IN THE SUPREME COURT OF FLORIDA

JOHN EARL BUSH,)

Appellant,)

v.) CASE NO. 62,947

STATE OF FLORIDA,)

Appellee.)

INITIAL BRIEF OF APPELLANT

On Appeal From the Circuit Court of the Nineteenth Judicial Circuit of Florida, In and For Martin County [Criminal Division].

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STATEMENT OF THE CASE

The Appellant, John Earl Bush, was arrested on May 4, 1982. A Grand Jury later returned an indictment against Defendant, Bush, and three other co-defendants, charging them with premeditated murder in the first degree; robbery with a firearm; and kidnapping (R 1360). The Defendants moved for a change of venue (R 1538-1539A) because of extensive pretrial publicity, and the motion was granted (R 1544-1545).

The Defendant was tried before a jury in Fort Myers, Florida on November 15, 1982. The jury returned a verdict of guilty of murder in the first degree, kidnapping, and robbery with a firearm (R 1640- 1642). The court then reconvened the jury to render an advisory sentence of death or life imprisonment. At the conclusion of the proceedings, the jury recommended the death penalty (R 1630). Thereafter, the court entered his findings upon the record and sentenced the Defendant to death (R 1300-1308). In addition, the court adjudicated the Defendant guilty of armed robbery and kidnapping and entered concurrent life sentences on those charges (R 1300, 1646-1652). The Defendant entered his appeal of the convictions and sentences on December 6, 1982 (R 1659-1660).

STATEMENT OF THE FACTS

On the evening of April 26, 1982, the Defendant, hereinafter referred to as Bush, got together with Alfonso Cave, "Pig" Parker, and Terry Wayne Johnson in Fort Pierce, Florida. After a few drinks at a local bar, they purchased a gallon of gin (R 768), drank it, and proceeded to travel in Bush's car towards Stuart. Their intention was to go to Palm Beach (R 814). They reached Martin County at approximately 11:00 p.m. and stopped briefly at the Little General store on north U. S. 1 in Stuart. Then they drove out towards Indiantown and stopped at another convenient store on State Road 76 (R 845). Bush went in and bought a bag of potato chips. For the next several hours they rode around in Stuart.

Finally, they headed back towards Fort Pierce and Bush again stopped at the Little General store on North U. S. 1, where Frances Slater worked (R 817). Bush went in to purchase a pack of cigarettes. Cave and Parker got out of the car and came up behind him as Frances Slater was coming from the back of the store. Cave then pulled a gun on her (R 819). Cave and Parker told her to open the cash register. They also made her open the floor safe to get the rest of the money (R 819). Cave pulled Slater out of the store with him and ordered Bush to pick up the money bag. Cave and Parker put her in the back seat of Bush's car and told Bush to drive away (R 819).

Bush was driving south on U. S. 1 when they told him to head towards Indiantown (R 819). When they got further down the road and saw no traffic was coming, Cave and Parker ordered Bush to stop (R 820). Slater was put out of the car and it was Bush's intention to let her go at that point (R 821). However, Cave and Parker decided that she might be able to identify them and they told Bush to get rid of her. Cave gave his knife to Bush after Bush refused to take the gun (R 822). Bush, not wanting to kill the girl, faked a blow at her with the knife and stabbed her superficially. The girl fell to the ground (R 820). Bush then turned to get back into the car when he heard a shot fired by "Pig" Parker. This was the fatal gunshot wound to the victim's head. Bush was scared. He then got back into his car and drove away (R 837).

On the following Saturday morning, after the police had seized Bush's car pursuant to a search warrant, Bush went to the Martin County Sheriff's Department to see about his car. At that point, Lloyd Jones, a black detective, questioned Bush about the Slater murder investigation. Detective Jones read Bush his rights, and asked Bush to repeat them on the tape. Bush tried to read them back, but because of his limited education, he stumbled over several phrases (R 687-688). Bush denied any involvement in the crime and stated that he was in Palm Beach at the time of the murder. The detectives questioning Bush, repeatedly and persistently referred to the fact

that "only one person pulled the trigger" and that he should think about that before denying any involvement in the crime.

The officers questioned Bush for approximately an hour and a half. Following the interrogation, Bush remained at the Martin County Sheriff's Department. Bush stayed at the Sheriff's office all day, and the detectives, particularly Charles Jones and Lloyd Jones, both black officers in the Sheriff's Department, continued to talk with Bush about the Slater murder (R 631).

At approximately 3:00 p.m. on that Saturday, Bush agreed to go with Detective Charles Jones to West Palm Beach to check out his alibi. Another deputy also went with them (R 632). They attempted to locate Bush's alibi witness, but the witness didn't show up. Since it was late, they all decided to get something to eat.

After dinner, Bush decided to make another statement to the detectives. At this point, Bush was not reread his rights, but Jones took the statement from him anyway (R 638). This statement was taken at approximately 7:35 p.m. in West Palm Beach. The last time Bush was advised of his rights was eleven (11) hours earlier, prior to his first statement at 8:40 a.m. that morning (R 742). During the second statement, taken in West Palm Beach, Bush identified Alfonso Cave, "Pig" Parker and Terry Wayne Johnson as being his three companions during the evening of the murder. Bush described his involvement in the incident but denied stabbing or shooting the girl (R 749-757).

After taking this statement in West Palm Beach, the detectives brought Bush back to the Martin County Sheriff's Department in Stuart where a third statement was taken from him at 9:20 p.m. (R 767-786) Bush had now been with the detectives for over 13 hours. Detective Charles Jones advised Bush of his Miranda rights prior to this third statement (R 763). The statement that Bush gave at the third interview was, to a large degree, confirmatory of the second statement. Bush again denied stabbing Slater (R 769). Bush admitted that he felt remorseful at Slater's death. In fact, he said, "I hate that she's dead, because I have sisters at home." (R 778)

After this third statement, Bush was placed under arrest. The next morning he was taken before a magistrate and a probable cause hearing was held.

On May 7, 1982, the Jail Administrator of the Martin County Jail "received information" that Bush wanted to talk to Sheriff John Holt (R 650). At that point, Sheriff Holt went to the jail and talked to Bush. Sheriff Holt told him that he would have to get in touch with his attorney because an attorney had been appointed to represent him (R 652). Bush was led to the telephone where he called Attorney Richard Schopp. After Bush spoke with Schopp, Sheriff Holt spoke with Schopp. Schopp told Holt that he advised Bush not to talk to the Sheriff, but Bush told him that he was going to talk anyway (R 655). After the telephone conversation with Schopp, Bush was taken to the Detective Bureau where a fourth statement was

taken from him. Bush's purpose for making the fourth statement was to make it clear that he did not shoot Slater: that he did not pull the trigger (R 812). He admitted stabbing her, but explained that he had not wanted to but he felt he had no other choice (R 812).

The victim, Frances Julia Slater, was the granddaughter of Frances Langford and Ralph Evinrude, prominent citizens of Martin County (R 31). Her parents, Richard and Sally Campbell, are in the newspaper business in Martin County, Florida (R 32). Extensive pre-trial publicity necessitated a change in venue to Lee County where a jury trial commenced November 15, 1982.

During the course of the trial, the prosecution called Charlotte Gray, a convenient store clerk at the Little General Store on State Road 76 in Stuart. She testified that shortly before closing time that evening, two black males in dirty work clothes came into her store and purchased a bag of potato chips. She testified that one looked over the register to see how much money she had in the drawer (R 484). Prior to the trial, Gray had also picked out one photo from a photo lineup but wouldn't stake her life on it. She also didn't know whether or not the man she identified was the taller or the shorter individual in her store and was unable to make a composite drawing.

At trial, Detective John Forte testified that the photo she picked out was that of Defendant Bush. This was completely

contrary to his testimony at deposition where he stated that Gray had not identified any of the defendants (SR 1-23).

The Defendant moved for a mistrial because of the substantial contradiction between Forte's deposition testimony and his trial testimony. The court denied the motion for mistrial and stated: "Whether or not there are inconsistencies between what Detective Forte said in the deposition and what he said in court here today, that is for the jury to determine. So I deny all the motions." (R 510)

Throughout the trial the prosecution used extensive photographs, both of the crime scene and of the victim. Most of the photographs of the crime scene and of the store in which the victim worked were small 3 x 5 size. However, the photos of the victim were all 16 x 20. In particular, the State admitted two photographs of the victim which were objected to by the Defendant on the grounds that their prejudicial value outweighed any relevance, one of the victim's body at the medical examiner's office and one of the gunshot wound to the head. Again, the defense objected on the grounds of prejudicial effects (R 463). The court overruled the objection (R 464). All of these large pictures of the victim were thus admitted into evidence. In fact, the court did not refuse to admit any of the photographs into evidence which the State requested.

At the conclusion of the evidence, the prosecutor put great emphasis in his closing argument on the testimony of Charlotte Gray (R 973-974) in showing that Bush and his friends

were staking out another convenient store in Stuart to rob. The prosecution also relied heavily on the 16 x 20 photographs of the victim. The photograph of the back of the victim's head was shown to the jury in closing argument to show "what happens when a live round is fired by John Earl Bush and smashes into the skull of Frances Julia Slater." (R 992-993) (There was no testimony at trial that Bush shot Slater.) The prosecution did not argue that the Defendant was guilty of premeditated murder, but the State argued at length that they had established felony murder (R 991-993).

After receiving instructions from the court, the jury deliberated and found Bush guilty of first degree murder; robbery with a firearm; and kidnapping. Court was adjourned and reconvened the following Monday morning for the penalty phase of the trial. During the penalty phase, the State put on evidence of Bush's previous conviction for rape and armed robbery. The State offered no other evidence. The Defendant then took the stand in his own behalf. After his testimony, the court instructed the jury with regard to aggravating and mitigating circumstances. The court also gave the following instructions: "when seven or more of you are in agreement as to what sentence should be recommended to the court, that form of recommendation should be signed by your foreman and returned to this court." (R 1291) After their deliberations, the jury delivered a 7-5 advisory sentence of death for Bush. Immediately thereafter, the court announced that it was ready to

sentence the Defendant. The court enumerated the aggravating and mitigating circumstances and found that three of the four aggravating circumstances had been established, but none of the mitigating circumstances were established. As a result of his findings, the court sentenced Bush to death (R 1308). He sentenced the Defendant to two concurrent life imprisonment terms for his convictions of armed robbery and kidnapping. From this conviction and sentence, the Defendant, Bush, has appealed.

POINTS ON APPEAL

POINT I

WHERE THE STATE OFFERS EVIDENCE FROM AN INVESTIGATING OFFICER TOTALLY CONTRADICTORY TO HIS TESTIMONY DURING PRE-TRIAL DISCOVERY AND THE DEFENDANT MOVES FOR A MISTRIAL BASED THEREON, THE COURT ERRED IN FAILING TO GRANT A MISTRIAL OR CONDUCT A RICHARDSON INQUIRY PRIOR TO ALLOWING THE EVIDENCE TO GO TO THE JURY.

The trial court erred in refusing to grant Defendant's Motion for Mistrial after a State investigating officer testified that a witness had identified the Defendant at her convenient store, when, during a discovery deposition, that same officer testified that the witness had not identified any of the Defendants in this case. The trial court further erred, after hearing the Motion for Mistrial, by failing to conduct a Richardson Inquiry as to the violation of discovery rules. Where it is brought to the attention of the trial court that a party has failed to comply with the criminal rules of discovery, the trial court must make adequate inquiry into the surrounding circumstances before determining whether non-compliance would result in harm or prejudice to the Defendant. Richardson v. State, 246 So.2d 771 (Fla. 1971); Coffey v. State, 421 So.2d 49 (Fla. 2d DCA 1982). Failure to conduct an inquiry requires reversal of the conviction. Cumbie v. State, 345 So.2d 1061 (Fla. 1977). In this case, the State revealed to the Defendant the existence of the witnesses, Charlotte Gray, and Detective John Forte. On July 22, 1982, the defense

took the deposition of Detective Forte (SR 1). At his deposition, Detective Forte testified that he had taken a statement from Charlotte Gray at the Little Saints store on State Road 76 (SR 1-5). The detective was then asked:

> Question: "Okay, was a photo line up also conducted with Charlotte Gray?"
>
> Answer: "Yes there was."
>
> Question: "Okay, and was she able to make any identification of any of the Defendants?"
>
> Answer: "No, Ma'am."

Later in the deposition, Detective Forte was asked the following questions: (SR 1-21)

> Question: "And being the detective involved and having investigated the matter fully, do you have <u>any</u> <u>evidence</u> which would indicate that the individuals who came into Charlotte Gray's store are the same individuals who are charged with the murder of Frances Slater?" (Emphasis supplied.)
>
> Answer: "No, I don't."

Again, Detective Forte was asked whether or not Charlotte Gray was shown any photographs. He responded affirmatively. Asked, "Was she able to identify any of the photographs?", he said "No". (SR 1-23)

On August 31, 1982, the deposition of Charlotte Gray was taken. In that deposition, Charlotte Gray again repeated essentially the same story that she told to Detective Forte. Gray did testify that she was able to identify one photograph (SR 2-13) but she did not know whether or not the man she identified was the taller individual or the shorter individual

in her store. Furthermore, she told Detective Forte that she was pretty sure regarding her identification, but she wouldn't stake her life on it (SR 2-31). The detectives also tried to make a composite drawing of those individuals, but she testified that they couldn't make one that would satisfy her (SR 2-16).

At trial, Mrs. Gray again testified with regard to the two gentlemen who entered her store on the night of the murder. When she was asked if anything unusual occurred, she stated that one of the men looked over into the register to see how much money she had in the drawer (R 484). The defense attorney objected on the grounds of relevancy and materiality, but the court overruled the objection (R 485). The defense attorney also elicited from Mrs. Gray that she had not been able to identify anyone in a live line up (R 491). On redirect, the State's attorney asked whether or not she had been able to identify anyone in a photo line up. She said, "For myself, yes." (R 493)

Then, the State called Detective Forte to the stand. Completely contrary to his deposition testimony, Detective Forte then testified that out of a twenty photograph line up, Mrs. Gray picked out one photograph--that of the Defendant, John Bush (R 507D). The defense attorney objected to the photos on the grounds of relevance and materiality. On cross-examination, the defense attorney went through the deposition of Detective Forte, pointing out several places

where he testified that she had not been able to identify any of the photographs (R 507K).

Immediately thereafter, the Defendant moved for a mistrial on the grounds of substantial surprise and based upon the serious discrepancy between Detective Forte's deposition testimony and his testimony at trial. The defense was totally mislead by Detective Forte to believe that Charlotte Gray had not identified any of the Defendants as being those individuals who peered into her cash register the night of the Slater murder (R 508-509). The court did not conduct a Richardson Inquiry as to why this information was withheld from the defense and the State gave no explanation. The court simply ruled that the inconsistencies in Detective Forte's testimony were a question for the jury to determine. Thus, he denied the motions (R 508-510).

However, during closing argument, the State exploited this testimony to show that Bush and his companions were out on a robbery spree in Martin County. The State went to considerable lengths during closing argument to establish that it was the Defendant in Charlotte Gray's store and that he went to the store to stake it out. The prosecutor specifically stated, "They went in there to stake it out. They created a reign of terror in Martin County that night and you can see it right here in this little area. Back and forth, stalking, looking for a convenience store to rob." (R 974)

Thus, the testimony of Charlotte Gray and the surprise identification of the Defendant through the photographs at trial was prejudicial to the defense's case. The Defendant's position was that he was not an active participant in the robbery--that he had only gone in to the convenience store where the victim worked to buy cigarettes. The testimony of Charlotte Gray and her identification of the Defendant placed the idea in the jury's mind that Bush was out to rob other convenience stores.

The State's Attorney's failure to notify the Defendant of the false testimony by the detective violated the prosecutor's continuing duty to disclose, pursuant to Florida Rule of Criminal Procedure 3.220(f). A similar situation was presented in Neimeyer v. State, 378 So.2d 818 (Fla. 2d DCA 1979). In that case, a pathologist testified on deposition that the victim could have been moving towards the defendant when the he was shot, thus supporting the defendant's claim of self-defense. The night before the trial, the State Attorney told the defense counsel that the pathologist would say that the victim was paralyzed and could not move towards the defendant. The defense objected to the new testimony at trial but the trial court admitted it. On appeal, the court held that the State's failure to inform the defense of the new information until the evening of the trial was a violation of discovery obligations imposed on the State by Rule 3.220(f). A

Richardson Inquiry was needed and, since none was held, the court was required to reverse.

In the instant case, the State never informed the defense of the change in Forte's testimony: the defense first learned it when the surprise was sprung at trial. It is clear from the depositions and his testimony at trial that the detective was either lying or had forgotten. The fact of the identification was used by the State at trial, but the defense was mislead to believe there was no identification.

In Cuciak v. State, 410 So.2d 916 (Fla. 1982), this Court stated that the basic philosophy underlying discovery is the prevention of surprise and the implementation of an improved fact-finding process. Cuciak, supra, at 917. This Court also quoted, with approval, Judge Hurley's concurring opinion in Cuciak v. State, 394 So.2d at 505 (4th DCA):

> "Long ago we recognized that trial by ambush is so unfair as to be violative of due process."

This rule of law was completely abandoned by the State in this case. In its efforts to seek a conviction in this highly publicized case, the State appears to have deliberately mislead the defense on a key identification of the Defendant. Without this identification, the jury may well have believed that Bush was not the active participant in the robbery that the State pictured him to be.

Furthermore, Charlotte Gray's testimony was irrelevant and immaterial under Williams v. State, 117 So.2d 473 (Fla. 1960)

and may have caused irreparable harm in the sentencing phase of the trial. The evidence elicited from Charlotte Gray was that these individuals were attempting to commit a collateral crime when they entered her store. While evidence of a collateral crime may be admissible, the trial court must assess the probitive value of the evidence against its prejudicial effect. Smith v. State, 344 So.2d 915 (Fla. 1st DCA 1977); Josey v. State, 336 So.2d 119 (Fla. 1st DCA 1976); Dodson v. State, 344 So.2d 305 (Fla. 1st DCA 1976); Colbert v. State, 320 So.2d 853 (Fla. 1st DCA 1975). In Smith v. State, supra, the Court listed three factors to be weighed in determining the admissibility of such evidence:

> One factor is the issue of relevancy itself, to what extent is the objectionable evidence relevant...A second factor is the necessity of the testimony. How important is the testimony to the State's case?...A third factor might be termed quality of testimony. Was the testimony directly related to the material issues of the case or was it more inclined to demonstrate the bad character of the accused, thereby unduly prejudicing him." 344 So.2d, at 916.

In the instant case, none of the three factors are present. The evidence was not relevant or necessary in the State's case because the State based its case on felony murder. The confessions of the Defendant fully illustrated all of the necessary elements of the crime. Furthermore, the evidence of an alleged prior attempted robbery in Charlotte Gray's store,

which never took place, may have been more in her mind than real and was not relevant to the issues of the murder of Frances Slater. Nothing that was done in Charlotte Gray's store had any bearing on the abduction of Frances Slater and her murder. The testimony served no purpose other than to prejudice the jury against the Defendant on the basis of his character or propensity to commit crimes. The Court should not condone or allow prosecutorial overkill such as this. See Pack v. State, 360 So.2d 1307 (Fla. 2d DCA 1978).

The effect of this evidence not only prejudiced the defense of the crime, it also affects the sentencing phase of the trial. In Williams v. State, 117 So.2d 473 (Fla. 1960) this Court recognized the danger of collateral crime evidence in death penalty cases:

> "It may well have influenced the jury to find a verdict resulting in the death penalty while a restriction of that testimony might well have resulted in recommendation of mercy, a verdict of guilty of murder of a lesser degree or even a verdict of not guilty. It is the responsibility and obligation of this Court to deal cautiously with judgments imposing the extreme penalty... the Court must...determine whether or the interests of justice demand a new trial." 117 So.2d, at 476.

Thus, not only does the harm come in the surprise and harm to the theories of the defense created through violations of the discovery rules, but also admitting such testimony creates harm in the sentencing phase which this Court has admitted cannot really be calculated. Thus, the jury may have been influenced

by unauthorized non-statutory aggravating factors, which may have lead one of them to change his vote from a recommendation of life to a recommendation of death.

Due process is not served when the prosecution conducts trial by ambush and admits evidence highly prejudicial to the Defendant but not relevant to any of the material issues of the case. Consequently, this Court should reverse and remand this case for a new trial.

POINT II

THE COURT ERRED IN ADMITTING THE CONFESSIONS OF THE DEFENDANT WHEN THEY WERE PROCURED THROUGH IMPROPER INFLUENCE AND ONE WAS PROCURED WITHOUT THE DEFENDANT BEING READ FULL MIRANDA WARNINGS.

Where a confession is obtained through interrogation without full benefit of the Miranda Warning or rights thereunder, it is inadmissible. Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966). Even when such Miranda rights are given, the focus of the inquiry is whether the confession has been extracted by any sort of threat or violence or obtained by any direct or implied promise, however slight, or by the exertion of improper influence. Bram v. U. S., 168 U.S. 532, 18 S. Ct. 183, 42 L.Ed. 568 (1897); Harrison v. State, 12 So.2d 307 (Fla. 1942); Frazier v. State, 107 So.2d 16 (Fla. 1958); Garriel v. State, 317 So.2d 141 (1976).

(1) WHETHER OR NOT THE CONFESSIONS BY THE DEFENDANT WERE THE RESULT OF IMPROPER INFLUENCE ON BEHALF OF THE STATE.

Whether or not Miranda rights are given is a prerequisite to obtaining an admissible confession. However, that is not the end of the inquiry. Depending upon the totality of the circumstances, a confession may be inadmissible because it was not voluntary, even though Miranda rights have been read. In order to render a confession voluntary or admissible, the mind of the accused should, at the time it is obtained or made, be free to act uninfluenced by fear or hope. If the attending circumstances or declarations of those present are calculated to delude the accused as to his true position and exert an improper and undue influence over his mind, the confession is unlawfully obtained. Harrison v. State, 12 So.2d 307 (Fla. 1942); Frazier v. State, supra.

In the instant case and during the time the first statement was taken from the Defendant on Saturday morning, the detective's statements to Bush presented him with the impression that if he had not pulled the trigger which killed Frances Slater, he would be in good shape, undoubtedly implying that he would not be convicted of murder. The interrogation is replete with such references:

> (R 710) Waldron: "Okay, let me--let me take something here. John Earl, I want you to think about something. You know this is a homicide investigation that we are questioning you about. Now, if you will just think a minute. Now, there's others involved--and before

we go any further, decide whether you want to come clean now or come clean after somebody else makes--. Think about it. Now, if you're not the one that pulled the trigger, you'd better think about that."

Holt: "That's in your favor, John."

Waldron: "You'd better think about that."

Holt: "Now, I want you to think about that, too."

* * * * * * * * * * *

Holt: "Well, we know that, John. That's why we're talking to you the way we're talking. We know you ain't the one that pulled no trigger."

Waldron: "We're right at the top now, and we're coming on strong, and we're going to talk with everybody."

Bush: "That's why.."

Waldron: "Think about it. Really think about it now...Now you better think about it yourself. You better think about that before you sit there and just continue to deny, deny, deny. Because you're going to put your foot deeper."

Bush: "It's just like I say. Who killed her I don't know."

Waldron: "It's going to be too late now."

Bush: "And I know I wasn't involved in it."

Holt: "But we want to know the three people that was with you. One of them's going to talk, John, and it might as well be you." (R 713)

Bush: "But, you see, my car was at..from the understanding my daddy told me last night, the way..the officers say I'm the one that killed her, shot her."

Holt: "No, no, no, no, no. Ain't nobody ever said that."

Waldron: "We're not saying that. You're --you're in the middle of this thing, and you can't see where we're coming from."

* * * * * * * * * *

(R 720) Waldron: "John--let's back up here just a minute. I see where you're coming from, okay?...Now, what is going to happen if that car comes up with cloth fibers, face powder, perfume, hairs, fingerprints of that woman in your car, and the crime lab is going over it with a microscope. They're going to find it. It'll put that woman in your car. It'll put you at the scene with those other guys. Where is that going to leave you if you continue to deny it? If you're not the one that pulled the trigger, only one person pulled that trigger. If you didn't pull that trigger, now you'd better think about it. I'm telling you now, you better think about it now. Because the whole thing is fixing to cave in...We're coming on strong and we're just about to come out the door on it now and common sense is going to tell you that. Only one person out of that car pulled that trigger, only one person." (Emphasis supplied.)

Thus, the impression left from the interrogation was that the detectives were searching out the person who pulled the trigger to charge him with murder. The persistent reference to "only one person pulled the trigger" would only lead the Defendant to believe that if he didn't pull the trigger, then he wouldn't be charged with murder. It was also this inference that obviously lead to the other confessions. In particular,

that the Defendant thought that if he didn't pull the trigger, then he would not be charged with murder is apparent from his final statement wherein he admitted stabbing the victim. In that, a statement given without benefit of counsel, he stated:

> "The reason I'm here, but ah, to make myself clear that I didn't shoot her." (R 812)

That was why the Defendant was so anxious to speak to the Sheriff even without the presence of counsel. In fact, the Sheriff even stated that when he first went to see Bush at the jail, Bush started talking to him about the case that he wanted to tell the Sheriff about his part in it, "that he had been accused of something and he wanted to get it straight." (R 797) Thus, the pressure of the detectives worked in getting Bush to confess to his involvement in this crime believing that his confession to his part, since he didn't actually kill Frances Slater, would prevent him from being tried for murder.

A similar case is Bram v. U.S., 168 U.S. 532, 18 S. Ct. 183, 42 L.Ed 568 (1897). In that case, the Court held that a confession, in order to be admissible, must be free and voluntary; that it must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promise, however slight. The reason for the rule is that the law cannot measure the force of the influence used or decide upon its effect upon the mind of the prisoner. The rule therefore excludes the declaration, if any degree of influence has been exerted. In Bram, the investigating detective told the defen-

dant that a co-suspect had implicated the defendant in the crime and the detective said he believed the person was guilty and had an accomplice. If he did have an accomplice, the defendant was urged to say so and not have the blame of the murder on his shoulders. The Supreme Court held that a confession obtained under such circumstances was inadmissible. The Court stated that such pressure obviously placed the accused in the position that if he remained silent it would be considered as an admission of guilt. Furthermore, the Court surmised that,

> "It, in substance therefore, called on the prisoner to disclose his accomplice, and might well have been understood as holding out and encouragement that by doing so he might at least obtain a mitigation of the punishment of the crime which otherwise would assuredly follow...In this case before us, we find that an influence was exerted, and as any doubt as to whether the confession was voluntary must be determined in favor of the accused, we cannot escape the conclusion that error was committed... in admitting the confession."

Certainly, if such mild language can compel the Court to raise the specter of improper influence in Bram, the persistent references by the detective in this case that "only one person pulled the trigger" could lead to a much stronger conclusion that improper influence was exerted. As in Harrison v. State, supra, the statements of the detective in this case were obviously calculated to delude the Defendant as to his true

position, that is, to make him think that if he had not killed Frances Slater, that he would not be charged in the homicide.

The State violated the Defendant's Fifth Amendment rights under the United States Constitution by the admitting of the statements of the Defendant, which were procured through improper influence and the suggestion of a benefit if the Defendant would confess. Even if there is other evidence to support a conviction, it is not harmless error to introduce a coerced confession. Lynman v. Illinois, 372 U.S. 528, 9 L.Ed.2d 922, 83 S. Ct. 917 (1963). Consequently, the judgment of conviction in this case should be reversed.

(2) WHETHER OR NOT DEFENDANT'S SECOND STATEMENT WAS OBTAINED IN VIOLATION OF THE DEFENDANT'S MIRANDA RIGHTS.

In the instant case, the Defendant made four different statements to the police. The first was taken from him when he first went to the Martin County Sheriff's Department to inquire about his car at 8:40 a.m. on Saturday, May 4, 1982. The Defendant was read his rights at the beginning of the statement, and at the time he denied involvement in the incident. However, the Defendant remained in custody at the police department throughout the day. Questioning on the case continued, although none of it was taped. The Defendant then agreed to accompany the officers to West Palm Beach to establish an alibi. At 7:30 p.m., after the officers had taken him to dinner, the Defendant agreed to make a second statement. However, at this time no Miranda Warnings were read to him.

During this statement, the Defendant admitted involvement in the robbery which culminated in the murder of Frances Slater.

The failure to give Miranda Warnings prior to this crucial confession by the Defendant which first implicated the Defendant in the crime should have required its exclusion. Miranda Warnings, once given, are not to be afforded unlimited efficacy or perpetuity. U.S. v. Hopkins, 433 F.2d 1041 (5th Cir. 1970). The Defendant in this case had been in custody of the Sheriff's Department for over eleven hours at the time the incriminating statement was given. Under a similar situation, the United States District Court in South Dakota determined that a new set of warnings should be given to the suspect before questioning was resumed in the evening. See, Stumes v. Solem, 511 F.Sup. 1312 (D. S.D., S.D., 1981). The same holding can be implied from Michigan v. Mosley, 423 U.S. 96, 46 L.Ed.2d 313, 19 S. Ct. 321 (1975). In that case the Defendant was arrested for robbery, read his rights, and stated he wanted counsel. The questioning stopped. Two hours later a different detective questioned about a different murder and read his rights again, thus prompting his confession. The issue in that case was whether or not the detectives had violated his right of counsel. However, in discussing the confession the Court put great emphasis on the fact that the rights were reread before they started questioning him again in the second interrogation session. The implication is, of course, that had the

rights not been reread, the second confession would not have been admissible.

The failure to fully advise the Defendant of the Miranda Warnings prior to his initial confession violated the Defendant's Fifth Amendment rights and therefore his original confession should be inadmissable. It therefore follows that the third and the fourth confessions are also fruit of the initial confession which was illegally obtained and therefore should also have been suppressed for violation of the Defendant's Fifth Amendment rights.

POINT III

THE TRIAL COURT ERRED IN ADMITTING GORY AND GRUESOME PHOTOGRAPHS OF THE VICTIM INTO EVIDENCE WHICH WERE ADMITTED PRIMARILY TO INFLAME THE JURY AND HAD NO RELEVANCE TO ANY ISSUES IN THE CASE.

In State v. Wright, 265 So.2d 361 (Fla. 1972), this Court stated that gruesome and inflammatory photographs are admissible into evidence only if they are relevant to issues required to be proved in the case. This Court reaffirmed that position in Jackson v. State, 359 So.2d 1190 (Fla. 1978) and admonished prosecutors throughout the State that:

> "We again caution the prosecutors of this State that gory and gruesome photographs admitted primarily to inflame the jury will result in a reversal of the conviction."

In the instant case, the primary purpose of several of the photos admitted in this case was to inflame the jury and should

require a reversal of the conviction. A review of the exhibits will show that most of the photographs of the store, the vehicle, and the evidence in this case were small 3 x 5 size. However, the photographs of the victim, being Plaintiff's Exhibit 15 (R 445), 16 (R 446), 20 (R 464) and 21 (R 464), were all color photographs blown up to a 16 x 20 size, thus accentuating the gruesomeness of what the pictures portrayed.

Defense counsel will concede that State Exhibit 16 (R 446) and Exhibit 20 (R 464) were relevant and within the guidelines set forth by this Court. However, State Exhibit 15 (R 445) and State Exhibit 21 (R 464) were irrelevant to the issues to be proved in Bush's case and served only to prejudice and inflame the jury.

In particular, State's Exhibit 15, a 16 x 20 blow up of the bloody face of Frances Slater, was taken, not at the scene, but two days later at the morgue in Fort Lauderdale (R 445). (The defense objected to this photograph on the grounds of relevancy and prejudice.) It will also be noted in the photograph that the victim's hands are covered with bags, thus the condition of the body is not the same as it was at the scene of the crime. The sole basis for admitting the photograph on behalf of the State was "identity". However, Plaintiff's Exhibit 16 (R 446) could have been used to establish identity of the victim without the use of the gruesome and gory picture. The picture of the victim, obviously not in the same position or at the scene when discovered, is not proper. In Thompson v. State, 398 So.2d 197 (Fla. 1980) this Court approved the admis-

sion of four allegedly gruesome and gory photographs of the victim noting that,

> "The trial court was careful to admit only those photographs depicting the victim at the crime scene; photos of the victim taken at the medical examiner's office were excluded. We find these photographs were properly admitted to establish the extent of the heinous nature of this torture murder."

Thus, this Court's own opinions indicate that photos taken at the medical examiner's office are not generally proper to be admitted.

Similarly, the 16 x 20 blow up of the gun wound to the decedent's head was also prejudicial. The location of the gunshot wound to the head was not relevant to any issue in the Defendant's case. There was no evidence that it was the Defendant that shot the deceased, and the Defendant, through his confessions, had admitted that the deceased was, in fact, shot although by J. B. Parker. The sole purpose for using the picture of the gunshot wound was to inflame the jury as is quite apparent from the prosecutor's closing argument:

> "State's Exhibit #22 is what happens when a live round is fired by John Earl Bush and smashes into the skull of Frances Julia Slater." (R 992-993)

Such prosecutorial remarks are not only highly prejudicial and totally contrary to the evidence, but the effect of such comments combined with the gruesome picture of State's Exhibit #22 can only serve to unfairly prejudice the Defendant in the trial.

In Dyken v. State, 89 So.2d 866 (Fla. 1956), the defendant was convicted on a verdict of guilty of murder in the first degree without recommendation of mercy. In that case, the defendant questioned the propriety of admission into evidence of a photograph of the deceased lying on the mortuary table. The deceased had been shot in the head with a shotgun. The State argued that it was relevant because it showed the wound of the deceased. The Court held that not only was it not independently relevant because the location of the wound had already been conceded and proved by other evidence but that the photograph did not include any part of the crime scene and was taken at a time too far away in time and space to have any independent probitive value. Thus, the Court agreed that the photograph could have no purpose or effect other than to inflame the minds of the jury. The Court further stated,

> "We cannot say, in a first degree murder case without recommendation of mercy, that an error of this character and magnitude was not prejudicial. It follows that the judgment appealed from must therefore be and it is hereby reversed and the cause remanded for a new trial."

The facts of this case are remarkably similar to Dyken v. State. In particular, State's Exhibits 15 and 21 were taken at a time and place removed from the crime scene, and the location of the gunshot wound and the fact that the deceased was shot were conceded by the defense and proved through other testimony. As this Court noted in Dyken, the prejudicial effect of

such evidence cannot be calculated where a defendant faces the possibility of a death penalty. Again, the admission of the large color blow up shows substantial prosecutorial overkill in this case just as the admission of the testimony of Charlotte Gray as set forth in Point I. The prosecutors were aiming for a conviction and sentence of death and pulled out all the stops in order to secure it. It is impossible to calculate the harm by such prosecutorial overkill when a swing of one vote in the minds of the jury may have changed the recommendation of the death penalty for the "non-trigger man" to life imprisonment.

The admissibility of such highly prejudicial and inflammatory material which is considered by the jury in its sentencing phase deprives the Defendant of a fair trial and adds non-statutory aggravating factors of an arbitrary nature to the process contrary to the Eighth and Fourteenth Amendments. Proffitt v. Florida, 428 U.S. 242, 49 L.Ed.2d 913, 96 S. Ct. 2960 (1975); Lockett v. Ohio, 438 U.S. 586, 57 L.Ed.2d 973, 98 S. Ct. 2954 (1978); Gregg v. Georgia, 428 U.S. 153, 49 L.Ed.2d 859, 96 S. Ct. 2909 (1979); Godfrey v. Georgia, 446 U.S. 420, 64 L.Ed.2d 398, 100 S. Ct. 1759 (1980).

Consequently, because of the prejudicial admission of inflammatory photographs, the Defendant's conviction should be reversed and remanded for a new trial.

POINT IV

THE COURT ERRED IN EXCLUDING JUROR REID ON A CHALLENGE FOR CAUSE, IN VIOLATION OF WITHERSPOON v. ILLINOIS.

In Witherspoon v. Illinois, 391 U.S. 510 (1968), the Supreme Court held that the State has the right to exclude only those jury veniremen who make it unmistakably clear: (1) that they would automatically vote against the imposition of capital punishment without regard to the evidence at trial; or (2) that their attitude toward the death penalty would prevent them from making an impartial decision in the Defendant's guilt.

The Court clarified its decision in Lockett v. Ohio, 438 U.S. 586, 57 L.Ed2d 973, 98 S. Ct. 2954 (1978) by holding that the State could exclude jury veniremen who make it unmistakeably clear that their attitude toward the death penalty would prevent them from making an impartial decision as to the Defendant's guilt. Later, in Adams v. Texas, 448 U.S., U.S. 38, 65 L.Ed.2d 581, 100 S. Ct. 2521 (1980) the Supreme Court again addressed the question and held that the State may bar a venireman from service if their beliefs about capital punishment would lead them to ignore the law or violate their oaths. In the instant case, Juror Reid was excluded on the State's challenge for cause without making it unmistakeably and unequivocally clear that she could not come to a verdict of guilty knowing that the death penalty was imposed. Specifically, the following passages are relevant:

(R 50) Mr. Stone: "Do you know of any reason why anything outside might come into it, other than what you hear here?"

****

(R 51) Mrs. Reid: "I don't know if I could take the responsibility of committing one to death. I just don't know if I could handle that."

Mr. Stone: "Let me point out two things to you. First, your sentence is only advisory. The final decision, responsibility and burden lies with His Honor, the Judge...Would that in any way cause you to change your opinion as to whether or not you could?"

Mrs. Reid: "I just don't think I could handle the responsibility of condemning somebody. I think it's up to God."

(R 52) Mr. Stone (incorrectly identified as Mrs. Reid): "And you feel like that would affect you even in the first stage, in determining the guilt or the innocence, knowing if you rendered a verdict of guilty of murder in the first degree that the man could be put to death, you feel that it could affect you?"

Mrs. Reid: "I feel it would be a problem for me, myself, in my heart."

****

Mr. Muschott: "I understand, of course, sympathy will enter into practically any case....It's not anything that is unique to this case or any particular type of case. Do you understand that? How would you feel about it with that in in mind?"

Mrs. Reid: "I don't know. It would just be a very difficult thing to do."

Mr. Muschott: "Do you think you could do it, put sympathy out of your

> mind and base your verdict on the law and the evidence?"
>
> Mrs. Reid: "No, I don't think so."

The Court then sustained the challenge and excused Mrs. Reid.

The excusal of Mrs. Reid on this ground violates Adams v. Texas, supra. Mrs. Reid was strictly expressing a misgiving which did not make unmistakeably clear that her verdict would be affected. There was no irrevocable opposition to capital punishment expressed by Mrs. Reid which would justify her excusal from the jury. Certainly she did not evidence an unmistakeably clear attitude toward the death penalty. Furthermore, it is difficult to ascertain from the questioning whether or not her answers showing questions in her mind concerning the finding of guilt were due to her opinions about the death penalty or because of her potential feelings of sympathy in the case. If it were because of potential feelings of sympathy, then there would be no ground for challenge for cause. Florida Statute 913.13 states that:

> "a person who has beliefs which preclude him from finding a defendant guilty of an offense punishable by death shall not be qualified as a juror in a capital case."

There was nothing in Mrs. Reid's responses to questions to show that she was totally precluded and irrevocably committed to a verdict of innocence because of her feelings.

The Appellant concedes that there is no stated objection on the record as to the challenge to cause for Mrs. Reid. However, the questioning of the defense counsel of the witness should be taken as the entry of an objection to the State's original challenge for cause.

Having failed to follow the Witherspoon, Lockett and Adams, supra, the Defendant was denied his rights under the Eighth and Fourteenth Amendment of the United States Constitution.

POINT V

THE TRIAL COURT ERRED IN REFUSING TO REQUIRE THE STATE TO DISCLOSE WHETHER OR NOT THEY WERE PROCEEDING UNDER FELONY MURDER OR PREMEDITATED MURDER, WHERE PREMEDITATED MURDER WAS THE ONLY CHARGE IN THE INDICTMENT.

In this case, the indictment charged the four Defendants only with the premeditated murder of the victim. It did not recite the felony murder portion of Florida Statute 923.03(1)(a). At trial, the State produced no evidence to show that the Defendant committed the murder. Therefore, this case is distinguishable from Knight v. State, 338 So.2d 201 (Fla. 1976) and its progeny.

In Knight and the cases that followed it, this Court held that an indictment charging premeditated murder would allow the State to proceed on either the theory of premeditated murder or felony murder. However, in this case the Defendant did not, in

fact, commit the actual murder. Therefore, the only theory upon which the Defendant could have been convicted was felony murder. In all of the cases following Knight, the defendant actually committed the murder. Thus, there was basis upon which premeditated murder could have been charged against those defendants. Where, as in this case, there is no evidence of premeditation and the Defendant did not commit the actual killing, an indictment which charges him strictly with premeditated murder fails to fully apprise the Defendant of the charges against him. It also places the Defendant at a disadvantage in forcing him to prepare defenses, which may be inconsistent, to each theory. The Defendant is entitled under the due process clause of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 9, of the Florida Constitution, to be advised of the nature of the charges against him. The indictment, as it reads, does not adequately charge this Defendant with the crime for which he was, in fact, prosecuted and therefore violates his due process rights. The Court thus erred in failing to grant the Motion for Statement of Particulars under the circumstances of this case and the cause should be remanded for a new trial.

POINT VI

THE COURT ERRED IN FAILING TO GIVE THE DEFENDANT'S REQUESTED INSTRUCTION ON THIRD DEGREE MURDER TO THE JURY.

The defense offered a third degree murder instruction which was rejected by the court (R 935; 1625). The requested

instruction was: that the death occurred as a consequence of and while the Defendant was engaged in the commission of an aggravated battery; that the Defendant was not the person who actually killed the victim, but was present and did knowingly aid, abet, counsel, hire or otherwise procure the commission of the aggravated battery.

This Court recently held in Bryant v. State, 412 So.2d 347 (Fla. 1982) that where there is any evidence introduced at trial which supports a theory of the defense, a Defendant is entitled to have a jury instruction on the law applicable to his theory, if requested. In this case, the Defendant's theory of defense was that he was not an active participant, but an unwilling participant in the robbery and the kidnapping. If the jury believed the Defendant, they could have found him guilty of the aggravated battery of stabbing the victim, but not guilty of robbery and kidnapping. Since the stabbing facilitated the ultimate death of the victim, this would constitute third degree murder under Florida Statute §782.04(4). And, since the killing occurred in the course of the aggravated battery, the Defendant was entitled to this instruction. Failure to give this instruction constitutes reversible error. Johnson v. State, 423 So.2d 614 (1st DCA 1982); Hunter v. State, 389 So.2d 661 (Fla. 4th DCA 1980).

Consequently, this matter should be reversed for a new trial.

POINT VII

THE FLORIDA CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED.

The Florida Capital Sentencing Statute denies due process of law and constitutes cruel and unusual punishment on its face and as applied, for the reasons set forth felow. Because this Court has rejected these challenges in previous cases, they are presented here in summary fashion. If the Court decides to revisit its determinations on any of these issues, Appellant requests the opportunity to provide further briefing on these matters.

1. The Florida capital sentencing scheme fails to provide notice to the Defendant of the aggravating circumstances upon which the State intends to rely and thus denies due process of law. See, Cole v. Arkansas, 333 U.S. 196 (1948).

2. The capital sentencing statute in Florida fails to provide any standard of proof for determining that aggravating circumstances outweigh the mitigating factors. Milany v. Wilbur, 421 U.S. 684 (1975).

3. The aggravating circumstances in the Florida capital sentencing statute have been applied in a vague and inconsistent manner. See, Godfrey v. Georgia, 446 U.S. 420, 64 L.Ed.2d 398, 100 S. Ct. 1759 (1980).

4. Execution by electrocution is a cruel and unusual punishment.

5. The Florida capital sentencing statute does not require a unanimous jury or substantial majority of the jury thus denying the right to a jury and due process of law resulting in arbitrary and unreliable application of the sentencing statute.

6. The Florida capital sentencing law is violates the Equal Protection Provisions of the Fourteenth Amendment to the United States Constitution and Article I, Section 2 of the Florida Constitution, as applied and enforced, because the discretionary aspects of the capital sentencing provision (condemned in Furman v. Georgia, 92 S. Ct. 2726 (1972)) are simply shifted from the jury to the Judge. Thus the arbitrariness still applies, especially since all first degree murder cases are not automatically reviewed by the Supreme Court. The basis whereby the Court "controls and channels the sentencing process" remains dubious because it does not pass on the many cases in which the first degree murder conviction results in a life imprisonment sentence as opposed to death. See, State v. Dixon, 283 So.2d 1 (Fla. 1973).

POINT VIII

THE COURT COMMITTED FUNDAMENTAL ERROR IN THE PENALTY PHASE IN INSTRUCTING THE JURY THAT A MAJORITY OF THE JURY WAS REQUIRED TO AGREE ON THE SENTENCE BEFORE A VERDICT SHOULD BE RETURNED.

In Rose v. State, 425 So.2d 521 (Fla. 1982) this Court held that a majority of the jury was not necessary to reach a

sentencing recommendation under the death penalty statute. Rose was decided after the trial in the instant case.

In the instant case, the Court repeatedly instructed the jury that the decision for sentencing should be made by a majority of the jury. At least five times during the instructions, the Court told the jurors that a majority of the jury should make the sentencing recommendation. In this case, the recommendation of death was made by a seven to five vote of the jurors (R 1630).

The effect of the Judge's instructions on the jury is incalculable, but undoubtedly prejudicial. If the jury attempted to follow these instructions, they may have believed that a majority of the jurors had to reach a single result. Especially in a case such as this where the vote comes out seven to five for death, the damage caused by this instruction cannot be measured or repaired.

Florida Statute 921.141(2) does not require a finding of the majority of the jurors, and this was acknowledged in Rose v. State, supra.

As Justice O'Connor, concurring in Eddings v. Oklahoma, 455 U.S. 104, 71 L.Ed.2d 1, 102 S. Ct. 869 (1980) stated:

> "Because the sentence of death is qualitatively different from prison sentences, the United States Supreme Court has gone to extraordinary measures to insure that the prisoner sentenced to be executed is afforded process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice or mistake. 455 U.S., at 8118.

While the facts in Eddings v. Oklahoma are considerably different, the statement made by Justice O'Connor can apply to this situation. Because of the jury instruction compelling a majority of the jurors to approve the sentence, it may very well be that one juror was swayed simply by the exortation that a majority must be reached rather than by the specific facts or his personal conviction as to the type of sentence that should be applied.

By compelling a majority verdict when this Court has determined that no majority is required, the Defendant was denied his right to a fair trial and due process under the Eighth and Fourteenth Amendments of the United States Constitution. This matter also should be considered fundamental error, even though no objection was made at trial, because the decision of Rose v. State was rendered after the trial in this action and therefore the defense counsel did not have the benefit of the interpretation which Rose v. State placed upon the advisory sentencing procedure in this case.

Therefore, this Court should reverse and remand for a new sentencing proceeding before a jury.

POINT IX

THE TRIAL COURT COMMITTED FUNDAMENTAL ERROR WHEN HE FAILED TO INSTRUCT THE JURY ON THE SENTENCING PHASE THAT THE JURY COULD NOT SENTENCE THE DEFENDANT TO DEATH UNLESS IT FOUND THAT THE DEFENDANT KILLED OR ATTEMPTED TO KILL THE VICTIM OR INTENDED OR CONTEMPLATED THAT LIFE WOULD BE TAKEN.

In Enmund v. Florida, 73 L.Ed.2d 1140 U.S., 102 S. Ct. 3368 (1982), the Supreme Court held that a death penalty could not be administered against a defendant who neither killed, attempted to kill nor intended the death of the victim. While no sentencing phase instruction was requested by the Defendant regarding the intent to kill, the Court committed fundamental error in failing to instruct the jury in accordance with Enmund.

Under the instructions given by the court in this case, it would be possible for the jury to advise the death sentence without a specific finding that the Defendant attempted or intended to kill the victim. For instance, under the aggravating circumstances, the jury could have found that the Defendant had a prior criminal history and that the offense was committed while the Defendant was engaged in a robbery or kidnapping. The jury could have also found no mitigating factors, but none of the mitigating factors require the jury to specifically address whether or not the Defendant intended or attempted to kill the victim. Therefore, it is possible that the jury may have sentenced the Defendant to death simply because he was involved in the robbery and kidnapping and he had a prior criminal record. In other words, the jury may have found that he was simply a bad fellow and sentenced him to death without specific regard for his participation in the crime for which he was charged.

Enmund makes it clear that without such specific intent or attempt to kill, a death sentence is improper. From the jury

instructions given, and the general jury verdict, there is no way to dissect the jury's deliberations to determine whether or not they felt that the State had proved beyond a reasonable doubt that the Defendant intended or attempted to kill the victim. If that proof did not meet that standard, then the Defendant should not have been sentenced to death.

The failure to give such an instruction to the jury constitutes fundamental error because it goes to the very essence and the merits of the sentencing procedure. To sentence the Defendant to death without proof of specific attempt to kill and regardless of whether or not the Defendant intended or contemplated that life would be taken violates the Eighth and Fourteenth Amendments to the Constitution. Therefore, this cause should be reversed for a new sentencing hearing.

POINT X

THE EXECUTION OF APPELLANT'S DEATH SENTENCE WOULD DEPRIVE HIM OF LIFE WITHOUT DUE PROCESS OF LAW.

A. THE PENALTY OF DEATH WAS ASSESSED AGAINST JOHN EARL BUSH WHERE THE TRIAL COURT IMPROPERLY APPLIED THE AGGRAVATING CIRCUMSTANCE THAT THE CRIME WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER; FURTHER, THAT THE APPLICATION OF THE AGGRAVATING CIRCUMSTANCE THAT THE CRIME OCCURRED AS A RESULT OF A ROBBERY APPLIES AN AUTOMATIC AGGRAVATING CIRCUMSTANCE IN THE SENTENCING PHASE RENDERING THE FLORIDA STATUTE ARBITRARY AND CAPRICIOUS AS APPLIED.

The trial court found three aggravating circumstances to be present in this case. First, the Defendant was previously convicted of another felony involving the use of or threat of violence to the person (F.S. 921.141(5)(b)); second, the capital felony occurred while the Defendant was engaged in or was an accomplice in or attempting to commit a robbery or kidnapping (F.S. 921.141(5)(d)); and, third, that the capital felony was a homicide and was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification (F.S. 921.141(5)(i)).

The court erred in its finding of "cold, calculated, premeditated manner..."because it failed to individualize this finding to the facts and circumstances as they applied to Bush. The Constitution requires individualized consideration in imposing the death sentence. Lockett v. Ohio, 438 U.S. 586, 605 (1978). This means that the focus must be on the individual defendant's culpability, not on that of those who committed the robbery and shot the victim. Enmund v. Florida, 73 L.Ed.2d 1140 U.S. 102 S. Ct. 3368 (1982). Furthermore, the aggravating circumstance of "cold, calculated and premeditated" implies a level of premeditation higher than that necessary to convict of first degree premeditated murder in the guilt phase. Jent v. State, 408 So.2d 1024 (Fla. 1981). This aggravating circumstance must be proved beyond a reasonable doubt, Jent v. State, supra; Mann v. State, 420 So.2d 578 (Fla. 1982).

In this case, the State did not prove beyond a reasonable doubt that, as applied to this Defendant, the cold and calculating factor applied. First, Bush did not kill the victim. The only testimony regarding this at trial was taken from his confessions that he did not intend to kill the victim and wanted to let her go. His co-defendants were exorting him to kill her and tried to get him to take the gun. When he wouldn't take the gun, they gave him a knife with a six inch blade. His confession indicated that he faked a blow at her, stabbed her superficially, and she fell to the ground. All this is consistent with a lack of intent to kill. While the Defendant did assault the victim, the stab wound inflicted on the victim was superficial and non-fatal. If the Defendant had really wanted to kill her, he could have inflicted substantially more damage with a six inch blade. He then testified that he started to walk back to the car when "Pig" Parker actually shot her.

Thus, the only testimony introduced at trial was that the Defendant in stabbing her had inflicted a superficial, non-fatal wound and had started to return to the car at the time she was shot. From this evidence, the court could not find that as applied to him, Defendant had coldly and calculatedly formed a premeditated intent to kill the victim. Such evidence would not be sufficient to convict him of premeditated first degree murder. Therefore, as a matter of law, such evidence cannot be sufficient to establish the aggravating circumstance in the sentencing phase. Jent v. State, supra.

It is also a violation of the Eighth and Fourteenth Amendments to apply the aggravating circumstance that the capital felony was committed during the course of a robbery, since that becomes an automatic aggravating circumstance for every felony murder conviction. Thus, this Statute creates a presumptive death penalty under felony murder situations, where no mitigating circumstances are found. Under Enmund v. Florida, supra, such an automatic aggravating circumstance would be impermissible under the Eighth Amendment.

Appellant acknowledges that the Court has already found this argument without merit in Menendez v. State, 419 So.2d 312 (Fla. 1982). However, in addition to the argument raised in Menendez, Appellant submits that allowing an automatic aggravating circumstance for every felony murder would allow no statutory guidelines for determining which felony murder cases receive the death sentence and which do not. Without guidelines to channel both jury and Judge in assessing the death penalty in such cases, the statute is unconstitutional and arbitrary, as applied, in violation of the Eighth and Fourteenth Amendments of the United States Constitution. Furman v. Georgia, 408 U.S. 238 (1972); Proffitt v. Florida, 428 U.S. 242, 253 (1976). See also State v. Cherry, 257 S.E.2d 551 (N.C. 1979) in which the North Carolina Supreme Court applied similar reasoning in striking the use of the underlying felony as an aggravating circumstance in the North Carolina death penalty statute. The Cherry Court found that due to the

use of the underlying felony as an aggravating circumstance, the death penalty in a felony murder case would be disproportionately applied.

B. THE EXTREME PENALTY WAS ASSESSED AGAINST JOHN EARL BUSH WHERE THE PROSECUTOR CROSS-EXAMINED THE APPELLANT BEYOND THE SCOPE OF EVIDENCE PRESENTED IN MITIGATION, IN ATTEMPTING TO INTRODUCE OTHER AGGRAVATING FACTORS INTO EVIDENCE AND FURTHER MADE PREJUDICIAL AND INFLAMMATORY ARGUMENTS OUTSIDE THE EVIDENCE PRESENTED AT THE SENTENCING HEARING.

The evidence offered by the prosecution in the sentencing phase consisted solelyof proof of a prior conviction of the Defendant (R 1128-1152). The defense put on the Defendant in mitigation and he testified about the circumstances of what occurred on the night of the murder. His previous conviction was not covered in his direct testimony. On cross-examination, the prosecution attempted to use the prior conviction to prove other aggravating circumstances for the State. The prosecution asked the Defendant whether or not he remembered that the young girl whom he raped had identified him when he was driving away from the store with Frances Slater in his car. The defense strenuously objected to this line of questioning, but the court overruled the objection. The obvious intent of the questions was to show that Bush intended to get rid of Slater in order to prevent her from identifying him. However, in State v. Dixon, 283 So.2d 1 (Fla. 1973), the court held that the State may not use cross-examination to elicit aggravating circumstances on behalf of the State. The court stated:

> "Another advantage to the Defendant in a post conviction proceeding is his right to appear and argue for mitigation. The State can cross-examine the Defendant on those matters which the Defendant has raised, to get to the truth of the alleged mitigating factors, but cannot go beyond them in an attempt to force the Defendant to prove aggravating circumstances for the State. A defendent is protected from self-incrimination through the Constitutions of Florida and of the United States. Fla. Constitution, Article I, Section 9, F.S.A., and U.S. Constitutional Amendment V. In no event, is the defendant forced to testify. However, if he does, he is protected from cross-examination which seeks to go beyond the subject matter covered on his direct testimony and extends to matters concerning possible aggravating circumstances." (283 So.2d, at 7-8).

Obviously, the questions went beyond the scope of the examination of the Defendant and were totally improper. The testimony was offered only to inflame the minds of the jury against the Defendant and for no other reason. (R 214-215)

The prosecution also went to great lengths to discredit the Defendant with his prior statements. However, the prosecution went way beyond the use of prior statements to impeach the Defendant. After Slater was murdered and while Bush and his companions were on their way back to Fort Pierce, their car was stopped by a Sheriff's deputy for a minor traffic violation. On cross-examination, Bush was questioned at length regarding whether there was discussion in the car regarding shooting the deputy (R 234-236). This matter was not brought up on direct examination and therefore was highly improper on

cross-examination. It was offered strictly to prove non-statutory aggravating circumstances, including a propensity to commit crimes and bad character. See, Miller v. State, 373 So.2d 882 (Fla. 1979). Since Florida Statute §921.141 limits the aggravating circumstances to those specifically listed in the Statute, consideration of non-statutory aggravating circumstances is clear error. To allow consideration of non-statutory circumstances brings arbitrary elements into the sentencing process in violation of the Constitutional mandates. Godfrey v. Georgia, 446 U.S. 420, 64 L.Ed.2d 398, 100 S. Ct. 759 (1980); Gregg v. Georgia, 428 U.S. 153, 49 L.Ed.2d 859, 96 S. Ct. 2909.

During closing argument, the prosecutor also invited the jury to consider non-statutory aggravating factors in assessing the death penalty. The prosecution stated:

> "The only reason, or the main reason that he killed Frances Julia Slater was because he sat in the courtroom eight years ago and the woman that he robbed and raped stood on that witness stand and pointed her finger at him and said, "That's the man that did it" and he had to serve thirty years because of that." (R 1277).

This is clearly an impermissable non-statutory aggravating factor. Furthermore, it is pure speculation and totally unsupported by the evidence, since the prosecution did not present any evidence to show that the victim of the previous rape had, in fact, identified the Defendant as her attacker.

Finally, at closing argument, the prosecution made an inflammatory and highly prejudicial appeal for sympathy and revenge for the family of the victim. Mr. Stone stated:

> "I ask you, don't consider the sympathy that Mr. and Mrs. Campbell have. Don't consider that when Mr. and Mrs. Campbell sit down to Thanksgiving dinner just three days from now that they are going to look across the table and they are going to look at Cathy and they are going to see Frances Julia Slater, the identical twin sister. If sympathy had any part of it, think of what they go through. And every time they sit down and look at her, this whole incident is going to come back..." (R 1280)

A more blatant appeal to sympathy could not be imagined: referring to the recurring pain of the victim's parents because the victim had an identical twin sister who is a constant reminder of her dead sister. The defense immediately objected (R 1280), but the irreparable prejudicial effect on the jury had already occurred.

Florida Statute §921.141 was enacted to eliminate such prejudicial matters from the jury's consideration. All death cases involve sympathies for the victim's family. However, the prosecution's direct appeal for sympathy is exactly the type of prejudicial matter which prevents discretion from being suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action in death cases. Godfrey v. Georgia, supra; Gregg v. Georgia, supra.

This improper evidence and argument irreparably harmed and clouded the penalty phase of this trial. With an advisory

sentence of seven to five, it is impossible to know whether one juror would have decided differently, had the impermissable aggravating factors not been present. See, Elledge v. State, 346 So.2d 998 (Fla. 1977). Therefore, this Court should reverse the death sentence imposed upon the Defendant and reduce the sentence to life imprisonment, or in the alternative, remand for a new penalty trial.

C. THE TRIAL JUDGE FAILED TO CONSIDER NON-STATUTORY MITIGATING CIRCUMSTANCES IN HIS ASSESSMENT OF THE DEATH PENALTY AGAINST THE DEFENDANT.

The Court found that no statutory mitigating curcumstances were present in this case and that the record was "totally devoid of anything that may be said in behalf of the Defendant" (R 1307). However, the trial court overlooked such non-statutory mitigating factors as the Defendant's remorse; that the Defendant, while he committed a previous crime, finished his prison sentence and parole without violation (R 1146); and that the Defendant confessed and had voluntarily surrendered to authorities. Washington v. State, 362 So.2d 658 (Fla. 1978).

Most importantly, however, the State did not prove that Bush intentionally killed or attempted to kill the victim in this case. Although the Defendant did stab the victim, the evidence is clear that the stab wound was superficial and non-fatal. This is consistent with the Defendant's testimony that he did not intend to kill the victim. The sentence in this case must be tailored to Bush's personal responsibility

and moral guilt and limited to his participation. The Supreme Court stated in Enmund v. Florida, supra:

> "Putting Enmund to death to avenge two killings that he did not commit and had no intention of committing or causing does not measurably contribute to the retributive end of ensuring that the criminal gets his desserts."

The Judge did not apply Enmund to this situation, and therefore failed to consider this non-statutory mitigating factor. Thus, the Appellant was denied due process of law because of the failure of the trial court to give independent weight to all factors offered in mitigation.

POINT XI

THE TRIAL COURT ERRED IN SENTENCING THE APPELLANT FOR FELONY MURDER, ROBBERY, AND KIDNAPPING IN THAT ROBBERY AND KIDNAPPING CONSTITUTED THE UNDERLYING FELONIES FOR THE MURDER CONVICTION AND THUS SENTENCING ON BOTH UNDERLYING FELONIES CONSTITUTED DOUBLE JEOPARDY.

Appellant was convicted of first degree murder, robbery, and kidnapping and sentenced on all three charges (R 1646-1652). The first degree murder conviction was based solely on felony murder (premeditation on the part of this Defendant having not been proved). The underlying felony was either kidnapping or murder. However, under State v. Pinder, 375 So.2d 836 (Fla. 1979) and State v. Hegstrom, 401 So.2d 1343 (Fla. 1981), the Appellant should have been sentenced only for felony murder and one of the underlying felonies. To sentence

him for both underlying felonies and felony murder constituted double jeopardy in violation of the Fifth Amendment of the United States Constitution.

CONCLUSION

The Defendant was convicted and sentenced to death as a result of a trial that was replete with overreaching by the prosecution--springing surprise testimony in violation of discovery rules; use of confessions obtained through misleading the Defendant as to his true position; use of highly prejudicial and inflammatory photographs; and use of prejudicial argument to the jury. From the beginning, it was apparent that guilt was not the issue in this case. The prosecution was intent upon securing the death penalty in this highly publicized case and nothing else. However, in doing so, the prosecution repeatedly violated the Defendant's Fifth, Eighth and Fourteenth Amendment rights of the United States Constitution and Sections 9 and 16, Article I, Constitution of the State of Florida.

Both the Defendant's conviction and his sentence of death should be reversed and remanded for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief of Appellant has been furnished, by mail, this 23rd day of May, 1983, to: Robert L. Bogen, Esquire, 111 Georgia Avenue, Room 204, West Palm Beach, Florida 33401.

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