groups may be the Spanish language, it certainly cannot be said that these groups have a common identity, similarity in attitudes, ideas or experience. Thus, appellee submits that appellant has failed to prove that Latins are a cognizable group.

2. The Appellant Failed to Present Allegations Sufficient to Establish A Prima Facie Case of Underrepresentation.

Appellee submits that even if this court should find that Latins are a cognizable class, this Court should affirm the trial court's denial of the Motion to Dismiss the Indictment in that the appellant failed to present allegations sufficient to establish a prima facie case of underrepresentation that was unrebutted by the State.

The appellant's grand jury and the grand juries previous to his were selected pursuant to Chapters 70-1000, 57-500 and 57-551, Laws of Florida. (R. 864-69). This method of grand jury selection and the legislation authorizing grand jury selection have been consistently upheld as both constitutional and effective. See, e.g., Dykman v. State, 294 So.2d 633 (Fla. 1973), cert. den. 419 U.S. 1105 (1974); Rojas v. State, 288 So.2d 234 (Fla. 1973); Seay v. State, 286 So.2d 552 (Fla. 1973), cert. den., 419 U.S. 867 (1974); Calvo v. State, 313 So.2d 39 (Fla. 3d DCA 1975), cert.den. 429 U.S. 918 (1976); Cf. Barnason v. State, supra. The so-called "key man" grand jury selection process has also been upheld by the federal courts as not unconstitutional per se. See, e.g., Carter v. Jury Commission, 396 U.S. 320 (1970); Akins v. Texas, 325 U.S. 398 (1945).

In order to make a showing of a prima facie case of discrimination or underrepresentation, a defendant must initially demonstrate a substantial difference between the percentage of a given group in the population presumptively eligible to serve on a grand jury rather than the general population, and the percentage of that group actually selected for the grand jury venire's master lists. Barksdale v. Blackburn, 639 F.2d 1115, 1123-24 (5th Cir. 1981); See also United States v. Yazzie, 660 F.2d 422 (10th Cir. 1981); United States v. Maskeny, 609 F.2d 183 (5th Cir. 1980); United States v. Potter, 552 F.2d 901 (9th Cir. 1977); Foster v. Sparks, 506 F.2d 805, 811-837 (5th Cir. 1975) (Appendix).

Appellee submits that in the instant case, the appellant has failed to make a prima facie showing of discrimination or underrepresentation. Appellant was indicted by the Fall, 1977, grand jury. (R. 14-24A). The figures presented by Appellant showed that from 1974 to 1977, 10.73 percent of Dade County's registered voters were Latin and that from 1974 to 1977, 1.49 percent of the grand jury veniremen were Latin. (R. 876).[9] Thus, the asserted underrepresentation

[9]Appellant also presented figures thar from 1971 to 1977, Latins comprised 13.37% of the general population of Dade County, and that from 1971 to 1977, 1.41% of the grand jury veniremen were Latin. (R. 876). However, because no figure was available for the percentage of Latin registered voters from 1971 to 1977 (R. 498), appellee submits that there cannot be a meaningful comparison with these figures.

for Latins was 9.24 percent. Within the evidentiary exhibits attached to appellant's Motion to Dismiss were the percentage figures introduced by the State in the 1978 hearing. (R. 582-83). Those figures showed that from 1971 to 1977, there was a 9.23 percent disparity of Latins on the grand jury venires. (R. 626). These assertions are clearly insufficient to allege a prima facie case.

Appellee submits that this Court must focus on the actual disparity and not the compartive disparity as asserted by the appellant. United States v. Yazzie, 660 F.2d at 426; United States v. Maskeny, 609 F.2d at 190. Focusing on the actual disparity of 9.23 percent, appellee submits that appellant has not met his burden. Appellee asserts that the case law has established that a defendant must allege a disparity of greater than 10 percent to meet his burden. In Swain v. Alabama, 380 U.S. 302 (1965), the Supreme Court stated:

> We cannot say that purposeful discrimination based on race alone is satisfactorily proved by a showing that an identificable group in a community is underrepresented by as much as 10%.
>
> 380 U.S. 208-209.

A review of the cases dealing with this issue indicates that 10 percent has indeed become a minimum figure necessary to

make a prima facie showing. Cases which have found a showing have invariably involved a disparity of greater than 10 percent. Castaneda v. Partida, supra; 40 percent; Alexander v. Louisiana, 405 U.S. 625 (1972), 14 percent; Turner v. Fouche, 396 U.S. 346 (1970), 14 percent; Carter v. Jury Commission, 396 U.S. 320 (1970), 33 percent; Sims v. Georgia, 389 U.S. 404 (1967), 19.7 percent; Jones v. Georgia, 389 U.S. 24 (1967), 25.7 percent; White v. Georgia, 385 U.S. 545 (1967), 33.5 percent; Eubanks v. Louisiana, 356 U.S. 584 (1958), 25 percent and 33 percent; Hernandez v. Texas, 347 U.S. 475 (1954), 14 percent and 11 percent.

Reviewing these cases in light of the pronouncement in Swain v. Alabama, supra, the Fifth Circuit in United States ex rel. Barksdale v. Blackburn, 610 F.2d 253 rev'd on other grounds on rehearing en banc 639 F.2d 1115 (1981), stated:

> It can be argued, therefore, that the Supreme Court has set 10% as an acceptable disparity, at least where there is no evidence that the system of selection is not racially neutral or is subject to abuse.
>
> 610 F.2d at 264.

See also United States v. Maskeny, supra at 190. Therefore, appellant's claims of underrepresentation amounting to 9.24 percent in the grand jury list that indicated him simply fails to allege underrepresentation of a sufficient magnitude to establish a prima facie case or to raise a

doubt as to whether the panel may of been improperly constituted.[10] Thus, appellee submits that the appellant is not entitled to relief.

Appellee would also submit that appellant's assertion concerning his challenge to the grand jury foreperson is without merit. Appellee would initially submit that appellant has not preserved this issue for appeal. Appellant's written Motion to Dismiss the Indictment did not challenge the procedure for the selection of the grand jury foreperson. (R. 445). The fact that the evidentiary materials appended to appellant's motion contained testimony concerning the grand jury foreperson, (R. 24, 469-70, 514-29, 874-75) did not adequately put the trial court on notice in the instant case, that the appellant was challenging the procedure for the selection of the grand jury foreperson.

[10]Appellee submits that the appellant has also failed to establish a prima facie case of underrepresentation of blacks or women. The figures presented by the appellee shows a 6.24 percent underrepresentation of blacks from 1971 to 1977, and a 22.13 percent underrepresentation of women. The women's percentages are rationally explained because of section 40.01, Florida Statutes (1977) provided that expectant mothers and mothers with children under 15 years of age, upon request, shall be exempted from grand or petit jury duty. This exemption has been constitutionally recognized by both this Court and the federal courts. In Duren v. Missouri, 439 U.S. 357, 370 (1979), the United States Supreme Court held that "a State may have an important interest in assuring that those members of the family responsible for the care of children are available to do. An exemption appropriately tailored to this interest would, we think survive a fair-cross section challenge." See also United States v. Eskew, 460 F.2d 1028, 1029 (9th Cir. 1972); United States v. Rosenthal, 482 F.Supp. 867, 873 (M.D. Ga. 1979); United States v. Briggs, 366 F.Supp. 1356 (M.D. Fla.

As such, appellee submits that appellant has waived this challenge.

However, if this court finds that the appellant has not waived his challenge to the grand jury foreperson, appellee submits that appellant has not met the prerequisites for establishing discrimination in the selection of the grand jury foreperson as set forth in Castenada v. Partida, supra and Rose v. Mitchell, 443 U.S. 545 (1979), in which the defendant must (1) establish that the group against when discrimination is asserted is a recognized, distinct class, singled at for different treatment; (2) prove the degree of underrepresentation by comparing the proportion of the group in the total population to the population called to serve, here as a foreperson, over a significant period of time; and (3) support the presumption thus created by showing that the selection procedure is susceptible to abuse was not racially neutral.

Appellee asserts as it did supra, that Latins are not a recognized, distinct class, singled out for different treatment, and that the appellant has no standing to challenge

1973); Hitchcock v. State, 413 So.2d 741, 745 (Fla. 1982); Sireci v. State, 399 So.2d 964, 970 (Fla. 1981); Vasil v. State, 374 So.2d 465, 468 (Fla. 1979); McArthur v. State, 351 So.2d 972, 974-75 (Fla. 1977). Cf., Alachua County Court Executive v. Anthony, 418 So.2d 264 (Fla. 1982).

the grand jury venire on the grounds of underrepresentation of blacks and women as grand jury forepersons.[11] In determining whether the appellant has made a prima facie case of underrepresentation, unrebutted by the State, the analysis under the equal protection clause must be used and not a fair-cross section analysis. United States v. Holman, 680 F.2d 1340, 1357-58 (11th Cir. 1982); United States v. Perez-Hernandez, supra, at 1385. Appellee submits that appellee has failed to establish a prima facie case.

In the instant case, the appellant's figures establish that from 1967 to 1977, twenty-three grand juries were impanelled. Out of those twenty-three grand juries, two

[11]Appellant has alleged standing in footnote 16 of his brief.

Appellee would submit that appellant's reliance on United States v. Perez-Hernandez, 672 F.2d 1380 (11th Cir. 1982) is misplaced as it involved a challenge to a federal grand jury. Federal grand and petit juries are governed by the Jury Selection and Service Act of 1968, 28 U.S.C. §1861, et.seq. which requires that juries be selected at random from a fair cross section of the community. Furthermore, the Perez-Hernandez reliance on the holding in Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), cert. den., 440 U.S. 976 (1979) is misplaced. In Spinkellink, the court held that the defendant had the standing to raise the equal protection issue even though he was not a member of the class allegedly discriminated against because the discrimination if proven, impinged on his constitutional rights under the Eighth and Fourteenth Amendments, not to be subject to cruel and unusual punishment. 578 F.2d at 612, n. 36. Furthermore, the defendant was a member of the class because he had been convicted of murdering a white person. Id. at 586.

women were chosen as grand jury forepersons, three forepersons race were undetermined, and the remaining eighteen were white, non-latin males. (R. 674-75). Appellant did have available population figures of Latins from 1967 to 1977, only form 1971 to 1977. During those years, Latins composed, 13.37 percent of the population, during which time 1.41% of the grand jury venires were Latin. (R. 876). Appellee submits that the appropriate number of grand juries that this court must focus on is those from 1971 to 1977, fifteen.

In Bryant v. Wainwright, 686 F.2d 1373 (11th Cir. 1982), the Eleventh Circuit held that in Palm Beach County, where the black population was fourteen percent, and no black had been chosen as a foreperson in ten grand juries, the statistical probability that only are black person would have been chosen out of the ten, did not rise to a presumption of discrimination, when so small an expectancy was not realized. 686 F.2d at 1378. Appellee submits that in the instant case where the Latin population was 13.37 percent, 1.41% of the grand jury venires and no Latin had been chosen as foreperson in fifteen grand juries, the statistical probability that almost two Latins would have been chosen out of the fifteen similarly does not rise to a presumption of discrimination. See United States v. Test, 550 F.2d 577, 588 n. 11 (10th Cir. 1976).

In Wiley v. State, __So.2d___ , Case No. Af-168, Fla. 1st DCA, opinion filed February 22, 1983 (8 F.L.W. 617), the First District held that the evidence was insufficient to establish a prima facie case of discrimination of blacks as grand jury foremen where the evidence showed that from 1955, fifty grand jury foremen had been chosen, none black, although the black population in Leon County ranged from 19.7 percent to 39.5 percent. Appellee asserts that as in Wiley, Appellant has also failed to establish a prima facie case of discrimination against Latins.[12]

Appellee would submit that even if appellant has established a prima facie case, the State has presented enough evidence to rebut it. Although, the various circuit judges testified in their depositions only as to their selection procedure for the persons who comprised the grand juries, there is a clear presumption that the same procedures would also apply to the selection of grand jury foreperson. All the circuit judges denied making race, sex or ethnic groups a factor in their selection of grand jurors. (R. 610). Furthermore, because the circuit judges selected the venire and grand jury forepersons, it must be presumed that judges, as opposed to laypersons, acted properly and pursuant to the law. Porter v. State, 160 So.2d 104 (Fla. 1964), cert. den.

[12]Appellee asserts that the same is true of blacks and women.

379 U.S. 849 (1964). Thus, if it cannot be presumed that circuit judges acted properly, pursuant to law and without discrimination in their selections, then it must be said that these same judges acted improperly, not pursuant to law and with discrimination in discharging all of their other duties, which include criminal trials, sentencing, and a myriad of other responsibilities of both a civil and criminal nature.

Appellee submits that the depositions of the seventeen circuit court judges as referred to in the Timberlake hearing, clearly demonstrate that the procedure they would use to select grand jury forepersons would involve no discrimination and would be pursuant to law. In Casteneda v. Partida, 430 U.S. at 498, 499, the Supreme Court noted:

> The commissioners themselves were not called to testify. A case such as Swain v. Alabama, 380 U.S. at 205 n. 4, 209, 85 S.Ct. at 85 S.Ct. at 828, 829, illustrates the potential usefulness of such testimony, when it sets out in detail the procedures followed by the commissioners.
>
> * * * *
>
> We emphasize, however, that we are not saying that the statistical disparities proved here could never be explained in another case; we are simply saying that the State did not do so in this case.

Thus, the appellee submits that the evidence rebutted any prima facie case. United States v. Holman, 680 F.2d 1340, 1347 (11th Cir. 1982); United States v. Perez-Hernandez, supra, at 1387-88; Wiley v. State, supra.

Finally, appellee would submit that the position of grand jury foreperson is not significant, but rather ministerial and relatively unimportant, so that any discrimination in the selection of a grand jury foreperson should not result in the reversal of appellant's conviction. See Bryant v. Wainwright, supra at 1378 n. 5; United States v. Cross, 516 F.Supp. 700 (M.D. Ga. 1981). At the most, appellee would submit that appellant would be entitled to a full evidentiary hearing, during which time the State should be given an opportunity to present rebuttal evidence.

3. Any error in the Composition of the Grand Jury would be Harmless Error Where There Has Been A Change In the Procedure Utilized In Selecting The Grand Jury.

Appellee submits that even if the appellant has asserted sufficient facts to raise a doubt as to whether the grand jury panel may have been improperly constituted, any error in the composition of the grand jury would be harmless. An impartially selected petit jury has determined that there has been shown evidence sufficient to prove beyond a reasonable doubt that appellant committed the crimes for which he

was convicted. Furthermore, the appellant has never made a colorable claim that he is innocent of the crimes for which he was convicted. Given these facts, it cannot seriously be contended that the grand jury, however constituted, would have failed to find the mere probable cause necessary to hold appellant for trial. Any impropriety in the selection process of the grand jury cannot be said to have had any effect.

In Rose v. Mitchell, 443 U.S. 545 (1979), the Supreme Court essentially recognized the inherently harmless nature of an impropriety in the selection process of a grand jury when a defendant is convicted by a petit jury, the composition of which is not challenged. The Court did allow for a federal review of such claims, however, but did so for the reason that discrimination in selecting grand juries "strikes at the fundamental values of our judicial system and our society as a whole." 443 U.S. at 556. The Court thus found that society's interest in changing an improper selection system is of such magnitude that review of claims as appellant's will as a general policy, be allowed, despite the fact that error is harmless in any given case as regards to the rights of a given defendant.[13]

[13]The issue of whether discrimination in grand jury selection, absent petit jury discrimination, should be deemed harmless, has been recognized by the Fifth Circuit as still an open question. In its en banc decision in United States

In the present case, the grand jury selection process complained of is no longer in use. Laws of Florida, Ch. 78-455. Thus, the societal interest that formed the basis for the conclusion in Rose v. Mitchell, supra, is non-existent. Given this fact, there is no countervailing policy reason to outweigh the inherently harmless nature of this issue as regards to one individual petitioner.[14]

B. The Trial Court Did Not Err In Denying The Appellant's Motion to Strike. The Petit Jury Venire Where The Appellant Failed To Present Allegations Sufficient To Establish A Case of Underrepresentation.

Appellant asserts that he was denied equal protection and due process because of a substantial underrepresentation

---

States ex rel. Barksdale v. Blackburn, 639 F.2d 1115 (5th Cir. 1981), the Fifth Circuit discussed the Supreme Court's decision in Rose v. Mitchell, supra and stated that Part II of Justice Blackmum's opinion may not be the final word on the subject of harmless error, citing Justice Powell's concern for the abuse of the writ of habeas corpus. 639 F.2d at 1120.

[14]See Zamora v. State, 422 So.2d 325 (Fla. 3d DCA 1982), in which the appellate court has recognized the lack of prejudice to a defendant who failed to challenge a grand jury indictment, due to the fact that it was evident that the defendant would of been re-indicted by a properly constituted grand jury.

of Latins on the petit jury venires. Again, appellee submits that this challenge must fail because appellant has failed to comply with the requisites for establishing a prima facie case of discrimination or underrepresentation.

Under Florida law before a defendant is entitled to a full-scale investigation of his jury panel, he must assert facts that tend to raise a doubt as to whether the panel may have been improperly constituted. Dykman v. State, 294 So.2d 633, 637 (Fla. 1973); Rojas v. State, 288 So.2d 234, 237 (Fla. 1973). As stated, supra, the elements set forth by the Supreme Court of the United States for a equal protection violation requires that the defendant establish that the group is one that is a recognizable, distinct class, singled out for different treatment, that the degree of underrepresentation be shown by comparing the proportion of the presumptively eligible population with those called to serve as jurors over a significant period of time,[15] and that the selection procedure be susceptible to abuse or not be racially neutral.

Appellee submits that by categorizing himself as a Latin rather than as a specific group, the appellant has failed to establish himself as a member of a cognizable,

[15]Singleton v. Estelle, 492 F.2d 671, 677 (5th Cir. 1979)

distinct class. United States v. Rodriguez, supra. Thus, appellant has failed to met the first criterion.

Appellee submits that appellant has also failed to meet the second criterion by merely giving the probability factor of Latins serving on juries based on voter registration lists, rather than actual figures over the past few years.[16] The conclusions of appellant's expert are not binding on the trier of fact and the court has discretion to accept or reject the conclusions of an expert even though it is not controverted. Nettles v. State, 409 So.2d 85, 88 (Fla. 1st DCA 1982). Thus, without the actual figures of Latins called for jury duty, it is impossible for this Court to determine the degree of underrepresentation.

Appellee would further submit that the three year period of time is insignificant. Appellee submits that the period of time is not significantly large enough to allow a meaningful statistical comparison, so that this Court can be convinced that any disparity is not due to chance or inadvertance. Bryant v. Wainwright, supra at 1379. This is especially true in the instant case where one of the years

[16]Appellant acknowledges this deficiency but asserts that it was due to the absence of an evidentiary hearing. See footnote 17 of appellant's brief. Any lack of an evidentiary hearing was due to the filing of the Motion on July 8, 1981 (R. 433), only three weeks before trial, and having it heard on July 22, 1981, only one week before trial.

included is 1980, during which time Dade County's population was increased by over 100,000 persons from Mariel, Cuba.[17]

Appellee would also submit that appellant has failed to sustain his burden of overcoming the presumptive fairness of the source of the petit jurors, the computerized, random selection from the voter registration lists. Appellant alleges that because under Section 40.01, Florida Statutes, jurors are required to be registered voters, it is impermissible to rely exclusively upon voter registration lists for the source of venireman. Appellee submits that there is no support in the law for this argument. This court has repeatedly upheld the constitutionality of Section 40.01 against the argument that the selection of juries solely from voter lists was defective. See, e.g., Bryant v. State, 386 So.2d 237 (Fla. 1980); Johnson v. State, 293 So.2d 71 (Fla. 1974); Reed v. State, 292 So.2d 7 (Fla. 1974); Jones v. State, 289 So.2d 385 (Fla. 1974). See also Wilson v. State, 330 So.2d 457 (Fla. 1976); Wilson v. State, 306 So.2d 513 (Fla. 1975). The federal courts have also upheld the State's selection of grand juries from voter registration lists. Reed v. Wainwright, 587 F.2d 260 (5th Cir. 1979). Further, it should be noted that the United States Supreme Court has never found the selection of jurors solely from

[17]Appellee respectfully requests that this Court take judicial notice of this fact which is commonly known. Section 90.202(11), Florida Statutes.

registration lists to be unconstitutional and that supplementation of such lists from other sources is not required by the Jury Selection Act of 1968, 28 U.S.C. §1861 et.seq. See United States v. Blair, 470 F.2d 331, 337 (5th Cir. 1972).

Appellant has failed to show that the jury selection procedure was due to some form of intentional discrimination. The use of the voter registration list, is racially neutral. "While the legislature might choose to supply viable supplemental jury sources, the failure to do so does not equal purposeful exclusion." Bryant v. State, supra at 240. Thus, appellant has failed to establish a prima facie case of a violation of the equal protection clause.

Appellant also alleges that the petit jury venire selection violates due process by failing to insure a fair cross-section. See Duran v. Missouri, 439 U.S. 357 (1979). To establish a due process violation, the defendant must prove that group allegedly excluded is a distinct group in the community, that representatives of that group in the jury venires is not fair and reasonable and that underrepresentation results from the systematic exclusion of that particular group. Duran v. Missouri, supra; Taylor v. Louisiana, 419 U.S. 522 (1975).

Appellee submits that appellant did not meet the criteria for a prima facie showing as delineated in Duran. Again,

appellee asserts that appellant did not establish that Latins are a distinct group. Appellee also asserts that appellant has failed to show that the representatives of that group in the jury venires is not fair and reasonable. Appellant has only presented percentage figures for Latins in the total population, and those who are registered voters. Appellant has failed to present any actual facts which establish the percentage of Latins who are called for the weekly venires. Without those figures, this court cannot make a comparison of the make up of the jury venires to the make up of the community. See, e.g., Duran v. Missouri, (women made up 54% of the community and 14.5% of jury venires); United States v. Yazzie, supra at 427 (the appropriate figure for comparison to the percentage of Indians in the community is the percentage of Indians actually qualified for jury service at the final venire stage); Clifford v. United States, 640 F.2d 150, 154 (5th Cir. 1981)(Indians made up 15.6% of the total population and 8.4% of the jurors sitting on petit juries); United States v. Maskeny, supra at 190 (no underrepresentation between the percentage of the distinctive group in the community and the percentage of that group either returning questionnaires or ending up on the qualified wheel).[18] Thus, appellee submits that

[18]See also Harris v. Wyrick, 644 F.2d 710, 713 (5th Cir. 1981) in which the court held that under Duran, the defendant must show that the underrepresentation of the group, generally and on his venire was due to their systematic exclusion.

appellant's asserted underrepresentation of 21.25% absolute disparity, which is the difference between the percentage of Latins in the community and those registered to vote, on December 31, 1980, (R. 438) is misplaced as it does not represent the absolute disparity between the percentage of Latins in the community and those called to sit on jury venires. Further, appellee would submit that the total population figures are distorted due to the influx of persons from Mariel, Cuba in May of 1980.

Appellee would further submit that appellant has failed to prove that the alleged underrepresentation results from the systematic exclusion of that group, for which the State has no adequate justification. Appellee asserts that what appellant is actually alleging is that because Latins traditionally register to vote in lesser numbers, the use of voter registration lists provides for systematic exclusion of Latins. Appellee submits that this argument is without merit.

The federal courts has held on numerous occasions that the fact that an identifiable minority group votes in a proportion lower than the rest of the population and is therefore underrepresented on jury panels presents no constitutional issues. See, e.g., United States v. Apodaca, 666 F.2d 89, 92-93 (5th Cir. 1982); United States v. Brummit,

665 F.2d 521, 527-30 (5th Cir. 1981); United States v. Lopez, 588 F.2d 450, 451-52 (5th Cir. 1979); United States v. Arlt, 567 F.2d 1298, 1297 (5th Cir. 1978); United States v. Lewis, 472 F.2d 252, 255-56 (3d Cir. 1973); Camp v. United States, 413 F.2d 419, 421 (5th Cir. 1969). See also United States v. Westlake, 480 F.2d 1225 (5th Cir. 1973).

Furthermore, appellant failed to prove that the alleged underrepresentation results in the systematic exclusion of Latins, where appellant's general population figures do not account for those persons who are aliens, non-citizens and thus not eligible for jury service. In United States v. Gordon-Nikkar, 578 F.2d 972, 977-78 (5th Cir. 1975), the Fifth Circuit held that where Congress or a State has the inherent power to deprive aliens of the right to vote, they may validly require citizenship as a prerequisite to service on juries, and there is no Sixth Amenment violation by the failure to have resident aliens included in petit juries. In Gordon-Nikkar, the defendant alleged that he was deprived of his Sixth Amendment right to a fair cross-section where the defendant's trial took place in Miami, where 30% of the city's population were resident aliens, and thus not included on jury venires. See also United States v. Musto, 540 F.Supp. 346, 356-57 (D.N.J. 1982).

Appellee would further submit that the State has an adequate justification for requiring that jurors to be registered voters and citizens. The State is justified in assuring that those serving on its juries are personally committed to the proper application and enforcement of the laws. Perkins v. Smith, 370 F.Supp. 134, 142 (D. Md. 1974) aff'd, 426 U.S. 913 (1976). In addition, voter registration lists aid in efficiency and cost of judicial administration. Reed v. Wainwright, 587 F.2d 260, 264 (5th Cir. 1979). Thus, appellee submits that the appellant has utterly failed to establish the selection of petit jurors violated due process.[19]

[19]Appellee also submits that appellant's assertion that the exclusion of jurors for cause who morally oppose capital punish or who would not impose death but could fairly determine guilt or innocence violated appellant's due process right to a jury selection from a fair cross-section of the community is without merit and has been rejected by the courts on numerous occasions. See, e.g., Witherspoon v. Illinois, 391 U.S. 490 (1968); Bumper v. North Carolina, 391 U.S. 543 (1968); Smith v. Balkcom, 660 F.2d 573 (5th Cir. 1981); Maggard v. State, 399 So.2d 973 (Fla. 1981); Gafford v. State, 387 So.2d 333 (Fla. 1980); Riley v. State, 366 So. 2d 19 (Fla. 1979).

Appellant's assertions that the exclusion of the jurors produced a jury which was not neutral and impartial on guilt or innocence is also without merit and has been rejected by the courts on numerous occasions. See, e.g., Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978); United States v. Fike, 538 F.2d 750 (7th Cir. 1976); United States v. Twomey, 452 F.2d 350 (7th Cir. 1972); Nettles v. State, 409 So.2d 85 (Fla. 1st DCA 1982).

III

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION FOR MISTRIAL, WHERE THE TESTIMONY THAT APPELLANT HAD RATHER NOT ANSWER ONE QUESTION DURING THE CUSTODIAL QUESTIONING WAS NOT ELICITED AS A COMMENT ON THE APPELLANT'S INVOCATION OF HIS RIGHT AGAINST SELF-INCRIMINATION. (Restated)

Appellant alleges that his statement during his custodial interrogation when asked "What is the name of the man you were working for?", that "I'd rather not say," (R. 944), was a reference before the jury of his assertion of his Fifth Amendment rights to decline to answer police questioning, and as such the trial court should have granted his motion for mistrial. Appellee submits that the testimony that is now challenged was not an invocation of the Fifth Amendment privilege against self-incrimination and was not elicited to show the appellant's assertion of his right to remain silent. As such, the trial court did not err in denying appellant's motion for mistrial. Hayes v. State, 400 So.2d 519, 520 (Fla. 3d DCA 1981).

In Donovan v. State, 417 So.2d 674 (Fla. 1982) this Court reaffirmed the holding in Bennett v. State, 316 So.2d 41 (Fla. 1975), that it is reversible error to comment on an accused's exercise of his right to remain silent. However, this Court stated that "for Bennett to apply, the accused must have exercised his right to remain silent." 417 So.2d

at 675. Appellee submits that in the instant case the appellant's refusal to answer one question was not an exercise of his right to remain silent.

The Florida courts have recognized that a defendant's refusal to answer only one question of many during a lengthy post-Miranda conversation is not an invocation of the defendant's Fifth Amendment right. In Ragland v. State, 358 So.2d 100 (Fla. 3d DCA 1978), the Third District held that during a post-Miranda lengthy conversation with the police, the defendant's refusal to answer one question of many, was not an invocation of the defendant's Fifth Amendment right against self-incrimination. Thus, the prosecutor's comment upon the defendant's failure to answer the single question was not violative of the defendant's constitutional right. Id.

Appellee submits that appellant's assertion that Ragland v. State, supra is no longer valid in light of the Fourth District's decision in Roban v. State, 384 So.2d 683 (Fla. 4th DCA 1980) is without merit, especially in light of this Court's decision in Donovan v. State, supra. Appellee submits rather that Roban v. State, supra, is inapplicable to the instant case. In Roban, the defendant had actually refused to answer any questions. It was on this basis that this Court in Donovan, held that there was no conflict with Roban. 417 So.2d at 676. In Donovan, this Court held that

it was proper to elicit testimony from a police officer that the defendant was given Miranda warnings in order to prove that the subsequent statements were voluntarily made. Id. Appellee submits that it was necessary for Detective Wolf to testify as all questions asked during the entire interrogation in order to show that the statements were made voluntarily. The fact that Detective Wolf did not badger the appellant concerning the one question he did not want to answer clearly indicates that all of the other answers were given voluntarily. See also Antone v. State, 382 So.2d 1205 (Fla. 1980); Williams v. State, 353 So.2d 588 (Fla. 3d DCA 1977). Thus, no error was committed by the State in eliciting this testimony.

Appellee further submits that the appellant's words "I'd rather not say" in response to one question, was not even incriminatory, and [20] was not an invocation of his right to remain silent. In United States v. Klein, 592 F.2d 909, 914 n. 10 (5th Cir. 1979), the Fifth Circuit held that a defendant's statement that he did "not particularly" want to tell where he got the cocaine, did not constitue an invocation of his right to remain silent especially in light of the fact that the equivocal language was almost immediately followed by the incriminating statements. As

[20]The statement was in response to a question about who the appellant was going to visit prior to the shooting.

such it was not an invocation of the appellant's right to remain silent, and thus, any testimony elicited concerning the remark was not done to show the appellant's assertion of his right to remain silent and a mistrial was not required. See also McCoy v. State, ___So.2d___, Case No. AI-247, 1st DCA, opinion filed March 31, 1983 [8 F.L.W. 933].

Even, if the statement was an invocation of the appellant's Fifth Amendment rights, it was at best only a partial invocation. In Shriner v. State, 386 So.2d 525 (Fla. 1980), this Court held that a defendant's partial exercise of his Miranda privilege in one specific area, did not restrict further questioning into other areas and thus did not run afoul of Miranda v. Arizona, 384 U.S. 436 (1966) and Michigan v. Mosely, 423 U.S. 96 (1975). This Court quoting from the Fifth Circuit decision in United States v. Vasquez, 476 F.2d 730, 731-33 (5th Cir. 1973) held that:

> When a person in custody was responded to proper police interrogation by voicing a general willingness to talk, subject only to a limited desire for silence, and his wishes not to discuss a particular subject matter area are respected, nothing rooted in law or constitutional policy makes it improper to question him as to any unlimited subjects.
>
> 366 So.2d at 532.

The federal courts have repeatedly held that a defendant in custody may selectively remain silent by indicating

he will respond to some questions but not to others. United States v. Thierman, 678 F.2d 1331, 1335 (9th Cir. 1982); Smith v. United States, 505 F.2d 824, 829 (6th Cir. 1974). The courts have further held that a defendant's failure to respond to one question put by the interrogating officer does not constitute either a total or selective revocation of an earlier waiver of his Fifth Amendment rights. United States v. Lorenzo, 570 F.2d 294, 298 (5th Cir. 1978); United States v. Matthews, 417 F.Supp. 813, 818 (E.D. Pa). aff'd, 547 F.2d 1165 (3d Cir. 1976), cert. den. 429 U.S. 1111 (1977). See also Anderson v. Charles, 447 U.S. 404 (1980).

The appellee submits that the appellant's partial exercise of his Miranda rights in one specific area did not restrict further questioning into other areas, and thus, it was not error for the State to elicit such testimony. Therefore, the trial court did not err in denying appellant's motion for mistrial.

IV

THE SENTENCE OF DEATH WAS PROPERLY AND APPROPRIATELY IMPOSED. (Restated)

A. The Trial Court Did Not Err In Overruling Appellant's Objection to the Exclusion For Cause of Juror Ladd.

The appellant asserts that under the dictates of Witherspoon v. Illinois, 391 U.S. 510 (1968), the trial court erred in excluding a particular juror for cause. Witherspoon has been interpreted and applied in a plethora of cases. The United States Supreme Court has recently defined the Witherspoon dictate as follows:

> . . .a juror may not be challenged for cause based on his views about capital punishment unless those view would prevent or substantially impair the performance of his duties as a juror in accordance with his oath. The State may insist, however, that jurors will consider and decide the facts impartially and conscientiously apply the law as charged by the court. Adams v. Texas, 448 U.S. 38, 45 (1980).

Neither Witherspoon nor Adams provides trial courts with a formula or requisite colloquy for the proper excusal of prospective jurors on Witherspoon grounds. The question of competency of a challenged juror is one of mixed law and facts to be determined by the trial judge in his discretion, as the trial judge is in the best position to evaluate

the prospective juror's demeanor and answers to the questions. Darden v. Wainwright, ___F.2d____, Case No. 81-8559, 11th Cir., slip opinion filed February 14, 1983, at 1641, 1649; Mason v. Balkcom, 487 F.Supp. 554, 560 (M.D. Ga. 1980) rev'd on other grounds, 669 F.2d 222 (5th Cir. 1982). The trial court's decision will not be disturbed unless error is manifest. Piccott v. State, 116 So.2d 626 (Fla. 1959); Singer v. State, 109 So.2d 7 (Fla. 1959); Blackwell v. State, 101 Fla. 997, 132 So. 468 (1931); Ashley v. State, 370 So.2d 1191 (Fla. 3d DCA 1979). "[I]f there is basis for any reasonable doubt as to any juror's possessing that state of mind which will enable him to render an impartial verdict based solely on the evidence submitted and the law announced at the trial he should be excused on motion of a party or by the court on its own motion." Singer v. State, supra at 23-24. See also Johnson v. Reynolds, 97 Fla. 591, 121 So. 793, 796 (1929); Leon v. State, 396 So.2d 203 (Fla. 3d DCA 1981). It is within this framework that appellant's claim must be considered.

In determining whether Juror Ladd was properly excused for cause, this Court must look at the whole voir dire examination. Maggard v. State, 399 So.2d 973, 976 (Fla. 1981); Paramore v. State, 229 So.2d 855, 858 (Fla. 1969). This Court in scrutinizing a cold record, must not "treat the words of prospective jurors as free floating icebergs

unrelated to the voir dire examination as a whole." Darden v. Wainwright, supra at 1649.

A review of the entire colloquy involving the prospective juror, Ms. Ladd, show that she made it unmistakably clear that she would automatically vote against imposing the death penalty in this particular case. Initially, it must be observed that the trial court was fully conscious of the existence of the Witherspoon decision, through the numerous pretrial motions and discussions in this case. (T. 386-87, R. 185). Also, it is important to note that Ms. Ladd after the initial voir dire was completed, and there were no challenges, made it a point to specifically tell the bailiff that she had forgotten to say something. (T. 746). Further, Ms. Ladd's demeanor was one of being upset, distraught and nervous by this area of questioning. (T. 747, 751).

Ms. Ladd stated that although she believed in the death penalty, she did not believe that she could personally sentence anyone to death. (T. 746). She further reiterated her position by stating "but when I am really in here in seeing the defendant and everything and knowing what he looks like, I don't know if I personally could sentence anyone to death." (T. 747). When asked by the prosecutor if during the second part of trial, he is arguing that the evidence has shown that death is the appropriate recommendation under

the facts of the case, he would really be only arguing to eleven members of the jury, Ms. Ladd replied that she couldn't do it. (T. 748-49). Although Ms. Ladd, then stated that the State would have a lot to overcome before it could convince her (T. 749), she followed those statements by saying that she could not follow the judges instructions because she "would still see it as [her]." (T. 750). Ms. Ladd stated that although there may be some circumstances in which she could recommend the death penalty, she couldn't think of any. (T. 750). She again answered that she didn't know if she could do it in this case. (T. 751).

The appellee submits that the precise words used by Ms. Ladd are not dispositive. Rather this Court must look instead at the perfunctory nature of the voir dire examination and on the fact that the questions were directed at whether the responsibility to recommend life or death would substantially impair the performance of her duties as a juror. This court must assess the "bottom line" rather than search the entire voir dire for signs of equivocation. Barfield v. Harris, 540 ~~F.2d~~ F.Supp. 451, 465 (E.D. N.C. 1982). Thus, courts have upheld the exclusion of jurors who stated that "he believes", Darden v. Wainwright, supra at 1651 n. 19; Barfield

v. Harris, supra; Gafford v. State, 387 So.2d 333, 335 (Fla. 1980); "really wouldn't know", Gafford v. State, supra; Williams v. State, 228 So.2d 377, 380 (Fla. 1969) sentence vacated on other grounds, 408 U.S. 941 (1972); "I don't think, it might", Brown v. State, 381 So.2d 690, 694 (Fla. 1980); "think so, pretty sure", Jackson v. State, 366 So.2d 752, 755 (Fla. 1978); and "afraid", Paramore v. State, supra at 858.

Appellee submits that Ms. Ladd made clear that the bottom line was that she could not vote to recommend the death penalty when she stated that she could not follow the judge's instructions because she would believe that it was her personally sentencing the appellant to death, which was something she could not do. (T. 747, 750). Thus, Ms. Ladd not only made it clear that her views on capital punishment would substantially impair the performance of her duties as juror, but also that she could not consider the death penalty in this case.[21] Thus, the trial court did

[21]Ms. Ladd's answer also indicated that she could not personally sentence the appellant to death after having seen him. (T. 746). In Williams v. Maggio, 679 F.2d 381, 386 (5th Cir. 1982), the court held that to be excluded in a capital case, a prospective juror need not aver that he would refuse to consider the death penalty in every case that could possibly arise; rather he must be excluded if he indicated that he is unwilling to consider the death penalty in that particular case.

not err in excusing Ms. Ladd for cause.[22]

B. The Trial Court Did Not Err In Excluding Cumulative, Irrelevant and Incompetent Testimony That The Appellant Would Be A Model Prisoner.

In Lockett v. Ohio, 438 U.S. 586 (1978) the United States Supreme Court held that the Eighth and Fourteenth Amendments require that the defendant not be precluded from introducing as a mitigating factor, evidence of any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. 438 U.S. at 604. However, the Court held that nothing in the opinion limited the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense. Id. at n. 12.

The appellant alleges that the trial court improperly excluded mitigating evidence that the appellant would be

[22]It should also be noted that the State used only nine of its ten peremptory challenges. (R. 36-38); Rule 3.350, Florida Rules of Criminal Procedure. Thus, if not excused, juror Ladd could have been, and certainly would have been excused by the State. This factor was pointed to by this Court in at least three instances in which this Court declined to reverse a claimed Witherspoon violation. See, e.g., Hawkins v. Wainwright, 245 So.2d 865, 866 (Fla. 1971); Paramore v. State, supra at 858; Campbell v. State, 227 So.2d 873, 876 (Fla. 1969). Contra Burns v. Estelle, 592 F.2d 1297, 1300 (5th Cir. 1979).

a model rehabilitated prisoner. The appellee submits that testimony as proferred was irrelevant and not competent as it did not bear on the appellant's character, prior record or the circumstances of the offense.

Initially, it must be stressed that the appellant was permitted to present competent evidence that the appellant had been a model prisoner and was rehabilitated. Eurvie Wright, the special administrator of the Dade County Corrections and Rehabilitation Department, testified that in 1975, while he was the bureau supervisor of the Dade County Stockade, and the appellant was an inmate, he found the appellant to be a model prisoner and that as a rehabilitation officer, found the appellant to be rehabilitated. (T. 1495-97) Thus, appellee submits that any other evidence concerning appellant's status as a model prisoner was cumulative.

At the sentencing phase, the appellant attempted to introduce the testimony of Robert Digriazia and John Buckley. Mr. Digriazia was a consultant in the police field with past experience as a deputy sheriff, chief of police, police commissioner, and superintendent of police, (T. 1499), who would have testified that appellant's death would not serve as a deterrent for other police killings. (T. 1500, R. 1069).Thus, it is obvious that Mr. Digriazia's testimony was properly excluded as it was irrelevant as it did not bear on

the appellant's character, prior record, or the circumstances of the offense. Mr. Buckley was a consultant on correctional matters, who had been a sheriff, and taught courses on law and justice. (T. 1506), who would of testified that the appellant was a model prisoner. (T. 1507, R. 1074-75). Mr. Buckley's testimony would be based on meeting with the appellant for 3 1/2 hours reading Officer Spell's deposition, as well as considering the opinions of Dr. Toomer and Dr. Fisher, that the appellant was not a violent person. (T. 1073, 1074). Mr. Buckley also offered the opinion that the appellant would be one of the best mannered and best type of inmate to have, like all lifers. (R. 1074). Appellee submits that Mr. Buckley's testimony was also irrelevant and incompetent. It was based on a short interview with the appellant, and the conclusions of others. Appellant was never an inmate in a prison supervised by Mr. Buckley, so he had no opportunity to observe the appellant's life inside prison first hand. His qualifications as an expert were certainly in doubt. Finally, appellee would submit that the testimony failed to show that appellant's ability to be a "model prisoner" had any correlation to his ability to be rehabilitated. Thus, appellee submits that the trial court did not err in excluding Mr. Buckley's testimony.

At the sentencing hearing, appellant did not proffer the names or testimony of any other witness. The judge allowed the appellant the opportunity to proffer the testimony of the excluded witnesses outside his presence. (T. 1509-10). At the sentencing, after the jury had recommended death, the appellant filed copies of the transcript of the proffer. (T. 1568). The State objected on the grounds that the testimony was taken at a day and time of which the State was not notified (T. 1568), and therefore the State had not been given an opportunity to cross-examine the witnesses to determine their competency to testify as experts. (T. 1570-71). The trial court then indicated that he had reviewed the proffered testimony of Mr. Buckley, Mr. McClendon, and Dr. Fisher, found them to be irrelevant (T. 1569), and stated that there would have been at least one of them that he would not have qualified to testify. (T. 1571).

Appellee submits that because the appellant did not proffer the names of Mr. McClendon or Dr. Fisher as potential witnesses during the jury advisory phase, he cannot now claim that the trial court erred in not allowing those two witnesses to testify before the jury. Section 90.104(1)(b), Florida Statutes (1981). See also Atlantic Coast Line R.Co. v. Shouse, 83 Fla. 156, 92 So. 90 (1922); Cason v. Smith, 365 So.2d 1942 (Fla. 3d DCA 1978). Appellant further submits that the trial court did review the testimony of Mr. Buckley, Mr. McClendon, and Dr. Fisher, but found them to be

irrelevant. In Mikenas v. State, 407 So.2d 892, 893 (Fla. 1982) this Court held that a trial court is not required to give any weight to testimony concerning the possibility of a defendant's rehabilitation. Thus, the trial court did not err in failing to give the proffered testimony any weight.

However, if this Court should find that Appellant has properly preserved the issue as to whether the jury should of heard the testimony of Mr. McClendon and Dr. Fisher, the appellee submits that like the testimony of Mr. Buckley, it was irrelevant. Mr. McClendon was an assistant administrator for prison industries in Ohio, (R. 1079), who would have testified that the appellant would of been a model prisoner because he was a loner in prison, would tend towards the mainstream, follow the rules and stay out of trouble. (R. 1084-86). Appellee submits that this testimony would be irrelevant as to rehabilitation. The fact that a prisoner behaves while inside an institution does not necessarily have any correletion to the way he would behave outside of prison, that is, his ability to be rehabilitated. Dr. Brad Fisher, was a clinical correctional psychologist (R. 1092), who would have testified that appellant was under the influence of extreme mental and emotional disturbance at the time of the incident (R. 1103),[23] and that because of his lack

[23]Dr. Fisher's testimony was not proferred for the purpose of showing that the appellant acted under the influence of

of violent behavior while in prison, appellant would not be a danger to inmates. (R. 1109). Again, appellee submits that because this testimony was irrelevant as it did not concern rehabilitation, it was properly excluded.

Appellee acknowledges this Court's decision in Simmons v. State, 419 So.2d 316 (Fla. 1982), but submits that Simmons, the proffered testimony of a psychiatrist was that, in his opinion that, unlike some violent criminals with more severe character disorders, the defendant had the capacity to be rehabilitated. 419 So.2d at 317-18. In the instant case, there was no testimony from the proferred witnesses that the appellant had the capacity to be rehabilitated, only that while he was in prison, he would be a model prisoner. Furthermore, the appellee submits that because there was testimony that appellant was a model prisoner and was rehabilitated through Mr. Wright (1495-97), who had the opportunity to personally supervise the appellant, the trial court did not prevent the jury from considering rehabilitation as a possible mitigating circumstance. Therefore, the trial court did not err in excluding the irrelevant and incompetent testimony as proferred by the appellant.

---

extreme mental disturbance or whether his ability to conform his conduct to the essential requirements of the law were substantially impaired, but for the purpose of showing that appellant was a model prisoner. Even if it was proferred for the former, it was clearly cumulative to Dr. Toomer and Dr. Smith's testimony. (T. 1402-28, 1457-60, 1475-79).

C. The Jury's Recommendation of Death Was Not Impermissively Tainted.

It is well recognized that although the advisory recommendation of the jury is to be accorded great weight, the ultimate decision on whether the death penalty should be imposed rests with the trial judge. White v. State, 403 So.2d 331 (Fla. 1981); Hoy v. State, 353 So.2d 826 (Fla. 1977). Thus, in determining whether a jury's recommendation was tainted, this Court must review the record to determine whether the jury based its recommendation on improper considerations. Riley v. State, 413 So.2d 1173, 1175 (Fla. 1982). Appellee submits that the appellant has failed to demonstrate any taint on the jury's recommendation.

1. There was no error in the prosecutor's argument.

Appellant alleges that the prosecutor improperly argued to the jury that the appellant did not deserve rehabilitation, that he might be paroled if sentenced to life imprisonment and that a life sentence would be unfair to the victim's family. Appellee asserts that the arguments of counsel were proper within the context of the evidence.

It is well recognized that wide latitude is permitted in arguing to a jury. Thomas v. State, 326 So.2d 413 (Fla. 1975); Spencer v. State, 133 So.2d 729 (Fla. 1961). Counsel

may argue any logical inferences that may be drawn from the evidence and may advance all legitimate arguments. Breedlove v. State, 413 So.2d 1, 8 (Fla. 1982). The control of counsel's arguments are within the trial court's discretion, and an appellate court will not interfere unless an abuse of discretion is shown. Thomas v. State, supra; Paramore v. 229 So.2d 855 (Fla. 1969).

Appellee submits that the prosecutor's comments concerning the "model prisoner" argument as a mitigating factor was based on the testimony of the appellant's witness, Eurvie Wright,[24] who testified that appellant was a model prisoner and had been rehabilitated. Thus, it was a valid comment on the evidence. Appellant also complains about the prosecutor's comments concerning the victim and his family. It must first be noted that these comments were never objected to[25] and thus were not preserved for review. Cumbie v. State, 380 So.2d 1031 (Fla. 1980); Gibson v. State, 351 So.2d 948, 950 (Fla. 1977).

Even if appellant had properly preserved this issue for review, appellee submits that the argument was not improper,

[24]See text of page

[25]Appellant only objected along the lines of his motion in limine, i.e., lack of remorse, killing of a police officer, improper doubling, heineous, atrocious, or cruel. (T. 1529-30). Furthermore, although the trial court inquired if he was asking for relief, appellant replied no. (T. 1530).

as again, it was a comment on the evidence. This court in reviewing comments must consider each case on its own merits, and within the circumstances surrounding the complained of remarks. Breedlove v. State, supra at 8. During the penalty phase, the appellant introduced the testimony of many of the members of his family, his wife, his mother and his sisters. The obvious purpose was to evoke the sympathy of the jury. It was in response to these pleas of sympathy that the prosecutor based his comments. Specifically, the appellant's wife testified that she still loved the appellant and would wait for him as she had done before. (T. 1468). The prosecutor's remarks concerning the inability of the victim and his family to see each other again and to make their peace was a response to the appellant's wife's testimony, as well as to the circumstances surrounding Luis Pena's death. Luis Pena died without being prepared to do so, an opportunity the appellant would have. Thus, the comments were based on the evidence that was before the jury and were not improper. They did not prevent the jury from exercising reasoned judgment as to whether the death penalty should be imposed.[26]

[26]Appellee would submit that appellant's reliance on cases such as Pait v. State, 112 So.2d 380 (Fla. 1959) are inapplicable where the statutes involved in Pait and the instant case are different. Section 921.141, Florida Statutes (1959) required a person convicted of a capital felony to be punished by death unless the jury recommended mercy, in which case the punishment was life imprisonment. Under the present statute, the jury's recommendation is only advisory, and sentencing is left to the trial court. Thus, the effect of so-called prejudicial comments can be considered as harmless. See, e.g., Clark v. State, 363 So.2d 331, 334 (Fla. 1978).

2. The Trial Court Did Not Err In Allowing The Admission or Argument Of Non-statutory Aggravating Evidence.

The appellant alleges that the trial court improperly allowed the State to introduce non-statutory aggravating evidence of the victim's pain and suffering before death, the appellant's lack of remorse, and the victim's status of a police officer. The appellee submits that all of the above evidence were elements of statutory aggravating circumstances and were not introduced or argued as separate non-statutory aggravating evidence.

It is well established that although lack of remorse is not a permissible aggravating circumstance, Menendez v. State, 368 So.2d 1278 (Fla. 1979), it can be offered to the jury and judge as a factor which goes into the equation of whether or not the crime was heinous, atrocious, or cruel. Sirici v. State, 399 So.2d 964, 971 (Fla. 1981). See also Hargrave v. State, 366 So.2d 1, 5 (Fla. 1978); Sullivan v. State, 303 So.2d 632, 638 (Fla. 1974). Thus, where the State was attempting to prove beyond a reasonable doubt that the murder was heinous, atrocious, or cruel, the evidence and argument concerning appellant's lack of remorse was admissible. There is no showing that the jury or judge improperly considered this factor. See, e.g., Quince v. State, 414 So.2d 185 (Fla. 1982). Furthermore, the testimony as to lack of remorse was also presented to

demonstrate the lack of the mitigating circumstances of rehabilitation as presented through the appellant's witness, Eurvie Wright. See, e.g., Jackson v. State, 366 So.2d 752 (Fla. 1978).

Appellant also alleges that it was improper to allow testimony concerning the victim's pain and suffering and that the victim was a police officer. Appellee submits that a victim's pain and suffering is obviously relevant to whether a murder was heinous, atrocious, or cruel. Where a victim does not die immediately, the pain and suffering that the victim feels is relevant to determine whether the crime was "cruel". Cruel "means designed to inflict a high degree of pain; utter indifference to, or the enjoyment of, the suffering of others." State v. Dixon, 283 So.2d 1, 9 (Fla. 1973). The fact that the appellant did not intend that the bullet should cause the victim to drown in his own blood is irrelevant. Appellant stated in his confession that he did intend to shoot both Luis Pena and Gary Spell so as to wound them so that he could escape. (T. 1133-34, 1168-69). Thus, there is evidence to suggest that the appellant intended to cause to victim pain and suffering.[27]

Appellee further submits that any evidence or comment concerning the victim's occupation as a police officer were

[27]Appellee will elaborate on the finding that the murder was especially heinous, atrocious and cruel, infra at 90, 93-95.

relevant to show that the crime was committed for the purpose of avoiding or preventing a lawful arrest and to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws. The evidence was not introduced so as to be considered as a non-statutory aggravating circumstance.[28] Appellee asserts that appellant allegations concerning improper argument and evidence is without merit, and the jury's recommendation has not in anyway been tainted.

3. The Trial Court Properly Instructed The Jury.

Appellant alleges that the trial court's instruction that "the crime for which the defendant is to be sentenced was especially wicked, evil, atrocious or cruel" was insufficient to permit the jury to exercise reasoned judgment to determine whether this aggravating circumstance existed and thus the trial court erred by not giving the detail instruction requested by the appellant. Appellee submits that this argument is without merit. The trial court in the instant case following the standard jury instructions as promulgated by this Court. This Court has consistently held that the standard jury instructions on aggravating and mitigating

[28]Appellant also alleges that the prosecutor improperly argued that this police killing was the "ultimate" crime. Appellee submits that when the comment is read in its full context, it is obvious that the prosecutor was referring to murder in general as being the ultimate crime (T. 1527), and not the killing of a police officer.

circumstances are sufficient and do not require further refinements. Vaught v. State, 410 So.2d 147, 150 (Fla. 1982); Demps v. State, 395 So.2d 501, 505 (Fla. 1981). In Alvord v. State, 307 So.2d 433, 444 (Fla. 1975) this Court held that the terms, heinous, atrocious and cruel, are matters within common knowledge, so that an ordinary man would not have to guest at what was intended. See also Proffit v. Florida, 428 U.S. 242, 255 (1976); Magill v. State, __So.2d___ Case No. 51,699, Fla., opinion filed March 10, 1983 [8 F.L.W. 105].

Appellant's analysis and reliance on the plurality decision in Godfrey v. Georgia, 446 U.S. 420 (1980) is clearly strained and misplaced. In that case the defendant was sentenced to die upon a finding, under the Georgia capital punishment statute, that the offense "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim," notwithstanding the fact that the prosecutor stated in his argument to the jury that the case involved no allegation of torture or of aggravated battery. 446 U.S. at 426. Finding that the circumstances of that case did not satisfy the statutory criteria of the criteria laid out by the Georgia Supreme Court in its prior decisions, 446 U.S. at 430-33, four Justices held that the death penalty in that case could not stand. The Godfrey decision did not invalidate the Georgia statute in question, only its application

to the facts of the case. As stated infra at 93-95, the facts of this case clearly establish that the murder was heinous, atrocious or cruel as interpreted by this Court.

Appellant also alleges that the jury's recommendation was tainted by the trial court allowing the jury to "double up" aggravating circumstances while the trial court did not. Appellee submits that this argument is totally without merit and can be seen as such by the appellant's failure to cite any case in which this Court reversed a death sentence where the jury had improperly doubled up aggravating circumstances, while the trial court did not. Indeed, this Court has consistently upheld death sentences, even where the trial court has improperly doubled up aggravating circumstances, where there were no mitigating circumstances. See, e.g., White v. State, 403 So.2d 331 (Fla. 1981); Armstrong v. State, 399 So.2d 953 (Fla. 1981); Ford v. State, 374 So.2d 496 (Fla. 1979).

Appellee further submits that in any event there was no improper doubling up of aggravating circumstances as in Provence v. State, 337 So.2d 783 (Fla. 1976). The basis for this Court's holding in Provence is the fact that a robbery is always for pecuniary gain. Thus a Section 921.141(5)(f) aggravating circumstance will always be present where the capital felony is committed in the course of a robbery. The

same is not true of the aggravating circumstances present in this case. Section 921.141 (5)(e) applies to any situation where a witness is killed with the intent to avoid arrest and detection. Riley v. State, 366 So.2d 19 (Fla. 1978); Washington v. State, 362 So.2d 658 (Fla. 1978). On the other hand, while a shootout with the police may provide a classic example of the proper application of this subsection, Washington v. State, supra at 668 (England, C.J., concurring), such a situation might not necessarily involve the application of Section 941.141 (5)(g), because the defendant might lack the requisite specific intent, to disrupt or hinder the lawful exercise of any governmental function or the enforcement of the laws, as the defendant may be acting from instinct, reflex or passion.

The case at bar involves a different situation entirely. The appellant did not kill Officer Pena in a "shoot-out." Rather, the murder of Officer Pena was committed by the appellant to avoid his arrest for the outstanding probation warrants as well as for being in the possession of the stolen vehicle. Furthermore, the murder of Officer Pena was committed while Officer Pena was performing the routine functions of a police officer who stops a vehicle for a traffic violation.[29] This Court has upheld the separate

[29]Appellant commented to Felix Ruiz, when he saw Officer Pena's vehicle following him, that the officer was going to stop him. (T. 1125).

findings of these two aggravating circumstances in situations where the police officer is shot responding to a crime, or routinely checking out a stopped vehicle. See, e.g., Tafero v. State, 403 So.2d 355, 362 (Fla. 1981); Jacobs v. State, 396 So.2d 713, 717-18 (Fla. 1981); Ford v. State, 374 So.2d 502 (Fla. 1979); Raulerson v. State, 358 So.2d 826, 833 (Fla. 1978). Thus, the appellee submits that under the facts of the instant case, the jury would have properly found that both aggravating circumstances applied.

Appellee also submits that separate findings that the homicide was especially heinous, atrocious, and cruel, and that it was committed in a cold, calculated premeditated manner without any pretense of moral or legal justification, could also be sustained. There can be no serious question that the murder was a cold-blooded execution of Officer Pena. However, separate from the manner in which the murder was committed were the additional facts that the bullet severed nerves carrying feelings of pain of the deep visceral variety believed to be the worst pain there is (T. 1399), that the pain suffered by Officer Pena would have been excruciating (T. 1399), that Officer Pena did not die instantaneously, but rather lived fifteen to twenty minutes, part of which time he was conscious, (T. 1398), and that Officer Pena died by drowning in his own blood. (T. 1228). As stated, infra at 93-95, these facts sustain a finding

that the murder was specially heinous, atrocious or cruel. See, e.g., Breedlove v. State, 413 So.2d 1, 9 (Fla. 1982); Spinkellink v. State, 313 So.2d 666 (Fla. 1975). Thus, the appellee submits that the jury's recommendation was not tainted by impermissible doubling up of aggravating circumstances.

Finally, appellee would submit that the appellant has failed to demonstrate that the jury's recommendation was based on improper considerations. The fact that the jury was urged by the prosecutor to find certain aggravating circumstances does not establish that the jury's recommendation was tainted. Riley v. State, 413 So.2d at 1174-75. Thus, the appellee asserts that the jury's recommendation was valid and is to be given great weight by this Court.

D. The Trial Court Did Not Err In Accepting the Jury's Recommendation and Imposing A Sentence of Death.

The primary standard for this Court's review of death sentences is that the recommended sentence of a jury should not be disturbed if all relevant data was considered, unless there appear strong reasons to believe that reasonable persons could not agree with the recommendation. Tedder v. State, 322 So.2d 908 (Fla. 1975). The standard is the same regardless of whether the jury recommends life or death. LeDuc v. State, 365 So.2d 149 (Fla. 1978). The appellant

alleges that death is a disproportionate sentence because the murder was not heinous, atrocious or cruel, and that because the expert testimony that the appellant was suffering extreme mental or emotional disturbance and that his ability to conform his behavior to law was impaired at the time of the offense, was unrefuted, requiring this Court to reverse the sentence of death.

Initially, this Court has repeatedly held that neither the jury or the trial court is compelled to find mitigating circumstances, only that they consider them. Hargrave v. State, 366 So.2d 1 (Fla. 1978). The decision of whether a particular mitigating circumstance in sentencing is proven and the weight to be given it rests with the judge and jury. Smith v. State, 407 So.2d 894, 901 (Fla. 1981); Lucas v. State, 376 So.2d 1149 (Fla. 1979). Furthermore, the conclusions of an expert are not binding on the trier of fact and the court has the discretion to accept or reject the conclusions of an expert even though it is not controverted. Nettles v. State, 409 So.2d 85, 88 (Fla. 1st DCA 1982). Thus, the appellee submits that the jury and trial judge were entirely within their reasoned judgment to find that the appellant was not under the influence of extreme emotional distress at the time of his alleged offense, or that

his ability to conform his conduct to the requirements of the law was not substantially impaired.[30]

Appellee also submits that appellant's argument that the murder was not especially heinous, atrocious or cruel because it was accomplished with a single shot must be repudiated. This Court has, on a number of occasions, held that a murder is not especially atrocious, heinous or cruel when the victim died immediately as a result of a gunshot wound, or there was no evidence that the victim suffered. Menendez v. State, 368 So.2d 1278 (Fla. 1979); Riley v. State, 366 So.2d 19 (Fla. 1978); Cooper v. State, 336 So.2d 1133 (Fla. 1976). This Court has never held that the mere fact death was caused by a single gunshot prevented the application of this aggravating circumstance, and, in fact, has upheld the finding that a murder was especially heinous, atrocious and cruel in cases where the victim suffered far less pain than Luis Pena. See, e.g., Spinkellink v. State, 313 So.2d 666 (Fla. 1975); Proffit v. State, 315 So.2d 461 (Fla. 1975). This court recently in Breedlove v. State, supra, held that a murder was heinous, atrocious and cruel

[30]This is especially true in light of Dr. Toomer's testimony that he believes that anytime there is a premeditated killing, the murderer is sick, and suffers under an extreme emotional disturbance. (T. 1442-43). In addition, the appellant's experts did not find the appellant to be schizophrenic, (T. 1476) and that he does not have difficulty knowing the difference between reality and non-reality. (T. 1475).

where the death resulted from a single stab wound, during an attack that occurred while the victim lay asleep in his bed, where the victim suffered considerable pain and did not die immediately. 413 So.2d at 9.[31]

Appellee submits that the instant case is akin to that of Breedlove. Officer Pena was not shot down in a "gunfight" while trying to arrest the appellant, he was cold-bloodedly executed while sitting in his car performing routine traffic duties. Officer Pena was shot through the neck and suffered excruciating pain before drowning in his own blood. Nothing so graphically illustrates this as does the police tape introduced into evidence, during which Officer Pena managed to broadcast the words "I'm shot. I'm shot. I'm shot." (T. 91). This court has also upheld the finding that the shooting of a police officer in the heart during a shootout was heinous, atrocious and cruel. Raulerson v. State, 358 So.2d 826, 828, 834 (Fla. 1978). The murder of Luis Pena was conscienceless, premeditated, and viciously carried out by a defendant who was willing to kill two officers to further his own ends,[32] and it was

[31] In Washington v. State, 362 So.2d 658 (Fla. 1978), this Court considered the fact th at the victim did not die instantly as a factor tending toward classifying the murders as heinous, atrocious, and cruel.

[32] Where a murder is also one of cold, calculated design, it can fall into the category of heinous, atrocious and cruel. Armstrong v. State, 399 So.2d 953, 963 (Fla. 1981); Magill v. State, 386 So.2d 1188 (Fla. 1980).

only through luck and foresight that one of these two officers was not killed. The appellee submits that the finding that the murder was heinous, atrocious or cruel should be upheld.

Appellee further submits that even if the murder was not heinous, atrocious or cruel, it certainly was one committed in a cold, calculated, premeditated manner without any pretense of moral or legal justification. Thus, where the trial court specifically found that this aggravating circumstance existed (R. 1048), it becomes a viable aggravating circumstance to be considered by this Court. In any case, there are at least one if not two aggravating circumstances which were correctly found to exist by the trial court. This coupled with the fact that the trial court found no mitigating circumstances (R. 1049) and that the jury recommended death, compels this Court to affirm the sentence of death. It is well established that where a trial court has improperly found aggravating circumstances to exist, but there are no mitigating circumstances, death is presumed, and this Court will not reverse the sentence. See, e.g., Ford v. Strickland, 696 F.2d 804, 813-15, 822-24 (11th Cir. 1983); Middleton v. State, __So.2d__, Case No. 60,021, Fla., opinion filed December 22, 1982 [8 F.L.W. 9]; Tafero v. State, supra at 362; White v. State, supra at 339; Armstrong v. State, supra at 963; Antone v. State, 382 So.2d 1205

(Fla. 1980); Clark v. State, 379 So.2d 97, 104 (Fla. 1979); Cooper v. State, 336 So.2d 1133 (Fla. 1976). Thus, the appellee submits that where the record shows multiple aggravating circumstances, and where not one mitigating circumstance was found to exist, this court must affirm the sentence of death.

V

ANY ERROR SHOULD NOT AFFECT THE CONVICTIONS FOR ATTEMPTED FIRST DEGREE MURDER AND POSSESSION OF A FIREARM BY A CONVICTED FELON.

During both his opening statement and closing statement, appellant's counsel stated to the jury, that there was no dispute that the appellant had attempted to kill Officer Spell. (T. 939-940, 1316-17). Thus, appellant was in effect admitting his guilt as to counts two and three, attempted first degree murder and possession of a firearm by a convicted felon.

It is thus apparent that the defense strategy included admitting appellant's guilt on the attempted murder and possession of a firearm charges in hopes that his credibility would be enhanced and with it his chances of being acquitted on the first degree murder charge. Given this fact, it is clear that any error found regarding the issues raised in Points I, III, and IV of appellant's brief should not affect the attempted first degree murder charge and the possession of a firearm charge.

As to Point II, at least in relation to the allegations of the grand jury, both counts II and III [33] are charges

[33]The allegations concerning the petit jury would not affect Count III, which was severed and tried before the court without a jury.

which could be filed by information. Article I, Section 15(a), Florida Constitution; Rule 3.140(a), Florida Rules of Criminal Procedure. In Seay v. State, 286 So.2d 532, 534 (Fla. 1973), this court held that two defense challenges to the indictments would be:

> Moot as to any alleged defect in the grand jury selection, since informations filed pursuant to those indictments would be sufficient without the necessity of grand jury indictments.
>
> [Emphasis original]

Thus, based upon this authority, it is submitted that the appellant has not presented this Court with grounds to reverse his convictions for attempted first degree murder and possession of a firearm by a convicted felon.

CONCLUSION

Based upon the foregoing reasons and citations of authority, the State respectfully submits that the judgment and sentence of death should clearly be affirmed, and in any event, the conviction and judgment and sentence for possession of cocaine should be unaffected by this appeal.

Respectfully submitted,

JIM SMITH
Attorney General

Penny Hershoff Brill

PENNY HERSHOFF BRILL
Assistant Attorney General
Department of Legal Affairs
Florida Regional Service Center
401 N. W. 2nd Avenue (Suite 820)
Miami, Florida 33128
(305) 377-5441

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF APPELLEE was furnished by mail to MICHAEL ZELMAN, Esquire, Office at Bay Point, Suite 1130, 4770 Biscayne Boulevard, Miami, Florida 33137, this 14 day of April, 1983.

Penny Hershoff Brill

PENNY HERSHOFF BRILL
Assistant Attorney General

ss/