IN THE SUPREME COURT OF FLORIDA

CASE NO. 62,691

MARIO LARA

Appellant,

vs.

STATE OF FLORIDA

Appellee.

ON APPEAL FROM JUDGMENT OF CONVICTION AND SENTENCE OF DEATH IN THE DADE COUNTY CIRCUIT COURT

BRIEF OF APPELLANT

ADAM H. LAWRENCE, ESQ.
Special Assistant Public Defender
1008 Peninsula Federal Building
200 S.E. First Street
Miami, Florida 33131
(305) 358-3371

TABLE OF CONTENTS

TABLE OF CONTENTS (CONTINUED) PAGE NO.

TABLE OF CITATIONS

TABLE OF CITATIONS (Continued)

TABLE OF CITATIONS (Continued)

TABLE OF CITATIONS (Continued)

TABLE OF CITATIONS (Continued)

TABLE OF CITATIONS (Continued)

TABLE OF CITATIONS (Continued)

STATEMENT OF THE CASE AND FACTS

On July 16, 1981 a Miami police officer was dispatched to an address in Miami where he met Francisco Rizo and, through Rizo, gained access to a dwelling in which Rizo had, earlier, discovered the dead body of his girl friend Grisel Fumero. (T. 523-541). Fumero had been shot 4 times and was lying in the kitchen of a downstairs apartment in the multi-family dwelling. During the course of the crime scene search, an upstairs tenant discovered and reported to police the presence of another body between the beds of an upstairs bedroom. This decedent, Olga Elviro, had been gagged, bound wrist-to-ankle and wrist-to-ankle, her pants and underpants had been cut or ripped open, and she had been stabbed three times. (T. 1280, 1282-3, 1289-90, 1307-9, 1331-2; 1397, 1407; R. 185, 186, 197, 200).

The medical examiner testified that Elviro had died from a stab wound in the chest, and that Fumero had died from multiple gunshot wounds. (T. 1400, 1418). A medical technician testified that he found evidence of seminal fluid and sperm from swabs taken from Elviro's vaginal canal. (T. 1827-8). A handgun found on the premises was determined to be the weapon that fired at least one of the bullets into Fumero. A serrated edge knife was tentatively established as the weapon that may have made the wound in Elviro's neck. (T. 1510-15; 1458-62; 1398-1400). However, no fingerprints, or blood, hair, saliva, or bodily secretion specimens taken from the defendant and the victims tied the defendant to the rape or to either of the homicides.

The state's evidence established that, at the time of the homicides, the defendant was awaiting trial on charges of voluntary and involuntary sexual battery against a 13 year old girl who was allegedly Fumero's sister. A charge of robbery was also pending against the defendant. It was unclear from the proofs whether the rape victim was also the victim of the robbery. Francisco Rizo was a fugitive

at the time of the homicide trial. He may have, at one time, been working for the police. Rizo, who apparently had fled shortly after the homicides, had information concerning the rape case and, although this too is unclear, may have even been charged, with the defendant, for the rape, or the robbery, or for both offenses. (T. 1534-5, 1541-2, 1546-51).

The decedent Fumero had given a deposition in the rape case and was apparently to be a witness in that case against the defendant. The record does not reveal whether Fumero was a crucial witness, whether or how she had implicated the defendant, or the nature of what she could relate or prove. (T. 1535-41). It was the state's theory of the case that the defendant had killed Fumero to silence her as a witness.

The state's key, and only eyewitness to either of the homicides, Tomas Barcelo, testified that prior to July 16, 1981, the defendant and Rizo had embarked upon a scheme to convince Fumero that Rizo loved her and wished to marry her, and that she should stay with Rizo in the defendant's home. It was apparently believed by Rizo and the defendant that if this occurred, Fumero could be convinced not to testify in the rape case against the defendant. Approximately 4 days prior to the homicides Fumero, in fact, came to stay in the defendant's house where she was visited by Rizo. (T. 1557-60, 1680-85, 1693).

At or about this time, in a way that is not clear from the record, the defendant's girl friend, Elviro, learned from somebody, possibly Elviro's sister-in-law, Martinez, who was a witness for the state, of the rape charges against the defendant and expressed her intention of leaving him. This enraged the defendant who on July 16, 1981, displayed some guns and threatened to kill both his girl friend and Martinez. (T. 1566-68, 1570-73). Martinez, who had a weak heart fainted as a result of the defendant's threats, and was taken to

the hospital by the defendant and Elviro. The defendant and Elviro subsequently left the hospital and returned to the defendant's house. (T.1573-77).

When the defendant and Elviro arrived at the defendant's house, the defendant aroused a sleeping Tomas Barcelo, and told him that he wished to use the bedroom. Barcelo went outside in the yard and within a half-hour observed the defendant exit the door from the upstairs apartment and knock loudly on the door of the downstairs apartment. (T.1701-5).

Barcelo stated that the defendant was admitted to the downstairs apartment by Fumero. Angry or loud words were apparently exchanged between the defendant and, possibly, Fumero, as the defendant strode through the kitchen to his brother's bedroom. The defendant then returned to the kitchen where Fumero, Barcelo, and the defendant's brother, Arsenio Lara, were standing. The defendant stood staring at Fumero with his hands behind his back and his leg twitching. Saying, "It's your fault that I have lost everything", or "Because of you I've lost everything", the defendant quickly pulled his brother's gun from behind his back and fired five times at Fumero, calling her a "son of a bitch." (T. 1705-15). The defendant continued to pull the trigger after the gun was empty. Arsenio started screaming and crying. He asked his brother if he was crazy and told his brother that he was, in fact, "crazy". Barcelo also believed that the defendant had "gone crazy". Both Arsenio and Barcelo told the defendant that he was a murderer. The defendant, laughing, retorted, "So I am a murderer, am I" and threatened to kill Arsenio. When the defendant started reloading the gun, Arsenio told Barcelo to run - that his brother would kill him too since Barcelo had also called the defendant a murderer. (T. 1713-17, 1761).

The parties quickly dispersed. Barcelo ran out and, eluding the defendant who he believed was looking for him, made his way to New York where he was located by the State Attorney's Office in June, 1982. Arsenio, who was found with a blood spattered watch in his possession, was originally charged with murder, but was

given immunity and the charges against him were dismissed. (T.1775-8). He was rearrested as a material witness to the homicides but refused to give any testimony incriminating his brother, and was jailed for contempt. Either Rizo or Arsenio called the police and Rizo, who became a fugitive himself, returned to the premises to meet the Miami police officer who was dispatched to the scene. (T. 1608-9). The defendant made his way to Union City, New Jersey, where he was arrested by the Union City police department on July 21, 1981. (T. 1717-18), 1720-21, 1665-67).

The defendant waived extradition from New Jersey and was returned to Florida on July 23, 1981. In a three count indictment filed on November 18, 1981, the defendant was charged with the premeditated killing of Grisel Fumero with a pistol, contrary to §§782.04 and 775.087 Fla. Stat.,the premeditated killing of Olga Elviro with a knife, contrary to §§782.04 and 775.087 Fla. Stat., and the involuntary sexual battery of Elviro using a deadly weapon, contrary to §794.011(3) Fla.Stat.(R.1).

Through witness cross-examination, and argument to the jury, the defendant presented the defense at trial that Rizo, his brother, Arsenio, and possibly others were the actual murderers. He relied heavily on Rizo's fugitive status, the fact that his brother's gun was the murder weapon and the brother was found with a blood stained watch, and investigatory lapses or omissions by the state. The defendant did not take the stand.

On July 15, 1982, the defendant was convicted of first degree murder in the death of Fumero, but was convicted of second degree murder in the death of Elviro. The defendant was convicted as charged for the sexual battery of Elviro. (R. 253-57). The jury returned an advisory recommendation of death with which the court concurred. On July 22, 1982 the defendant was sentenced to death for the murder of Fumero, and 99 years on each of the other two convictions. (R. 256-61). The defendant's motion for a new trial was denied and this appeal, and the State's cross-appeal, followed. (R. 356, 362).

POINT I

THE TRIAL COURT ERRED BY DENYING THE DEFENDANT'S MOTION FOR DISCHARGE AFTER THE STATE FAILED, WITHOUT LEGAL EXCUSE, TO COMMENCE THE DEFENDANT'S TRIAL WITHIN 180 DAYS OF HIS ARREST.

The offenses for which the defendant was convicted occurred on July 16, 1981. That was also the week during which a sexual battery and robbery case against the defendant, in which the decedent Fumero was allegedly a witness, was set for trial. (T.1537-8). On July 21, 1981 Miami Police Department homicide detectives learned of the decedent's whereabouts in New Jersey.(T.376-8). Up to the time of the offense, neither homicide detectives Guzman nor Napoli, had anything to do with the initial rape case against the defendant or even knew the defendant's name. After July 16, however, the defendant became the prime suspect in the homicides.(T.389).

On July 22, within 12 hours after learning of the defendant's capture, homicide detectives Guzman and Napoli flew up to New Jersey in order to, according to Guzman, convince the defendant that things would go better for him, and for his brother who was then under arrest for the homicides, if he came back to Florida to face the homicide charges. (R.392). It is significant that neither detective took with him to New Jersey any case files or information about the rape or robbery cases or had the slightest interest in those cases. The information they carried with them consisted of the case file on the double homicide, photographs of the crime scene, the sworn statement of the defendant's brother incriminating the defendant, the brother's arrest warrant, and pictures of the defendant's family.(T. 389-90,481,485).

The conclusion is inescapable that the information chosen by the homicide detectives was geared to play upon the defendant's emotions, to convince him to confess his participation in the homicides, and to obtain his voluntary return to Miami to face the homicide charges. The crime scene pictures were, for example, exhibited to the defendant in the plane on the trip back, according to Guzman, in order to induce him to cooperate and give a statement (T.395). Upon deplaning in Miami on

July 23, the defendant was not taken to the Dade County Jail on the underlying fugitive charge, but to the homicide unit of the Miami Police Department. (T.396).

Detective Guzman's explanation of why he went to New Jersey was disputed by his partner, Napoli, whose testimony, even to the most partisan of advocates for the state's position has to border on the incredible. Napoli, however, did reluctantly admit the critical and controlling fact that he told Guzman to tell the defendant, when the defendant was given his rights and questioned by both detectives at the Hudson County, New Jersey, jail on July 22, that "he was under arrest for the murder". (T.485-6). Napoli also admitted the equally important fact that except for some minor laboratory work, and a second statement from a witness, when he went up to New Jersey on July 22, the homicide investigation was essentially complete and he was personally convinced that the defendant and his brother were the murderers.(T.490-92).

From the point of view of the New Jersey authorities, the documentation and information emanating from Florida justifying the defendant's arrest, unambiguously indicated that the defendant's detention on the homicides was the primary concern of the Florida authorities. The Hudson County, New Jersey fugitive complaint, dated July 21, alleged that the defendant was arrested and detained on the authority of the Miami Homicide Division, for the charges of rape, robbery and two counts of homicide. (R.77,86). On the initial teletype to Hudson County, the very first lines state that the defendant was to be located for questioning with reference to a homicide that occurred on July 16, 1981.(R.87). The Hudson County Arrest Report specified the offenses for which the defendant was arrested as rape, robbery and "suspected homicide, 2 charges".(R.88). The Hudson County "Incident Report" related that Hudson County was initially contacted by Miami Homicide relative to a "double homicide and robbery", involving the defendant.(R. 159). At the New Jersey extradition hearing on July 23, the court asked the defendant whether he understood he had been arrested on a warrant charging him with "rape and robbery and homicide". The defendant

answered "Yes".(R.81). All this documentation is consistent with Guzman and Napoli's statement to the defendant, in New Jersey, that he was under arrest for homicide.

At the time that Lt. Wolpert of the Union City, New Jersey Police Department arrested the defendant on July 21, he advised the defendant that he was being arrested on a warrant charging robbery, rape and a double homicide. Wolpert personally believed that the homicides were an integral basis of the Florida warrant, and did not learn anything to the contrary until considerably after the defendant's arrest.(T.400-403, 409,424,430). Wolpert's associate, Sergeant Karabatsos, had learned from Florida that the defendant was "wanted" for questioning concerning the double homicide in Miami.(T.447,455). Before arresting the defendant, Karabatsos had spoken with Miami Homicide about the murders and, pursuant to directions given to him by Miami Homicide, caused the defendant to be questioned about the homicides.(T.456). The actual questioning was done by a Spanish-speaking officer who asked the defendant some questions about the homicide but was prevented from continuing by instructions from her chief. Apparently, the chief feared that if too much information about the homicides was elicited by his officers, their services would be lost to his department during the time they were in Florida as witnesses.(T.668-9, 681-3,R.183).

The defendant was subsequently indicted and formally arrested on November 17, 1981, for these homicides while lodged in the Dade County Jail. Between July 23, 1981, and January 19, 1982, the date the 180 day speedy trial period expired, the defendant's trial had not commenced nor had any delays in commencement been charged to the defendant.(T.509). The defendant moved for discharge because of the state's violation of the speedy trial rule and this motion was denied.(R.74,173-178).

Fla.R.Crim.P.3.191(a)(1) and (4)(i) provides that a person charged with a felony must be tried within 180 days of the day he is taken into custody. A person is taken into custody when he is arrested as a result of the conduct which gave rise

to the crime charged. The simple and controlling fact in this case is that on July 21, 1981, the Homicide Unit of the Miami Police Department caused the defendant to be arrested and questioned in New Jersey for his role in a double homicide. The coincidental presence of the one week old rape and robbery warrants merely provided legal window dressing for an arrest that was intended, beforehand, to culminate and resolve an intense one week long homicide investigation.

When the defendant was taken into custody by New Jersey authorities on July 21, 1981, told that he was being arrested for the homicides, and advised of his Miranda rights, and questioned about the homicides, the defendant was then in custody on the homicides. State v. N.B.,360 So.2d 162, 165 (Fla. 1st DCA 1978), cert.den. 383 So.2d 1199 (Fla. 1980); Wiggins v. State, 384 So.2d 43 (Fla. 1st DCA 1980). The defendant's "anxiety and concern attendant on public accusation" about the homicides had certainly commenced at the time he was detained in New Jersey for the homicides, the rape and the robbery. The defendant was sufficiently in custody on the homicides to be at the disposal of the Miami homicide detectives who were then rushing northward to confront him, question him and take him into Florida custody for the murders. See, Singletary v. State, 322 So.2d 551, 554 (Fla. 1975); Johnson v. State, 409 So.2d 152 (Fla. 1st DCA 1982).

If, somehow, the defendant is not deemed to have been arrested for the homicides on July 21 by the New Jersey police, there can be no dispute that he was under arrest, and had every right to perceive himself under arrest for the homicides, on July 22, when confronted by Miami homicide detectives Napoli and Guzman in the Hudson County Jail. Melton v. State, 75 So.2d 291, 294 (Fla. 1954). There is no explaining away lead detective Napoli's testimony that he directed Guzman to tell the defendant that the defendant was then under arrest for murder. (T.485-6). There is also no doubt, because Napoli himself admitted it, that Miami Homicide had probable cause to arrest the defendant for murder on July 21, 1981. (T.490-492). This case thus falls squarely within the class of cases identified in Thomas v. State, 374 So.2d

508,513 (Fla. 1979), in which an arrest on one charge will not stop the speedy trial period from running on another if the arresting authorities possessed ample evidence to arrest or indict on the second charge:

> [T]he spirit of the Speedy Trial Rule would not condone the withholding of some charges and an arrest on others so as to effectively extend the time periods of the rule where there is ample evidence to support probable cause as to all charges.

The relevance of Thomas to the instant case would have been made even more apparent had the trial court not erroneously limited the defendant in his cross-examination and production of evidence. The court first prohibited the defendant from questioning Napoli to show that the real reason Napoli went to New Jersey was to arrest the defendant for murder. (T.482-3). The court then prevented the defendant from examining Napoli, or calling the Assistant State Attorney in charge of the investigation, to show why no indictment had been returned between July 23, 1981, and November 17, 1981. The defendant proffered the fact that the state had probable cause to indict for the homicides and that the only reason for the delay in indictment was the state's desire to insure that the defendant's conviction on the rape and robbery would be available to aggravate the homicides. (T.492-3, 497-500). These two rulings by the trial court were so prejudicial that they constitute independent grounds, under this Point, to reverse the trial court's denial of his motion for discharge.

For the reasons stated above. the trial court erred when it denied the defendant's motion for discharge.

POINT II

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS PHYSICAL EVIDENCE WHEN THE PRECEDING SEARCH WAS BASED UPON AN INVALID CONSENT PROVEN BY INCOMPETENT HEARSAY EVIDENCE

Miami police officer Diazlay testified that he was informed by his sergeant "that there was a man who had gone into the station and advised that he had gone home and found his girl friend - I don't remember if he said girl friend or wife, dead". (T.597)

Diazlay went to the reported address and waited at the scene until he was met by the "complainant", Francisco Rizo. Rizo had a key and let the officer into the apartment where both bodies, and other incriminating evidence, was eventually found.(T.598).

The defendant objected to the question "[d]id you discuss with him as to who lived in the house?", on the grounds of hearsay. The objection was overruled and Diazlay answered that Rizo told him he lived there with his wife or girl friend. (T.598-600). The officer admitted that he did not know Rizo before that day or ever saw him again after that day and that he saw no personal belongings, clothes, or papers of Rizo's on the prmises which would suggest to him that Rizo was renting that apartment. Over the defendant's hearsay objection the court also permitted Officer Diazlay to state that Rizo told him that he was the complaining witness.(T.601).

Lead detective Napoli testified that he never met Rizo at the scene but believed that, prior to sealing the residence, the police let Rizo remove some of his property from the house.(T.617, 630). Diazlay, who had remained with Rizo the entire time Rizo was at the scene, denied this.(T.600-602). See, Moffett v. Wainwright, 512 F.2d 496 (5th Cir. 1975).

The defendant testified that he was a rent paying tenant at the premises.(T.595). He stated that Rizo, like the decedent Fumero, had been a guest at the premises for a few days, but was not a tenant in the house nor did he have his own keys. If Rizo wanted to come in he had to knock and someone would let him in - or else he would be locked out. The defendant tried to explain that the house keys came into Rizo's possession when Rizo borrowed his brother's car - a fact independently verified by the defendant's brother in his statements of July 16, 1981 and August 6, 1981. (R.36, 42; T. 636).

The defendant also stated that Rizo and Fumero were friends, and during their residence on the premises as guests had shared a bed in the bedroom in which the

defendant also slept. The defendant further stated that any clothes Rizo may have removed from the house belonged to the defendant because Rizo did not have any clothes on the premises.(T.635-640). The defendant's testimony was essentially uncontradicted.

The trial court relied on United States v. Matlock, 415 US 164, 39 LEd.2d 242, 94 SCt. 988 (1974), and State v. Brown, 408 So.2d 846 (Fla. 2nd DCA 1982) to support the admission of Rizo's hearsay statements. However, in Brown, which relied on Matlock, the unavailable declarant's consent was found to have been trustworthy because by consenting to a search of Brown's premises, the consenter also admitted facts against his own penal interest, and because the defendant after his arrest, corroborated the consenter's story.

Here, by comparison, Rizo, who was a fugitive at the time of trial, was not admitting anything against his penal interests by consenting to a police search of the defendant's premises, and the defendant did not corroborate, but denied Rizo's right to joint control and access over his premises. There was simply no proof that Rizo was a credible person or that he had joint dominion and control with the defendant, over the defendant's entire living space. See Ferguson v. State, 417 So.2d 631 (Fla.1982); Silva v. State, 344 So.2d 559 (Fla. 1977). The Miami police had no independent knowledge of Rizo's reliability as a consenter or his connection to the premises, other than what Rizo told them. No clear and convincing evidence was thus adduced that Rizo had sufficient rights in the premises or that he voluntarily consented to its search. Moffett v. Wainwright, supra, 512 F.2d at 499-500; State v. Brown, supra, 408 So.2d at 848.

Matlock is also not controlling because aside from the issue of witness availability, it differs in one crucial respect from the instant case. Matlock was decided largely under Fed.R.Evid. 104. That rule provides, in subsection (a), that in deciding preliminary questions concerning the admissibility of evidence the court "is not bound by the rules of evidence except those with respect to

privileges". Fed.R.Evid. 1101(d)(1), provides that the Rules are applicable to all proceedings except those in which the court is determining preliminary issues of the admissibility of evidence.

In Florida, however, the Legislature has consciously chosen not to model its rules after Fed.R.Evid. 104 or 1101. Section 90.103(2) Fla. Stat. states that the Evidence Code applies to all "criminal proceedings". Section 90.105(1) the Florida counterpart to Fed.R.Evid 104, states simply that "the court shall determine preliminary questions concerning...the admissibility of evidence." Since Florida has chosen not to relax its hearsay rules in preliminary proceedings, such as motions to suppress evidence, the trial court's overruling of the defendant's hearsay objections was error. The trial court's ruling denying the motion to suppress was also erroneous since, without evidence of a valid consent, the police lacked probable cause to enter and search the house.[1/]

Assuming that Rizo could or did consent to a search of the downstairs apartment, he certainly did not consent to a search of the upstairs apartment where Elviro's body was found. The police entered the upstairs apartment on consent allegedly given by another tenant, who did not testify at trial, and who, it is undisputed, did not share that apartment with the defendant.(T. 611). Furthermore, if the original intrusion was illegal, the discovery of the upstairs body was as a consequence of that illegality and must be suppressed as well.

---

(1) There was no basis for an "exigent" circumstances entry or search in the present case. If Rizo is to be believed, he reported to the police that he had entered the premises, found his girl friend dead (not murdered), and would meet them back at the premises. The police had no reasonable basis to believe that their immediate entry into the house could aid the deceased victim or reveal the presence of a murderer in a house that the alleged complainant had already entered, inspected, and exited. In fact, Officer Diazlay arrived at the scene before Rizo but felt it was appropriate to simply wait outside.(T.598). Compare, Ziegler v. State, 402 So.2d 365 (Fla. 1981); State v. Hetzco, 283 So.2d 49, (Fla. 4th DCA 1973); Webster v. State, 201 So.2d 789 (Fla. 4th DCA 1967).

POINT III

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS HIS ORAL ADMISSIONS THAT WERE NOT PRECEDED BY A KNOWING AND INTELLIGENT WAIVER OF HIS SIXTH AMENDMENT RIGHTS.

After his arrest on July 21, 1981, the defendant, who spoke no English, was taken to the Union City, New Jersey, police station where he was confronted by Nilsa Garcia, a Spanish-speaking police officer on the Union City force. Garcia read the defendant his Miranda rights from a form printed in Spanish that was marked in evidence at the hearing on the motion. (T.673-675; R.158).

Garcia related that she read the defendant the rights printed on the form, asked the defendant if he understood them, and then, after the defendant nodded "yes", asked him to sign the form, which he did. (T.676-79). At no point did Garcia ask the defendant whether he wished to avail himself of any of the rights she had mentioned. In Garcia's words "[a]s far as I'm concerned, they're just something read to him. There are no questions on there." (T.686). Garcia also did not believe that the defendant read the Rights form before he signed it. (T.686-7).

Garcia then asked the defendant several questions relating to the circumstances of his capture, the whereabouts of his belongings, and "what he did with the gun after he killed the woman". (T.681-2). The defendant's response to this last question, that was admitted against him at trial, was that "[h]e took the gun home and he left it on the table." (T.1796-7).

Miranda v. Arizona, 384 US 436, 475, 16 LEd.2d 694, 86 SCt. 1602 (1966), states that a valid waiver of the rights required to be given to a suspect under that decision

> will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained.

Inherent in the Miranda Rule are the corrollaries that implied waivers of rights are disfavored, and that courts should indulge in every reasonable presumption

against waiver. See, e.g. United States v. Hernandez, 574 F.2d 1362,1371(5th Cir. 1978); United States v. Christian, 571 F.2d 64 (1st Cir. 1978); State v. Craig, 237 So.2d 737, 741(Fla.1970)(Waiver requires at least a "verbal acknowledgement of ...willingness to talk").

The rule against waiver in Miranda has not been affected by the holding of North Carolina v. Butler, 441 US 369, 60 LEd.2d 286,292,99 S.Ct. 1755 (1979). Butler holds simply that counsel need not be "expressly" rejected in order for a waiver to be effective. Butler, supra, 441 US at 373, n.4., specifically reaffirmed Miranda and its progenitor, Carnley v. Cochran, 369 US 506, 8 LEd.2d 70, 82 SCt 884 (1962) with the observation that it did not "even remotely" question the holdings of Miranda and Cochran that waiver will not be presumed from silence and that the record must affirmatively show that the accused "intelligently and understandingly rejected the offer" of counsel. There is nothing in the record before the court to show that the defendant, a 25 year old Mariel refugee with a third grade education, did anything other than answer questions, after acknowledging that he understood his rights. This was, as a matter of law, insufficient evidence of a waiver of the right to counsel.

If anything, a request for counsel is affirmatively shown in this case by the statement in Union City Police detective Karabatsos' report that

> The suspect after having been given his rights by interpreter Off. Garcia confirmed her story and then refused to speak any further, requesting an attorney.(R.161).

Karabatsos attempted to disavow this statement by suggesting that it was a typographical error - that the "his" should have been a "her" - but the trial court properly rejected this explanation as not credible. The trial court could then only speculate that the reason this statement appeared in the report was not because the defendant requested counsel, but because the Union City police chief did not want his officers travelling to Miami to give testimony in the homicide. (T.665-7;910).

Since Karabatsos' explanation for the appearance of that critical phrase in his report, and the defendant's testimony that he asked for an attorney, were both rejected by the court, (T.699,910), no record explanation exists for why that phrase appears in the police report. A statement in a police report that a defendant invoked his rights to counsel cannot lightly be dismissed as it was here, by a trial court's speculation as to why it might have been written. The unexplained presence of that phrase in the police report particularly when coupled with the absence of an express waiver of counsel prevented the state from meeting its burden of showing that the defendant intelligently and understandingly waived counsel.

POINT IV

THE TRIAL JUDGE ABUSED HER DISCRETION BY FAILING TO GRANT TO THE DEFENDANT MORE THAN TEN PEREMPTORY CHALLENGES

The defendant had moved for 30 peremptory challenges citing the three counts of the indictment, the gravity of the charges, and the publicity surrounding the case. (R.152). The trial court allowed the defendant only 10 challenges. (T.725). On voir dire 55 potential jurors were examined. Eleven jurors or 20% of the total had heard about the case. Of the 11, 3 jurors were excused for cause because of their knowledge of the case, 4 were excused for cause for other reasons, 2 were peremptorily challenged by the defendant, and 2 were eventually impanelled as trial jurors.

Given the substantial number of jurors who had heard about the case, the fact that peremptory challenges had to be used against 2 of these jurors but that 2 jurors who had heard about the case were impanelled, the defendant's exhaustion of his peremptory challenges, and the gravity of the charges against him, the defendant should have been permitted a greater number of challenges than the ten he was allowed. The trial court's denial of the defendant's motion for additional challenges was an abuse of discretion. Meade v. State, 85 So.2d 613 (Fla. 1956).

POINT V

THE TRIAL JUDGE ERRED BY IMPROPERLY EXCUSING FOR CAUSE TWO JURORS WHO STATED THAT THEY DID NOT OPPOSE CAPITAL PUNISHMENT ALTHOUGH THEY COULD NOT PREDICT HOW THE DEATH PENALTY WOULD AFFECT THEIR DELIBERATIONS.

Subpoint I

The Trial Judge Erred by Improperly Excusing Juror Beverly Watkins for Cause.

The relevant voir dire of Ms. Watkins is set forth in Appendix "A". Based upon her responses during voir dire, Ms. Watkins was excused for cause over the defendant's objection. (T. 888,897). Under Witherspoon v. Illinois, 391 US 510, 20 LEd.2d 776, 88 SCt. 1770 (1968), and cases interpreting that decision, Ms. Watkins' excusal for cause was improper, and violated the defendant's 6th, 8th and 14th Amendment rights.

The trial court apparently excused Ms. Watkins in the belief that her non-committal answers to the question whether her attitude toward capital punishment would affect her deliberations on guilt or innocence disqualified her under Brown v. State, 381 So.2d 690 (Fla. 1980). However, a review of the test in Williams v. State, 228 So.2d 377, 381 (Fla. 1969), vacated on other grounds, 408 US 941, 33 LEd2d. 765, 92 SCt. 2864, (1972) upon which Brown relied, shows that Ms. Watkins never revealed "an intransigent determination not to weigh the evidence presented at trial", which Williams requires. In fact, since Ms. Watkins was not once asked the crucial question of whether she could follow the court's instructions in deciding guilt, innocence or penalty, the presence of Ms. Watkins' alleged intransigence was never revealed or confirmed.

If Brown and Williams are to be interpreted as justifying the excusal of a juror with Ms. Watkins' attitudes, then those decisions are inconsistent with Witherspoon and subsequent United States Supreme Court cases. Witherspoon allows the excusal of only those jurors who make it

> unmistakably clear...that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt. 391 US at 523; 20 LEd 2d. at 785.

Ms. Watkins' alleged inability to render an impartial decision on guilt or innocence was far from "unmistakably clear". Since Ms. Watkins stated that she was not opposed to the death penalty, but favored it under certain circumstances, it is difficult to see how, as a matter of law, a juror with Ms. Watkins' views could ever be excused for cause under Witherspoon or Brown. Ms. Watkins plainly fell within that category of citizens who, while favoring the death penalty, would rather leave the emotional stresses of determining guilt and recommending the death penalty to others.

Ms. Watkins' emotional uncertainty over how she might be affected by the proofs in the murder trial, unaccompanied by any fixed intransigent attitude against capital punishment as such, was simply not a basis for her excusal. The excuse for cause of jurors with precisely Ms. Watkins' temperament was discussed, and prohibited in Adams v. Texas, 448 US 38, 65 LEd 2d. 581, 100 SCt. 2521 (1980).

Adams involved a Texas statute, (§12.31(b))), which required a juror in a first degree murder trial to swear that "the mandatory penalty of death or imprisonment for life will not affect his deliberations on any issue of fact". 448 US at 42, 65 LEd 2d at 587. At the penalty phase, the jurors were required to answer "Yes" or "No" to each of three questions bearing on aggravation. A "yes" to all questions meant the death penalty. A "no" to any one meant automatic life imprisonment. The conclusion by the court that Texas' interpretation of §12.31(b) unconstitutionally excluded too broad a class of jurors is controlling in the present case and must be quoted at length:

Based on our own examination of the record, we have concluded that §12.31(b) was applied in this case to exclude prospective jurors on grounds impermissible under Witherspoon and related cases. As employed here, the touchstone of the inquiry under §12.31(b) was not whether putative jurors could and would follow their instructions and answer the posited questions in the affirmative if they honestly believed the evidence warranted it beyond reasonable doubt. Rather, the touchstone was whether the fact that the imposition of the death penalty would follow automatically from affirmative answers to the questions would have any effect at all on the jurors' performance of their duties. Such a test could, and did, exclude jurors who stated that they would be "affected" by the possibility of the death penalty, but who apparently meant only that the potentially lethal consequences of their decision would invest their deliberations with greater seriousness and gravity or would involve them emotionally. Others were excluded only because they were unable positively to state whether or not their deliberations would in any way be "affected." But neither nervousness, emotional involvement, nor inability to deny or confirm any effect whatsoever is equivalent to an unwillingness or an inability on the part of the jurors to follow the court's instructions and obey their oaths, regardless of their feelings about the death penalty. The grounds for excluding these jurors were consequently insufficient under the Sixth and Fourteenth Amendments. Nor in our view would the Constitution permit the exclusion of jurors from the penalty phase of a Texas murder trial if they aver that they will honestly find the facts and answer the questions in the affirmative if they are convinced beyond reasonable doubt, but not otherwise, yet who frankly concede that the prospects of the death penalty may affect what their honest judgment of the facts will be or what they may deem to be a reasonable doubt. Such assessments and judgments by jurors are inherent in the jury system, and to exclude all jurors who would be in the slightest way affected by the prospect of the death penalty or by their views about such a penalty would be to deprive the defendant of the impartial jury to which he or she is entitled under the law. (Emphasis supplied). 448 US at 49-50, 65 LEd.2d at 592-3.

Brown and Williams, to the extent they make an "I don't know"answer to the question whether trial deliberations would be affected by the prospect of the death penalty, grounds for exclusion, are thus inconsistent with Witherspoon and Adams.

There is another reason why the exclusion of Ms. Watkins was impermissible in the present case. Florida requires a trial judge to instruct the jury on the death penalty, at the adjudicatory phase of the case, if either side requests that instruction. Tascano v. State, 393 So.2d 540 (Fla. 1981); Fla.R.Crim.P. 3. 390(a). The defendant requested a penalty instruction in this case, and the court gave it. (T.1899, 2018). The dictates of Witherspoon and Adams are thus doubly offended when a potential juror is excluded because she may be affected by thoughts of the death penalty during the adjudicatory phase, when the juror, by law, must be advised, before deliberations, on the penalties that may attend her vote for a guilty verdict. Florida cannot have it both ways. If it insists upon instructing jurors on penalties, it cannot anticipatorily exclude them because they might be affected by those instructions. Defendant's death sentence must, accordingly, be vacated.

Subpoint II

The Trial Judge Erred by Improperly Excusing Juror Donna Alexander for Cause.

The relevant voir dire of Ms. Alexander is set forth in Appendix B. Over the defendant's objection, the court removed Ms. Alexander for cause on the basis of the Brown decision. (T. 994).

Defendant repeats the arguments he made in Subpoint I, supra, which are as applicable to Ms. Alexander as they were to Ms. Watkins. Ms. Alexander was improperly excused for cause in contravention of Witherspoon, Adams, and Williams, all supra. Defendant's death sentence must, accordingly, be vacated.

POINT VI

THE TRIAL COURT IMPERMISSIBLY LIMITED THE DEFENDANT'S RIGHT TO CROSS-EXAMINE THE STATE'S KEY WITNESS BY DENYING A CONTINUANCE UNTIL THE DEPOSITION OF THE WITNESS COULD BE TRANSCRIBED.

The key prosecution witness in the murder of Fumero, without whom the State would probably not have been able to prove its case but whose testimony, standing alone, was sufficient to convict, was the only eyewitness to either homicide, Tomas Barcelo. Barcelo had left Florida right after the murders but was located by the state, and asked to return to Florida, approximately one year later on the eve of trial. The importance placed upon Barcelo's testimony by the state is illustrated by the prosecutor's closing argument to the jury that if they did not believe Barcelo, they should "walk [the defendant] out the door, find him not guilty", (T.1955), and that Barcelo was a "crucial witness". (T. 1968).

After the trial had begun a deposition was taken of Barcelo, which, as of the time Barcelo took the stand, had not been transcribed. The contents of the deposition were critical because they dealt with the abduction of Barcelo, just 24 hours previously, by several individuals, including Arsenio Lara - a person the defense contended had murdered one or both victims. (T.1624, 1627-37). The defendant protested that he could not effectively cross-examine Barcelo without the written deposition in hand. (T.1667). Following Barcelo's direct examination, the defendant renewed his request for a continuance to obtain a transcript of Barcelo's deposition. (T.1723-7).

In response the court again denied the defendant's motion stating that since the deposition was recent and since the court assumed that counsel had made some notes, the deposition would not be necessary for impeachment purposes.(T.1725). Counsel again protested that he could not sit down with the court reporter and go through her notes and, at the same time, conduct a proper cross-examination. Although the court recognized that anything affecting the bias or prejudice of

Barcelo, the state's main witness, would be of critical importance to the defendant, (T.1635-6), the defendant was ordered to proceed with his examination without the deposition transcript. (T. 1726-7)

Section 90.608(1)(a) Fla. Stat. provides that the credibility of a witness may be attacked by "[i]ntroducing statements of the witness which are inconsistent with his present testimony". Section 90.614 Fla. Stat. anticipates that the prior inconsistent statement will be in a form cognizable to the cross-examiner. The trial court was thus in error when it concluded that Barcelo could be impeached using the court reporter's notes. The right to impeach by showing prior inconsistent statements includes the right to confront a witness, while testifying, with the text of his prior statement. This could not have been done effectively using the court reporter's stenographic notes which, this court may judicially notice, are inscrutable to persons not trained in their translation. Furthermore, to have required counsel and the reporter to continually search for possible conflicting statements would have been cumbersome and time-consuming and frustrative in itself, of an effective cross-examination.

The only alternative for impeachment open to the defendant was that of putting the court reporter on the stand, as part of the defendant's case, to read the inconsistent portions of Barcelo's deposition into the record. This, in addition to being a pallid substitute for cross-examination, may have deprived the defendant of the right to closing argument. Fla.R.Crim.P. 3.250. As a condition of exercising his Rule 3.250 rights, a defendant should not have to bear

> ...the intolerable burden of electing to either refrain from the exercise of his constitutional right to cross-examine and thereby suffer adverse testimony to stand in the record unchallenged and unimpeached or forfeit the valuable procedural right to closing argument.

Beard v. State 104 So.2d 680, 682 (Fla. 1st DCA. 1958).

It has been recognized in this state that forcing counsel to proceed with the cross-examination of a key state witness without having the witness' deposition in hand, is error:

> [U]nder the fact presented, we find that the court's failure to grant a continuance until the deposition could be transcribed and until defense counsel could at least locate and speak with persons previously unknown until mentioned in [the deposition], was highly prejudicial to the defense and that it constitutes reversible error since effective cross-examination of the State's key witness was precluded thereby.

Anderson v. State, 314 So.2d 803 (Fla.3rd DCA 1975). See also State ex rel Gerstein v. Durant, 348 So.2d 405, 408 (Fla. 3rd DCA 1977) and Kelly v. State, 311 So.2d 124 (Fla.3rd DCA 1975).

It is also settled that the right of cross-examination is absolute and any limitation placed on that right - particularly when the offense is a capital one, the witness is crucial to the state's case and the limitation as here, frustrated the theory of the defense (that persons other than the defendant were the killers) - may easily constitute reversible error. Davis v. Alaska, 415 US 308, 39 LEd.2d 347, 94 SCt 1105 (1974); Coxwell v. State, 361 So.2d 148 (Fla.1978); Coco v. State, 62 So.2d 892,894-5 (Fla. 1953).

In deciding whether the unavailability of the deposition for cross-examination harmed the defense in this case, decisions interpreting the rule in Jencks v. United States, 353 US 657, 1 LEd.2d 1103, 77 SCt. 1007 (1957) are also instructive. Jencks established the principle that the prosecution was required to provide to the defense, before cross-examination, any prior "substantially verbatim recital[s]" of the witness. Palermo v. United States, 360 US 343,352-4, 3 LEd.2d 1287,1295-6, 79 SCt. 1217 (1959). In establishing prejudice, a defendant is not required to first show a conflict between the prior statement and the testimony. A defendant is entitled to see the statement first to decide what use to make of it. Jencks v. United States supra, 353 US at 667-9, 1 LEd. 2d at 1111-1112. Thus,

> Since courts cannot "speculate whether [Jencks material] could have been utilized effectively at trial***the harmless error doctrine must be strictly applied in Jencks Act cases".

Goldberg v. United States, 425 US 94, 111, n.14(b), 47 LEd.2d 603,618, 96 SCt.1338 (1976).

Under the circumstances of this case, the trial court's frustration of the cross-examination of Barcelo by denying the defendant a brief continuance until he had Barcelo's deposition in hand, was reversible error.

POINT VII

THE TRIAL COURT ERRED BY IMPROPERLY LIMITING THE DEFENDANT'S CROSS-EXAMINATION OF A STATE'S WITNESS IN ORDER TO PROVE THE WEAKNESS OF THE UNDERLYING SEXUAL BATTERY CHARGE AGAINST THE DEFENDANT.

The state produced Assistant State Attorney Dennis Siegel to establish that the defendant's motive for killing Fumero was the fact that Fumero was to be a witness against the defendant in a sexual battery case arising out of the defendant's assault on a girl alleged to be Fumero's sister. The defendant attempted to cross-examine Siegel to show that the chief of the sexual battery unit, and a second prosecutor in the State Attorney's office, had recommended that the sexual battery charge against the defendant not be filed. The state's objection to this line of examination, after the defendant proffered what his questions would show, were sustained by the court. (T. 1544-1546).

The fact that the State Attorney's office had recommended that the rape charge not be filed was highly significant. Proof of the State Attorney's recommendation against prosecution would have revealed the state's belief in the weakness of its case and thus cast doubt on the defendant's alleged motive for the killing of Fumero. If the state's case against the defendant was weak, then the defendant would probably not have resorted to murder, and certainly would not have premeditated the murder of Fumero, in order to avoid being prosecuted for the charge.

Section 90.402 Fla. Stat. states the general rule that all relevant evidence is admissible. Reluctance to prosecute is some evidence of a party's consciousness of the weakness of its case. II Wigmore §284 (3rd Ed.1940). The controlling principle when determining whether to admit evidence of an indirect, but probative nature,

such as Siegel's cross-examination, is set forth in Astrachan v. State, 158 Fla. 457, 28 So.2d 874,875 (1947):

> The rule with respect to the admission of indirect, collateral, or circumstantial evidence is that great latitude is to be allowed in the reception of indirect or circumstantial evidence. It includes all evidence of an indirect nature, whether the inferences afforded by it be drawn from prior experience, or be a deduction of reason from the circumstances of the particular case, or of reason aided by experience. The competency of a collateral fact to be used as the basis of legitimate argument is not to be determined by the conclusiveness of the inferences it may afford in reference to the litigated fact. It is enough if these may tend, even in a slight degree, to elucidate the inquiry, or to assist, though remotely, to a determination probably founded in truth.

The trial court's improper exclusion of this important defense evidence left the defendant without any means, direct, or indirect, for refuting the state's imputation to him of a witness elimination motive. The consequences of the court's action to the defendant were not only a conviction of premeditating the underlying homicide of Fumero, but an aggravation of the offense, under §921.141(5)(e) Fla.Stat. on the grounds of his alleged witness elimination motive.

POINT VIII

> THE TRIAL COURT ERRED BY REFUSING TO PERMIT THE DEFENDANT TO CROSS-EXAMINE ONE MEDICAL EXAMINER BASED UPON ANOTHER MEDICAL EXAMINER'S REPORT AND THEN DENYING DEFENDANT THE RIGHT TO PROFFER THE ANSWERS HE EXPECTED FROM THE MEDICAL EXAMINER.

During the defendant's cross-examination, Medical Examiner Ludwig was asked to state, based upon his study of his associate, Dr. Middleman's report, what time Dr. Middleman had arrived at the scene of the homicides. An objection, apparently on hearsay grounds, was raised and sustained. Defendant then asked for a sidebar conference but his request was refused. (T.1435-6). Counsel's next question, again predicated upon Ludwig's study of Middleman's report was interrupted before it could be completed. Counsel again asked for a sidebar. His request was again refused.(T. 1437). Thereafter

each question directed to Ludwig's knowledge and interpretation of the findings and observations in Middleman's report was objected to and the objection was sustained. (T.1439-42). It is significant that the state was willing to let the entirety of Dr. Middleman's report be marked in evidence, thus conceding, by inference, the authenticity and relevance of that document, but was not willing to allow Ludwig to use the report in any way as a basis for Ludwig's opinion testimony. (T.1437, 1442).

The trial judge was in error in concluding that Ludwig's testimony would have been hearsay and inadmissible opinion. The Medical Examiner's reports concerning the homicides were public records which contained matters observed by the medical examiners "pursuant to duty imposed by law as to matters which there was a duty to report". Dr. Middleman's duty to report was established in §§406.11,12 and 13 Fla.Stat. His report was thus admissible under hearsay exceptions §§ 90.803(6) and (8) Fla. Stat. Dr. Ludwig, a medical expert and a public official, should have been permitted to answer the defendant's questions based upon the records of his office, whether those questions called for facts, or opinions and whether or not the report was in evidence. Sections 90.704, 90.705 Fla. Stat.; "Law Revision Council Note - 1976", to Rule 90.704; Smith v. Mott, 100 So.2d 173 (Fla. 1957).

The information the defendant was seeking from Ludwig was obviously related to the victims' times of death. From this information counsel clearly intended to draw an inference in support of the theory of his defense that defendant was not the murderer, since the defendant could not have been present when the victims were killed. The defendant twice attempted to address the court out of the presence of the jury. The only conceivable reason for his requests was to proffer to the court what he expected to prove through the medical examiner. The trial court improperly limited defendant's cross-examination, and then wrongly denied the defendant the opportunity to proffer his proofs.

POINT IX

THE TRIAL COURT ERRED WHEN IT ADMITTED INTO EVIDENCE OVER THE DEFENDANT'S OBJECTION GRUESOME PHOTOGRAPHS OF THE VICTIM THAT WERE PREJUDICIAL, IRRELEVANT, AND CUMULATIVE.

The defendant repeatedly objected to different pictures of the victims that the state offered in evidence. The defendant, significantly, did not object to certain pictures that were believed to be reasonably related to the elements of the state's case.

Thus, state exhibit 17 (R.197), showing Olga Elviro, the rape/stabbing victim as she was found between the upstairs beds, was not objected to. This photograph showed the victim on her side with her pants down, her legs drawn up, and her right wrist tied to her right ankle.

Exhibit 18, which was objected to, is a close up of the upper torso of Elviro after she had been turned over on her back.(R.198). It shows Elviro's bloody clothes and a bloody rag or sheet on top of her face. Although the prosecutor justified admitting this photograph on the grounds that it suggested smothering of the victim, (T.1321), the state never proved or argued that Elviro died from anything other than her stab wounds.(T.1400). This photograph was plainly irrelevant and inflammatory.

Exhibit 19 was identical to 18 but the rag or sheet on Elviro's face had been removed. The prosecutor justified admitting this exhibit of the bloody upper torso of the victim om the grounds it showed the "possibility" of one stab wound, with the gag in the victim's mouth "slightly" shown. (T.1317, 1331, R.199).

However, exhibit 20 (R.200), which the defendant alwo objected to was a gruesome full face photograph of the victim with half-open eyes, bloody clothing and the knotted gag more than "slightly" shown. Although exhibit 20 was clearly adequate to show the "knot" on the gag - a fact that was totally irrelevant and immaterial to any issue in the case - nevertheless exhibit 21, another bloody close-up of the side of the victim's face, was justified by the prosecutor as showing the "actual knot" on the gag. (T.1318, R.201). The other justification for admitting exhibit 19, the "possibility" it showed one stab wound, was equally spurious since ample photographic evidence of this non-lethal wound was subsequently admitted.

Exhibit 22, a close-up of Elviro's left hand tied to her left ankle added

nothing to the case that exhibit 17 had not introduced except that exhibit 22 showed the left hand and ankle while exhibit 17 showed the right hand and ankle. It was clear from the witnesses at the scene, however, and not denied by the defendant, that Elviro was bound wrist-to-ankle on each side, and the photographs were, at best, cumulative of this fact.

Exhibit 22 was, additionally, cumulative with exhibit 55 which also showed Elviro's left wrist bound to her left ankle. The prosecutor justified exhibit 55 because it showed the brand label on the victim's jeans. The prosecutor argued that the photograph would support the credibility of a state's witness who remembered the victim wearing that brand of jeans. The defendant did not deny that Elviro was wearing those jeans the brand name of which had no relevance in the case. (R. 202, 232; T.1396, 1282-3).

Exhibits 17, 22 and 55 were also cumulative with exhibits 52, 53 and 54 which showed bind marks on the victim's ankles and wrists after the bonds had been removed by the medical examiner. The prosecutor justified these photographs because they showed the victim's bonds were tight, as a basis for inferring she could not get loose, as a basis for inferring that there was no consent to the sexual battery. (T.1390-92, R.229-231). Not only was "consent" not an issue, but the violence of the rape and homicide had been communicated to the jury quite dramatically by other pictures in evidence and by the testimony of several witnesses including the medical examiner. (T. 1390).

The stab wounds on the victim's body were shown in exhibits 24, 25 and 26, even though the defendant had admitted in his opening that Elviro had been stabbed, and the medical examiner did not need the photographs to testify about his observations of the victim's body and the results of his autopsy. (R.204-206; T.1397-8,1240). The defendant also objected to exhibit 27, a close-up of the wound on the victim's neck which allegedly showed evidence of its infliction with a serrated knife of the type found on the premises. Exhibit 27 was duplicative of exhibit 18 which only showed the "possibility" of this neck wound. (R. 207; T. 1403-1405).

Exhibit 23 stands out as a particularly prejudicial and unnecessary photograph. This photograph, taken in the medical examiner's office, depicted the victim on her back on the autopsy table, gag in place, clothing bloody, ankles and wrists still tied, pubic hair visible, and her cut pants and underpants around her legs. Besides again depicting everything that had already been shown, including the cut outer and underpants, (R. 228), the photo insidiously posed the victim in a sexually suggestive posture. The victim was found on her side (R. 197), not on her back. By posing the victim on her back with her legs apart, the state was impermissibly suggesting to the jury its theory of the case. Exhibit 23 was highly improper and prejudicial and should never have been admitted. (R. 203; T. 1319-20).

The defendant also objected to photographs of the shooting victim, Grisel Fumero. Exhibit 34 was a photograph of the victim as she was found face down in the kitchen. Her clothes are bloodied and her body is in the grotesque position in which she fell and died. This photograph of a dead body did not prove identity and added nothing to the case except cumulatively proving the undisputed fact of death. The state's circular argument for exhibit 34 was simply that the jury was entitled to see how the body was found at the scene. (R.214; T.1327-28) The same argument would justify the jury seeing anything.

Exhibit 35 was perhaps the most gruesome photograph of all showing the torso and lower face of the victim after she had been turned over. The picture is simply a morass of blood and bloody clothing. Her dress had apparently been pulled up by someone at the scene (for reasons that do not appear of record - compare photograph R. 214 with R. 215), and no wounds are distinctly visible because of the confusion of blood and clothing. Other photographs of the victim amply reveal the various bullet wounds in her body. (R.215, 216, 217, 227, 234-236).

The defendant objected to all these photographs of both victims on the grounds that they were cumulative, that the defendant was not contesting the causes of death or the positions or conditions of the bodies, and that under §90.403 Fla. Stat., the relevance of the photographs, if any, was substantially outweighed by their prejudicial value. (T. 1240, 1310-1315, 1317-1320, 1322, 1324-29).

Section 90.403 Fla. Stat. provides, in its pertinent parts, that "[r]elevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice...or [the] needless presentation of cumulative evidence". It is not enough, as the court and the prosecutor assumed, that gruesome photographs are relevant. Section 90.403 presumes that the gruesome photographs would be relevant but goes on to require a weighing test before they are admitted. The probative value of each photograph, based upon the importance to the case of the relevant features that photograph communicated should have been weighed against the amount of prejudicial and irrelevant information communicated by its gruesome features to determine whether the relevant features in each photograph was overwhelmed by its irrelevant gruesomeness.

Here, the state violated every tenet of §90.403, Fla. Stat. It used photographs that were doubly, triply and quadruply cumulative. It used posed and suggestive pictures at the medical examiner's office far removed from the crime scene in time and place. It elevated photographic features of at best trivial relevance into pseudo-justifications for the admission of prejudicial information. It induced at least two witnesses to testify concerning the appearance and condition of each victim, yet unnecessarily sought to corroborate their unchallenged testimony with photographs. It justified the pictures as showing the causes of death when the causes were admitted, and the condition of the bodies when the conditions of the bodies were not contested. And it concocted justifications for other pictures, such as those of the binding marks, by a nonsensical pyramiding of presumptions and inferences. The state's justifications for its pictures were, on

the whole, frivolous, if not disingenuous. The trial court erred in admitting the photographs identified, supra, over the defendant's objections. Reddish v. State, 167 So.2d 858 (Fla. 1964); Dyken v. State, 89 So.2d 866 (Fla. 1956); Beagles v. State 273 So.2d 796 (Fla. 1st DCA 1973).

POINT X

THE TRIAL COURT ERRED BY CHARGING THE JURY ON WITNESS UNAVAILABILITY OVER THE DEFENDANT'S OBJECTION.

Over the defendant's strenuous objections, the trial court gave the jury the instruction on witness unavailability requested by the state. (T.1855-63, 1996-7; R. 251). That instruction read:

> The State and the defense have the right to compel any persons to appear in this court and testify concerning any case.
>
> It is not the duty of either the State or the defense to call every person who might seem likely to have some knowledge about this case and have them testify on the witness stand.
>
> It is the right of all parties in the case to call those witnesses whom the respective parties feel will contribute something material to the issues, and any omission to produce other witnesses does not raise any presumption that they would, if produced, testify adversely to either side in the case. You cannot assume that anyone who has not testified in this case would have testified one way or the other.

This instruction was improper because it substantially diluted the state's burden of proof, was inconsistent with the jury instruction that a reasonable doubt could be created by a lack of evidence, and penalized the defendant's exercise of his right to point out to the jury omissions in the state's case.

Generally, a party may comment on the failure of his adversary to call an available witness who can provide competent and material testimony. Buckrem v. State, 355 So.2d 111 (Fla. 1978); Daughtrey v. State, 325 So.2d 456 (Fla. 1st DCA 1976); Jenkins v. State, 317 So.2d 90 (Fla. 1st DCA 1975). The defendant's counsel, in his closing arguments, commented upon the failure of the state to call

a fingerprint expert to corroborate Tomas Barcelo's story, a medical expert who might have proved that a bite mark on the victim was not the defendant's, and a ballistics expert to reveal the results of a powder test of Arsenio Lara's hands. It was the defendant's theory of the case that Barcelo, Arsenio Lara and others, were the guilty parties. (T. 1936-7, 1977-9).

On the most fundamental level the quoted instruction had the effect of neutralizing one of the most important arguments in the defense arsenal, and one of the most helpful jury instructions for the defendant the court could give - that a reasonable doubt as to the defendant's guilt may arise from a lack of evidence. (T. 2011-12). If a defense argument calling the jury's attention to the absence of prosecution evidence is met by an instruction advising the jury not to consider the state's failures of proof, then the defendant will have been deprived of the full benefits of the reasonable doubt instruction, Cf. Wright v. State, 363 So.2d 619, 620 (Fla. 1st DCA 1978); and the state's burden of proving guilt beyond a reasonable doubt has been concomitantly, and impermissibly, lightened.

A second problem with the court's instruction is that it relieved the state of one of its testimonial burdens - adducing evidence through its witnesses, for instance, as to why the bite mark was inconclusive, the fingerprints unreadable, or the ballistics tests unhelpful. If the state did not avail itself of these opportunities to explain its actions or omissions through its witnesses, the court may not, through its instructions, remedy these defects in the state's case.

A corrollary of the foregoing problem is that the instruction deprived the defendant of a charge supporting the theory of his defense. The closest the defense came to presenting an exculpatory theory was in its arguments that the proofs and the lack thereof pointed to a perpetrator other than the defendant. Although the defendant could not request an instruction on this defense he had a right to expect that his defense would not be judicially nullified. Compare, Bryant v. State, 412 So.2d 347 (Fla. 1982).

An additional problem with the instruction is that it infers mutuality by purporting,on its face, to apply equally to both the state and the defendant. A jury, impressed by the evenhandedness of the instruction could as easily hold a default in proof against the defendant, even though the defendant has no burden of proving his innocence, as it could against the state. The quoted instruction thus conflicted with another part of the instruction which advised the jury that the defendant need not prove or disprove anything and could remain silent throughout. (T. 2016).

Lastly, the trial judge misconceived of the meaning of the term "available" when she gave the charge. It is clear that the availability of a witness will depend upon that witness' relationship to the parties. Jenkins v. State, supra. A witness is not equally available to the defense when he is a government employee and law enforcement officer who has an interest in seeing his police work and his employer's theories of the case vindicated. United States v. Mahone, 537 F.2d 922 (7th Cir. 1976). Thus, in State v. Davis, 438 F.2d 185,189 (Wash. 1968) a police witness was not "available" to the defendant because

> the uncalled witness worked so closely and continually with the county prosecutor's office with respect to this and other criminal cases as to indicate a community of interest between the prosecutor and the uncalled witness.

See, State v. Denmon, 473 SW.2d 741,745 (Mo.1971); People v. Fiori, 108 NYS 416,426 (App. Div. 1908). The instruction, to the extent it made police officers, technicians and medical examiners as "available" to the defendant as they were to the state, misstated the law.

The far wiser and safer practice would have been for the court to leave the entire question of witness unavailability to the arguments of counsel. See, United States v. Young, 463 F.2d 934,943 (D.C. Cir. 1972). The defendant was substantially prejudiced by the court's instruction which stripped him of his defensive arguments and the basic safeguards provided to every defendant accused of a crime.

POINT XI

THE PROSECUTION'S AD HOMINUMS AGAINST DEFENSE COUNSEL HAD THE EFFECT OF PREJUDICING THE JURORS IN THE ABSENCE OF JUDICIAL WARNINGS OR CURATIVE INSTRUCTIONS

The prosecutor's objectionable ad hominums in his closing argument fell into two categories - those which accused the defendant's counsel of trying to fool the jury, and those which suggested that defense counsel would not hesitate to tailor his defense to fit the prosecution's case. Some of the prosecutor's comments were the basis for a mistrial motion, some for objections, and others were not the subject of objections. The comments, in toto, had the clear capacity to prejudice the defendant.

In the first category of ad hominums are those unobjected to comments which accuse defense counsel of trying to fool the jury with a "smoke screen" of false or misleading arguments (T.1949,1951,1970,1972); the accusation that counsel was resorting to "a good defense ploy". (T.1952); and the prolonged disparaging comment comparing defense counsel to a squid, a creature that manufactures its own defense by emitting a smoke screen and clouding the water. Defendant moved for but was denied a mistrial, based upon this comment. (T. 1970,1975).

In the second category of ad hominums is the objected to statement (that also indirectly comments on the defendant's silence) that the defense attorney was not disingenuously admitting facts he could not overcome (T.1938); the objected to insinuation that defense counsel would have improperly changed his factual argument if the state's proofs had differed, (T. 1950); the unobjected to comment that the prosecutor was surprised that the defense counsel had not attempted to offer the jury a misleading argument (T. 1952); the unobjected to comment that defense counsel would have offered an argument he did not believe in if he thought the jury would have believed it (T. 1970); and the objected to comment that the defense attorney would never be satisfied with the strength of the state's proofs. (T.1973).

The courts of this state have continuously railed at prosecutors for accusing their adversaries of tricks, ploys, smoke screens and concocted defenses. See, e.g. Tacorante v. State, 419 So.2d 789 (Fla. 3rd DCA 1982); Westley v. State, 416 So.2d 18 (Fla. 1st DCA 1982); Cooper v. State, 413 So.2d 1244 (Fla. 1st DCA 1982); Melton v. State, 402 So.2d 30 (Fla. 1st DCA 1981); Porter v. State, 386 So.2d 1209 (Fla. 3rd DCA 1980); Carter v. State, 356 So.2d 67 (Fla. 1st DCA 1978); Cochran v. State, 280 So.2d 42 (Fla. 1st DCA 1973). Many similar cases could be cited.

If repeated judicial warnings to prosecutors that their behavior is prejudicial, unethical and insulting are to have meaning, judgments in cases in which prosecutors have behaved like the prosecutor below, must be reversed. In this case, where the state's proofs consisted of essentially one main witness, and the defendant offered no proofs but depended entirely upon the persuasive powers of his attorney in cross-examination and argument to suggest loopholes, flaws, and omissions in the state's proofs, ad hominums directed to the competence or credibility of the defense attorney had a clear capacity to contribute to the defendant's conviction. See, Tacorante v. State, supra, 419 So.2d at 792.

POINT XII

THE COURT ERRED IN DENYING THE DEFENDANT'S MOTIONS FOR MISTRIAL WHEN STATEMENTS BY THE PROSECUTOR IN HIS CLOSING ARGUMENT IMPERMISSIBLY COMMENTED UPON THE DEFENDANT'S PRE-ARREST SILENCE.

At one point in his closing argument the prosecutor stated:

> Was Mario at the scene? He was in that house. He was there earlier in the day.
>
> Did he ever come back? Didn't say "Oh, my God, What happened here?"
>
> Hell, no. He's on his way to Union City.

The defendant's motion for mistrial following this statement was denied. (T.1946-7). Later in his summation, the prosecutor stated:

> Margarita spoke to the police. He [the defendant] only spoke to the police five days later in Union City, New Jersey.

The defendant again moved for but was denied a mistrial. (T.1967). Defendant renewed his motions for mistrial at the close of his argument. (T.1994-6).

It is settled that a defendant may be impeached by his pre-arrest silence if he takes the stand and offers testimony inconsistent with that silence. Jenkins v. Anderson, 448 US 231, 65, LEd.2d 86,100 SCt. 2124 (1980); Ruiz v. State, 378 So.2d 101 (Fla. 3rd DCA 1979); Reaser v. State, 356 So.2d 891 (Fla. 3rd DCA 1978). But that is not what occurred in the present case.

The defendant never took the stand and thus there was no inconsistent testimony to rebut. Where there is no testimonial conflict, a prosecutor may not set up the straw man of a non-proferred defense, in order to knock it down with proofs of silence. See, Kindell v. State, 413 So.2d 1283,1288,n. 3 (Fla. 3rd DCA 1982), Pearson, J., concurring.

The prosecutor's comments prejudiced the defendant in several ways. They suggested to the jury that the defendant violated some duty of coming forward and speaking to the police, and that it was evidence of his guilt that he had not. There is, of course, no duty on the part of anyone to volunteer information to the police, and the failure or refusal to do so is an aspect of the constitutional right of silence. The defendant's exercise of this aspect of his right of silence could not be commented upon by the state. Furthermore, unlike the situation in which the truth-finding function of a court is imperiled by a perjurious defendant, here no judicial truth-finding function would be protected or vindicated by calling attention to a non-testifying defendant's pre-arrest silences.

Equally important, there is simply no discernible relevance or probativeness in a defendant's pre-arrest silence. In the defendant's case, because he spoke no English, was a recent immigrant, was under indictment for a previous rape, and may have felt circumstances and the accusations of others had incriminated him, the

decision not to come forward could have been prompted by numerous considerations other than consciousness of guilt. Not only is it true that "[i]n most circumstances silence is so ambiguous that it is of little probative force", but silence frequently, as here, has a "significant potential for prejudice" that outweighs its insignificant probativeness. United States v. Hale, 422 US 171,176,180, 45 LEd.2d 99, 95 SCt. 2133 (1975).

Taken together, the prosecutor's comments were fundamentally unfair to the defendant. The comments were "fairly susceptible" to interpretation by the jury as implying that the defendant remained silent where an innocent man would have offered an explanation. Cf. David v. State, 369 So.2d 943 (Fla. 1979). Defendant's motions for mistrial should have been granted or, at the very least, the jury cautioned that the defendant's pre-arrest silences were not evidential.

POINT XIII

THE TRIAL COURT ERRED BY CHARGING THE JURY ON ONLY THOSE AGGRAVATING AND MITIGATING FACTORS WHICH THE COURT THOUGHT WERE RELEVANT.

Both the state and the defendant requested that the jury be charged on all aggravating and mitigating factors. The court at first agreed but then refused to follow this procedure. (T.2062-4, 2071-2). Instead, the trial court instructed the jury on only the three aggravating and two mitigating factors it thought were relevant, in addition to permitting the jury to consider "any other aspect of the defendant's character or record and any other circumstance of the offense" bearing on mitigation. (T.2123-4). In so limiting the jury's consideration the trial court deprived the defendant of the benefits inherent in Florida's bifurcated sentencing scheme, and violated his rights under the 8th and 14th Amendments to the United States Constitution.

The practice of charging the jury on selected aggravating and mitigating factors was specifically disapproved in Cooper v. State, 336 So.2d 1133,1140 Fla.1976):

> The Legislature intended that the trial judge determine the sentence with advice and guidance provided by a jury, the one institution in the system of Anglo-American jurisprudence most honored for fair determinations of questions decided by balancing opposing factors. If the advisory function were to be limited initially because the jury could only consider those mitigating and aggravating circumstances which the trial judge decided to be appropriate in a particular case, the statutory scheme would be distorted. The jury's advice would be pre-conditioned by the judge's view of what they were allowed to know. The judge should not in any manner inject his preliminary views of the proper sentence into the jurors' deliberations, for after the jury has rendered its advisory sentence the judge had the affirmative duty to decide the sentence in the context of his exposure to the law and his practical experience.

See also, Ford v. Strickland, 676 F.2d, 434,440 (11th Cir. 1982). The trial judge's act of limiting, if not altogether neutralizing the jury's independent advisory function in the instant case requires that the sentence of death imposed upon the defendant be vacated. The defendant's right to a jury recommendation of life imprisonment was a valuable right that should not have been jeopardized or frustrated by incomplete instructions to the jury. Walsh v. State, 418 So.2d 1000,1003 (Fla. 1982; Thomas v. State, 403 So.2d 371,376 (Fla.1981).

POINT XIV

THE TRIAL COURT ERRED BY FAILING TO CHARGE THE JURY ON THE MITIGATING FACTORS OF AGE AND THE LACK OF A SIGNIFICANT CRIMINAL HISTORY.

Subpoint I

The Trial Court Erred by Failing to Charge the Jury on the Mitigating Effect of the Defendant's Age.

Peek v. State, 395 So.2d 492, 498 (Fla. 1980) states that "[t]here is no per se rule which pinpoints a particular age as an automatic factor in mitigation". It is significant that the statute speaks of "age" as a mitigating factor and not "youth". Accordingly, the "age" factor has two components. A defendant's chronological age "whether youthful, middle aged, or aged" is one factor; the length of time that a defendant has been in compliance with the law is another. State v. Dixon, 283 So.2d

1, 10 (Fla. 1973). The jury should thus have been allowed to at least consider the defendant's age in order to give his age whatever weight, if any, they felt that mitigating factor deserved. Eddings v. Oklahoma, 455 US ____, 71 LEd.2d 1, 102 SCt. 869 (1982).

It is ironic that the very reason the trial court refused to charge the jury on age was because "[t]hey might think, well, he's a young man, we'll consider this as a mitigating factor." (T.2078). That is precisely the type of reasoning in which the jury was entitled, if not statutorily required, to indulge.

Subpoint II

The Trial Court Erred by Failing to Charge the Jury on the Mitigating Factor of the Defendant's Lack of a Significant History of Prior Criminal Activity.

The defendant moved for a statement by the prosecution of the evidence it intended to use to prove aggravating factors. (R.133). The court ordered the state to produce its evidence in aggravation to which the state responded that it would call the medical examiner but that it would offer no other evidence of aggravating factors. (T.911-13). The state, however, did represent that if the defendant argued an absence of significant prior criminal activity, it would bring in the witness in the underlying rape case against the defendant to prove that significant criminal activity had occurred. (T.913-14, 2059-61).

By approving the proposed use of the rape victim by the state, the trial court improperly chilled the defendant's right to justifiably argue to the jury that he had no significant criminal history. The trial court's advance approval of the state's use of the rape victim had the effect of giving respectability to the state's threat to turn the penalty phase of the trial into a trial of a rape case, in controvention of the principles behind Florida's bifurcated sentencing scheme.

State v. Dixion, supra, 282, So.2d at 9, observed that

> [a]s to what is significant criminal activity, an average man can easily look at a defendant's record, weigh traffic offenses on the one hand and armed robberies on the other, and determine which represents significant prior criminal activity. Also, the less criminal activity on the defendant's record, the more consideration should be afforded this mitigating circumstance.

The fact that there may have been criminal "activity", but none of it ever culminated in a conviction, also has a bearing upon whether the criminal activity was "significant". Hargrave v. State, 366 So.2d 1,4 (Fla. 1978).

Here, by the state's admission, the only prior criminal act it could prove was the defendant's alleged rape of the decedent Fumero's younger sister. This alleged rape had been mentioned by several witnesses throughout the trial. Its existence was relied upon by the state in arguing to the jury that the defendant had a motive to kill the victim's sister who was an alleged witness in that rape case and in arguing, to the jury, the propriety of a death sentence against the defendant. There was thus more than ample evidence in the trial of the underlying rape that the jury could have considered in weighing the existence, and the importance, of the rape as an aggravating factor.

The testimony of the rape victim would have had the effect of turning the penalty phase into a trial of the rape case. Defendant, with his life at stake, would have been forced to fully and vigorously litigate the rape case, in the penalty phase of his trial, in order to disprove or minimize the victim's allegations. The supporting witnesses and medical proofs that the state and the defendant would likely have offered would have consumed a large amount of time, dominated the penalty proceedings, and given unnecessary emphasis to the alleged rape as an aggravating factor.

If it would have been error to try the rape case at the penalty phase, it was also error for the state, with the court's approval, to threaten to do it.

The defendant was thus deterred from arguing that the alleged rape which the jury already knew about, was not a significant prior criminal act. The trial court erred by placing the defendant in the position of either waiving the benefits of that mitigating factor, or suffering the state to threaten to overwhelm the penalty proceedings with a trial-within-a-trial.

POINT XV

THE TRIAL COURT ERRED BY FAILING TO CHARGE THE JURY IN ACCORDANCE WITH THE DEFENDANT'S REQUESTS TO CHARGE.

Subpoint I

The Trial Court Erred by Failing to Instruct the Jury Not to Double-Up Aggravating Circumstances.

In his requested instructions No. 9 and 25, the defendant asked that the jury be told that

> [w]here the same aspect of the facts would support more than one aggravating circumstance, that aspect can be considered as only one circumstance in aggravation. (R. 289, 305).

The court charged the jury on potentially overlapping aggravating circumstances - that the crime was committed in a cold, calculated and premeditated manner, and that it was committed for the purpose of disrupting or hindering the enforcement of law. (T. 2123-4). There was no instruction preventing the jury from using the defendant's premeditation to establish the disruption and hinderance of law in Section 921.141 5(g) Fla. Stat., and to establish the unjustified "cold, calculated and premeditated" act described in sub-section (i) of that statute. The jury should not have been permitted to find two aggravating factors using the "same aspect" of the defendant's crime. Francois v. State, 407 So.2d 885 (Fla. 1981); Provence v. State, 337 So.2d 783 (Fla. 1976).

Subpoint II

The Trial Court Erred by Failing to Charge the Jury that the Totality of Aggravating Factors Had to Outweigh the Totality of Mitigating Factors Beyond a Reasonable Doubt.

Florida's sentencing scheme gives no guidance to the jury in the event they find all aggravating factors beyond a reasonable doubt and all mitigating factors beyond a reasonable doubt, but are unable to conclude that either group outweighs the other in importance. If a jury reaches this juncture they can, under Florida law, recommend a sentence of death as well as one of life because no guidance is given on the ultimate burden of proof at the penalty phase. The defendant's instructions No. 10, 18, 24 and 28 address this question by requiring aggravating circumstances to outweigh mitigating circumstances beyond a reasonable doubt before a sentence of death can be recommended.

Since aggravating factors are elements of the crime of first degree murder that the state must prove beyond a reasonable doubt in order to impose the death penalty, any dilution of the state's burden is violative of the 8th and 14th Amendments. The state's standard of proof, if death is to be imposed, must remain inviolate and undiminished throughout the penalty phase. This can only be accomplished by instructing the jury that the consequences of their weighing of factors must convince them beyond a reasonable doubt that the composite of aggravating factors outweighs the composite of mitigating factors. Anything less denies the defendant the benefit of the reasonable doubt standard and introduces an unacceptable level of arbitrariness into the penalty process. Furman v. Georgia, 408 US 238, 33 LEd.2d 346; 92 SCt. 2726 (1972). See, Mullaney v. Wilbur, 421 US 684, 44 LEd.2d 508, 95 SCt. 1881 (1975); In re Winship, 397 US 358, 25 LEd.2d 368, 90 SCt. 1068 (1970); Arrango v. State, 411 So.2d 172, 174 (Fla. 1982); State v. Dixon, supra, 283 So.2d at 9.

Subpoint III

The Trial Court Erred by Failing to Charge the Jury That the Mere Existence of an Aggravating Factor Does not Require the Return of a Recommendation of Death.

The defendant requested in instructions Nos. 13, 14, 23 and 24, that the jury be told that even if no mitigating circumstances were shown, and aggravating circumstances were proved, they could still return a recommendation of life imprisonment. Since a jury may find one or more aggravating circumstances to exist beyond a reasonable doubt, but chose to give them no weight, the court's refusal to give this instruction was improper and amounted to a directed verdict of death in the event the jury found no mitigating circumstances to exist. See White v. State, 403 So.2d 331, 336 (Fla. 1981).

POINT XVI

THE TRIAL COURT ERRED IN FINDING THAT THREE AGGRAVATING AND NO MITIGATING FACTORS EXISTED.

Subpoint I

The Trial Court Erred in Finding that the Murder was Committed to Disrupt or Hinder the Lawful Exercise of a Governmental Function or the Enforcement of Laws.

The trial court found that the disruption/hinderance aggravating factor, codified as Section 921.141(5)(g) Fla. Stat., had been established. (R. 259; T.2156-7). The trial court erred, however, in finding that that factor had been proven beyond a reasonable doubt.

In construing the closely related aggravating factor of Section 921.141(5)(e), killing to avoid or prevent a lawful arrest, this court has observed that where a non-police witness is killed, "[p]roof of a requisite intention to avoid arrest and detection must be very strong". The facts pointing to such an intention must lend themselves to only one interpretation. Armstrong v. State, 399 So.2d 953 (Fla. 1981); Riley v. State, 366 So.2d 19, 22 (Fla. 1978).

Here, the evidence did not point to the motivation for Fumero's killing as the elimination of a witness. Rather, Fumero's death occurred in the emotional aftermath of defendant's killing of his girl friend just minutes before. There was no reason for the defendant to kill Fumero to eliminate her as a witnes. The state's own witnesses showed that the defendant's alleged strategy, of bringing Fumero to his house where his friend Rizo could lead her to believe he loved her, and thus lessen her desire to testify against the defendant, was working. Fumero did in fact come to the house and appeared to be content to live there with her lover, Rizo, despite being told by Rizo's wife in no uncertain terms how the defendant and Rizo were using her. (T.1684-5, 1687-8, 1691-3).

The more consistent and persuasive reason for the defendant's shooting of Fumero was his emotionally overwrought condition following his killing of his girl friend, Olga Elviro. The defendant and Elviro were boy and girl friend and had been going "steady" about two months. (T.1557,1694). At some point Elviro threatened to leave the defendant because of what she had learned about the rape of Fumero's sister. This enraged the defendant who threatened both his girl friend and the woman, not Fumero, whom he believed responsible for imparting the damaging information about him. (T. 1693-4, 1705, 1566-73).

This hypothesis for the defendant's killing of Fumero becomes the only reasonable one when it is considered that the defendant first killed his girl friend in a rage that the jury found was not premeditated, and then went downwtairs where he told Fumero, just before he shot her "because of you I have lost everything". (T. 1711-12). Obviously what the defendant had just lost was his girl friend, and the possibility of his freedom, if not his life. There is not the slightest suggestion from this contemporaneous utterance, that the defendant was shooting Fumero to eliminate her as a witness against him as opposed to just venting his generalized rage. This hypothesis is further corroborated by evidence offered at the sentencing phase where the defendant's doctor described the defendant as a

brutal and explosive person subject to being "carried off...by intense moods of rage that were pretty much beyond his control". (T. 2138-2146).

Significant, too, is the prosecutor's admission that the defendant's words were ambiguous. The prosecutor interpreted the phrase for the jury as a reference to the fact that the defendant had just "lost" his girl friend, and that he was killing Fumero because her testimony had caused this turn of events. Even the prosecutor could not argue that the defendant's motive was the elimination of a prospective witness against him. (T. 1962).

There was simply no basis for the jury or the court to have found, beyond a reasonable doubt, that the defendant's killing of Fumero satisfied the criteria of Section 921.141(5)(g).

Subpoint II

The Trial Court Erred in Finding that the Murder was Committed in a Cold, Calculated and Premeditated Manner without any Pretense of Moral or Legal Justification.

If, as it is likely, the defendant killed Fumero while in the same rage that he was in when killing Elviro only minutes earlier, then, by definition, the "cold, calculated and premeditated" requirement of Section 921.141(5)(i) cannot be satisfied. There is no evidence that any factors intervened in the few minutes between the killings to make the first homicide second degree murder and the second one first degree murder. Rather, the logical evidentiary presumption is of the continuation of the defendant's state of rage from murder to murder.

In Smith v. State, 344 So.2d 915, 918 (1st DCA 1977), lim. on other gds., Ruffin v. State, 397 So.2d 277 (Fla. 1981), the state argued that the evidence of the defendant's apparent calmness at and after the shooting was evidence that he was also emotionally undisturbed at the time of the shooting. The Court rejected this argument, stating

> Evidence that appellant acted coolly and calmly after the shooting was consistent with the state's psychiatric testimony that

> a person who was temporarily insane at the time of the homicide would continue to remain in that condition for some time afterwards.

There can be little doubt here that the defendant's rage continued and was spontaneously expressed against Fumero. The observations of Tomas Barcelo, the reported question of the defendant's brother asking the defendant if he had gone crazy, and the defendant's threats against his own brother, support the inference that at the time he shot Fumero, the defendant was still in an emotional state that made the killing anything but cold, calculated and premeditated. (T. 1716-61). See, Halliwell v. State, 323 So.2d 557, 561 (Fla. 1975).

Not only was the defendant's mental state not proven to be cold and calculating beyond a reasonable doubt, but the rest of the circumstances surrounding the homicide prove that Section 921.141(5)(i) does not apply. It has been held that subsection (5)(i) ordinarily applies only to those murders that can be characterized as executions or contract murders. McCray v. State, 416 So.2d 804 (Fla. 1982). The killing of Fumero was neither an execution, nor a contract killing. Compare, Autone v. State, 382 So.2d 1205 (Fla. 1980).

Lastly, the defendant's killing of Fumero was accompanied by at least a "pretense" of moral justification. The defendant obviously viewed the decedent, in his rage, as the person who had caused him to kill his girl friend. While that may not have been objectively true, it is clear from the defendant's own contemporaneous expression of intent that he believed that to have been the case. This subjective belief by the defendant of the moral justification for his act is enough to prevent subsection (5)(i) from being used as an aggravating factor against the defendant. Cannady v. State, Sup. Ct. Case No. 59,974, February 24, 1983; Jacobs v. State, 396 So.2d 713, 718 (Fla. 1981); Websters 3rd New International Dictionary, (1976) ("pretense": something alleged or believed on slight grounds: an unwarranted assumption").

Subpoint III

The Trial Court Erred by Failing to Give any Weight to the Mitigating Factor of Whether the Defendant had a Significant History of Prior Criminal Activity.

The chilling effect of the Court's treatment of this issue at the penalty phase has already been discussed, supra. Notwithstanding the court's refusal to allow the jury to consider this mitigating factor, the court had an independent duty to scrutinize the mitigating factors for any that could be assigned any weight. There is no evidence in either the transcript or the record that the trial court gave specific consideration to the absence of a "significant history of prior criminal activity" in the defendant's background, as a mitigating factor. (R. 260; T.1399, 2158).

The fact that the defendant's one prior criminal act was a rape, possibly statutory, for which he had not been convicted, and which, so the state alleged, was integrally related to the present offenses, required the court to give that factor some weight. There was a basis for the court finding, in mitigation, that the statutory rape was not a "significant" crime, and that even if it was, there was no "history" or continuum of "criminal activity" on the defendant's part. State v. Dixon, supra, 283 So.2d at 9; Hargrave v. State, supra, 366 So.2d at 4. The failure of the trial court to give this mitigating factor any weight is violative of the 8th and 14th Amendments. See, Eddings v. Oklahoma, supra; Lockett v. Ohio, 438 US 586, 57 LEd.2d 973, 98 SCt.; Section 921.141(6)(a).

Subpoint IV

The Trial Court Erred by Failing to Give any Weight to the Mitigating Factor of Extreme Mental and Emotional Disturbance.

For the reasons previously stated, it is clear that the defendant's rage, which the jury recognized caused the first homicide, persisted for a few minutes until the second homicide was committed. The defendant's contemporaneous and spontaneous explanation for his act, and the observations of what the defendant said and

did at and immediately after the shooting, strongly support the thesis that the defendant was suffering from "extreme mental and emotional disturbance" following the death of his girl friend. The failure of the trial court to identify the defendant's emotional state as a mitigating factor, and give it some weight, was error. See Section 921.141(6)(b), Fla. Stat.

Subpoint V

The Trial Court Erred by Failing to Give Any Weight to the Mitigating Factor of the Defendant's Age.

The trial court paradoxically believed that it could not charge the jury on the defendant's age because the jury might find age to be a mitigating factor. (T. 2078). This, as has been argued, was error, but it was also error for the court in the final sentencing phase not to have then considered the defendant's age as a mitigating factor. Despite the teachings of this court that there is no automatic cutoff date after which youthfulness is no longer to be considered, Peek v. State, supra, 395 So.2d at 498, and neither extreme youth nor extreme old age are the only "age" variants entitled to weight, State v. Dixon, supra, 283 So.2d at 10, the trial court apparently adopted a per se rule to preclude her consideration of the defendant's age as a matter of law. This was error. See, Eddings v. Oklahoma, supra, Lockett v. Ohio, supra, Section 921.141(6)(g), Fla. Stat.

Subpoint VI

The Trial Court Erred in Finding that the Defendant's Killing of Fumero Was Not Influenced or Affected by his Childhood Experiences.

The court found that there was no evidence that "the history of abuse suffered by the defendant as a child" in any way influenced or affected his actions in killing Fumero. (R.260). However, a psychiatrist testified for the defendant that an abused and beaten child will identify with the model of brutality to which he has been exposed, and would himself become brutal. (T.2138-9). A child in whom

brutality has begotten brutality will remain "very injured, very damaged" unless remedial efforts are brought to bear to help the child. The doctor found that the defendant had never received remedial help, (T. 2140-41), and thus remained an explosive, aggressive, and dangerous person. (T. 2144). The doctor characterized the defendant as susceptible to being "carried off by intense moods of rage that... were pretty much beyond his control". (T. 2145-6).

Given this abundance of direct proofs linking the defendant's childhood experiences to his adult behavior, the court's findings of no causal relationship are unsupported by the record and are a legally and factually insufficient predicate upon which to find the non-existence of §921.141(6)(b) as a mitigating factor.

POINT XVII

THE PROSECUTOR'S IMPROPER COMMENT IN CLOSING ARGUMENT AT THE PENALTY PHASE PREJUDICED THE DEFENDANT'S RIGHT TO A FAIR TRIAL.

During his closing argument at the penalty phase the prosecutor stated.

> The crime is an aggravated-type crime above and beyond your - I hate to say this, but it's true, your normal run of the mill murder. (T. 2111).

An objection to this comment was sustained. By stating that the homicide in question was more aggravated than "normal" murders, and then affirming the truth of his own statement to the jury, the prosecutor unmistakeably suggested to the jury that based upon his superior personal and professional knowledge and experience, the defendant's crime was one particularly deserving of capital punishment.

Considering the fact that only one aggravating circumstance was proved beyond a reasonable doubt, and that the jury was not fully instructed as it should have been, on all factors, it cannot be said that the prosecutor's comment was harmless beyond a reasonable doubt. A comment of this nature, even in the absence of a request for a curative instruction or a motion for mistrial, is fundamentally prejudicial. Pait v. State, 112 So.2d 380 (Fla. 1959).

POINT XVIII

THE TRIAL COURT'S DENIAL OF THE DEFENDANT'S MOTIONS FOR JUDGMENT OF ACQUITTAL AND THE JURY'S FINDING THAT THE DEFENDANT PREMEDITATED THE DEATH OF GRISEL FUMERO, WERE CONTRARY TO THE WEIGHT OF THE EVIDENCE.

The jury, on circumstantial evidence, concluded that the defendant was guilty of the premeditated murder of Fumero. It has been shown in Point XIV supra, that at the time the defendant allegedly killed Fumero, he was suffering from the same rage that, moments earlier, had caused him to kill his girl friend. The jury acquitted the defendant of premeditated murder in the first killing but found premeditation in the second.

The evidence of the defendant's mental condition at the time he killed Fumero was more consistent with the absence than with the presence of premeditation. The ambiguous circumstantial evidence of the defendant's state of mind was insufficient to support a finding of premeditation, or a conviction of the first degree murder of Fumero. The trial court erred in denying the defendant's motions for a judment of acquittal on that ground. (T. 1916, 1921).

The defendant, in the interest of shortening this brief, has placed his factual and legal arguments in support of this Point in the Points referenced above, and now incorporates those arguments into this Point by reference.

CONCLUSION

For the reasons stated in POINT I, the defendant's convictions should be vacated and the defendant discharged from custody on all three charges. For the reasons stated in POINT XVIII, the defendant's conviction of the premeditated murder, and the sentence thereon, should be reversed and a judgment of conviction of second degree murder, and an appropriate sentence therefor, imposed. For the reasons stated in POINTS II to XII the judgments of conviction should be reversed and the defendant awarded a new trial. For the reasons stated in POINTS V, XIII,

XIV, XV, XVI and XVII the sentence of death should be vacated and a sentence of life imprisonment imposed.

ADAM LAWRENCE, ESQ.
Special Assistant Public Defender
LAWRENCE & DANIELS
1008 Peninsula Federal Building
200 Southeast First Street
Miami, Florida 33131

By _____
ADAM H. LAWRENCE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief and Appendix has been mailed this 29th day of March to CAROLYN SNURKOWSKI, Esq. Asst. Attorney General, Appellate Section, 401 NW 2nd Avenue, Suite 820, Miami, FL, 33128.

_____
ADAM H. LAWRENCE