IN THE SUPREME COURT OF FLORIDA

CASE NO. 61,176

MANUEL VALLE,

Appellant,

-vs-

THE STATE OF FLORIDA,

Apellee.

APPEAL FROM THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR DADE COUNTY

INITIAL BRIEF OF APPELLANT

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INTRODUCTION

This is an appeal from a judgment of guilt and the imposition of a sentence of death. The appellant, MANUEL VALLE, was the Defendant in the lower court and the appellee, THE STATE OF FLORIDA, was the prosecution. In this brief the parties will be referred to either by name or as they stood below. The record will be designated by the following symbols:

"R." - Record on Appeal.

"T." - Transcript of lower court proceedings.

"S.R." - Supplemental Record on Appeal.

STATEMENT OF THE CASE

The Defendant was indicted for first degree murder, attempted first degree murder, possession of a firearm by a convicted felon, and auto theft. (R. 14-24A). Following jury trial he was found guilty of first degree murder and attempted first degree murder, and upon non-jury trial he was found guilty of possession of a firearm by a convicted felon. (R. 961, 962; T. 1551). After the sentencing hearing the jury's advisory verdict of death was returned. (T. 1546). The trial court adjudicated the Defendant guilty and sentenced him to death on the first degree murder conviction, with consecutive prison terms of thirty and five years respectively imposed on the convictions for attempted first degree murder and possesion of a firearm by a

convicted felon. (R. 1057). This appeal was then instituted. (R. 1189).

STATEMENT OF FACTS

On April 2, 1978, Officer Luis Pena of the Coral Gables Police Department was shot and killed by a single bullet wound to the neck. (T. 866-71, 1218, 1228). Gary Spell, also a Coral Gables police officer, witnessed the events which led up to the shooting. (T. 977-98).

Before his death Pena had been patrolling with his police dog in a marked vehicle. (T. 965). According to Spell, and as similarly reflected by police radio tapes, Pena had stopped two latin males in a Camaro because of a traffic infraction. (T. 966-71, 977-79). Spell arrived in his vehicle and saw the Defendant standing next to Pena as Pena was sitting in his car. (T. 977, 978). The Defendant's companion then emerged from the passenger side of the Camero and approached Spell. (T. 981, 983). This individual, later identified as Felix Ruiz, was soon asked by Pena to move because his presence was agitating the dog. (T. 981, 983). Ruiz then returned to the Camaro. (T. 983).

At this point Spell heard Pena use his radio and ask for a check of the Camaro's license tag. (T. 984). The Defendant then walked back to the Camaro. (T. 984). Spell later recalled at the trial that Ruiz soon walked away from the Camaro, behind Spell, and that Ruiz's location became unknown. (T. 958, 1010, 1011).

Spell also testified that the Defendant reached into the

Camaro and walked back to Pena. (T. 985). The Defendant then addressed Pena as "officer", raised a gun, and fired one shot at Pena. (T. 986, 989-90). The Defendant fired two more shots at Spell, and returning to the Camaro, fled the scene. (T. 986-7, 991, 992).

Spell fired his gun at the Camaro as it sped away. (T. 992). It was later learned that one of the bullets fired at Spell had lodged in the "bullet-proof" vest he had been wearing. (T. 998).

Investigators soon arrived at the scene and located the abandoned Camaro one-half block away. (T. 1027). Both the Defendant's and Ruiz's fingerprints were discovered on the Camaro and it was learned that the car had been stolen one year earlier. (T. 1054-5, 1088-90, 1091). Spell was shown a photo display and he identified the Defendant. (T. 996).

Two days later, on April 4, 1978, the Defendant was arrested in Deerfield Beach, Florida. (T. 1068, 1069, 1070). That evening the Defendant gave Dade County Detectives both oral and written incriminating statements although his attorney had not been present. (T. 308, 956, 1068, 1083, 1103-5, 1125-41, 1152-73).

Prior to trial a hearing was held upon the Defendant's written motion to suppress the incriminating statements. (R. 174-84; T. 187-269). Evidence at the hearing showed that hundreds of police officers were notified of the Defendant's identity prior to his arrest by the circulation of flyers bearing his photograph. (T. 208). Two of these officers, Edward

Rodriguez and James Twiss of the Deerfield Beach Police Department, arrested the Defendant at about 3:30 p.m. (T. 272-85, 298-302). Rodriguez testified that after reading Miranda rights the Defendant stated his willingness to give a statement without a lawyer. (T. 285).

A short time later, Detective Wolf, a Dade County police officer and the lead investigator of the Pena homicide, was notified of the Defendant's arrest. (T. 187, 210). Wolf and five other detectives then departed to Deerfield Beach for the express purpose of interrogating the Defendant. (T. 212, 213, 216). It took the detectives one hour to get to Deerfield Beach. (T. 210).

Before the Dade County detectives arrived, Deerfield Beach Police Lieutenant Guiffreda telephoned the Broward County Public Defender's Office and informed Assistant Public Defender Lisa Kahn of the Defendant's arrest. (T. 231, 233, 243). Guiffreda had the Defendant brought to the phone to talk with Kahn but he did not hear the Defendant's conversation. (T. 234). According to Kahn, (who was an assistant state attorney at the time she testified at the hearing), the Defendant was told that she represented him, that he should not speak with anyone, and that if anyone attempted to speak with him he should contact her. (T. 242-3, 245). The Defendant agreed and stated that he would call if anyone tried to speak with him. (T. 145, 150-1).

After speaking with the Defendant Kahn told Guiffreda that no Deerfield Beach police officers were to speak with the Defendant unless Kahn was first notified. (T. 234, 246).

Guiffreda agreed. (T. 235). Kahn also told Guiffreda that he should give those instructions to any police officers who might come in contact with the Defendant. (T. 234, 246). Guiffreda replied that Kahn should call the Broward Sheriff's Office because that was where the Defendant was to be taken. (T. 235, 246).

Ms. Kahn subsequently called the Broward County Sheriff's Office. (T. 246). The tape recording of Kahn's conversation with the Sheriff's Office reflects that she then stated she had spoken with the Defendant, that he did not wish to give a statement without an attorney being present, and that she was to be contacted prior to any attempt to take the Defendant's statement. (T. 330).

When the Dade County detectives arrived at about 5:45 to 5:55 p.m. a meeting was held with Deerfield Beach police officials. (T. 210, 216, 236). Guiffreda, who was present at this meeting, told the Dade County detectives that the Defendant had been advised of his rights and had been placed in contact with the public defender's office. (T. 236). The meeting lasted one hour. (T. 216).

At the hearing, Detective Wolf stated that he had been at the meeting and recalled having a discussion with Deerfield Beach police officers regarding the Defendant. (T. 216, 217-8). Wolf further recalled that he was told by someone at the Deerfield Beach Police Department that it was their policy to place arrested individuals in contact with the public defender's office. (T. 219-20). However, according to Wolf, these

conversations occurred after he interrogated the Defendant. (T. 219). Guiffreda believed he told Wolf that the Defendant had spoken to a public defender, but he could not recall whether this was before or after the Defendant's interrogation. (T. 236-7).

At about 6:55 p.m., Detective Wolf, accompanied by his assistant, began to interrogate the Defendant. (T. 187-8). The Defendant was told that the detectives were investigating the Pena murder and were there to "conduct an interview." (T. 189). The Defendant replied that he was aware that he was under arrest and that he had spoken to Lisa Kahn, a Public Defender, who had "advised him not to speak with anybody or sign anything." (T. 189-90).

Wolf testified at the hearing that his reply to the Defendant was that "that was his constitutional right", (T. 190), but that he was there "hopefully to speak with him." (T. 223). According to Wolf, the Defendant then declared that he had cooperated with the police in the past and wanted to do so now. (T. 190). Wolf's response was that no deals could be made and that the Defendant would have to execute a rights waiver form if he wanted to speak with Wolf. (T. 190).

Wolf then determined that the Defendant could read English and had one year of junior college. (T. 191). The Defendant could not hear in his left ear. (T. 192). The rights waiver form was read aloud; the Defendant said he understood that he was waiving his rights to remain silent and to have an attorney present. (T. 192-5). The Defendant initialed and signed the form. (T. 195).

Wolf then interrogated the Defendant for two and one half hours. (T. 195). During this time, according to Wolf, the Defendant was neither threatened nor coerced and he did not request an attorney. (T. 195, 196). He was given coffee and cigarettes. (T. 197). When the Defendant refused to answer questions he was told that that was his right. (T. 196).

The Defendant's oral statement, as related to the jury by Wolf, was that he and Ruiz were driving in Coral Gables when they were stopped by Pena for going through a yellow light. (T. 1025-6). The Defendant gave Pena false information about his identity and the Camaro's owner, and heard Pena use his radio to make a check. (T. 1027). The Defendant went back to Ruiz in the Camaro and said that they were going to jail. (T. 1028). Ruiz questioned the Defendant on what should be done, and, according to Wolf, the Defendant said that he told Ruiz that he would "bust" him. (T. 1029). The Defendant then took the gun from the Camaro, walked back to Pena, aimed at his stomach and chest, and fired. (T. 1033). The Defendant continued his oral statement by disclosing to Wolf how he had fled and arrived in Deerfield Beach. (T. 1033-40). According to Wolf, the Defendant concluded by saying that he had shot Pena because he had violated his probation, he was driving a stolen car, and he did not want to go back to jail. (T. 1041).

Following the oral statement a twenty-five minute break was taken and a stenographer was summoned. (T. 204). The rights form was reviewed again, and a one half hour statement was recorded. (T. 205). In this statement, which was introduced

into evidence and was read to the jury, the Defendant told Wolf that Pena was accidentally shot when his hand hit the windshield of Pena's car. (R. 952; T. 991).

At the conclusion of hearing the court denied the Defendant's motion to suppress confessions and admissions, finding 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)". (R. 1054) (Emphasis by the court).

Prior to trial, the Defendant filed a motion to dismiss the indictment upon the ground that the grand jury had been unlawfully drawn and composed in violation of equal protection and due process of law. (R. 445-46). The motion was accompanied by extensive sworn testimony and evidentiary exhibits. (R. 446-884). An additional motion was filed by the Defendant challenging the petit jury venire on equal protection and due process grounds and seeking the empanelment of a new venire. (R. 426-428). This motion was accompanied by an evidentiary proffer consisting of sworn affidavits of expert witnesses. (R. 429-442). In both motions the Defendant requested the Court to conduct evidentiary hearings. (R. 426, 446). After indicating that it had read the motions, the court denied each without receiving evidence. (R. 1196, 1210, 1210-1211).[1]

Prior to jury selection a hearing was held upon the

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[1] For a summary of the facts contained in the sworn testimony and exhibits accompanying these motions, see Point II, infra.

Defendant's Motion to Preclude Death-Qualification of Jury. (R. 185-86, 1195-1209). The motion alleged that removal of persons morally opposed to capital punishment or who would not impose the death penalty but could fairly determine guilt or innocence denied the Defendant Sixth and Fourteenth Amendment rights to:

> (1) a jury that was impartial on the issue of guilt, and
>
> (2) a jury that was selected from a fair cross-section of the community.

(R. 185). Accompanying the motion was an appendix comprised of five studies of capital juries which collectively show that jurors who are not morally concerned about capital punishment are more apt to find an accused guilty. (R. 198-390).

The prosecution made no response to the Motion to Preclude Death-Qualification of Jury and the court sumarily denied it. (R. 1209).

During jury selection Miss Ladd, a prospective juror, told the court that she had a general opinion regarding the death penalty which would not prevent her from sitting as a juror. (T. 723). Upon questioning by the prosecutor Miss Ladd stated that she believes in capital punishment and that she could make an appropriate recommendation following the penalty phase. (T. 723, 724).

After several other persons were voir dired outside of Miss Ladd's presence, Miss Ladd asked to return to the courtroom. (T. 746). She informed the court that she did not know if she could personally sentence anyone to death. (T. 746).

Further questioning reaffirmed that Miss Ladd believed in capital punishment and that she could make a fair determination of guilt or innocence. (T. 747-8). Miss Ladd again stated that she did not know if she could personally sentence anyone to death. (T. 747). The following colloquy then occurred:

> MR. ADORNO [The Prosecutor]: 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?
>
> * * *
>
> 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 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 convice me.
>
> * * *
>
> MR. ROSENBERG [Defense Counsel]: Are there any circumstances 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. (T. 748-53).

Over the Defendant's objection, the court excused Miss Ladd for cause. (T. 753).

During the trial Detective Wolf testified for the state and began to relate the oral statements made by the Defendant. (T. 1103). Wolf testified that the Defendant told him that on the night of the murder he went to Coral Gables to see a man that he had been working for. (T. 1105). Wolf then told the jury that the Defendant refused to answer the next question as to the man's identify. (T. 1105).

Defense counsel immediately objected upon the ground that Wolf's testimony concerned the Defendant's fundamental right to stop questioning. (T. 1105-6). The prosecutor replied that counsel should have known that the Defendant's refusal to answer would be introduced, but that in any event, its admission was relevant to show that the Defendant's statements were voluntary. (T. 1106-7). The court overruled the objection and found the Defendant's refusal to be "innocuous". (T 1108, 1109).

The Defendant next moved for a mistrial, but the court replied that it would reserve its ruling. (T. 1110).

Shortly thereafter the Defendant requested that his refusal to state the name of the person he was going to see in Coral Gables be deleted from the written statement that had been given to Wolf. (T. 1117). The prosecutor's response was that there was no invocation of silence because the Defendant had merely said that he would "rather not answer" the question. (T. 1118). The court denied this request, and then denied the Defendant's previous motion for mistrial. (T. 1119, 1123).

Wolf completed his testimony, relating the Defendant's other incriminating statements. (T. 1125-41). The Defendant's written

statement was admitted, and Wolf, reading from it, told the jury that the Defendant had said that he would "rather not say" who he was going to see in Coral Gables. (R. 944; T. 1157).

At the conclusion of the trial the Defendant was found guilty of first degree murder and attempted first degree murder. (R. 961, 962; T. 1345). A sentencing hearing was then held. (T. 1393-1479).

Prior to the commencement of testimony at the sentencing hearing argument was held upon the Defendant's written motion to preclude certain evidence and comment from being presented to the jury. (R. 145-163; T. 1350-90). The court stated that it would resolve all of the Defendant's objections prior to the presentation of evidence. (T. 1366).

After the Defendant made oral objections and arguments, the court denied the following:

> 1. Preclusion of "'doubling up'" evidence or comment that the homicide "'was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody'," and that the homicide "'was committed to disrupt or hinder the lawful exercise of any government function or the enforcement of laws'." (R. 151; T. 1351-8).
>
> 2. Preclusion of evidence or comment regarding the victim's pain and suffering before death because such is not relevant to establish any aggravating circumstance. (R. 148-55; T. 1359-66).
>
> 3. Preclusion of use by the prosecutor of Section 921.141(5)(i), Florida Statutes, that the homicide was committed in a cold, calculated and premeditated manner without pretense of moral or legal justification, upon the ground that such use constituted an unconstitutional application of law ex post facts. (T. 1377-81).

Regarding other written objections to evidence or comment that the Defendant's lack of remorse, the possibility of parole, and the status of the victim as a police officer were not aggravating circumstances, the court ruled that such were admissible and declared that "Every objection is noted". (R. 155-8; T. 1371-3).

The state's first sentencing witness, Detective Wolf, testified over objection that the Defendant had never shown any remorse for the Pena murder. (T. 1393-4).

The state's second and concluding witness was Dr. Wright, the medical examiner who had autopsied Officer Pena. (T. 1346-7). Dr. Wright testified over objection that Officer Pena suffered the "worst" kind of pain before death, but on cross-examination he admitted that half of all trauma victims he had performed autopsies upon were multiple gunshot or stabbing victims who had lived longer and had suffered more pain than Officer Pena. (T. 1399, 1400). The doctor also testified that because he could not breathe Pena died in five to fifteen minutes and was conscious before death. (T. 1397, 1398)

To show mitigation defense counsel established through expert testimony that at the time of the offense the Defendant had been operating under extreme mental and emotional distrubance and his capacity to appreciate the criminality of his acts was impaired. (T. 1407, 1460-1). The first witness to testify was Dr. Toomer, a psychiatrist who had examined the Defendant for between twenty and thirty hours. (T. 1402, 1403-4). Dr. Toomer had also reviewed depositions and transcripts of the case and had

interviewed members of the Defendant's family. (T. 1403, 1408-9). From his examinations and interviews the doctor concluded that the Defendant had an IQ of 127, but was an individual who had set high self-expectations which were unachievable. (T. 1412, 1418).

Interviews with the Defendant and his family revealed that the Defendant's father had been very strict and that during childhood the Defendant and his sisters lived "almost in a state of fear". (T. 1409) Whenever the Defendant cried his father dressed him like a girl. (T. 1409). When the Defendant was a teenager his father set impossible curfews and when they were not met, the Defendant was forced to sleep outside. (T. 1410).

Dr. Toomer performed various psychiatric tests upon the Defendant and concluded there was evidence that the Defendant suffered from defensive schizophrenia, which manifests itself by the separation of an individual's feelings from the thought processes dealing with stress or trauma. (T. 1423-6). Based upon these tests and his interviews, the doctor diagnosed that the Defendant suffered from a transient situational personality disorder, which explains the way in which the Defendant behaves under stress. (T. 1421).

Dr. Toomer found that when the Defendant was stopped by Officer Pena, his ensuing actions were consistent with his personality disorder. (T. 1424). The doctor concluded that at the time of the offense the Defendant was "operating under extreme mental and emotional disturbance and at the same time the capacity to appreciate the criminality of the act or conform his

behavior to the requirements of law were impaired". (T. 1407).

On cross examination, Dr. Toomer agreed that there was no evidence that the Defendant suffered from brain damage, a mental disorder, or hallucinations. (T. 1432).

The Defendant also presented a forensic psychologist, Dr. Harold Smith, who had also examined the Defendant and had administered several personality tests. (T. 1457, 1459, 1473-5). Dr. Smith found the Defendant to be a passive person who when frustrated has much less ability than a normal person to control his behavior. (T. 1478). Dr. Smith concluded that given the frustrating circumstances presented when the offense occurred the Defendant's ability to conform his behavior to the requirements of the law was impaired and that at that time the Defendant was under the influence of extreme mental distress. (T. 1460-1, 1483).

Other evidence showed that the Defendant was born in Cuba in 1951 and that he came to the United States with his family in 1961. (T. 1448-9). In Cuba, the Defendant's father had been a businessman and the family had been wealthy. (T. 1448, 1463). Once in the United States, however, the family had nothing and the Defendant's father had to work sixteen hours a day. (T. 1448-9). As a child the Defendant had to work to help support his family. (T. 1464).

Additional evidence showed that the Defendant is married and has a daughter. (T. 1466-7). The Defendant's wife testified that when the Defendant had been in prison before she had waited for his release and if possible, would do so again. (T. 1467-8).

Eurvie Wright then testified that he had known the Defendant when he had been incarcerated in the Dade County Stockade in 1975. (T. 1495). Wright, who had been the supervisor of the Stockade, and gave the opinion that the Defendant was "the model prisoner inmate" who had completed the work release program. (T. 1496-7).

The Defendant next called John Buckley, a professional corrections consultant, who teaches at both Harvard University and the University of Massachusetts. (T. 1505-7). The prosecutor objected to testimony by Mr. Buckley and a hearing was held outside the jury's presence. (T. 1506).

The Defendant proffered that Buckley is an expert on prisons and corrections, that he had examined the Defendant, and that in Buckley's opinion the Defendant would be a model prisoner. (T. 1506-7). Upon the court's inquiry the Defendant stated that there were other similar defense witnesses, including a corrections psychiatrist. (T. 1508-9). The Defendant argued the relevancy of these witnesses as follows:

> . . . . I have assumed Mr. Adorno is going to argue that this person deserves the electric chair. I think it is fair to say, and I think that the jury, in making that decision, should know what is going to happen if they choose the other alternative. I think they should know if they do, based upon the expert's testimony that they are going to hear and have presented, that they should see what the other alternative is, and it is a pretty thick bet that they will not have anything to worry about from this guy.

(T. 1509).

The court characterized this defense a "charade" and finding the testimony irrelevant, excluded it from the jury's

consideration. (T. 1507, 1508-9). The Defendant's immediate request for a formal evidentiary proffer with testimony was met with the court's ruling that such could be done but not in the court's presence. (T. 1510). The Defendant then rested. (T. 1511).

Prior to argument of counsel a hearing was held upon the Defendant's written requests to instruct the jury that:

> (1) the "State may not rely upon a single aspect of the offense to establish more than a single aggravating circumstance", (R. 1021), and
>
> (2) with regard to the aggravating circumstance that the offense was especially heinous, atrocious or cruel, "'heinous' means wicked or shockingly evil, . . . 'atrocious' means outrageously wicked and vile, and . . . 'cruel' means designed to inflict a high degree of pain; utter indifference to, or enjoyment of, the suffering of others; pitiless. . . . [T]his aggravating circumstance is limited to those offenses where the homicide was accompanied by such additional acts as to set the crime apart from the norm of capital felonies -- the conscienceless or pitiless crime which is unnecessarily tortuous to the victim, and . . . you must find the homicide in this case to have been accompanied by such additional acts to find this aggravating circumstance applicable. (R. 1006).

The court denied these requests. (T. 1484-5, 1491).

The prosecutor began his argument to the jury by declaring that the homicide was both committed to avoid lawful arrest and to disrupt or hinder the lawful exercise of a governmental function or the enforcement of laws. (T. 1516-7). He continued by arguing that the crime was especially wicked, evil, atrocious, and cruel because the victim died an "awful" death, described by

the prosecutor as follows:

> He felt that bullet enter his neck, he never saw what hit him, and imagine what feelings must have been in that man as he was trying to breathe air for his life and instead he was drowning in his own blood.

(T. 1519).

After describing the homicide as done in a cold and calculating manner and as being the "best example of cold-blooded" murder, the prosecutor declared that the Defendant had shown no remorse. (T. 1521).

Turning to the mitigating evidence, the prosecutor first stated that the Defendant had not acted under the influence of extreme mental or emotional disturbance and that his ability to conform his conduct to the requirements of law was not substantially impaired, (T. 1513-4), but then the prosecutor argued:

> Going back to 1968 up to April 2nd, 1978, he does not obey the law, he does not obey the law, he does not obey the law.
>
> Then we go to the model prisoner argument. The guy is a model prisoner look, he gets out, and look what he does. First of all, he steals a car. Second of all, he violates his probation, and third of all, he commits the ultimate crime, he executes a police officer and attempts to execute another one. (T. 1524-5).
>
> * * *
>
> Even now it is your duty to finish that. He acted as judge, jury, and executioner in those eight minutes, and now he is here and his lawyer is going to come up and say have mercy on him.
>
> I have a lot of trouble with that because that man never had any mercy on Lou Pena, and to this day, to this day you hear Detective Wolf say he never told Detective Wolf he was sorry for what he did.

> What he did was wrong and he ought to stand up to it, but yet he wants you to give him a break, to give him another chance. He has had breaks since 1968 and each time the crime has gotten worse.
>
> Now the crime is the ultimate one and there is no place to go. (T. 1527).

* * *

> It seems the argument is going to be that twenty-five years is a real long time. Think about it. If you multiply that by the hours, by the days, by twenty-five years, that he will be there, he won't be out until he is fifty-five.
>
> Well, think about that argument. At least he has hope, even at fifty-five, to get out. His wife, his child, they all have hope that some day they will see him again.
>
> Alana Pena will never see Lou Pena again, nor his parents, nor his children. They will never spend a fifty-fifth birthday with Lou Pena, and if [defense counsel] comes up and he begins to describe electrocution to you, I agree it is not very pleasant, but if he does, and you should consider that, which I believe you should not, and he describes that last meal and the last walk down the hallway to the room, think about it.
>
> This man has had a chance to prepare, to make his peace with his family and with God. Not on April 2nd, 1978, did Lou Pena ever get a chance to do this.
>
> When he left his home on that day, I am sure he did not think that that would be the last time he ever left, and I am sure when he kissed his wife and children good-bye, I am sure he did not think that would be the last one. (T. 1527-8).

After the prosecutor's argument, and before beginning his, the Defendant renewed his prior written objections. (T. 1529-30). The court simply stated, "Same rulings". (T. 1530).

During its charge to the jury, the court gave the following instructions:

> The aggravating circumstances that you may consider are limited to any of the following that are established by the

evidence. The crime for which the defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

The crime for which the defendant is to be sentenced was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

The crime for which the defendant is to be sentenced was especially wicked, evil, atrocious, or cruel.

The crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

(T. 1538).

Following deliberation the jury recommended that the Defendant be sentenced to death. (T. 1542-3). The court implemented the recommendation and imposed the death penalty upon the following findings:

AGGRAVATING CIRCUMSTANCES

(1) THE CAPITAL FELONY WAS COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST OR EFFECTING AN ESCAPE FROM CUSTODY. Fla. Stat. 921.141(5)(e) (R. 1045).

* * *

(2) THE CAPITAL FELONY WAS COMMITTED TO DISRUPT OR HINDER THE LAWFUL EXERCISE OF ANY GOVERNMENTAL FUNCTION OR THE ENFORCEMENT OF LAWS. Fla. Stat. 921.141(5)(g).

During jury instruction on August 1, 1981, the Court instructed the jury that one of the possible aggravating factors was whether the capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

The Court finds that this aggravating circumstance factually exists and has been

proved beyond a reasonable doubt, but that based on the facts presented to the jury, this Court will exercise its inherent discretion in a death penalty case and find that this aggravating circumstance merges with paragraph (1) above.

Therefore, this Court will not base its decision whether to impose the death penalty using paragraph (g) as a separate aggravating circumstance.

(3) THE CAPITAL FELONY WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL. Fla. Stat. 921.141(5)(h).

This Court is aware of and has reviewed State v. Dixon, 283 So.2d (1) [sic.] (Fla. 1973) and its progeny. This Court finds that the capital felony was especially heinous, atrocious and cruel for the following:

1. Dr. Ronald Wright, the former Chief Deputy Medical Examiner of Dade County testified as to the effect the gunshot had upon Officer Pena.

2. Dr. Wright testified that:

   (a) Officer Pena was shot in the throat at very close range;

   (b) That Officer Pena lived for approximately fifteen (15) minutes thereafter;

   (c) That Officer Pena drowned in his own blood; and

   (d) That during the fifteen minutes Officer Pena remained conscious, he suffered unimaginable excrutiating pain.

This Court has listened to the tape recording of Officer Pena's dying words and finds that reasonable minds can not differ in accessing the amount of pain and suffering Officer Pena experienced during those approximate fifteen minutes.

This Court has reviewed those cases where the Florida Supreme Court has overruled findings that this aggravating factor does

not exist when the victim was shot only once. In this case, the Court finds that the Defendant set in motion and was the proximate cause of the pain and suffering experienced by Officer Pena and that made his act especially wicked, evil, atrocious and cruel.

(4) THE CAPITAL FELONY WAS A HOMICIDE AND WAS COMMITTED IN A COLD CALCULATED, PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION. Fla. Stat. 921.141 (5)(i).

This Court finds that there is no doubt that this aggravating circumstance has been proved beyond a reasonable doubt but further finds that it may be duplicitous with paragraphs 1, 2, and 3 above and therefore under the facts of this case will not consider it in weighing the aggravating and mitigating factors. (R. 1046-8).

MITIGATING CIRCUMSTANCES

* * *

(1) . . . . [T]his Court is convinced that the Defendant was not under the influence of any extreme mental or emotional disturbance.

(2) . . . . [T]his Court is convinced that the Defendant was both able to appreciate the criminality of his conduct and to conform his conduct to the requirements of the law.

This Court has listened and carefully considered all testimony which could be considered non-statutory mitigating grounds under Lockett v. Ohio, 438 U.S. 586 (1978), and finds a total absence of any non-statutory mitigating circumstances. (R. 1048-9).

Following imposition of sentence a formal evidentiary proffer of the excluded mitigating testimony was taken outside the court's presence. (R. 1059-1112). James Buckley testified that he has previously been court qualified as a corrections expert, that he has evaluated the Defendant and through court

documents has become familiar with the facts of the case. (R. 1073, 1074). Mr. Buckley found that if incarcerated the Defendant would be a leader among other prison inmates who would help bring order to the institution. (R. 1074-5).

The Defendant further presented the testimony of Lloyd McClendon, assistant prison administrator for the State of Ohio and another previously court qualified corrections expert who had also evaluated the Defendant and familiarized himself with the case. (R. 1079-1083). Mr. McClendon believed that the Defendant was not a typical inmate, was not violent, that he would obey prison rules, stay out of trouble, and that he would try to educate himself. (R. 1084-5). Mr. McClendon concluded that the Defendant would be a model prisoner who would leave prison a model citizen. (R. 1087-8).

The Defendant's last proffered witness was Dr. Brad Fisher, an associate professor of psychology employed by the United States Government to write a book regarding inmate evaluation and classification. (R. 1089). He had testified as an expert forty to fifty times. (R. 1095). Dr. Fisher performed an eight to ten hour comprehensive evaluation of the Defendant and concluded that he suffered high levels of anxiety which are exacerbated by stress. (R. 1098-9). Dr. Fisher believed that the Defendant would be a non-violent prisoner who would be a constructive influcence upon other inmates. (R. 1106-8). Dr. Fisher further concluded that because of the substantial stress present during the offense the Defendant was then under the influence of extreme mental or emotional disturbance and that his ability to

appreciate and understand his behavior was significantly impaired. (R. 1101-3).

Subsequent to the evidentiary proffer the court reviewed the above testimony pursuant to the Defendant's written motion for a new sentencing hearing and ruled that it had previously been correct in excluding the witnesses. (R. 1113-1115A; T. 1569-70, 1572). These facts form the basis of this appeal.

POINTS ON APPEAL

I

WHETHER THE DEFENDANT WAS DENIED HIS CONSTITUTIONAL RIGHTS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS WHERE THE COURT FAILED TO SUPPRESS INCRIMINATING STATEMENTS OBTAINED BY INTERROGATING OFFICERS WHO REFUSED TO HONOR THE DEFENDANT'S INVOCATION OF HIS RIGHTS TO COUNSEL AND SILENCE.

II

WHETHER THE DEFENDANT WAS DENIED EQUAL PROTECTION AND DUE PROCESS OF LAW WHERE THE GRAND AND PETIT JURIES WERE SELECTED IN A MANNER WHICH GROSSLY UNDERREPRESENTED THE DEFENDANT'S MINORITY GROUP AND DID NOT REFLECT A FAIR CROSS-SECTION OF THE COMMUNITY.

III

WHETHER THE TRIAL COURT ERRED IN FAILING TO GRANT THE DEFENDANT'S MOTION FOR MISTRIAL WHEN THE STATE ELICITED TESTIMONY, OVER OBJECTION, THAT THE DEFENDANT REFUSED TO ANSWER A QUESTION PUT TO HIM DURING CUSTODIAL INTERROGATION.

IV

WHETHER THE APPLICATION OF SECTION 921.141, FLORIDA STATUTES, TO IMPOSE DEATH UPON THE DEFENDANT VIOLATES THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

A. The Improper Exclusion Of A Prospective Juror Who Merely Stated That She Would Have Difficulty Recommending A Sentence Of Death Requires That The Death Sentence Be Vacated.

B. Death May Not Be Imposed Where The Court Excluded Mitigating Character Evidence That The Statutory Alternative To Death Would Be Fulfilled By The Defendant's Incarceration As A Model Rehabilitated Prisoner.

C. Death May Not Be Imposed Where The Essential Safeguard Of A Valid Jury Recommendation Made In Conformity With Constitutional Law Was Nulified Because Erroneous Prejudicial Aggravating Evidence Was Admitted, Buttressed By Inflamatory Prosecutorial Argument, And Not Limited By Proper Instructions.

D. Death Is A Disproportionate Sentence In This Case.

ARGUMENT

I

THE DEFENDANT WAS DENIED HIS CONSTITUTIONAL RIGHTS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS WHERE THE COURT FAILED TO SUPPRESS INCRIMINATING STATEMENTS OBTAINED BY INTERROGATING OFFICERS WHO REFUSED TO HONOR THE DEFENDANT'S INVOCATION OF HIS RIGHTS TO COUNSEL AND SILENCE.

Prior to trial the Defendant moved to suppress highly incriminating oral and written statements obtained from him after he had been placed in police custody and after he had consulted with counsel. (R. 171-2; T. 187-269). Because the Defendant had individually and through his attorney invoked his rights to silence and to have counsel present during interrogation, the trial court erred in admitting the subsequently obtained confessions.[2]

In Miranda v. Arizona, 384 U.S. 436 (1966), the Supreme Court recognized that custodial interrogations were inherently compulsive and that, therefore, a person to be questioned "must first be informed in clear and unequivocal terms that he has the right to remain silent". 384 U.S. at 467-8. However, the Supreme Court also found that "the right to have counsel present at the interrogation is indispensable to the Fifth Amendment privilege", 384 U.S. at 469, and accordingly, the Court held that "an individual held for interrogation must be clearly informed

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[2] The Defendant renewed his objections to the admission of these confessions at the time they were offered into evidence. (T. 1095-6)

that he has the right to consult with a lawyer and to have the lawyer with him during interrogation". 384 U.S. at 471.

The burden is upon the prosecution to establish not only that these requisite warnings were provided, but that the corresponding Fifth Amendment protections were validly waived:

> If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel. This Court has always set high standards of proof for the waiver of constitutional rights, and we re-assert these standards as applied to in-custody interrogation. Since the State is responsible for establishing the isolated circumstances under which the interrogation takes place and has the only means of making available corroborated evidence of warnings given during incommunicado interrogation, the burden is rightly on its shoulders.

384 U.S. at 475 (citation omitted). Accord: Tague v. Louisiana, 444 U.S. 469, 470, (1980); State v. Craig, 237 So.2d 737, 740-41 (Fla. 1970); Cason v. State, 373 So.2d 372, 375 (Fla. 2d DCA 1979); Breedlove v. State, 364 So.2d 495, 497 (Fla. 4th DCA 1978); Singleton v. State, 344 So.2d 911, 912 (Fla. 3d DCA 1977); Tennell v. State, 348 So.2d 937, 938 (Fla. 2d DCA 1977); Rodriguez v. State, 287 So.2d 395, 396 (Fla. 3d DCA 1973); Woods v. State, 211 So.2d 248, 249 (Fla. 3d DCA 1968).

The question of waiver is not conclusively resolved by the existence of an express written waiver; "[t]he question is not one of form, but rather whether the defendant in fact knowingly and voluntarily waived the rights delineated in the Miranda case." North Carolina v. Butler, 441 U.S. 369, 373 (1979)

(emphasis supplied). See also Hogan v. State, 330 So.2d 557, 559 (Fla. 2d DCA 1976); Grimsley v. State, 251 So.2d 671, 672 (Fla. 2d DCA 1971).

The circumstances surrounding the interrogation in this case cannot support any finding that the Defendant knowingly and intelligently waived his rights to counsel and silence. Prior to the interrogation the Defendant consulted an attorney and told her that he would remain silent and call her prior to any questioning. (T. 234, 245, 250-1). This was undisputed. The attorney told the lieutenant police officer having custody of the Defendant that the Defendant had invoked his rights to counsel and silence. (T. 234, 246). This was undisputed. The Dade County officers who went to Deerfield Beach did so for the express purpose of interrogating the Defendant and were told by the lieutenant that the Defendant had already consulted an attorney. (T. 212, 213, 236). This was undisputed. When the interrogating officer told the Defendant he was there to "conduct an interview" the Defendant declared that he had spoken to a lawyer and that "she had advised him not to speak to anybody or to sign anything." (T. 189-90). This too was undisputed.

A. The Defendant's Invocation Of His Right To Silence Was Not Honored.

Before analyzing this case further it is essential to first consider that the Constitution requires police officers to "scrupulously honor" an accused's desire to cut off custodial interrogation. Michigan v. Mosley, 423 U.S. 96, 104 (1975); Witt v. State, 342 So.2d 497, 500 (Fla. 1977). Indeed, in Miranda,

the Supreme Court held:

> If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statements taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise.

384 U.S. at 473-74 (emphasis added, footnote omitted). Accord: Arnold v. State, 265 So.2d 64, 66 (Fla. 3d DCA 1972); State v. Prosser, 235 So.2d 740, 742 (Fla. 1st DCA 1970).

Clearly, "what the Court sought to interdict in Miranda were those situations in which a person has indicated his desire to exercise his constitutional right of silence but the police refuse to take 'no' for an answer." Jennings v. United States, 391 F.2d 512, 515 (5th Cir. 1968), cert. denied, 393 U.S. 868 (1968). This is not to say, however, that interrogation is forever barred if the right to remain silent is invoked. The Mosley decision establishes the parameters of permissible subsequent interrogation once the right is invoked.

In Mosley, the accused was arrested on two robbery charges. After the commencement of custodial interrogation the accused "said that he did not want to answer questions about the robberies" and the interrogation ceased. 423 U.S. at 97. Several hours later another officer sought to interrogate the accused concerning a murder and after waiving his Fifth Amendment privilege, the accused confessed to the murder.

The Supreme Court held that the determinative factor was whether the "right to cut off questioning was 'scrupulously

honored'". 423 U.S. at 104 (footnote omitted). In resolving the case, the Court held that since the "police here immediately ceased the interrogation, resumed questioning only after the passage of a significant period of time and the provision of a fresh set of warnings, and restricted the second interrogation to a crime that had not been the subject of the earlier interrogation", the right of the accused "to cut off questioning was fully respected in this case". 423 U.S. at 105-6.

But the Mosley Court was careful to point out that its decision did not grant police officers carte blanche to ignore an assertion of Fifth Amendment rights:

> To permit the continuation of custodial interrogation after a momentary cessation would clearly frustrate the purposes of Miranda by allowing repeated rounds of questioning to undermine the will of the person being questioned.

423 U.S. at 103.

If an accused after having invoked the Fifth Amendment privilege subsequently comes forward and indicates a desire to confess, questioning may properly resume. Witt v. State, 342 So. 2d 497, 499-500 (Fla. 1977). On the other hand, if questioning is resumed "after only a momentary respite", and the interrogating officer seeks to persuade the individual to "reconsider his position" and make a statement, any purported "waiver" of Fifth Amendment rights which follows is involuntary and invalid. Cribbs v. State, 378 So.2d 316, 319 (Fla. 1st DCA 1980. Accord: Jones v. State, 346 So.2d 639 (Fla. 2d DCA 1977).

Returning to this case, it is against these legal principles that the interrogator's response to the Defendant's statement

that he had consulted a lawyer and that "she had advised him not so speak to anybody or sign anything" must be judged. (T. 189-90).

Detective Wolf, the interrogator, told the Defendant that "that was his constitutional right", (T. 190), but that he was there "hopefully to speak with him". (T. 223).

Wolf's response is significant in two respects. First it clearly and unequivocally demonstrates that the Defendant had invoked, at the very least by Wolf's account, his right to remain silent.[3] Second, it affirmatively proves Wolf's intent to continue with his purpose, now twice expressed to the Defendant, to "conduct an interview". (T. 189).

In Rhode Island v. Innis, 441 U.S. 291, 300 (1980), the Supreme Court held that "any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect", constitute interogation under Miranda. Accord: Lornitis v. State, 394 So.2d 455, 458 (Fla. 1981). In this regard, the interrogator's actual intent may be considered in determining the effect his conduct is expected to have upon the suspect. 441 U.S. at 307, n.7.

It is undisputed that Wolf went to Deerfield Beach to interrogate the Defendant. (T. 212-3). In fact, Wolf twice told

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[3]/ See Maglio v. Jago, 580 F.2d 202, 205 (6th Cir. 1978), where the court looked to the interrogator's response and upon that basis concluded that the accused's statement was a request for counsel. Here, Wolf's response was an express acknowledgement of the Defendant's invocation of his right to silence.

the Defendant that he intended to "interview" him. (T. 189, 223). The inescapable conclusion is that Wolf hoped that his response would facilitate the "interview."

But the most accurate test of Wolf's response is to examine the conversation which followed. The Defendant stated that he had cooperated with police in the past and wished to do so now. (T. 190). Wolf then told the Defendant that no deals could be made but that "if he wanted to talk to me he first had to execute a constitutional rights warning form". (T. 190).

Once again, Wolf's reply lends considerable significance to the meaning of the Defendant's statements. Wolf obviously interpreted the Defendant's reply to be an offer to make a deal in return for cooperation in giving a statement. Significantly, Wolf did not tell the Defendant that his offered cooperation was unwanted, only that he would have to sign a rights warning form for the desired interview to continue.

It is thus quite apparent that Wolf did absolutely nothing to "scrupulously honor" the Defendant's invocation of his right to remain silent. In fact, since Wolf's statements were calculated to facilitate his "interview" of the Defendant, there is no doubt that under Innis the interrogation continued after the Defendant's invocation of his right to silence. The record fully supports this conclusion, reflecting that the Defendant immediately "waived" his rights and began to respond to interrogation. (T. 191-5). Accordingly, the incriminating statements, both oral and written, should have been suppressed.

B. The Defendant's Invocation Of His Right To Have Counsel Present Was Not Honored.

As with invocation of an accused's right to silence, the constitution requires that interrogation must cease upon the accused's invocation of his right to counsel. Edwards v. Arizona, 451 U.S. 477, 484-5, (1981); Colquitt v. State, 396 So.2d 1170, 1171 (Fla. 3d DCA 1981); Buehler v. State, 381 So. 2d 746, 748 (Fla. 4th DCA 1980); Jones v. State, 346 So.2d 639, 640 (Fla. 2d DCA 1977). In Miranda, the Supreme Court held:

> If, however, [the accused] indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning.
>
> * * *
>
> If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning.

384 U.S. at 444-45, 474 (emphasis added).

Miranda thus gives police officers only two possible choices once an accused invokes the right to counsel: (1) the accused may be given an opportunity "to confer with the attorney and to have him present during any subsequent questioning", or (2) if counsel is not provided, the police "may refrain from doing so without violating the person's Fifth Amendment privilege so long as they do not question him". Miranda v. Arizona, 384 U.S. at 474; see also United States v. Massey, 550 F.2d 300, 307-08 (5th Cir. 1977); Biddy v. Diamond, 516 F.2d 118, 122-13 (5th Cir. 1975), cert. denied 475 U.S. 950 (1976); United States v. Priest, 409 F.2d 491, 493 (5th Cir. 1969). Thus, the somewhat

fluid standard of Mosley, applicable when an individual invokes the right to silence, is inapplicable when the right to counsel is invoked. This distinction, and the impermeable nature of the bar to questioning when the latter right is invoked, was very recently re-affirmed by the Supreme Court in Edwards v. Arizona, 451 U.S. at 484-5.

In Edwards, the Defendant initially agreed to be questioned and gave an exculpatory statement. He thereafter "sought to 'make a deal'" with the interrogating officer, who told him he could not do so. The Defendant then stated, "'I want an attorney before making a deal'", and the interrogation was terminated. 451 U.S. at 479. However, the Defendant was interrogated by two other officers on the following day, and after stating his willingness to speak with them, gave an inculpatory statement.

The Supreme Court held that the interrogation on the second day was impermissible, and re-emphasized that Miranda creates a total bar to further police-initiated questioning once the right to counsel is invoked:

> . . . [A]lthough we have held that after initially being advised of his Miranda rights, the accused may himself validly waive his rights and respond to interrogation, the Court has strongly indicated that additional safeguards are necessary when the accused asks for counsel; and we now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until

> counsel had been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.

451 U.S. at 484-5 (citation and footnotes omitted, emphasis added). Accord: Harris v. State, 396 So.2d 1180, 1181 (Fla. 4th DCA 1981).

Thus, unlike the question of the Defendant's invocation of his right to silence, if the Defendant invoked his right to counsel all subsequent statements not initiated by the Defendant should have been suppressed.

To invoke the right to counsel, an individual in custody need not say "I want a lawyer"; Miranda makes it clear that interrogation must cease if the person "indicates in any manner . . . that he wishes to consult with an attorney". 384 U.S. 444-5. See also Singleton v. State, 344 So.2d 911, 912 (Fla. 3d DCA 1977) (accused who was "asked if she wanted an attorney present during the questioning [and] replied, 'Maybe I had better ask my mother if I should get one'" held to have invoked right to counsel). As the Fourth District Court of Appeal recently stated:

> . . . [Q]uestioning cannot continue after assertion by an accused of his or her right to counsel. The prohibition applies where the assertion is made by indirection or suggestion, as well as in the case of direct, positive assertion.

Harris v. State, 396 So.2d at 1181 (citations ommitted). See also United States v. Nick, 604 F.2d 1199, 1201 (9th Cir. 1979) (accused's request to arresting officer to get paper with lawyer's name on it held to be request for counsel).

It has already been shown that the Defendant invoked his right to silence when he told Wolf that he had consulted an attorney and that "she had advised him not to speak to anybody or to sign anything." (T. 189-90). The record relects that upon hearing this, Wolf chose not to contact the attorney but instead informed the Defendant that "that was his constitutional right." (T. 190). However, the focus under Edwards is not whether Wolf understood the Defendant's statement to be a request for counsel, but whether the Defendant "[had] invoked his right to have counsel present during custodial interrogation". 451 U.S. at 484. Accord: White v. Finkbeiner, 611 F.2d 186, 189 (7th Cir. 1979) (rejecting officer's subjective interpretation of ambiguity in accused's request for counsel).

To determine whether an accused has made a request for counsel, courts must look to the "totality of the circumstances surrounding the interrogation." Fare v. Michael C., 442 U.S. 707, 725 (1979). The circumstances to be considered include the accused's statements regarding his desire for counsel made at times other than when the waiver purportedly occurs. Jurek v. Estelle, 623 F.2d 929, 939 (5th Cir. 1980).

In Jurek, the accused appeared before a magistrate and stated under questioning that he could not afford an attorney, that one should be appointed for him, but that he did not then desire the attorney's presence. The accused was subsequently questioned by police and said before confessing that he did not wish to have an attorney present. In determining whether the colloquy with the magistrate was a request for counsel's presence

which would preclude latter interrogation, the Fifth Circuit concluded that it must consider the accused's subsequent waiver of counsel made to police to resolve the colloquy's ambiguity. 623 F.2d 939.

Here the record demonstrates that prior to interrogation the Defendant spoke with his attorney, Lisa Kahn, and told her that he would remain silent and would call her prior to any questioning. (T. 234, 245, 250-1). By making this agreement, the Defendant obviously invoked his right to counsel and clearly manifested his intent to continue to invoke this right in the future.[4] This case is then dramatically different than Edwards, Singleton, Harris, and Nick, where the accuseds had not consulted counsel prior to interrogation. The importance of this distinction is that the Defendant's statement to Wolf, as was done in Jurek, should be placed in the context of his previous declaration to his lawyer that he would call her if questioned. Thus, the Defendant was not required to repeat the obvious to Wolf: that he did not intend to speak to Wolf without having his attorney present.[5]

4/ Testimony that the Defendant told his attorney that he would remain silent and call her prior to questioning came from the Defendant and from the attorney. While it might be argued that the Defendant's testimony is self-serving, that of his attorney is presumed to be truthful. See Russ v. State, 95 So.2d 594, 599 (Fla. 1957). Thus, there is no reason to doubt that the Defendant invoked his rights to have counsel present and to silence when he conversed with his attorney.

5/ Even the prosecutor recognized the obvious when he recited the facts to the court at the hearing on the motion to suppress: "They went up there, went into the room, told them [sic] he was under arrest, and the statement that he had spoken (Cont.)

Moreover, there is additional independent evidence in the record that the Defendant invoked his right to have counsel present for questioning. It is undisputed that prior to interrogation the lieutenant having custody of the Defendant was instructed through counsel, and he subsequently agreed, not to permit police officers to question the Defendant. (T. 235). Under Santobello v. New York, 404 U.S. 257 (1972), this was sufficient to invoke the rule in Edwards forbidding further questioning.

In United States v. Wedra, 343 Supp. 1183, 1184 (S.D.N.Y. 1972), the accused's attorney told police officers at the time of arrest that the Defendant was not to be questioned without counsel being notified; the accused was then taken into custody and interrogated by other officers who had not been advised by the attorney. The court held that under Santobello the facts known to the arresting officers would be imputed to the interrogating officers. 343 F.Supp. at 1184, n.3. The Court further stated that the instructions of the attorney to the officers had the legal effect of invoking the right to counsel as guaranteed in Miranda:

> Just as the right to counsel does not depend on a request, so, too, once counsel has been retained and he is known to the interrogators the right to have him present does not depend upon the accused asserting a formal demand for his presence, at least where, as here, the interrogators have already been advised that the client is not to be questioned in the absence of counsel and they have given assurance to that effect. Mere silence of an accused does not suffice to constitute a

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to Lisa Kahn and he wanted an attorney was then made". (T. 250).

> waiver of constitutional rights. In end result, the action of the officers effectively prevented the attorney from advising his client, thereby violating his right to the assistance of counsel under the Sixth Amendment -- assistance which indeed was required if the defendant was intelligently and knowingly to surrender his Fifth Amendment privilege to remain silent. The failure of the authorities to call defendant's attorney was tantamount to a denial of a request by defendant for his attorney as articulated by the attorney.

343 F. Supp. at 1186-7 (footnotes omitted, emphasis added). See also Shaffer v. Clusen, 518 F. Supp. 963, 965 (E.D. Wis. 1981) (knowledge of accused's invocation of his right to silence is imputed to second interrogating officer).[6]

As in Wedra, the Defendant successfully and completely invoked his right to have counsel present during interrogation when his attorney notified the lieutenant of the Defendant's desire. Accordingly, Edwards requrires that all subsequently obtained statements be suppressed.

The record in this case presents compelling evidence that highly incriminating oral and written statements were admitted into evidence despite the Defendant's invocation of his rights to counsel and silence. Irrefutably demonstrated is the interrogating officer's persistence in obtaining a confession

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[6]/ Wedra rests on the sound principle that to invoke the constitutional right to have counsel present an accused need not repeat his previously expressed desire to an interrogator. This principle was recently relied upon by the First District in Silling v. State, ____ So.2d ____ (1st DCA 1982) (opinion filed June 11, 1982, Case No. AD 255), where the accused's request for counsel, made to her first interrogator, barred the fruits of subsequent questioning by a second interrogator although no such request was then made. Similarly in this case the Defendant was not required to have repeated his desire for counsel to Wolf.

despite having been specifically told by the Defendant of his desire to remain silent upon his attorney's advice. Simply stated, the interrogator's response to the Defendant that "that was his constitutional right" but that he was there "hopefully to speak with him" was nothing less than an attempt to dissuade the Defendant from his position by initiating further discussion on the propriety of his decision. The record cannot support any finding that the interrogator "scrupulously honored" the Defendant's right to cut off questioning or that the Defendant knowingly and intelligently waived his right to have counsel present. It was thus error for the trial court to have admitted the Defendant's confessions.

II

THE DEFENDANT WAS DENIED EQUAL PROTECTION AND DUE PROCESS OF LAW WHERE THE GRAND AND PETIT JURIES WERE SELECTED IN A MANNER WHICH GROSSLY UNDERREPRESENTED THE DEFENDANT'S MINORITY GROUP AND DID NOT REFLECT A FAIR CROSS-SECTION OF THE COMMUNITY.

In two pre-trial motions the Defendant raised equal protection and due process claims attacking underrepresentation of his minority group on both grand and petit jury venires. (R. 426-8, 445-6). Both motions were accompanied by extensive and detailed exhibits consisting of sworn testimony or affidavits. (R. 429-442, 446-884). Both were denied by the court despite the State's refusal to offer rebuttal evidence. (R. 1196, 1210, 1210-1). Both rulings were error of constitutional magnitutude.

A. The Grand Jury Challenge

The Defendant, a latin male, established that the grand jury which indicted him, as well as all other grand juries dating back from 1971, had been selected from venires which were chosen in a manner that produced gross underrepresentation of latins and that it was impossible to conclude that this underrepresentation was due to random causes. (R. 14-24A, 530-2, 561-5, 876, 878). Further, the procedure used to select these venires was totally subjective and capable of abuse. (R. 864-9).

The Defendant's grand jury and the grand juries previous to his were selected from venires personally chosen by the circuit judges of the Eleventh Judicial Circuit of Florida, in and for Dade County, pursuant to Chapters 70-1000, 57-500, and 57-551,

Laws of Florida. (R. 864-9). Pursuant to these laws the circuit judges submitted names of approximately five hundred individuals believed to be "morally fit" for grand jury service; a venire of ninety was then formed from this limited source by random selection. (R. 453-5, 864, 872). This procedure placed only four latins on the Defendant's grand jury venire. (R. 872).[7]

This procedure did not require the circuit judges to make certain that minority groups were adequately represented or that the venire's composition reflected a fair cross-section of the community. Chs. 57-550 and 70-1000, Laws of Florida. This same procedure had been used in Dade County since 1971; prior to 1971 a grand jury commission chose the individuals submitted for the selection process. (R. 457-458). The procedure was abandoned in May, 1978, when a computer random selection method was substituted. (R. 458).

Further sworn evidence submitted by the Defendant showed the national origin of individuals on all grand jury venires since 1971. (R. 465, 870-2).[8] Corresponding national origin data was

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[7] To determine latin origin on the venires, Dade County Elections Department records were used to establish each individual's national origin. (R. 461, 463, 467). Voter records could not identify some names on the venires, but expert testimony showed that statistical computations accounted for this problem. (R. 463-4, 544-6, 872). Of the ninety individuals on the Defendant's venire, national origin was determined for seventy-six persons. (R. 872).

[8] Of the fifteen venires since 1971, ten had either one or no latins among its members. (R. 870-2). Of the remaining five venires, four had two latins and one had four latins. (R. 870-2).

also submitted reflecting the composition of both Dade County's population and voter registration lists for the periods of time during which the venires were selected. (R. 873, 883-884).[9] The venires, population, and voter registration lists were then compared for randomness by a statistical expert who applied the method of analysis described by the Supreme Court of the United States in Castaneda v. Partida, 430 U.S. 482 (1977). (R. 554-6, 585).[10]

The expert, who is a mathematics professor with numerous academic credentials, found that the grand jury venires had not been randomly selected with regard to latins from either Dade County's population or its voter registration list. (R. 530-2, 561-5, 878). The professor concluded that the probabilities

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9/ This national origin data was summarized by an expert statistician as follows:

percent of Dade County's population that is latin:

1971-1977:	13.37%
1974-1977:	15.01%

percent of Dade County's registered voters that is latin:

1971-1977:	unavailable (R. 468)
1974-1977:	10.73%

(R. 533-7, 876).

10/ The expert statistician determined the percent of latin grand jury veniremen as follows:

1971-1977:	1.41%
1974-1977:	1.49%

(R. 533-7, 876). However, the expert noted that percent comparisons could not validly determine randomness but that statistical analysis could do so. (R. 537-539). Accordingly, the expert employed the Castanada method of analysis. (R. 585).

involved in randomly obtaining from the voter list the number of latins that were actually found on the venires would be statistically equivalent to rolling a pair of dice eight consecutive times with each roll producing "snake eyes". (R. 562, 876). The probability involved from the population to the venire was equivalent to increasing the consecutive number of "snake eye" rolls to eighteen. (R. 562, 876). Thus, the professor concluded that the venire selection process was not random with regard to latins. (R. 530-2, 561-5, 878).

Other evidence submitted showed that the foreperson on the grand jury indicting the Defendant was a white non-latin male. (R. 24, 469-70, 875). He was selected by a judge to preside over grand jury proceedings. (R. 516-7, 521, 529). During deliberation, it was the foreperson's responsibility to limit discussions and decide who could speak. (R. 522). Further evidence revealed that of the twenty past forepersons chosen by judges to preside over grand juries from 1967 to 1977, none had been latin. (R. 469-70, 874-5).

Since 1880, the Equal Protection Clause of the Fourteenth Amendment has precluded conviction of an accused upon an indictment which was returned by a grand jury from which members of the accused's race were excluded solely because of their race. Strauder v. West Virginia, 100 U.S. 303, 310 (1880). Subsequent decisions of the Supreme Court of the United States have held that substantial underrepresentation of any cognizable class violates equal protection where there has been an intent to discriminate. Castaneda v. Partida, 430 U.S. 482, 493 (1977);

Swain v. Alabama, 380 U.S. 202 (1965). Intent to discriminate is presumptively proved by statistical evidence which demonstrates that over a significant period of time the degree of underrepresentation has been substantial. Castaneda v. Partida, 430 U.S. at 494; Washington v. Davis, 426 U.S. 229, 241 (1976). Alexander v. Louisiana, 405 U.S. 625, 630-1 (1972). Furthermore, proof that the procedure which selected the grand jurors is "susceptible of abuse or is not racially neutral supports the presumption of [intentional] discrimination raised by the statistical showing". Castaneda v. Partida, 430 U.S. at 494. (citations omitted.)

Standing to assert an equal protection claim of underrepresentation is achieved when the accused demonstrates that he is a member of a "recognizable, distinct class, singled out for different treatment under laws, as written or applied". Castaneda v. Partida, 430 U.S. at 494. Blacks, latins, and women have been judicially recognized as distinct classes to which relief may be granted. Strauder v. West Virginia, 100 U.S. at 309 (blacks); Hernandez v. Texas, 347 U.S. 475, 480 (1954) (latins); Taylor v. Louisiana, 419 U.S. 522, 537 (1975) (women).

The burden of proving substantial underrepresentation rests with the accused. Castaneda v. Partida, 430 U.S. at 494; Bryant v. State, 386 So.2d 237,238 (Fla. 1980). However,

> . . . [o]nce the Defendant has shown substantial underrepresentation of his group, he has made out a prima facie case of discriminatory purpose, and the burden then shifts to the State to rebut that case.

Castaneda v. Partida, 430 U.S. at 495. Accord: Bryant v.

State, 386 So.2d at 238.

Applying these principles to this case, the record demonstrates that the indictment should have been dismissed because of substantial latin underrepresentation on the Defendant's grand jury venire[11] and because the system which produced this result had repeated this pattern of underrepresentation over a significant period of time.

The Defendant, a latin male, clearly has standing to challenge latin underrepresentation. Castaneda v. Partida, 430 U.S. 495; Barnason v. State, 371 So.2d 680, 681 (Fla. 3d DCA 1979). The Defendant established that latins were grossly underrepresented and that such was not due to random causes -- under Castaneda, as will be demonstrated, this constitutes substantial underrepresentation.

In Castaneda the Supreme Court of the United States exhaustively analyzed the equal protection problems arising from state laws which direct officials to personally, rather than randomly, select individuals for grand jury service. The evidence in Castaneda showed that in a county which was 79.1% Mexican-American, only 39% of the individuals summoned for grand jury service were of such descent. Applying statistical analysis, the Court found that this result could not have been

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11/ Analysis of jury selection procedures requires examination of venires rather than juries themselves. Alexander v. Louisiana, 405 U.S. at 628; Rojas v. State, 288 So.2d 236 (Fla. 1974).

achieved through random causes.[12] The Court then refused to find that the underrepresentation had been non-discrimatory upon the asserted assumption that since Mexican-Americans were the "governing majority" they would not discriminate against their own. 430 U.S. at 499-501. Thus, the Supreme Court held that where a selection process results in underrepresentation which cannot be explained by random causes there is prime facie proof of substantial underrepresentation and a discriminatory purpose. 430 U.S. at 495-6.[13]

12/ The Court relied upon the "rule of exclusion" to determine the degree of underrepresentation. 430 U.S. at 494. The Court described the rule's logic as follows:

> The idea behind the rule of exclusion is not at all complex. If a disparity is sufficiently large, then it is unlikely that it is due solely to chance or accident, and, in the absence of evidence to the contrary, one must conclude that racial or other class-related factors entered into the selection process.

430 U.S. at n.13 (citations ommitted).

13/ This holding was underscored by Justice Powell, who declared in dissent:

> The Court today considers it dispositive that the lack of proportional representation of Mexican-Americans on the grand jury lists in this county would not have occurred if jurors were selected from the population wholly at random. But one may agree that the disproportion did not occur by chance without agreeing that it resulted from purposeful invidious discrimination. In my view, the circumstances of this unique case fully support the District Court's finding that the statistical disparity--the basis of today's decision--is more likely to have stemmed from neutral causes than from any intent to discriminate against Mexican-Americans. (Cont.)

The grand jury which indicted the Defendant was randomly selected from a pool of five hundred individuals personally chosen by circuit judges. (R. 453-455). However, as established by the professor's analysis, this "random" selection process fails to afford random selection from the population or voter registration lists. (R. 530-2, 561-5, 878). Moreover, since the process requires circuit judges to make personal and highly subjective decisions as to their selections the procedure is susceptible to abuse. (R. 452-5). This is additional support for the statistical showing of discrimination. See Castaneda v. Partida, 430 U.S. at 494. The obvious explanation, and indeed the only explanation, is that the judges failed to chose sufficient numbers of latins for the pool of potential grand jurors. Thus the selection process was presumptively discriminatory, constitutionally deficient, and because there was no rebuttal evidence, the indictment should have been dismissed.[14]

Additionally, the evidence submitted by the Defendant demonstrates that the foreperson of the grand jury was not latin, that like twenty previous forepersons he had been selected by a

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430 U.S. at 508. (footnote ommitted.) Of course, the Supreme Court rejected this view and held that the state bears the burden of proving that the "statistical disparity" arises from neutral causes. 430 U.S. at 498-9.

14/ The Defendant asserted in the court below (R. 445, 879-82), and does so again in this Court, that substantial underrepresentation of blacks and women on his grand jury, similarly shown on past grand juries, denied him due process of law. Cf. Carter v. Jury Commission of Green County, 396 U.S. 320, 330 (1970); Peters v. Kiff, 407 U.S. 493, 502 (1972).

judge, and that no latin had been selected foreperson since at least 1967. (R. 24, 469-70, 516-7, 874-5). The record further reflects that the foreperson's role in returning the indictment against the Defendant was substantial -- it was his responsibility to limit the grand jury's deliberations and decide who could speak before a vote was taken. (R. 522).

In Rose v. Mitchell, 443 U.S. 545, 565 (1979) the Supreme Court of the United States upheld the principle that an equal protection violation is shown when substantial minority underrepresentation over a significant period of time occurs in the selection of grand jury forepersons. However, the evidence offered by Mitchell, a black, was found lacking as it only showed that two past forepersons and a present foreperson were white and that they merely had "no knowledge" of a black having ever served.

In Guice v. Fortenberry, 633 F.2d 699 (5th Cir. 1980), black accuseds challenged a grand jury foreperson selection procedure on the basis of black exclusion. Evidence showed that no black had been selected foreperson in seventeen years but there was no evidence revealing the number of forepersons actually selected during that period. The court held that absent proof of the number of forepersons selected there was insufficient evidence to show that the exclusion of blacks was statistically significant under Castaneda's rule of exclusion.[15] 633 F.2d at 705.

15/ In Guice the accuseds postulated that thirty-one white forepersons had been selected during the seventeen year period. The court declared that had this been proved "we would certainly agree . . . that 'the rule of exclusion' had been satisfied". (Cont.)

The evidence introduced by the Defendant stands in astonishing contrast with that presented in Rose and Guice. Here there is conclusive proof that for ten years twenty-one forepersons were chosen, yet no judge selected a single latin. (R. 469-70, 874-5). The Defendant has thus proved prima facie an equal protection violation by showing that the failure of the judge to select a latin foreperson on his grand jury was statistically significant and hence discriminatory. Accordingly, the indictment should have been dismissed.[16]

B. The Petit Jury Challenge

In Bryant v. State, 386 So.2d 237 (Fla. 1980), this Court upheld a petit jury random selection process for Palm Beach County where a voter registration list was the sole source of prospective jurors. In this case, because of the unique demographic characteristics of Dade County, the same selection process is unconstitutional because exclusive use of voter lists results in gross underrepresentation of latins on petit jury venires. This underrepresentation violated the Defendant's right

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633 F.2d at 705. In this case, the Defendant's unequivical specific proof of twenty-one consecutive foreperson selections without a latin is legally indistinguishable from thirty-one such selections.

16/ Additionally, the Defendant contends, and the record reflects, that he was denied equal protection of law when neither a black nor woman was selected forepoerson on his grand jury. (R. 874-5). See United States v. Perez-Hernandez, 672 F.2d 1380, 1386 (11th Cir. 1982) (White male has standing to challenge discrimination of black and women in grand jury foreperson selection).

to due process and equal protection of law.

1. Selection of the petit jury venire

The sworn affidavits submitted with the Defendant's challenge to the petit jury venire show that during the three year period prior to the Defendant's trial the population of Dade County changed from 34.94% latin to 39.03% latin. (R. 437, 438). However, during the same period the growth of latins among registered voters was only from 13.19% to 17.78%. (R. 436, 438). Thus, while it is obvious that Dade County is becoming more latin, it is more important to consider that enormous numbers of latins have not, and are not, registering to vote. In fact, the Defendant's expert statistician concluded, using the method of analysis described in Castaneda v. Partida, 430 U.S. 482 (1977), that "the probability that the registered voters randomly reflect the population of Dade County, with respect to latins, is far less than one in one trillion (1,000,000,000,000) for [the three year period]". (R. 439).

In addition to statistical evidence the Defendant submitted the sworn affidavit of an expert sociologist who has a subspecialty in the study of minority groups. (R. 440-2). Using the statistical evidence, the sociologist compared interaction among twelve members of a group composed of five latins (proportionally equivalent to random selection from Dade County's population) with another twelve member group containing only two latins (proportionally equivalent to random selection from Dade County's registered voters). (R. 442). The expert's conclusions

were:

1. A certain viewpoint that might be asserted by five latins is less likely to be "advocated with the same degree of vigor if the latins are reduced to two (2) and three (3) non-latins are added". (R. 441).

2. ". . . [I]t is less likely that ten (10) non-latins will consider the viewpoint represented by two (2) latins to the same degree as would seven (7) non-latins who are confronted by five (5) latins." (R. 441).

3. ". . . [I]t is less likely that a random selection of two (2) latins from the community will fairly represent the latin community viewpoint than would a random selection of five (5) latins." (R. 441).

2. Petit jury venire selection violates equal protection

As previously discussed, a prima facie equal protection violation is shown by proof of substantial underrepresentation on jury venires of a cognizable group over a significant period of time. Castaneda v. Partida, 430 U.S. at 494; Washington v. Davis, 426 U.S. at 241; Alexander v. Louisiana, 405 U.S. at 630-1; Bryant v. State, 386 So.2d at 239.

In this case, the petit jury venire was randomly selected by computer from Dade Count's voter registration list pursuant to local rule of the Eleventh Judicial Circuit approved by this Court on December 10, 1978. (S.R. 1-7). There is no provision in the local rule for any additional source to supplement the voter list. (S.R. 1-7).

The Defendant's sworn exhibits prove that the underrepresentation of latins on voter lists in Dade County have a

probability of occurrence of "far less than one in one trillion (1,000,000,000,000)". (R. 439). Put another way, Dade County voter lists do not present a random representation of latins selected from the population. Since state officials exclusively rely upon voter lists to select Dade County's petit jury venires, latin underrepresentation is transmitted to the venires. (R. 439). This is because the selection process is random. ". . . [I]f it is assumed that the jury venires are randomly selected from Dade County's registered voters, then statistical principles dictate that the average composition of jury venires will not randomly represent the population of Dade County with respect to Latins." (R. 439).[17]

It is thus evident that under Castaneda substantial latin underrepresentation has been prima facie shown. The remaining question is whether the underrepresentation has occurred "over a significant period of time". 430 U.S. at 494.

17/ Equal protection requires analysis of venires, rather than petit or grand juries. See n.11, supra. In the absence of a hearing the defendant was only able to submit data of latin representation among registered voters. (R. 436, 438). However, expert testimony showed that since venires were randomly selected from registered voters, the average latin venire representation would be the same as that on the voter registration list. (R. 439). This conclusion is obviously premised upon the assumption that unless latin voters utilize statutory exemptions differently than non-latins, venire lists will reflect the same representation as voter lists. Section 40.13, Florida Statutes, supports this assumption by providing that exemptions from jury service are equally applicable to latins and non-latins. In fact, the Supreme Court of the United States employed this same logic by concluding that the state bears the burden of proving that statutory jury exemptions are utilized by minorities differently than non-minorities. Duren v. Missouri, 439 U.S. 357, 368-9 (1979). Thus, in this case voter lists can be used to statistically analyze petit jury venires.

Since December 31, 1978, petit jury venires in Dade County have been selected by the random computer method with exclusive reliance upon voter lists for the source of veniremen. (S.R. 1-7). New venires were formed weekly. See Section 40.41, Fla. Stat. Thus the Defendant has presented statistical evidence which shows that scores of petit jury venires were selected in the same manner as his and that for each venire there had been substantial latin underrepresentation. The record reflects no suggestion that this three year period is statistically unreliable, and hence a significant period of time has been shown.[18]

The challenge to the petit jury in this case is different than that previously made to the grand jury because the source list for the petit jury -- registered voters -- may be considered presumptively fair. See Bryant v. State, 386 So.2d, at 240; Thompson v. Sheppard, 490 F.2d 830, 833 (5th Cir 1974). However, this presumption is rebuttable. Berry v. Cooper, 577 F.2d 322, 327 (5th Cir. 1978); United States v. Goff, 509 F.2d 825, 827 (5th Cir. 1975). In fact, the United States Court of Appeals, Fifth Circuit, has held:

> The use of [a] voter list is not the end sought. Rather it is the principal source. If the source is deficient or infected its

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18/ In Castaneda, the Supreme Court found that in the absence of contrary evidence presented by the state the period of time suggested by the accused was reliable and appropriate. 430 U.S. at 495-6. Likewise, the three year period in this case, which commences with the beginning of the selection procedure under consideration, is the appropriate period of time. It must be recalled that Castaneda did not require a "lengthy" period, but a "significant" period. 430 U.S. at 494.

use alone will not suffice.

Broadway v. Culpepper, 439 F.2d 1253, 1257 (5th Cir. 1971) (emphasis added, footnote omitted).

The Defendant has rebutted the presumption of fairness and has shown that in Dade County the exclusive reliance upon voter lists to select petit jury venires violates the equal protection rights of latins. The Defendant, a latin, is entitled to this protection, and thus the trial court erred in denying his motion to strike the petit jury venire. The Defendant must be afforded a new trial.[19]

3. Petit jury venire selection violates due process

In Taylor v. Louisiana, 419 U.S. 522, 538 (1975); the Supreme Court of the United States held that due process requires that in a criminal trial

> jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof.

Subsequently, in Duren v. Missouri, 439 U.S. 357, 364 (1979), the Supreme Court elaborated upon this "fair cross-section requirement" and held that a prima facie due process violation is

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[19]/ Although section 40.01, Florida Statutes requires that all jurors be registered voters, it is nonetheless impermissible to rely exclusively upon voter lists as the source for random selection of veniremen. The commands of equal protection and the requirements of the statute are simultaneously satisfied when sufficient numbers of latin registered voters are placed on venire source lists so that latins are represented as they are in the population. As indicated by expert testimony, this is not possible in Dade County when venires are exclusively selected from voter lists. (R. 439).

established when the accused shows:

> 1) that the group alleged to be excluded is a "distinctive" group in the community;
>
> 2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and
>
> 3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

Unlike equal protection analysis, there is no standing requirement to assert a fair cross-section due process claim. Duren v. Missouri, 439 U.S. at n.1, Taylor v. Louisiana, 419 U.S. at 526; Barnason v. State, 371 So.2d at n.2.

Applying the Duren criteria to this case, there can be no doubt that the Defendant has made a prima facie case. The first requirement is unquestionably established since latins have previously been judicially recognized as a constitutional group and they comprise 39.03% of Dade County. (R. 438). See Castaneda v. Partida, 430 U.S. at 495 (latins constituting 79.1% of community held to be constitutional group); Hernandez v. Texas, 347 U.S. at 480-1 (latins constituting 14% of community held to be constitutional group). It is equally clear that the third requirement is established since the Defendant's proof shows that Dade County's latin underrepresentation on voter lists is endemic and that the system of jury selection is exclusive reliance upon such lists. See Duren v. Missouri, 439 U.S. at 366-7 (underrepresentation which is inherent in jury selection process is systematic); Machetti v. Linahan, 679 F.2d 236, 241 (5th Cir. 1982) (selection method mandated by statute is

systematic). However, with regard to Duren's second requirement, a more difficult question is presented as to whether the Defendant has shown that the latin underrepresentation is "not fair and reasonable in relation to the number of such persons in the community". Duren v. Missouri, 439 U.S. at 364.

It must first be considered that the underrepresentation comparison is to be made with the community's population, not the venire source list. In Duren, the Supreme Court expressly held:

> [T]he fair-cross-section requirement involves a comparison of the makeup of jury venires or other sources from which jurors are drawn with the makeup of the community, not of voter registration lists.

357 U.S. at n.23 (emphasis in the original). Accord: United States v. Yazzie, 660 F.2d 422, 426-7 (10th Cir. 1981); United States v. Clifford, 640 F.2d 150, 155 (8th Cir. 1981); United States v. Maskeny, 609 F.2d 183, 190 (5th Cir. 1980).

However, the more difficult problem arising under this requirement is determining the method by which the underrepresentation comparison is to be made. In Duren, it was shown that slightly over half the population were women, but jury venires were only 15% women. In deciding that the representation of women was not a fair cross-section of the community, the Supreme Court found that the underrepresentation meant that only one of six prospective jurors was female whereas fair representation would have resulted in one of every two prospective jurors being a woman. Thus, the Supreme Court looked to the effect of the underrepresentation upon the actual composition of prospective jurors to determine whether the

underrepresentation was fair and reasonable. 357 U.S. at 365-6.

Although no Florida court has as yet been confronted with Duren, several circuits of the United States Court of Appeals have analyzed various methods of determining underrepresentation. See United States v. Yazzie, 660 F.2d at 426; United States v. Clifford, 640 F.2d at 155; United States v. Butler, 611 F.2d 1066, 1070 (5th Cir. 1980); United States v. Maskeny, 609 F.2d at 190. In each of these cases a percent comparison was used to calculate the effect of underrepresentation on jury venires.

In Yazzie, the Tenth Circuit computed the "absolute disparity" of underrepresentation by subtracting the subject group's venire percentage from the group's population percentage. The court then formulated the "comparative disparity" by dividing the absolute disparity by the population percentage. The Eighth Circuit did these same calculations in Clifford, while the Fifth Circuit in Maskeny and Butler calculated only absolute disparities.

In Maskeny, the Fifth Circuit reasoned that since in past equal protection cases the Supreme Court had considered absolute disparities and had done so specifically in Duren, a due process case, absolute disparity was the appropriate method for assessing underrepresentation. 609 F.2d at 190. In both Yazzie and Clifford the courts considered arguments that comparative disparity was the appropriate method, but in neither case was that method held appropriate. 660 F.2d at 427-8 (Yazzie); 640 F.2d at 150-1 (Clifford).

The disparities in all four federal cases, whether comparative or absolute, were found not to be constitutionally deficient. The following table summarizes these cases:

CASE	ABSOLUTE DISPARITY	COMPARATIVE DISPARITY
YAZZIE	4.29%	46.3%
CLIFFORD	7.2 %	46.0%
MASKENY	less than 10 %	--
BUTLER	9.14%	--

Standing in stark contrast is the 21.25% absolute disparity for latin underrepresentation on Dade County's petit jury venires for December 31, 1980 (the date closest to the commencement of the Defendant's trial for which data was available). (39.03% - 17.78% = 21.25%). (R. 438). The comparative disparity is 54.45%. (21.25 ÷ 39.03 = 54.45%).

In Clifford, Maskeny, and Butler, the courts looked to Swain v. Alabama, 380 U.S. 202, 208-9 (1965), and concluded that because there the Supreme Court found no prima facie case where only a 10% absolute disparity existed, the accuseds in the respective federal cases had failed in their claims. United States v. Clifford, 640 F.2d at 155, United States v. Maskeny, 604 F.2d at 190; United States v. Butler, 611 F.2d at 1070. In Yazzie, the court concluded that because the absolute disparity of 4.29% did not even approach the 14.7% found to have been constitutionally deficient in Jones v. Georgia, 389 U.S. 24

(1967), the accused did not make out a prima facie case. 660 F.2d at 427-8.

Against these federal cases the 21.25% absolute disparity of latin underrepresentation on Dade County's petit jury venires does indeed radiate. It soars above the 14.7% absolute disparity the Supreme Court found infirm in Jones and considerably more than the absolute disparities of Sims v. Georgia, 389 U.S. 404, 407 (1967) (19.7%), and Whitus v. Georgia, 385 U.S. 545, 552 (1967) (19.3%), which were also found to be constitutionally unacceptable. In light of Jones, Sims, and Whitus, the Defendant has unquestionably shown that the representation of latins was not fair and reasonable.

Moreover, the Defendant's proof, through the affidavit of the expert sociologist, showed the dramatic impact the latin underrepresentation has upon a typical twelve-member jury. This proof showed that because of the 21.25% absolute disparity a typical twelve-member jury would have only two latins instead of five and would, in all likelihood, not behave in the same manner as a jury which represented a cross-section of the community. (R. 440-1).

In United States v. Goff, 509 F.2d 825, 826-7 (5th Cir. 1975), the court analyzed the accused's claim that underrepresentation of certain groups violated the Jury Selection Act of 1968 (28 U.S. §1861, et. seq., which provides that jury venires are to be "selected at random from a fair cross section of the community"). The court concluded that because the absolute disparities were so small, the difference of the group's

representation on a twenty-three member grand jury was only one or two less than if representation had been perfect. The disparities were thus held to be insignificant under the Act. Accord: United States v. Jenkins, 496 F.2d 57,64-5 (2d Cir. 1974).

Similar analysis to that used in Goff produces an obviously different result in this case. Here it is shown that the replacement of three latins with three non-latins on a twelve-member jury will likely affect the ability of the remaining two latins to project their viewpoint. (R. 441). Thus, not only has the Defendant shown a prima facie violation of the fair cross-section requirement, he has demonstrated the substantial prejudice inherent in this constitutional deprivation.

Significantly, the fair cross-section requirement is violated in this case without regard to the quite probable, but inarticulate, benevolent intentions of state officials who formulated the local rule governing random venire selection in Dade County. However, such intent is irrelevant because unlike equal protection analysis, discriminatory purpose is not an essential element of this constitutional violation. Duren v. Missouri, 439 U.S. at n.26. Thus, with only convenience as justification, the state chose to try the Defendant before a jury selected from a venire which, because of exclusive reliance upon voter lists, arbitrarily failed to reflect a fair cross-section of the community. The Constitution requires that the Defendant's

conviction be reversed.[20]

20/ The Defendant asserted in the court below, and does so again here, that the exclusion of jurors for cause who morally oppose capital punishment or who would not impose death but could fairly determine guilt or innocence violated the Defendant's due process right to a jury selected from a fair cross section of the community. (R. 185). The court did indeed exclude three such jurors over the Defendant's objection. (T. 723-4, 746-53, 806-16, 856-65). The record reflects that the excluded jurors were a distinct recognizable segment of community. (R. 198-390). The systematic exclusion of these jurors therefore denied the Defendant due process of law under Duren.

Additionally, the exclusion of the jurors produced a jury which was not neutral and impartial on guilt or innocence, denying the Defendant rights guaranteed under the Sixth and Fourteenth Amendments and rendering imposition of the death penalty unconstitutional under the Eighth Amendment. See Grigsby v. Mabry, 483 F.Supp. 1372 (E.D. Ark. 1980), aff'd in part and rev'd in part, 637 F.2d 525 (8th Cir. 1980).

III

THE TRIAL COURT ERRED IN FAILING TO GRANT THE DEFENDANT'S MOTION FOR MISTRIAL WHEN THE STATE ELICITED TESTIMONY, OVER OBJECTION, THAT THE DEFENDANT REFUSED TO ANSWER A QUESTION PUT TO HIM DURING CUSTODIAL INTERROGATION.

Twice during custodial interrogation following Miranda warnings the Defendant chose to "cut off" questioning and refused to answer a question seeking the identity of the person he was going to see just before he was stopped by Officer Pena. (R. 944; T. 1105). Thereafter, the Defendant answered questions regarding the Pena murder. (T. 1125-41). The issue is, however, whether the Defendant's motion for mistrial should have been granted when his objection to the prosecutor's deliberate publication to the jury of the refusals was overruled.[21]

In this state, "any reference before the jury to the Defendant's assertion of his Fifth Amendment rights to decline to answer police questioning is improper". Peterson v. State, 405 So.2d 997, 999 (Fla. 3d DCA 1981). Brown v. State, 367 So.2d

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21/ The refusal was first made known to the jury when Detective Wolf, the interrogator, testified that the Defendant had refused to answer the question as to the identity of the man the Defendant claimed he was going to see shortly before the murder occurred. (T. 1105). The jury was again told of the refusal when the Defendant's written statement was read to them. (R. 944; T. 1157). The Defendant objected on both occasions upon the ground that the testimony referred to his right to stop questioning. (T. 1105-6, 1117). He also promptly moved for a mistrial after the first occasion. (T. 1110). The prosecutor argued that the testimony was relevant to show the voluntariness of the Defendant's statements. (T. 1106-7). The court, after finding the reference to the Defendant's refusal to answer was "innocuous", finally denied the motion for mistrial after the second occasion. (T. 1108, 1109, 1123).

616, 624 (Fla. 1979). Moreover, such improper comment, if properly preserved for appellate review by objection and motion for mistrial, requires reversal without regard to the harmless error rule. Clark v. State, 363 So.2d 331, 334-5 (Fla. 1978); see also Willinsky v. State, 360 So.2d 760 (Fla. 1978); Shannon v. State, 335 So.2d 5 (Fla. 1976); Bennett v. State, 316 So.2d 41 (Fla. 1975).

In this case, there can be no doubt that the prosecutor deliberately informed the jury that the Defendant invoked his Fifth Amendment right to cut off police questioning.[22] Since the Defendant properly preserved his objection to this reference of his silence by making a prompt objection and motion for mistrial, this case must be reversed.

In Peterson v. State, 405 So.2d at 999, the accused said during custodial interrogation that he would answer some questions and then stop when he did not want to answer any more. The arresting officer told the jury of this statement, and that the accused did exactly what he said he would do. The Third District declared:

> It is said in Miranda itself that "[t]he mere fact that [the defendant] may have answered some questions . . . does not deprive him of the right to refrain from answering any further inquiries . . ."Miranda v. Arizona, 384 U.S. 436, 445, 86 S.Ct. 1602, 1612, 16 L.Ed.2d 694, 707 (1966). Accordingly, even if interrogation is once begun, the defendant may cut it off at any time and for any

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22/ The prosecutor admitted his conduct was deliberate when he argued to the court that the interrogator's honoring of the Defendant's refusal to answer showed the voluntary character of the confessions. (T. 1106-7).

> reason. E.g., Michigan v. Mosley, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975); Thus, when Peterson told the officer that "he would stop when he didn't want to answer any more", he did no more than assert a right which Miranda and the constitution had granted him. The officer's statement to the jury that he had done so was consequently indefensibly improper.

405 So.2d at 999 (some citations ommitted). Accord: Thompson v. State, 386 So.2d 264, 267 (Fla. 3d DCA 1980); review denied, 401 So.2d 1340; Brownlee v. State, 361 So.2d 724, 725 (Fla. 4th DCA 1978); Davis v. State, 356 So.2d 1252 (Fla. 4th DCA 1978).

In Roban v. State, 384 So.2d 683, 685 (Fla. 4th DCA 1980), the jury was first informed that after being given Miranda warnings the accused decided to remain silent. He did, however, eventually give an inculpatory statement and the jury was accordingly told. In reversing, the Fourth District rejected the state's contention that there was no comment upon silence because the accused did not remain silent.

In Marshall v. State, 393 So.2d 584, 585 (Fla. 1st DCA 1981), the First District faced virtually the same facts as in Roban. The state's contention in Marshall went further however, asserting that the invocation of silence provided the accused with an opportunity to create the statement he later gave police. As in Roban, this contention was flatly rejected with the First District holding that:

> [the accused's] initial silence must be regarded not as probative in the sense first suggested, but as a penalty for the exercise of his constitutional right to be silent.

393 So.2d at 585.

In this instance, the Defendant was penalized for cutting

off questioning, a decision which was constitutionally his to make. See Michigan v. Mosley, 423 U.S. 96 (1975); Peterson v. State, 405 So.2d at 999. Moreover, once having made the decision, the Defendant was free to resume answering questions without suffering a penalty for his previously exercised right. Marshall v. State, 393 So.2d at 585; Roban v. State, 384 So.2d at 685.

In light of the previous authorities, the efficacy of Ragland v. State, 358 So.2d 100 (Fla. 3d DCA 1978), is in serious doubt. In Ragland, the court found that the accused had not invoked his Fifth Amendment right although in giving police a statement he had declined to answer a single question.

If Ragland suggests that an accused who refuses to answer a question following Miranda warnings during custodial interrogation has not invoked his Fifth Amendment right, it cannot stand against the foregoing impressive authorities.[23] Indeed, the Third District in deciding Peterson and Thompson did not give Ragland any such meaning. This Court should decline to

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[23]/ The cases relied upon in Ragland do not support this holding. Kellerman v. State, 353 So.2d 901 (Fla. 3d DCA 1977) held that an accused's exculpatory trial testimony could be cross examined with his arrest statement which did not include the exculpatory version. Williams v. State, 353 So.2d 588 (Fla. 3d DCA 1977) held there was no invocation of silence, and hence no improper comment, when all that was shown was that without questioning the accused failed to volunteer a statement until asked. Miller v. State, 343 So.2d 1292 (Fla. 3d DCA 1977) merely held that where an accused claims at trial that he gave a certain statement to police there is no error in permitting rebuttal testimony that he did not. And United States v. Fairchild, 505 F.2d 1378 (5th Cir. 1975) simply held that an accused's arrest silence may be used to impeach defense counsel's improper attempts to create the impression that the accused had fully cooperated with law enforcement officials.

do so as well.

It is thus evident that reversible error occurred when the trial court permitted the prosecutor to elicit testimony that the Defendant had exercised his Fifth Amendment right to cut off questioning. Accordingly, the Defendant's motion for mistrial was improperly denied and under Clark his conviction must be reversed.

IV

THE APPLICATION OF SECTION 921.141, FLORIDA STATUTES, TO IMPOSE DEATH UPON THE DEFENDANT VIOLATES THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.[24]

A. The Improper Exclusion Of A Prospective Juror Who Merely Stated That She Would Have Difficulty Recommending A Sentence Of Death Requires That The Death Sentence Be Vacated.

Prospective juror Ladd was excused for cause over the Defendant's objection when, after stating she believed in capital punishment and that she could fairly determine guilt or innocence, (T. 747-8), she told the prosecutor in response to his inquiry as to whether she could be convinced to vote for death that:

> I can't say there is nothing, you couldn't do, but I mean, you would have alot to overcome before you would be able to convince me.

(T. 749).

In Witherspoon v. Illinois, 391 U.S. 510, 522 (1968), the Supreme Court held that "a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general

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[24] In light of decisions of this Court and of the Supreme Court of the United States the defendant will not present repetitive arguments concerning the constitutionality vel non of Section 921.141. However, the defendant does not waive any contentions that capital punishment is per se violative of the Eighth and Fourteenth Amendments and that Section 921.141 is unconstitutional on its face.

objections to the death penalty". The decision allows the exclusion of only two classes of jurors: 1) those who "would automatically vote against the imposition of capital punishment without regard to any evidence"; or 2) those whose "attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt". 391 U.S. at n.21. If prospective jurors are "excluded on any broader basis than this, the death sentence cannot be carried out". 391 U.S. at n. 21. Accord: Maxwell v. Bishop, 398 U.S. 262 (1970), Boulden v. Holman, 394 U.S. 478, 481-82 (1969).

Accordingly, exclusion is permissible if a prospective juror states that he could not possibly recommend a sentence of death. See: Jackson v. State, 366 So.2d 752, 754-5 (Fla. 1978), (jurors who "said they would vote to recommend death in no circumstances" were properly excluded); Witt v. State, 342 So.2d 497, 499 (Fla. 1977) (jurors who clearly stated that "they could not return an advisory sentence of death" were properly excluded); Portee v. State, 253 So.2d 866, 868 (Fla. 1971) (jurors who "would never vote to impose the death penalty" were properly excluded); Paramore v. State, 229 So.2d 855, 858 (Fla. 1969) (juror who "would be unable to return a verdict that carried with it the death penalty" was properly excluded).

In this record there is nothing to indicate that Miss Ladd could not or would not recommend the death penalty. In fact, she expressly told the prosecutor she could be convinced to vote for death but that he "would have a lot to overcome". (T. 749). While Miss Ladd may have had a distinct bias against voting for

the death penalty, such is clearly not a valid basis for exclusion. See: Boulden v. Holman, 394 U.S. at 483. A prospective juror with a bias against the death penalty cannot be excluded "so long as his bias is not so strong as to preclude or prevent him from at least considering the issue of punishment". Williams v. State, 228 So.2d 377, 379 (Fla. 1969) (emphasis added).

Miss Ladd was excused for cause over objection because she merely expressed a bias against voting for death. Her erroneous exclusion requires that the sentence of death be vacated.

B. Death May Not Be Imposed Where The Court Excluded Mitigating Character Evidence That The Statutory Alternative To Death Would Be Fulfilled By The Defendant's Incarceration As A Model Rehabilitated Prisoner.

During the penalty phase the Defendant attempted to call a professional corrections consultant, a prison psychiatrist, and other similar witnesses who had interviewed the Defendant and had concluded that if given a sentence of incarceration, the Defendant would be a model rehabilitated prisoner affording no threat to society. (T. 1505-9). Refusing to permit an evidentiary proffer for its own consideration, the trial court impulsively held that this character evidence was a "charade". (T. 1508-9). This mitigating evidence was then excluded. (T. 1508-11).[25]

25/ The exclusion of the mitigating evidence was egregious enough, however, it was devastating to the Defendant because (Cont.)

The Eighth Amendment "calls for a greater degree of reliability" in the death sentencing process than is required in any other criminal proceeding. Lockett v. Ohio, 438 U.S. 586, 604 (1978). Accord: Gardner v. Florida, 430 U.S. 349 (1977); Woodson v. North Carolina, 428 U.S. 280 (1976). This requirement is enforced by focusing the capital sentencing process on "the particularized circumstances of the individual offense and the individual offender". Jurek v. Texas, 428 U.S. 262, 274 (1976). An "individualized decision" to impose the death penalty is therefore mandated by the Eighth Amendment. Lockett v. Ohio, 438 U.S. at 605-6.

The mandated individualized decision requires a "character analysis of the Defendant to ascertain whether the ultimate penalty is called for in his or her particular case". Elledge v. State, 346 So.2d 998, 1001 (Fla. 1977). Accord: Woodson v. North Carolina, 428 U.S. at 304. Thus:

> [T]he Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, 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.

Lockett v. Ohio, 438 U.S. at 604 (emphasis in original). Accord: Eddings v. Oklahoma, ___ U.S. ___ (1982), 102 S.Ct. 869; Songer v. State, 365 So.2d 696 (Fla. 1978) (On Rehearing), cert.

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prior to the exclusion the jury had already been told of a necessary but highly prejudicial aspect of mitigation -- that the Defendant had previously been in prison for a non-violent felony. (T. 1495). Thus, the court's ruling disclosed the worst (and standing alone, the inadmissible) aspects of the Defendant's character without permitting the jury to hear the best.

denied, 441 U.S. 956 (1979).

Given the unusual clarity of the decisions hailing the constitutional mandate for unlimited character evidence in the death sentencing process, the trial court's decision excluding such is impossible to justify. Indeed, this Court has on three occasions recognized the compelling need for character evidence in capital cases.[26]

First, in Perry v. State, 395 So.2d 170 (Fla. 1981), this Court vacated the accused's death sentence and ordered a new sentencing hearing before a jury where the trial court had excluded evidence concerning the accused's "age, background, and upbringing". 395 So.2d at 172. Then, in Menendez v. State, ___ So.2d ___ (Fla. 1982) (Case No. 49,294, opinion filed August 26, 1982), this Court reversed the death sentence imposed in accordance with the jury's recommendation when, after applying

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26/ As used here, character evidence includes mitigating evidence described by Sections 921.141(6)(b) and (f), Florida Statutes, which refer to the accused's mental state at the time of the offense. Here the trial court also excluded this type of evidence when it first refused to permit the Defendant's timely proffer and then ruled that it had been correct in excluding Dr. Fisher's testimony regarding the Defendant's mental state at the time of the offense. (R. 1101-3; T. 1510, 1569-70, 1572). With respect to subsections (6)(b) and (6)(f), this Court has trice vacated death sentences for exclusion of mitigating evidence, Jones v. State, 362 So.2d 1334, 1336 (Fla. 1978); Miller v. State, 332 So.2d 65, 68 (Fla. 1976); Messer v. State, 330 So.2d 137, 142 (Fla. 1976), and has even reversed a death sentence where the trial court refused to find the presence of a mitigating circumstance when mental state evidence was presented. Huckaby v. State, 343 So.2d 29, 33 (Fla. 1977) cert. denied, 434 U.S. 920. Since Florida's death penalty statute is not narrowly limited regarding mitigating evidence, these cases provide compelling authority for the prohibition against exclusion of any mitigating character evidence. See: Songer v. State, 365 So.2d 696 (Fla. 1978) (On Rehearing), cert. denied, 441 U.S. 956 (1979).

the review standard of State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 426 U.S. 943 (1974), it was determined that a single aggravating factor was outweighed by the mitigating circumstances that the accused had no significant history of prior criminal activity and because the accused had "demonstrated a capacity for rehabilitation". ___ So.2d at ___.

Menendez is particularly important because it shows that character evidence is so critical to the sentencing process that rehabilitative prospects alone can override a jury recomended death sentence. But even more telling of the necessity for unlimited character evidence, and the controlling authority for this appeal, is Simmons v. State, ___ So.2d ___ (Fla. 1982) (Case No. 58,183, Opinion filed August 16, 1982). In Simmons, the accused proffered at the sentencing hearing the testimony of a psychiatrist that he had the capacity to be rehabilitated. The trial court ruled that such evidence could not be presented to the jury but it would be considered by it in imposing sentence. In vacating the sentence of death and remanding for a new sentence proceeding before a newly impaneled jury, this Court held:

> . . . In United States v. Grayson, 438 U.S. 41, 47-48 (1978), the Court said, "To an unspecified degree, the sentencing judge is obligated to make his decision on the basis, among others, of predictions regarding the convicted defendant's potential, or lack of potential, for rehabilitation". A person's potential for rehabilitation is an element of his character and therefore may not be excluded from consideration as a possible mitigating factor. Lockett v. Ohio, 438 U.S. 586 (1978). Since the evidence appellant offered was reasonably related to such a valid mitigating factor, the evidence should

> have been admitted before the jury at the sentencing phase of the trial.

____ So.2d at ____ (some citations omitted). Accord: Eddings v. Oklahoma, ____ U.S. at ____, 102 S.Ct. at 875-6.

The proffered character evidence in this case was expert testimony that the Defendant would be a model prisoner and not a threat to prison oficials, inmates, or society. (R. 1073-1108; T. 1506-9). Since this evidence is clearly rehabilitative in nature it obviously is reasonably related to the Defendant's character and should have been admitted under Simmons.[27] There can be no justification for the trial court's refusal to permit the jury's consideration of this mitigating circumstance and for the expulsion of the evidence from the balancing process which the trial court must solemly perform.

Very recently the Supreme Court of the United States re-affirmed the mandate for unlimited character evidence in Eddings v. Oklahoma, ____ U.S. at ____, 102 S.Ct. at 875-6. Eddings was sentenced to death for having shot and killed a police officer during a traffic stop. In a case thus remarkably similar to the case at bar, the parallel continues with the Oklahoma trial court's findings, like those here, that the murder was especially heinous, atrocious, or cruel and that it was committed to avoid

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27/ Even the prosecutor conceded to the jury that the Defendant's rehabilitative evidence was relevant. In his argument the prosecutor ridiculed the meager evidence the Defendant presented when he declared sarcastically that the Defendant had been such a "model prisoner" in the past that he "gets out . . . he steals a car . . . he violates his probation . . . he executes a police officer . . . ." (T. 1524-5) The point made is that the prosecutor chose to attack the Defendant's rehabilitative prospect rather than argue its irrelevancy.

or prevent lawful arrest. In mitigation Eddings showed that he had been raised without adult supervision and had suffered physical violence. Sixteen years old at the time of the crime, evidence indicated that in fifteen or twenty years he could be rehabiliated.

Upon these facts the trial judge and the state appellate court held that as a matter of law all aspects of Eddings character save his youth must be excluded from the death sentencing process. Reversing the death sentence, the Supreme Court of the United States held:

> We find that the limitations placed by these courts upon the mitigating evidence they would consider violated the rule in Lockett. Just as the state may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer, refuse to consider, as a matter of law, any relevant mitigating evidence. In this instance, it was as if the trial judge had instructed a jury to disregard the mitigating evidence Eddings proffered on his behalf. The sentencer, and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration.

102 S.Ct. 875-6 (Emphasis in original).

The trial court in this case thus committed the same error as the Oklahoma courts by excluding the Defendant's character evidence of his rehabilitative prospects in prison. The error here, like Eddings but even more compelling than Simmons, is total since the trial court not only excluded the evidence from the jury but himself refused to consider the evidence in mitigation. Accordingly, this death sentence cannot be lawfully

imposed.

C. Death May Not Be Imposed Where The Essential Safeguard Of A Valid Jury Recommendation Made In Conformity With Constitutional Law Was Nulified Because Erroneous Prejudicial Aggravating Evidence Was Admitted, Buttressed By Inflamatory Prosecutorial Argument, And Not Limited By Proper Instructions.

In this state the death penalty can only be imposed pursuant to Section 921.141, Florida Statutes, upon the reasoned judgment of the trial jury, trial judge, and this Court that the particular factual situation involved, in light of the totality of the circumstances present in the evidence, cannot be satisfied by the lesser penalty of life imprisonment. Proffitt v. Florida, 428 U.S. 247, 251-9 (1976); Alvord v. State, 322 So.2d 533, 540 (Fla. 1975); State v. Dixon, 283 So.2d 1, 7-8 (Fla. 1973). Both the trial jury and judge "must weigh the evidence of aggravating and mitigating circumstances delineated in the statute to determine whether death is an appropriate sentence". Brown v. Wainwright, 392 So.2d 1327, 1331 (Fla. 1981), cert. denied, ___ U.S. ___, 102 S.Ct. 542 (1981); Accord: Adams v. State, 412 So.2d 850, 855 (Fla. 1982). Unlike the trial jury and trial judge, the exercise of this Court's reasoned judgment is not to impose sentence, but as stated by this Court, to

> "review", a process qualitatively different from sentence "imposition". It consists of two discrete functions. First, we determine if the jury and judge acted with procedural rectitude in applying section 921.141 and our case law.

* * *

> The second aspect of our review process is to ensure relative proportionality among death sentences which have been approved statewide. After we have concluded that the judge and jury have acted with procedural regularity, we compare the case under review with all past capital cases to determine whether or not the punishment is too great.

Brown v. Wainwright, 392 So.2d at 1331 (emphasis supplied). Accord: Adams v. State, 412 So.2d at 855.

Indeed, this Court has previously held that the review function cannot be administered without a jury recommendation, or in its absence, the appearance on the record of the accused's knowing, intelligent, and voluntary waiver of his right to a jury recommendation. Lamadline v. State, 303 So.2d 17, 20 (Fla. 1974). The jury represents the "conscience of the community", McCaskill v. State, 344 So.2d 1276, 1280 (Fla. 1977), and this Court must give "great weight" to its recommendation -- be it life or death. Odom v. State, 403 So.2d 936, 942 (Fla. 1981). Accord: Neary v. State, 384 So.2d 881, 885 (Fla. 1980). Additionally, the standard employed by this Court to review a death sentence where the jury recommendation was life requires that death be reversed unless "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ", Tedder v. State, 322 So.2d 908, 910 (Fla. 1975), but where a jury recommends death, a sentence of death should not be distrubed "unless there appears strong reasons to believe that reasonable persons could not agree with the recommendation". LeDuc v. State, 365 So.2d 149, 151 (Fla. 1978). Accord: Ross v. State, 386 So.2d 1191, 1197-8 (Fla.

1980). Finally, in exercising its review function, this Court has in the past expressly considered jury recommendations in other but similar cases so as to ensure relative proportionality among death sentences. McCaskill v. State, 344 So.2d at 1280.

The essence of these legal principles is that this Court cannot perform its review function without a valid jury recommendation.[28] In fact, in cases where jury death recommendations have been tainted by the exclusion of mitigating evidence or the admission of non-statutory aggravating evidence, this Court has repeatedly vacated death sentences and remanded for resentencing before new specially impaneled juries. See: Simmons v. State, ____ So.2d at ____; Maggard v. State, 399 So.2d 973, 978 (Fla. 1981); Perry v. State, 395 So.2d at 176; Elledge v. State, 346 So.2d 998, 1003 (Fla. 1977); Miller v. State, 332 So.2d 65, 68 (Fla. 1976); Messer v. State, 330 So.2d 137, 142 (Fla. 1976).

In this case, the jury recommendation was not merely tainted by the exclusion of mitigating evidence and the admission of non-statutory aggravating evidence, but any validity that the recommendation might have had was utterly destroyed by the prosecutor's inflamatory argument and the trial court's erroneous instructions. Each of these errors will now be individually

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28/ Clearly the trial court cannot exercise reasoned judgment and weigh the evidence when the jury recommendation is not valid. Miller v. State, 332 So.2d at 68; See: Messer v. State, 330 So.2d at 1420. Since under Brown this Court can only review what the trial court imposes, such review is not possible when the trial court's sentencing judgment was impaired by the invalidity of the jury recommendation.

addressed.

1. The prosecutor's argument regarding excluded mitigating character evidence

Analysis of the trial court's ruling excluding expert testimony of the rehabilitative aspects of the Defendant's character was presented in Point IV B and is therefore not here repeated. However, it is now appropriate to discuss the prejudicial effect of the prosecutor's argument to the jury, over objection,[29] that the Defendant 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.

The prosecutor stressed sarcastically that this "model prisoner" repeatedly violates the law after repeatedly being released from prison, each time committing a more serious crime. (T. 1524-5, 1527). The prosecutor then suggested that it was unfair to the victim's family to release the Defendant after twenty-five years since they, unlike the Defendant's family, will never see their loved one again. (T. 1528). The prosecutor then completed his emotional plea for the jury's sympathy by declaring his personal opinions as follows:

> [The Defendant] has had a chance to prepare, to make his peace with his family and with God. Not on April 2nd, 1978, did

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29/ This objection, as well as all of the Defendant's objections to be discussed in connection with the penalty phase, were raised in accordance with the trial court's procedure to resolve all objections prior to taking evidence. (T. 1366). The trial court specifically ruled upon and noted each of the Defendant's contentions. (T. 1371-3). The Defendant's renewal of his objections was met by the trial court's affirmance of its previous rulings. (T. 1530).

Lou Pena ever get a chance to do this.

> When he left his home on that day, I am sure he did not think that that would be the last time he ever left, and I am sure when he kissed his wife and children good-bye, I am sure he did not think that would be the last one.

(T. 1527-8).

An accused in a capital case has the same right to have the jury consider the appropriate penalty "in a fair and impartial proceeding, free from prejudicial inflamatory statements, as he does to have the question of guilt so determined". Singer v. State, 109 So.2d 7, 30 (Fla. 1959). Moreover, it is fundamental that a prosecutor may not inject his personal opinions into any part of the trial process, e.g. Pait v. State, 112 So.2d 380, 384-5 (Fla. 1959) (opinion that death penalty appropriate); Wilson v. State, 371 So.2d 126 (Fla. 1st DCA 1978) (opinion as to guilt); Dukes v. State, 356 So.2d 873, 876 (Fla. 4th DCA 1978) (opinion regarding witness credibility), nor may the prosecutor make appeals to the jury predicated upon sympathy for the victim's family, e.g. Grant v. State, 171 So.2d 361, 365 (Fla. 1965), Knight v. State, 316 So.2d 576, 578 (Fla. 1st DCA 1975); Breniser v. State, 267 So.2d 23, 25 (Fla. 4th DCA 1972).

In this case the prosecutor did not merely violate these fundamental rules of fairness, but he successfully attacked the Defendant's character upon the very grounds that had been the subject of previously excluded mitigating evidence -- the Defendant's rehabilative prospects in prison.

It is clear error to comment upon matters relating to the accused's post-conviction treatment unless such is properly in

evidence before the jury. Singer v. State, 109 So.2d at 27-8. Moreover, the possibility of parole for a capital accused sentenced to life imprisonment is a non-statutory aggravating factor which cannot be injected into the death sentencing process. Miller v. State, 373 So.2d 882, 885 (Fla. 1979) See also Grant v. State, 194 So.2d 612, 614-15 (Fla. 1967); Burnette v. State, 157 So.2d 65, 68 (Fla. 1963). In this instance the Defendant was first stripped of the mitigating shield of rehabilitative character evidence just before the state began its character attack belittling the Defendant's plea for life. Not content with this improper argument, the prosecutor declared that it was unfair to the victim's family to award the Defendant life because he would be paroled in twenty-five years and would see his family again. This Court must not sanction these prosecutorial tactics because they were calculated to, and did in fact, prevent the jury from exercising reasoned judgment as to whether the death penalty should be imposed.[30]

30/ When this case is analyzed by its factual elements and the emotional effect inflamatory argument would have upon the jury, analogy may be made to Washington v. State, 343 So.2d 908 (Fla. 3d DCA 1977) and Brown v. State, 284 So.2d 453 (Fla. 3d DCA 1973). In Washington, the accused's conviction was reversed when the prosecutor attempted to buttress the credibility of his only witness, a police officer, by making a sympathetic plea based upon the recent deaths of three police officers in the community. In Brown, the accused's criminal record was properly before the jury but the prosecutor's argument that the accused was a "three time loser" who did not deserve sympathy required reversal. This case thus has the same elements of Washington and Brown, because here the prosecutor improperly derided the Defendant for his criminal record, compared his family's plight to that of the victim police officer, and then concluded that the Defendant did not deserve sympathy.

2. Admission and argument of non-statutory aggravating evidence

Prior to the sentencing hearing the Defendant unsuccessfully sought to exclude all evidence and argument regarding the victim's pain and suffering before death, the Defendant's lack of remorse, and the status of the victim as a police officer. (R. 148-58; T. 1359-66, 1371-3).[31] Thereafter the state presented testimony over objection that the Defendant never showed any remorse and that the victim could not breathe and lived for five minutes before death. (T. 1393-4, 1397-1400). In argument to the jury the prosecutor stressed that the victim died an "awful" death "drowning in his own blood". (T. 1519). Then on two occasions the prosecutor argued that there should be no mercy for the Defendant because he had shown no remorse and had committed the "ultimate" crime -- the killing of a police officer. (T. 1525, 1527).

It is clear error for either the judge or jury to consider non-statutory aggravating evidence. Maggard v. State, 399 So.2d at 977-8; Perry v. State, 395 So.2d at 176, Elledge v. State, 346 So.2d 998, 1002-3 (Fla. 1977). In Maggard there were no mitigating circumstances and there was one aggravating circumstance, but the court had erroneously permitted the jury to

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31/ The Defendant also moved to exclude use by the prosecution of Section 921.141 (5)(i), Florida Statutes, that the homicide was committed in a cold, calculated and premeditated manner without pretense of moral or legal justification, upon the ground that such use constituted an unconstitutional ex past facto application of law. (T. 1377-81). The Defendant here raises this contention, but in light of Combs v. State, 403 So.2d 418, 421 (Fla. 1981), will present no further argument.

consider aggravating evidence of the accused's past convictions for non-violent felonies. Because this error was so egregious, this Court refused to apply State v. Dixon, 283 So.2d 1 (Fla. 1973), and required that a new jury be impaneled for a new sentencing hearing.

Lack of remorse is not a permissible aggravating circumstance. Menendez v. State, 368 So.2d 1278, 1281 (Fla. 1979); Riley v. State, 366 So.2d 19, 21 (Fla. 1979); compare Sireci v. State, 399 So.2d 964, 971-2 (Fla. 1981) (lack of remorse evidence admissible when subsection (5)(h) proved). Nor is it proper to consider the victim's occupational status as an aggravating circumstance since such is not provided for by statute. See Elledge v. State, 346 So.2d at 1002-3.

The victim in this case was a police officer who at the moment of the shooting could not have anticipated the Defendant's act. (T. 986, 989-90). There is no evidence to suggest that the Defendant intended to cause the victim any pain or suffering. Nor is there any evidence that the Defendant's intention was that the bullet would pass through the victim's neck and cause the drowning which resulted in death. Furthermore, nothing in the record even hints that this crime was committed with any additional acts so as to separate it from the norm of capital felonies. Indeed, following this Court's previous decisions involving similar facts, this homicide was not heinous, atrocious or cruel as a matter of law and thus the contested evidence and argument should have been excluded from the jury's consideration. See e.g. Kampf v. State, 371 So.2d 1007 (Fla.

1979); Point IV D, infra.

Moreover, the prosecutor's argument regarding the Defendant's lack of remorse precludes the necessity for determining the admissibility of that evidence. The prosecutor chose not to argue that the Defendant's lack of remorse proved the crime heinous, atrocious, or cruel, but instead he declared:

> . . . [The Defendant's] lawyer is going to come up and say have mercy on him.
>
> I have a lot of trouble with that because that man never had any mercy on Lou Pena, and to this day, to this day you hear Detective Wolf say he never told Detective Wolf he was sorry for what he did.

(T. 1527).

After improperly arguing that the Defendant deserved no mercy for having shown no remorse, the prosecutor immediately decried that this police officer killing was the "ultimate" crime. (T. 1527). Certainly this Court has never sanctioned such inflamatory argument in the death sentencing process. Argument of this kind must not be permitted because it serves no purpose but to persuade the jury to avoid reasoned judgment. Accordingly, the jury recommendation in this case, based upon such argument, is tainted and unacceptable in the sentencing process.

3. The instructions of the trial court did not permit the jury to exercise reasoned judgment

Before argument of counsel the court denied the Defendant's written requests to instruct the jury that:

(1) The "state may not rely upon a single

> aspect of the offense to establish more than a single aggravating circumstance", (R. 1021; T. 1484-5, 1491), and,
>
> (2) With regard to subsection (5)(h), "'heinous' means wicked or shockingly evil, . . . 'atrocious' means outrageously wicked and vile, and . . . 'cruel' means designed to inflict a high degree of pain; utter indifference to, or enjoyment of, the suffering of others; pitiless . . . . [T]his aggravating circumstance is limited to those offenses where the homicide was accompanied by such additional acts as to set the crime apart from the norm of capital felonies -- the conscienceless or pitiless crime which is unnecessarily tortuous to the victim, and . . . you must find the homicide in this case to have been accompanied by such additional acts to find this aggravating circumstance applicable". (R. 1006; T. 1484-5).

Both of these instructions were a correct statement of law. See: Lewis v. State, 398 So.2d at 438 (defining subsection (5)(h)); Provence v. State, 337 So.2d 783, 786 (Fla. 1976) (prohibiting "doubling up" of aggravating circumstances); State v. Dixon, 283 So.2d at 9 (defining subsection (5)(h)). However, by denying these requested instructions the court permitted the prosecutor to violate the law by first asking the jury to "double up" aggravating circumstances and then permitted the jury to find another although no instruction by which reasoned judgment could be exercised was given.

The prosecutor argued to the jury the homicide was committed to both avoid arrest and to hinder or disrupt government functions. (T. 1516-7). He also argued that the homicide was especially heinous, atrocious, and cruel and that it was

committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. (T. 1520-1). After the jury recommendation, the court expressly found that the aggravating factor present in subsection (5)(g) (hindering or disrupting government function) "merge[d]" with subsection (5)(e) (avoiding arrest) and that the aggravating factor of subsection (5)(i) (cold, calculated, premeditated) was "duplicitous" with subsections (5)(e), (5)(g), and (5)(h) (especially heinous, atrocious, or cruel). (R. 1046, 1047-8). Of course, these findings were of no benefit to the jury in its attempt to weigh the lawfully present aggravating circumstances.

The only guidance the court gave the jury regarding subsection (5)(h) was to instruct them that:

> The aggravating circumstances that you may consider are limited to any of the following that are established by the evidence.
>
> * * *
>
> The crime for which the Defendant is to be sentenced was especially wicked, evil, atrocious or cruel.

(T. 1538).

In Gregg v. Georgia, 428 U.S. 153, 192 (1976), the Supreme Court declared:

> [T]he provision of relevant [sentencing] information under fair procedural rules is not alone sufficient to guarantee that the information will be properly used in the imposition of punishment, especially if the sentencing is performed by a jury. Since the members of a jury will have little, if any, previous experience in sentencing, they are unlikely to be skilled in dealing with the information they are given. To the extent that this problem is inherent in jury sentencing, it may not be totally

> correctable. It seems clear, however, that the problem will be alleviated if the jury is given guidance regarding the factors about the crime and the defendant that the State, representing organized society, deems particularly relevant to the sentencing decision.

(Citations ommitted). Accord: Godfrey v. Georgia, 446 U.S. 420, 428-9 (1980) (reversing jury's death sentence based upon finding of aggravating circumstance not properly instructed upon).

The importance of jury instructions in the sentencing process was clearly demonstrated by the Fifth Circuit in Washington v. Watkins, 655 F.2d 1346, 1373-77 (5th Cir. 1981). Instructions in that case informed the jury, contrary to Lockett v. Ohio, supra, that mitigating circumstances were those enumerated by the court. The Fifth Circuit held that even though no mitigating evidence was excluded and counsel had argued unenumerated mitigation, the jury was prevented from properly weighing the sentencing evidence and, therefore, the death sentence could not be constitutionally imposed.

It cannot be reasonably argued that while a judge is prohibited from "doubling up" aggravating circumstances the jury, upon whose recommendation the judge must accord great weight, is free to do so. The entire assumption of Dixon's "reasoned judgment" fails if the jury, one of the three essential components of the capital sentencing structure, is permitted to assign weight to an aggravating factor which is legally not present. But the jury recommendation in this case was predicated upon just such a deficiency, for the prosecutor asked, and the judge affirmed, that "doubling up" was permissible. Thus, the

jury's death recommendation was achieved though an invalid procedure which necessarily tainted the recommendation.

This deficiency alone was serious enough. However, the recommendation was further tainted by the jury's inability to legally apply subsection (5)(h) because the court refused to define that subsection in a manner consistent with the Eighth and Fourteenth Amendments to the United States Constitution.

In Godfrey v. Georgia, 446 U.S. at 426, the Supreme Court analyzed Georgia's attempt to impose death upon an individual who was convicted of a murder found by the jury to be " . . . 'outrageously or wantonly vile, horrible and inhuman'". Recognizing first that a sentencing body is constitutionally restricted so as to minimize risk that death will not be imposed arbitrarily and capriciously, the Supreme Court then turned to the jury's finding:

> . . . . There is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could farily characterize almost every murder as "outrageously or wantonly vile, horrible and inhuman". Such a view may, in fact, have been one to which the members of the jury in this case subscribed. If so, their preconceptions were not dispelled by the trial judge's sentencing instructions. These gave the jury no guidance concerning the meaning of any of [the aggravating circumstance]'s terms. In fact, the jury's interpretation of [the aggravating circumstance] can only be the subject of sheer speculation.

446 U.S. at 428-29. Finding nothing to indicate that the state supreme court applied a constitutional construction in its review of the jury's finding, the United States Supreme Court struck

down the death sentence. 446 U.S. at 432.

Significantly, the jury's finding in Godfrey is remarkably similar to subsection (5)(h). But this Court, unlike the situation in Godfrey, has repeatedly limited the construction of (5)(h) so as to render it constitutionally valid. See, e.g. Lewis v. State, 377 So.2d at 646; Riley v. State, 366 So.2d at 21; State v. Dixon, 283 So.2d at 9. The question is however, given the constitutional need to limit (5)(h)'s applicability, and the importance of the jury's recommendation predicated upon a finding of its presence, of what value is that recommendation when the jury was never instructed upon the very limitations which make the subsection constitutional as an aggravating circumstance?

The answer has to be, as it was in Godfrey, that the jury cannot be trusted to have conformed its findings to that which is constitutionally permitted. Accordingly, the recommendation in this case, not predicated upon valid weighing of a legally found subsection (5)(h) aggravating circumstance, was tainted and thus useless to the sentencing process in this case.

4. The tainted jury recommendation precludes review of this death sentence

The review function described in Brown v. Wainwright, supra, which this Court is required to perform is predicated upon a valid jury recommendation. Here the jury's recommendation was tainted beyond permissible bounds by prosecutorial argument upon excluded character evidence, admission and argument regarding non-statutory aggravating circumstances, and erroneous and

misleading jury instructions. Since the trial court presumably afforded this tainted recommendation great weight, review of the imposition of the death sentence is now impossible. This Court must remand for a new sentencing hearing before a new jury.

D. Death Is A Disproportionate Sentence In This Case.

The trial court found as aggravating circumstances subsections (5)(e) and (5)(h) but, despite the presentation of unrefuted expert testimony establishing that at the time of the offense the Defendant was suffering extreme mental or emotional disturbance and that his ability to appreciate the criminality of his conduct and to conform his behavior to law was impaired, the trial court refused to find mitigating subsections (6)(b) and (6)(f). (R. 1045, 1046-9; T. 1407, 1460-1, 1483). It is conceded that subsection (5)(e) was properly found, but the record cannot support the finding that this crime was especially heinous, atrocious or cruel. Moreover, the expert mitigating evidence presented, fully supported by the Defendant's history of childhood hardship and abuse, requires that subsections (6)(b) and (6)(f) be considered.

All homicides are heinous, Lewis v. State, 377 So.2d 640, 646 (Fla. 1980), and atrocious, Tedder v. State, 322 So.2d at 910. But a homicide is only aggravated by subsection (5)(h)

> . . . where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies -- the conscienceless or pitiless crime which is unnecessarily tortuous to the victim.

State v. Dixon, 283 So.2d at 9, (Fla. 1973); Accord: Riley v. State, 366 So.2d at 21.

Applying this rule, this Court has uniformly held that a "spontaneous" shooting, where the victim does not suffer either mental or physical anguish before the accused's act, is not a homicide subscribed by subsection (5)(h). E.g. Armstrong v. State, 399 So.2d 953, 963 (Fla. 1981) (victims surprised by robbery, shot suddenly); Maggard v. State, 399 So.2d 973, 977 (Fla. 1981) (victim shot through window, unaware of accused); Williams v. State, 386 So.2d 538, 543 (Fla. 1980) (victim shot while sleeping). Nor are "execution" killings, provided there is no evidence that the victim suffered from awareness of the Defendant's homicidal intention. E.g. Menendez v. State, 368 So.2d 1278, 1281-2 (Fla. 1979) (insufficient evidence of awareness where only shown that robbery victim might have been in submissive position before shooting); Cooper v. State, 336 So.2d 1133, 1141 (Fla. 1976) (police officer suddenly shot after stopped motorist, fleeing after having committed a robbery, walked to patrol car). Compare: Francois v. State, 407 So.2d 885, 890 (Fla. 1982) and White v. State, 403 So.2d 331, 339 (Fla. 1981) (six robbery victims bound, gaged, and blindfolded, heard accuseds discuss need to kill victims before beginning executions).

Even where the victim does not die immediately and painlessly this Court has still found shootings not especially heinous, atrocious, or cruel if the accused intended nothing more than the victim's death. Lewis v. State, 377 So.2d 640, 646

(Fla. 1980) (accused shot victim several times; as victim fled, shot again); Tedder v. State, 322 So.2d at 910 (accused fled after shooting victim, death four weeks later). See also: Demps v. State, 395 So.2d 501, 506 (Fla. 1981) (subsection (5)(h) not applicable to multiple stabbing where despite victim's brief survival nothing to set accused's conduct apart from norm of capital felonies).[32]

Thus, the critical factor considered by this Court to find a murder especially heinous, atrocious, or cruel arises not from the unintentional suffering following the accused's act of firing a gun, but from the unnecessary and deliberate suffering caused by the accused before the act is completed. Indeed, this Court has repeatedly evaluated the accused's tortuous intent during the homicide before concluding that a killing was "conscienceless or pitiless". See, e.g. Ruffin v. State, 397 So.2d 277 (Fla. 1981). (female victim abducted, driven to secluded area, sexually assaulted, pistol whipped and robbed, then shot to death); Straight v. State, 397 So.2d 903 (Fla. 1981) (victim bound with wire, placed in box, and tormented with hammer and stabbings for approximately half hour before death from the knife wounds); McCrae v. State, 395 So.2d 1145 (Fla. 1980) (victim, a 67 year-old woman, brutally beaten, then thrown on floor, crushing ribs and causing death by asphyxiation; victim raped

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32/ The record reflects that a shooting death accompanied by suffering from a gunshot wound is not set apart from the norm of capital felonies since, as testified to by the medical examiner, half of all trauma victims are multiple gunshot or stabbing victims who live longer and suffer more pain before death than did the victim in this case. (T. 1399, 1400).

either shortly before or after death); Thompson v. State, 389 So.2d 197 (Fla. 1980) (victim beaten with chain belt, sexually abused with chair leg and night stick, tortured with lit cigarettes, beaten again with chair leg, club and belt); Foster v. State, 369 So.2d 928 (Fla. 1979) (accused cut throat of victim, dragged him into undergrowth and left him, then returned and cut his spine); Smith v. State, 365 So.2d 704 (Fla. 1978) (victim forced into trunk of car at knifepoint, driven to secluded location, beaten with a tire iron, then burned to death after car saturated with gasoline and ignited); Hoy v. State, 353 So.2d 826 (Fla. 1977) (accused and accomplice raped young girl in presence of her fiance, then killed him, shot her twice, raped her a second time, and then killed her); Adams v. State, 341 So.2d 765 (Fla. 1976) (victim murdered by beating past the point of submission, body grossly mangled); Henry v. State, 328 So.2d 430 (Fla. 1976) (victim bound and gagged, blunt trauma as well as deep razor cuts inflicted); Gardner v. State, 313 So.2d 675 (Fla. 1975) (victim suffered one hundred bruises, sexual mutilation and massive hemorrhages of head).

Against this array of tortuous homicides the Defendant's conduct of shooting the victim to escape arrest pales in horror as well as legal significance. Indeed, in a past instance of the sudden shooting of a police officer by a stopped motorist, Cooper v. State, 336 So.2d at 1141, this Court concluded that the crime was not especially heinous, atrocious, or cruel.

In Cooper, two robbers fleeing by automobile were stopped by a police officer. As determined by the court at the sentencing

hearing, Cooper walked to the patrol car and shot the officer twice in the head. Reversing the trial court's finding that this conduct satisfied subsection (5)(h), this Court declared:

> While we agree that this execution-type murder may have been unnecessary . . . [the victim] was killed instantly and painlessly, without additional acts which make the killing "heinous" within the statutorily announced "aggravating" circumstance.

336 So.2d at 1140-1 (footnote ommitted, emphasis added).[33]

This case is not distinguished from Cooper by the unfortunate circumstance of the victim's unintentional suffering before death, since, as earlier shown, unintentional suffering from a gunshot wound to the head does not demonstrate a "consienceless or pitiless crime which is unnecessarily tortuous to the victim". State v. Dixon, 283 So.2d at 9. Instead, the Defendant's admittedly premeditated act of firing a single shot at the victim to avoid arrest is, just as in Cooper, confirmation that the Defendant intended nothing more than the sole act which was committed.[34] This crime, then, was not especially heinous,

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33/ See also Fleming v. State, 374 So.2d 954, 959 (Fla. 1979) where this Court held that the shooting of a police officer during a kidnapping victim's rescue attempt to grab the accused's gun was not especially heinous, atrocious or cruel. Also similar to this case is Jacobs v. State, 396 So. 713, 717-8 (Fla. 1981), where the trial judge declined to find subsection (5)(h) for the shooting of a police officer by a stopped motorist attempting to avoid arrest or escaping custody.

34/ While the Defendant's act is considered premeditated, it must be noted that premeditation does not establish an aggravating circumstance under subsection (5)(h). See: Armstrong v. State, 399 So.2d 953, 963 (Fla. 1981); Lewis v. State 398 So.2d 432, 438 (Fla. 1981).

atrocious, or cruel.

The record below, however, does offer unrefuted expert testimony explaining the Defendant's intentional act of shooting the victim. Psychiatric tests performed by two doctors established that consistent with the Defendant's history of childhood abuse and his present high intellect the Defendant suffers from a personality disorder. (T. 1409-10, 1421, 1457, 1459, 1473-5). The personality disorder manifests when the Defendant, faced with stress or trauma, has separation of feelings from his thought process and has much less ability than a normal person to control his behavior. (T. 1423-6, 1421, 1478). Both doctors concluded that during the offense sufficient stress was presented the Defendant so that he was then operating under extreme emotional and mental disturbance and that his ability to conform his conduct to law and appreciate the criminality of his act was impaired. (T. 1407, 1460-1, 1483).

In Huckaby v. State, 343 So.2d at 33-4, this Court held that despite the trial court's refusal to find mitigating subsections (6)(b) and (6)(f), the unrefuted evidence showed that these two circumstances were in fact present. This Court then reduced the death sentence to life because of the "causal relationship between the mitigating and aggravating circumstances". 343 So.2d at 34.

Like Huckaby, the only aggravating circumstance of this case, the commission of the crime to avoid arrest, is the direct consequence of the Defendant's mental state. Just as in Huckaby, the punishment of death is too great a penalty for the state to

impose. Indeed, no death sentence has yet appeared before this Court predicated upon the single aggravating circumstance of avoiding arrest. This aggravating circumstance is not enough to justify the sentence of death upon the Defendant.

CONCLUSION

Based upon the foregoing cases and authorities, the Defendant requests this Court to (1) vacate the adjudication of guilt and remand for new trial, (2) vacate the sentence of death and remand for a new sentencing hearing before a newly impaneled jury, or (3) reduce the sentence of death to life imprisonment.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered to Penny Hershoff, Assistant Attorney General, 401 N.W. Second Avenue, Miami, Florida 33128, by mail on this 22nd day of November, 1982.

Respectfully submitted,

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