FLORIDA SUPREME COURT

Case No. 62,098

FREDDIE C. JONES,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE ELEVENTH JUDICIAL CIRCUIT

Criminal Division

Case No. 81-23460(A)

# BRIEF OF APPELLANT

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## INTRODUCTION

This an appeal from the convictions and sentences imposed by the trial court. This brief is filed on behalf of appellant, Freddie C. Jones. Hereinafter the parties will be referred to by the positions that they held in the trial court and their proper names. All references to the transcript of proceedings beginning on March 29, 1982 will be abbreviated with the letter T. All references to the rest of the record on appeal will be abbreviated with the letter R.

## STATEMENT OF THE CASE

An indictment was filed on October 30, 1981 charging the defendant with first degree murder, robbery and kidnapping. (R. 1603-1604). Trial of the case was commenced on March 29, 1982 (T. 1) and on April 5, 1982 a jury found the defendant guilty as to all three counts of the indictment. (R. 1781-1783). After a hearing to determine the penalty to be imposed on the first count (R. 1203-1310), the jury advised that the court impose a sentence of life imprisonment without possibility of parole for 25 years. (R. 1850). On Count I the court ordered the defendant sentenced to death. (R. 1844). On Counts II and III the court sentenced the defendant to life imprisonment with a minimum mandatory of three (3) years to be served without eligibility of parole. (T. 1844). All sentences were imposed consecutive to one another. (T. 1845).

References to the course of proceedings and citation to the record will be made in the relevant argument portions of the brief in order that the court can better relate these proceedings to what the defendant asserts as error.

## STATEMENT OF THE FACTS

Tomas DeVillegas (T. 864-865) was killed (T. 705) October 7, 1981 in Hialeah, Florida (T. 705) at approximately 9:45 a.m. (T. 719, 723). The bullet that was removed from the deceased's head (T. 897-898) was a .38 caliber bullet (T. 924). The father of the defendant bought a .38 caliber "gun" (T. 943) and he could not find that gun on October 16, 1981 (T. 944).

On October 7, 1981 (T. 796), Tomas DeVillegas drove a Blue Ribbon Meat truck (T. 796) out of the Blue Ribbon Meat Company lot in Hialeah, Florida at 9:00 a.m. (T. 799). On October 7, 1981 (T. 636, 670-671), Francisco and Ligia Diaz were stopped at the intersection at West 4th Avenue and 29th Street in Hialeah (T. 638-639). The time of day was in dispute (T. 638, 655-656, 657, 658, 670-671, 682, 696). The car in front of the Diazes (T. 639) was the car owned by the defendant's father (T. 673, 677, 945-947). Cecil Jones, the father, testified that on October 7, 1981 his car was at home (T. 949-950.) The truck in front of the car had a Blue Ribbon logo on it (T. 639-640). The Diazes saw 2 black men get out of the car and enter the truck (T. 641-643, 674-675).

The Blue Ribbon truck had been washed early in the morning of October 7, 1981 (T. 813) and the defendant's fingerprint was found, sometime after 3:00 p.m. on October 7, 1981 (T. 752), on the outside door of the driver's side of the Blue Ribbon truck. (T. 755-756).

Robert Horton testified that he drove Freddie Jones and Carlton Adderly to a red light where the defendant and Adderly exited the car and got into a truck that was stopped at the light in front of them (T. 960-961). Horton followed the truck until it stopped near a row of trees. (T. 963). Horton heard shots (T. 964) and saw the defendant get back in the truck (T. 964) with a gun in his hand. (T. 964-965).

In the penalty phase of the proceeding Carlton Adderly testified that he and the defendant got into a Blue Ribbon Meat Truck on October 7, 1981. (T. 1204). He first testified that neither he nor the defendant had a gun (T. 1209) and then said that the defendant did have one. (T. 1205). Adderly testified that the defendant hit the man in the meat truck. (T. 1205). After the defendant hit the man he was pointing the gun around "and stuff, making him be quiet." (T. 1205). Adderly testified about the victim that: "He was crying; he was crying but I don't think he know any English or nothing. He was like saying, 'Please, please,' that is what he was saying." (T. 1206).

Jones made the man get down on the floor and he got down. (T. 1206). After the truck was stopped, Jones, according to Adderly, opened the door at the passenger's side and pulled the victim out of the truck. (T. 1207).

The trunk of the car got opened, Jones tried to tell the victim to get into the trunk and the victim started crying and going crazy. (T. 1207). Jones started going crazy saying "I will kill you." (T. 1208). Adderly testified that the gun was fired, but did not "recall" how far Jones was when he fired the gun. (T. 1209). On cross-examination of Carlton Adderly the following exchange took place:

> Q. [By Mr. Gold] You were not out there by the truck, by the back of the Cadillac, when the shooting took place, were you?
>
> A. No, sir.
>
> Q. You were in the truck, is that correct?
>
> A. Yes, sir.
>
> Q. And you just heard some shots, isn't that right?
>
> A. Yes.
>
> Q. You do not know how close Freddie Jones was to the man when he was shot, do you?
>
> A. No, not really, sir.
>
> Q. You really do not know what happened out there, do you, because you were in the truck when that happened?

A. Not the killing, sir. I just heard the shots. (T. 1215)

On redirect examination Adderly testified as follows:

Q. [By Mr. Kahn] From where you were sitting, you were seated higher in the truck than where the car is?

A. Yes, sir.

Q. You can see out the windshield and see out?

A. Yes, you can see out. (T. 1216)

Statements of the facts of this case and references to the appropriate pages of the transcript of proceedings will be made throughout the argument section of this brief in order to relate particular facts to the issues to which they are relevant.

## ISSUES PRESENTED FOR REVIEW

I. Is the evidence sufficent to support the conviction?

II. Did the court err in admitting inflammatory photographs into evidence?

III. Was the proof fatally at variance with the indictment?

IV. Was the defendant tried by a jury purposefully selected so as not to represent a fair cross section of the jury?

V. Did the prosecution engage in argument that destroyed the essential fairness of the trial?

VI. Did the court err in refusing to give instructions as to penalties for lesser included offenses?

VII. Did the court improperly override the jury recommendation of life imprisonment?

VIII. Did the court err in finding aggravating circumstances under the capital felony sentencing statute?

IX. Did the court err in refusing to consider the facts that would have mitigated the death sentence?

X. Is death a disproportionate sentence in this case?

## ARGUMENT

### I.

### REVIEW OF EVIDENCE

Under Rule 9.140(f), Fla. R. App. P.:

> In the interest of justice, the court may grant any relief to which any party is entitled. In capital cases, the court shall review the evidence to determine if the interest of justice requires a new trial, whther or not insufficiency of the evidence is an issue presented for review.

Review of the legal sufficiency of the evidence to support the conviction is required under § 921.141(4), Fla. Stat. (1981). LeDuc v. State, 365 So.2d 149, 150 (Fla. 1978).

Blue Ribbon Meat Company is located at 2340 Webster Avenue in Hialeah, Florida. (T. 799). Miguel Mendez, the supervisor at Blue Ribbon Meat (T. 794), testified that at approximately 9:00 a.m. on October 7, 1981 Tomas DeVillegas drove a truck out of the company's parking lot. (T. 799). The truck turned left to 23rd Street and then turned right onto West 4th Avenue. (T. 798). The intersection of West 4th Avenue and 29th Street in Hialeah is six blocks from the Blue Ribbon Meat plant (T. 632, 814). According to Miguel Mendez it would take less than 5 minutes for a truck to drive from the plant to West 4th Avenue and 29th Street. (T. 814).

Patrolman Victor Anchipolovsky found the body of the deceased 65 yards east of the intersection of East 1st Avenue and 33rd Street in Hialeah. (T. 705). He

was dispatched to the scene at 10:07 a.m. and arrived about 10:30 a.m. (T. 705). A Hialeah fire rescue unit had arrived prior to Anchipolovsky. (T. 705). Officer Gary Williams of the accident investigation unit (T. 710) estimated the time of the death causing incident at 9:45 a.m. (T. 719, 723). Dulce De Armus, who lives at 237 East 33rd Street, Hialeah, (T. 699) heard 2 shots at approximately 10:00 a.m. on October 7, 1981. (T. 700).

Francisco Diaz lives at 251 East 7th Street in Hialeah. (T. 635). He did not go to work on October 7, 1981. (T. 636). That day he drove with his wife to the house of his son who lives in Hialeah. (T. 637). They were heading northbound on West 4th Avenue (T. 639) and stopped at a red light at the intersection of West 4th Avenue and 29th Street. (T. 638-639). Mr. Diaz was asked if he knew what time he left his house that day. (T. 638). He answered:

> Not exactly. It was before eleven, between ten and eleven. Between noontime. (T. 638).

On cross-examination Mr. Diaz was asked if it was before lunch when he got to the intersection of West 4th Avenue and 29th Street in Hialeah. (T. 655). He replied:

> Yes -- no. I think it was little earlier than that, before twelve. (T. 655).

The examination continued as follows:

Q. Was it between eleven and twelve when you got there?

A. Could be.

Q. You are not sure of that?

A. No, because I didn't look at my watch at that time.

Q. Well, do you think the time was before or after eleven?

A. I believe it was before.

Q. How much before?

A. I told you maybe 20 minutes, a half hour.

(T. 655-656).

At his deposition Mr. Diaz testified that he arrived at the intersection a little before lunch, around eleven or so. (T. 657). On October 7, 1981 Mr. Diaz testified that he ate lunch, with his wife, at home, before going to his son's house at around 10:00 a.m. (T. 658).

Ligia Diaz is Francisco Diaz's husband. (T. 670). Her direct examination concerning when she left home on October 7, 1981 went as follows:

Q. And do you recall what time you left your house, to go see them?

A. It must have been around lunch time, like that.

Q. Do you know what time?

A. I do not recall exactly. It must have been ten, ten-thirty.

Q. Is eleven o'clock lunch time for you?

A. Well sometimes it is.

Q. About ten-thirty or so, did you leave with your husband to go somewhere?

A. Yes, because my son called that he was sick.

(T. 671).

At her deposition Mrs. Diaz said that she did not know whether it was 12 o'clock or 1 o'clock when she got to the intersection at West 4th Avenue and 29th Street in Hialeah. (T. 682).

Maria Diaz is the daughter-in-law of Francisco and Ligia Diaz. (T. 690). On October 7, 1981 she was living at 3740 West 5th Court in Hialeah, Florida. (T. 689). Mr. and Mrs. Diaz came to visit her that day (T. 690). To drive from the intersection of West 4th Avenue and 29th Street to her house takes three or four minutes at most. (T. 695-696). Maria Diaz's direct examination concerning when her in-laws arrived at her house was as follows:

Q. About what time did they come to your house?

A. Before noon. Before lunch.

Q. Do you remember specifically what time?

A. No. Exactly, no.

Q. But it was in the morning hours?

A. It was in the morning.

MR. GOLD: Objection to Counsel leading the witness.

THE COURT: Overruled. It is just for the preliminary matters.

(T. 691).

Her cross-examination on this point was:

Q. Thank you. You say your parents got there before twelve o'clock?

A. Around that time. I cannot say exactly what time it was

Q. Excuse me. I meant your in-laws.

A. Yes.

Q. Maybe a few minutes before or after?

A. Before, not after.

Q. A few minutes before?

A. Right.

(T. 696).

The Blue Ribbon truck being driven by Tomas DeVillegas arrived at the intersection of West 4th Avenue and 29th Street at 9:05 a.m. The truck was hijacked and Mr. Devillegas was killed at 9:45 a.m. at East 1st Avenue and 33rd Street. According to the testimony of three persons, Maria and Francisco Diaz arrived at the intersection of West 4th Avenue and 29th Street no earlier than 10:30 a.m. and possibly as late as 12:00 p.m. The incident they observed occurred at

least 1 1/2 hours after Tomas De Villegas' truck was hijacked -- unless one can believe that 2 people would describe a meal eaten before 9:00 a.m. as lunch.

The description by Mr. and Mrs. Diaz of the events they observed when compared to the testimony of Robert Horton lends credence to the conclusion that what the Diazes saw was not the hijacking of the truck being driven by Tomas De Villegas. According to Horton the defendant was in the front passenger seat and Carlton Adderly was in the back. (T. 988). The defendant exited from the front passenger door (T. 988) and leaned in the rear passenger side for about a minute pointing a gun at Carlton Adderly. (T. 962, 990). The defendant told Adderly to get out of the car and Adderly got out. (T. 962, 990). The defendant still had a gun in his hand (T. 990) as he turned around and walked towards the truck. (T. 991). Adderly and the defendant were together, but Horton did not know which one went first. (T. 991). At some point the defendant crossed over to the driver's side and Adderly went to the passenger's side. (T. 991). When they got to the truck the defendant pulled out his gun and told Adderly to get in. (T. 961).

As Francisco Diaz stopped at the traffic light, there was a car in front of him and a truck in front of the car. (T. 638-639). The truck had the Blue Ribbon logo (640) and the car was the brown one (T. 640), with an antenna on top of the center of the trunk (T. 641),

from which two black men exited (T. 641). One of the black men got out on the right side and one got out on the left side of the car. (T. 641). When asked for a description of the men, Mr. Diaz said that their backs were turned towards him. (T. 641). The man who got out on the driver's side of the car went toward the driver's side of the truck. (T. 642). The man who got out on the other side went toward the passenger side of the truck. (T. 642). Testifying about the man who approached the driver's side Mr. Diaz said:

> I saw that he reached the door. He opened the door and he went into the truck. (T. 643).

Francisco Diaz did not see either one of the men have anything in their hands. (T. 661). Neither one had a weapon in their hand. (T. 662). Neither one had a pistol. (T. 662). Mr. Diaz never saw the black male that went to the driver's side of the truck lean into the passenger's side of the brown car before he went to the truck. (T. 662). As he passed the truck, Mr. Diaz saw 2 men inside and nothing unusual happening at that time. (T. 662).

Ligia Diaz confirmed that the man who got out on the driver's side of the car went to the dirver's side of the truck and the man who got out on the passenger side of the car went to the passenger side of the truck. (T. 674). Ligia Diaz did not see any guns or anything in the hands of the men who exited the car and went to the truck. (T. 687).

The scene that occurred at 9:05 a.m. was a forced confrontation. One man exited the front passenger side of the car, pulled a gun, leaned in the rear of the car and forced the passenger in the rear to exit. He then crossed over in front of the car, went to the driver's side of the truck, pulled a gun on the driver of the truck and forced his way into the truck. The scene that occured between 10:30a.m. and 12:00 p.m. was more of a friendly rendezvous. Two men exited from opposite sides of the car, no guns were drawn, the man from the front did not lean into the rear and force the man in the rear to exit, no one crossed over in front of the car, no one had anything in their hands at any time, and when the man from the driver's side of the car reached the driver's side of the truck he merely opened the door and got in.

The Diazes were immediately behind the brown car from which the two black men exited. It bends credulity to believe that they would not have seen any guns drawn or that the man from the front passenger side could have exited, gone to the rear door and stood there for a minute as he got the rear passenger out of the car without the Diazes seeing. There is a significant and noticeable difference between going up to a truck, opening the door and getting in versus going up to the door pulling a guna and forcing one's way into a truck. Common sense and logic indicate that someone as close to the scene

of events as were the Diazes, and someone as observant as to memorize the license plate number of the car would not have noticed the difference.

Both of the Diazes described the man they saw go to the driver's side of the truck as merely a black man. There was no description of the man's face, clothing or any identifying traits or characteristics other than he was black. Is such a description of any probative value? What kind of probative weight would be given to testimony that merely described a suspect as being white?

Robert Horton, Carlton Adderly and Melvin Williams all live in Carol City. (T. 980-981). They went to school together (T. 981); they played ball together (T. 981) and are all pretty good buddies. (T. 981). The defendant lived at 9150 N.W. 7th Avenue in Miami and worked at the port on Dodge Island. (R. 1602). Up until 5 or 6 months before the incident he had lived with his parents (T. 1269) at 281 N.W. 52nd Street in Miami (R. 1747-1748). One October 7, 1981 Horton had known Jones for only a couple of weeks. (T. 956). When asked if he knew Freddie Jones, Carlton Adderly said:

> Not really, but yes I know him. (T. 1203).

The hijacked meat truck was found by the police at 47th Avenue and 183rd Street in Carol City. (T. 745, 785). The truck was taken there by Horton, Adderly and Williams. (T. 971). Williams drove the truck to Carol City and Adderly was with him in the truck. (T. 971). Horton followed in Williams' car. (T. 971).

According to Horton, when the hijacked truck was moved from East 1st Avenue and 33d Street it was taken to a warehouse in Opa-Locka. (T. 966). Adderly and the defendant were in the truck and Horton followed in the car. (T. 966). According to Horton, the defendant talked to someone in the warehouse. (T. 968) and then took it to a street on the side of a dump. (T. 969). At this point the defendant abandonned the truck and drove Adderly and Horton to Adderly's house. (T. 970). The reasonable inference from Horton's account is that Jones surrendered the keys to the meat truck to Adderly and Horton at this point. After reaching Adderly's house, Horton called Williams and Williams drove to Adderly's. (T. 971). Horton, Adderly and Williams then drove in Williams' car to the abandonned truck. (T. 971). Williams and Adderly got in the truck and drove it from the dump site to the apartments at N.W. 47th Avenue and 183d Street in Carol City. (T. 971-972). Horton followed in Williams' car. (T. 971).

Defendant asks the court to take judicial notice of the geographic proximity of Opa-Locka to Carol City. If Horton's account is to be believed, it was the defendant who chose the warehouse in Opa-Locka that was close to where Williams, Adderly, and Horton lived even though the defendant lived in a different part of Dade County. If Horton's account is to be believed, the defendant, after speaking to one man in a warehouse in Opa-Locka, completely abandoned the entire enterprise and handed over the keys to the truck to Horton and Adderly, even though he had masterminded the hijacking and killed a man in order to obtain the contents of the truck.

The more logical explanation of the evidence is that the state entered into agreement with Horton and Adderly who in exchange for lenient sentences agreed to place the blame for the kidnapping and killing on the defendant. Horton and Adderly were part of a well established group with Williams. The defendant was an outsider. Horton, Adderly and Williams got the proceeds of the robbery. The defendant mercurially abandoned the entire enterprise. The place where the parties decided to take the truck to sell the contents was not in the defendant's neighborhood, but rather that of Horton, Adderly and Williams. Horton and Adderly have nothing to lose by pointing their collective finger at the defendant and leniency for themselves and preservation of their friendship to gain.

Officer Steve Williams arrived at the meat truck's location in Carol City at 1:53 p.m. (T. 745). It is perfectly possible that the defendant's fingerprint that was found on the truck was placed there at 10:30 a.m. This is well before 1:53 p.m. and is consistent with the testimony of the three Diazes. Officer Douglas Stephens lifted 53 latent fingerprints from the truck. (T. 754). One of these prints belonged to the defendant (T. 755-756, 878). Considering that Miguel Mendez washed off the truck before it went on the road on October 7, 1981 (T. 813), this means that 52 other fingers were placed on the outside of the meat truck between 9:00 a.m. and 1:53 p.m.

The bullet that was removed from the victim was a .38 caliber one (T. 924). No gun was submitted to be compared with that projectile. Robert Kennington, a criminologist with the Dade County crime lab (T. 915), testified that the projectile could have been fired from an Armonous, F.I.E., Omega or Burgo revolver. (T. 924-925). According to Kennington there are in Dade County "certainly a thousand" Armonous and over 100,000 F.I.E. revolvers that could have fired the particular projectile taken from the victim. (T. 933). In addition Kennington testified that: "Many guns could be modified to fire a bullet that looks like this one." (T. 934).

Cecil Jones testified that he purchased a .38 caliber "gun" several years ago. (T. 943). He kept it in a case in his house. (T. 944). When he looked for the weapon on October 16, 1981 he was not able to find it. (T. 944). There was no evidence to show when the gun was first missing or who took it. (T. 944).

The testimony of Robert Horton is inconsistent with that of Francisco and Ligia Diaz and inconsistent with logic and common sense. Without the testimony of Horton, the evidence is not sufficient to prove that the defendant committed the kidnapping and homicide of which he was convicted even by the standard of preponderance of evidence and does not approach the higher degree of beyond and to the exclusion of every reasonable doubt.

The one independent and disinterested witness who could have tied Freddie C. Jones to the initial hijacking and established his position as the master-mind of the scheme was the warehouseman from Opa-Locka. If Freddie Jones did in fact drive the truck to a warehouse in Opa-Locka and actually talked to a warehouseman there, then why didn't the state present the warehouseman's testimony? Could it be that Freddie Jones did not drive the truck to Opa-Locka and that no such warehouseman exists? Or could it be that this story exists only in the mind of Robert Horton in order to deflect guilt from him and direct culpability toward Freddie C. Jones?

II.

THE LOWER COURT ERRED IN ADMITTING MULTIPLE INFLAMMATORY PHOTOGRAPHS NOT RELEVANT TO THE ISSUE OF THE CASE

The lower court, over objection of defendant's counsel, allowed into evidence multiple photographs of the body of the victim which were designed to inflame the jury. (See R. 736-741, 740-847, 899-901; See also Defendant's Motion in Limine R. 1702-1703a). The pictures were gruesome in nature depicting the crushed head of the victim from various angles, including a picture with the head reconstructed by the medical examiner.

Among the photographs which the state submitted into evidence were the following. State Exhibit 5 shows the victim's body partially covered and its relationship to the street. State Exhibit 6 depicts the victim from a closer angle, showing the crushed head (the sheet removed partially), and his arm outstretched with a watch on it. State Exhibit 7 again is a closer view of the victim, showing the crushed head and arm outstretched (watch not visible). Exhibit 8 shows the victim from another angle, full body. State Exhibit 9 depicts again the upper torso of the body, shirt removed to reveal tire tracks on the back, and crushing injuries to head. State Exhibit 10, and one of the more gruesome photographs, shows the victim's body turned over on its back, graphically depicting the crushing injuries to the face and skull. (R. 1722 through 1727).

All of the above described photogrpahs were taken at the scene of the crime.

In addition, the state submitted the following photographs into evidence which were taken at the morgue at the time of the autopsy. (R. 899-902). State Exhibit 24 shows a close-up facial shot of the victim after reconstruction of the head and face. It does not reveal the site of the bullet wound, but very graphically shows the facial disfigurement. (R. 1742). State Exhibt 25 is a very close shot of a portion of the victim's head showing the entrance wound of the bullet. (R. 1743, 906-907). State Exhibits 26 and 27 show the victim's fingers. (R. 1744, 1745).

As set forth more fully in the facts section, the victim herein died of a gunshot wound to the head and was subsequently run over by his own truck, crushing his skull. Significantly, the indictment charges Freddie Jones with the murder of the victim "by shooting him with a firearm." (R. 1602).

The arrest form reflects that the "medical examiners autopsy revealed victim to have expired from a GSW [gun shot wound] to the head." (R. 1602). The relevant issue for the state to prove was the cause of death by gun shot wound. The subsequent disfigurement of the victim was irrelevant to the issues as framed by the charging document. There was no evidence to show that: a) the victim was alive at the time the truck ran over his body or b) that the defendant intended

in any manner to run over the body. (In fact there was evidence to the effect that the victim was hit by a rear tire of the truck during a turn, thus negating any inference of intent. R. 1226-27).

The admissibility of gruesome and inflammatory pictures is governed by the rules enunciated by this court in Young v. State, 234 So.2d 341 (Fla. 1970) and Bauldtree v. State, 284 So.2d 196 (Fla. 1973). Generally, the admissibility of pictures depicting injuries or of an otherwise gruesome nature are allowed if they are relevant to an issue in the case, either independently or to corroborate witness testimony. However, this court has recognized occasions in which pictures, otherwise relevant, were not admissible because of their inflammatory and prejudicial effects. In Young v. State, supra, 22 of 45 photographs showed all portions of the partially decomposed body of the victim. The court found them to be of a gory and gruesome nature and prejudicial. The court held that although relevance is still the basis for determining admissibility, nevertheless, large numbers of photographs of a gruesome nature taken away from the scene are suspect. In Young, the court found prejudicial error and reversed the conviction. Thus, necessity and prejudice may be considered in the determination of admissibility of gruesome photographs.

"Ordinarily, photographs normally classed as gruesome should not be admitted if they were made after

the bodies have been removed from the scene unless they have some particular relevance." Reddish v. State, 167 So.2d 858, 863 (Fla. 1964). The Reddish court established a more stringent standard for evaluating admissability of photographs taken away from the crime scene. In the Reddish case, photographs of the victim taken at the morgue were ruled to be irrelevant and therefore inadmissible. The court held that the cause of death was clearly established and no fact or circumstances justified its introduction.

In the instant case, a very gruesome photograph of the victim was presented to the jury, depicting the victim's reconstructed head and face. (State Exhibit 24, R. 1742). It does not show a gunshot wound and appears to have no other value than to show the reconstruction work done by the medical examiner. (R. 902, wherein the medical examiner indicates the bullet hole is hidden by hair). State Exhibit 25 particularly was shown to the jury three times at the behest of the lower court judge. (R. 907). It depicted the entrance wound of the bullet and was taken after an autopsy and reconstruction of the head. The cause of death was amply described and testified to by the county medical examiner. (R. 890-934). There were x-rays which showed the bullet. (R. 897). Even the bullet was allowed into evidence. (R. 913-914). There was therefore no necessity, nor justification for the admission of photographs taken at the morgue after substantial

reconstruction of the victim's face and skull.

More importantly, the defendant was substantially prejudiced by the very gory and gruesome photographs of the victim taken at the scene. There were multiple, repetitive photographs of the victim depicting his head split open. (R. 1722-1727). The photographs were graphic, in color, and from various angles, showing the victim's crushed head. There could be no purpose for these photographs other than to inflame the jury.[1] The defendant was never charged with, nor was any proof given, that defendant Jones intended to kill the victim by crushing his skull.[2] On the contrary, the physicial evidence indicated that the crushing injuries were accidental. (R. 1226-1227). The photographs were therefore no more relevant to the issues as framed by the charging document than if another car had come by, accidentally running over the victim. There is no question

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[1]The state argued the necessity of showing the victim with his watch to negate any inference that the victim was robbed and murdered subsequent to the hijack of his truck by other parties. (R. 728). Assuming this to be valid, there were certainly less inflammatory means of proof including witness testimony or a photograph of the outstretched arm with watch but with the rest of the body covered. The state's motive is transparent.

[2]It should be noted that despite the language in the arrest form and the indictment, the medical examiner did testify that the gun shot wound or the crushing injuries were sufficient to kill the victim, and the victim died as result of either, "depending on whether or not you want to say one or the other resulted in his death." R. 911).

but that the repetitive photographs of the victim's crushing injuries were irrelevant to any issues of this trial and had the purpose and effect of inflaming the jury's prejudice and passion.[3]

[3]The photographs no doubt had a similar effect on the trial judge who acted almost as proponent for State's Exhibits 24 and 25. (R. 900-901,907) and who overrode the jury recommendation of life.

## III.

## PROOF AT VARIANCE WITH THE INDICTMENT

The first count of the indictment reads:

> The Grand Jurors of the State of Florida, duly called, impaneled and sworn to inquire and true presentment make in and for the body of the County of Dade, upon their oaths, present that on the 7th day of October, 1981, within the County of Dade, State of Florida, FREDDIE JONES, did, unlawfully and feloniously, from a premediated design to effect the death of TOMAS DIAS DEVILLEGAS, a human being, or while engaged in the perpetration of, or in an attempt to perpetrate Robbery, kill TOMAS DIAS DEVILLEGAS, a human being, by shooting him with a firearm, in violation of Florida Statutes 782.04 and 775.087, to the evil example of all others in like cases offending and against the peace and dignity of the State of Florida. (R. 1603).

Defendant filed a request for a bill of particulars (R. 1638-1642). In paragraph A(5) of the bill of particulars the defendant asked with regard to Count I of the indictment for:

> A detailed description of the alleged acts of each accused in the commission of the alleged criminal offense complained of, or in the aiding, abetting, counseling, hiring, or procuring of such offense to be committed. (R. 1639).

This request was denied by the court. (R. 1644).

Carl Mitchell, the Assistant Dade County Medical Examiner (T. 890), testified that the victim:

> ... died as a result of a gunshot and crushed injuries. The reason I do not say a gunshot alone or crushed injuries alone is because any of those could have in of itself killed him, depending on whether or not you want to say one or the other resulted in his death. (T. 910-911).

The state introduced six 8" x 10" glossy photographs showing that the victim's head had been crushed. (R. 1723-1727). When the state wanted to know from Dr. Mitchell if the victim had been fingerprinted it asked:

> Was the person who you described with the injuries to the head, the crushing to the head in fact fingerprinted by somebody from the Hialeah Police Department at your office? (T. 895-896).

Dr. Mitchell testified that the head had been extensively crushed (T. 897) and that he had to reconstruct the face of the victim in order to define some relationship of the gunshot to the head. (T. 897).

Patrolman Victor Anchipolovsky explained how "the head of the body was crushed beyond recognition" (T. 707) and that "the tire [had] gone over his head completely crushing every bone in his head, face or jaw. It was the face, couldn't be recognized by anyone." (T. 707). Technician Israel Urra, who went to the medical examiner's office to fingerprint the victim (T. 842), was asked three times by the prosecutor about:

1) the nature of the injuries to the head of the victim (T. 845); 2) whether the head was recognizable (T. 845); and 3) whether there was a crushing-type of injury to the head. (T. 845).

In his closing the prosecutor argued to the jury that the defendant had driven straight over the victim. (T. 1088, 1106). It was this point that the prosecutor stressed in order to show the animus of the defendant as he argued:

> He did not care. He did not give a damn. He knew the guy was right in front of the truck, and killed him if he was not dead already. (R. 1106).

The court instructed the jury:

> Before you can find the defendant guilty of first-degree premediated murder, the State must prove the following three elements beyond a reasonable doubt.
> Number one. Thomas De Villegas is dead.
> Number two. The death was caused by the criminal act or agency of the defendant.
> There was a premediated killing of Tomas De Villegas. (T. 1129-1130).

Generally, the state cannot submit proof at trial of facts at material variance with those set forth in the information and the statement of particulars. State v. Davis, 234 So.2d 713, 715 (Fla. 2d DCA 1970). A variance arises when the evidence adduced at trial establishes facts different from those alleged in an indictment. Dunn v. United States, 442 U.S. 100, 105 (1979), but

only a fundamental defect will render the variance challengeable for the first time on appeal. Marshall v. State, 381 So.2d 276, 278 (Fla. 5th DCA 1980). A variance is fatal in this regard if the record reveals a possibility that the defendant may have been misled or embarrassed in the preparation or presentation of his defense. Marshall v. State, supra at 278 and Fitzgerald v. State, 227 So.2d 45, 46 (Fla. 3d DCA 1969).

It is stated in Lewis v. State, 53 So.2d 707 (Fla. 1951) at page 708 that:

> No principle of criminal law is better settled than that the State must prove the allegations set up in the information or indictment.

The general rule is that where an offense may be committed in various ways, the evidence must establish it to have been committed in the manner charged in the indictment. Long v. State, 92 So.2d 259, 260 (Fla. 1957). Proof at trial must substantially conform to the allegations of the charging document in order that the defendant not be misled. Grissom v. State, 405 So.2d 291, 292 (Fla. 1st DCA 1981). A fatal variance between allegations and proof renders improper any conviction entered on that particular charge. Howlett v. State, 260 So.2d 878, 880 (Fla. 4th DCA 1972).

This court stated in Patrick v. State, 117 Fla. 432, 158 So. 101 (1934), at 158 So. 103:

> Where an indictment charges an unlawful homicide of one kind as having been committed by a particular means duly described in the indictment, a conviction of homicide of a different kind alleged to have been committed in a different manner and by a different means not described in the indictment, although based upon sufficient evidence to make out the latter offense, cannot be upheld, and it is error for the court to so charge the jury.

In O'Brien v. State, 128 So.2d 621 (Fla. 3d DCA 1961), the information alleged a larceny of $1,900.00. The proof was that the defendant had misappropriated a chattel mortgage with a value of $1,905.00. The court found this variance to be fatal, reversed the conviction and remanded with directions to enter a judgment of acquittal. In Fastow v. State, 54 So.2d 110 (Fla. 1951), the information alleged embezzlement of jewelry with a value of $7,000.00. The proof showed that the defendant was given the jewelry to sell, but embezzled the $7,000.00 proceeds of the sale. In reversing the conviction this court said:

> The rule which prevails in this State is that the charge in the information must be sustained by the proof. Although the evidence may be sufficient to show that the defendant was guilty of a crime of a similar nature to the one charged in the inforamtion, such proof is irrelevant, inadmissible and consequently, insufficient to uphold the judgment of conviction.
>
> Fastow, supra at 111.

In the instant case the state alleged that the defendant killed a person by shooting him with a firearm. It can hardly be argued that the record does not reveal a possibility that the defendant was misled in the preparation of his defense when the state puts on three witnesses to testify about the victim's extensively crushed head and then argues to the jury the ill-will and lack of conscience of the defendant in driving a truck over the victim. The six 8" x 10" glossy photographs showing the victim's crushed head become even more prejudicial in the light of the fact that the vehicular wrongdoing was not mentioned in the indictment. Under Fastow v. State, supra, all of this evidence should have been considered inadmissible at trial.

Proof at trial has not conformed to the allegations of the charging document. The state has charged in its indictment that a homicide has been committed by a particular means and has proved a homicide committed in a different manner and by a different means. The trial judge, in the face of this variance, has charged the jury that as one element of required proof it need only find that death was caused by the criminal act or agency of the defendant, instead of limiting the charge to the criminal acts alleged in the indictment. Under Patrick v. State, supra, the state was wrong in varying its proof, the court was in error in failing to limit his charge to the jury and a homicide conviction of this nature cannot be upheld.

If the court is to follow the principle of Howlett v. State, supra, it cannot let stand a conviction where there is a fatal variance between the allegations and the proof especially where: 1) the prosecution has gone out of its way to phrase its questions and solicit responses that impress upon the jury the condition of the victim's crushed head resulting from the defendant's vehicular misconduct; 2) the indictment is silent as to any vehicular wrongdoing; and 3) the court has denied to the defense a request for a bill of particulars as to the acts of the accused in the commission of the alleged criminal offense.

IV.

RACIALLY BASED USE OF PEREMPTORY CHALLENGES PREVENTED DEFENDANT FROM BEING TRIED BY A JURY THAT REPRESENTED A FAIR CROSS-SECTION OF THE COMMUNITY

The state used its peremptory challenges to exclude Calvin Mapp, Angela Capers, Celeste Owens, Ron Sneed, a Mr. Branch and James Bunyan - all of whom were black. (T. 591). Only one of the jurors on the panel that tried the case was black. (T. 591). The defense moved to dismiss the panel (T. 591-592) and the court responded:

> On the authority of "Swaine" and the other cases from the United States Supreme Court, and the other cases that follow the theory, I find that there has been no violation of the rules and I find there has been no indication of systematic case by case exclusion by the State Attorney's Office and I find the Defendant's rights regarding the allegation made by counsel are unfounded and do not apply in this case. (T. 592).

The rule of law that the court applied in this case is set forth in Swain v. Alabama, 380 U.S. 202 (1965). In Swain, supra at 221, the court held that the striking of black jurors in a particular case could not constitute a denial of the equal protection of the laws, and a plurality of four justices stated that there would be a violation of the Fourteenth Amendment to the U.S. Constitution where in case after case the prosecutor uses his peremptory challenges in a systematic

practice to remove black people from the jury. Swain v. Alabama, supra at 223-224.

The law concerning jury selection has changed substantially since 1965. In Duncan v. Louisiana, 391 U.S. 145, 154 (1968), the Supreme Court announced that the Sixth Amendment right to trial by jury must be recognized by the states in serious criminal cases as part of their obligation to extend due process of law to all persons within their jurisdiction. The court next announced in Carter v. Greene County, 396 U.S. 320, 330 (1969), that:

> Once the State chooses to provide grand and petit juries, whether or not constitutionally required to do so, it must hew to federal constitutional criteria that the selection of membership is free of racial bias. The exclusion of Negroes from jury service because of their race is "practically a brand upon them . . ., an assertion of their inferiority . . ." That kind of discrimination contravenes the very idea of a jury . . ." a body truely representative of the community," composed of "the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds." (footnotes omitted)

In Peters v. Kiff, 407 U.S. 493, 496 (1972), the court openly recognized the distinction between the Sixth Amendment-due process rule it announced in Duncan v. Louisiana, supra, and the equal protection

analysis it had applied in all prior cases including Swain v. Alabama, supra. Here the court held that:

> . . . a State cannot, consistent with due process, subject a defendant to indictment or trial by a jury that has been selected in an arbitrary and discriminatory manner, in violation of the Constitution and laws of the United States.
>
> Peters, supra at 502.

One of the laws of the United States that speaks directly to this issue is 18 U.S.C. § 243 which says that:

> No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as a grand or petit juror in any court of the United States, or of any State on account of race, color, or previous condition servitude; and whoever, being an officer or other person charged with any duty in the selection or summoning of jurors, excludes or fails to summon any citizen for such cause, shall be fined not more than $5,000.

In applying the Peters v. Kiff, standard:

> . . . any doubt should be resolved in favor of giving the opporutnity for challenging the jury to too many defendants, rather than giving it to too few.
>
> Peters, supra at 504.

Next, in Taylor v. Louisiana, 419 U.S. 522, 530 (1975), the court announced the requirement that a jury chosen from a fair cross section of the community was a fundamental part of the right to a jury trial

guaranteed by the Sixth Amendment. The court was not speaking in terms of equal protection, but in terms of right to a jury trial, when it said:

> Restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial.
>
> Taylor, supra at 530.

The same concept, and the distinction between the old equal protection approach and the new right to jury trial analysis, was spelled out in Peters v. Kiff, supra at 503-504, where it is stated:

> Moreover, we are unwilling to make the assumption that the exclusion of Negroes has relevance only for issues involving race. When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that their exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented. (footnote omitted).

Instead of just examining for a case by case systematic exclusion, the Supreme Court stated in Castaneda v. Partida, 430 U.S. 482 (1977), a decision

involving the selection of a grand jury, that:

> . . . we prefer to look at all the facts that bear on the issue, such as the statistical disparties, the method of selection, and any other relevant testimony as to the manner in which the selection process was implemented.
>
> Castaneda, supra at 500-501.

The trial court in the case at bar applied the equal protection standard from Swain v. Alabama, supra. It failed to analyze the motion presented by the defendant in terms of the fair cross section of the community standard that was developed by the U.S. Supreme Court after Swain. It was up to the court to decide, from its first hand exposure to the proceedings, whether the jury had been selected in an arbitrary and discriminatory manner in violation of either 18 U.S.C. § 243 or the Sixth Amendemnt right to a representative jury, from which there has not been excluded an identifiable group that plays a major role in the community.

The first state court decision to hold that the use of peremptory challenges to remove prospective jurors on the sole ground of group bias violates the right to trial by a jury drawn from a representative cross-section of the community was People v. Wheeler, 22 Cal. 3d 258, 583 P.2d 748, 762 (1978). The same holding was made in Massachusetts in Commonwealth v. Soares, 377 Mass. 461, 387 N.E. 2d 499, 516 (1979). New York courts adopted the rule that a peremptory challenge may not be employed to exclude a prospective juror solely

because of his race with People v. Thompson, 79 A.D. 87, 435 N.Y.S. 2d 739 (2nd Dep't. 1981) as did Illinois with People v. Payne, 106 Ill. App. 3d 1034, 436 N.E.2d 1046, 1048 (1st Dist. 1982). A plurality of the Louisiana Supreme Court said that a prosecutor cannot use a disproportionate number of peremptory challenges against members of one race solely on the basis of the jurors' race. State v. Eames, 365 So.2d 1361, 1370 (La. 1979). The New Mexico Court of Appeals has held that certain fact situations may arise where the defendant can show the impermissible use of peremptory challenges based entirely upon the facts of his own case. State v. Crespin, 94 N.M. 486, 612 P.2d 716, 717 (Ct.Apls. 1980).

The most recent court to comment on this issue in our state, Johnson v. State, 418 So.2d 1063, 1064 (Fla. 3d DCA 1982), has left open the issue of whether a defendant can attack the use of peremptory challenges solely on its use in his own case. The policy arguments behind this concept are clear. Racial discrimination by government officials is highly disfavored by the law. The exclusion of a person from a jury in any state on account of race is a violation of 18 U.S.C. § 243. People should not be convicted in proceedings that are conducted in violation of federal statute.

Defendant asks the court to adopt the procedure set forth in People v. Payne, supra at 436 N.E. 2d 1046,

1050-1051, where it says:

> Accordingly, we hold that when it reasonably appears to the trial court, either by its own observation or after motion by the defendant, that the prosecuting attorney is using peremptory challenges to systematically exclude Blacks from the jury solely because they are Blacks, the court should require the prosecutor to demonstrate, by whatever facts and circumstances exist, that Blacks were not being systematically excluded from the jury solely because they were Blacks. At this stage, the burden of demonstrating that the Constitution was not being violated is upon the prosecution. Also, at this stage, the trial court should not employ any presumption that the Constitution is not being violated. Once it reasonably appears to the trial court that the accused is being affirmatively denied an impartial jury as required under the 6th Amendment, there is no reason to presume that the State is not affirmatively violating the accused's constitutional entitlement.
>
> If the trial court finds that as to any of the questioned challenges the State has not sustained its burden of demonstrating that it was not excluding Blacks from the jury solely because they were Blacks, the court must then conclude that the jury as constituted at that point fails to comply with the fair cross section requirement of the Constitution, and it must dismiss the jurors thus far selected. Also, it must quash any remaining venire, since the accused is entitled to a random draw from an entire venire, not one that has been partially or totally stripped of a cognizable group by unconstitutional means. Upon such dismissal, a different venire should be drawn and the jury selection process may begin again. (footnotes omitted).

The present case is not unlike United States v. McDaniels, 379 F.Supp. 1243 (E.D. La. 1974), in terms of the use of peremptory challenges by the prosecution. There the court granted a new trial saying:

> This duty was not born of Swain's constitutional prohibition, nor any explicit duty the law imposes on a prosecutor; it arose out of the matrix of facts in this case. There can be no reflection of his personal character, no issue of his lack of racial animus, nor any argument that he violated the law. But his failure to exercise challenges in such a manner as to render the jury in this case unrepresentative resulted in a trial process that was so unfair as to impel the court to grant a new trial under Rule 33 of the Federal Rules of Criminal Procedure, in the interest of justice.
>
> McDaniels, supra at 1250.

V.

IMPROPER ARGUMENT
BY THE PROSECUTION

It is stated in Pait v. State, 112 So.2d 380, 385 (Fla. 1959), that:

> ... when an improper remark to the jury can be said to be so prejudicial to the rights of an accused that neither rebuke nor retraction could eradicate its evil influence, then it may be considered as ground for reversal despite the absence of an objection below, or even in the presence of a rebuke by the trial judge.

If the errors complained of destroy the essential fairness of a criminal trial, they cannot be countenanced regardless of the lack of objection. Dukes v. State, 356 So.2d 873, 874 (Fla. 4th DCA 1978). Comments that are so prejudicial as to deprive the defendant of a fair trial constitute fundamental error and can be the basis for the reversal of a conviction in the absence of a contemporaneous objection. Ross v. State, 386 So.2d 1191, 1195 (Fla. 1980). Where the contents of the prosecutor's final argument, taken as a whole, were such as utterly to destroy the defendant's right to the essential fairness of his criminal trial, a new trial should be granted even in the total absence of timely preservation below. Peterson v. State, 376 So.2d 1230, 1234 (Fla. 4th DCA 1979). In Winters v. State, 425 So.2d 203, 204 (Fla. 5th DCA 1983), the court at least implies that if the closing argument of a prosecutor is "fundamentally inflammatory" this will require a

reversal even where there was no objection made at the trial.

A trial judge must halt improper remarks of counsel in argument to the jury, whether objection is made or not; and the court must then admonish the jury properly so as to erase any prejudical result such remarks may have created against the party thus attacked. Ailer v. State, 114 So.2d 348, 351 (Fla. 2d DCA 1959). When a prosecuting attorney has indulged in improper argument the question at the appellate level is whether or not the court can see from the record that the conduct of the prosecutor did not prejudice the accused, and unless this conclusion can be reached the judgment must be reversed. Thompson v. State, 318 So.2d 549, 552 (Fla. 4th DCA 1975). As was stated by Justice Drew in Grant v. State, 194 So.2d 612, 615 (Fla. 1967):

> To some it might appear to be straining at technicalities to reverse this case in which literally thousands of words were spoken for the mere utterance of 30 words, but this result is required not by the whims or indivdual feelings of the Justices of this court but because the law which we, and those others who exercised the State's sovereign power in the trial and prosecution, are sworn to uphold has been patently disregarded. The rules which govern the trial of persons accused of crime in our courts are the result of hundreds of years of experience. With their manifold faults, they have proven to be man's best protection against injustice by man. Many a winning touchdown has been called back and nullified because someone on the offensive team violated a rule by which the game was to be

> played. The test in such case is not whether the infraction actually contributed to the success of the play but rather whether it might have. Surely where life is at stake, the penalty cannot be less severe. (emphasis in original).

It is improper for a prosecutor to assert his personal opinion as to the credibility of a witness, Dukes v. State, supra at 876 and Murray v. State, 425 So.2d 157, 158-159, n.2 (Fla. 4th DCA 1983), especially that of a key witness. Thompson v. State, supra at 552. Fla. Bar Code Prof. Resp., D.R. 7-106(C)(4) expressly prohibits a lawyer from asserting his personal opinion as to the credibility of a witness.

At the guilt phase of the trial, the key witness for the prosecution was the co-defendant, Robert Horton. He was the only witness who placed the defendant at the scene of the crime. In his closing argument the prosecutor told the jury:

> Robbie Horton agreed to testify, not under subpoena, not because he was a defendant in the case, but to testify what he knows to be the truth. He testified truthfully and did not lie. He testified as to the truth. (T. 1094).

The record indicates that the prosecutor agreed to ask the court to give Horton a substantial break regarding the time he would serve in jail (T. 986), and further agreed that Horton's testimony would not be used against him at any later date (T. 979), in exchange for Horton's

testimony against Freddie Jones. There is no statement in the record from Horton that he agreed to testify "not because he was a defendant in the case, but to testify what he knows to be the truth." This is a creation of the prosecutor, unsupported by the record.(T. 976-980).

In argument to the jury, counsel are restricted to evidence and reasonable deduction therefrom. They are not permitted to misstate the evidence or to influence the jury by facts or conditions not supported by the evidence. Akin v. State, 86 Fla. 564, 98 So. 609, 613 (1923). It is improper to argue what is not in evidence or what is contrary to the evidence. Peterson v. State, 376 So.2d 1230, 1232 (Fla. 4th DCA 1979).

Officer Gary Williams was asked at trial if he could determine which way the tire tracks went (T. 714). In response Williams said:

> At that point, I was not asked to make a determination of the tire tracks, although, due to the fact that I have been told at that point that someone heard a truck come from the west and traveled towards the west, I assumed that it came from this direction here and also, based upon this area, roadway which it started from and emanated to. (T. 715).

In his attempt to show that the defendant deliberately drove a truck over the victim's body, the prosecutor told the jury:

> Gary Williams, the man who drew the sketch, showed the

> Line of tire markings over the roadway, continuing over the body's back on the roadway in the same direction. There were no backup marks or anything else. Just one line straight over the body. (T. 1088).

This was a mischaracterization of Officer Williams' testimony that he had not been asked to make a determination of the direction of the tire tracks and was merely making an assumption based on what he had been told about a third person having heard the general direction from which a vehicle came.

This mischaracterization was exacerbated when the prosecutor told the jury:

> This man did not even bother to back up the truck on the roadway to avoid running over this man who he just shot in the head. he did not care. He did not give a damn. He knew the guy was right in front of the truck, and killed him if he was not dead already. (T. 1106).

The police officers who spoke with Cecil Jones were not called as witnesses. The totality of the testimony concerning the conversation between Cecil Jones and the police officers was:

> [Mr. Kahn]. And did there come a time on October 16, 1981, that a City of Hialeah police officer came to speak to you at your house?
> [Mr. Jones]. Yes.
> Q. That was about five o'clock in the evening?

A. I do not recollect the time.

Q. And they came and spoke to you about that gun?

A. They did.

Q. After you spoke to them about the gun what did you then do?

A. Went and looked for it.

Q. In your house?

A. Yes

Q. And did you find it?

A. No, I didn't.

Q. Did you come back and tell the police you did not find the gun?

A. Told them I didn't find it.

Q. Did they also question you about your car, ask you about your vehicle?

A. They did. (T. 944-945)

In closing argument the prosecutor said:

> The police went over to Mr. Jones' house and asked if that is your car. Mr. Jones said, "Yes, that is my car."
>
> And they said, "With this license tag?"
>
> And he said, "Yes."
>
> They asked him if he had it the day of October 7th or were you at work on October 7th, and he said no, the car was home with the keys. That is how he testified in court. (T. 1092).

In order to magnify the horror of the crime the prosecutor said of the victim:

> He could hear the discharge of that gun before feeling any penetration into his skull. (T. 1103).

There is no testimony or other evidence in the record that would indicate that the victim heard the discharge of a gun before being shot.

It is improper for counsel to state facts of his own knowledge which are not in evidence. Cummings v. State, 412 So.2d 436, 439 (Fla. 4th DCA 1982). It is improper for the prosecutor to lead the jury to believe that he has information outside the record, Wheeler v. State, 425 So.2d 109, 110 (Fla. 1st DCA 1983), or to imply that he has additional knowledge or information about the case which has not been disclosed to the jury. Thompson v. State, supra at 551-552. As stated in the Thompson case at page 552.

> . . . the inquiry should be whether the prosecutor's expression might reasonably lead the jury to believe that there is other evidence, unknown or unavailable to the jury, on which the prosecutor was convinced of the accused's guilt.

When speaking in closing argument about the testimony of the witness who heard shots in the neighborhodd of the crime the prosecutor said:

> I wish I had a live eye cap, a filming of the whole thing for you, to show you that is how the crime occurred. (T. 1087).

The implication of these assertions is that if there had been a witness who had seen all the events that led to the death of the victim or a camera that filmed everything that happened in Hialeah on October 7, 1981 those extra-record items would prove the defendant's guilt and the prosecutor knows beyond the evidence that this is so.

Steve Williams, the first police officer, to get to the Blue Ribbon meat truck arrived at 1:53 p.m. (T. 745). Douglas Stephens, the officer who lifted the fingerprints from the truck (T. 754) arrived at 3:00 p.m. (T. 752). Officer Stephens said that from his limited experience he would assume that the fingerprints were recently placed on the truck and could have been placed there at 11:00 a.m. as well as 9:30 a.m. Officer Gary Willism, estimated the time of the incident at 9:45 a.m. (T. 719, 723). Patrolman Victor Anchipolovsky was dispatched to the scene at 10:07 a.m. and arrived at 10:30 a.m. (T. 705).

In his closing argument the prosecutor told the jury:

> The defense attorney wants you to believe somewhere, somehow, the Cadillac took off, although the defendant's fingerprints are on the outside of that truck.
>
> We know that the defendant got into the truck or somebody got into that truck at the intersection. Somebody, somewhere before the body was found or sometime before he was shot, fingerprints were on there, somewhere, somehow. (T. 1085).

and:

> I believe his Honor will instruct you as follows: That to satisfy the requirements of proof in a circumstantial case, the fingerprints which correspond to those of the accused must be found in the place where the crime was committed under such circumstances as to rule out the possibility that they could have been impressed at a time other than the time when the crime was committed.
>
> I do not know of any other possibilities that the fingerprints could have been there. That is in evidence, in front of you, at this point, where it could have been there anytime. (T. 1111).

The evidence does not show that the defendant's fingerprints were on the truck before the body was found or before the victim was shot. The evidence does not rule out the possibility that the prints were placed there after 9:45 a.m. The prosecutor is either mischaracterizing the evidence or implying to the jurors that he has information beyond what he has presented to them.

The timing of the fingerprints was very important to the state's case. Francisco Diaz and Ligia Diaz, the witnesses who saw 2 black men leave the brown Cadillac and first approach the meat truck, could not place them at the truck any earlier than 10:30 a.m., and possibly even later. This was at least 45 minutes after the shooting and even longer after the time the killers approached the truck. If this were so, then the brown Cadillac owned by Cecil Jones did not rendezvous with the meat truck until after the kidnapping and killing. For the prosecutor to reach outside of the evidence to argue this point is highly prejudicial.

Ligia Diaz did not look inside the Blue Ribbon meat truck. (T. 686). She testified that she could not see the left or passenger's side of the truck. (T. 675). When Francisco Diaz passed the truck he saw 2 black men inside. (T. 668). There is no evidence that the regular driver, a white man, was in the truck at this time. During closing argument the prosecutor told the jury:

> Mr. Diaz does not see the driver. Where is he? Probably on the floor. He did not know.
>
> I am not going to speculate. You, as a jury, should not speculate where he is in that truck or what is happening. There is no evidence of that.
>
> We can assume somebody is driving the truck up to the stop light. It is reasonable to presume nobody got out of the truck. He was probably

> still in the truck with the other two men that had gotten in the truck. (T. 1084).

These statements, implying that the deceased was probably on the floor of the truck after the defendant entered it, do not arise from the evidence or as an inference therefrom. They come from the prosecutor's speculation. The Diazes never saw the regular driver in the truck. No witness ever placed the victim, or any regular driver, in the truck at the time the Diazes saw it -- 10:30 a.m. or later. If the regular driver was not in the truck when the 2 black men left the brown Cadillac, then the incident the Diazes witnessed occurred after the regular driver had been kidnapped and killed. In order to eliminate such a probability the prosecutor invented in his closing argument the facts that the victim was on the floor between the 2 black men who got into the truck at the time the Diazes passed the truck.

It is improper for counsel to state his personal opinions in closing argument. Cummings v. State, 412 So.2d 436, 439 (Fla. 4th DCA 1982). In the closing argument in the case at bar the prosecutor said:

> 1. No one is trying to hide anything from you, but I do not think the man should walk out the door because of a slight conflict like that. I do not think this man should walk out the door because the Diazes did not know whether it was 10:00 or what time in the morning it was. (T. 1114-1115).

2. The defense attorney is going to argue that this is a bad identification. I do not believe it is. (T. 1113).

3. I believe all the elements have been met in this case beyond a reasonable doubt. There is no doubt about it. (T. 1100-1101).

4. I have done my job. I believe that I have proven the defendant guilty beyond a reasonable doubt. (T. 1118).

5. Sure there were some conflicts. If there weren't I would be surprised as to who got together here on this case and planned this testimony. (T. 1114).

The defendant is placed at an extreme disadvantage if the prosecutor makes improper remarks on 16 different occasions during his closing argument. If the defendant rises to object 16 separate times it will appear to a jury that he is being obstructive and unfair to the prosecution. On the other hand if the defense does not object the prosecution has unfairly prejudiced the jury against the defendant and the defense has waived its right to raise thereafter the unobjected to comment.

This is not a question trying to "sandbag" the opposition by withholding an objection as a matter of strategy. Rather, this is a case of being overwhelmed by improper remarks by opposing counsel and fearing the displeasure of the jury if one bounces up and down in continual objections.

It is stated in Kirk v. State, 227 So.2d 40, (Fla. 4th DCA 1969), and repeated with approval in Cochran v. State, 280 So.2d 42, 43 (Fla. 1st DCA 1973), that it is:

> ... the duty of a prosecuting attorney in a trial to refrain from making improper remarks or committing acts which could or might tend to affect the fairness and impartiality to which the accused is entitled. [citation omitted]. The prosecuting attorney in a criminal case has an even greater responsibility than counsel for an individual client. For the purpose of the individual case he represents the great authority of the State of Florida. His duty is not to obtain convictions but to seek justice, and he must exercise that responsibility with the circumspection and dignity the occasion calls for. His case must rest on evidence, not innuendo. If his case is a sound one, his evidence is enough. If it is not sound, he should not resort to innuendo to give it a false appearance of strength.
>
> Kirk, supra at 42-43.

An accused has a fundamental right to a fair trial free from improper argument by the prosecution. Chavez v. State, 215 So.2d 750 (Fla. 2d DCA 1968). That fundamental right was violated in the trial of the case at bar.

VI.

THE COURT ERRED IN REFUSING TO INSTRUCT THE JURY AS TO PENALTIES OF LESSER INCLUDED OFFENSES

Rule 3.390(a) of the Florida Rules of Criminal Procedure provides:

> (a) The presiding judge shall charge the jury only upon the law of the case at the conclusion of argument of counsel and upon request of either the State or the defendant the judge shall include in said charge the maximum and minimum sentences which may be imposed (including probation) for the offense for which the accused is then on trial.

The rule is mandatory, not discretionary. Tascano v. State, 393 So.2d 540 (Fla. 1981). The language "for which the accused is then on trial" has been interpreted to mean different things by the district courts of appeal, but has not been specifically ruled on by this court. For example, the Fourth District has decided that penalties need only be provided for those crimes charged in the charging document. Renaud v. State, 408 So.2d 1059 (Fla. 4th DCA 1981).

The explicit language of the rule is much broader than that. A defendant in a criminal matter is on trial not only for those crimes actually charged in the indictment or information, but is also on trial and subject to conviction for any lesser included offenses. The defendant is no less in jeopardy for the lesser included offenses than he is for those crimes actually charged. Thus, under the clear language of Rule 3.390(a),

the defendant is entitled to an instruction regarding the penalties, if requested.

This interpretation was used by the court in Gable v. State, 394 So.2d 231 (Fla. 1st DCA 1981). The trial court in that case had refused to instruct the jury on the penalties for lesser included offenses where the defendant was charged with rape. The First District Court of Appeal held that the refusal of the trial court to instruct the jury on "penalties for the crimes [defendant] could have been found guilty of" was grounds for reversal. This court affirmed relying on Murray v. State, 403 So.2d 417 (Fla. 1981). State v. Gables, 406 So.2d 1113 (Fla. 1981). In Murray this court held that Rule 3.390(a) was mandatory and the failure to comply with it was reversible error.

Similarily, in the case of Malloy v. State, 382 So.2d 1190 (Fla. 1979), this court held proper the inclusion of the penalty for second degree murder although the defendant had been charged with and convicted of first degree murder. Although in that case the defendant complained of the inclusion of the lesser included penalty, this court upheld the inclusion citing to Rule 3.390(a) and Dorminey v. State, 214 So.2d 134 (Fla. 1975). In Dorminey, the defendant was convicted of first degree murder for a murder to which he had confessed. The trial court had given an instruction as to the penalty for second degree murder. The

defendant claimed error, but this court relied on Rule 3.390(a) stating that it:

> directs that the presiding judge shall include in his charge to the jury the penalty defined by law for the offense for which the accused is then on trial. In properly applying this rule clearly no error was commited, and further comment is unnecessary. (See Johnson v. State, 308 So.2d 38, Fla. 1975).

Dorminey, supra at 136.

In addition to the express language of the rule, the policy also dictates the giving of a penalty instruction for lesser included offenses. The rule was formulated to facilitate the jury pardon power. The rule was made to allow for "the jury's right to consider the potential sentence on the crime charged in evaluating whether to convict of that crime or something less." Williams v. State, 399 So.2d 999 (Fla. 3d DCA 1981) applying Tascano, supra. The jury's right to pardon is unaffected by clear evidence of guilt. Williams, supra at 1003.

Thus, by providing the jury information as to the potential penalty and ramification of their determination of guilt as to the particular crimes included, the jury has a more rational basis by which to exercise its pardon power. By refusing the jury this very vital data, i.e. the possible results of their choice of crime, the jury is compelled to exercise its pardon power in the dark. It has no understanding of the implication

of convicting of a lesser included offense. This situation is even more crucial in a social climate in which the public is disconcerted with a system they perceive to be lenient and parole, too quick. When given information such as mandatory sentence provisions, a jury is better able to exercise its pardon power in an informed and rational way.

It is interesting to note that the Third District in Williams found it anomalous that "the jury need not be instructed on the penalty provisions of lesser included offenses" in light of the jury pardon policy behind Rule 3.390(a). Williams, supra at 1002, fn 9. The Williams court cited only to other district court cases in concluding that the rule did not warrant the lesser penalties. Nevertheless, anomalous is the proper characterization of an interpretation of Rule 3.390(a) which would preclude instruction on lesser included penalties for which a defendant stands in jeopardy.

In this case, the trial court refused to give an instruction as to the lesser included offenses for which Freddie Jones could have been convicted. (R. 1041-42). The refusal violated the letter and the policy behind Rule 3.390(a). The rule is mandatory and its violation requires reversal. Tascano, supra; Murray, supra.

VI.

OVERRIDING THE JURY RECOMMENDATION OF LIFE IMPRISONMENT

In Tedder v. State, 322 So.2d 908 (Fla. 1975), this court said:

> A jury recommendation under our trifurcated death penalty statute should be given great weight. In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ.
>
> Tedder, supra at 910.

This court in Shue v. State, 366 So.2d 387 (Fla. 1978), directed the trial court to vacate the sentence of death and to impose a sentence of life imprisonment where the court found that:

> It is impossible to say that there was no reasonable basis for the jury to have concluded that some mitigating circumstances existed sufficient to outweigh the aggravating circumstances. (emphasis in original).
>
> Shue, supra at 366.

In Walsh v. State, 418 So.2d 1000, 1003 (Fla. 1982), the court cites 23 cases where it has reversed a death sentence and directed the trial court to impose life imprisonment where there was a reasonable basis for the jury's recommendation. The mitigating circumstances that can be the basis for the jury's recommendation are not limited to those listed in § 921.141, Fla. Stat. (1981). Songer v. State, 365 So.2d 696, 700 (Fla. 1978). The jury can draw on any consideration reasonably relevant to the question of

mitigation of punishment. Lewis v. State, 398 So.2d 432, 439 (Fla. 1981).

The jury's recommendation of life imprisonment can be reasonably based on sentences imposed on accomplices. Malloy v. State, 382 So.2d 1190, 1193 (Fla. 1979). In Barfield v. State, 402 So.2d 377 (Fla. 1981), the reasonable basis for the jury's verdict was that: 1) one co-defendant charged with conspiracy to commit first degree murder received a 5 year sentence; 2) the state granted one of the participants immunity; 3) the mastermind of the murder had died; and 4) the defendant was considered a middleman. In McCampbell v. State, 421 So.2d 1072 (Fla. 1982), this court found that the jury's recommendation of life imprisonment should not have been overruled by the trial judge where it appeared that the jury could have been influenced in its recommendation by: 1) the defendant's employment record; 2) his prior record as a model prisoner; 3) psychological testimony of intelligence and personality traits which showed potential for rehabilitation; 4) family background; and 5) the disposition of a co-defendant's case.

In the case at bar the jury that recommended life imprisonment could have been influenced in its recommendation by: 1) the absence of a significant history of prior criminal activity; 2) co-defendant

Robert Horton's conviction for only robbery and the prosecutor's statement that he would recommend to the court that Horton not be sentenced to the fullest extent; 3) co-defendant Carlton Adderly being told that the most time he could be sentenced to was 15 years in jail and the prosecutor's promise to tell the court to take his co-operation into consideration at the time of sentencing; 4) the testimony of Dr. Jeffrey Elenewski that the defendant had no serious personality difficulties, that he was of low-average intelligence, that he would be a well behaved, model sort of prisoner and that his likelihood of committing a violent act in prison was very low; 5) the testimony of the defendant's work supervisor, who had known him for 10 years, that the defendant was a peaceful and a non-violent person and that the defendant was at his job every time boats came in; 5) the testimony of the assistant pastor of the defendant' church that the defendant was active in church activities, worked well in those activities, regularly attended church and was a non-violent person; and 6) the testimony of the defendant's father that the defendant had lived at home up to six months before the incident in question and was a non-violent person.

For the Florida Supreme Court to approve the imposition of a death sentence, the court must find some compelling reason for the trial judge's rejection of the jury's recommendation of life imprisonment.

Burch v. State, 343 So.2d 831, 834 (Fla. 1977). In Smith v. State, 403 So.2d 933 (Fla. 1981), the court reduced a sentence of death to life imprisonment saying:

> The trial judge did not articulate any reason for rejecting the jury's recommendation of a life sentence. The record does not show that he had any more information than the jury did; the trial judge did not demonstrate how reasonable men would not differ on the matter of sentencing. Whatever his rationale, we are unable to discern a basis which would be sufficient to reject the life-sentence recommendation.
>
> Smith, supra at 935.

In the case sub judice the trial judge, though he enumerated the aggravating and mitigating factors, failed to articulate a compelling reason (or any reason at all) for rejecting the jury's recommendation of a life imprisonment. The record does not show that the judge had more information than the jury with regard to this issue. A court must weigh heavily the advisory opinion of the sentencing jury. McCaskill v. State, 344 So.2d 1276, 1280 (Fla. 1977). Even when there are no mitigating factors and one aggravating factor, the jury's recommendation militates against the normal presumption that death is the proper sentence. Williams v. State, 386 So.2d 538, 543 (Fla. 1980). As a basis for its recommendation the jury can use both its view of the evidence and its conclusions as to aggravating and mitigating factors. Gilvin v. State, 418 So.2d 996, 999 (Fla. 1982). Given these standards the court must do more than recite

why it feels that the aggravating factors outweigh the mitigating factors. The court should articulate why it is rejecting the jury's recommendation. Otherwise the court could impose the death penalty merely by weighing the aggravating and mitigating factors differently than the jury did instead of by meeting the standard of Gilvin v. State, supra, that the death penalty can be imposed only where the court:

> ... cannot say that the jury's view of the evidence and its conclusions as to aggravating and mitigating factors could not reasonably differ from that of the trial court and that it could not reasonably conclude under the circumstances that a life sentence was warranted.
>
> Gilvin, supra at 999.

In the case at bar the trial court recognized that there was one statutory mitigating factor and three other factors that it appears to hold are reasonably relevant to the question of mitigation of punishment. We know from McCampbell v. State, supra at 1075, that positive intelligence and personality traits bearing on the defendant's life while incarcerated are appropriate for the jury's consideration. In all, we have at least 5 mitigating factors in this case. In Lewis v. State, 398 So.2d 432 (Fla. 1981). this court said:

> Under the Florida capital felony sentencing law, the

> recommendation of the jury is entitled to great weight, and should not be overruled unless, based on the aggravating circumstances and the lack of mitigating circumstances, a sentence of death is clearly appropriate.
>
> Lewis, supra at 438.

There is not lack of mitigating circumstances in the present case. Thus, the trial court erred in overruling the recommendation of the jury.

## VIII.

## THE LOWER COURT IMPROPERLY APPLIED FLORIDA STATUTE §921.141 IN FINDING AGGRAVATING CIRCUMSTANCES

### A. The Court Below Improperly Found A Previous Conviction.

The court erred in finding that defendant had been previously convicted of another capital felony at the time of sentencing. Specifically the judge applied Fla. Stat. § 921.141(5)(b) and found:

> On April 5, 1982, the defendant JONES was convicted of two offenses which involved the use or threat of violence to another person. Although the defendant was convicted of these two offenses, to wit: robbery with a firearm and kidnapping with a firearm, at the same time he was convicted of the murder for which he is presently to be sentenced, the facts show that these two crimes occurred prior to the murder. The defendant was in full control of the truck and its driver, Tomas DeVillegas, before he, the defendant, drove the truck to another location where the actual murder took place.

The court relied on this court's ruling in King v. State, 390 So.2d 315 (Fla. 1980) and Lucas v. State, 376 So.2d 1149 (Fla. 1979) in justifying its application of that particular aggravating circumstance but the facts of those cases are irrelevant to these. Rather, the rule as set forth in Meeks v. State, 339 So.2d 186 (Fla. 1976) is applicable to the circumstances herein.

This court has stated that "it is true that contemporaneous convictions do not qualify as an aggravating circumstance vel non under section 921.141(5)(b)." Meeks, supra at 190. In the Meeks case, the defendant had been convicted of robbery, assault to commit murder

and possession of a firearm in addition to the murder conviction, in one proceeding. The acts were part of a continuous event in which the defendant and his accomplice robbed a small food store and took the cashier and her boyfriend to a back room and shot them. One of the victims survived.

Similarly, the events of which defendant Jones was convicted were all part of a continuous series of events in a short span of time and involving the same people.

In the King case, the defendant was tried in one proceeding for sexual battery, murder and attempted murder. The attempted murder took place separate and apart from the murder and sexual battery. The murder took place at the victim's home after which the defendant returned to the correctional facility where he was serving a sentence. The defendant then stabbed a prison counselor who had discovered the defendant returning to the facility.

The attempted murder of the prison counselor was a separate incident unrelated to the murder and sexual battery charges which was the subject of the death penalty. In fact, the two incidents were charged by separate indictment and information.

The King court determined that under those circumstances, it was appropriate to consider the attempted murder as a previous conviction, even though

the convictions were contemporaneous. The court addressed the apparent conflict with Meeks. The court stated:

> We find the legislature intended that the attempted murder be considered as an aggravating factor in an instance of this type. In reaching this decision, we have not overlooked our decision in Meeks vs. State, 339 So.2d 186 (Fla. 1970). The conviction in Meeks are factually distinguishable from those in the instant case; however, to the extent there is conflict with Meeks, we hereby recede.
>
> King, supra at 321.

Thus, while this court has indicated its intent to interpret section 921.141(5)(b) to include certain crimes for which the convictions are contemporaneous, it appears not inclined to consider crimes which occurred in the same sequence of events, contemporaneously. The inappropriateness of considering the contemporaneous robbery conviction as a "previous conviction" is further demonstrated by the lower court's application of section 921.141(5)(c) to the same factual circumstance. The court found that the murder was committed while the defendant was engaged in the commission of two of the enumerated crimes in subsection (d), to wit robbery and kidnapping. Thus for the same aspect of the crime, the defendant was penalized twice. Under these circumstances, the court has improperly doubled the aggravating circumstances. This is just the same type of doubling which this court has condemned in White v. State, 402 So.2d 331

(Fla. 1981) and in Hargrove v. State, 366 So.2d 1 (Fla. 1978).

B. The Court Improperly Doubled Subsections (d) and (f).

The lower court further erred in doubling the impact of the fact that the murder herein was found to have been committed in the course of a robbery and therefore committed for pecuniary gain. The court thus found that sections 921.141(5)(d) and (f) applicable, based upon the same aspect of defendant's behavior. The cases are replete that such doubling of these aggravating circumstances is error. White v. State, supra; Enmund v. State, 399 So.2d 1362 (Fla. 1981); Armstrong v. State, 339 So.2d 953 (Fla. 1981); Hargrove v. State, supra; Provence v. State, 337 So.2d 783 (Fla. 1976).

It has been held that the mere recitation of the two aggravating circumstances will not necessarily render the death sentence in error. Provence, supra; State v. Dixon, 283 So.2d 1 (Fla. 1973). Nevertheless, if the doubling appears to have impaired the process of weighing the aggravating versus the mitigating, the sentence must be vacated. Enmund, supra. Generally, if there are no mitigating circumstances involved when the trial court has improperly doubled these circumstances, this court has held such error to be harmless. Armstrong v. State, 399 So.2d 953 (Fla. 1981); White v. State, supra; Elledge v. State, 346 So.2d 998 (Fla. 1977).

In this case the sentencing process was fundamentally impaired. The court found a mitigating factor insofar as defendant Jones has no prior criminal convictions. The weighing process therefore could not have been appropriately conducted with the scale balanced erroneously to the death penalty side. Even though the judge may have found more aggravating than mitigating circumstances, the "death penalty statute does not contemplate a mere tabulation of x number of aggravating and y number of mitigating circumstances." White, supra at 336. Therefore even assuming the remainder of the aggravating findings are appropriate, nevertheless the error of the subsection (d) and (f) doubling prevented a "reasoned weighing" of the circumstances to determine the appropriateness of the death penalty. White, supra at 336. If there were no mitigating factors, then perhaps it could be argued there is no harmful error in the doubling factor. But where a mitigating factor exists, it cannot be said with certainty that the outcome would be the same, given the mandate of White. See also Fleming v. State, 374 So.2d 954 (Fla. 1979).

The impairment of the process is further exacerbated by the fact that in this case there was really a multiple doubling effect: the robbery and kidnapping herein became the basis for a finding of three aggravating factors. Out of the same aspect of the behavior the court found a pecuniary motive; a conviction for a previous serious felony; and that it was committed in the course of another felony.

C. There Was No Evidence To Support The Trial Court Finding Of Cold And Calculating Premeditation.

The lower court erred in applying section 921.141(5)(i) to this case. In applying subsection (i), the court stated:

> There was absolutely no necessity for the taking of human life in the case. The unarmed victim had been rendered helpless from the moment his truck was hijacked by the defendant and his accomplices. Helpless, and in no position to defend himself, the victim cried and begged for his life throughout this terrifying ordeal. The defendant coldly, with calculation and premediation, placed the gun to the side of the victim's head and fired one shot at point blank range. There is absolutely no legal or moral justification for the death of Tomas DeVillegas.

There is not basis in the record for such a finding. The burden of proof as to the aggravating factor is the same as in the guilt phase: beyond a reasonable doubt. Jent v. State, 408 So.2d 1024 (Fla. 1981); Williams v. State, 386 So.2d 538 (Fla. 1980).

Contrary to the cold, calm and calculating manner which the lower court described, the testimony reflected that the defendant "started going crazy" (Tr. 1208). The only purported witness to the shooting testified that just prior to the shooting, defendant Jones' behavior was far from cold and calculating. There was no evidence whatsoever that there existed a plan to kill the victim from the beginning or that there was premediation.

The scenario depicted by the only witness, Carlton Adderly, is more readily susceptible to an inference that the defendant panicked when the victim began hollering and refused to get into the car. (Tr. 1208). There is nothing in the record which tends to prove beyond a reasonable doubt that defendant Jones acted in a cold calculating and premeditated manner.

The provision of subsection (i) has been interpreted to apply to those "murders which are characterized as executions or contract murders." McCray v. State, 416 So.2d 804, 807 (Fla. 1982). For example this court upheld the application of subsection (i) in Combs vs. State, 403 So.2d 418 (Fla. 1981) in which the defendant taunted his victim with death just prior to shooting her.

The facts as testified to herein do not comport with the trial judge's finding and in fact belie those findings under subsection (i). As such the sentence imposed was erroneous and must be reversed.

IX.

THE LOWER COURT ERRED
IN REFUSING TO CONSIDER
CERTAIN MITIGATING FACTS

The defendant presented evidence of mitigating circumstances which the court described under the heading:

> Whether there are any other aspects of the defendant's character or record, and any other circumstances of the offense. (R. 1843).

Defendant, Jones presented the testimony of Dr. Jeff Elenewski, a clinical psychologist, who evaluated Jones after visiting and consulting with him and testing him by means of the Minnesota Multiphasic Personality Inventory. (R.1234-1237). The psychologist testified that Freddie Jones was easily influenced by others and lacking social maturity and socialization. (R. 1241). He indicated that Jones requires little restrictive custody and is able to modify his life style and to change behavioral patterns and has a better than average chance of adjusting both in and after prison. (R. 1242).

Further, Elenewski testified it was his opinion that Freddie Jones was not likely to engage in homosexual activity in prison or to engage in violence or assaultive behavior either. (R. 1242). He determined that Jones does not possess a basically violent personality and that the likelihodd of Freddie Jones committing a violent act was very low. (R. 1244). Ultimately, the psychologist concluded that in his opinion Freddie Jones would be a model prisoner and well-behaved. (R. 1245).

Despite this testimony, the lower court made the following findings:

> This Court heard and considered the testimony of the defendant's father ("Defendant has no propensity to commit acts of violence"), his employer ("the defendant was a good worker"), and his preacher ("the defendant was a member of the church, did work for the church, and showed no signs of violence") and I have given these matters their just weight. (R. 1844).

Further the court in its sentence stated: "This court, having faced one statutory mitigating circumstance . . . is of the opinion that the aggravating circumstances far outweigh the mitigating circumstances, either statutory, or by any testimony, facts or circumstances presented at the trial and at the advisory proceeding." The court therefore "refuse[d] to concur" with the jury recommendation.

Significantly, the court refused to consider or give any weight to the testimony of Elenewski. It is not within the discretion of the court to refuse to consider any relevant evidence of mitigating circumstances. Eddings v. Oklahoma, 455 U.S. 104, 113-114 (1982). These non-enumerated mitigating factors must be considered as well as any of the statutory factors. It is the availability of these non-enumerated mitigating factors which saves Florida's death penalty statute from unconstitutionally depriving defendants from due process. Lockett v. Ohio, 438 U.S. 586 (1978); Sireci v. State, 399 So.2d 964 (Fla. 1981); Songer v. State, 365 So.2d 696 (Fla. 1978). The mitigating factors enumerated merely indicate the principal factors to be considered in every

case. White v. State, 403 So.2d 331, 336 (Fla. 1981).

This court has tacitly approved just the type of evidence as was presented by Elenewski as an appropriate mitigating factor. In the case of Miller v. State, 415 So.2d 1262 (Fla. 1982) the defendant had challenged the lower court's failure to allow testimony of a psychologist as to defendant's rehabilitative capacity. The psychologist had testified as to other aspects of defendant's character. This court found no error insofar as even without such testimony the jury had recommended a life sentence. It is worthy to note that the dissent in that case found the psychologist's testimony so persuasive as to warrant reversal of the death penalty.

Nevertheless, it cannot be denied that the type of testimony presented by Dr. Elenewski warrants minimum consideration by both the jury and the court. In Riley v. State, Fla. 366 So.2d 19, defendant cited as error the fact that the court had failed to consider certain non-statutory mitigating factors. This court found no merit to the charge insofar as the lower court had expressly stated it had considered all mitigating factors. In the instant case, the court completely eliminated the testimony of Dr. Elenewski from its consideration. It is incumbent upo- the lower court to articulate each and every mitgating factor it considers. Magill v. State, 407 So.2d 894 (Fla. 1981), the court in this case never got to the point of deciding the weight of the testimony because it never considered the testimony in the first place.

The court's failure to consider the character testimony of the psychologist was erroneous and prejudicial as is evidenced by his reversal of the jury's recommendation of life.

X.

DEATH IS A
DISPROPORTIONATE SENTENCE

The death penalty is the most irrevocable of sanctions and should be reserved for a small number of extreme cases. Gregg v. Georgia, 428 U.S. 153, 182 (1976). The Florida Supreme Court has a separate responsibility in cases where a death sentence is imposed to determine independently whether the ultimate penalty is warranted. Sullivan v. State, 303 So.2d 632, 637 (Fla. 1974).

Section 921.141, Fla. Stat. (1981), is constitutionally valid because the Florida Supreme Court reviews each death sentence to ensure that similar results are reached in similar cases. Proffitt v. Florida, 428 U.S. 242, 258 (1976). Under this proportionality concept, see Proffitt v. Florida, supra at 259, if a defendant is sentenced to die, the Florida Supreme Court reviews that case in the light of other decisions and determines whether or not the punishment is too great State v. Dixon, 283 So.2d 1, 10 (Fla. 1973).

The imposition of life sentences in similar cases, while not absolutely controlling, cannot be ignored by the Florida Supreme Court. McCaskill v. State, 344 So.2d 1276, 1280 (Fla. 1977). Identical crimes committed by people with similar criminal histories requires identical sentences. Meeks v. State, 339 So.2d 186, 192 (Fla. 1976). It is stated in Slater v. State, 316 So.2d 539, 542 (Fla. 1975) that:

> Defendants should not be treated differently upon the same or similar facts. When the facts are the same, the law should be the same.

The facts in the case at bar show at least 3 individuals involved in the hijacking of a meat truck and its driver. One bullet was removed from the victim's body. (T. 897-898, 913). The victim was not consciously aware of any pain when he was run over. (T. 912). The defendant had no significant history of prior criminal activity. (R. 1841). He had steady employment as a longshoreman and was on the docks every time boats came in. (T. 1265). He regularly attended church and was active in church functions. (T. 1267). His reputation in the community for being a nonviolent person was good. (T. 1263, 1267, 1269-1270).

In Brown v. State, 367 So.2d 616 (Fla. 1979), 3 young men wanted to steal a car for a robbery. As an elderly man was entering his car, he was struck by one defendant, forced into the car and then forced into the trunk. The victim was driven to the home of one defendant where it was decided that the defendants would kill him. He was then driven to a lake and forced into the water. All three defendants proceeded to hit the victim with their fists and with boards. Two of the defendants took turns shooting at the victim. After the victim was shot, the defendants thought he was dead. As the defendants left the lake, the victim

started to climb out of the water. They returned and one defendant held the victim's head under water until he drown. The car was stolen and the victim's money and watch were divided up. None of the three defendants was sentenced to die as a result of this criminal episode.

As in the case at bar, the Brown case involved a robbery and kidnapping. The persons who committed the crimes described in Brown obtained a financial gain from their crime. If it is logical to say in the instant case that: "The murder was committed by the defendant JONES for the sole purpose of avoiding or preventing a lawful arrest." (R. 1839), the same rationale should apply to the facts in Brown. There are no factors to distinguish the crimes committed in Brown v. State, supra, from the crimes committed in the case sub judice. If similar results are to be reached in similar cases, and the death penalty was not imposed on any of the three people involved in the criminal episode described in Brown, then this ultimate penalty is not appropriate for the case at bar.

The defendant in Stokes v. State, 403 So.2d 377 (Fla. 1981) "participated fully, with other members of the Outlaws Motorcycle Gang, in the brutal and senseless, beating of two members of a rival motorcycle gang." Stokes, supra at 378. He was convicted of 2 first degree murders. The murders were committed in the course of a kidnapping and were found to meet the

standard of § 921.141(5)(h), of Florida Statutes, of being especially heinous. In a system where the death penalty is reserved for a small number of extreme cases, it is difficult, if not impossible, to say that the crimes committed in Stokes are any less extreme than the crimes in the case sub judice. Stokes' sentence was reduced to life imprisonment by this court.

The purpose of the crime in Swan v. State, 322 So.2d 485 (Fla. 1975), was robbery or burglary. A television set, money and other items of value were taken by the defendant. The cause of death was a severe beating. The morning after the beating the victim was found in a semi-conscious condition on the floor of her home, badly bruised and beaten. Her mouth was gagged and her neck, left-foot and hands were tied so that any efforts the victim might make to free herself could have choked her to death. The victim died after 7 days in the hospital. The murder was committed during the night of May 29-30, 1973. On May 8, 1973 the defendant pled guilty to resisting arrest with violence, but he was not sentenced until June 19, 1973. The defendant in Neary v. State, 384 So.2d 881 (Fla. 1980), was convicted of robbery, burglary, sexual battery and first degree murder. The crime was committed for pecuniary gain and to avoid arrest. The cause of the death was strangulation. The facts as set forth in the opinion in Vasil v. State, 374 So.2d 465

(Fla. 1979), show a kidnapping and sexual battery. The victim was struck in the head with a rock both before and after an attempted rape. The victim was stabbed in the vagina with a palmetto branch and had lacerations of her vagina, bladder and rectum. The defendant stuffed the 15 year old girl's underpants in her mouth and she died of suffocation. The sentences imposed in Swan, Neary and Vasil were all life imprisonment.

In Gregg v. Georgia, supra at 188, the U.S. Supreme Court recognized the constitutional infirmity of a death penalty that is imposed in an arbitrary manner where there is no meaningful basis for distinguishing the cases in which it is imposed from the cases in which it is not. Defendant herein contends that there is so little meaningful distinction between the murders in Swan, Neary and Vasil on the one hand and in the crime committed in the instant case on the other, that it would be unconstitutionally "cruel and unusual" for this court to impose the death penalty in the case at bar.

There is a flaw in § 921.141, Fla. Stat. (1981), that was not addressed in Proffitt v. Florida, supra. Subsection 4 says, in part, that:

> The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida . . .

Cases involving a sentence of life imprisonment are not subject to direct review by the Florida Supreme Court. Where the defendant receiving life imprisonment chooses not to appeal, the case is not reported. Where the defendant receiving life imprisonment appeals his or her conviction, the district court of appeal does not review and discuss in its opinion the appropriateness of the sentence. The cases that get reported, and in which the sentence is discussed, are all cases where the death penalty is imposed by the trial court.

In Proffitt v. Florida, supra at 253, it is stated:

> Under Florida's capital-sentencing procedures in sum, trial judges are given specific and detailed guidance to assist them in deciding whether to impose a death penalty or imprisonment for life. Moreover, their decisions are reviewed to ensure that they are consistent with other sentences imposed in similar circumstances. Thus, in Florida, as in Georgia, it is no longer true that there is "no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many in which it is not.

The reality of the situation is that death sentences are reviewed to ensure that they are consistent with other cases in which the trial judge has imposed the death sentence. Cases where the trial judge has considered all aggravating and mitigating

factors and determined that life imprisonment is the appropriate sentence are ignored. Thus, the process is heavily skewed in favor of death. Unless life sentences imposed by the trial court are reported on a regular basis, there will be no opportunity for the Florida Supreme Court to compare each case against all other sentences imposed in similar circumstances. Until that time there exists the condition of no meaningful basis for distinguishing the cases in which the death penalty is imposed from those in which the trial court has ordered a sentence of life imprisonment. This entire process is directly contrary to the language of McCaskill v. State, supra at 1280, that:

> Were they [life sentences in simlar cases] to be ignored, however, our death penalty statute, § 921.141, Florida Statutes, could not be upheld under the requirements of Profitt v. Florida, supra, and Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed. 2d 346 (1972).

## CONCLUSION

Because of the individual and cummulative effect of the errors in the trial below, and because of the insufficiency of the evidence to support the conviction, this court should reverse the convictions and sentence in the trial below.

## CERTIFICATE OF SERVICE

We certify that copy hereof has been furnished to Carolyn Snurkowski, Assistant Attorney General, 401 N.W. 2nd Avenue, Suite 800, Miami, Florida 33128 by mail this 9th day of May, 1983.

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