IN THE SUPREME COURT OF FLORIDA

ALPHONSO CAVE,

Appellant,

vs.

CASE NO. 63,172

STATE OF FLORIDA,

Appellee.

INITIAL BRIEF OF APPELLANT

On Appeal From the Circuit Court of the
Sixth Judicial Circuit In and For Pinellas
County, Florida (Criminal Division)

WAYNE R. MCDONOUGH
Attorney for Appellant
Saliba & McDonough PA
2121 14th Avenue
Box 1690
Vero Beach, Florida 32960
(305) 567-6111

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PRELIMINARY STATEMENT

Appellant, ALPHONSO CAVE, was the defendant and Appellee was the prosecutor in the Circuit Court of the Nineteenth Judicial Circuit In and For Indian River County, Florida. However, as a result of a considerable amount of pre-trial publicity, the matter was transferred to and tried in Pinellas County, Florida. In the brief the parties will be referred to as "Appellant" or "Defendant". Appellee will be referred to as the "State" or the "Prosecutor". The symbol "R" designates the page number from the six volume transcript of final proceedings. The symbol "RS" designates the page number from the transcipt volume containing the Motion to Suppress, Motions for New Trial and Judgment of Acquital. "OR" shall designate the page number from official record prepared by Pinellas County Clerks Office.

STATEMENT OF THE CASE

An indictment was filed charging the Defendant with first degree murder, robbery with a deadly weapon and kidnapping.

Numerous motions were filed and entertained by the Court. One motion granted was Change of Venue as a result of the exhaustive pre-trial publicity relative to this matter. Trial commenced on the date of December 6, 1982 and sentencing was imposed on December 9, 1982. Defendant was convicted of all three charges and the Court imposed the sentence of death and two (2) concurrent life sentences. It is from these convictions and sentencing that Defendant appeals.

STATEMENT OF THE FACTS

On the evening of April 26, 1982, the Appellant, Alphonso Cave, met John Earl Bush, 'Pig' Parker and Terry Wayne Johnson in Fort Pierce, Florida. They began drinking, purchased a gallon of gin, consumed it and drove south towards Stuart, Florida in Bush's automobile. After driving for some period, the four men ultimately stopped at a Little General Store located near Stuart where Frances Slater was employed. Although there was no admissable testimony introduced at trial relative to the events which occurred at the Little General Store, according to Appellant's questionable taped confession, all four men proceeded into the store. Appellant admitted in his taped confession that he was the person who pulled the gun on Slater in the presence of his companions. After Slater handed over a small sum of money, she then was lead out of the store in the presence of all four men and placed in the backseat of Bush's car. Bush then drove towards Indian Town and ultimately stopped the car and pulled along the road. At that time, according to Appellant's taped confession, three of his companions exited the car on one side along with the victim. Appellant got out of the car on the other side. At that point, Bush stabbed the victim resulting in her falling to the ground. 'Pig' Parker then fired the fatal gunshot wound into the victim's head. All four men then got back into the vehicle and proceeded towards Fort Pierce. Appellant stated in his taped confession that he was drunk during the whole incident and further repeated several times during his taped confession he had not planned to kill the victim and played no part in the slaying. He believed they were going to let her go, not kill her. Various state witnesses testified resulting in identifying the victim (R 325, 327) and seeing her alive at approximately 2:46 a.m. on the morning of April 27. The state presented Danielle Symons, who testified that while waiting at

a stop light near the Little General Store, she looked into the store and saw several black men inside the store. In addition, she observed a certain vehicle parked outside the store which later was recognized by her as a result of a questionable vehicle lineup. She recognized the vehicle as that driven by and/or belonging to Bush. Ms. Simons witnessed four physical lineups and did identify Bush as one of the men seen by her on the morning in question. However, Ms. Simons did not pick out the Appellant although he was a participant in one of the four lineups. (R 351,352). The state presented various witnesses who introduced documents relative to the crime scene including the highly inflammatory and blown up colored photographs of the victim, some said photographs taken several days later at the coroner's office. The state called Dr. Ronald Wright who is forensic pathologist out of Fort Lauderdale. Dr. Wright testified that the cause of death was a bullet wound into the victim's head. (R 455). The state also presented deputy Willie Williams of the St. Lucie County Sheriff Department. Deputy Williams accompanied Deputy Bargo in encountering the four men some time after 3:00 a.m. on April 27. Deputy Williams testified that he knew Appellant and identified him that morning. (R 490). Officer Williams also testified that when he approached Bush's car, there were two black males outside the car, one was Bush and the other was Appellant. Deputy Bargo further testified that the two men located outside the car would have been front seat occupants. (R 487). This is significant in that the state argued circumstantially that at all times matrial to the incident and alleged crime, Appellant was in the backseat with the victim.

Detective Charles Jones with the Martin County Sheriff Department testified that after securing a search warrant for the Bush vehicle, he had a lengthy encounter with Bush which resulted in several statements, the last confession being a taped statement. Bush's taped statement was then played for Detective Lloyd Jones who directed various officers

of the Fort Pierce Police Department and Martin County Sheriff Department to locate the other three men including Appellant. At approximately 2:00 a.m. on May 5, four police officers proceeded to a rooming house which was the residence of Appellant. One of the officers advised Appellant that he was to accompany them to the State Attorney's office in Fort Pierce, Florida. (RS 127). Once Appellant arrived at the State Attorney's office, he encountered numerous officers and was primarily interrogated by Detective Lloyd Jones. At the outset of their discussions Detective Jones advised Appellant that he had secured a taped confession from Bush which implicated Cave in the subject crime. Cave denied any involvement resulting in Detective Jones playing a portion of Bush's statement. Again, Cave denied any involvement resulting in Jones playing Bush's statement in its entirety. (RS 117). Appellant testified during the suppression hearing that he denied involvement on three or four occasions. (R). Appellant testified at the suppression hearing that Officer Charles Jones exerted more blatant form of undue influence in advising him that there is a possibility that he would be found dead along side a road unless he cooperated with the police. Ultimately, Appellant did make an incriminatory statement which resulted in the ultimate taped confession. (RS 117).

Appellant testified that he specifically requested an attorney but none was furnished him at any time during the interrogations session which lasted approximately three hours from 2:00 a.m. till 5:00 a.m. (RS 116). Further, Appellant requested that his mother be called down to the State Attorney's office before he made any statements however he did not see her until completion of the taped confession in question.

The State Attorney's theory of prosecution throughout the trial was the felony murder doctrine. The concept of that doctrine was repeatedly and frequently posed to the potential jurors during voir dire by the prosecutors and the court. In addition, the State Attorney

stressed the importance in application of the felony murder doctrine during closing arguments in both the guilt and sentencing phase. The record will reflect that the prosecutors engaged in highly inflamatory and prejudicial conduct during their closing arguments in both phases.

After receiving instructions from the court, the jury found Cave guilty of first degree murder, robbery with firearm and kidnapping. The court reconvened the following morning at the penalty phase of the trial. Neither the state nor the defense counsel presented any testimony or witnesses during the penalty phase. In fact, defense counsel did not present any witnesses or testimony either during the guilt phase or the penalty phase. After closing arguments, the court instructed the jury in what Appellant maintains is confusing and prejudicial instructions to the effect that a majority of jurors was required in order to bring back an advisory sentence. In fact, the jury presented the court with a handwritten informal advisory sentence stating that they were at a split decision. The jury further advised they would like it stated and published to the court of this advisory sentence. (R 792). The response to the jury's position, the court improperly reread portion of the jury instructions resulting in the jury bringing back a seven to five advisory sentence for death. The court in its dictated findings of fact and subsequent written findings of fact, stated that there was no evidence that Cave killed the victim. However, the court applied the felony murder doctrine in ultimately imposing death.

POINT I

THE TRIAL COURT ERRED IN EXCLUDING CERTAIN PROSPECTIVE JURORS ON CHALLENGES FOR CAUSE IN VIOLATION OF WITHERSPOON VS ILLINOIS.

In Witherspoon vs. Illinois, 391 U.S. 510 (1968) the Supreme Court held that the State may exclude a venireman for cause only when it is unmistakably clear that he is 'irrevocably committed before the trial has begun to vote against the penalty of death regardless of the fact in circumstances that might emerge in the course of the proceedings'.(Witherspoon vs. Illinois, supra at 522 n.21.). The Court further stated that the State retains the right to exclude only those veniremen who:

> "...make unmistakably clear (1)that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them or (2)that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt..."(Witherspoon v. Illinois, supra, Emphasis in original).

The record is replete with evidence that the trial court misunderstood the holding in Witherspoon v. Illinois, as such misunderstanding resulting in improperly excusing two potential jurors for cause. During the course of its initial comments to the potential jurors, the trial court attempted to advise potential jurors as to the holding in Witherspoon v. Illinois, however a review of the court's comments substantiates the fact that the court misapprehended the holding in that decision. Specifically, the court addressed the potential jurors as follows:

> "...now your belief either for or against capital punishment is your individual right as an American citizen. However, as it affects this case, I will ask this question: Does any juror have such a belief as to capital punishment, either for or against, that you could not or you would be reluctant to or you would even hesitate to find the defendant guilty of the offense in the first trial--that is, guilty of first degree murder

--if it is so proven to the exclusion of every reasonable doubt by the State of Florida that the defendant is guilty of first degree murder? Does any juror have such an opinion?...". (R 16).

The court made similar statements to the potential jurors throughout the course of trial (R 98, 99, 125).

Appellant maintains that the court's misunderstanding of the holding in Witherspoon v. Illinois resulted significantly in the improper exclusion of two potential jurors in violation of the holding in Witherspoon v. Illinois. After superficially questioning Mr. Bennett relative to his position on Felony/Murder Doctrine, the court on its own volition asked "...may Mr. Bennett be excused for cause...". Naturally, the state attorney moved for a 'for cause' excusal at the court's direct invitation. That dialogue made for an interesting reversal of roles in that the court initiated a question relative to excusing a juror, which question was responded to affirmatively by the State Attorney's Office. (R 100).

Appellant's trial counsel immediately interjected, requesting the court to further question Mr. Bennett with regard to the issue. The court did not question Mr. Bennett any further but stated '...I will permit you [Appellant's Counsel] to question,...' (R 100). Although the court allowed Appellant's counsel to engage in limited inquiry, the court did grant the 'for cause' excusal after improperly terminating Appellant counsel's examination, thereby precluding a thorough Witherspoon inquiry. (R103). In sum, not only did the trial court refuse to engage in a meaningful dialogue with Mr. Bennett in order to comply with the doctrine contained in Witherspoon v. Illinois, but the court improperly limited the extent of inquiry by Appellant's counsel in that regard.

During the course of the discussion between Mr. Bennett and Appellant's counsel, the questioning proceeded as follows:

Mrs. Steger: Mr. Bennett, you would agree that there are some cases heinous, atrocious crimes whereby the death penalty would be appropriate, is that right?

Mr. Bennett: Absolutely. (R101).

After further dialogue, Mrs. Steger continued to question Mr. Bennett as follows:

Mrs. Steger: You would agree-what type of situation do you feel-and this is in your own words-

Mr. Stone: Your Honor-

The Court: I feel-

Mr. Stone: In the interest of saving time, I think he has repeatedly answered that he cannot possibly-

The Court: I agree.

Mr. Stone: sit in this case. (R 103).

Whereupon, the Court precluded any further inquiry by Mrs. Steger, Appellant's counsel, concluding that Mr. Bennett must be excused for cause.

Appellant maintains that the above dialogue alone indicates that Mr. Bennett would impose the death sentence under certain circumstances and further showed that he was not unmistakably and unequivocally opposed to the death sentence. The court's premature termination of Appellant's counsel inquiry of Mr. Bennett and the court's further refusal in engaging in inquiry himself in addition to relieving the state of its burden to show that a proper for cause excusal should have been granted resulted in a Witherspoon violation.

Next, the court improperly excluded Mr. Black on a 'for cause' basis under similar circumstances existing under the Mr. Bennett excusal in that after superficial inquiry, the court invited the state to motion for a 'for cause' excusal. (R 223). Again, Appellant's counsel had to interject by asking the court if she may question the potential juror so as to avoid an immediate 'for cause' excusal. It is apparent the court had predetermined that a 'for cause' excusal was appropriate and consequently granted the state's motion. It is critically important that neither juror was specifically asked the appropriate Witherspoon inquiry so as to determine if an excusal for cause was appropriate and in conformity with Witherspoon. Further, the excusal of the jurors exemplifies the constitutional infirmity in the death qualification process resulting in a prosecution-prone panel violative of the fair cross-section requirement in the Sixth Amendment. See Grigsby v. Mabry,

569 F. Supp. 1273 (1983) and Enmund v. Florida, 102, S.Ct. 3368 (1982).

Only after the above-referenced potential jurors were improperly excused for cause in violation of Witherspoon did the court further inquire as to the meaning of the Witherspoon decision. During counsel argument relative to potentially excusing a juror by the name of Ms. Shaw, the court inquired '...What is Witherspoon?...' (R265). Counsel and the court had further dialogue on the meaning of Witherspoon during the next pages of the transcript. (R266, 267). Appellant maintains that had the trial court been more familiar with the holding in Witherspoon, then potential jurors could have been properly instructed or at least apprised as to the holdings in Witherspoon contrary to the information furnished them by the court throughout the jury selection process as referred above. (R 16, 125). In fact, Appellant maintains that had the court properly advised the potential jurors during the course of the trial as to the requirements of Witherspoon, then the jurors excused may have been in a better position in which to more intelligently discuss with the court had they been asked their position relative to the death penalty itself.

The record does not reflect that the two jurors excused for cause were irrevocably opposed to capital punishment and would automatically vote against the imposition of the capital punishment without regard to any evidence that might be developed during the course of trial. Appellant maintains that the prospective jurors were improperly excused for cause in violation of Witherspoon v. Illinois, supra; State v. Chandler, 442 So2d 171 (Fla. 1983); Davis v. Georgia, 429 U.S. 122 (1976); Grigsby v. Mabry, supra. In addition, the jurors excused herein resulted in their concern about the application of the felony murder doctrine contrary to Enmund v. Florida, supra.

In light of the court's fundamental error in connection with this point, Appellant maintains that his constitutional rights have been violated, as embodied in the Fifth, Sixth, Eighth and Fourteenth Amend-

ments of the United States Constitution in Article I, Sections 2, 9, 16 and 17 of the Florida Constitution; consequently, the conviction should be reversed and the death penalty vacated.

POINT II

THE DEATH SENTENCE SHOULD BE VACATED AND THE JUDGMENT REVERSED ON THE GROUNDS THAT THE RECORD IS INCOMPLETE IN THAT THE TRANSCRIBED COPY OF APPELLANT'S TAPED CONFESSION IS ABSENT FROM THE RECORD; FURTHER, THE USE OF SAID EVIDENCE RELIED ON BUT NOT INTRODUCED AS A EXHIBIT AT TRIAL IS ERROR MANDATING REVERSAL.

The state introduced State's Exhibit 19 which purports to be a taped confession of Appellant. However, throughout the course of trial, a transcribed copy of the said taped confession was referred to and further read by both the court and the jury but was never introduced into evidence (R 543). Specifically, the court read the alleged certified copy of the transcribed confession of Appellant while listening to the taped confession during the course of the suppression hearing (RS 97). Appellant maintains that the court obviously relied upon that missing document while determining whether the confession should have been admitted as evidence and introduced at trial. The court denied Appellant's Motion to Suppress resulting in the introduction of the confession during the course of trial. In addition, each juror had individual copies of the alleged certified copy of the transcribed confession while listening to the taped confession during the course of the trial (R590, 591). The transcribed copy of the confession was read over the timely objection of defense counsel (R 543).

Upon the review and perusal of the record, it has been determined that the alleged certified transcribed copy of Appellant's confession has not been included in the official record. A copy of the certificate of the Clerk of Court of Pinellas County attached as Appellant's Exhibit ' ' certifies that the transcribed confession is not part of the record. As a result, Appellate counsel has been precluded from examining a possible error and is unable to effectively raise an issue relative to a

substantial and significant item reviewed by the court and trier of fact during the course of trial. Further, Appellate counsel is precluded from comparing the taped confession with the alleged certified copy of the transcribed confession to insure that one tracks the other. In fact, the record reflects that fourteen alleged transcribed copies of the confession were distributed during the course of trial, over timely objections. (R 590, 591).

Rule 2.070(b), Florida Rules of Judicial Administration, provides in pertinent part:

> '...(b) Record: When trial proceedings are being recorded, no part of the proceedings shalll be omitted unless all of the parties agree to do so and the court approves the agreement...'

In addition, Florida Statutes and the applicable appellate rule mandate that the entire record be before this Honorable Court to determine if the interests of justice require a new trial. See §921.141, Fla. Stat. (1975); Fla. App. Rule 6.16.

As a result of the omission of the substantial and significant document, that this matter should be reversed and a new trial granted. Further, the court fundamentally erred by allowing the jury to read the transcribed copy (copies) over Appellant's objection when same was not introduced in evidence at trial. Appellant has effectively been denied the right for a direct appeal in the instant matter. See United States v. Selva, supra; Delap v. State, 350 So2d 462 (Fla. 1977); Wester v. State, 403 So2d 1109 (1981); Yancey v. State, 267 So2d 836 (Fla. 4th DCA 1972); Hardy v. U.S., 375 U.S. 277 (1964).

The absence of the significant substantial piece of evidence utilized during the course of trial by both the court and jury violates Appellant's constitutional rights embodied in the Fifth, Sixth, Eighth and Fourteenth Amendments in the United States Constitution in Article I, Sections 2, 9, 16 and 17 of the Florida Constitution, mandating reversal and and a new trial.

POINT III

THE TRIAL COURT ERRED IN ADMITTING GRUESOME AND INFLAMMATORY PHOTOGRAPHS WHICH WERE NOT RELEVANT AND FURTHER SERVED TO INFLAME THE JURY AND PREJUDICE APPELLANT.

The trial court admitted into evidence over timely objections by Appellant various photographs which were gruesome and inflammatory in nature and not relevant in the instant matter. Specifically, the court allowed the introduction of State's Exhibit 7 (R399), Exhibit 8 (R409), Exhibit 13 (R449) and Exhibit 14 (R450). It is noteworthy that the four referenced exhibits were all 16" by 20" blown-up color photographs of the victim and certain areas of the victim's body. A brief review of the exhibits will indicate that most of the photographs introduced at trial were 3" by 5" size, some of which were black and white including photographs of the store lay-out, the vehicle in question along with other vehicles which served as a vehicular line-up (State's Exhibits 4A through 4H; State's Exhibit 3; State's Exhibit 5, respectively). In addition, several large black and white photographs were introduced relative to an aerial photograph of the Little General Store, line-ups of co-defendants and the beach site. The objectionable color 16" by 20" photographs of the victim and bloody section of her body were introduced primarily to accentuate the gruesomeness and to inflame the jury to the prejudice of Appellant.

State's Exhibit 7 depicts a 16" by 20" blow-up color photograph of the bloody face of the victim, Francis Slater, with a lot of dried blood on the side of the victim's face, under her nostrils and caked blood in her hair. In addition, Exhibit 7 reflects that the victim's hands are covered with what appears to be brown bags which further serves a gruesome effect. It is important to emphasize that the

State's Exhibit 7 was taken two days after the incident at the medical examiner's autopsy table in Fort Lauderdale, Florida, not at the scene of the crime (R443,448). Consequently, this particular exhibit was not independently relevant whatsoever and should have been excluded from evidence in light of the lack of probative value as compared to the gruesome nature of the photograph resulting in inflaming the jury and prejudicing the Appellant. In Thompson v. State, 398 So2d 197 (Fla. 1980), this court commented favorably on the trial court's exclusion of certain pictures of the victim in that case which were taken at the medical examiner's office, as follows:

> "The trial court was careful to admit only those photographs depicting the victim at the scene of the crime; photos taken of the victim at the medical examiner's officer were excluded..." (Emphasis added).

The court in Thompson did determine that certain photographs of the victim taken at the scene were properly admitted; however the court's opinion intimated that the photographs which were taken at a location removed from the scene were not relevant especially in light of the potential inflammatory effect same would have on the jury.

State's Exhibit 7 was not relevant and clearly introduced to inflame the jury as evidenced by the Prosecutor emphasizing this highly prejudicial photograph during closing argument over Appellant's objection (R 669). The State could have used other photographs in which to identify the victim. Specifically, State's Exhibit 8 which depicts the victim along side the road at the scene would have served that purpose. Furthermore, Appellant offered to stipulate to the identity of the victim along with the cause of death which would have obviated the need to introduce the objectionable exhibits referred to herein (R 396).

Additional inflammatory photographs were introduced which were not relevant in the instant matter but introduced nonetheless to serve to inflame the jury and prejudice the Appellant. State's Exhibit 14, which depicts a gunshot wound to the back of the head was not relevant in the instant matter on the ground that Appellant attempted to stipu-

late to the cause of death plus no evidence was introduced whatsoever that Appellant shot the victim. This exhibit was also taken two days after the estimated time of death at the medical examiner's office in Fort Lauderdale, Florida. (R448).

State's Exhibit 13, another 16" by 20" color photograph depicted the victim's stomach wound, said photograph taken also at the medical examiner's office two days after the incidence. This exhibit was not relevant on the same grounds that Appellant attempted to stipulate to the cause of death and further that the stomach wound was not the cause of death nor is there any testimony linking Appellant to stabbing the victim in the instant matter.

In Dyken v. State, 89 So2d 866 (Fla. 1956), the defendant was convicted of murder wherein the victim died of a shotgun wound to the head. In that case, a photograph of the deceased lying on the mortuary table was introduced into evidence over defendant's objection. The state argued that it was relevant to indicate that fatal wound of the deceased; however, this court held that it was not relevant because that location of the wound was conceded and further that the photograph did not depict the crime scene and was taken at a time too far removed to have any independent probative value. The court reversed and remanded the cause for a new trial stating in part that '...we cannot say, in a first degree murder case without recommendation of mercy, that an error of this character and magnitude was not prejudicial...' Dyken v. State, at 867.

In the matter at hand, State's Exhibit 7, 13 and 14 were all taken at the medical examiner's autopsy room in Fort Lauderdale, Florida some two days after the incident. (R 448). Consequently, the above-referenced exhibits were too far removed in time and proximity from the crime scene in which to have the degree of probative value necessary to outweigh the obvious gruesome and inflammatory effect same would have on the jury. Appellant maintains that the introduction of the particular photographs had no other purpose or

effect and was calculated to inflame the jury as was done during the course of trial and during the closing argument. As indicated in Dyken v. State, it cannot be determined that an error of this character and magnitude was not prejudicial to Appellant. See Young v. State, 234 So2d 341 (Fla. 1970); Reddish v. State, 167 So2d 858 (Fla. 1964).

In light of the court's fundamental errors outlined above, Appellant maintains that his constitutional rights have been violated as contained in the Fifth, Sixth, Eighth and Fourteenth Amendments United States Constitution, Article I, Sections 2, 9, 16 and 17 of the Florida Constitution.

POINT IV

THE PROSECUTORS MISCONDUCT DURING THE COURSE OF CLOSING ARGUMENT IN BOTH THE GUILT/INNOCENCE PHASE AND PENALTY PHASE WAS SO EGREGIOUS SO AS TO WARRANT THE GRANTING OF A NEW TRIAL.

Both prosecutors argued on the behalf of the State of Florida during the course of closing argument and independently engage in prosecutorial misconduct, the combined effect of which warrants granting a new trial. The prosecutorial misconduct employed to unduly prejudice Appellant and gain the sympathy of the jury occurred during closing arguments at both the guilt innocence phase and the sentencing phase.

During the course of closing argument at the guilt/innocence phase, State Attorney Robert Stone improperly stated to the jury that the defendant need carry the burden to prove that he was not involved in the subject kidnapping, robbery and resulting felony murder. Specifically, Mr. Stone stated as follows:

> '...and I submit to you thatwith all the pleading that Mrs. Steger can do, she cannot show that Alphonso Cave was not involved and did not commit the kidnapping...' (R 647).

Shortly thereafter, the prosecutor improperly and prejudiciously appealed to the sympathy of the jury by stating as follows:

> '...and when they left Fort Pierce, Frances Julia Slater was at home, was home alive, laying in front of her television, watching t.v....' (R 648).

Moments thereafter, the State Attorney agian appealed to the sympathy of the jury in an attempt to inflame the jurors to the prejudice of defendant by waiving certain evidence before the jury as follows:

'...it was Alphonso Cave who had the gun, or she would never have left that store. It was Alphonso Cave who had the gun, or she would never have been put in that car. And if it had not been for Alphonso Cave, we would not have to had introduced this into evidence...' (Emphasis added). (R 655).

Defense counsel immediately moved for a mistrial at that juncture however the court instantaneously overruled the objection which further amplified the prejudicial effect in the attempt to gain sympathy from the jury. Edwards v. State, 428 So2d 357 (Fla. 3rd DCA 1983), in which the court reversed and remanded for a new trial in murder conviction on the ground that the prosecutors comment in closing argument was prejudicial as a result of appealing for sympathy from the jury. In that decision, the trial court overruled the objection to the prosecutor's closing argument. The court held that the trial court's erroneous ruling in overruling said objection constituted reversible error plus the fact that the court's ruling '...stamped approval on the argument thereby aggravating the prejudicial effect...' Edwards v. State, at 359.

The co-prosecutor in the matter at hand, Mr. James Midelas, concluded the second half of the State's closing argument by also engaging in prejudicial prosecutorial misconduct calculated to unduly influence the jury. Specifically, Mr. Midelas stated that '...the only witness to the robbery is the girl portrayed in this photograph...'. (R 669). Defense counsel moved for mistrial and the trial court immediately overruled the objection resulting in additional amplification of the prejudicial effect of the prosecutors' improper comment. Immediately after the court's ruling in denying the motion for mistrial in overruling defense counsel's objection, Mr. Midelas continued in his efforts to unduly influence the trial jury by seeking sympathy and stating as follows:

'...How can the State call any witnesses? The only witness is dead...'. (R 669).

Mr. Midelas improperly referred to a pistol which presumably was the murder weapon over defense counsel's objection on the ground that said weapon was not introduced into evidence. The trial court overruled the objection stating that the prosecutor can comment on the evidence even though same was at no time admitted into evidence. (R 662).

The final instance of prosecutorial misconduct mandating a reversal and granting new trial relates to the State improperly placing Appellant's character in issue before the jury during the course of closing argument at the guilt/innocence phase. Specifically, Mr. Midelis stated emphatically that Appellant was a liar as indicated as follows:

> '...First the defendant said, "I was with my girlfriend." Is that a true statement? Of course it's not...'. (R 659).

Appellant elected not to take the stand during the course of the guilt/innocence phase and consequently affirmatively chose not to place his character in issue before the jury. Nonetheless, the prosecutor improperly accused him of being a liar during closing argument as quoted above, in contravention of a legion of Florida case law including Bullard v. State, 436 So2d 962 (Fla. 3rd DCA 1983); Perkins v. State, 349 So2d 776 (Fla. 2nd DCA 1977); Wooden v. State, 107 Fla.333, 144 So 669 (1932); Roti v. State, 334 So 2d 146 (Fla. 2d DCA 1976).

In sum, all of the above prosecutorial acts of misconduct constituted fundamental error and mandates reversal of the conviction and the granting of a new trial in this matter. Also see Peterson v. State, 376 So2d 1230 (Fla. 4th DCA 1979).

Insofar as the penalty phase is concerned, the prosecutors engaged in additional prejudicial conduct calculated to appeal to the sympathy of the jury and to unduly influence the jurors in their deliberation. One example of the prosecutors' attempt to appeal to the sympathy of the jury stated as follows:

> '...the point is that there has to be a greater penalty if the victim is killed. Otherwise, the odds are in the favor of the persons who are committing the robbery, the odds are in favor of the persons committing the kidnapping. That's common sense.
>
> That girl portrayed in that photograph can never testify against the person who robbed her. There is no way that she can do that. And the odds are much greater of being convicted if the victim is alive. And if you kill someone to avoid eventually being identified by the victim, then there should be a greater penalty and I submit to you that the penalty should be death.

> It is the State's position that the society not only has the right to demand the death penalty, but also it has the duty to do so. Otherwise, this girl's life will be in vain. The importance of her life is minimized by an advisory sentence of life imprisonment...' (R 766).

The prosecutor went on to appeal to the jury's sympathy as follows:

> '...Can you invision the horror that Frances Julia Slater experienced during that death ride from the store to the thirteen (13) mile area? Pleading for her life? Pleading for her life. In such terror that she released her bladder. She wet her pants. ...
>
> You heard Mr. Nippes testify that her scalp hairs were forceably removed from her scalp...'. (R 767).

The last reference by the prosecutor was totally improper in that there is no evidence whatsoever to support the conclusion that Appellant was the person who forceably removed hair from the victim's scalp. Nonetheless, the prosecutor sought to inject that fact in his continuing attempt to develop sympathy for the victim and undue prejudice against Appellant.

The prosecutor next directly appealed to the jury for their sympathy for the family of the victim. In a blatant and clearly prejudicial comment relating to the victim's family, the prosecutor made his appeal as follows:

> '...Any sympathy that I have in this case is not directed toward Alphonso Cave. It is directed towards Kathy Slater, her sister, the family, Mr. and Mrs. Campbell. For the rest of their lives, there is going to be an empty chair at their table. (Emphasis added). (R 774).

Appellant feels that such an inflammatory statement as quoted above requires a new trial in this matter. In Edwards v. State, supra, the court stated that it is the responsibility of the prosecutor to seek verdict based on evidence without indulging in appeals to sympathy, bias, passion or prejudice. In that decision, the prosecutor stated as follows:

> '...Mr. Kahn [the prosecutor]: All I'm going to ask you for is justice. I ask you for justice both on behalf of myself and the people of the State of Florida, also on behalf of [victim's] wife and children. ...' (Original emphasis). Edwards v. State, at 359.

The court went on to state that the prosecutor's argument was an improper appeal to the jury for sympathy for the wife and children of the victim and the natural effect of said appeal would be hostile emotions towards the accused.

The prosecutor continued seeking sympathy for the victim and further claimed that the Appellant's crime was perpetrated not only against the victim and her family but against all of the people of the State of Florida, naturally including the jurors. The quote is as follows:

> '...Now, Mr. Stone and I do not represent the Campbell family. We don't represent Kathy Slater. We represent all of the people of the State of Florida. And what Alphonso did on the morning on April 27, the later part of April 26, is a crime not only against the Slaters, the Campbells, but against all of the people of the State of Florida, and that's who Mr. Stone and I represent...'. (R 775).

The prosecutor is seeking justice and retribution for the members of the family including Kathy Slater, twin sister of the victim present during the course of trial. Further, the prosecutor in the above-referenced quote sought to inflame the jurors by appealing to their rage that the crime was committed also against them. See Bullard v. State, supra, where the court reversed or remanded for a new trial conviction based in part on the error committed by the State Attorney in presenting a 'golden rule' argument in closing remarks. Also see Barns v. State, 58 So2d 157 (Fla. 1952); Houston v. State, 376 So2d 1230 (Fla. 4th DCA 1979); Lucas v. State, supra; Wheeler v. State, 425 So2d 109 (Fla. 1st DCA 1982).

In further violation of the law announced in cases cited above, the prosecutor in his final statement to the jury exclaimed as follows:

> '...Now, I am going to sit down. The task that I have is not an easy one. I have to cover everything that Frances Julia Slater would have liked me to cover and if I have forgotten anything during the stage of the trial, please be Frances

Julia Slater's voice while you are deliberating. Thank you very much...'. (R 775).

In all of the instances representing improper prejudicial attempts to gain the jury's sympathy on behalf of the victim and to prejudice the Appellant, the prosecutor compounded errors by placing Appellant's character in issue and further by improperly commenting on Appellant's failure to testify on his own behalf. All of said improper comments by the prosecutor were timely objected to by defense counsel. The dialogue in this regard proceeded as follows:

'...What have you leared regarding the defendant's character? Absolutely nothing. What witnesses appeared during the second phase to testify regarding the defendant's character? None. Of all the persons that Alphonso Cave knew, what person told you anything regarding Alphonso Cave's character? None...' (R 772).

There is a legion of case law which states it is fundamental that unless a defendant has first placed his character in issue, the State is not permitted to adduce evidence relative to same. See Perkins v. State, supra; Bullard v. State, supra; Lewis v. State, 377 So2d 640 (Fla. 1979); Albright v. State, 378 So2d 1234 (Fal. 2nd DCA 1979); Donaldson v. State, 369 So2d 691 (Fla. 1st DCA 1979). Also see Young v. State, 280 So2d 13 (Fla. 3nd DCA 1973) and Fernadez v. State, 427 So2d 265 (Fla. 2nd DCA 1983) wherein convictions were reversed because the prosecutor improperly commented on defendant's election not to testify on his own behalf. In Young v. State, supra, the prosecutorial error was as follows:

'...the defendant has not presented a defense today...' at 13.

Each and every instance of prosecutorial misconduct is grounds for granting a new trial in the instant matter. Further, the cumulative effect of the various instances of said misconduct demand the granting of a new trial. See Peterson v. State, 376 So2d 1230 (Fla. 4th DCA 1979).

POINT V

THE TRIAL COURT ERRED IN ALLOWING THE INTRODUCTION OF LINEUP OF THE ALLEGED ACCOMPLICE BUSH.

The trial court erred in allowing the introduction of a line-up photograph of the alleged accomplice BUSH over timely objection of Appellant's counsel at trial. Specifically, Appellant's counsel objected on the grounds that said photograph was immaterial and irrelevant and further that the state failed to lay a proper predicate for the introduction of said photograph. Nonetheless, the court overruled the timely objection and allowed said evidence. The introduction of same was error in that the court's erroneous ruling assisted the state in attempting to establish the corpus delicti. (R 342).

POINT VI

THE TRIAL COURT ERRED IN REQUIRING DEFENSE COUNSEL TO PROFFER HER CLOSING ARGUMENT AT THE GUILT PHASE.

During the course of Appellant's closing argument during the guilt phase, the prosecutor objected stating that defense counsel failed to properly and thoroughly discuss the instructions as it related to the felony murder doctrine. The court sustained the state's objection in the presence of the jury and further admonished defense cousel that she should not read the instructions out of context. (R 673-678). After continuing argument during the bench conference, the court then excused the jury in the middle of defense counsel presenting closing argument. The trial court required Appellant's counsel to proffer her closing argument so that the court could rule as a matter of law as to whether it was an appro-

priate argument before the jury. The court then denied the proffer made by defense counsel but failed to clarify what statements could be made during closing. (R 681).

The court improperly excused the jury during defense counsel's final argument and erred by requiring a proffer of same. Said interruption and proffer served to violate Appellant's due process rights and Sixth Amendment rights relative to the entitlement of a fair trial and effective representation of counsel.

POINT VII

THE TRIAL COURT ERRED IN DENYING A MISTRIAL ON THE GROUNDS THAT AN INVESTIGATOR TESTIFIED AS TO THE SUBSTANCE OF AN ACCOMPLICE'S STATEMENT THAT APPELLANT OWNED THE KNIFE WHICH WAS USED TO STAB THE VICTIM.

During the course of direct examination of the state's investigator, LLOYD JONES, the prosecutor asked if the alleged accomplice, JOHN EARL BUSH, had made a statement. Further, the question was posed as to what JOHN EARL BUSH stated on the taped statement.

The dialogue proceeded as follows:

By Mr. Stone:

Q Did John Earl Bush make a statement implicating Mr. Cave?

A Yes, sir, he did.

Q And what did Mr. Bush say on that statement about Mr. Cave?

By The Court:

All right. The relation would be only as it relates to this Defendant.

By Mr. Stone:

Q Only as it relates to Mr. Cave, what did John Earl Bush say about Mr. Cave?

A He just stated that he was with him the night of the crime, sir, basically, is what he stated.

Q Did he say what Mr. Cave did out at the crime scene?

A I can't recall that right off the bat, sir. I don't think he did.

Q Did he implicate that Mr. Cave was there?

A Yes, sir.

Q And that he did participate?

A Yes, sir.

By Mrs. Steger:

Judge, I object. Leading the witness.

By the Court:

Objection sustained. (R 553).

In addition to testifying that the alleged accomplice BUSH implicated CAVE in the instant matter, Detective Jones further stated in response to a leading question that JOHN EARL BUSH told him that it was CAVE's knife that was used. Defense counsel immediately objected and moved for a mistrial on the grounds that the taped statement by BUSH was not in evidence. Specifically, the dialogue proceeded as follows:

'...(By the State Attorney) O.K. when you played JOHN EARL BUSH's statement, did JOHN EARL BUSH tell you that it was CAVE's knife that was used? (By Mrs. Steger) Judge, I would object to that. I move to strike it and I move for a mistrial...' (R 554).

After considerable argument by defense counsel relative to moving for a mistrial, the court sustained the objection but denied the motion for mistrial. (R 555-556).

The leading question by the prosecutor relative to the ownership of the knife and the response thereto along with testimony by Detective Jones that BUSH's statement implicated CAVE is highly prejudicial requiring a reversal and granting a new trial. Reference to the taped confession by accomplice BUSH along with comments relative to the sub-

stance of said statements improperly implicated CAVE and further denied him the right to confront the witness against him in violation of the Sixth Amendment. It is axiomatic that a statement or confession of a co-defendant which implicates an accused is not admissable against the accused unless he has an opportunity to confront and cross-examine the co-defendant. To admit such statement is a reversible error. See Bruton v. United States, 391 U.S. 123 (1960); Hall v. State, 381 So2d 683 (Fla. 1979); Engle v. State, 438 So2d 803 (Fla. 1983). The trial court's error requires reversal and a new trial.

POINT VIII

THE TRIAL COURT ERRED IN ADMITTING APPELLANT'S CONFESSION WHICH WAS INVOLUNTARILY GIVEN AS A RESULT OF IMPROPER INFLUENCE.

The trial court erred in admitting Appellant's confession in that same was involuntary as a result of various acts and circumstances constituting improper influence. A confession is inadmissable when procured through interrogation without full benefit of the miranda warnings. Further, any waiver of miranda rights is considered involuntary if made in response to police threats and/or improper influences. A waiver of the miranda rights must not be a result of any evidence that the accused was threatened, tricked or cajoled resulting in a waiver. See Miranda v. Arizona, 384 U.S 436 (1966). Once Miranda rights are given, the focus of the inquiry is whether the confession has been procured by any sort of threat, improper influence, violence or any misconduct, however slight, or the exertion of any type threats whether express or implied. Bran v. U.S., 168 U.S. 532 (1897); Frazier v. State, 107 So2d 16 (1958); further, if the police urge an accused, by direct or implied promises or threats to make a statement, the admission will be suppressed because it violates a basic tenet of the law that a confessing defendant should be entirely free of the influence of hope or fear. Frazier v. State, supra, Harrison v. State, 12 So2d 307 (Fla 1943) Garriel v. State, 317 So2d 141 (Fla. 1976).

The facts adduced at the suppression hearing and at trial reflects that the State through the various officers and investigators exerted undue influence and coer ion in ultimately obtaining a confession from Appellant. The police had an initial introduction to Appellant by arriving at his apartment at approximately 2:00 a.m. in the morning.

Apparently one officer knocked on Appellant's door and advised him that he was taking him down to the station. Appellant maintains that he did not volunteer to go down to the station but that it was clear he was going in light of the statements by the initial officer and further in light of the fact that additional officers were at the front door and back door of the rooming house . The officer did not ask the Appellant to come down but advised him that he was taking the Appellant down to the State Attorney's office for questioning. (RS 127). On the way down to the station, Appellant was accompanied by four investigators. Upon arrival at the State Attorney's office in the early morning hours, CAVE was brought into a certain room which at any given time was attended by three or four investigators during the course of CAVE's questioning. (RS 81). CAVE was initially requested to sign the waiver portion of the Miranda Rights however refused to do so and at no time did sign said waiver. (RS 57).

Appellant was initially asked whether he had any involvement in the death of the victim. The record reflects that Appellant denied any involvement on three or four occasions and that the interrogating officer admitted that Appellant denied any involvement at least on two occasions. (RS 68). The record is clear that during this denial and throughout the course of the 3 hour interrogation, Appellant was not represented by counsel. Although the interrogating officer testified that Appellant did not request an attorney at the time, Appellant expressly denies that in stating that he made a formal and explicit request for an attorney but was denied that request. (RS 116, 68). There is a legion of case law which holds that when an accused requests an attorney but is denied the right to counsel, any and all statements made thereafter should be excluded. See Miranda, supra; Cason v. State, 373 So2d 372 (2nd DCA 1979); State v. Dixon, 348 So2d 333 (Fla. 2nd DCA 1977).

Despite Appellant's continued denial of any involvement and knowledge of the alleged crimes involving the victim, the interrogators persisted in their questioning of Appellant. Also see Edwards v. Arizona, 451 U.S. 477 (1981) which stands for the pro position that whether an accused has knowingly and intelligently relinquished his right to counsel is a separate determination from whether he has voluntarily consented to being questioned. The fact that Appellant at no time executed the waiver form lends support to his testimony that he did in fact request an attorney and at no time waived that right. Unlike the decision of Witt v. State, 342 So2d 497 (Fla.), the State did not carry its stricter standard for showing that an accused has knowingly and intelligently waived a previous request for counsel wherein in that decision the accused did voluntarily execute a written waiver. Despite Appellant's request for an attorney, the interrogating officers persisted in their questioning contrary to People v. Traubert, 608 P. 2d 342 (Colo. 1980) which requires that officials immediately cease questioning until the accused's attorney arrives. When asked why he did not cease the interrogation upon Appellant's several denials as to any knowledge of the crime, the investigator stated '...basically because I didn't believe him, ma'am...' (R S 68). The interrogating officer continued to question Appellant as to his presence on the night of the murder. Detective Lloyd Jones admitted that the purpose of the continuing questioning in addition to the fact that he did not believe Appellant was to develop a rapport obviously with hopes of seeking an implicating statement. (R S 69). Detective Jones testified that Appellant admitted his involvement in the crime only after the tape of accomplice BUSH was played at Appellant's request. (R S 78). However, Appellant denied that he asked to hear the tape but that Detective Jones asked him if he wanted to hear the tape. Further, the record is clear that Detective Jones advised Appellant even before any questioning that BUSH made a statement implicating CAVE and that the confession was taped. In fact, Detective Jones admitted that upon the initial question-

ing of Appellant, the tape recorder along with BUSH's taped confession was on the desk in front of Appellant. (RS 68, 69). After Appellant began his incriminating statement to Detective Jones, Jones requested a taped statement. However, at that point Jones did not again advise Appellant of his miranda rights. (RS 78, 79). Detective Jones admitted that he was interrogating the Appellant for approximately three hours before he secured the incriminating taped statement. Consequently, approximately two hours and forty minutes of that period was not taped. (RS 50, 84). The three hour interrogation period lasted from approximately 2:00 a.m. till 5:00 a.m. It is important to note that Detective Jones admitted on more than one occasion that he intentionally attempted to develop a raport with Appellant in order to obtain an incriminating statement. Jones felt that he enjoyed a common bond with Appellant in that both are black. Further, Jones admitted that he talked to Appellant about his girlfriend and his mother and that in that period of 'raport building' lasted approximately twenty minutes (RS 89, 90). Appellant maintains that Detective Lloyd Jones initially played the BUSH tape for a short period enough to hear the implicating statement of BUSH. However Appellant again denied his involvement in the crime. Detective Lloyd Jones then played the tape in its entirety which resulted in another denial by Appellant.(R). However, Appellant testified during the course of the Motion to Suppress that a State official did coerce him into making the confession. Specifically, Appellant stated that Detective Charles Jones who he identified in the courtroom employed coercive and undue influence tactics in order to secure the incriminating statement. Specifically, Appellant testified as follows:

> '...Q They didn't coerce you in anyway did they?
> A Yes sir.
> Q Well, how did they coerce you, if they didn't twist your arm--
> A Well ah--
> Q --how did they coerce you?
> A Well one ah, Detective Jones one of those Jones he asked me--he tells me if I don't tell it now they'll find me somewhere dead in a ditch 'cause the got got so much money ah speaking of Mr Evinrude, talking about he had so much money he was saying if ah, I didn't say nothing they let me go you know--" (RS123).

Appellant submits that the totality of the circumstances surrounding the confession leads to the conclusion that the same was not voluntary

and further was given in violation of his right to counsel. Appellant denied being advised his rights before he made an oral statement preceding the taped confession (R 118). Appellant was directed to accompany four (4) police officers who picked him up at his rooming house at Two AM in the morning. He did not accompany the officer voluntarily but did so under their direction. Upon arriving at the State Attorney's office, numerous police officers and investigators were in the immediate area. Perhaps as many as ten (10) were there. (R 85). In fact, the lead investigating officer testified that at any given time three (3) or four (4) officers were present during the three (3) hour interrogation session. Detective Jones admitted that he advised the Appellant at the outset of any questioning that he was in possession of a taped incriminating statement made by accomplice Bush. Detective Jones placed the tape recorder and tape before Appellant and played it twice. Appellant testified that he requested an attorney but none was given him. Further, at no time did he sign the proper waiver form. Although Appellant did deny his involvement in the crime on several occasions, Detective Jones did continue to interrogate him relative to that matter. Further, only twenty (20) minutes of the three (3) hour interrogation period is taped, that twenty (20) minute period apparently commencing at approximately four-thirty AM resulting in the taped confession. Appellant testified that he was threatened and led to believe that in the event he did not cooperate with the investigators, he would be released which would result in his being killed by someone presumably a member or a hired employee of the victim's family.

The totality of the circumstances indicate that the investigators employed improper tactics, coercion and undue influence in order to secure the incriminating statement. Various authority supports Appellants contention that such confession was involuntarily made and should have been ruled inadmissible. See DeConingh v. State, 433 So2d 501 (Fla. 1983).

A factor in that decision focused on the fact that the deputy involved in the interrogation was a personal friend of the accused who had established a rapport. See Cason v. State, supra, wherein the Defendant stated he wanted an attorney however the officers continued to interrogate him. That decision recognized the various factors and calculated circumstances designed for the sole purpose of overcoming the defendant's will in obtaining a confession. In Fillinger v. State, 349 So2d 714 (Fla. 2nd DCA 1977), the Court stated that if the interrogator induces the accused to confess by using language that amounts to a threat or a promise of benefit of any kind, then the confession should be suppressed. In the instant matter, Detective Charles Jones used express language calculated solely to frighten Appellant into providing a confession in this matter. In Fex v. State, 386 So2d 59 (Fla. 2nd DCA 1980), the Court considered the factor that the interrogating officer told the accused that he had already been identified and that the officer presumably knew that he was involved in the case. In this case, Detective Jones exerted undo influence by advising the Appellant at the outset that he had a taped confession incriminating the defendant and he further played the confession twice all in an attempt to overbear the Appellant's free will not to incriminate himself. Also see Brewer v. State, 386 So2d 232 (Fla. 1980). It is axiomatic that psychological coercion may vitiate a confession. Reddish v. State, 168 So2d 858 (Fla. 1964)

The trial court erred in admitting the involuntary confession of Appellant. This error was critical in that the confession constituted a feature of the trial in that but for said confession, the State would not have been able to secure a conviction in this matter. As a result of the Court's error in admitting said confession this matter should be reversed and a new trial granted.

POINT IX

THE TRIAL COURT ERRED IN ADMITTING APPELLANT'S CONFESSION ON THE GROUND THAT THE STATE FAILED TO ESTABLISH SUFFICIENT CORPUS DELICTI PRIOR TO THAT ADMISSION OF SAID CONFESSION.

The court erred by allowing the introduction of Appellant's confession over the timely objection of defense counsel on the ground that the State failed to establish sufficient corpus delicti as to each of the offenses charged in the indictment. The courts have consistently held that prima efaci proof of the corpus delicti is a required predicate for the introduction of the confession. See McQueen v. State, 304 So2d 501 (Fla. 4th DCA, 1975); Jefferson v. State, 128 So2d 132 (Fla. 1961). The State produced insufficient evidence linking Appellant to the offenses in the information prior to the introduction of said confession. Further, the State argued that Appellant had participated in the division of proceeds after the murder although had been no testimony supporting that argument. (R 589). The State had to rely on Appellant's confession and the conclusion is drawn from the improperly admitted statements of the alleged accomplice, BUSH in order to attempt to prove his case.

The court committed error by allowing the introduction of Appellant's confession before the State carried its burden relative to the proof of corpus delicti. See Ruiz v. State, 378 So2d 101(Fla. DCA 1979). Also see Frazier v. State, 107 So 2d 16 (1958) which provides that there should at least be some additional substantial evidence, either direct or circumstantial before a confession maybe introduced. Frazier v. State, at 26.

POINT X

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON CERTAIN AGGRAVATING CIRCUMSTANCES AND BY LIMITING THE MITIGATING CIRCUMSTANCES PRESENTED TO THE JURY BY FURTHER REFUSING TO CONSIDER ALL EVIDENCE RELATIVE TO THE ISSUE OF MITIGATING CIRCUMSTANCES.

The trial erroneously instructed the jury that certain aggravating circumstances existed in the instant matter including that the capital felony was committed for the purpose of avoiding or preventing a lawful arrest for affecting an escape from custody. The court erred in submitting the aggravating circumstance to the jury on the ground that the record is devoid of any evidence whatsoever that Appellant killed the victim in this matter. The court announced in its written findings of fact in support of the imposition of the death penalty that there is no evidence that Appellant did commit the murder. (R 820). Further, there was insufficient evidence to show beyond a reasonable doubt that the Appellant played a significant part in killing the victim for the purpose of avoiding or preventing a lawful arrest. See Riley v. State, 366 So2d 19 (Fla. 1979), wherein the court stated '...the mere fact of a death is not enough to invoke this factor when the victim is not a law enforcement official. Proof of requisite intent to avoid arrest and detection must be very strong in these cases...'. Riley v. State, supra at page 22. In Menendez v. State, 368 So2d 1278 (Fla. 1979), the court stated that '...that an attempt to avoid arrest is not pertinent, at least when the victim is not a law enforcement officer, unless it is clearly shown that the dominant or only motive for the murder was elimination of witness...'. Menendez v. State, supra at page 1282. The trial court in its sentencing order speculates that the only possible reason for the killing was to prevent arrest.

The court's written findings of fact relative to this aggravating circumstance is not supported by evidence beyond and to the exclusion of every reasonable doubt, certainly not as it relates to Appellant in this matter. The court further erred in instructing the jury that there was sufficient evidence adduced during the course of trial to conclude that the felony was especially heinous, atrocious and cruel. There is insufficient evidence to show beyond a reasonable doubt that this particular aggravating circumstance existed in the instant matter, certainly as applied to Appellant. As defined in State vs. Dixon, 283 So2d 1 (Fla.1973), the court has defined this particular aggravating circumstance as follows:

> It is our interpretation that heinous means extremely wicked or shockingly evil. That atrocious means outrageously wicked and vile; and that cruel means desiring to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual permission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies-the consciousless or pitiless crime which is unneccesarily tortuous to the victim.

The facts in the instant matter do not include such additional facts as to set the crime apart from the norm of capital felonies. The facts simply do not constitute a '...consciousless or pitiless crime which is unneccesarily tortuous to the victim...' as contemplated by this particular aggravating circumstance. In Halliwell v. State, 322 So2d 557 (Fla. 1975), the death sentence is reversed because of any erroneous finding as to this aggravating circumstance. In Halliwell v. State, the defendant bludgeoned the victim to death by repeatedly beating him about the skull and body with a nineteen (19) inch bar. Several hours later, the defendant dismembered the body of the victim with a saw, machete and fishing knife and disposed of the corpse in a creek. In discussing the 'heinousness' aspect of this aggravating circumstance, the Florida Supreme Court concluded that '...we see nothing more shocking in the actual killing than in the majority

of murder cases reviewed by this court...'. See Halliwell v. State, supra at 561. In Riley v. State, 366 So2d 19 (Fla. 1979), the facts revealed the execution style shooting of two (2) bound and gagged victims for the purpose of eliminating them as witnesses. In that case, the court approved that the facts did not justify an 'especially heinous, atrocious or cruel murder'. Also, see Lucas v. State, 376 So2d 1149 (Fla. 1979); Alvord v. State, 322 So2d 553 (Fla. 1975). In Lewis v. State, 377 So2d 640 (Fla. 1980), this court stated that it is apparent that all killings are heinous, to members of our society and deem the intentional unjustifiable taking of human life to be nothing less. However, the legislature intended to authorize the death penalty for the crime which is 'especially heinous', when it is consciousless or pitiless which is unnecessarily tortuous to the victim. The facts in this matter reveal that Appellant did not kill nor intended to kill the victim. In addition, the facts in the instant matter simply do not constitute an especially heinous crime as contemplated in the statutory aggravating circumstance and as compared to the various authority in cases contained herein.

The court erred in determining that the capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit the crimes of robbery and kidnapping. The court determined in its written findings of fact that Appellant did perform the robbery. In addition, the court states that Appellant forced the victim from the Little General Store against her will by the means of a gun. The court goes on to state that the victim was taken to a remote area in Martin County where she was murdered. (R 818). The record reflects that the robbery was committed some thirteen miles from the location of the shooting. (R 819). Appellant maintains that the eventual murder was too far removed in time and distance so as to consider this aggravating circumstance as against Appellant. Further, the trial court fails to expressly state

in its written findings of fact that Appellant was engaged in the kidnapping and that that particular crime was considered insofar as this aggravating circumstance was concerned. Finally, the court referred to both crimes of robbery and kidnapping in applying this aggravating circumstance, however the facts and law do not support the court's conclusion.

The court improperly limited the mitigating circumstances submitted to the jury for their review during the advisory sentence phase. Specifically, the court refused to allow the mitigating circumstance that Appellant was an accomplice in the offense for which he is to be sentenced but that the offense was committed by another person and Appellant's participation was comparatively minor. Again, the trial court made the specific written finding of fact that the Appellant did not actually commit the murder in the instant matter. Consequently, the court in applying all the aggravating circumstances and in denying the request for mitigating circumstances based its action on the legal fiction of a felony murder, which undermines the court's holding in Enmund v. Florida, supra.

The court further erred by failing to present to the jury that there was evidence that Appellant's conduct may have been substantially impaired based on the fact that Appellant had been drinking heavily at and during the time of the offense. (R 750). Appellant maintains that there was evidence adduced at trial so as to allow the jury to make the determination whether or not there was sufficient testimony so as to find this mitigating.

The trial court erred by failing to consider the Appellant's age as a mitigating factor in the instant matter. The record reflects that the Appellant was the age of twenty-two (22) at the time of the commission of the alleged offenses. During the argument relative to age as a mitigating factor, the court was under the mistaken belief that a Supreme Court decision precluded this mitigating factor if a defen-

dant was over the age of eighteen (18); specifically, the court stated as follows: '...the Supreme Court has held that anyone over eighteen, that age is not and should not be considered a mitigating factor...' (R 754). The court apparently was relying upon a previous citation furnished by the prosecutor and cited in the official records as Saunders v. State, 322 So2d 481. Apparently, the court reporter mistyped the name of the case which presumably is referring to the decision of Songer v. State, 322 So2d 481 (Fla. 1975). Nonetheless, the court completely misconstrued that decision in concluding that the trial court was precluded and in fact could not exercise its discretion in determining whether age should be a mitigating factor as it relates to anyone over the age of eighteen (18). In fact, the decision cited by defense counsel, namely Peek v. State, 395 So2d 492 (Fla. 1981), a case of much more recent authority than the Songer decision provides in pertinent part that '...there exists no per se rule which pinpoints a particular age as an automatic factor in mitigation of sentence...' Peek v. State, supra at . Further, there is a legion of case law which states that age for the purposes of mitigating factor is a discretionary decision by the fact finder depending on circumstances introduced at trial and at the sentencing hearing. Also see, Mikenas v. State, 407 So2d 892 (Fla. 1982), wherein the trial court held that the defendant's age in that case, namely twenty-two (22) years old, was a mitigating factor. In sum, Appellant maintains that the trial court improperly refused to entertain the age of Appellant as a potential mitigating factor; consequently the court's refusal to exercise its discretion in determining whether or not that would be an appropriate mitigating factor was error requiring reversal of the sentence and position of death. Appellant maintains that the court's refusal to exercise its discretion based on its misconstruction of previous case law is of vital importance based on Appellant's belief that the court erroneously determined that various

aggravating circumstances existed in the case at hand. And the court's refusal to consider age as a mitigating factor totally undermines Lockett v. Ohio, supra, and the various other authority which holds that a sentencing body must not be precluded from considering, as a mitigating factor, aspects of defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

The court erroneously limited mitigating factors by refusing to grant Appellant's motion that 'any aspect of the defendant's character record' and any other circumstances of the offense be submitted to the jury as mitigating circumstances. Note that the lower court limited its consideration as to mitigating circumstances to Appellant's 'character or record'. (R 752). The lower court only discussed the issue of Appellant's participation in the victim's death and was silent as to the other statutory ennumerated mitigating circumstances and any other type of mitigating circumstance which may have existed in this matter. Unlike written findings of fact enounciated in Rutledge v. State, 374 So2d 975 (Fla. 1979) and in Mann v. State, 420 So2d 578 (Fla. 1982), the court did not specifically address each statutory mitigating circumstance and reject the same in writing. Consequently, neither Appellant nor this Honorable Court has the opportunity to determine if the trial court either properly or improperly rejected the mitigating factors in this mattter. Appellant maintains that as a result of the deficient findings of fact in the record as a whole reflects that the court did not consider any and all mitigating factors, as a matter of law, relative to potential mitigating evidence in contravention of Eddings v. Oklahoma, 455 U.S. 104 (1982). Also, see Dobbert v. State, 328 So2d 433 (Fla. 1976). In Dobbert v. State, wherein the record failed to show that the court considered non-statutory mitigating factors in imposing the death sentence. In White v. State, 403 So2d 331 (Fla. 1981), the mere existence of aggravating circumstances doesn't mandate imposition of death sentence and the statute simply does not contemplate a mere tabulation of the number of aggravating circumstances

versus the mitigating circumstances, but requires reasoned weighing of these circumstances to determine if a death sentence is appropriate. In sum, the record simply does not reflect if the court did, in fact, consider all statutory mitigating circumstances and non-statutory mitigating circumstances before imposing the death sentence in this matter. As required in Furman v. Georgia, 408 U.S. 23 (1976), if the death sentence is imposed the sentencing authority must articulate the same in writing the statutory reasons that lead to its decision. Those reasons, and the events supporting them, are conscientiously reviewed by a court which, because of its state wide jurisdiction, can assure consistency, fairness and rationality in the even-handed operation of the state law. Since the record is incomplete and fails to show that the trial court did consider all mitigating circumstances, statutory or otherwise, this Honorable Court is denied its duty in assuring that the death sentence is fairly and even-handedly imposed. Also see, Lucas v. State, 417 So2d 250 (Fla. 1982).

Appellant maintains that the court improperly allowed the jury to consider the various aggravating circumstances herein and further erred in determining beyond a reasonable doubt that sufficient evidence was introduced at trial to find the existence of said aggravating circumstances. Appellant maintains that the erroneous application of said aggravating circumstances requires a reversal and new sentencing hearing in this matter especially in light of the fact that the court failed to consider all mitigating evidence relative to this matter. Appellant asserts that if any of the three (3) aggravating circumstances were erroneously applied, then resentencing is mandated since this court is unable to determine what significance any given aggravating factor was given in the weighing process. See Fleming v. State, 374 So2d 954 (Fla. 1979). Also, the failure to require a full sentencing after invalidating any of the aggravating circumstances obligates the court's holding in Lockett v. Ohio, supra and Eddings v. Oklahoma, supra. In light of the above-

referenced errors, the Appellant's constitutional rights have been violated as contained in the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution. This matter should be reversed and new trial should be granted.

POINT XI

THE TRIAL COURT ERRED BY INSTRUCTING THE JURY DURING THE PENALTY PHASE THAT A MAJORITY VOTE WAS REQUIRED TO REACH AN ADVISORY SENTENCE; FURTHER, THE TRIAL COURT SUGGESTED THAT THE JURY WAS TO TABULATE THE AGGRAVATING CIRCUMSTANCES IN COMPARISON TO THE MITIGATING CIRCUMSTANCES IN ORDER TO ARRIVE AT AN ADVISORY SENTENCE.

The trial court instructed the jury on three occasions that a majority vote of the jurors was necessary in order to recommend a death sentence or a sentence of life imprisonment. Initially, the court stated as follows:

> "In these proceedings it is not necessary that the advisory sentence of the jury be unanimous. Your decision may be made by a majority of the vote." (R 787). (Emphasis added).

> "The fact that the determination of whether a majority of you recommend a sentence of death or sentence of life imprisonment in this case can be reached by a single ballet...". (R787). (Emphasis added).

The most damaging and prejudicial instruction read to the jury which occurred immediately before the jury convened for deliberation, read as follows:

> "You will now retire to consider your recommendation. When seven or more 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 the court." (R 788). (Emphasis added).

Appellant maintains that the three instructions requiring a majority decision lead the jury to reasonably believe that in fact a majority vote was required in order to render an advisory sentence. Clearly it is not possible to calculate the extent of confusion and misunderstanding of the jury as a result of the court's erroneous, misleading and prejudicial instructions; however as indicated in

POINT 12 of this brief, it is apparent that the jury was confused and that such confusion entered into the jury's deliberations. Appellant maintains that the court's misleading and erroneous instructions constitute fundamental error of constitutional dimensions, infecting the sentencing phase in the instant matter. The Court's error requires a vacation of the death penalty and reversal of the court's decision.

In Rose v. State, 425 So2d 521 (Fla. 1982), this Court held that a majority of jurors is not required to reach an advisory sentencing recommendation as to life imprisonment under the applicable Death Penalty Statute. In the instant matter, the jury indicated to the court that they were at a split decision relative to the advisory sentence (R 792). However, the jury further stated in its handwritten inquiry to the court that they had not been furnished a proper form enabling them to reduce their advisory sentence to writing.
Note that the advisory sentence form furnished the jury as to life imprisonment fails to explicitly indicate that a majority need not agree in order to render an advisory life imprisonment sentence (OR322). Appellant maintains that the court fundamentally erred by submitting the deficient form to the jury in conjunction with reading improper instructions. See Smith v. State, 282 So2d 179 (Fla. 2nd DCA 1973) which stands for the proposition that the trial judge has the sole responsibility to correctly and fairly instruct the jury on essential elements of a crime. Appellant maintains that in a capital felony case, the court has the same responsibility as it relates to critical instructions and verdict forms whereupon the ultimate sanction of death may be imposed.

The court answered the handwritten notation from the jury resulting in the jury later returning a seven to five advisory opinion recommending death on the form furnished them (OR 321). Appellant maintains that the jury was at best confused relative to whether or not a majority was required in order to reach an advisory sentence, said confusion resulting from the court's faulty instructions as cited above. The extent of said confusion is incalculable, but clearly prejudicial to Appellant.

Section 921.141(2), Florida Statute, does not require a finding that a majority of jurors reach a decision when imposing a life imprisonment. Consequently, in light of the applicable statute and the court's holding in Rose v. State, plus the constitutional deprivations, Appellant maintains that the court committed fundamental error in directing the jury on three occasions that a majority vote was necessary in order to render an advisory sentence.

The court further suggested in its instruction that the jury should engage in a tabulation process in terms of counting the number of aggravating circumstances against the number of mitigating circumstances in reaching an advisory sentence. The court stated in part '...if one or more aggravating circumstances are established, you should consider all the evidence attempting to establish one or more mitigating circumstances...' (R 786). The instruction to engage in a tabulating process was an error especially in light of the fact that the court read three aggravating circumstances to the jury and then read but one mitigating circumstance to the jury. (R785, 786). The prosecutor magnified the error by stating in closing argument:

> '...The Court is going to instruct you regarding three aggravating circumstances which have been established by the evidence in this case, and the Court will instruct you as to one mitigating circumstance...' (Emphasis added). (R 761).

The applicable statute does not comtemplate mere tabulation of the potential aggravating and mitigating circumstances in reaching an advisory sentence. Hargrave v. State, 366 So2d 1 (Fla. 1978). White v. State, 403 So2d 331 (Fla. 1981).

In light of the court's fundamental errors outlined above, Appellant's constitutional rights have been violated as contained in the Fifth, Sixth, Eighth and Fourteenth Amendments United States Constitution, Article I, Sections 2, 9, 16 and 17 of the Florida Constitution.

POINT XII

THE TRIAL COURT ERRED IN CHARGING THE JURY DURING THE PENALTY PHASE IN RESPONSE TO THE JURY'S INQUIRY THAT THE ADVISORY SENTENCE FORM DID NOT ALLOW FOR A 'SPLIT DECISION'.

In addition to furnishing the jury with confusing and inconsistent instructions relative to the advisory sentnece aspect of trial, the jury received an advisory sentence form which did not expressly indicate the number of votes necessary to render an advisory sentence for life imprisonment (OR322). The faulty advisory sentence form is significant considering that the court furnished the jury with confusing and inconsistent jury instructions relative to the punishment phase of trial. The confusing nature of the court's instructions along with the faulty advisory sentence form as to life imprisonment resulted in the jury delivering to the court a handwritten note which stated as follows:

> Penalty Phase
> To the Judge: We are at a split decision. We would like it stated and published to the court of this advisory sentence. (Emphasis added).
>
> The current form does not allow for this revelation.
>
> Please advise.
>
> Thank you,
>
> The Jury. (R 792). (OR 313).

Upon receipt of the above-referenced handwritten note from the jury, the court proposed to answer what he perceived as a pending question of the jury with the following instructions:

> Under the instructions I have given you, if by six or more votes the jury determines that the defendant should not be sentenced to death, the advisory sentence would be, the jury advised and recommends to the court that it impose a sentence of life imprisonment upon defendant without possibility of parole for 25 years.

The above-referenced response was delivered to the jury which resulted in the jury's recommendation for the imposition of the death sentence in a seven to five vote which was rendered some eight minutes after receiving the court's instruction. (R 802).

Appellant maintains that upon recieving the jury's handwritten message, the court at that time should have adopted same as the jury's advisory sentence in that that document expressly indicated that the jury was at a split decision and that they desired that decision be stated and published to the court. Appellant urges that the trial court was obligated to accept the advisory sentence since the jury was unequivocal in its sentence as quoted above. Further, Florida Rule of Criminal Procedure 3.680 entitled "Judgment on Informal Verdict" expressly provides for the acceptance of such a sentence, said rule quoted as follows:

> Rule 3.680 If a verdict is rendered from which it can be clearly understood that it is the intention of the jurors to acquit the defendant, a judgment of not guilty shall be rendered thereon even though the verdict is defective. No judgment of guilty shall be rendered on a verdict unless the jurors clearly espress in it a finding of guilt of the defendant.

Instead of accepting that as the jury's position, the court further confused the jury by responding with an unresponsive instruction. The court reversably erred in violation of decisions in Rose v. State, 425 So2d 521 (Fla. 1982); Lewis v. State, 369 So2d 667 (Fla. 2nd DCA 1979).

In light of the court's errors as outlined above, Appellant has been deprived of his constitutional rights contained in the Fifth, Sixth, Eighth and Fourteenth Amendments in the United States Constitution in Article I, Sections 2, 9, 16 and 17 of the Florida Constitution.

POINT XIII

THE TRIAL COURT ERRED IN DENYING DEFENSE COUNSEL'S MOTION TO DISCUSS WITH THE INDIVIDUAL JURORS THEIR THOUGHTS AND/OR MISUNDERSTANDINGS BELIEVED TO HAVE RESULTED IN THE ADVISORY SENTENCE FOR THE DEATH PENALTY.

As indicated in previous points herein, the jury submitted to the Court an informal handwritten statement to the effect that they were at a split decision in that no jury forms were furnished to reflect that decision. (R 792). In response to the jury's request, the Court reinstructed the jury as to the sentencing of Appellant resulting from a six (6) advisory verdict. A few minutes after the Court's uninvited reinstruction, the jury altered the six(6)-six(6) decision to a seven(7)-five(5) advisory sentence of death. Defense counsel motioned the Court so as to allow Appellant to inquire from the jurors as to whether there was any confusion and/or other problems associated with the advisory sentence of death. In fact, defense counsel argued that a newspaper article reflected that an individual juror had some concerns and felt pressured into rendering a majority opinion in this matter as a result of the Court's reinstruction.(R 809,810). Nonetheless, the Court denied Appellant's motion in upholding the 'sanctity' of the jury system. Although Appellant respects the rule of the jury and their entitlement to privacy relative to their deliberations, the facts in the case at hand warranted an indebth discussion with the jurors so as to ascertain what appeared to be confusion and/or miscomprehension of a law or facts resulting in the advisory sentence of death.

POINT XIV

THE TRIAL COURT COMMITED ERROR BY ENDORSING THROUGHOUT THE COURSE OF TRIAL THE STATE'S THEORY OF FELONY/MURDER DOCTRINE, BY DENYING APPELLANT'S MOTION TO PRECLUDE DEATH AS A POSSIBLE PENALTY AND BY INSTRUCTING THE JURY ON THE THEORY OF FELONY/MURDER AS A LEGALLY ACCEPTABLE THEORY IN WHICH A PERSON MAY BE CONVICTED OF FIRST DEGREE MURDER.

The record is replete with evidence that the prosecution proceeded exclusively on the Felony/Murder Doctrine. Throughout the entire voir dire process, the prosecutors continued to inquire as to whether each potential juror could embrace and accept the theory of felony/murder in order to find the Appellant guilty of first degree murder and further to impose the death penalty as a result of said doctrine. (R 44-48, 195).

In addition, the trial court engaged in similar inquiries during the course of voir dire and as a result endorsed the prosecution's furtherance of the Felony/Murder Doctrine. Consequently, from the outset of the trial, the jurors were indoctrinated into accepting the Felony/Murder Doctrine as a legally acceptable and available legal vehicle in which to find Appellant guilty of first degree murder. Further, the jurors were repeatedly questioned as to whether they could impose the death penalty as a result of the implementation of the Felony/Murder Doctrine. In fact, two jurors were excused during the course of voir dire as a result of their questioning the applicability of the Felony/Murder Doctrine as a theory in which to impose the death sentence. (R 103, 224).

In Enmund v. Florida, 102 S.Ct. 3368 (1982), the United States Supreme Court held that the Eighth and Fourteenth Amendment to the United States Constitution precludes the imposition of the death penalty on a defendant who did not kill, attempt to kill or intend to kill

the deceased. The lower court in that decision instructed the jury that '...the killing of a human being while engaged in the perpetration of or in the attempt to perpetrate the offense of robbery is murder in the first degree even though there is not premeditated design or intent to kill...'. Enmund v. Florida, supra at
In the instant matter, the trial court instructed the jury that '...in order to convict the defendant of first degree felony/murder, it is not necessary for the state to prove that the defendant had a premeditated design or intent to kill...' (R 696).

In the matter at hand, it is clear that the jury was instructed that they could find Appellant guilty of first degree murder and ultimately impose the death penalty based on the legal fiction known as the Felony/ Murder Doctrine. However, the Enmund v. Florida decision clearly emphasizes that before the ultimate sentence of death can be imposed, the focus must be on the defendant's culpability, not on the actions and/or intent of his accomplices. There is no evidence whatsoever to support the conclusion that Appellant either killed or intended to kill the victim, Francis Slater. The trial court announced this conclusion in its findings of fact in support of the imposition of death penalty. (R 820).

In response to the issue presented to the Enmund court, namely whether death is a valid penalty under the Eighth and Fourteenth Amendments for one who neither took life, attempted to take life, nor intended to take life, the court answered in the negative. Further, the court stated that given the fact that the death penalty is 'unique in its severity and irrevocability', the death penalty itself is an excessive penalty for the robber who, as such, does not take human life. See Furman v. Georgia, supra, Weems v. United States, 217 U.S. 349 (1910); Coker v. Georgia, 433 U.S. 584 (1977); Gregg v. Georgia, supra; Lockett v. Ohio, supra; Robinson v. California, 370 U.S. 660 (1962); Bell v. Ohio, supra.

In light of the fact that the prosecution repeatedly sold the jurors on the acceptability of the theory of felony/murder, and the fact that

the court endorsed the prosecutor's position and further specifically instructed the jury on that theory, Appellant respectively maintains that there was a fundamental error created in light of the authority cited herein and in further violation of Appellants's constitutional rights contained in the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution Article I, Section 2, 9, 16 and 17 of the Florida Constitution.

POINT XV

THE TRIAL COURT COMMITTED FUNDAMENTAL ERROR BY IMPANELING A 'DEATH QUALIFIED JURY' BY WAY OF EXCLUDING 'DEATH SCRUPLED' JURORS IN THE INSTANT MATTER: FURTHER, THE FLORIDA DEATH PENALTY STATUTE WHICH REQUIRES THAT THE SAME JURY REMAIN IMPANELED AT BOTH THE GUILT/INNOCENCE PHASE AND THE PENALTY PHASE IS UNCONSTITUTIONAL.

As discussed in a previous Point herein, the trial court erred by improperly excluding two jurors in violation of the holding in Witherspoon v. Illinois. Further, the trial court committed error by announcing to potential jurors what the trial court appeared to believe the holding in Witherspoon; however, the trial court's announcements throughout the course of jury selection clearly did not comport with the Witherspoon decision and further impressed upon the jury that anyone who would be hesitant to impose the death penalty would be and/or should be excluded as a juror in the instant matter. (R 124). Appellant maintains that the death qualification process employed in the instant matter pursuant to the Applicable Florida Death Penalty Statute effectively and systematically excludes an entire group of fair and impartial jurors because of a particular attitude that they possess upon a matter that is irrelevant to their jury service during the guilt/innocence phase of the trial. During a typical death qualifying voir dire, the court as indicated in the instant matter and respective counsel repeatedly discussed the procedures leading to the penalty phase of the trial and intentionally questioned each prospective juror concerning his or her attitudes about capital punishment. Jurors undergoing the death qualifying process can reasonably infer that the court and respective counsel personally believe that the accused is quilty and consequently anticipate that the jury will reach and should reach a quilty verdict. This concern is magnified in the instant matter by the various improper comments made by the court relative to potential jurors' attitude concerning death along with the court's repeated references to the second phase of the trial. (R 226). Prospective jurors not familiar with courtroom

procedures would have to infer that that Appellant was guilty as charged in justifying in their own minds why so much time and energy is expended on the discussion of the death penalty before the trial has even commenced. It is reasonable to conclude that the jurors themselves subconsciously or otherwise become more inclined to believe that the accused is guilty as charged and act accordingly during the course of the trial. Jurors who have been tainted by the death qualification process will subconsciously consider the testimony, evidence and credibility of witnesses in favor of the state and to the detriment of the accused.

In Hovey v. Superior Court of Alameda County, 616 P2d 1301 (Cal. 1980), the California Supreme Court recognized the validity of the study conducted by Dr. Haney regarding the death qualification process and stated in part;

> "Haney's findings indicate that the current process for selecting capital jurors creates certain side effects which shapes the jury's attitudes towards the death sentence. The courts are appropriately concerned if procedures incur 'tendencies, no matter how slight, toward the selection of jurors by any method other than a process which will insure a trial by a representative group.; Glasser v. United States, 315 U.S. 60,62, 62 S. Ct. 457, 86 L.Ed2d 680 (1942).
> It has always been the judiciary's duty to counteract processes which generates in jurors 'a bias in favor of the prosecution; (Ibid.). The high court has been diligent in its review of the procedures which 'undermine and weaken the institution of jury trial' (Ibid).
>
> Haney's studies serve to alert this court to some of the pernicious consequences of our current voir dire procedures in capital cases. This court must be concerned about the threat these procedures present to an accused's constitutionally protected interests in fair trial.
>
> Haney testified that the prejudicial alteration and attitudes which resulted from a juror's observations of death qualification of his or her fellow vinire persons is a 'function of exactly how extensive the questioning becomes. The more extensive the questioning, the more you would expect to find important differences between the state of mind of jurors who have been through the one process compared to those who have been through the other.' This proposition implies a corollary which is 'the extent to which (these effects) are minimal would be a function to the extent to which questioning is minimized.'

> The most practical and effective procedure available to minimize untowards effects of death qualification is individualized sequestered voir dire because jurors would then witness only a single death qualifying voir dire- their own dire - each individual juror would be exposed to considerably less discussion in the questioning of the various aspects of the penalty phase before hearing any evidence of guilt. Such a reduction in the pretrial emphasis on penalty should minimize the tendency of a death qualify jury to presume quilt and expect conviction. (Emphasis added)." (Hovey, supra at 1353).

The California Supreme Court in Hovey, supra, entertained the testimony of Dr. Haney relative to its study in connection with the death qualification process and was so impressed with testimony that the court ruled that individualized sequester voir dire is a process which must be utilized in order to minimize the 'pernicious consequences' of death states therefore voir dire procedures in capital cases.

In Grigsby v. Mabry, 569 F. Supp. 1273 (1983) the District Court held that 'death qualified' jurors impaneled to determine an accused's guilt as well as their punishment is unconstitutional in that the exclusion of death scrupled jurors is violative of the Sixth Amendment's fair cross-section requirement and further produces a prosecution prone, conviction prone jury. The Grigsby court also recognized that the questions and answers in general dialogue pursued during the course of the death qualification process has a clear tendency to suggest that the defendant is guilty. The record is replete with discussions by counsel and the bench in the instant matter which confirms the concern enunciated in Grigsby. (R 103, 224). Further, the Grigsby court recognized the fact that the death qualification process is violative of due process in that it imparts the belief to the jury that the defendant is guilty via continuing questioning of the attorneys but also by instructions by the court.

The court's conduct constitutes fundamental error and further the death qualification process implemented by the trial court and further

embodied in the Florida Death Penalty Statute violates his constitutional rights contained in the Fifth, Sixth, Eighth and Fourteenth Amendments in the United States Constitution in Article I, Sections 2, 9, 16 and 17 of the Florida Constitution.

POINT XVI

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO DISMISS THE INDICTMENT AND/OR TO DECLARE THE FLORIDA DEATH PENALTY TO BE UNCONSTITUTIONAL AND MOTION TO PRECLUDE AND PREVENT SENTENCING UNDER THE FLORIDA DEATH STATUTE.

Appellant timely filed the above-referenced motions which were improperly denied by the trial court for the following reasons:

1. The indictment was legally insufficient in that it did not properly charge a capital offense. The indictment in this matter stated only that the Grand Jurors do 'present' that 'defendant' committed a crime. Further, the indictment was insufficient in that it failed to list the statutory aggravating circumstances upon which the State would rely in order to seek the death penalty and therefore did not properly apprise Appellant as to the nature of the offense in violation of the due process clause of the Fourteenth Amendment of the United States Constitution and Article I, Sections 15 and 16 of the Florida Constitution.

2. Section 782.04 and 921.141, Florida Statutes, are unconstitutionally vague in violation of the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution and Article I, Section 16 of the Florida Constitution because the Grand Jury may not have been able to distinguish between murder in the first degree and murder in the second degree. Therefore, the charging document may have been issued in an unconstitutionally capricious and arbitrary fashion.

3. Sections 782.04, 775.082 and 921.141, Florida Statutes, provide for insufficient and arbitrary standards relative to the imposition of death. The Statutes are vague, indefinite and uncertain which deprived Appellant of his right to know the nature of the charges against him, the differentiation between the degrees of homicide, all

of which resulted in his inability to adequately prepare for trial; furthermore, the trial court cannot determine what specific crimes are embodied within the division of murder in the first degree, and murder in the second degree, in order to properly instruct the jury and to conduct the course of trial. Said statutory provisions deprived the Appellant of life and liberty without due process of law, and violated his constitutional rights contained in the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution and Article I, Section 9 and 16 of the Florida Constitution.

4. Section 921.141, Florida Statute, violates the due process clause of the Fifth and Fourteenth Amendments of the United States Constitution and Article I,Sections 2 and 9 of the Florida Constitution in that the fundamental right to life is violated by the imposition of the death penalty without requiring the State to prove beyond a reasonable doubt that there exists a compelling State interest for the deprivation of that fundamental right. Further, said statutory provision provides for a procedure pertaining to the imposition of the death penalty which violates the separation of powers between the Legislature and Judiciary in violation of Article V, Section 2 of the Florida Constitution.

5. Section 921.141, Florida Statute, is constitutionally infirm in that it impermissibly shifts the burden to the Appellant having to prove certain mitigating circumstances in order to be spared of the death penalty. This impermissible burden violates the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution and further is contrary to the case of Mullaney vs. Wilbur, 421 U.S. 684 (1975).

6. Section 921.141, Florida Statute, does not mandate that the State prove beyond a reasonable doubt the existence of certain statutory aggravating circumstances and further fails to create a burden of proof relative to the existence of mitigating circumstances; said statutory deficiencies violate the due process and equal protection clauses of the Fifth and Fourteenth Amendments of the United States

Constitution and Article I, Section 2 and 9 of the Florida Constitution. Further, said statute is unconstitutional in that the mitigating circumstances contained therein are unnecessarily restrictive in scope contrary to Lockett v. Ohio, 438 U.S. 586 (1978), and Bell v. Ohio, 438 U.S. 637 (1978).

7. Section 922.10, Florida Statutes, authorizes per se cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments of the United States Constitution and Article I, Section 17 of the Florida Constitution.

8. The Florida Murder Statutes, Section 782.04 and 921.141 are unconstitutional as applied in that Florida adheres to the Felony/Murder Doctrine which allows premeditation and/or first degree murder be established through proof of an underlying felony. In the absence of adequate notice as to whether or not the accused is required to defend against either felony/murder or premeditated murder, the statute is unconstitutional in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution and Article I, Section 2 and 9 of the Florida Constitution; and further undermines the court holdings in Lockett v. Ohio, supra; Bell v. Ohio, supra; Enmund v. Florida, 102 S.Ct.U.S. 3368 (1982).

9. Section 782.04 and 921.141 of the Florida Statutes are unconstitutional in that the death penalty may be imposed under the theory of felony/murder without finding that the Appellant intentionally caused the death of the victim. This lack of the requirement of a criminal mens rea violates the basic fairness concepts contained in the due process clause on the Fifth and Fourteenth Amendments of the United States Constitution. Whether a death results in the course of a felony giving rise to the Felony/Murder Doctrine turns on fortuitous events that do not distinguish nor focus upon the intent or culpability of the accused. Furthermore, the statutory scheme as applied allows a verdict of guilty in the imposition of the death sentence without distinguishing on what theory the jury based its verdict. Consequently, said statutory sections are unconstitutional and contrary to

the holdings in Coker v. Georgia; 433 U.S. 584 (1977); Enmund v. Florida, supra; Furman v. Georgia, supra; Lockett v. Ohio, supra; Bell v. Ohio, supra. In Lockett v. Ohio, supra, the appellant argued that the Eighth Amendment of the United States Constitution barred the death penalty in cases where there was not a finding that the accused possessed a purpose to cause the death of the victim. Justice White, in a concurring opinion,stated that "...the conclusion is unavoidable that the infliction of death upon those who had no intention to bring about the victim is not only grossly out of proportion to the severity of the crime but also fails to significantly contribute to acceptable or, indeed, any perceptible goals of punishment...". In Enmund v. Florida, supra, the court states that the focus must be on the culpability of the defendant, not on that of those who committed murder. In light of the above, the Florida Death Statute is violative of the due process in that an accused in Florida can be sentenced to death two seperate ways under the said Death Penalty Statute without the requirement that he possessed the criminal intent and purpose to take the life of another person.

10. Sections 782.04, 775.082 and 921.141, Florida Statutes, provide for the arbitrary and capricious imposition of the death sentence because Florida Appellate Courts have no knowledge of the standards applied at the trial court level. Although the Florida Supreme Court reviews all cases in which the death sentence has been imposed, the Court does not review the records of the cases where the life sentence has been imposed. Consequently, the Florida Supreme Court has no rational basis for the comparison of various aggravating and mitigating circumstances as set forth in the Florida Statutes. In the absence of a meaningful review of the cases which resulted in life sentences, the Florida Supreme Court lacks the ability to engage in a rational, reasoned comparison of cases so as to create a valid standard pertaining to the imposition of the death sentence. Accordingly, the Supreme Court decisions are inconsistent in their review and unconstitutional as applied thereby violating the strict review requirements

of Proffit v. Florida, 428 U.S. 242, 96 S.Ct. 2690, 49 L.Ed.2d 913 (1976); Gregg v. Georgia, supra. In sum, there is no way for the Florida Courts to establish a standard for death as they have no knowledge of the standards being employed at the trial court level for life sentences.

11. Section 921.141, Florida Statutes, which establishes the procedure for imposition of the death penalty has not been promulgated or adopted by the Florida Supreme Court, thereby rendering it void. See State v. Smith, 260 So.2d 489 (Fla. 1970).

Appellant maintains that the trial court erred by denying his Motion to Dismiss The Indictment and/or declare the Florida Death Statute unconstitutional for the legal arguments expressed above.

POINT XVII

THE TRIAL COURT ERRED BY REFUSING TO ORDER THE STATE TO ELECT ITS THEORY OF PROSECUTION BETWEEN THE FELONY MURDER DOCTRINE AND THE PREMEDITATION THEORY CONTAINED IN THE FLORIDA DEATH STATUTE.

Appellant made a motion for a Statement of Particulars pursuant to Florida Rules of Criminal Procedure 3.190. Appellant argued, inter alia, that the State is required to elect its theory of prosecution on either a felony/murder theory or premeditation basis in order to adequately and constitutionally notify the accused of the charges against him. Appellant maintained that the State must restrict its prosecution at trial to one of the two theories unless the State is precluded at the sentencing phase from presenting both aggravating circumstances involving felony/murder and aggravating circumstances involving premeditated murder. Otherwise, the accused would be subject to the double punishment/merger proscription embodied in the Fifth Amendment to the United States Constitution and Article One Section Nine of the Florida Constitution. An accused cannot be punished at the first phase of trial for premeditation or for the underlying felony in a felony/murder prosecution

and then be punished again at the penalty phase of trial for the same factor that resulted in his first degree murder conviction. See State v. Pinder, 375 So.2nd 836 (Fla. 1979); State v. Cherry, 257 S.E. 2nd 553 (N.C. 1979).

In State v. Cherry, supra, the North Carolina Supreme Court held that the state is required to make an election in death penalty cases so as to properly advise the accused of the state's prosecution theory. It is noteworthy that the death penalty statute of North Carolina is similar to the Florida statute and that the Cherry decision nonetheless required an election in order to comply with constitutional mandates. In State v. Pinder, supra, the Court held that a defendant who is convicted on a felony/murder theory first degree murder cannot be convicted of the underlying felony. In order to insure that an accused will not be convicted on the underlying theory, that state must necessarily elect its theory of persecution in order to comply with the constitutional requirements contained in the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 2 and 9 of the Florida Constitution.

POINT XVIII

THE TRIAL COURT ERRED IN DENYING APPELLANT's MOTION FOR A STATEMENT OF PARTICULARS, STATEMENT OF AGGRAVATING CIRCUMSTANCES AND DEMAND FOR DISCOVERY RELATIVE TO SENTENCING.

Appellant filed timely discovery motions seeking, inter alia, the exact aggravating circumstances that the State intended to prove in support of its request for the death penalty and a complete list of all witnesses and statements, reports, documents and other relevant material of any type which the State intended to introduce at the penalty phase of trial. The indictment in this matter alleged no aggravating circumstances which was the basis of one of Appellant's motions which was denied by the trial court; furthermore, no other form of adequate notice advised Appellant of the aggravating circumstances and evidence relating thereto which the State would rely on in seeking the death penalty. Nonetheless, the trial court de-

nied Appellant's motion in refusing to order the State to furnish any type of notice pertaining to the aggravating circumstances prior to the penalty phase.

Appellant filed a Motion to Dismiss the indictment on the ground, inter alia, that same failed to contain any aggravating circumstances upon which the State would rely in seeking the death penalty. It is axiomatic that criminal defendants have a right to notice of the specific charges against them. See Cole v. Arkansas, 333 U.S. 196 (1948). The basic and fundamental right to notice is essential to allow a defendant to properly prepare his defense. The fundamental notice requirement applies to the penalty phase of a capital trial. See Presnell v. Georgia, 439 U.S. 14 (1978); Gardner v. Florida, 430 U.S. 349 (1977).

The United States Supreme Court has recognized a great need for reliability relative to the sentencing phase in a capital case. Woodson v. North Carolina, 428 U.S. 280 (1976). A sentence of death because of its unique severity and finality, necessarily requires much greater consideration and deliberation than any other sentence. Consequently, the need for notice and time to prepare for the sentencing phase in a capital case is also greater. The ability to prepare an effective defense against aggravating evidence requires adequate notice of the aggravating circumstances which the state seeks to prove. Just as it would be an impossible burden resulting in a violation of due process to force a criminal defendant to defend against charges not alleged in the charging document, it is likewise an impossible burden and a violation of due process under Gardner v. Florida, supra, to force the defendant in a capital case facing the possible sentence of death to defend against aggravating circumstances that he receives no notice of until the sentencing phase of that trial. The importance of receiving adequate notice of aggravating circumstances in the indictment along with other forms of notification, such as in response to a Motion for a Bill of Particulars, is especially obvious in the State of Florida considering the Death Penalty Statute mandates

that the penalty phase commence as soon as practical after the guilt/innocent phase trial, as was the case in the instant matter. See Section 921.141, Florida Statutes. An accused faces an improper and unconstitutional burden when he has been deprived of adequate notice relative to the aggravating circumstances upon which the state will rely at the penalty phase along with being denied the right to postpone the penalty phase in order for his attorneys to adequately prepare for that crucial phase.

The need for notice of the aggravating circumstances which the state seeks to establish has been recognized by other states. Of the three states whose death penalty statutes have been upheld by the United States Supreme Court, only Florida does not give the defendant notice of the aggravating circumstances upon which the state seeks to rely. In Texas, the statute limits capital murder to five separate classes. See Vernon's Ann. Texas Code, Penal Code Section 19.030 (formerly Article 1257(b) Vernon's Ann. Texas Penal Code). The Texas courts have held that notice prior to trial of all those aggravating circumstances which the state intends to prove is mandatory. Furthermore, the Texas courts have held that the indictment must contain one of the aggravating factors in the Texas Capital Murder Statute '...in order to fully apprise the accused of the charge against him...'. Jurek v. State, 522 S.W. 2nd 934, 941 (Tx.Ct.Crim. App. 1975). In Georgia, the need for notice not only of the aggravating circumstances, but of any evidence to be used in the proof of said aggravation, be given to the defendant prior to trial. The Georgia Code describes the sentencing hearing as follows: In such hearing, the jury or judge shall hear additional evidence in extenuation, mitigation, and aggravation of punishment...provided, however, that only such evidence and aggravation as the state has made known to the defendant prior to his trial shall be admissible. (emphasis added) Ga. Code Ann. Section 27-2524.

The Ohio Death Penalty Statute precludes consideration of the death penalty unless one of the aggravating circumstances is alleged in the indictment. See Ohio Rev.Code Ann. Section 2929.03. In sum, other states have recognized the constitutional need to provide an

accused facing the possible death sentence notice of the aggravating circumstances upon which the state will seek to rely.

The importance of the Florida statutory aggravating circumstances is obvious. The aggravating circumstances listed in the statute '... actually defines those crimes...to which the death penalty is applicable in the absence of mitigation circumstances. As such, they must be proved beyond a reasonable doubt before being considered by a judge or jury...' State v. Dixon, 293 So.2nd 1, (Fla. 1983). Further, the court in Gardner v. Florida, supra, held that the sentencing process in a capital case must comply with due process. The Florida Supreme Court has held that aggravating circumstances is absolutely essential to the question of the imposition of sentencing. Therefore, the proof of aggravating circumstances must be accomplished in a manner which comports with the requirements of due process. Cole v. Arkansas, supra; Morgan v. United States, 304 U.S. 1, (1938).

The right to notice of the aggravating circumstances and evidence relating to same is absolutely necessary and constitutionally required for a defendant to prepare his case for the sentencing phase of trial. In Florida, an accused facing the death penalty is given no notice prior to trial of what aggravating circumstances the state intends to prove.

Death is the ultimate sentence which may be imposed by society and therefore every reasonable procedure should be enacted to insure that the accused be afforded the opportunity to adequately and effectively prepare and present his defense to that ultimate sanction. Consequently, Appellant maintains that he was denied the right to receive proper notice of aggravating circumstances and evidence related to same resulted in a denial of his constitutional rights embidied in the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution and Article I, Sections 2, 9, 16, 17 and 21 of the Florida Constitution.

POINT XIX

THE COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL, MOTION FOR A NEW TRIAL AND A MOTION TO PRECLUDE THE IMPOSITION OF THE DEATH PENALTY.

Appellant timely filed the above-referenced motions during the course of the lower proceedings however the trial court denied same. Appellant submits that the court erred in denying each and every motion and the various allegations set forth in each.

POINT XX

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO PRECLUDE DEATH AS A PENALTY DURING THE PENALTY PHASE OF THE INSTANT MATTER.

Appellant motioned the lower court to preclude death as a potential penalty based in part on the decision of Enmund v. Florida, supra. The Enmund decision stands for the proposition that death is an improper penalty against defendant who neither killed, attempted to kill nor intended the death of a victim. As announced in the Enmund decision, the death penalty which is '...unique in its severity and irrevocability...' is an excessive penalty for the robber, who, as such, does not take human life. The Enmund court stresses that the focus must be on the defendant's culpability, not on those who committed the robbery and killings. As contained in the facts in the Enmund decision, Appellant did not kill nor attempt to kill nor intend to kill the victim in the instant matter. The record is devoid of any evidence relative to that claim as announced by the trial court in its written findings of fact. Consequently, Appellant maintains that it is constitutionally impermissible for the State to impose the death sentence in this matter and ultimately treat Appellant in the

same fashion and equate his culpability with that of the accomplices who actually committed the murder.

The trial court allowed the jury to consider three (3) aggravating circumstances in its deliberation relative to the sentencing phase. None of the aggravating circumstances required the jury to focus specifically on the Appellant's culpability in determining whether or not he intended or attempted or did in fact kill the victim. Consequently, Appellant was convicted of murder and sentenced to death based on his participation in an underlying felony, not the murder itself.

The court's instructions and refusal to preclude the jury from entertaining the death penalty allowed the jury to impose the death sentence upon Appellant without regards to the Appellant's intent, or proof of attempt to kill the victim. Appellant maintains that Enmund prohibits the imposition of the death penalty when it is imposed without reference to a defendant's culpability in determining whether or not he intended or attempted to kill or in fact did kill given victim. Consequently, Appellant maintains that the imposition of the death sentence without a specific finding of intent or attempt to kill violate the Eighth and Fourteenth Amendment of the United States Constitution thereby mandating a reversal and new trial in this matter.

POINT XXI

THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY AS TO THE OFFENSE OF SECOND DEGREE FELONY MURDER. APPELLANT'S TRIAL COUNSEL REQUESTED THE COURT TO INSTRUCT THE JURY ON THE OFFENSE OF SECOND DEGREE FELONY MURDER. HOWEVER, THE COURT REFUSED SAID REQUEST AND DENIED APPELLANT'S MOTION IN THAT REGARD.

The trial court committed reversible error by refusing to instruct the jury on the second degree felony murder. See Sturdivan v. State, 419 So2d 300 (Fla. 1982); Beck v. Alabama, 447 U.S. 636 (1980); State v. Abreau, 363 So2d 1063 (Fla. 1978); Lomax v. State, 345 So2d 719 (Fla. 1977). Accordingly, this matter should be remanded to the trial court for a new trial.

POINT XXII

THE TRIAL COURT ERRED BY VIOLATING APPELLANT'S FUNDAMENTAL RIGHT TO A FAIR AND IMPARTIAL JURY.

As more particularly argued in various points herein, the trial court improperly excused two jurors for cause namely, Mr. Bennett and Mr. Black. In that regard, the trial court violated Appellant's fundamental right to have a fair and impartial jury of his peers as guaranteed in the Sixth Amendment of the United States Constitution. The trial court erred by excusing for cause the two named jurors as a result of what the trial court perceived as their reluctance to impose the death sentence on the felony murder doctrine. Consequently, the trial court improperly excluded the jurors in contravention of the decision of Enmund v. Florida, supra and Witherspoon v. Illinois, supra. Appellant should be granted a new trial as a result of the abrogation of his fundamental right in connection with this issue.

POINT XXIII

THE CONVICTIONS AND SENTENCING RELATIVE TO KIDNAPPING AND ROBBERY WITH A FIRE ARM SHOULD BE VACATED AND REVERSED ON THE GROUND THAT SAME REPRESENTS A VIOLATION OF APPELLANT'S FIFTH AMENDMENT RIGHT IN REGARDS TO DOUBLE JEOPARDY.

The record is replete with evidence of the fact that the State Attorney sought a first degree murder conviction on the theory of the felony murder doctrine. (R 44, 48, 195). Further, the record is devoid of any evidence of premeditation upon which the jury could have based its verdict of first degree murder. In fact, the court concluded in its written findings of fact that the Appellant did not kill the victim in this matter. As a result, it is obvious

that one of the above-referenced underlying felonies was indispensible in supporting the murder conviction. The double jeopardy clause of the Fifth Amendment of the United States Constitution prohibits and protects against multiple convictions and punishment for the same offense. See State v. Pinder, 375 So2d 836 (Fla. 1979); Whalen v. U.S., 445 U.S. 648 (1980). Based on the above arguments, Appellant argues that the convictions and sentencing relative to the underlying felonies in this matter should be vacated and reversed, in furtherance of the double jeopardy clause of the Fifth Amendment of the United States Constitution in Article I, Section 9 of the Florida Constitution.

POINT XXIV

THE TRIAL COURT ERRED BY VIOLATING APPELLANT'S DUE PROCESS RIGHTS AND SIXTH AMENDMENT RIGHT TO THE JURY BY PRECLUDING DEFENSE COUNSEL FROM PRESENTING VARIOUS FACTS AND CIRCUMSTANCES UNDER WHICH THE CONFESSION WAS MADE.

The trial court fundamentally erred over objection of defense counsel by improperly limiting Appellant from presenting to the jury during the guilt/innocense phase the circumstances under which Appellant's confession was made. This was a critical error by the trial court especially in light of the fact that but for the confession, the state had at best a purely circumstantial case. Once the court has determined that a given confession was freely and voluntarily made, the accused is entitled to have testimony concerning the admissability of the confession repeated before the jury so that that fact finding body may consider such testimony in determining how much weight should be accorded that confession. See, Calloway v. Wainwright, 409 F. 2d 59 (5th Cir. 1958); Palmes v. State, 397 So2d 648 (Fla. 1981). A review of the record reflects that the court improperly

limited defense counsel from going into the totality of all circumstances pertaining to the giving of the confession. Apparently, the court was under the misconception that since it had ruled on the voluntariness of said confession, then in that event Appellant could not address any and all issues relative to the confession and the circumstances surrounding giving same. (R 574). Appellant maintains that the trial court fundamentally erred in improperly restricting Appellant from presenting to the jury all facts and circumstances surrounding the making of said confession in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

POINT XXV

THE TRIAL COURT ERRED BY ALLOWING THE INTRODUCTION OF TESTIMONY AT THE GUILT PHASE OF THE TRIAL RELATIVE TO STATEMENTS MADE BY APPELLANT'S ACCOMPLICES.

The trial court committed reversible error by allowing the prosecutor to introduce testimony over Appellant's timely objection relative to statements made by Appellant's alleged accomplice, JOHN EARL BUSH. Specifically, the record reflects that an investigator, Mr. Jones, had an occasion to drive to Palm Beach County in the company of JOHN EARL BUSH. Mr. Jones testified that during the course of that travel, Mr. BUSH gave him a statement obviously implicating Appellant in the instant matter. In addition, the investigator testified that he took another taped statement from JOHN EARL BUSH upon his return to Martin County. Shortly thereafter, the investigator played the tape recording of the confession made by BUSH to Detective Lloyd Jones. Detective Lloyd Jones then testified

on direct examination that he along with other officers from the Sheriff's department sought and located several individuals who were brought to the State Attorney's office in St. Lucie County, Florida for questioning. The individuals brought to the State Attorney's office as a result of the statement and statements received from JOHN EARL BUSH included the Appellant. (R 531). Again, defense counsel had voiced a timely objection to all such testimony but after a proffer made by the State Attorney's office, the court overruled said objection. (R 517). The court improperly allowed the testimony relative to the statements made by the alleged accomplice, BUSH because of the inescapeable conclusion that said statements implicated Appellant resulting in the officers transporting him to the State Attorney's office from his home at 2:00 a.m. Naturally, a defendant cannot require an accomplice to waive his right to remain silent and force him to testify. Consequently, CAVE was denied the right to properly confront the witness against him, namely the alleged accomplice BUSH. Further, any doubts which the jury may have entertained relative to the voluntariness and credibility of CAVE's confession were reduced knowing that other statements were made by alleged accomplices in this matter. It is fundamental that a statement or confession of co-defendant which implicates an accused is not admissible against the accused unless he has an opportunity to confront and cross-examine the co-defendant. To admit such a statement is 'unquestioned error'. See Bruton v. United States, 391 U.S. 123 (1968). Also see Hall v. State, 381 So2d 683 (Fla. 1979); Engle v. State, 438 So2d 803 (Fla. 1983).

The court committed reversible error in allowing the introduction of testimony pertaining to statements made by the alleged accomplice, BUSH; consequently, this matter should be reversed and a new trial granted for the reasons alleged herein.

POINT XXVI

THE TRIAL COURT ERRED BY REFUSING TO GRANT FUNDS TO APPELLANT, AN INDIGENT, FOR VARIOUS EXPERTS.

The trial court denied various motions timely filed by Appellant for funds in order to retain expert witnesses. The motions filed for funds for expert witnesses in this cause which were denied by the trial court included the following:

1. A Motion for Funds For A Jury Selection Expert to assure Appellant of his right to a fair and impartial trial by jury and effective assistance of counsel. An expert was needed in this area in light of the critical nature of a capital case and the possibility, and in the instant matter, the actuality of the death sentence; further the trial court denied Appellant's Motion to Preclude the Exclusion of Mothers with Children under Fifteen Years of Age from Being Excused from Jury Service in violation of the right to have a jury composed of a cross section of the community.

2. A Motion for Funds to Retain Experts In the Field of Rehabilitation and Criminology to examine Appellant in order to assist in his defense at the guilt/innocent phase and to prepare evidence and additional mitigating circumstances to be introduced at the penalty phase.

Appellant, an indigent, was financially unable to retain the services of the above-referenced experts. A solvent defendant would have had the funds to retain the services of the various experts resulting in additional evidence and testimony. Further, the experts would have provided an invaluable service during the course of the trial and at the penalty phase relative to preparing additional mitigating evidence. The trial court's rulings effectively denied Appellant a meaningful hearing on various justiciable issues in violation of Article I, Section 21, of the Florida Constitution guaranteeing the

right to access to courts. In addition, the trial court's denials deprived Appellant of due process, equal protection and other constitutional rights embodied in the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9, 16 and 17 of the Florida Constitution.

POINT XXVII

THE TRIAL COURT ERRED BY NOT DIRECTING A VERDICT RELATIVE TO A LIFE SENTENCE AS THE STATE DID NOT ESTABLISH A PRIMA FACIE JUSTIFYING THE IMPOSITION OF THE DEATH PENALTY.

The evidence presented by the State did not justify the imposition of the death penalty and the Court should have directed a verdict of life upon motion of the Appellant. Halliwell v. State, 323 So2d 557 (Fla. 1975); Tedder v. State, 322 So2d 908 (Fla. 1975); Lewis v. State, 377 So2d 640 (Fla. 1979); Alford v. State, 307 So2d 433 (Fla. 1975); Salvatore v. State, 366 So2d 745 (Fla. 1978); Sullivan v. State, 303 So2d 632 (Fla. 1974); Kampff v. State, 371 So2d 1007 (Fla. 1979); Buckrem v. State, 355 So2d 111 (Fla. 1974); Enmund v. Florida, supra; Eddings v. Oklahoma; supra; Lockett v. Ohio, supra.

POINT XVIII

THE TRIAL COURT ERRED BY NOT GRANTING A JUDGMENT OF ACQUITAL IN THAT THE EVIDENCE PRESENTED BY THE STATE WAS PURELY CIRCUMSTANTIAL AS TO PREMEDITATED MURDER AND SUCH EVIDENCE DID NOT EXCLUDE EVERY REASONABLE HYPOTHESIS OF INNOCENCE.

The trial court erred in denying Appellant's Motion for Acquital on the grounds set forth therein. It is axiomatic that circumstantial evidence cannot be sustained on appeal unless it is established that is inconsistent with any reasonable hypothesis of innocence. McArthur v. State, 398 So2d 168 (Fla. 1980); Cahudoin v. State, 362 So2d 398 (Fla. 2nd DCA 1978); Fisher v. State, 365 So2d 1055 (Fla. 4th DCA 1978); Sanders v. State, 344 So2d 876 (Fla. 4th DCA 1977); U.S. v. Haggins, 545 F. 2d 1009 (5th Cir. 1970); State v. Pinder, 366 So2d 38 (Fla. 2nd DCA 1978); State v. Savarino, 381 So2d 734 (Fla. 2nd DCA 1980).

The evidence presented in this matter as to premeditated murder was solely circumstantial. In fact, there was not even a suggestion of evidence that Appellant committed the act of premeditated murder by shooting the victim. Evidence submitted at trial indicated that the Appellant's co-defendants engaged in the actual shooting and stabbing of the victim and that Appellant was not actively involved in the actual killing of Frances Slater. Further, the state effectively conceded that Appellant was not guilty of premeditated murder by frequently and continually emphasizing the concept of felony/murder throughout the trial. (R 195).

A review of the record will establish that the evidence in this matter fails to exclude every reasonable hypothesis of innocence as it relates to premeditated murder consequently, the conviction as it relates to that theory must be reversed and a new trial granted. Ritter v. State, 390 So2d 168 (Fla. 5th DCA 1980); Dobey v. State, supra; McMillan v. U.S. 399 F2d 478 (5th Cir. 1968).

POINT XXIX

THE COURT ERRED IN DENYING APPELLANT'S MOTION TO PRECLUDE EXCLUSION OF MOTHERS WITH CHILDREN UNDER FIFTEEN YEARS OF AGE FROM BEING EXCUSED FROM JURY SERVICE.

Section 40.013(4), Florida Statutes, states as follows:

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

In Anthony v. Alachua County Court Executive and the Honorable Osee R. Fagan, (Fla. 1 DCA 1981, September 11, 1981, Florida Law Weekly), the Court declared the above-entitled Statute to be unconstitutional.

The trial court denied appellant his constitutional right to a jury composed of his peers; consequently, Appellant should be granted a new trial.

POINT XXX

THIS MATTER SHOULD BE REVERSED AND A NEW TRIAL GRANTED ON THE GROUNDS THAT FUNDAMENTAL ERROR WAS COMMITTED AT THE TRIAL COURT LEVEL AS A RESULT OF THE CUMULATIVE EFFECT OF THE VARIOUS ERRORS OUTLINED IN APPELLANT'S BRIEF.

Fundamental error was committed at the trial court level as a result of each and every point raised herein, the cumulative effect of the multitude of errors constitute fundamental error and prejudice to Appellant in violation of his right to a fair trial and other constitional rights embodied in the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution in Article I, Sections 2, 9, and 16 and 17 of the Florida Constitution. The cumulative effect of the various errors raised herein mandate a reversal and granting of a new trial consistent with the decisions in Dukes v. State, 356 So2d 873 (Fla. 1978); Perkins v. State, 349 So2d 776 (Fla. 2nd DCA 1977); Van Note v. State, 366 So2d 78 (Fla. 1978); Walker v. State, 403 So2d 1109 (Fla. 2nd DCA 1981).

POINT XXXI

SECTION 925.036 FLORIDA STATUTES, IS UNCONSTITUTIONAL IN THAT IT LACKS A RATIONAL BASIS FOR THE PURPOSE IN WHICH IT WAS ENACTED AND FURTHER VIOLATES THE DUE PROCESS AND EQUAL PROTECTION CLAUSE.

The above-referenced statute specifies a maximum amount of compensation for an Appellant attorney representing an indigent on appeal. Said section reads in pertinent part as follows:

> "...The compensation for representation shall not exceed the following...
> ...(e) For representation on appeal $2,000..."
> (s.925.036 Fla. Stat., 1981).
>
> "...This section does not allow stacking of the fee limits established by the Statute.
> (s925.036 Fla. Stat., 1981).

The statute authorizes compensation in the amount of Twenty-Five Hundred Dollars for indigents represented by appointed counsel on the trial level involving non-capital, non-life felonies. The same statute limits compensation to Three Thousand Dollars for representation of an indigent defendant in capital cases. Consequently, the Statute is not reasonably related nor has a rational basis for the purpose in which it was enacted. Specifically, said statute fails to reasonably compensate the Appellant's counsel for services rendered for appellate representation, thereby denying an indigent appellant due process and equal protection.

Said statute grossly fails to compensate the Appellant's attorney for services rendered relative to a murder conviction and, as in the case at hand, the imposition of death. An attorney who is engaged in the private practice of law is precluded from effectively, efficiently and adequately representing an indigent appellant in an appeal such as this since he cannot devote his full energies and time necessary for said representation. Said statute consequently violates due process

and equal protection clause of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and further violates an indigent appellant's right to effective assistance of counsel and fair trial guaranteed him by the Sixth Amendment to the United States Constitution. In addition, an indigent appellant's constitutional rights guaranteed in Article I, Sections II, IX, XVI and XVII of the Florida Constitution are violated as a result of this arbitrary and irrational statute.

CONCLUSION

It is respectfully submitted that the convictions be reversed and the death sentence imposed upon Appellant, ALPHONSO CAVE, be vacated for every and/or any of the arguments raised herein.

Respectfully submitted,

Saliba & McDonough, P.A.
Attorneys for Appellant
2121 14th Avenue
Post Office Box 1690
Vero Beach, Florida 32960
(305) 567-6111

BY _____
Wayne R. McDonough

BY _____
Richard J. Saliba

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Intial Brief of the Appellant has been forwarded by United States Mail this 14th day of June, 1984, to James P. McLane, Esquire, Office of the Attorney General, Regional Service Center, 111 Georgia Avenue, Room 204, West Palm Beach, Florida 33401.

Wayne R. McDonough
Attorney for Appellant
Saliba & McDonough, P.A.
2121 14th Avenue
Box 1690
Vero Beach, Florida 32960
(305) 567-6111