IN THE SUPREME COURT OF FLORIDA

PEDRO MEDINA,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 63,680

ON APPEAL FROM THE CIRCUIT COURT
OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

JIM SMITH
ATTORNEY GENERAL

EVELYN D. GOLDEN
ASSISTANT ATTORNEY GENERAL
125 N. Ridgewood Avenue
Fourth Floor
Daytona Beach, Fl 32014
(904) 252-1067

COUNSEL FOR APPELLEE

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ANSWER BRIEF OF APPELLEE

PRELIMINARY STATEMENT

Appellant was the defendant and appellee the prosecution in the Circuit Court of the Ninth Judicial Circuit of the State of Florida, in and for Orange County. In this brief, the parties will be referred to as they appear before this Honorable Court and as they appeared before the lower courts.

In this brief, the following symbols will be used:

"R" - Record on Appeal.

STATEMENT OF THE CASE AND FACTS

Appellee hereby accepts appellant's statement of the case and facts for the sole purpose of discussion of the points raised on appeal. Certain clarifications and additions will be presented where relevant in appellee's argument.

POINT ONE

THE TRIAL COURT DID NOT ERR IN DENYING THE DEFENDANT'S MOTION TO PRECLUDE CHALLENGE FOR CAUSE OF POTENTIAL JURORS.

ARGUMENT

Challenges for cause and peremptory challenges do not conflict with the constitutional right of the accused to trial by an "impartial jury." No one is guaranteed a partial jury. Such challenges generally are highly individualized not resulting in depriving the trial of an entire class or of various shades of community opinion or of the "subtle interplay of influence" of one juror on another. Ballard v. United States, 329 U.S. 197, 193, 67 S.Ct. 261, 264, 91 L.Ed. 181 (1946).

In Riley v State, 366 So.2d 19 (Fla. 1978), this Court held that defendants in bifurcated capital cases are not entitled to have on the jury that determines guilt or innocence jurors who are unalterably opposed to the death penalty because they represent a definable cross section of the community. See also, Spenkelink v. Wainwright, 578 F.2d 582, 593, 597 (5th Cir. 1978), cert. denied, 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed. 2d 796, reh. denied 441 U.S. 937, 99 S.Ct. 2064, 60 L.Ed. 2d 667 (1979).

This contention of appellant's was submitted to the United States Supreme Court in Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed. 2d 776 (1968), and the court

expressly declined to embrace it, stating:

> "We simply cannot conclude, either on the basis of the record now before us or as a matter of judicial notice, that the exclusion of jurors opposed to capital punishment results in an unrepresentative jury on the issue of guilt or substantially increases the risk of conviction."

Witherspoon v. Illinois, supra, 391 U.S. at 518, 88 S.Ct. at 1774-75.

Appellee would point out that challenges for cause are also available to a defendant who feels a potential juror is prosecution prone, and could properly have been struck for cause. E.g., Witherspoon v. Illinois, supra, 391 U.S. at 521, 88 S.Ct. at 1776, Fay v. New York, 332 U.S. 261, 294 67 S.Ct. 1613, 1630, 91 L.Ed. 2043 (1947); Glasser v. United, States, 315 U.S. 60, 83-87, 62 S.Ct. 457, 471-72, 86 L.Ed. 680 (1942). Fla. R. Crim. P. 3.300, 3.340.

This Court has held that:

> "Prospective jurors may be excused for cause if their opposition to the death penalty might interfere with their ability to decide guilt or innocence or would render them unable to consider the death penalty if a finding of guilt were reached."

Steinhorst v. State, 412 So.2d 332, 335 (Fla. 1982).

POINT TWO

THE TRIAL COURT DID NOT ERR IN DENYING THE DEFENDANT'S MOTION TO DECLARE SECTION 921.141 FLORIDA STATUTES UNCONSTITUTIONAL. SECTION 921.141 FLORIDA STATUTES IS CONSTITUTIONAL ON ITS FACE AND AS APPLIED.

ARGUMENT

Appellant suggests that the Florida capital sentencing scheme denies due process of law and constitutes cruel and unusual punishment on its face and as applied in violation of the Eighth and Fourteenth Amendments to the United States Constitution, as well as Article I,Sections 9 and 17 of the Florida Constitution. A review of the cases that he cites will serve to show that these contentions are without merit.

Appellant contends that the aggravating and mitigating circumstances as enumerated in Section 921.141 are impermissably vague and overbroad. In support of this contention, he sites Coker v. Georgia, 433 U.S. 584, 97 S. Ct. 2861, 53 L.Ed. 2d 982 (1977). Coker was sentenced to death for the rape of an adult woman. The Supreme Court reversed the sentence of death as cruel and unusual punishment. Such is not the facts of this case. This case involves the brutal stabbing murder of an adult woman who befriended the defendant. Appellee fails to see any relevance between the Georgia rape statute in Coker and the Florida death penalty in the instant case.

In Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), the United States Supreme Court reversed a death sentence based on Georgia law, citing Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 2967, 49 L.Ed. 2d 913 (1976) as a valid example of a capital sentencing scheme which provides "specific and detailed guidance."

Appellant further relies on Meeks v. State, 336 So.2d 1142 (Fla. 1976), who, like appellant brutally stabbed his victim, and inasmuch as this Court affirmed the death penalty in Meeks, so should this Court in the instant case.

Appellant's contention that the death penalty is automatic for certain crimes so as to amount to cruel and unusual punishment or violation of due process, is without merit. This Court in Menendez v. State, 419 So.2d 312 (Fla. 1982), rejected this argument as being without merit.

The Florida death penalty scheme, under which a trial judge weighs nine (9) aggravating factors against seven (7) mitigating factors to determine whether the death penalty shall be imposed, under which the trial judge focuses on the circumstances of the crime and the character of the individual, under which the court sets forth in writing its findings upon which the sentence of death is based, and under which there is automatic review by the Supreme Court of Florida is sufficient, on its face, to avoid constitutional deficiencies arising from arbitrary and capricious imposition of death penalty. Proffitt v. Florida, supra. The court also held that imposition of the death penalty is not cruel and unusual punishment.

The constitutionality of the Florida capital sentencing statute both as to due process arguments and cruel and unusual punishment arguments has repeatedly been upheld. Spenkelink v. Wainwright, 578 F.2d 582 (5th Cir. 1978) cert. denied, 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed. 2d 796 (1979); State v. Dixon, 283 So.2d 1 (Fla. 1973); Ford v. State, 374 So.2d 496 (Fla. 1979); Foster v. State, 369 So.2d 928 (Fla. 1979); Songer v. State, 365 So.2d 696 (Fla. 1978); Jackson v. State, 366 So.2d 752 (Fla. 1978); Raulerson v. State, 358 So.2d 826 (Fla. 1978); Gibson v. State, 351 So.2d 948 (Fla. 1977); McCaskill v. State, 344 So.2d 1276 (Fla. 1977); Meeks v. State, 364 So.2d 461 (Fla. 1978); Cooper v. State, 339 So.2d 1133 (Fla. 1976); Halliwell v. State, 323 So.2d 557 (Fla. 1975); McCrae v. State, 395 So.2d 1145 (Fla. 1980); Peek v. State, 395 So.2d 492 (Fla. 1981); Booker v. State, 397 So.2d 910 (Fla. 1981).

Therefore, this argument is without merit and the trial court correctly denied defendant/appellant's motion.

POINT THREE

THE TRIAL COURT DID NOT ERR IN DENYING DEFENDANT'S MOTION FOR EVIDENTIARY HEARING AND MOTION TO DECLARE FLORIDA STATUTE, SECTION 922.10 UNCONSTITUTIONAL.

ARGUMENT

Section 922.10 Florida Statutes, provides that a death sentence shall be executed by electrocution. Appellant contends that this statute is unconstitutional because it proscribes cruel and unusual punishment. This argument has been repeatedly rejected by this Court and the United States Supreme Court and is without merit. See Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed. 2d 859 (1976); Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 67 S.Ct. 374, 91 L.Ed. 422 (1947); Spenkelink v. Wainwright, supra; and Booker v. State, supra.

POINT FOUR

THE TRIAL JUDGE DID NOT ERR IN DENYING DEFENDANT'S MOTION FOR INDIVIDUAL VOIR DIRE AND SEQUESTRATION OF THE JURORS DURING VOIR DIRE; NOR DID HE ERR IN DENYING HIS REQUEST FOR SEQUESTRATION OF THE JURORS DURING TRIAL.

ARGUMENT

There is no authority for defendant/appellant's position that denial of a motion to sequester in a capital case is an automatic abuse of discretion. Rule 3.370(a), Florida Rules of Criminal Procedure, leaves the decision to the trial judge's discretion, and there is nothing about a capital case which makes a refusal to sequester a per se abuse of that discretion. Ford v. State, 374 So.2d 496, 499 (Fla. 1979), cert. denied, 445 U.S. 972, 100 S.Ct. 1666, 64 L.Ed. 2d 249 (1980).

Furthermore, the appellant has made no showing that there was such an abuse in the instant case. At trial, appellant's motion for individual voir dire and sequestration of the jurors during voir dire was supported only by the conclusions of defense counsel:

> MOTION FOR INDIVIDUAL VOIR DIRE AND SEQUESTRATION OF JURORS DURING VOIR DIRE.
>
> The Defendant, by and through his undersigned counsel moves this Court to allow counsel to voir dire the prospective jurors individually, separate and apart each from the

other and sequester the jurors from the courtroom during the voir dire in order to prevent the jury panel from hearing the questions being asked individual jurors. In support of his motion, Defendant states:

1. Emotionally charged and prejudicial publicity appeared in local papers describing the acts with which defendant is charged.
2. Collective voir dire of jurors in panels as to their familiarity with the crime, the victim or the probability of Defendant's guilt or innocence, will educate all jurors to prejudicial and incompetent material, thereby rendering it impossible to select a fair and impartial jury.
3. The issues in this case require that the voir dire include sensitive and potentially embarrassing questions exploring the prospective juror's bias or prejudice.
4. Collective voir dire of jurors in panels will preclude the candor and honesty on the part of the jurors which is necessary in order for counsel to intelligently exercise their peremptory challanges.
5. A collective voir dire will demonstrate to prospective jurors what the grounds are for excuses for cause. Therefore the court will never know if a juror's answers are truthful or expedient. (R 1559).

Likewise, appellant's request for sequestration of jury during trial was supported only by the conclusions of defense counsel.

REQUEST FOR SEQUESTRATION OF THE JURY DURING TRIAL.

COMES NOW the Defendant, PEDRO MEDINA, pursuant to Florida Rules

> of Criminal Procedure 3.370(a), and would move this Honorable Court to enter its Order directing the sequestration of the jury in the above styled cause during the course of this trial. As grounds therefore, the defense would state and allege as follows:
>
> 1. That this case may generate certain media coverage of the trial which would improperly influence the jury.
> 2. That justice would be best served if the jurors are sequestered and unable to see or hear any of the media coverage in this cause. (R 1801).

Moreover, defense counsel had an alternative to sequestration in Rule 3.240 Fla. R. Crim. P. which provides for a change of venue. If counsel was of the opinion that the defendant could not obtain a fair and impartial trial in Orange County due to adverse pre-trial publicity, the remedy is a change of venue, not sequestration of the venireman. Defense counsel never moved for a change of venue.

Nothing in the record suggests the existence of unfair or unduly pervasive media coverage of this trial or the events which preceded it. Absent such a showing, the trial judge's denial of Medina's motion to sequester, was correct. (R 913).

POINT FIVE

THE TRIAL COURT DID NOT ERR IN DENYING DEFENDANT'S MOTION FOR PRESENTENCE INVESTIGATION.

ARGUMENT

The appellant concedes that presentence investigation reports are not mandatory in death cases, but that since presentence reports were submitted in other cases, it was error to deny defendant's motion, and a new trial is required.

The appellee fails to see how the denial of a motion for a presentence investigation, which is not mandatory, requires reversal of the conviction and a new trial.

The trial judge was not required to grant defendant's motion for presentence investigation before sentencing defendant. Buford v. State, 403 So.2d 943 (1981). Hargrave v. State, 366 So.2d 1 (Fla. 1979), cert. denied, 444 U.S. 919, 100 S.Ct. 239, 62 L.Ed. 2d 176 (Fla. 1976); Thompson v. State, 328 So.2d 1 (Fla. 1976).

POINT SIX

THE TRIAL COURT DID NOT ERR IN DENYING THE DEFENDANT 'S MOTION TO DISMISS THE INDICTMENT OR TO DECLARE THAT DEATH IS NOT A POSSIBLE PENALTY.

ARGUMENT

The appellant contends that the aggravating circumstances are essential facts constituting any capital offense and must be alleged in the indictment to confer jurisdiction on the trial court to impose a sentence of death. Additionally, appellant contends that the aggravating circumstances must be alleged in the indictment to notice the defendant that death is a possible penalty.

This argument has been repeatedly rejected by this Court. Appellee would incorporate its argument in Point Seven herein and maintains that an indictment charging first degree murder, sufficiently puts the defendant on notice that the possible penalty is death. Furthermore, the defendant had to know that death was a possible penalty, since he asked the court to declare that it was not a possible penalty.

Additionally, this Court in State v. Dixon, 283 So.2d 1, 9 (Fla. 1973) stated that the aggravating circumstances represent situations wherein the death penalty has been determined by the Legislature to be applicable. This Court never stated that the enumerated aggravating circumstances were essential elements of each capital offense,

that must be pleaded and proved. Therefore, the trial court correctly denied defendant's motion. Sireci v. State, 399 So.2d 964 (Fla. 1981).

POINT SEVEN

THE TRIAL COURT DID NOT ERR IN DENYING DEFENDANT'S MOTION FOR STATEMENT OF AGGRAVATING CIRCUMSTANCES.

ARGUMENT

There is no merit in Medina's contention that the State should have been required to provide defense counsel with advance notice of the aggravating factors on which it intended to rely. See Spinkellink v. Wainwright, 578 F.2d 582, 609 (5th Cir. 1978), Menendez v. State, 368 So.2d 1278, 1282 N.21 (Fla. 1979). As for Appellant's contention that he had no notice of the aggravating circumstances which the State would rely or which the trial court would consider, we need only point to Section 921.141(5) Fla. Stat. Ann., which defines the aggravating circumstances that may be considered by both judge and jury.

Unlike the Georgia statute, there is no requirement in the Florida statute that the State provide the defendant with a statement of aggravating circumstances. See Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 2920, 49 L.Ed.2d 859 (1976). Therefore, the trial court did not err in denying defendant/appellant's motion for statement of aggravating circumstances. Ruffin v. State, 397 So.2d 277 (Fla. 1981).

POINT EIGHT

THE TRIAL COURT DID NOT ERR IN DENYING DEFENDANT'S MOTION FOR VOIR DIRE OF THE GRAND JURORS.

ARGUMENT

The grand jury panel may by statute in Florida be challenged "only on the ground that the grand jurors were not selected according to law." Section 905.03, Fla. Stat. (1983). A challenge or objection to the grand jury may not be made after it has been impaneled and sworn. Section 905.05, Fla. Stat. Appellant's motion was filed on July 23, 1982 (R 1569). The indictment was returned on June 14, 1982. Therefore, defendant/appellant's motion was too late to challenge the grand jury, and was correctly denied. Seay v. State, 286 So.2d 532 (Fla. 1973).

POINT NINE

THE TRIAL COURT DID NOT ERR IN DENYING DEFENDANT'S MOTION FOR DISCHARGE.

ARGUMENT

Defendant/appellant was arrested on April 16, 1982, for first degree murder (R 1510). An indictment was handed down on June 14, 1982, (R 1518). On June 16, 1982, after arraignment, the public defender was appointed to represent the defendant (R 1523).

On August 17, 1982, the public defender moved to withdraw as counsel for defendant Medina, inasmuch as he had represented a State's witness, Reinaldo Dorta; and to continue to represent the defendant Medina, would be a conflict or interest (R 1588). The court granted this motion on August 26, 1982 (R 1594).

On August 31, 1982, a joint notice of appearance was filed by defendant's attorneys (R 1598). Trial was scheduled to begin on August 31, 1982 (R 1600). The State announced that it was ready to go to trial. Defense counsel declined to move for a continuance, announcing that the public Defender had been allowed to withdraw, and they were appointed on August 26, 1982; and requested an additional sixty (60) to ninety (90) days to file additional motions and take discovery depositions of witnesses which had not been taken by the public defender (R 1600).

The court, prior to defendant's motion for

discharge, had found that this delay in the defendant's trial was not attributable to the prosecution nor to the court, but due to a conflict of interest in the public defender's office. The court found that neither the public defender or newly appointed counsel were adequately prepared for trial on August 30, 1982 (R 1600). Consequently, the court charged the continuance to the defendant and held that a waiver of the one hundred eighty (180) day speedy trial rule had occurred; or at the very least, that speedy trial should be and thereby was extended an additional ninety (90) days to and including December 1, 1982, because of exigent circumstances (R 1600).

On October 29, 1982, defendant filed a motion for discharge. On October 27, 1982, and October 28, 1982, defense counsel filed notices of taking depositions to occur on November 4, 1982, and November 5, 1982 (R 1655, 1664). Additionally, on October 28, 1982, defense counsel filed a motion for psychiatric examination (R 1668). On November 5, 1982, a hearing was held on the motion (R 890).

The trial court found that (1) defense counsel was still not prepared for trial at the time of the hearing on his motion, in that there was one more witness to be deposed; (2) that defense counsel had a pending motion for psychiatric evaluation (which was heard immediately after the hearing on the motion to discharge and granted) which constitutes an exceptional circumstance under Rule 3.191(d)(2) Fla.R.Crim.P. and (3) defense counsel could have filed a written demand for speedy trial after the continuance of September 1, 1982, but did not choose to do so (R 1678).

It is interesting to note that counsel for appellant has cited no case law in support of his position that his motion for discharge should have been granted.

The delay in bringing defendant/appellant to trial was attributable to exceptional circumstance wherein the public defender, a few weeks before trial, had to withdraw due to a conflict of interest. This court, under similar facts, has found that it is a conflict to represent a defendant when an adverse witness is also a client. See Jennings v. State, 413 So.2d 24 (Fla. 1982). Failure to allow the public defender to withdraw would have resulted in the denial of a fair trial to the defendant. Jennings, supra.

Under Rule 3.191(f), Fla. R. Crim. P., exceptional circumstances are those which as a matter of substantial justice to the accused or the State or both require an order by the court; Such circumstances include (4) a showing by the accused or the State of necessity for delay grounded on developments which could not have been anticipated and which will materially affect the trial. It could not be anticipated that the public defender would have a conflict of interest that would not be timely discovered.

Additionally, under Rule 3.191(d)(2)(iv) Fla. R. Crim.P. the time may be extended by written or recorded order of the court for a period of reasonable and necessary delay resulting from proceedings including but not limited to an examination and hearing to determine the mental competency

or physical ability of the defendant to stand trial, for hearings on pre-trial motions, ... et al.

The appellee contends that because the continuance occasioned by the withdrawal of the public defender and request from newly appointed counsel for sixty (60) to ninety (90) days to prepare for trial, was a continuance charged to the defense, that the one hundred eighty (180) day speedy trial rule was not applicable. See Butterworth v. Fluellen, 389 So.2d 968 (Fla. 1980). Thereafter defendant was entitled to constitutional speedy trial rights. The defendant/appellant was not prejudiced by the delay in that he still was conducting discovery and a motion to determine his competency was still pending. Therefore, the trial court correctly denied defendant's motion for discharge. See State v. Nieman, 433 So.2d 572 (Fla. 3rd DCA 1983). Compare, Ehn v. Smith, 426 So.2d 570 (Fla. 5th DCA 1983) [withdrawal of defense counsel where no specific trial date was set; substitute counsel appointed on same date of withdrawal; no period of extension was stated; and none of the other grounds for extension as enumerated in 3.191(d)(2) of the rule were present].

POINT TEN

THE TRIAL COURT DID NOT ERR IN DENYING DEFENDANT'S MOTIONS IN LIMINE REQUESTING THE COURT TO PROHIBIT THE STATE FROM QUESTIONING PROSPECTIVE JURORS ABOUT THEIR ATTITUDES TOWARD CAPITAL PUNISHMENT.

ARGUMENT

The trial court correctly denied appellant's motions in limine. Section 913.13, Fla. Stat. (1983) provides that:

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

There is no way to qualify a juror in a capital case without ascertaining whether a juror could discharge their obligation should the evidence warrant it.

In Witherspoon v. Illinois, the court specifically recognized that the State may well have the power to exclude jurors on grounds more narrowly drawn:

> [N]othing we say today bears upon the power of a State to execute a defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who made [it] 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.

Id. at 522-523, N.21, 88 S.Ct. at 1777 (emphasis in original).

This statement seems clearly designed to accommodate the State's legitimate interest in obtaining jurors who could follow their instructions and obey their oaths.

The questions asked of prospective jurors clearly comported with the United States Supreme Court decisions in Witherspoon, Lockett v. Ohio, 438 U.S. 586, 595-596, 98 S.Ct. 2954, 2960, 57 L.Ed. 2d 973 (1978); and Adams v. Texas, 448 U.S. 38, 45, 100 S.Ct. 2521, 2526, 65 L.Ed. 2d 581 (1980). (See R 26-28). Therefore, the trial court did not err in denying defendant's motions in limine.

POINT ELEVEN

THE TRIAL COURT DID NOT ERR IN DENYING IN PART DEFENDANT'S MOTION FOR DISCLOSURE OF RECORDS OF PRIOR CONVICTIONS OF SEVERAL NON LAW ENFORCEMENT STATE'S WITNESS.

ARGUMENT

The record indicates that the trial court granted in part defendant's motion (R 919). The court ordered the state to disclose any information, by letter, from his files and records, which contain the prior convictions of the witnesses (R 919). The court ruled that absent a further showing by the defense that the information is unavailable, the court was not inclined to order the prosecutor to do anything further (R 919).

The appellant had obtained the information regarding the prior records of Michael White, Reinaldo Dorta, and Gracie Moore at the time of the hearing (R 915). He had deposed all but Margaret Moore who resided out of state (R 915).

In the instant case, the order of the trial court granting appellant's motion in part, fully complies with this Court's decision in State v. Coney, 294 So.2d 82 (Fla. 1973) reh. granted 294 So.2d 87 (Fla. 1974), requiring the state to disclose criminal records in the physical possession of the state prosecutorial or law enforcement office.

The court reaffirmed its decision in State v. Crawford, 257 So.2d 838 (Fla. 1972) requiring the prosecuting attorney to secure the information only upon a showing

by defense counsel that he has first exerted his own efforts and resources; and has pursued and concluded other available means and remedies available to him to obtain such information. Id. The prosecuting attorney is not required to actively assist defendant's attorney in the investigation of the case. Crawford, supra, 294 So.2d. Coney, at 87.

POINT TWELVE

THE TRIAL COURT DID NOT ERR IN DENYING DEFENDANT'S REQUEST FOR AN ADDITIONAL PSYCHIATRIC EXAMINATION OF DEFENDANT.

ARGUMENT

Rule 3.210(b), Fla. R. Crim. P. provides that:

> (b) If before or during the trial the court of its own motion, or upon motion of counsel for the defendant or for the State, has reasonable ground to believe that the defendant is not mentally competent to stand trial, the court shall immediately enter its order setting a time for a hearing to determine the defendant's mental condition, which shall be held no later than 20 days after the date of the filing of the motion, and shall order the defendant to be examined by no more than three nor fewer than two experts prior to the date of said hearing. Attorneys for the State and the defendant may be present at the examination.

Pursuant to the Rule, the trial court ordered an examination of defendant/appellant upon defense counsel's motion. The two (2) experts concluded after an examination of the defendant that he was competent to stand trial. Upon defense counsel's motion for an additional expert, the trial court denied the motion inasmuch as both experts reached the same conclusion about defendant's mental condition (R 914). Had there been a split of opinions, the trial court would have ordered an additional examination by a third expert (R 914). The appellee maintains that the

ruling of the trial court was correct. Compare, Chapman v. State, 391 So.2d 744 (Fla. 5th DCA 1980) [court appointed four experts due to split opinions regarding defendant's competency; one more than required under the rules].

POINT THIRTEEN

THE TRIAL COURT DID NOT ERR IN DENYING DEFENDANT'S MOTION TO VACATE DEATH PENALTY.

ARGUMENT

Defendant/appellant maintains that Section 921.141, Florida Statutes (1981) is unconstitutional in that this Court has not adopted the procedure outlined in the statute as a rule of this Court. Appellee would point out that appellant has apparently overlooked, The Florida Bar re: Florida Rules of Criminal Procedure, 343 So.2d 1247, 1263 (Fla. 1977) wherein this Court adopted Rule 3.780, Fla. R. Crim. P. governing Sentencing Hearings in Capital Cases; which was designed to create a uniform procedure to be followed, which was consistent with Section 921.141, Fla. Stat.

The constitutionality of Section 921.141, Fla. Stat. has been repeatedly upheld and does not violate the requirements of Article V, Section 2(a) Florida Constitution, by attempting to govern practice and procedure. See Dobbert v. State, 375 So.2d 1069 (Fla. 1979), cert. denied, 447 U.S. 912, 100 S.Ct. 3000, 64 L.Ed. 2d 862 (1980); Smith v. State, 407 So.2d 894 (Fla. 1981), and Vaught v. State, 410 So.2d 147 (Fla. 1982).

Accordingly, the order denying defendant's motion was proper.

POINT FOURTEEN

THE TRIAL COURT DID NOT ERR IN DENYING DEFENDANT'S MOTION TO SUPPRESS THE ARREST OF THE DEFENDANT AND SUBSEQUENT SEIZURE OF PHYSICAL EVIDENCE FROM THE CADILLAC FOLLOWING HIS ARREST BY THE FLORIDA HIGHWAY PATROL.

ARGUMENT

The Florida Highway Patrolman, Trooper Wilson, had probable cause to arrest appellant. Trooper Wilson testified at the suppression hearing that he observed appellant, apparently asleep, in the driver's seat of a green over white Cadillac, parked in a rest area (R 322-323). The car was running and there appeared to be a gas leak. The trooper radioed his station and advised that he would be checking the driver to ascertain his physical condition (R 322-323). However, before he reached the front of his car, the station radioed that the car he had called in was possibly used in a homicide (R 323). Trooper Wilson waited for back-up and proceeded to arrest the appellant (R 324). Following the arrest, the trooper searched the car, incident to the arrest; and found a buck knife with a wood color handle underneath a hub cap in the back right floorboard of the vehicle, (R 337) and two tags in the trunk and keys with the initial "D" (R 441-443).

The trial court found that the defendant, Medina, did not have standing to complain of the search of the car; finding that he did not have permission of the owner and in fact that he had stolen the car (R 354). Appellant concedes

that he had no standing to object to the search of the car (See initial brief of appellant p.54 line 6), but maintains nevertheless that the search was the product of an illegal arrest not based on probable cause, and therefore, should have been suppressed.

Appellant's argument is without merit. See, Rawlings v. Kentucky, 448 U.S. 98, 100 S.Ct. 2556, 65 L. Ed. 2d 633 (1980).

Appellant's reliance upon State v. Rogers, 427 So.2d 286 (Fla. 1st DCA 1983) is misplaced. Rogers was arrested for murder. The appellant was arrested for auto theft. In light of appellant's lies about ownershop of the car, the officers, in light of their knowledge, were justified in their belief that appellant was not the owner or an authorized user of the car.

Probable cause for an arrest is formulated when reasonably trustworthy facts and circumstances are within the knowledge of the arresting officer to warrant a man of reasonable caution in the belief that an offense has been or is being committed. Draper v. United States, 358 U.S. 307, 313, 79 S.Ct. 329, 3 L.Ed.2d 327 (1964). And where there is at least minimal communication between different officers, we [this court] look to the "collective knowledge" of the officers in determining probable cause. United States v. Vasquez, 534 F.2d 1142, 1145, (5th Cir. 1976) cert. denied, 429 U.S. 979, 97 S.Ct. 489, 50 L.Ed. 2d 587 (1976). A showing of probable cause requires much

less evidence than a finding of guilt. United States v. Beck, 431 F.2d 536, 538 (5th Cir. 1970). Probable cause must be judged not with the logic of cold steel, but with a common sense view to the realities of everyday life. Brinegar v. United States, 338 U.S. 160, 175, 69 S.Ct. 1302, 1310, 93 L.Ed. 1879, 1890 (1949).

The search of the car and subsequent seizure of the knife, tags, keys, etc. was justified as incident to a valid arrest. Chimel v. California, 395 U.S. 752, 89 S. Ct. 2034, 23 L.Ed. 2d 685 (1969); United States v. Agostino, 608 F.2d 1035 (5th Cir. 1979); and New York v. Belton, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed. 2d 768 (1981).

POINT FIFTEEN

THE TRIAL COURT DID NOT ERR IN DENYING DEFENDANT'S MOTION IN LIMINE REGARDING TROOPERS HULL AND WILSON'S TESTIMONY OF THE FACTS SURROUNDING DEFENDANT'S ARREST IN COLUMBIA COUNTY.

ARGUMENT

The trial court found that the troopers' testimony was admissible because (a) defense counsel had deposed the officers; (b) that defendant was on trial for auto theft along with the murder case and was part and parcel; (c) that any resistance to arrest on that charge would be an appropriate part of that case (R 906).

The fact and place of perpetration are ingredients of a crime and are germane to proof required for conviction. Tompkins v. State, 386 So.2d 597,599 (Fla. 5th DCA 1980). Appellant's arrest for auto theft and his resistance to arrest on that charge, are part and parcel of the trial in that part of the case. The evidence was not similar fact evidence because appellant was on trial for auto theft; and testimony regarding his resistance to arrest was unavoidable in that it was impossible to give a complete or intelligent account of the crime charged (auto theft) without referring to the other crime (resisting arrest and battery on a law enforcement officer). Tompkins, supra.

The court's inquiry regarding the alleged violation of the notice requirements of section 90.404, Florida Statutes, was sufficient. There was no violation of this court's decision regarding discovery in Richardson v. State, 246 So.2d

771 (Fla. 1971) in that there was no discovery violation. Defense counsel had deposed the troopers and was fully aware of the facts regarding defendant's resistance to arrest (R 906). Accordingly, the trial court correctly denied defendant's motion.

POINT SIXTEEN

THE TRIAL COURT DID NOT ERR IN DENYING DEFENDANT'S MOTION TO SUPPRESS ADMISSIONS AND STATEMENTS MADE BY THE DEFENDANT TO DETECTIVES PAYNE AND NAZARCHUCK OF THE ORANGE COUNTY SHERIFF'S OFFICE.

ARGUMENT

The defendant never asked for an interpreter or explained that he didn't understand Detective Nazarchuck's questions (R 205). The defendant understood his rights and spoke English to Detective Nazarchuck (R 200).

During the taped conversation, after his rights were explained to him Detective Nazarchuck asked him if he wanted to talk at this time (R 201). The defendant answered, "No." (R 201). Detective Nazarchuck sought to clarify the answer because he didn't know if the defendant meant he didn't want to talk at that time, or no, he didn't have any problems talking to us (R 206). After clarifying the defendant answered, "Well, I want to tell you something." (R 201). The defendant never indicated that he wanted to stop to have an attorney, or discontinue making a statement (R 202).

Defendant/appellant argues that his arrest in Columbia County was illegal and therefore his statements should have been suppressed. Appellant does not challenge the voluntariness of the statement, the taped statements; or the verbal statement preceding the taped statement (R 309).

He only contends that his statements were the product of an illegal arrest and should have been suppressed.

Initially, appellee would point out that appellant's statement was primarily exculpatory. His arrest was based on probable cause and therefore was not illegal. United States v. Vasquez, 534 F.2d 1142, 1145 (5th Cir. 1976).

The issue of the voluntariness of the statement was never raised by the court below. Therefore, it is waived. In the absence of fundamental error, this court cannot consider an issue raised for the first time on appeal. Steinhorst v. State, 412 So.2d 332 (Fla. 1982).

The ruling of the trial court on a motion to suppress, when it comes to the reviewing court, is clothed with the presumption of correctness, and the reviewing court will interpret the evidence and reasonable inferences and deductions derived therefrom in a manner most favorable to sustain the trial court's ruling. McNamara v. State, 357 So.2d 410, 412 (Fla. 1978). Therefore, this Court should affirm the ruling of the trial court.

POINT SEVENTEEN

THE TRIAL COURT DID NOT ERR IN DENYING DEFENDANT'S MOTION FOR SEVERANCE.

ARGUMENT

Appellant, acknowledging the great measure of discretion accorded trial judges on the question of severance, but maintains that the only evidence linking defendant with the murder was the fact that he was found in the victim's car, and therefore, was prejudiced.

Appellee maintains that the auto theft was part and parcel of the murder. Since appellant received mail at the victim's residence, he would eventually have been questioned about the victim's death. But the test for severance is not whether this Court might have granted severance, but whether the trial court abused its discretion. Menendez v. State, 368 So.2d 1278 (Fla. 1979).

Additionally, appellee would point out that some evidence relevant to the grand theft charge were admissible at the trial on the murder charge, and therefore, the trial judge did not abuse its discretion in denying the motion for severance and that the consolidation of the offenses did not prejudice Medina's right to a fair trial. See Clark v. State, 379 So.2d 97, 103 (Fla. 1979); Zeigler v. State, 402 So.2d 365 (Fla. 1981).

POINT EIGHTEEN

THE TRIAL COURT DID NOT ERR IN DENYING DEFENDANT'S MOTION IN LIMINE WITH RESPECT TO JAMES McNAMARA'S TESTIMONY REGARDING THE RESULTS OF THE TEST PERFORMED ON THE KNIFE FOUND IN THE CAR.

ARGUMENT

The trial court was correct in ruling that the test results were relevant to the issues at trial and therefore were admissible. The results went to the issue of whether or not the knife in question was the murder weapon. The defendant's objection went to the weight to be given the evidence due to the inconclusiveness of the results.

Appellant has cited no authority for his position, and appellee contends that there is no authority for his position. The weight to be given the evidence is a question of fact for the jury to decide. Tibbs v. State, 397 So.2d 1120 (Fla. 1981), affirmed, 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed. 2d 652 (1982). Accordingly, the trial court properly denied defendant's motion.

POINT NINETEEN

THE TRIAL COURT DID NOT ERR IN DENYING DEFENDANT'S MOTION IN LIMINE REGARDING THE TESTIMONY OF TWO ORANGE COUNTY CORRECTIONAL OFFICER'S TESTIMONY ABOUT DEFENDANT'S ESCAPE ATTEMPT FROM THEIR CUSTODY.

ARGUMENT

While conceding that the Williams Rule allows the use of collateral crimes to show escape, appellant contends that in this case evidence of escape should not have been introduced since the defendant had been involved in other criminal activity between the time of the murder and the time of the escape attempt.

This court should reject appellant's argument. "When a suspected person in any manner attempts to escape or evade a threatened prosecution by flight, concealment, resistance to lawful arrest, or other indications after the fact of a desire to evade prosecution, such fact is admissible, being relevant to the consciousness of guilt which may be inferred from such circumstances." Straight v. State, 397 So.2d 903, 908 (Fla. 1981), cert. denied, 454 U.S. 1022, 102 S.Ct. 556, 70 L.Ed. 2d 418 (1981). The evidence of appellant's escape attempt was relevant to the issue of his guilty knowledge and thereby to the issue of guilt. This evidence was probative of his mental state at the time and was properly admitted. Id.

POINT TWENTY

THE TRIAL COURT DID NOT ERR IN DENYING DEFENDANT'S MOTION FOR MISTRIAL REGARDING THE SHACKLING AND HANDCUFFING OF DEFENDANT DURING TRIAL.

ARGUMENT

The record indicates that prior to voir dire examination by counsel for the defense, the defendant/appellant was making a good number of comments and acting in such a manner that required that he be handcuffed or placed in ' restraints while a couple of panel members were going out of the back door during a recess (R 68). The panel had already been excused to return to the central panel room (R 58). Thereafter the court attempted to explain that now counsel for Mr. Medina would have an opportunity to voir dire or select the jury (R 59). The appellant began a discussion with the court wherein the court instructed him that he should speak to the court through his attorneys unless the court expressly directs a question or expressly talks to Mr. Medina first. Thereafter appellant lost his temper and had to be placed in handcuffs. Mr. Medina talking loudly expressed his anger at being in jail for a year and at the amount of time assigned to try his case (R 64-66). At that time defense counsel moved for a mistrial while acknowledging that the actions of the defendant were not grounds for mistrail, even though the jury had heard a good number of defendant's comments, that he would ask the court to not require that his client be handcuffed in front of the jury

panel (R 68). The court noted that the jury was practically out of the back door when the restraints were placed on Mr. Medina (R 68). The court denied the defendant's motion (R 59). Thereafter prior to voir dire by the defense, the handcuffs were removed and the defendant was placed at the defendant's table (R 72). The court admonished appellant to hold his anger (R 72).

On the second day of trial, Lieutenant Mead and Sergeant Whitted informed the court that as the bailiffs arrived to transport Mr. Medina to court there was some loud banging on the walls, hollering, and Sergeant Whitted and Lieutenant Mead went to see what the problem was. Mr. Medina had torn the light fixture out of the ceiling of the holding cell (R 228). He was very loud, boisterous, and hostile. The officers attempted to calm him down but to no avail. They had to place him in handcuffs, remove him from the holding cell, and place him into another cell. Thereafter, it became necessary to put leg irons on Mr. Medina because he was kicking and just raising sand in general (R 228). Mr. Mead testified that Mr. Medina was very unpredictable and had been that way for the past several months (R 228-229). That Mr. Medina had been in several fights and had to be moved and had been in nearly every cell in the jail (R 229). The officer further testifed that it had become necessary to keep Mr. Medina isolated from the population (R 229). Sergeant Whitted testified that Mr. Medina was real hyper and a hostile inmate (R 229). Sergeant Whitted stated that

no matter what you do to him he still won't calm down. Handcuffed or leg irons, it still won't get his attention. For a while it would while you had him chained up but he goes and come all the time (R 229-230). In response to questions from defense counsel, Mr. Edwards, who asked does he go off on these tangents for no apparent reason; Lieutenant Mead responded that the least little thing agitates him and sets him off to become very violent (R 231). The chief bailiff recommended that due to Mr. Medina's history of escape and given a layout of the courtroom, that he highly suggested that Mr. Medina not be brought into the courtroom unsecured again (R 232). Upon the return of Mrs. Rodriquez, she informed the court that Mr. Medina was still agitated and she would compare his present status to that of yesterday morning (R 239). She declined to assure the court that Mr. Medina would remain calm and behave (R 239). The court instructed the bailiffs and jailors to put the belly belt and leg brace on underneath a jumpsuit that Mr. Medina was wearing (R 239). Defense counsel objected to the shackling due to the inference that the jury would draw from such shackling (R 240). The court informed counsel that he overruled that objection inasmuch as the jury would be unable to see the leg brace (R 240). The court instructed defense counsel to instruct his client to keep his hands folded in his lap down behind counsel's table, and if there were any disruptions that he was going to be removed from the courtroom and that the trial would proceed without him (R 240). The court

reiterated that it's a question of security and the defendant's right to be present; and that the court would have to balance it in that fashion (R 240).

Thereafter, on approximately the third day of trial counsel for the defendant moved for a mistrial due to the fact that the defendant was shackled before the jury. Defense counsel argued that there was no indication in the defendant's behavior on that date that indicated that shackling was required. Defense counsel argued that a mistrial should be granted in that the inference drawn by the jury could only be negative and prejudicial to the defendant (R 469). The court reiterated its reasons for the shackling stating that due to the misconduct of the defendant in his cell, which was fully explored on the record, and based on sworn testimony of officers, that the court felt that it was necessary for security precautions. Therefore, the motion was denied (R 469).

Appellant asserts that his appearance before the jury in leg irons lead to prejudice in the jury's mind. Cases which concern such prejudice deal with the adverse effects that such restraints have upon the accused presumption of innocence. See Kennedy v. Cardwell, 487 F.2d 101, 104 (6th Cir. 1973), cert. denied, 416 U.S. 959, 94 S.Ct. (1976), 40 L.Ed. 2d 310 (1974). Appellant had already informed the jury that he had been in jail for a year. Therefore, any inference that could be drawn or any prejudice caused by the restraints, was as a result of the defendant's outbursts. In Illinois v. Allen, 397 U.S. 337, 90 S.Ct. 1057, (1970),

the United States Supreme Court was faced with the question of whether an accused can claim the benefit of the constitional right to remain in the courtroom while at the same time he engages in speech and conduct which is so noisy, disorderly, and disruptive that it is exceedingly difficult or wholly impossible to carry on a trial. The court in Illinois v. Allen, stated that:

> It is essential to the proper administration of criminal justice that dignity, order, and decorum be the hallmarks of all court proceedings in our country. The flagrant disregard in the courtroom of elementary standards of proper conduct should not and can not be tolerated. We belive trial judges confronted with disruptive, contumacious, stubbornly defiant defendants must be given sufficient discretion to meet the circumstances of each case. No one formula for maintaining the appropriate courtroom atmosphere will be best in all situations.

Id. at 397, U.S. 344, 90 S.Ct. at 1061.

Clearly,such restraints are within the sound discretion of the court. See Elledge v. State, 408 So.2d 1021 (Fla. 1981).

Defendants accused of crimes are, of course, entitled to physical indicia of innocence in their jury trials. However, brief and inadvertent exposure to jurors of defendants' handcuffs is not so inherently prejudicial as to require a mistrial, and defendants bear the burden of affirmatively demonstrating prejudice. Wright v. Texas, 533 F.2d 185, 187 (5th Cir. 1976). The defendant has made no showing of

actual prejudice, nor should this court assume any from the circumstances surrounding the isolated incident in which the jury observed the appellant in handcuffs. The defendant failed to request examination of jurors in order to determine who had seen the defendant in shackles or to exclude those whose impartiality might be affected. See Wright v. Texas, 533 F.2d at 187. Neither was any request made for a cautionary instruction. The trial court was clearly not in error for denying the motions for mistrial. See United States v. Diecidue, 603 F.2d 535, 549-550 (5th Cir. 1979).

POINT TWENTY-ONE

THE TRIAL COURT DID NOT UNDULY RESTRICT THE CROSS-EXAMINATION OF STATE'S WITNESS REINALDO DORTA BY THE DEFENSE.

ARGUMENT

Reinaldo Dorta, a witness for the state, testified that the appellant came by his apartment on the night of April 3rd, 1982 (R 368). He testified that the defendant Medina had a cap on and he identified the hat in the photograph C as the hat he had seen on the defendant's head (R 369). On cross-examination defense counsel in an attempt to impeach Mr. Dorta's testimony, defense counsel asked Mr. Dorta "Isn't it a fact that the hat that you saw on Pedro Medina's head was a red hat?" The witness answered "No."(R 373) Defense counsel then sought to impeach Mr. Dorta with his deposition wherein he stated that the hat was sort of a red color on Pedro's head (R 374). The State objected on the basis that they were not present when deposition was taken, that he did not stipulate to the qualifications of the translator, and that the State had another sworn statement in which Mr. Dorta had testified as to the color of the hat (R 374-376). The court disallowed the transcript of the preliminary hearing in which Mr. Dorta had identified the color of the hat as a tan hat and disallowed the transcript of Mr. Dorta's deposition in which he said the hat was sort of red (R 385).

In the state's direct examination of Mr. Dorta, the color of the hat was never brought out. Dorta simply identified the hat in the photograph as the hat that he had seen on Mr. Medina's head. Therefore the question regarding the color of the

hat was beyond the scope of direct examination and the court properly sustained the objection. Appellee maintains that the scope of cross-examination and control thereof is within the discretion of the trial court and absent any abuse of discretion, this Court should not disturb the trial court's evidentiary ruling. Maggard v. State, 399 So.2d 973, 975 (Fla. 1981); Mikenas v. State, 367 So.2d 606 (Fla. 1978); Hoy v. State, 353 So.2d 826 (Fla. 1977), cert. denied, 439 U.S. 920, 99 S.Ct. 293, 58 L.Ed.2d 265 (1978).

POINT TWENTY TWO

THE TRIAL COURT DID NOT ERR IN DENYING DEFENDANT'S MOTIONS FOR MISTRIAL FOLLOWING MICHAEL WHITE'S STATEMENTS THAT DEFENDANT HAD STABBED HIM: AND IN DENYING THE DEFENDANT'S REQUEST TO MAKE INQUIRY OF JUROR CODY AS TO WHETHER OTHER JURORS HAD BEEN SIMILARLY AFFECTED BY MICHAEL WHITE'S OUTBURST.

ARGUMENT

Initially, appellee contends that Michael White's testimony regarding being stabbed by the defendant, was not solicited by the prosecutor. His answer was unresponsive in that he could have answered, he saw the knife as he was holding the door open. Nevertheless, the volunteered testimony was not legally prejudicial because it was properly admissible.

It is true that similar fact evidence got before the jury not because the State intended to offer it but because the witness volunteered it. Appellee submits that White's testimony, if believed, was probative to several relevant factual issues involved in the underlying trial, including whether the defendant had a knife at the time and place in question, that fit the description of the knife seized from the car by Troopers Wilson and Hull. Additionally, the testimony was relevant to appellant's state of mind shortly after the crime and possibly as to Medina's consciousness of guilt that Michael White would find out that the car was stolen. See State v.

Baker, 441 So.2d 1102 (Fla. 5th DCA 1983.

Michael White was the last witness to testify for the State. The jury was carefully admonished by the court. Only juror Cody appeared to be unable to follow the court's admonition. He was promptly and properly discharged; and an inquiry of the remaining jurors was not necessary. Removal of the juror and substitution of the alternate was not an abuse of discretion. Orosz v. State, 389 So.2d 1199 (Fla. 1st DCA 1980).

The testimony regarding defendant's commission of other crimes was relevant to other issues and not simply to show defendant's propensity to commit a crime. Therefore, it was admissible, even though, unsolicited and unresponsive to the question. Williams v. State, 110 So.2d 654 (Fla. 1959). See also Shriner v. State, 386 So.2d 525 (1980), cert. denied, 449 U.S. 1103, 101 S.Ct. 899, 66 L.Ed. 2d 829 (1981).

POINT TWENTY-THREE

THE TRIAL COURT DID NOT UNDULY RESTRICT THE CROSS-EXAMINATION OF STATE'S WITNESS MICHAEL WHITE BY THE DEFENSE.

ARGUMENT

Appellant sought to delve into an area and explore certain evidence that he had previously objected to when Michael White blurted out the fact that the defendant had stabbed him. The witness in question was called primarily to identify a knife that was found in the victim's car which was driven by appellant; and to identify appellant as the driver of the victim's car. Michael White inadvertently blurted out that appellant had stabbed him with a knife. On cross-examination defense counsel sought to explore this area in order to negate any negative inferences that were raised by Mr. White's testimony. The court informed defense counsel that should he proceed in this area of questioning that the State would be allowed to inquire regardless of the court's previous rulings.

Appellant contends that this court's ruling unduly restricted cross-examination citing Coco v. State, 62 So.2d 892 (Fla. 1953). The appellee maintains that the scope of cross-examination and control thereof is within the discretion of the trial court and that no abuse has been demonstrated. See Maggard v. State, 399 So.2d 973 (Fla. 1981). See also, Brown v. State, 408 So.2d 243 (Fla. 4th DCA 1981).

POINT TWENTY-FOUR

THE TRIAL COURT DID NOT ERR IN DENYING THE DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL AT THE CLOSE OF THE STATE'S CASE IN CHIEF.

ARGUMENT

The defendant moved for judgment of acquittal on various grounds (R 656-661). The defendant argued that there was a material variance between the proof and the indictment in that the indictment alleged a date of death on one day and the proof showed that the date of death occurred the following day (R 657). The court denied the motion on that ground inasmuch as that was not a material variance. Dr. Gore testified that Mrs. James died at 11:00, p.m. on April 3, plus or minus three hours (R 410). This meant that she could have died between 8:00, p.m. on April 3, and 2:00, a.m. on April 4th (R 410). Appellant never moved to dismiss the indictment on these grounds and has failed to show any prejudice as a result of the proof at trial.

Appellant further argues that his motion for judgment of acquittal should have been granted in that there was no evidence of premeditation on the part of whoever it was that stabbed Mrs. James (R 657). Additionally, appellant maintains the proof of guilt was only circumstantial and that the evidence was insufficient to sustain a conviction. Appellee contends that premeditation can be shown by circumstantial evidence. Sireci v. State, 399 So.2d 964, 967

(Fla. 1981), cert. denied, 456 U.S. 984 (1982); Spenkelink v. State, 313 So.2d 666,670 (Fla. 1975) cert. denied, 428 U.S. 911, (1976). Whether or not the evidence shows a premeditated design to commit a murder is a question of fact for the jury. Larry v. State, 104 So.2d 352, 354 (Fla. 1958). In Larry v. State, this Court stated:

> "Evidence from which premediation may be inferred includes such matters as the nature of the weapon used, the presence or absence of adequate provocation, previous difficulties between the parties, the manner in which the homicide was committed, and the nature and manner of the wounds inflicted. It must exist for such time before the homicide as will enable the accused to be conscious of the nature of the deed he is about to commit and the probable result to flow from it in so far as the life of his victim is concerned. No definite length of time for it to exists has been set and indeed cannot be." Id.

There is substantial evidence from which premediation could have been inferred by the jury. The victim sustained multiple stab wounds. The nature of the injury she sustained was particularly brutal. The medical examiner testified that these wounds were painful (R 407). He testified that Mrs. James was facing her assailant at the time she received the multiple stab wounds (R 412). The medical examiner further

testified that he found a defensive wound on Mrs. James left wrist, indicating that she sought to block the stab wounds (R 411). The cause of death was massive hemorrhage due to laceration of the left lung and the heart as a result of multiple stab wounds to the chest (R 412).

In Spenkelink v. State, this court stated that when an appellant moves for an acquittal, he admitted the facts adduced in evidence and every conclusion favorable to the appellee which is fairly and reasonably inferable therefrom. Id. at 670. Considering all reasonable inferences which the jury could draw from the evidence adduced at trial and the nature and manner of the wounds inflicted upon the victim, this Court cannot conclude that the determination of the trial court was erroneous. Therefore, the trial court did not error in denying appellant's motion for judgment of acquittal. See also Preston v. State, Case No. 61,475 (Fla. Sup.Ct. Opinion filed January 19, 1984) [9 FLW 26].

POINT TWENTY-FIVE

THE TRIAL COURT DID NOT ERR IN DENYING THE DEFENDANT'S REQUEST TO SUBMIT TO THE JURY SPECIAL INSTRUCTION ON THE ISSUE OF CIRCUMSTANTIAL EVIDENCE; NOR DID THE COURT ERR IN DENYING THE DEFENDANT'S REQUESTED JURY INSTRUCTIONS ON THE THEORY OF HIS DEFENSE AS TO BOTH CHARGES.

ARGUMENT

The defendant maintains that the trial court erred in refusing his requested instructions on circumstantial evidence due to the fact that the case consisted almost entirely of circumstantial evidence. Although the defendant concedes that the giving of an instruction on circumstantial evidence is discretionary with the court, he nevertheless maintains that it was reversible error to deny his requested instructions.

In Williams v. State, 437 So.2d 133 (Fla. 1983), this court stated that:

> This court is not unmindful that "where the only proof of guilt is circumstantial, no matter how strongly the evidence may suggest guilt a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence."

McArthur v. State, 351 So.2d 972, 976 n.12 (Fla. 1977). See also Jaramillo v. State, 417 So.2d 257 (Fla. 1982). In Williams, as in the instant case, the sole theory of defense was that the crime was committed by an unknown assailant. According to

Medina, the victim was already wounded when he entered the apartment and he claimed that he tried to help her but she was too heavy. Additionally, appellant maintains that he didn't call the police because he was a Cuban refugee and he didn't speak English too well and he was afraid (R 674). Additionally, Medina's story about an unknown murderer being some drug dealers who were after him, is equally unreasonable (R 686). Due to the fact that there was no evidence of a burglary, no evidence of a robbery, the jury could properly find that the assailant was known to Mrs. James. Given the location of the victim crouching at the end of the bed when she was stabbed, the presence of defendant's cap on her bed, the jury could have found that Medina confronted the victim about moving in with her or using her car and she refused causing him to stab her repeatedly. This court should follow its decision in Williams v. State, in which the court held that the circumstantial evidence instruction is now unnecessary because the instruction on reasonable doubt and burden of proof are sufficient to properly instruct the jury and a separate instruction soley on circumstantial evidence would be duplicative. Williams, supra, at 136. See In re: Standard Jury Instructions in Criminal Cases, 431 So.2d 594 (Fla. 1981).

The defendant additionally argues that he is entitled to an instruction on his theory of the defense. However, the record does not support the defendant's theory of defense. He admitted that Mrs. James only gave him use of the car

to go to the Sunlight grocery. He did not have permission to go to Tampa or Lake City in the vehicle (R 694). Therefore, the trial court properly denied his requested jury instruction regarding the theft of the motor vehicle.

In Williams, this court stated that:

> We will not disturb the action of the lower court in the exercise of its judicial discretion unless palpable abuse of this discretion is clearly shown from the record.

Id. at 437, So.2d at 136.

The appellant, Medina, has not shown that the trial judges action was an abuse of his discretion.

POINT TWENTY-SIX

THE TRIAL COURT DID NOT ERR IN DENYING THE DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL MADE AT THE CLOSE OF ALL THE EVIDENCE AND POST-TRIAL; NOR DID THE COURT ERR IN DENYING THE DEFENDANT'S MOTION FOR NEW TRIAL.

ARGUMENT

The Appellee will incorporate its argument in Point Twenty-five and point out that the proper role that this Court plays in capital cases has been enunciated in Tibbs v. State, 397 So.2d 1120 (Fla. 1981), affirmed, 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982). In Tibbs, the court stated that:

> An appellate court should not retry a case or reweigh conflicting evidence submitted to a jury or other trier of fact. Rather, the concern on appeal must be whether, after all conflicts in the evidence and all reasonable inferences therefrom have been resolved in favor of the verdict on appeal, there is substantial, competent evidence to support the verdict and judgment.

397 So.2d at 1123. (footnotes omitted).

See also Spinkellink v. State, 313 So.2d 666 (Fla. 1975), cert. denied, 428 U.S. 911, 96 S.Ct. 3227, 49 L.Ed.2d 1221 (1976). The Appellee would contend that there is substantial, competent evidence to support this verdict.

The jury was told that shortly before Mrs. James was killed, she was having a conversation with Barbara Jean Andrews (R 176). That during the conversation, Miss Andrews

heard a knock at Mrs. James door, and Mrs. James told her that someone was at the door. (R 176). That after about five minutes, Mrs. James resumed the conversation, however, she appeared hesitant in her conversation, as if she didn't want to talk (R 176, 188). The jury was further told that there was no evidence of burglary, therefore Mrs. James had to know her assailant; contrary to defendant's testimony that it was some unknown revenge minded Cuban who might have killed her over the defendant's refusal to help them traffic in marijuana. Additionally, the jury was told by the defendant that he was there as Miss Andrews conversed with Mrs. James. (R 707). The defendant further testified that he knocked on the door while Mrs. James conversed with Miss. Andrews (R 707). It was the defendant who was arrested while in possession of the victim's car. It was the defendant who attempted to sell the victim's car in Tampa. It was the defendant's hat that was found on the bed in the room where Mrs. James was so brutally stabbed. Based upon the evidence admitted at trial, as well as the circumstances surrounding the defendant's attempt to dispose of the victim's vehicle, the jury could properly conclude that Medina was not telling the truth and given the evidence, that his flight from Mrs. James' apartment was evidence of guilt. Therefore, the trial court properly denied his motion for judgment of acquittal at the close of all the evidence and his post-trial motion for judgment of acquittal and motion for new trial.

POINT TWENTY-SEVEN

THE TRIAL COURT DID NOT ERR IN SENTENCING THE DEFENDANT TO DEATH FOLLOWING HIS CONVICTION FOR FIRST DEGREE MURDER.

ARGUMENT

The court found that the crime for which the defendant is to be sentenced to death was especially heinous, atrocious and cruel; in that the defendant stabbed the victim with a knife, inflicting a total of ten wounds: six to the left front of the victim's chest; one to the neck, one to the abdomen and two to the left wrist. At some point during or immediately following the stabbing, defendant tied a loose cloth gag in the victim's mouth. According to the medical examiner, the victim took thirty minutes to die and experienced considerable pain. (R 1877).

In addition to the aggravating circumstance of heinous, atrocious and cruel, the court found that the crime for which the defendant is to be sentenced was committed for pecuniary gain. The only motive reasonably inferable from the evidence is that the defendant had a tremendous desire to own a car; that when the victim refused to let him have her car he killed her for it and drove it to Tampa where he was then living; that he acquired two other tags to attempt to hide the identity of the car; that although he offered the car for sale to a witness, one Michael White, to get bail money for his girlfriend; he did not go through with the sale; that he left

several days later for his sponsor's home in New Jersey and was arrested in the car near Lake City, Florida. (R 1877-1878).

Medina highlights several cases in particular, all of which allegedly involved defendants equally or more deserving of the death penalty than he but in all of which the Florida Supreme Court reversed sentences of death. The first case cited by Appellant is Swan v. State, 322 So.2d 485 (Fla. 1975) wherein the victim was tied with strips of cloth from a bedspread, and her mouth was gagged with a silk stocking. She had been beaten and badly bruised and was tied in such a manner that any effort she might have made to free herself could have choked her to death. The jury recommended life sentences for Swan and his co-defendant.

The second case relied upon by Appellant is Halliwell v. State, 323 So.2d 557 (Fla. 1975), in which the defendant beat his victim to death with a breaker bar and then dismembered the body. The jury convicted him of first degree murder and recommended the death penalty which the trial court imposed. This Court affirmed the conviction but reduced the sentence to life imprisonment. In Halliwell, this Court's decision emphasized that "if the mutilation had occurred prior to death or instantly thereafter, it would have been more relevant in fixing the death penalty." Id. at 561. In the instant case, the multiple stabbing of Mrs. James occurred prior to her death.

The third case Appellant relies upon is Tedder v.

State, 322 So.2d 908 (Fla. 1975), wherein this Court recognized that a jury recommendation of life is entitled to great weight. Additionally, Appellant relies upon Jones v. State, 332 So.2d 615 (Fla. 1976). In Jones, the defendant raped his victim and then murdered her by stabbing her thirty-eight times. Id. at 616. The jury convicted him of first degree murder and recommended life imprisonment. The trial court sentenced him to death. This Court found that the defendant suffered a paranoid psychosis to such an extent that the full degree of his mental capacities at the time of the murder is not really known. This mitigating circumstance, according to the court, was "determinative," and sufficiently outweighed the aggravating circumstances. The court therefore reduced his sentence to life imprisonment.

Appellant further relies upon Thompson v. State, 328 So.2d 1 (Fla. 1976) wherein the defendant stabbed his victim in an attempt to commit robbery. The jury recommended that the defendant be sentenced to life imprisonment by a 12-0 vote. In Thompson, this Court reaffirmed the decision that a jury's recommendation of life imprisonment is entitled to great weight. This Court accordingly affirmed Thompson's conviction but reversed his sentence of death.

The Appellee would point out that unlike the cases relied upon by Appellant, this murder is especially heinous, atrocious and cruel due to the multiple stab wounds that Mrs. James suffered prior to her death. Additionally, the Appellant

was not found to be suffering from any psychosis or mental defect. Furthermore, unlike the juries in Swan, Tedder, Thompson, the jury did not recommend life imprisonment for Appellant. A majority of the jury, by a vote of 10-2 recommended the death penalty for Appellant (R 1875).

The brutal, multiple stab wounds that the victim sustained prior to her death warrant the finding of the aggravating circumstance of heinous, atrocious and cruel, and accordingly, the imposition of the death penalty. See Sireci v. State, 399 So.2d 964 (Fla. 1981).

Appellant further maintains that the court erred in finding the aggravating circumstance that the murder was committed for pecuniary gain. The Appellant relies upon Peek v. State, 395 So.2d 492 (Fla. 1980). Unlike in Peek v. State, the record does support that the conclusion that Appellant had the intent to profit from the illicit acquisition of Mrs. James' car. Michael White's testimony clearly indicates that the Appellant sought to sell Mrs. James' car. Considering all the circumstances, the evidence indicating that Appellant obtained two tags in order to facilitate the sale of the vehicle, clearly establishes this aggravating factor beyond a reasonable doubt.

With regard to mitigating circumstances, the court found that since the defendant was a Cuban refugee, and that neither side was able to ascertain or document whether he had a criminal history in Cuba, the court will give the defendant

the benefit of the doubt and will assume that he has no significant history of prior criminal activity and will find this to be a mitigating circumstance (R 1878). The court further found that the defendant was not under the influence of extreme mental or emotional disturbance at the time he committed the murder; that the victim was not a participant in the defendant's conduct nor did she consent to the act; that the defendant was alone when he committed the act; that that the defendant did not act under extreme duress nor was he under the domination of any other person at the time of the murder; that the capacity of the defendant to appreciate the criminality of his act or to conform his conduct to the requirements of law was not impaired at the time; that the defendant was either twenty or twenty-five at the time of the murder and that this was not a mitigating circumstance. (R 1878). The court further found that there were no compelling non-statutory mitigating circumstances. (R 1878-1879).

Although it was not argued by Appellant, the Appellee would point out that the defendant's age is not a mitigating factor. See Simmons v. State, 419 So.2d 316 (Fla. 1982) and Songer v. State, 322 So.2d 481 (Fla. 1975).

The Appellee would submit that the finding of the trial court that the murder was especially henious, atrocious and cruel, is sufficiently supported by the evidence and the imposition of death was proper. Sireci v. State, supra and Preston v. State, Case No. 61,475 (Fla. S.Ct. opinion filed

January 19, 1984) [9 FLW 26]. Additionally, the court's finding that the murder was committed for pecuniary gain was proper and the imposition of the sentence of death was proper. See Bolender v. State, 422 So.2d 833 (Fla. 1982).

CONCLUSION

Based upon the foregoing arguments and cited authorities, Appellee respectfully requests that this Honorable Court affirm the judgment and sentence of the trial court in all respects.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

Evelyn D. Golden

EVELYN D. GOLDEN
ASSISTANT ATTORNEY GENERAL
125 N. Ridgewood Avenue
Fourth Floor
Daytona Beach, Florida 32014
(904) 252-1067

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing brief has been furnished by mail to: Warren H. Edwards, Esquire and Ronald R. Findell, Esquire, Suite 101 Bradshaw Building, 65 N. Orange Avenue, Orlando, Florida on this 28th day of February, 1984.

Evelyn D. Golden

EVELYN D. GOLDEN
Of Counsel