IN THE
SUPREME COURT OF FLORIDA

NORMAN PARKER,

Appellant,

vs. CASE NO. 61,512

STATE OF FLORIDA,

Appellee.

ON DIRECT APPEAL FROM
A CONVICTION AND SENTENCE OF DEATH
IN THE CIRCUIT COURT OF THE ELEVENTH
JUDICIAL CIRCUIT, IN AND FOR DADE
COUNTY, FLORIDA

HONORABLE FREDERICKA G. SMITH, CIRCUIT JUDGE

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Appellant, NORMAN PARKER, was a Defendant in criminal proceedings pending in the Eleventh Judicial Circuit of Florida. Appellee, the State of Florida, was the prosecuting authority throughout those proceedings. In this brief the parties are referred to as they appeared before the trial court and by their proper names.

The Record on Appeal consists of 27 volumes of pleadings and transcripts.[1/] The symbol "R" followed by a page number indicates a reference to a portion of the record containing the pleadings, orders, and other documents filed with the clerk of the lower tribunal. The symbol "T" followed by a volume and page number is a reference to a particular portion of the transcript. For example, "T11:1" refers to page one of volume 11, which begins the hearing on the defense motion to suppress statements held January 15, 1980.

[1/] Although the index to the Record on Appeal describes all volumes as being sequentially numbered, Appellant's record is comprised of separately bound and individually numbered volumes. For ease of reference in this brief, all portions of the record are numbered by volume in the order contained in the index, found at the beginning of Volume 1 of the Record on Appeal.

STATEMENT OF THE CASE AND FACTS

(1) Course of Proceedings and Disposition Below.

The Dade County Grand Jury returned an indictment on December 15, 1978, charging NORMAN PARKER and Robbie Lee Manson with the first degree murder of Julio Cesar Chavez, four counts of robbery, involuntary sexual battery, possession of a firearm during the commission of a felony, and possession of a firearm by a convicted felon (R. 1-5a). Thereafter, two superseding indictments were returned which corrected deficiencies in the charging document (R. 6-25a). The final indictment was returned on January 6, 1980 (R. 11-15a). PARKER, through court-appointed counsel, entered a plea of not guilty to the charges and prepared the case for trial.

PARKER's pre-trial motion practice included motions to dismiss (R. 69-70, 71-73a, 78-79a, 162-166a), motion for severance of counts (R. 74-75a), and motions to suppress physical evidence, confessions, and identification (R. 122-123a, 124-125a, 294-295a). Suppression of physical evidence (a firearm) was granted by the trial court (T10:159-160; T11:50).[2/] The court denied the remaining suppression motions. (R. 29-33; T11:49-50).

A trial by jury began on September 9, 1981 (R. 16-17). PARKER proceeded to trial alone because the co-defendant had never been apprehended. A jury was selected on September 11,

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2/ The State of Florida appealed that ruling to the Third District Court of Appeal. The appellate court affirmed the order suppressing the firearm on the basis of an illegal search and seizure. State v. Parker, 399 So.2d 24 (Fla. 3d DCA 1981).

1981 (R. 21-22), and the presentation of the State's case commenced several days later (R. 23-24). During the trial, PARKER renewed his motion for suppression of his statements and related evidence, which was denied (R. 29-33, 294-295a). At the conclusion of the State's case, the trial judge denied the defense motion for judgments of acquittal (R. 34-37). The defense presented numerous witnesses, and PARKER testified in his own behalf (R. 34-37, 38-40). At the close of all the evidence, PARKER renewed his motion for judgments of acquittal, which was again denied (R. 38-40). After deliberations, the jury returned verdicts of guilty as charged (R. 38-40, 397-403).

The penalty phase was held September 21, 1983. Both the prosecution and the defense presented witnesses at this hearing (R. 42-45). The jury recommended that the trial court impose a sentence of death (R. 42-45; T24:90). Based on its findings of fact (R. 443-448), the trial court imposed the death penalty (T25:14-18). PARKER also received consecutive terms of life imprisonment on the four robbery and one sexual battery charges (R. 443-448). Imposition of sentence was suspended with respect to the possession of a firearm offense.

Post-trial motions were denied by the court (R. 434, 437-442a). PARKER was declared insolvent for purposes of appeal, and appellate counsel was duly appointed (R. 450-451, 452, 453). NORMAN PARKER is presently confined within the Florida prison system. This appeal follows.

(2) Factual Recitation.

Julio Cesar Chavez ("Chavez") was killed on the night of July 18, 1978, during the course of a cocaine transaction that led to a drug rip-off. The State accused NORMAN PARKER and Robbie Lee Manson ("Manson") of committing that murder, and formally charged them with premeditated and felony-murder. PARKER denied all involvement in the murder or the events surrounding the murder. He contended that Manson was the person responsible for the killing. Manson was never arrested on the charges and consequently was never brought to trial. PARKER's trial, however, resulted in guilty verdicts of first-degree murder, four counts of robbery, sexual battery, and possession of a firearm during a felony. He received a sentence of death.

This case begins with the story of three friends, David Ortigoza, Luis Diaz, and Chavez, who resided in a home in northwest Miami, Dade County, Florida (T16:58-59). All three men were in their early thirties, and employed in various capacities (T16:59; T17:332-333; T18:449). As an illegal side business, the three sold quantities of cocaine in order to earn additional money (T16:60, 109; T17:336, 395). Robbie Lee Manson was a regular customer of the sales group, and had been buying small quantities of cocaine from the trio for approximately six months (T16:60; T17:336).

On July 18, 1978, Manson inquired about purchasing thirteen ounces of cocaine from Ortigoza (T16:62; T17:336). That afternoon, Ortigoza and Chavez met Manson for the purpose of exchanging a sample of cocaine (T16:62-64). Arrangements were

made to complete that transaction later that same day at a designated location, but Manson failed to appear as agreed (T16:62-63; T17:340-341). Manson finally contacted Ortigoza by telephone and apologized for his non-appearance (T16:64). Ortigoza and Manson then agreed to complete the sale at Ortigoza's home that night (T16:64; T17:341).

Shortly before Manson was expected to arrive, Silvia Arana, the girlfriend of Julio Chavez, came to the house (T16:64; T17:341; T18:451). The two had been having personal troubles, so they retired into Chavez' back bedroom, where they talked and watched television (T16:64; T17:341; T18:453). Meanwhile, Manson and his "partner", a man who was not known previously to any of the trio,[3/] arrived to complete the deal (T16:64; T17:341-345). As the cocaine was produced and preliminary discussions concerning price commenced, Manson's "partner" produced a sawed off shotgun and demanded the cocaine and money (T16:64-71; T17:345).[4/] Manson held a chrome plated revolver (T16:64-71; T17:345).

Manson and his partner ordered Ortigoza and Diaz to strip and lay naked on the waterbed (T16:71; T17:346). Both men were ordered to remove their jewelry, which they did (T17:346). In response to a question from either Manson or his partner, Ortigoza replied that Chavez and Silvia were in another bedroom (T16:71-76). One of the assailants then left the room to find

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3/ PARKER was identified at trial as this person (T16:71).

4/ Both Manson and his "partner" were black males. The victims were white.

Parker

the other two (T16:71-76). Silvia and Chavez were told, at gunpoint, to exit the room. In the hallway, both Silvia and Chavez took off their clothes, and then entered the same room as the others (T18:454-455). Chavez initially asked the assailants to leave Silvia alone (T18:455).[5/] The partner removed gold chains from the victims (T18:455) and ordered them to lie face down on the bed (T16:76; T17:348; T18:455-459). Manson and his accomplice exchanged guns. The partner threatened to kill the victims (T16:76), adding that he had escaped and had nothing to lose (T16:76-78; T17:350). The victims asked to be left alone and said that the assailants could take anything they wanted (T16:76-78). Manson proceeded to ransack the house while the partner stood guard (T16:78).

During one of Manson's trips back into the bedroom, the partner pointed the revolver at Chavez (T16:78-80). Manson handed a pillow to his partner, who proceeded to shoot Chavez. The victims heard only a muffled shot (T16:78-81; T17:350; T18:460). After that, no one heard Chavez make a sound (T16:78-81).[6/] Manson's partner then ordered Silvia off the bed and sexually assaulted her (T16:79-81; T18:460-464), by putting his penis in her mouth (T18:464), and then penetrating her vagina with his penis and fingers (T18:467-469). Silvia noticed that

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[5/] The trial testimony of Diaz and Ortigoza was that Chavez was relatively quiet throughout the episode, while Silvia stated that Chavez kept pleading to leave her (Silvia) alone (T18:459).

[6/] The medical examiner, Dr. Charles Wetli, was of the opinion that Chavez died from a single gunshot wound to the chest, and was likely not in any pain at the time of death (T17:263, 272-273).

her assailant had "green eyes" and a fu manchu moustache (T18:467, 504).[7] During the assault, the perpetrator urinated on the bedroom rug (T17:351). Throughout this activity, neither Manson nor his partner wore gloves (T18:505).

Hearing the sound of a car engine, the partner told the victims to count to 500 before moving (T16:83; T18:469-473). The assailants then left the house (T16:83; T17:353-360; T18:474). After a short passage of time, Diaz ran to his mother's nearby home to call the police (T16:84). The phones in his house had been ripped out by the assailants (T16:84). Silvia ran to a neighbor's house to report the shooting (T18:476). Jewelry, camera equipment, and money had been taken from the premises (T16:87-88).

Officer Boyd Gans of the Metro Dade Police Department responded to the scene at eleven o'clock that night (T16:45-48). From the dispatch and his own view of the scene, Gans was of the belief that a robbery had taken place (T16:51). Photographs of the residence were taken and the house was processed for fingerprints (T16:192-200). No latent prints retrieved from the scene matched PARKER's fingerprints (T17:232). Silvia Arana refused police requests to go to the Rape Treatment Center (T17:258). She did go to the center the next day, but was accompanied by her attorney (T22:1057).

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[7] She identified her assailant as NORMAN PARKER at trial (T18:467). Luis Diaz testified that the assailant had a goatee (T17:353).

Chavez, unconscious but alive when the police arrived, was taken by ambulance to Parkway General Hospital (T17:256). Dr. Jose Font operated on Chavez and removed a bullet from his chest (T19:585-590), handing the bullet to a homicide detective (Pontigo) (T19:605).[8/] Chavez' death was hastened by the emergency first aid assistance provided at the scene (T17:271).

Meanwhile, police officers interviewed the victims to uncover additional facts about the case. Each victim stated that there had been an armed burglary by two unknown assailants (T16:88). Neither the drug transaction nor Manson's identity were revealed (T16:88-90; T17:369). Only the next day after Luis Diaz was compelled to take a polygraph test - and revealed to be lying by the polygraph operator (T18:444) - did Diaz and Ortigoza say that they had in fact been attempting to sell cocaine at the time of the rip-off and that they knew Manson's identity (T16:90-93, 179-181; T17:385-389).

Diaz, Ortigoza, and Silvia were able to identify Manson through a photographic display (T16:91-93; T17:373; T18:483-485). In August 1978, the victims were shown a picture of NORMAN PARKER which had been taken at least eleven years earlier (T16:94; T17:280-286, 373, 426). Even though the photo was so old, the victims identified the picture as Manson's co-perpetrator. Ortigoza was of the view that the photograph looked exactly like PARKER did on the night of the incident (T16:171).

[8/] Pontigo did not testify at trial. Although Pontigo was available (T19:731), the State decided not to use him as a witness because at the time of trial he was a defendant in a pending federal racketeering indictment (T20:783). During questioning at a defense deposition, Pontigo continually invoked his privilege against self-incrimination.

James Greenwell, a police officer in Washington, D.C., was responsible for investigating the shooting of Thomas Spriggs in D.C. (T19:613-619). On August 24, 1978, Greenwell arrested NORMAN PARKER for the Spriggs shooting (T19:619).[9] During the evidence collecting phase of that investigation, two bullets were retrieved from Spriggs' body (T19:630) and retained by Bancroft Miller as evidence (T19:636). One of these bullets was eventually obtained by Criminalist Robert Hart of the Metro Dade Police Department on January 15, 1980, for use in the Chavez murder investigation (T19:651-653, 748, 760). Hart compared the "Spriggs bullet" with a bullet believed by him to have been taken from the Chavez body, and determined that they were fired from the same firearm (T20:780).[10]

Officer Robert Sharkey of the Washington, D.C. police force interrogated PARKER with reference to the Spriggs homicide in the early morning hours of August 24, 1978 (T19:733-734). PARKER, who had just been released from the hospital (T19:745), admitted that he shot Spriggs (T19:736). During processing and booking Sharkey took PARKER's photograph (T19:740).[11]

On August 28, 1978, Detectives Al Lopez and lead investigator George Pontigo of the Metro Dade Police Department

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[9] At the time of the arrest, PARKER was known as Shawn Vincent (T19:622). PARKER turned himself in to the police after the shooting (T19:671).

[10] PARKER vigorously challenged the introduction of both bullets and Hart's conclusion on numerous grounds, including relevancy and chain of custody. (T19:634, 655-656, 786-810).

[11] Officer Sharkey knew PARKER by the aliases of Vincent and Miller (T19:740).

travelled to Washington, D.C. to interview NORMAN PARKER (T17:292-293). They were introduced to PARKER by Officer Greenwell (T17:294). During the interview, Lopez noticed that PARKER was wearing a Cartier watch and gold chains similar to those taken during the Chavez murder (T17:295). PARKER, explaining that he received the property as a gift from his girlfriend, allowed the police to take custody of the jewelry (T17:323). PARKER also told the police that he had been staying in Jacksonville, Florida prior to his June arrival in Washington (T17:323).[12/] The Cartier watch and two chains were identified by Ortigoza as resembling his jewelry taken during the homicide (T16:94-97), despite the fact that they were in all respects nondescript (T16:167).

During the trial, the State was permitted to request that NORMAN PARKER stand before the jury so that the "jury may view his eyes" (T21:893). After presenting this evidence, the State rested its case (T21:894).

The defense then presented witnesses who established that NORMAN PARKER could not have been involved in the Chavez murder because he was in Washington, D.C. at the time the shooting took place. Wendell Harrington, the man who managed Harrington's Lounge in Washington, D.C. (T21:895-896), knew PARKER as a regular customer. Between April and August 1978, PARKER routinely appeared at the club (T21:898-900). Earlene

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12/ In a pre-trial motion to suppress, PARKER challenged the admissibility of these statements and the accompanying evidence (T11:1). This motion was denied (T11:49).

Smith, an administrative assistant at the University of the District of Columbia (T21:902), also knew PARKER as being a Harrington's regular (T21:903-907). Although she could not recall specific dates, she did recollect that PARKER was seen at the club at least once every week throughout the summer of 1978 (T21:907-911).

Diane Dancy was a close friend of NORMAN PARKER until the time of his arrest (T22:912, 916). She was with PARKER almost daily during the summer months of 1978, and was certain that PARKER never left the District of Columbia during that time (T21:917). In July 1978, PARKER introduced her to Manson, who had recently come into town (T21:918-919). At that time, Manson gave PARKER a gold chain (T21:931-932).

Marilyn Walker also knew PARKER, and believed that he was in Washington on July 18, 1978, at Jan Peterson's house (T21:1004-1006). Walker spoke almost daily with Jan Peterson by telephone during the summer months, and routinely heard PARKER talking in the background (T21:1009).

Arnicia Donaldson Williams, an employee of the United States Navy in Washington, D.C., in a capacity requiring her to have "top secret" military clearance (T22:1015-1016), first met PARKER on July 16, 1978, in Washington, D.C., through Spriggs (T22:1019).

NORMAN PARKER testified in his own defense (T22:1067). He was not in Dade County during July 1978 and had no complicity in the Chavez homicide (T22:1071, 1077). He had first met Manson in early 1978; the two lived together, selling

small amounts of controlled substances (T22:1069). In April, PARKER moved to Jacksonville, Florida and then on to Washington, D.C. in May (T22:1070), where he stayed the whole summer (T22:1071). Manson, running from some sort of trouble, arrived in Washington in July or August (T22:1071-1073). Needing money, Manson gave PARKER a pouch containing a calculator, a watch, gold chains, and a pistol in exchange for cash (T22:1073). Manson left Washington after staying with PARKER for one week (T22:1073-1074). The old photograph used by the victims to identify him was taken when he was about 15 years old (T22:1077-1078). PARKER has always had brown eyes, not green ones (T22:1093).

At this point in the trial, the defense rested its case (T23:1206). The jury subsequently returned guilty verdicts on all charges (T23:1339).

During the penalty phase proceedings, the State established that PARKER was convicted of second-degree murder in the Spriggs shooting (T24:14-17). PARKER also had a prior Florida murder conviction (R. 408-411; T24:28-32).

The jury subsequently recommended imposition of the death penalty (T25:14) and the court agreed. In her sentencing order, the court found the existence of five aggravating factors, to wit: (1) PARKER was under a sentence of imprisonment; (2) PARKER was previously convicted of first-degree murder and second-degree murder; (3) PARKER committed the capital felony while engaged in armed robbery and sexual battery; (4) PARKER committed the murder for financial gain; and (5) PARKER committed the murder in a cold, calculated and premeditated manner (R. 443-

446). The court found no evidence of any mitigating circumstances (R. 446).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I

WHETHER THE DEFENDANT WAS DENIED HIS FLORIDA AND FEDERAL CONSTITUTIONAL RIGHTS GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS WHERE THE COURT FAILED TO SUPPRESS STATEMENTS OBTAINED BY INTERROGATING OFFICERS IN VIOLATION OF THE DEFENDANT'S INVOCATION OF HIS RIGHTS TO COUNSEL AND SILENCE AND WHERE THE STATEMENTS WERE INVOLUNTARY?

II

WHETHER THE DEFENDANT WAS DENIED HIS RIGHT TO A FAIR TRIAL, DUE PROCESS AND A JURY CONSTITUTED FROM A FAIR CROSS SECTION OF THE COMMUNITY AS GUARANTEED BY THE FLORIDA AND FEDERAL CONSTITUTIONS?

III

WHETHER THE TRIAL COURT ERRED IN REFUSING THE DEFENSE REQUEST FOR ADDITIONAL PEREMPTORY CHALLENGES AND PROHIBITING THE DEFENSE FROM EXERCISING A REQUESTED CHALLENGE AFTER TEN HAD BEEN USED?

IV

WHETHER THE TRIAL COURT ERRED IN PERMITTING THE PROSECUTION TO INTRODUCE THE DEFENDANT'S STATEMENT AS TO THE WASHINGTON, D.C. SHOOTING WHEN AN INDEPENDENT CORPUS DELICTI HAD NOT BEEN ESTABLISHED?

V

WHETHER THE CIRCUMSTANTIAL EVIDENCE WAS INSUFFICIENT TO SUSTAIN THE GUILTY VERDICTS WHERE THERE WAS A TOTAL ABSENCE OF SUBSTANTIAL, COMPETENT EVIDENCE THAT THE DEFENDANT PARTICIPATED IN ANY OF THE CHARGED OFFENSES?

VI

WHETHER THE ADMISSION OF EVIDENCE CONCERNING THE DEFENDANT'S USE OF OTHER NAMES IMPROPERLY SUGGESTED THAT HE WAS A CRIMINAL AND CONSEQUENTLY DEPRIVED HIM OF A FAIR TRIAL?

VII

WHETHER THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTION TO INTRODUCE INTO EVIDENCE SEVERAL PHYSICAL ITEMS IN THE ABSENCE OF A SUFFICIENT PREDICATE FOR INTRODUCTION WHERE THERE EXISTED A SUBSTANTIAL QUESTION AS TO RELEVANCY AND AUTHENTICITY?

VIII

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

SUMMARY OF THE ARGUMENT

1. NORMAN PARKER's statements were extracted from him while he was in custody and denied the right to counsel. Despite his unequivocal request that his court-appointed attorney attend the interrogation, the police failed to comply with the request and instead suggested reasons why counsel's appearance was unnecessary. Instead of immediately terminating the interrogation, the police began to question PARKER, eliciting

statements which were later used against him at trial and seizing evidence which was used by the prosecution to prove the charged crimes.

PARKER's subsequent confession, which was obtained upon a waiver of his constitutional rights, was nevertheless involuntary and not freely made. PARKER was in no condition to exercise his own free will in that he was suffering from serious injury. Moreover, his statement was the product of an illegal seizure of a firearm. Under the circumstances, PARKER's only path appeared to be that of submitting to the police. It is unconstitutional for the prosecution to benefit from the compulsion.

2. The Defendant's jury pool did not represent a fair cross-section of the community. The mandatory exclusion of mothers with children under fifteen years of age deprived the Defendant of access to a recognizable segment of the populace.

3. The trial judge, in her haste to move the trial along, repeatedly refused the defense request for additional peremptory challenges. PARKER was limited to ten. He exercised those challenges and even had to use peremptory challenges in situations where jurors should have been dismissed for cause. This was a serious case. Not only was the Defendant facing the death penalty, he was also facing a number of other charges. The trial court's less than detailed consideration of the reasonable requests for a limited number of additional challenges was an abuse of discretion.

4. A key piece of evidence introduced against the Defendant was his confession to the Washington, D.C. shooting. This confession was admitted in the absence of any proof of the corpus delicti of that crime. The prosecution did not even attempt to make such a preliminary showing. PARKER cannot be convicted by reason of his admission to the Spriggs shooting.

5. The prosecution's case was too weak to support the guilty verdicts. Apart from the in-court identification of PARKER as the perpetrator of the charged offenses, the remainder of the evidence was circumstantial and not inconsistent with the asserted hypothesis of innocence. The identification testimony was suspect in that the various witnesses' descriptions conflicted and the identification was based on a photograph which pictured the Defendant as a juvenile. The defense proved that he could not have committed the charged crimes. Not only is the evidence insufficient, but it also establishes PARKER's innocence.

6. As a tactic during its case-in-chief, the prosecution insisted on revealing to the jury the fact that the Defendant used assumed names when he was arrested for other criminal activity. The only reason for such evidence was to unfairly portray the Defendant as a "criminal type" in the jurors' minds. The evidence was not otherwise relevant for any purpose. Because of the seriousness of this error, the Defendant is entitled to a new trial.

7. The trial court committed reversible error in allowing the prosecution to introduce into evidence a projectile

and several accompanying documents under the guise that they were correctly identified as relating to the homicide for which PARKER was on trial. Because this evidence was not shown to be the same items allegedly removed from the decedent, PARKER was placed in a position of having to defend himself against potentially fabricated evidence. There were sufficient indications at trial that the evidence may have been "made" by Det. Pontigo, the lead investigator who was then under a federal indictment for participation in conspiratorial activities designed to "rip off" unsuspecting drug dealers. PARKER should not be made to suffer while Det. Pontigo's actions in this case go unchecked.

8. The jury's advisory recommendation, which was effectuated by the court's imposition of a death sentence, was defective in that it was based on improper arguments of the prosecutor and inadequate instructions to the jury. In the absence of a vaild jury recommendation, the court's sentence cannot stand. Moreover, death is a disproportionate penalty in this case.

ARGUMENT

POINT I

THE DEFENDANT WAS DENIED HIS FLORIDA AND FEDERAL CONSTITUTIONAL RIGHTS GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS WHERE THE COURT FAILED TO SUPPRESS STATEMENTS OBTAINED BY INTERROGATING OFFICERS IN VIOLATION OF THE DEFENDANT'S INVOCATION OF HIS RIGHTS TO COUNSEL AND SILENCE AND WHERE THE STATEMENTS WERE INVOLUNTARY.

Prior to and during the course of the trial, NORMAN PARKER sought to suppress two series of statements made by him to law enforcement officers while he was in custody in Washington, D.C. (R. 29-33, 122-123a, 294-295a; T19:659). PARKER challenged the statements given to officers of the Metro-Dade Police Department on the grounds that they were obtained in violation of his rights to counsel and silence (T11:3-50). PARKER challenged a separate interrogation conducted by Officer Robert Sharkey of the Washington, D.C. police department for the reason that his statements were not freely and voluntarily given (T19:659-707).[13/] Because PARKER did in fact invoke his right to counsel in connection with the first statement and because the second statement was involuntary, the trial court erred in admitting both statements into evidence.

13/ The Defendant was denied an opportunity by the trial court to challenge the legality of the arrest which led to this interrogation. The Court's ruling permitted PARKER only to challenge the voluntariness of the statement, concluding that any other suppression ground was untimely (T19:569-574). We submit that the court's limitation alone was error.

A. Statement To Metro-Dade Police Department.

On August 29, 1978, Metro-Dade Police Officers George Pontigo and A. Lopez conducted an investigation of NORMAN PARKER in Washington, D.C. by arranging an interview with PARKER, who was then in the custody of the District of Columbia Police (T11:5-6). The interrogation, which took place at 11:20 p.m. at the office of the United States Attorney in Washington, D.C., was attended by the Dade County officers, Detective Greenwell of the Washington D.C. police, and the Defendant (T11:6-7). According to Det. Pontigo, PARKER acknowledged his rights, and stated at that time that he did not desire his attorney's presence if the questioning did not involve the Washington case (T11:9). PARKER then denied being involved in the Chavez homicide, admitted escaping from prison in Dade County, spoke of his travels since his escape, and advised that a girlfriend had given him the jewelry he was wearing. He also denied knowing Manson (T11:9-12). Upon request, PARKER permitted the police to take custody of his jewelry. Pontigo knew that PARKER was then being represented by Washington attorney William Blair who had been appointed in the Washington matter (T11:16-17). Pontigo did not summon Blair, or even obtain permission from the attorney to interview PARKER.

PARKER admitted being interviewed by Pontigo and Lopez, but specifically stated that prior to the time he entered the interrogation room he asked that Det. Greenwell summon his court-appointed attorney, William Blair (T11:22-24). Greenwell refused to do so, advising that the questioning was only related to the

escape charge and therefore no attorney was needed. In the absence of counsel, PARKER signed the Miranda form only because his lawyer was not brought and because he was promised by the officers that they would only question him about the escape charge (T11:25, 28-32). No witness contested the fact that PARKER had requested counsel.

B. Statement To Detective Sharkey.

In the early morning hours of August 24, 1978, Detective Robert Sharkey of the Washington, D.C. Police Department interviewed NORMAN PARKER concerning the Spriggs shooting (T19:660-662). PARKER had just been released from the hospital where he had been treated for facial injuries resulting from the Spriggs shooting (T11:662). PARKER, who was under arrest for the Spriggs shooting, was advised of his constitutional rights (T11:664-665); he then admitted that he shot Spriggs in self-defense (T11:668, 671-678). Sharkey testified that he never threatened PARKER or promised him anything (T11:665).

PARKER testified that he had been injured in a brawl with Spriggs, and had received medical attention immediately prior to his interrogation (T11:692-695). He was in serious pain (T11:697). Although he did receive Miranda warnings, Sharkey additionally advised him that it would be best for him to explain the shooting to the police (T11:692).

C. Constitutional Requirements For Custodial Interrogation Were Violated.

In Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602 (1966), the Supreme Court recognized that custodial interrogations were inherently compulsive and 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. Accordingly, the Court held that "an individual held for interrogation must be clearly informed 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). E.g., Tague v. Louisiana,

444 U.S. 469, 470, 100 S.Ct. 652, 653 (1980); State v. Craig, 237 So.2d 737, 740-41 (Fla. 1970); Cason v. State, 373 So.2d 372, 375 (Fla. 2d DCA 1979).

The waiver issue 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, 99 S.Ct. 1755, 1757 (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 by Detectives Lopez and Pontigo cannot support any finding that PARKER knowingly and intelligently waived his rights to counsel and silence. Indeed, the evidence is unrebutted that NORMAN PARKER had counsel for the Washington case (the only offense for which he was then incarcerated), that the Dade County investigators knew of the existence of this court-appointed counsel, that PARKER specifically and unequivocally asked Det. Greenwell to summon his counsel prior the commencement of any questioning, that Det. Greenwell did not do so but instead told PARKER to go ahead with the questioning,[14/] and that PARKER only then executed a waiver of his rights upon a belief he could not have counsel and that the interrogation would be limited to the Dade County escape investigation (T11:5-40). This evidence was

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14/ Det. Greenwell did not testify at the suppression hearing.

undisputed.

Before analyzing the specific circumstances of this case, it is essential to recognize that the constitutional principles require law enforcement officers to "scrupulously honor" an accused's desire to cut off custodial interrogation. Michigan v. Mosley, 423 U.S. 96, 104, 96 S.Ct. 321 (1975); Witt v. State, 342 So.2d 497, 500 (Fla. 1977). This requirement applies whether the accused invokes his right to remain silent or to confer with counsel. Edwards v. Arizona, 451 U.S. 477, 484-485, 101 S.Ct. 1880, 1885 (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). 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 affords 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 persons's Fifth Amendment

privilege so long as they do not question him." Miranda, 384 U.S. at 474; see also United States v. Massey, 550 F.2d 300, 307-308 (5th Cir. 1977); Biddy v. Diamond, 516 F.2d 118, 122-123 (5th Cir. 1975), cert. denied, 425 U.S. 950, 96 S.Ct. 1724 (1976); United States v. Priest, 409 F.2d 491, 493 (5th Cir. 1969). Once a desire for counsel is made in any manner, a rigid ban on further interrogation applies. Edwards v. Arizona, 451 U.S. at 484-485.

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 terminated. 451 U.S. at 479. However, the defendant was interrogated by two other officers 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 has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.

451 U.S. at 484-485 (citation and footnotes omitted, emphasis added). Accord Harris v. State, 396 So.2d 1180, 1181 (Fla. 4th DCA 1981). Thus, in any situation wherein a defendant invokes his right to counsel, all subsequent interrogation and related activity not initiated by the defendant must be suppressed.

To invoke the right to counsel, an individual in custody need not say "I want a lawyer"; Miranda makes clear that interrogation must cease if the person "indicates in any manner...that he wishes to consult with an attorney." 384 U.S. 444-445. 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 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 omitted). 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 PARKER invoked his right to counsel when he requested that Det. Greenwell summon his lawyer, William Blair. Instead of immediately doing just that, Det. Greenwell attempted to, and did, persuade the Defendant to at least commence the interview with the Florida police officers by (falsely) telling him that the questioning would only relate to the escape charge. There is no doubt that Greenwell knew of this request and that PARKER did not initiate any further activity. The focus under Edwards, whether the accused had "invoked his right to have counsel present during custodial interrogation," was adequately met. 451 U.S. at 484. Whether Det. Greenwell subjectively interpreted PARKER's response in an ambiguous fashion is irrelevant. See White v. Finkbeiner, 611 F.2d 186, 189 (7th Cir. 1979)(officer's subjective interpretation of ambiguity in accused's request for counsel rejected). PARKER did request counsel and the presence of counsel was not forthcoming. Because PARKER requested counsel and did not initiate the further inquiry, his later waiver of rights has absolutely no effect on this issue. Edwards, supra; see Wyrick v. Fields, __ U.S. __, 103 S.Ct. 394 (1982)(only if accused initiated questioning will later waiver be deemed effective).

Lest there be any doubt, the "totality of the circumstances" surrounding the interrogation conclusively establishes that the Defendant made a request for counsel. Fare v. Michael C., 442 U.S. 707, 725, 99 S.Ct. 2560 (1979). Relevant circumstances in reaching this conclusion include the accused's statements regarding his desire for counsel at times other than

when the purported waiver occurred. 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 later interrogation, the Fifth Circuit concluded that it must consider the accused's subsequent waiver of counsel made to police to resolve the colloguy's ambiguity. 623 F.2d 939.

Here, the record establishes that PARKER had received the services of court-appointed counsel (T11:16-17) and specifically requested Mr. Blair's presence at the Pontigo-Lopez interview.[15/] Even Det. Pontigo admitted that during the ensuing questioning PARKER requested counsel (T11:12-15). At that point, having seized physical evidence, the police were satisfied with the progress of their investigation so they terminated the interrogation. The interview should never have gone that far. Det. Greenwell should have immediately maintained the status quo, kept PARKER apart from the officers, and sought out the lawyer.

15/ White it may be urged that PARKER's statements are self-serving, there is not one iota of evidence which contradicts it. Any attempt to suggest that PARKER should have renewed his request for counsel with Pontigo or Lopez is unpersuasive. That activity occurred after the fact of PARKER's invocation.

The failure to do so dooms consideration of PARKER's statements and all related evidence. Because the Defendant did not himself initiate the questioning which followed, the purported waiver is involuntary and invalid. Cribbs v. State, 378 So.2d 316, 319 (Fla. 1st DCA 1980). See also Jones v. State, 346 So.2d 639 (Fla. 2d DCA 1977). The interrogation which followed was clearly designed to "elicit an incriminating response from" PARKER. Rhode Island v. Innis, 441 U.S. 291, 300, 100 S.Ct. 1682 (1980); State v. Echevarria, 422 So.2d 53, 54 (Fla. 3d DCA 1982).

The conduct here cannot be excused on the basis that the request for counsel was made to officers other than Pontigo and Lopez. The knowledge of PARKER's request for counsel is imputed to the later interrogators. E.g., Silling v. State, 414 So.2d 1182 (Fla. 1st DCA 1982)(accused's request for counsel to first officer need not be repeated to a second officer); United States ex rel. Karr v. Wolff, 556 F.Supp. 760 (N.D. Ill. 1983) (Fifth Amendment right to counsel violated when defendant questioned about an offense in one jurisdiction after having twice asserted a right to counsel incident to offense in another jurisdiction).16/

PARKER was denied his right to the presence of counsel at a critical stage of the criminal process. E.g., Brewer v.

16/ Because PARKER was represented by counsel in the D.C. offense, we submit that any questioning without permission of that counsel violates the legal tenets set out by the Court in Massiah v. United States, 377 U.S. 201, 84 S.Ct. 1199 (1964). Once an accused is represented by counsel, the attorney must be present in order to validate any waiver. People v. Bell, 430 N.Y.S.2d 43, 407 N.E.2d 1340 (1980). See also White v. Finkbeiner (White III), 687 F.2d 885 (7th Cir. 1982).

Williams, 430 U.S. 398, 97 S.Ct. 1232 (1977). The oral statements and related physical evidence which directly resulted from the interrogation were unconstitutionally used against him at trial.[17] The effect of this evidence was damning to PARKER's case. The record supports no conclusion other than that the Defendant's rights were not "scrupulously honored." The evidence should have been suppressed. A reversal is required.

D. The Statement To Washington, D.C. Police Was Involuntary.

Before an accused's custodial statements can be admitted into evidence, the prosecution must prove by a preponderance of the evidence that the statements were freely and voluntarily made with full knowledge of the rights guaranteed by the constitution. E.g., Miranda v. Arizona, supra; Ross v. State, 386 So.2d 1191 (Fla. 1980); Brewer v. State, 386 So.2d 232 (Fla. 1980). In determining whether statements meet this standard for admissibility, the "totality of the circumstances" must assessed. Edwards v. Arizona, 451 U.S. at 486, 101 S.Ct. at 1885; Brewer v. State, supra ; Ross v. State, supra; Postell v. State, 383 So.2d 1159 (Fla. 3d DCA 1980).

PARKER's admission to Officer Sharkey that he shot Spriggs[18] (T19:659-700) did not meet this constitutional

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[17] Because the officers' acquisition of the jewelry was a direct outgrowth of the illegal interrogation, the physical evidence was unlawfully seized. Consent which is extracted in violation of the right to counsel is invalid. Hall v. Iowa, 705 F.2d 283 (8th Cir. 1983); United States v. McCraney, 705 F.2d 449 (5th Cir. 1983)(unpublished opinion).

(fn.cont.)

standard. Although PARKER had first been warned of his Miranda safeguards, the attendant circumstances of the situation reveal that he did not knowingly and intelligently waive those rights. At the time of this interrogation, which took place at two o'clock the morning following the shooting, PARKER had just been transported from the hospital where he had been treated for facial injuries incurred in a fight with the decedent (T19:662-663, 692). PARKER was in pain from the beating he suffered during the brawl (T19:697). PARKER, moreover, gave a statement only because he had been advised that giving a statement was in his best interests. (T19:692-695). He was, under those conditions, not capable of knowingly exercising his free will.

When a suspect is suffering from a physical disability, regardless of its cause, the voluntariness of statements made by the suspect is brought into question. The Supreme Court has held that suspects who were ill or had suffered injury were incapable of making voluntary confessions. Mincey v. Arizona, 437 U.S. 385, 98 S.Ct. 2408 (1978) (accused in pain from bullet wound, had tube down his throat, and was under sedation); Beecher v. Alabama (II), 408 U.S. 234, 92 S.Ct. 2282 (1972) (defendant wounded and sedated with morphine); Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774 (1964) (defendant suffering from a bullet wound); Cannady v. State, 427 So.2d 723 (Fla. 1983)(confession inadmissible where accused lacked capacity to exercise free will or fully appreciate

18/ The admission of this statement was detrimental to PARKER's defense. This was the key piece of circumstantial evidence connecting PARKER to the Chavez shooting through scientific comparison of the bullet removed from Spriggs with the bullet used to kill Chavez.

significance of statements because of influence of drugs). In PARKER's case, he had suffered a beating at the hands of the decedent, he was in pain and showed evidence of facial injuries, he had just been released from the hospital where he had received medical treatment, and had been in custody for nearly four hours. The police were of the view that PARKER may have acted in self-defense, and advised PARKER that giving a statement was in his best interests. PARKER clearly did not understand his rights and simply felt compelled to cooperate with the police. See Coningh v. State, ____ So.2d ____ (Fla. 1983)(1983 FLW 153). Under these circumstances, it cannot be said that PARKER's admission was voluntary.

E. The Statement To Washington, D.C. Police Was The Product Of An Illegal Seizure.[19]

The exclusionary remedy of the United States and Florida constitutions for illegal seizures extends not only to the direct product of the illegality, the primary evidence, but also the indirect product of the seizure, the derivative evidence. Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407 (1963). Such derivative evidence includes verbal statements of

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19/ Circuit Judge Smith refused to allow PARKER to raise this issue as a ground for suppression, reasoning that it was untimely to do so at the time of trial (T19:569). Defense counsel proffered that the State had never advised that the Washington statement, which involved a completely different and unrelated crime, would be used as evidence (T18:546-557; T19:700-703). A review of the record shows that the State originally never intended to use the Washington statement until the appellate court affirmed suppression of the firearm. PARKER should have been entitled to fully present this issue.

an accused which are the result of exploitation of the illegal search or seizure. E.g., United States v. Gillespie, 650 F.2d 127 (7th Cir. 1981); Ruiz v. Craven, 425 F.2d 235 (9th Cir. 1970) (confession concerning heroin found during illegal search); Amdor-Gonzalez v. United States, 391 F.2d 308 (5th Cir. 1968) (confession as to heroin found in illegal vehicle search); United States v. Nikrasch, 367 F.2d 740 (7th Cir. 1966) (confession after illegal search of car showed serial number substitution); Hart v. Commonwealth, 221 Va. 238, 269 S.E.2d 806 (1980) (defendant confronted with lab results on illegal search of clothing; confession exploited by search). As explained by the Illinois court in People v. Robbins, 54 Ill.App.3d 298, 369 N.E.2d 577 (1977):

> Confronting a suspect with illegally seized evidence tends to induce a confession by demonstrating the futility of remaining silent.

The giving of Miranda warnings does not break the causal chain between the illegal seizure of the firearm and PARKER's custodial admission. As stated in People v. Johnson, 75 Cal.Rptr. 401, 450 P.2d 865 (1969):

> There is little, if any reason, to assume that the Miranda warning neutralizes the inducement to confess furnished by the confrontation of the defendant with the illegally obtained evidence which shows his guilt and the futility of remaining silent. If Miranda warnings were held to insulate from the exclusionary rule confessions induced by unlawfully obtained evidence, the police would be encouraged to make illegal searches in the hope of obtaining confessions after Miranda warnings even though the actual evidence seized might later be found inadmissible.... To so hold would result

> in the Miranda warnings - intended to protect the defendant's rights to counsel and to remain silent ... and to prevent exploitive police practice ... - becoming the instrument of a bootstrap operation to insulate unlawful police activities from the effects of the exclusionary rule.

As in Johnson, Officer Sharkey here did not advise PARKER that the evidence which had been previously obtained had been seized illegally and would be inadmissible at trial. PARKER at no time exercised an act of free will sufficient to purge the taint of the illegal seizure. Because of this direct connection, the statement must be suppressed as the unlawful fruit of the unconstitutional seizure.[20]

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[20] While the Defendant did not present this position to the trial judge in a pre-trial suppression motion, he did vigorously object as soon as the situation was raised during the trial. Once improper Fifth Amendment evidence is admitted over a contemporaneous objection, reversible error results without consideration of the harmless error doctrine. See Roban v. State, 384 So.2d 683 (Fla. 4th DCA 1980). Here, the trial court was obligated to conduct a hearing to determine the voluntariness of the confession. Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774 (1964). That PARKER's statement is the direct product of the illegal seizure is an aspect of voluntariness that should have been considered by the court. Moreover, as contemplated by Fla.R.Crim.P. 3.190(i)(2), PARKER was absolutely entitled to a hearing on this aspect of the confession because defense counsel was not aware of the issue prior to trial. The trial court abused its discretion and denied PARKER due process by its refusal to consider this ground. See Davis v. State, 226 So.2d 257 (Fla. 2d DCA 1969). At a minimum, the Defendant is entitled to a remand in order to be able to fully explore and present this claim.

POINT II

THE DEFENDANT WAS DENIED HIS RIGHT TO A FAIR TRIAL, DUE PROCESS AND A JURY CONSTITUTED FROM A FAIR CROSS SECTION OF THE COMMUNITY AS GUARANTEED BY THE FLORIDA AND FEDERAL CONSTITUTIONS.

Prior to trial, the Defendant filed a formal challenge to the panel of prospective jurors contending, among other grounds, that the statutorily mandated systematic exclusion of mothers with children under fifteen years of age deprived him of his right to a jury drawn from a fair cross section of the community (R. 172-179A). PARKER supported this challenge with availble statistics and documentary evidence which established that the described class of women are automatically exempted from jury service without requiring individual excusal by the presiding judge (R. 171). This challenge was denied (R. 179A; T10:1-12).

Section 40.013(4), Florida Statutes (Supp. 1980), provides as follows:

> Expectant mothers and mothers who are not employed full time with children under 15 years of age, upon request, shall be excused from jury service.

Application of this statute denies a defendant's constitutional rights to a jury drawn from a fair cross section of the community. Courts look with disfavor on broadly drawn statutes which automatically exempt certain person from jury service. In Duren v. Missouri, 439 U.S. 357, 99 S.Ct. 664 (1979), the Supreme Court declared unconstitutional an exemption available upon request to all women because of their important role in the home

and family life. In Taylor v. Louisiana, 419 U.S. 533, 538, 95 S.Ct. 692, 702 (1975), the Court set out the basic constitutional guidelines for jury selection by mandating that "the 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."

The statute at issue here denied PARKER that very constitutional right by the automatic exclusion of certain females without any individualized showing that an exemption is needed in the particular case.[21/] To assume that all women within the statutory exemption in fact are responsible for daily child rearing is to generalize away the Defendant's rights. Such an oversimplified generalization is the precise reason this same statute was ruled unconstitutional on equal protection grounds in Alachua County Court Executive v. Anthony, 418 So.2d 264 (Fla. 1982). We submit that the same rationale should control this case and merits the conclusion that the available jury was not fairly representative of the community.

21/ This case differs from Hitchcock v. State, 413 So.2d 741 (Fla. 1982), where that jury did contain the statutorily excusable individuals.

POINT III

THE TRIAL COURT ERRED IN REFUSING THE DEFENSE REQUEST FOR ADDITIONAL PEREMPTORY CHALLENGES AND PROHIBITING THE DEFENSE FROM EXERCISING A REQUESTED CHALLENGE AFTER TEN HAD BEEN USED.

Despite the existence of eight separate charges included in the single indictment against NORMAN PARKER,[22] the trial judge took an extremely rigid view of the juror challenge requirements, limiting the defense to the minimum authorized amount of ten (T14:202-202; T15:8-9, 176-178). Due to the seriousness of the case, the nature of the charges, and the racial mixture of the prospective jurors, PARKER repeatedly requested a limited number of additional challenges, but was not permitted any challenges beyond ten. Under the circumstances of this case, it was error to refuse the defense request for additional peremptory challenges.

Both §913.08, Florida Statutes, and Fla.R.Crim.P. 3.350 provide that a defendant charged with an offense punishable by death or life imprisonment is permitted to exercise ten (10) peremptory challenges. Subsection (e) of the Rule provides that if an indictment contains two or more counts (as in this case), the accused is allowed the "number of peremptory challenges which would be permissible in a single case..." However, in such situations the trial judge is vested with discretion in extenuating circumstances to grant additional challenges in order

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[22] PARKER was only tried on seven of the charges.

to fairly promote justice. The judge in the instant case abused her judicial discretion by refusing to allow any extra challenges, despite the fact that the Defendant exhausted his authorized amount of challenges. The court's only concern during jury selection seemed to be to expedite empanelling of the jury (T14:78-79).

Because PARKER's indictment contained more than one count, the trial judge clearly possessed the authority to grant additional challenges. Moore v. State, 335 So.2d 877 (Fla. 4th DCA 1976). In situations involving first-degree murder charges which are joined with other serious felonies, courts have been receptive to defense requests for additional challenges. The rationale is obvious: the interests of justice and the defendant's right to a fair trial demand a full opportunity to select an impartial jury. For example, in Jacobs v. State, 396 So.2d 713 (Fla. 1981), the defendant was on trial for two counts of first-degree murder, robbery and kidnapping. Upon a defense request, the trial judge granted two additional peremptory challenges. This Court approved the judge's ruling, finding that the granting of additional challenges was a proper exercise of judicial discretion. Id. at 717. Similarly, in the related case of Tafero v. State, 403 So.2d 355 (Fla. 1981), cert. denied, ____ U.S. ____, 102 S.Ct. 1492 (1982), the trial court permitted the defendant three additional peremptory challenges, even though only ten were required in a prosecution for two counts of first-degree murder, robbery and kidnapping. In Thomas v. State, 403 So.2d 371 (Fla. 1981), the prosecution and defense

stipulated to a total of sixty-six challenges in a prosecution for seven felonies, including first-degree murder. The trial court's subsequent limitation to sixteen peremptory challenges was prejudicial to the defense, and required a reversal of the convictions.

The judge in PARKER's case did not exercise her discretion in any way. She simply denied the repeated requests without comment. Not only did this action deprive PARKER of the ability to secure a fair and impartial jury, but it also required him to exhaust certain of his limited number of peremptory challenges on jurors who should have been dismissed for cause.

The defense challenged Mr. Purness (Juror #17) for cause due to his extensive law enforcement background and his knowledge of the prosecutor and a number of State witnesses (Transcript of Sept. 9, 1981, page 76). While the mere fact that a juror is acquainted with either counsel in a case does not per se disqualify the juror, McQuay v. State, 352 So.2d 1276 (Fla. 1st DCA 1977), Purnell's background rendered him unable to fairly decide this case. He had been previously employed by the State Attorney's Office as a sworn law enforcement investigator for twenty years and now worked for the State juvenile court; he knew the prosecutor; he also knew police officers Pontigo, Lopez, and Alonzo, all of whom were involved in aspects of the case (T14:9-19). It is difficult to envision that a law enforcement officer could render a fair and impartial verdict, particularly since the defense theory here questioned the integrity of the lead police investigator and his investigation. As the Third District

recognized in Leon v. State, 396 So.2d 203, 205 (Fla. 3d DCA 1981):

> The test for determining the competence of a juror is not whether he will be able to control any bias or prejudice but rather whether he may lay aside those considerations and render his verdict solely upon the evidence presented and the instructions on the law given to him by the court. [3 citations omitted] Where there is any reasonable doubt as to a juror's possessing the requisite state of mind so as to render an impartial verdict, the juror should be excused, and the defendant given the benefit of the doubt. [2 citations omitted; emphasis added].

PARKER was not given any semblance of the benefit of the doubt. He should not have been required to utilize a peremptory challenge on this juror.

Consideration must also be given to the court's refusal of a challenge for cause as to juror Kaufman. The defense requested that she be so excused due to her partiality because of community crime (T14:79-81). The defense was instead obliged to exercise a peremptory strike, despite the fact that Mrs. Kaufman had been the victim of a recent burglary (T14:58-59), believed that any person who kills another deserves the same (T14:57-58), and was very frightened by the rampant crime in the community (T14:58-59). She did not even know if she would be able to disregard those fears during deliberations on PARKER's case (T14:58-59). That inability to disregard one's fears was precisely the basis for a reversal in Leon v. State, supra, where a juror stated that her home had been recently burglarized and that she did not know whether she could judge facts objectively.

Requiring PARKER to exercise a peremptory challenge on a prospective juror who should have been excused for cause is reversible error. Young v. State, 85 Fla. 348, 96 So. 381 (1923). Because he was deprived of an opportunity to reasonably exercise sufficient peremptory challenges, a reversal of his convictions is required so that this case can be remanded for a fair trial.

POINT IV

THE TRIAL COURT ERRED IN PERMITTING THE PROSECUTION TO INTRODUCE THE DEFENDANT'S STATEMENT AS TO THE WASHINGTON, D.C. SHOOTING WHEN AN INDEPENDENT CORPUS DELICTI HAD NOT BEEN ESTABLISHED.

During the prosecution's case-in-chief, Sergeant Sharkey of the Washington, D.C. Police Department was permitted to testify that NORMAN PARKER confessed to the Spriggs shooting (T19:736). This testimony was admitted in the absence of any independent proof of criminal agency on the Defendant's part. We assert on appeal that this confession should not have been utilized as evidence in the absence of adequate proof of the corpus delicti of the offense.

The necessary predicate under Florida law for introduction of any inculpatory statement is prima facie proof of criminal agency. Nelson v. State, 372 So.2d 949 (Fla. 2d DCA 1979). Generally speaking, corpus delicti is a legal phrase used to mean the elements necessary to show that a crime has been committed. State v. Allen, 335 So.2d 823 (Fla. 1976); Frazier v. State, 107 So.2d 16, 26 (Fla. 1958). In establishing these elements, the prosecution is called upon to bring forth "substantial evidence" tending to show the commission of a crime. State v. Allen, supra at 825; Tucker v. State, 64 Fla. 518, 59 So. 941 (1912). The term corpus delicti

> means that the state must establish that the specific crime charged has actually been committed. The corpus delicti is made up of two elements:
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> (1) That a crime has been committed, as for example, a man has been killed or a building has been burned; and

> (2) That some person is criminally responsible for the act. It is not sufficient merely to prove the fact that the person died or the building burned, but there must be proof of criminal agency of another as the cause thereof.

Sciortino v. State, 115 So.2d 93, 95 (Fla. 2d DCA 1959).

An understanding of this rule of law yields the principle that the absence of a witness who can establish that the offensive conduct was the result of the criminal action of another, as opposed to an accidental cause, precludes a finding of corpus delicti sufficient to justify admission of an extra-judicial statement. E.g., Jefferson v. State, 128 So.2d 132, 135-136 (Fla. 1961) (criminal agency means evidence tending to show the occurrence of a crime which is not the result of natural or accidental causes). In order to establish the corpus delicti in a homicide situation, it is necessary to prove the fact of death, the criminal agency of another as the cause thereof, and the identity of the deceased. Stone v. State, 378 So.2d 765 (Fla. 1979), cert. denied, 449 U.S. 986, 101 S.Ct. 407 (1980); Meeks v. State, 339 So.2d 186 (Fla. 1976).

Here, the prosecution failed to prove that the criminal agency of another was responsible for the Spriggs shooting. There was absolutely no attempt to show that PARKER, or anyone else for that matter, acted in a criminal manner in the Spriggs shooting. Because of the absence of this essential element, PARKER's statement was incorrectly utilized as evidence. Consideration of the confession played a crucial role in the State's case. In light of this fundamental defect, the Defendant's convictions must be reversed.

POINT V

THE CIRCUMSTANTIAL EVIDENCE WAS INSUFFICIENT TO SUSTAIN THE GUILTY VERDICTS WHERE THERE WAS A TOTAL ABSENCE OF SUBSTANTIAL, COMPETENT EVIDENCE THAT THE DEFENDANT PARTICIPATED IN ANY OF THE CHARGED OFFENSES.

NORMAN PARKER stands convicted of a murder, armed robberies, and a rape which he did not commit. There is no question that Julio Chavez was murdered on the night of July 18, 1978, or that Chavez, Silvia Arana, Luis Diaz, and David Ortigoza were robbed at gunpoint. Nor is there any dispute that Silvia Arana was the victim of a sexual battery on that date. The evidence adequately established that one of the perpetrators, who was known to the victims, was Robbie Lee Manson. The evidence did not establish, however, that NORMAN PARKER participated in these offenses in any manner whatsoever. In short, although PARKER was accused of committing the offenses, he is not the person who assisted Manson.

This Court is obviously familiar with claims of evidentiary insufficiency in connection with appellate review of criminal convictions. In reviewing such questions, this Court must view the testimony and evidence in the light most favorable to support the jury's verdict. E.g., Tibbs v. State, 397 So.2d 1120, 1123 (Fla. 1981), aff'd, ____ U.S. ____, 102 S.Ct. 2211 (1982). Affirmance of a conviction, particularly one involving first-degree murder, requires the presence of substantial, competent evidence as to each and every element of the offenses. Rose v. State, 425 So.2d 521, 523 (Fla. 1982); Welty

v. State, 402 So.2d 1159 (Fla. 1981). Evidence which suggests guilt but which does not refute every reasonable hypothesis of innocence can never be considered adequate proof. McArthur v. Nourse, 369 So.2d 578 (Fla. 1979). Moreover, when circumstantial evidence is the basis for a murder conviction, this Court has recognized that a careful and exacting analysis of the proof is required:

> Such testimony must be of a conclusive nature and tendency, leading, on the whole, to a reasonable and moral certainty that the accused and no one else committed the offense charged. It is not sufficient that the facts create a mere strong probability of guilt, but they must be consistent with guilt and inconsistent with innocence.

North v. State, 65 So.2d 77, 94 (Fla. 1953), aff'd, 346 U.S. 932, 74 S.Ct. 376 (1954).

The evidence here fails to satisfy these most basic evidentiary tenets. PARKER's valid defense, established through examination of the State's witnesses, defense witnesses, and his own testimony, disproved the prosecution's contention that he was in Dade County with Manson at the time of the Chavez homicide. The loose chain of circumstantial evidence was simply too weak to fashion a binding case against the Defendant.

The prosecution's case, when reduced to its fundamentals, consists of 3 basic elements: (1) the "eyewitness identification" of PARKER as the perpetrator by Arana, Ortigoza, and Diaz; (2) PARKER's possession of jewelry identified by the victims as having been taken during the robbery; and (3) the expert opinion that the bullet which killed Chavez was fired from

the same gun which was used to shoot Spriggs in Washington, D.C. While at first glance this evidence might appear formidable, a careful examination reveals that the case rests on too flimsy a foundation to support the State's case. In addition to this deceptively weak evidence, the non-presentation of available proof and the unrebutted testimony presented during the defense case justifies a finding of insufficiency. While it is not the function of this Court to reweigh the jury's consideration of the evidence, neither is it permissible for a reviewing court to abdicate its responsibilities to the determination of the trier of fact. See United States v. Goss, 650 F.2d 1336, 1341 n.3 (5th Cir. 1981). To accept the jury's verdicts would constitute just such an abdication.

The so called eyewitness identification presented in this case is nothing more than speculation. PARKER was supposedly identified on the basis of an outdated black and white photograph which was admittedly taken of the Defendant when he was fifteen years old (T22:1077). That photograph bore little resemblance to the Defendant. The witnesses were at odds in their description of the perpetrator. Silvia Arana described him as having a fu manchu moustache and green eyes (T18:477-478, 504-505). In fact, her identification of the assailant seemed to rely most heavily on the green eyes. NORMAN PARKER has brown eyes (T22:1093). Luis Diaz, on the other hand, recalled that the assailant had a goatee, not a fu manchu (T17:351; T18:426). David Ortigoza, while not giving a very detailed description of the assailants, did believe that the juvenile identification

picture looked exactly like PARKER on the day of the crimes (T16:171), a questionable identification at best inasmuch as the photo did not look anything like PARKER.

This identification testimony, we submit, is too infirm a basis on which to support a first-degree murder conviction.[23/] The remainder of the evidence, which serves only to corroborate the identification, is likewise too weak. The possession by PARKER of the "stolen" jewelry and his use of the Chavez murder weapon to shoot Spriggs are totally consistent with the proven defense that Manson arrived in Washington, D.C. shortly after the shooting, had a need for money, and gave PARKER the gun and some jewelry in exchange for cash. The defense testimony established that PARKER could not have been in Dade County during the Chavez shooting because he was in Washington, D.C. at that time period. Manson arrived in Washington shortly after the shooting and did not stay very long, presumably because he was on the run.

The "detailed investigation" orchestrated by Det. Pontigo is perhaps the weakest link. Pontigo, who himself was implicated in an ongoing conspiracy with a major drug trafficker to rip off unsuspecting drug dealers, had the ability and the motivation to create evidence against someone like PARKER. The State had ample opportunity to confirm the identity of the assailants. Yet, PARKER's fingerprints were not found at the

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[23/] The record is capable of supporting the suggestion that the Defendant's photograph looked like a person known as Eric Parker (T23:1252). Yet, the State made no attempt to exclude him as a suspect.

scene. The prosecution did not attempt to produce any scientific evidence comparing the urine left at the scene with PARKER's body chemistry.

This evidence is, as in the case of Jaramillo v. State, 417 So.2d 257 (Fla. 1982), too fragmented and capable of alternative constructions to support a conviction. In Jaramillo, the State's "smoking gun" evidence consisted of numerous latent fingerprints belonging to the defendant found at the murder scene. The defendant testified regarding how and when his prints were left at the location. His explanation, while consistent with the State's evidence, also presented a reasonable hypothesis of innocence. In such a situation, the evidence was not legally sufficient to establish a prima facie case of guilt.

PARKER's case is no different. The evidence does not exclude every reasonable hypothesis of guilt. PARKER's testimony was not impeached and was, moreover, corroborated by numerous witnesses. In view of this evidence, PARKER was entitled to a judgment of acquittal on all counts. His convictions should be reversed by this Court.

POINT VI

THE ADMISSION OF EVIDENCE CONCERNING THE DEFENDANT'S USE OF OTHER NAMES IMPROPERLY SUGGESTED THAT HE WAS A CRIMINAL AND CONSEQUENTLY DEPRIVED HIM OF A FAIR TRIAL.

Washington, D.C. police officer Sergeant Sharkey, was permitted to testify regarding certain aliases used by PARKER and which were contained on the police copy of the Defendant's statement concerning the Spriggs shooting (T19:734, 740). Because of the serious prejudicial impact of this irrelevant testimony, the defense requested a mistrial, which was denied (T19:741). Washington, D.C. police officer Greenwell was also permitted to relate that PARKER used an assumed name in the Spriggs shooting (T19:619-622). We contend on appeal that the State's intentional characterization of PARKER as a hardened criminal by evidence showing that he used aliases was an illegitimate attempt to deprive the Defendant of a fair trial. In light of the nature of the prosecution's case, which relied primarily on questionable circumstantial evidence, this impermissible testimony had a dominant impact on the jury's verdict. A reversal and a remand for a new trial is required.

The leading case on this issue, and the one on which PARKER relies, is Lee v. State, 410 So.2d 182 (Fla. 2d DCA 1982). There, in a prosecution for burglary, the State elicited testimony by a police officer that the defendant had used six other names. A defense motion for mistrial was denied. The appellate court reversed, finding the testimony irrelevant and

overly prejudicial. The court's detailed analysis is deserving of repetition here:

> It is generally known that some criminals assume another name for the purpose of avoiding apprehension, and the word "alias" has come to connote in the public mind some previous criminal activity. State v. Harvey, 26 N.C.App. 716, 217 S.E.2d 88 (1975). There may be instances where proof or reference to aliases is relevant and material to prove or disprove an issue. However, their admission at trial should be strictly scrutinized as they convey the impression that a defendant belongs to a "criminal class." See D'Allesandro v. United States, 90 F.2d 640 (3d Cir. 1937).
>
> We have found no Florida case which holds admission of aliases to be reversible error. Our sister court, in Lamb v. State, 354 So.2d 124 (Fla. 3d DCA 1978), held that the trial court did not err in denying defendant's motion to strike an alias from an information. The court noted, however, that there could be situations where the use of one or more aliases would prejudice the defendant's right to a fair trial. We think this is such a case.
>
> The prosecutor's initial recitation of Lee's six other names may not have been prejudicial. But when the state elicited these names from Detective Hampson and he stated that they were obtained from an FBI rap sheet, we think the cumulative effect of these references prejudiced Lee's right to a fair trial. Moreover, proof of the aliases was irrelevant to this case, and since the evidence, while persuasive, was largely circumstantial, the references were particularly harmful to the defendant. Therefore, we hold the court erred in denying the defendant's motion.

Id. at 183-184 (footnote omitted).

The idential considerations are present in this case. The alias testimony was completely immaterial and irrelevant. It

was repeated by more than one witness, causing undue emphasis by relating that PARKER used different names when he shot another human being. The clear implication is that PARKER was a criminal attempting to avoid responsibility and detection. This evidence was erroneously introduced. PARKER's fair trial rights have been compromised. A new trial unaffected by this substantial injustice is the only available vehicle to cure this error.

POINT VII

THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTION TO INTRODUCE INTO EVIDENCE SEVERAL PHYSICAL ITEMS IN THE ABSENCE OF A SUFFICIENT PREDICATE FOR INTRODUCTION WHERE THERE EXISTED A SUBSTANTIAL QUESTION AS TO RELEVANCY AND AUTHENTICITY.

The State's case against NORMAN PARKER relied heavily upon a chain of circumstantial evidence. Instead of utilizing an unbroken chain, however, the prosecution's method employed numerous weak and non-existent links. Among these defects are those involving the admission of several physical exhibits, including the .38 caliber projectile purportedly removed from the victim's body (State's Exhibit #16), a piece of brown paper bag which allegedly contained the projectile, and a hospital label (State's Exhibit #19) (R. 253) attached to the projectile. The defense objected to the introduction of these items on relevancy and authenticity grounds. The basic thrust of the objections was that this evidence was never shown to be the same items involving the victim Chavez, and lead investigator Det. Pontigo was never called as a witness to properly identify the items. Because there was substantial question at the trial as to the propriety of Pontigo's law enforcement activities, a substantial likelihood existed that the evidence was in fact not the same.

At issue here is the authentication or identification of key pieces of evidence. As a predicate to admissibility, the prosecution was required to demonstrate that the objects at issue are genuine. Professor McCormick expressed this requirement in

these terms: "When real evidence is offered an adequate foundation for admission will require testimony first that the object is the object which was involved in the incident, and further that the condition of the object is substantially unchanged." C. McCormick, Evidence 527 (2d ed. 1972). This requirement is codified in §90.901, Fla. Stat., which states: "The requirements of [authentication or identification] are satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Satisfaction of this requirement is generally made by establishing a chain of custody. That was not done in this case, however.

Not only did the prosecution fail to establish a continuous chain of custody with respect to this critical evidence, but it also failed to prove that the evidence was in fact what it purported to be. The most offensive defect concerns the .38 caliber projectile supposedly taken from the Chavez body. There is no doubt that Dr. Jose Font operated on Chavez and removed a bullet from the patient's chest wall (T19:590). Although he has removed more than thirty such bullets from patients in the past and has affixed his initials to the bullets (T19:602-603), he recognized this projectile as being the one he removed from Chavez (T19:594) only by the initials affixed thereon (T19:605). His statement notwithstanding, the whole of the evidence establishes only that State's Exhibit #16 was a bullet initialed by Dr. Font at some point in time when it was removed from a victim.

What actually happened to the bullet removed from Chavez is unclear. According to Dr. Font, he gave the bullet to Det. George Pontigo, the investigating officer (T19:605). The bullet admitted into evidence, however, was obtained by Det. Pontigo from Nurse Kasuito (T19:605-608). Because Det. Pontigo was never called as a trial witness,[24] there was no explanation for this critical discrepancy, an omission which cast serious doubt on the authenticity of the Chavez projectile, and further raised a question as to the relevancy of the purported projectile (T19:720).

Criminalist Hart of the Metro Dade Police Department saw a bullet (State's Exhibit #16) at the Crime Lab on July 20, 1978 (T19:761; T20:769). He had no idea who brought the bullet to the lab (T19:761). The projectile itself was in a hospital specimen container inside a sealed envelope with a property receipt attached (T20:770). This was all within a small manila bag (T20:775). Hart marked both the label and the bag with the police case number for the Chavez homicide (T20:775).[25] Hart had no knowledge as to how the bag and its container came to the lab; he did not know who affixed the markings onto the label and the bag; he did not even know if Pontigo was the person who brought the evidence to the lab (T20:786-800).

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[24] The State purposely decided not to call Pontigo as a witness (T20:783). He was then a defendant in a federal conspiracy which alleged that Pontigo and other police officers conspired with a known drug dealer to "rip off" unsuspecting drug dealers of their contraband and money, and convert the goods to their own use.

[25] Hart's forensics comparison of the "Chavez" projectile and the Washington, D.C. bullet resulted in a conclusion that the two were fired from the same gun (T20:780).

In the present situation, it was not established that the bullet and its marked container were relevant to this case by virtue of being the Chavez materials. The connection to this case was mere speculation and simple guesswork. Additionally, and on a more fundamental basis, there existed a likelihood that the existence of these materials was solely the handiwork of Det. Pontigo, and not the alleged PARKER activity.

This Court has recognized that chain of custody is an important component of the admission of physical evidence. See G.E.C. v. State, 417 So.2d 975 (Fla. 1982). While we recognize that deficiencies in the chain of custody are generally immaterial unless there exists evidence of tampering, e.g., Peek v. State, 395 So.2d 492 (Fla. 1980), cert. denied, 451 U.S. 964, 101 S.Ct. 1026 (1981) (relevant physical evidence admissible unless indication of tampering); Carey v. State, 349 So.2d 820, 823 (Fla. 3d DCA 1977), there was absolutely no proof that the evidence at issue here was in "substantially the same condition" or was the same item as when the projectile was first removed by Dr. Font. Cf. North v. State, 65 So.2d 77, 82 (Fla. 1952).

Connecting the projectile to the Chavez homicide was not accomplished by way of the documentary receipts attached thereto inasmuch as there was an absence of testimony as to who prepared them and what the items were. Those documents were not shown to be public or busines records. §§90.803(6) & (8), Fla. Stat.; Brevard County v. Jacks, 238 So.2d 156 (Fla. 4th DCA 1970) (hospital records admissible as busines records only when properly qualified). The consideration of those documents and

the information contained thereon was error. The prejudice to the Defendant is overwhelming.

Because the trial court admitted the projectile and its accompanying documents into evidence in the absence of a sufficient showing that the items were what they purported to be, reversible error occurred. Not only was PARKER denied the right to be prosecuted solely on the basis of relevant, admissible evidence, he was also denied his right to confront the makers of the documents. See Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531 (1980) (2-step analysis to assess constitutionality of hearsay statements). The evidence in this case was improperly handled. The State was able to circumvent applicable evidentiary rules in order to purposely avoid utilizing an accused defendant (Pontigo) as its key witness. The inexplicable "gaps" which could only have been filled in by Pontigo cast serious doubt on the reliability of this evidence. The Defendant's conviction cannot rest on such paltry proof.

POINT VIII

APPLICATION OF SECTION 921.141, FLORIDA STATUTES, TO IMPOSE DEATH UPON THE DEFENDANT VIOLATES THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.[25]

Following the jury recommendation (T24:90), the trial judge imposed the death penalty upon NORMAN PARKER, finding that the five statutory aggravating factors which were established beyond a reasonable doubt[26] sufficiently outweighed any mitigating factors. The court did not find that any mitigating factors existed (R. 443-448). We submit that the jury's advisory recommendation of death was invalid in that it was based on improper prosecutor argument and inadequate jury instructions. As a consequence of this invalidity, the resulting death sentence must be vacated.

A. Death May Not Be Imposed Where The Essential Safeguard Of A Valid Jury Recommendation Made In Conformity With Constitutional Law Was Nullified By The Prosecutor's Inflammatory Argument.

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[25] In light of decisions of this Court and of the Supreme Court of the United States the Defendant does not present repetitive arguments concerning the constitutionality vel non of §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 §921.141 is unconstitutional on its face.

[26] The aggravating factors found to exist include the following subsections of §921.141(5), Fla.Stat.: (a) defendant under sentence of imprisonment; (b) prior capital conviction or violent felony; (d) commission of crime during another felony; (f) crime committed for financial gain; and (i) murder committed in a cold, calculated or premeditated manner.

In Florida, the death penalty can only be imposed pursuant to §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 adequately punished by the lesser penalty of life imprisonment. Proffitt v. Florida, 428 U.S. 242, 251-259, 96 S.Ct. 2960 (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 885.

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 disturbed "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. 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 Maggard v. State, 399 So.2d 973, 978 (Fla. 1981); 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 tainted and utterly destroyed by the prosecutor's inflammatory argument that the Defendant's previous life sentences did not equate to life imprisonment (T24:66-68):

> Now, you may say, "Well, he's already serving one life sentence for the 1967 murder in Florida, and he's serving another life sentence for the 1979 murder in Washington," and you might say, "That's enough life. He's not getting out. He's not going to hurt anybody."
>
> You might want to consider that, but ask yourself, if life meant life, if in 1967 when the Judge said, "I sentence you to life in prison," if that meant anything, Julio Chavez would be alive.
>
> Thomas Spriggs would be alive.

The prosecution's emotional plea served only to inflame the jurors' righteous indignation at the thought that a life sentence might not prevent a person from killing another. 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).

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 7, 27-28, (Fla. 1959). 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). By analogy, the instant case is similar to Brown v. State, 284 So.2d 453 (Fla. 3d DCA 1973), where 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.

B. The Instructions Did Not Permit The Jury to Exercise Reasoned Judgment.

During the penalty phase, the trial court denied the Defendant's written requests to instruct the jury that:

> (1) In recommending a sentence to the Court, I caution you that the procedure of weighing aggravating circumstances and mitigating circumstances is not a mere counting process between the number of aggravating circumstances as compared to the number of mitigating circumstances. Rather your recommendation should be a reasoned judgment whether this factual situation requires the imposition of

> death or whether life imprisonment will be sufficient punishment. (R. 420).
>
> (2) I instruct you that a jury recommendation under our system of laws is entitled to great weight. Therefore your recommendation of the appropriate sentence in this case must be the product of careful, conscientious deliberations. (R. 421).

All these instructions were correct legal statements. State v. Dixon, 283 So.2d 1, 10 (Fla. 1973)(weighing of aggravating and mitigating factors); Tedder v. State, 322 So.2d 908, 910 (Fla. 1975)(great weight given to jury recommendation; defining heinous, attrocious and cruel); Cooper v. State, 336 So.2d 1133 (Fla. 1976)(definition of heinous, attrocious and cruel). However, by denying these instructions the court failed to give clear guidance to the jury in discharging their most difficult and important task.

In Gregg v. Georgia, 428 U.S. 153, 192, 96 S.Ct. 2909 (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.

Accord Godfrey v. Georgia, 446 U.S. 420, 428-429, 100 S.Ct. 1759 (1980)(reversing death sentence based upon finding of aggravating circumstance not properly charged). 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, 438 U.S. 586, 98 S.Ct. 2954 (1978), 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.

Here, without being familiar with the applicable legal standard and in the absence of any appropriate instructions, it cannot be said that the jury could properly exercise its decision making authority. The advisory recommendation is consequently a nullity. The sentence imposed as a result of that recommendation cannot stand.

C. Death Is A Disproportionate Sentence In This Case.

The trial court found as an aggravating circumstance subsection (5)(i), that the Defendant acted in a cold, calculated and premeditated manner without any pretense of moral or legal justification. This was error.

> As we stated in State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943 [,94 S.Ct. 1951, 40 L.Ed.2d 295] (1974), the aggravating circumstances set out in

> section 921.141 must be proved beyond a reasonable doubt. The level of premeditation needed to convict in the penalty phase of a first-degree murder trial does not necessarily rise to the level of premeditation in subsection (5)(i). Thus, in the sentencing hearing the state will have to prove beyond a reasonable doubt the elements of the premeditation aggravating factor - "cold, calculated ... and without any pretense of moral or legal justification."

Jent v. State, 408 So.2d 1024, 1032 (Fla. 1981), cert. denied, ___ U.S. ___, 102 S.Ct. 2916 (1982). "That aggravating circumstance ordinarily applies in those murders which are characterized as executions or contract murders, although that description is not intended to be all-inclusive." McCray v. State, 416 So.2d 804, 807 (Fla. 1982).

In Mann v. State, 420 So.2d 578 (Fla. 1982), the defendant was convicted of killing a ten-year-old girl who died of a skull fracture and had been stabbed and cut several times. Despite the victim's youth and the nature of her injuries, this Court held that the trial judge improperly found the murder to have been committed in a cold, calculated and premeditated manner. This Court also found that the same aggravating circumstance did not apply in McCray v. State, supra, even though an eyewitness testified that the defendant approached the victim, yelled, "This is for you, mother fucker," and shot the victim three times in the abdomen. E.g., Cannady v. State, 427 So.2d 723 (Fla. 1983)(murder not cold, calculated or premeditated where defendant shot minister five times and it was unlikely that the victim threatened or jumped the defendant).

In this case, PARKER's actions were not planned in advance and steadily executed. Cf. Hill v. State, 422 So.2d 816, 819 (Fla. 1982)(defendant intended to rape and murder victim and decision made substantially before defendant picked up victim). Nor did it appear that he acted in a manner showing utter disregard for the moral code governing people in our society. Rather, PARKER's actions seemed to occur in the heat of the moment; they were done in a fit of anger to stop Chavez from crying aloud to protect Silvia Arana. Under the circumstances, this aggravating factor was incorrectly found.

We submit, too, that the court erred in finding the existence of subsection (5)(a), in that there was no proof that PARKER was under a sentence of imprisonment.[27/] The prosecution merely showed that the Defendant had been convicted in Florida (T24:14-16, 22). During the guilt phase of the trial, the prosecution did not present any evidence that PARKER was under a sentence of imprisonment at the time he committed the Chavez homicide. During the penalty phase, the State's evidence showed PARKER's prior sentences (R. 404-405, 406, 407-410a), but did not even attempt to demonstrate PARKER's status at the time of the offense. There was no showing that PARKER was on parole, as was proved in Hitchcock v. State, 413 So.2d 741 (Fla. 1982), and White v. State, 403 So.2d 331 (Fla. 1981). Nor did the State

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27/ This factor, unlike (5)(b), requires that the defendant be under a sentence of imprisonment at the time of the murder. E.g., Hitchcock v. State, 413 So.2d 741 (Fla. 1982); White v. State, 403 So.2d 331, 337 (Fla. 1981). Thus, the Washington, D.C. sentence is inapplicable to this factor.

prove that PARKER escaped from a lawful sentence of imprisonment. In Peek v. State, 395 So.2d 492, 499 (Fla.), cert.denied, 451 U.S. 964, 101 S.Ct. 2036 (1981), this Court held that:

> Persons who are under an order of probation and are not at the time of the commission of the capital offense incarcerated or escapees from incarceration do not fall within the phrase "person under sentence of imprisonment" as set forth in section 921.141(5)(a).

Ferguson v. State, 417 So.2d 631, 636 (Fla. 1982).

Without this required proof, neither the jury, the trial court, nor this Court can speculate on the Defendant's status. This aggravating factor was improper.

Taking away these two unwarranted circumstances, it cannot be said that the death penalty is proper. The evidence presented in the Defendant's favor showed that he was a military veteran and that while in prison he regularly spoke to juveniles at schools in an effort to warn them about the dangers of drugs and crime. This information shows a side of NORMAN PARKER that is deserving of mitigation. This Court must vacate the death sentence for these reasons.

CONCLUSION

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

Respectfully submitted,

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By 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail this 2 day of August 1983 to PAUL MENDELSON, ESQUIRE, Assistant Attorney General, 401 Northwest 2nd Avenue, Room 820, Miami, Florida 33128.

Benedict P. Kuehne

BENEDICT P. KUEHNE