IN THE SUPREME COURT OF THE STATE OF FLORIDA

PEDRO LUIS MEDINA,

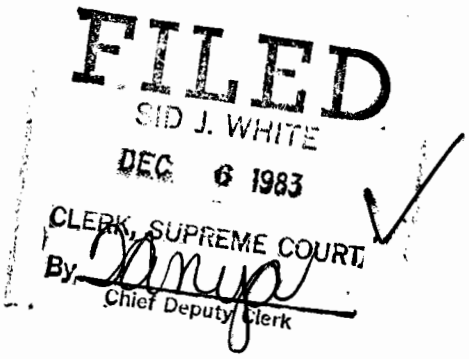
Appellant,

vs. CASE NO. 63-680

STATE OF FLORIDA,

Appellee.

_____/



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_____/

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Amended Table of Authorities on the above styled cause was furnished on this 20th day of December, 1983, to Evelyn Golden, Esquire, Assistant Attorney General, 125 North Ridgewood Avenue, Fourth Floor, Daytona Beach, Florida 32014.

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_____/

PRELIMINARY STATEMENT

The Appellant, PEDRO LUIS MEDINA, was the Defendant in the lower court. The Appellee, STATE OF FLORIDA, was the Plaintiff in the lower court. The parties will be referred to as the Defendant and the State for the purposes of this brief.

The symbol "TR" followed by an accompanying page number as well as line number (where appropriate) will denote the transcript of the record of appeal.

STATEMENT OF THE CASE AND FACTS

During the night hours of April 3-4, 1982, Dorothy James, who resided at 462 Oak Ridge Road, Apartment 211, Orlando, Florida, was stabbed to death in the bedroom of her apartment by an unknown individual or individuals. Her 1973 Cadillac was found missing from the apartment complex.

On April 8, 1982, Trooper R.A. Wilson, a member of the Florida Highway Patrol, observed a 1973 Cadillac parked in a rest area on I-10 near Lake City, Florida. He noticed that the car's engine was running and that the driver of the automobile appeared to be asleep. Upon closer inspection, he observed what appeared to be a gas leak from the rear of the vehicle. Prior to approaching the vehicle to check on the condition of the driver, Trooper Wilson radioed the tag number of the vehicle to his dispatcher. Before he could leave the vehicle his dispatcher radioed him back, stating that the car was wanted for possibly having been involved in a homicide in Orange County.

Based on this information, Trooper Wilson radioed for his back-up, Trooper W.H. Hull. Upon his arrival, both troopers approached the automobile with weapons drawn. They awoke the driver, later identified as PEDRO LUIS MEDINA, and arrested him for possession of a stolen vehicle. During the arrest, the Defendant allegedly struggled with the officers and was later charged with battery upon a law enforcement officer.

Following his arrest, the Cadillac was searched. The troopers found two Florida tags in the trunk of the vehicle. A silver colored, wood-handled knife with a four inch blade was discovered beneath a hubcap lying on the rear floor board of the car. Additionally, a key ring with a large initial "D" was found in the ignition.

Following his arrest, the Defendant was transported to the Columbia County Jail, and the information concerning his arrest and the evidence seized was radioed back to the Orange County Sheriff's Office. On April 9, 1982, Detective Daniel Nazarchuck, an investigator with the Orange County Sheriff's Office, traveled to

Lake City to interview the Defendant concerning his possession of the victim's car, and his possible involvement in her murder. Upon arrival, Detective Nazarchuck read the Defendant his rights off a standard Miranda card and then obtained both oral and taped interviews from the Defendant.

Based on the interviews with the Defendant, along with the evidence obtained from the car by the Florida Highway patrol, and other witness statements, Detective Nazarchuck arrested the Defendant for first degree murder (pages 1510-1512). The Defendant was then transported back to Orange County in a transport bus. The evidence gathered from the murder scene, the Cadillac, and the Defendant were turned over to the Sanford Crime Lab for analysis, except for the fingerprints, which were sent to Amanda Taylor, a latents print examiner for the Orange County Sheriff's Office, for comparison.

During the transport of the Defendant from Lake City to Orange County, R.D. Booth and D.L. Riley, Orange County Sheriff transportation officers, heard a thump from the rear of the locked bus where the Defendant had been seated. Officer Booth looked back and saw the Defendant not in the bus but on the pavement outside the bus (in chains and handcuffs). They retrieved the Defendant and placed him back into the transportation bus, where he was taken to the Orange County Jail without further incident.

On May 6, 1982, a preliminary hearing was held before the Honorable Gary Formet, Sr., acting Circuit Judge. Judge Formet heard the evidence and found that there was probable cause to hold the Defendant on the charges of auto theft and first degree murder (page 1515). On June 14, 1982, the Defendant was indicted for first degree murder (page 1518) and was served with an arrest warrant on the charge (page 1520).

On June 16, 1982, the Defendant was arraigned on the charge of first degree murder, and was appointed the Public Defender (page 1523). Trial was set for October 5, 1982, at 9:00 A.M. (page 1524). On July 14, 1982, the trial was reset

to August 31, 1982, at 9:00 A.M. (page 1527).

On July 23, 1982, the Public Defender filed various Motions on behalf of the Defendant including a Motion in Liminie (requesting the Court to issue an Order prohibiting the prosecutor from questioning any prospective jurors regarding their opinions on the death penalty), a Motion to Preclude Challenges for Cause (against prospective jurors who might be opposed to the death penalty), a Motion to Declare Florida Statute 921.141 Unconstitutional, a Motion for a Evidentiary Hearing (regarding death by electrocution as constituting cruel and unusual punishment) and to Declare Florida Statute 922.10 Unconstitutional, a Motion for Individual Voir Dire and Sequestration of the Jurors During Voir Dire, a Motion for Presentence Investigation, A Motion to Dismiss the Indictment or to Declare that Death (would not be a possible penalty in the case), and a Motion for Voir Dire of the Grand Jurors (pages 1547-1569). A hearing was set for the Motions, and on August 17, 1982, the Court entered its Order denying all the Motions except for the Motion for Individual Voir Dire and Sequestration of the Jury, which it took under advisement (page 1591). On August 17, 1982, the Public Defender moved to Withdraw as the Defendant's appointed counsel based on the fact that they had once represented one of the State's witnesses, Reinaldo Dorta (page 1588). On August 18, 1982, the State filed a Motion to Consolidate the auto theft charge with the first degree murder charge (page 1589). The Court granted the State's Motion to Consolidate on August 23, 1982 (page 1592).

On August 26, 1982, the Court granted the Public Defender's Motion to Withdraw, and appointed Anna Tangel Rodriquez and the undersigned to represent the Defendant (page 1594). On August 31, 1982, trial was set to begin. At that time, the newly appointed counsel announced that the Defendant was not yet ready to proceed to trial since the new counsel had only been appointed to represent the Defendant some four days earlier. Without formally moving for a continuance, and without waiving the Defendant's right to a speedy trial, counsel for the Defendant

requested an additional sixty to ninety days to prepare for trial. The Court ordered that the case be continued, stating that the delay was attributable to the conflict of interest on the part of the Public Defender only discovered a few weeks prior to trial. Based upon this "exigent circumstance", trial was continued for ninety days (page 1600).

On October 29, 1982, counsel for the Defendant filed a Motion for Discharge, stating that the Defendant had been taken into custody on April 8, 1982, and since the Defendant had never waived his right to a speedy trial, the 180 day period had run, entitling the Defendant to discharge (page 1662). A hearing was held on the Motion for Discharge on November 5, 1982, and the Motion for Discharge was denied (page 1678). Following the hearing, the Court reset the trial to March 15, 1983, based upon the Defendant's Motion for Continuance (page 1679).

On February 9, 1983, counsel for the Defendant filed a Request for Selection of Seating of the Defendant. On March 4, 1983, the State filed a Notice of Intention to Use Similar Fact Evidence (referring to the alleged escape attempt by the Defendant from the transportation bus).

On March 9, 1983, counsel for the Defendant filed various Motions on the Defendant's behalf, including a Supplemental Motion in Liminie (requesting the Court to enter an Order prohibiting any questioning of the prospective trial jurors regarding their attitudes towards the death penalty), a Request for List of Prospective Jurors, a Motion for Discharge of Records of Prior Convictions (of certain State witnesses), a Motion for Additional Psychiatric Examination of the Defendant, a Request for Sequestration of the Jury During Trial, a Motion to Vacate the Death Penalty, a Motion to Declare Florida Statute 922.10 Unconstitutional, and a Motion to Suppress the Evidence and Statements (obtained from the Defendant following his arrest by the Florida Highway Patrol on April 8, 1982). (pages 1794-1807).

On March 10, 1983, counsel for the Defendant filed a Motion in Liminie

(requesting that the State be refrained from making any references to the alleged battery on a law enforcement office which arose from the arrest of the Defendant by the Florida Highway Patrol on April 8, 1982), along with a Motion to Suppress the statements obtained from the Defendant by Detective Nazarchuck (pages 1809-1811).

On March 15, 1983, the day of trial, counsel for the Defendant filed a Motion to Challenge the Jury Panel and to Discharge the Panel. The Defendant additionally filed a Motion to Sever the auto theft charge from the first degree murder charge (pages 1818-1821). All these Motions were denied by the trial Court on March 11, 1983, except for the Request for List of Prospective Jurors, the Motion for Disclosure of Records of Prior Convictions, and the Motions to Suppress (pages 1836-1840).

Prior to the selection of the jury, counsel for the Defendant renewed his request to sever the charges. The Court denied the motion, stating that it had ruled on the matter previously when it consolidated the charges for trial (pages 5-6). During the voir dire, counsel for the Defendant moved for a mistrial due to the fact that the Defendant had been handcuffed while still within the view of the jury. The court denied this motion (pages 67-69).

Following selection of the jury, the Court denied the Defendant's Motion Challenging the Jury Panel, stating that no further argument or evidence had been offered in support of the Motion (pages 116-117). The State then proceeded with its opening statement. During that statement, the prosecutor alluded to the jury that he would be presenting evidence of the Defendant's alleged escape attempt from the transportation bus. The Defendant objected, but was overruled (page 135, lines 1-7). The State then presented its first four witnesses: Arnita James, Ernest Arnold, Ruby Pate, and Barbara Andrews. The Court then recessed the jury for the evening.

Following the excusal of the jury, the Court heard the Defendant's Motion to

Suppress the statements obtained from the Defendant by Detective Nazarchuck. Both the detective and the Defendant proffered their testimony on the Motion (pages 195-220). Following their testimony, the Court heard argument and then reserved ruling (pages 222-226). The Court then adjourned all proceedings until the following morning.

The next morning, prior to trial, Orange County corrections officers' Mead and Whitted stated that the Defendant had not been brought to the courtroom yet because he had been acting in a violent and hostile manner in his holding cell (pages 227-232). Based on this apprisal, the Court ruled that the Defendant would remain shackled and handcuffed for the remainder of the trial (pages 232-233). Counsel for the Defendant objected to the Defendant remaining chained during trial in full view of the jury, but was overruled (pages 235-247). The jury was then seated and the State presented the testimony of Lindi James, Elmer Holt, Richard Wetterstrom, Charles White, and Greg Taylor.

After lunch, the Court announced that it would deny the Defendant's Motion to Suppress the Statements given by the Defendant to Detective Nazarchuck (pages 307-309). The Court then heard the Defendant's Motion to Suppress the Statements made by the Defendant to the troopers, as well as the Motion to Suppress the evidence seized from the Defendant and the Cadillac by the troopers. The Defendant, as well as the two troopers, proffered their testimony to the Court. Following their testimony, the court suppressed the statements made to the troopers, but allowed the knife and Florida tags into evidence, stating that since the Defendant had no valid possesory interest in the car, he had no standing to object to its search and seizure (pages 354-355).

The State called Reinaldo Dorta as its next witness. During cross-examination, counsel for the Defendant attempted to impeach the witness' statements on the stand (concerning the last date he had seen the Defendant) with an inconsistent staement he had made during his deposition taken on January 20,

Nazarchuck. The Court then recessed while the detective was still on the stand. After lunch, counsel for the Defendant again renewed his Motion to Sequester the Jury, stating that the news media had been carrying reports about events taking place in the courtroom outside the presence of the jury, and thus the Defendant was concerned about the possible prejudicial effects those reports would have on a juror who chanced to hear or read them. The Court denied the Motion (pages 542-543).

The jury was then seated and Detective Nazarchuck completed his testimony. The State then presented the testimony of Decendra Patel, Andrew Baker, James McNamara, Steve Dexter, Donald Riley, and Robert Daniel Booth. The Court then excused the jury for the day. After their excusal, the Defendant again moved for a mistrial since the Defendant was still shackled in full view of the jury, although two days had passed without incident. The Court once again denied the motion and recessed the trial until the next morning (pages 636-637).

Trial resumed on March 18, 1983. Prior to the State's presentation of its last witness, Michael White, counsel for the Defendant requested that the Court remind the prosecutor that a Motion in Liminie was in effect which refrained the witness from making any comments concerning the Defendant allegedly stabbing him. The Court reminded the prosecutor, who commented that he had already warned the witness. When Michael White testified, however, he mentioned three separate times in the presence of the jury that the Defendant had stabbed him with a knife. Counsel for the Defendant immediately moved for a mistrial due to the prejudicial effect of the statements on the jury. The Court denied the motion, however, struck the statements and instructed the jury to disregard them (pages 647-648).

On cross-examination, counsel for the Defendant attempted to question Michael White concerning the alleged stabbing because he was now caught in a bind since the jury had heard the statements. The Court prohibited counsel from proceeding any further with that line of questioning and warned counsel that failure

1983. The prosecutor objected to the cross-examination because he had not been present for the deposition, nor was there any evidence on the record to show that the interpreter used by the defense was certified as accurate and reliable. The Court sustained the prosecutor's objection and refused to allow counsel to go forward with his cross-examination in so far as it concerned any attempts at impeachment with the January 20, 1983, deposition (pages 372-285).

The State finished its presentation of the evidence for the afternoon through the calling of Dr. Shashi Gore, Margaret Moore, Donald Potter, Trooper Wilson, and Trooper Hull. Trooper Hull stated during his testimony that the Defendant resisted their efforts to arrest him. Counsel for the Defendant objected to the introduction of the evidence, asking the Court to strike the statement and to instruct the jury to disregard it. The Court overruled the objection and denied the motion to strike (page 451).

After Trooper Hull completed his testimony, the Court excused the jury for the day. The State was then allowed to introduce into evidence its various exhibits. Counsel for the Defendant did object to the introduction of the knife and Florida tags, but was overruled by the Court. During the introduction of this evidence, counsel for the Defendant again moved for a mistrial, stating that the Defendant had remained shackled throughout the day in the presence of the jury, although his courtroom demeanor had been calm since the trial started. The Court denied the motion (page 469).

Counsel for the Defendant then requested the Court to grant his Motion in Liminie (pages 1829-1830) regarding the testimony of James McNamara about the results of tests he had performed on the knife found in the victim's car. The Court stated that it would hold the Motion under advisement. Trial was then recessed until the next morning (page 470).

Trial resumed the morning of March 17, 1983, with the State presenting the testimony of Gracie Moore, James Murray, Amanda Taylor, and Detective Daniel

to do so would open the door for the State to resume questioning concerning the alleged stabbing on re-direct (pages 651-652). Following Michael White's testimony, the State rested.

At that time, counsel for the Defendant again moved for a mistrial, stating that the prosecutor's line of questions had in fact elicited the responses from Michael White about the alleged stabbing. This motion was denied. Counsel for the Defendant then moved for a mistrial based on the fact that the Court had restricted his right to cross-examine the witness fully. This motion was also denied (pages 654-656).

Counsel for the Defendant then moved for a Judgment of Acquittal on various grounds, all which were denied (pages 657-660). The Court then prepared to proceed with the Defendant's testimony. Before counsel could proceed, however, a note was delivered from the jury room. In his note, Juror Cody stated that Michael White's statements concerning the alleged stabbing had raised doubts about his ability to proceed as an impartial juror without hearing rebuttal testimony from the Defendant. After reading the note, the Court announced that it would excuse Juror Cody and replace him with one of the alternates.

Counsel for the Defendant again moved for a mistrial stating that the note itself was indicative of the feelings of the panel and that the alleged stabbing of Michael White had now become a volatile issue that could not be cured by instruction or replacement. The Court denied the motion (pages 661-664). Counsel then requested the Court to inquire of Juror Cody as to how the other jurors felt on the subject. The Court denied the request (pages 665-668).

Following the replacement of Juror Cody, the trial resumed with the Defendant's testimony. Following his testimony, the defense rested. The Court then excused the jury and proceeded with the charge conference. During the charge conference, counsel for the Defendant requested the Court to instruct the jury on five special instructions, all which the Court denied (pages 726-731). The

Court then recessed for lunch. After lunch, the Defendant again renewed his request for the special jury instructions, which was denied (page 736-747). Counsel for the Defendant then moved for a judgment of acquittal at the close of the case, which was also denied (pages 745-746).

Closing arguments were given by both sides. The Court then charged the jury and excused them to deliberate. After an hour's deliberation, the jury returned with verdicts of guilty as to both the homicide and the auto theft. The Court excused the jury and then adjudicated the Defendant on both charges (page 1850-1852). The Court set the penalty phase of the trial for April 1, 1983, and recessed.

On March 28, 1983, Counsel for the Defendant filed a Motion for a post-trial Judgment of Acquittal (page 1863), as well as a Motion for New Trial (pages 1864-1867).

On April 1, 1983, the penalty phase of the trial was held. The State presented the testimony of Detective Daniel Nazarchuck in support of its attempt to prove the aggravating circumstances of murder for pecuniary gain, and murder committed in an especially atrocious, heinous or cruel manner. Counsel for the Defendant presented Margaret Maddon, Rubin Garcia, and the Defendant himself in an attempt to prove the mitigating circumstances of a lack of a prior signifigant criminal history, that the Defendant's background caused him to be mentally or emotionally disturbed, and that the Defendant was of a youthful age. Following closing arguments by both sides, the jury was excused to deliberate. The panel returned with an advisory sentence of death (pages 1869-1875).

Sentencing was held on April 11, 1983. The Court found that the two aggravating circumstances requested by the State did in fact exist and that only the lack of prior significant criminal activity existed as a mitigating circumstance for the Defendant. Since the one mitigating circumstance did not outweigh the two aggravating circumstances, the Defendant was sentenced to death by electrocution

(pages 1056-1058; pages 1877-1879). On April 15, 1983, the Court denied the Defendant's Motion for New Trial (page 1903). The Defendant was later sentenced to imprisonment on the auto theft conviction on September 6, 1983. It is from these convictions and sentences that the Defendant takes this Appeal.

QUESTIONS PRESENTED

WHETHER THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO PRECLUDE CHALLENGE FOR CAUSE OF THE POTENTIAL JURORS.

WHETHER THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO DECLARE FLORIDA STATUTE 921.141 UNCONSTITUTIONAL.

WHETHER THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR AN EVIDENTIARY HEARING AND THE DEFENDANT'S LATER MOTION TO DECLARE FLORIDA STATUTE 922.10 UNCONSTITUTIONAL.

WHETHER THE TRIAL COURT ERRED IN DENYING THE DEFENSE'S MOTION FOR INDIVIDUAL VOIR DIRE AND SEQUESTRATION OF THE JURORS DURING VOIR DIRE AND IN DENYING HIS REQUEST FOR SEQUESTRATION OF THE JURORS DURING TRIAL.

WHETHER THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR PRE-SENTENCE INVESTIGATION.

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

WHETHER THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR STATEMENT OF AGGRAVATING CIRCUMSTANCES.

WHETHER THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR VOIR DIRE OF THE GRAND JURORS.

WHETHER THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR DISCHARGE DUE TO THE RUNNING OF SPEEDY TRIAL.

WHETHER THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTIONS IN LIMINIE CONCERNING THE QUESTIONING OF PROSPECTIVE TRIAL JURORS AS TO

THEIR ATTITUDES TOWARDS CAPITAL PUNISHMENT PRIOR TO THERE BEING A DECISION BY SUCH JURORS AS TO THE GUILT OR INNOCENCE OF THE DEFENDANT.

WHETHER THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR DISCLOSURE OF RECORDS OF PRIOR CONVICTIONS OF SEVERAL OF THE STATE'S NON-LAW ENFORCEMENT WITNESSES.

WHETHER THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S REQUEST FOR AN ADDITIONAL PSYCHIATRIC EXAMINATION OF THE DEFENDANT.

WHETHER THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO VACATE THE DEATH PENALTY.

WHETHER THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS THE ARREST OF THE DEFENDANT AND THE SEIZURE OF EVIDENCE FROM HIM AND THE VICTIM'S CADILLAC FOLLOWING HIS ARREST BY THE FLORIDA HIGHWAY PATROL.

WHETHER THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION IN LIMINIE TO PREVENT TROOPERS WILSON AND HULL FROM TESTIFYING ABOUT THE INCIDENT IN WHICH THE DEFENDANT WAS CHARGED WITH RESISTING ARREST AND WITH BATTERY ON A LAW ENFORCEMENT OFFICER IN COLUMBIA COUNTY.

WHETHER THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO SUPRESS ADMISSIONS AND STATEMENTS MADE BY THE DEFENDANT TO DETECTIVES PAYNE AND NAZARCHUCK OF THE ORANGE COUNTY SHERIFF'S OFFICE.

WHETHER THE TRIAL COURT ERRED IN DENYING THE RESPONDENT'S MOTION FOR SEVERANCE OF THE OFFENSES FOR THE PURPOSE OF TRIAL.

WHETHER THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION IN LIMINIE AS TO THE ADMISSION OF TESTIMONY BY JAMES J. MCNAMARA OF THE SANFORD REGIONAL CRIME LABORATORY, ABOUT THE RESULTS OF TESTS PERFORMED ON A

KNIFE FOUND IN THE VICTIM'S CAR WITHOUT A PROFFER OUTSIDE THE PRESENCE OF THE JURY.

WHETHER THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION IN LIMINIE REGARDING THE ISSUE OF THE TWO ORANGE COUNTY CORRECTIONAL OFFICERS TESTIFYING ABOUT THE DEFENDANT'S ALLEGED ESCAPE ATTEMPT FROM THEIR CUSTODY.

WHETHER THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S SEVERAL MOTIONS FOR MISTRIAL REGARDING THE SHACKLING AND HANDCUFFING OF THE JURY IN FULL VIEW OF THE JURY.

WHETHER THE TRIAL COURT ERRED IN UNDULY RESTRICTING THE CROSS-EXAMINATION OF THE STATE'S WITNESS, REINALDO DORTA, BY THE DEFENSE.

WHETHER THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S SEVERAL MOTIONS FOR MISTRIAL FOLLOWING MICHAEL WHITE'S STATEMENTS TO THE JURY ON THREE SEPARATE OCCASIONS THAT HE HAD BEEN STABBED BY THE DEFENDANT AND IN DENYING THE DEFENDANT'S REQUEST TO INQUIRE OF JUROR CODY WHETHER ANY OF THE OTHER JURORS HAD BEEN INFLUENCED BY MICHAEL WHITE'S REMARKS.

WHETHER THE TRIAL COURT ERRED IN UNDULY RESTRICTING THE CROSS-EXAMINATION OF STATE'S WITNESS, MICHAEL WHITE, BY THE DEFENSE.

WHETHER THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL AT THE CLOSE OF THE STATE'S CASE-IN-CHIEF.

WHETHER THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S REQUEST TO SUBMIT TO THE JURY SPECIAL INSTRUCTIONS ON THE ISSUE OF CIRCUMSTANTIAL EVIDENCE.

WHETHER THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S REQUESTED JURY INSTRUCTION ON THE THEORY OF THE DEFENSE, AS TO BOTH CHARGES.

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AT THE CLOSE OF ALL THE EVIDENCE, THE DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL POST-TRIAL, AND THE DEFENDANT'S MOTION FOR NEW TRIAL.

WHETHER THE TRIAL COURT ERRED IN SENTENCING THE DEFENDANT TO DEATH AFTER HIS CONVICTION FOR FIRST DEGREE MURDER.

ARGUMENT I

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO PRECLUDE CHALLENGE FOR CAUSE OF THE POTENTIAL JURORS.

On July 23, 1982, the Public Defender, on behalf of the Defendant, filed a Motion to Preclude Challenges For Cause against persons who would not and possibly might not be able to impose the penalty of death (pages 1550-1551). The trial court denied the Motion on August 17, 1982 (page 1591).

The exclusion of prospective jurors who cannot or might not vote for the imposition of the death penalty is not only improper but also unconstitutionally violates the Fourteenth Amendment to the United States Constitution, pursuant to which the United States Supreme Court has laid out the requirements necessary for capital jury selection. Davis v. Georgia, 50 L.Ed. 2d 339 (1976); Mathis v. New Jersey, 403 U.S. 96 (1971); Maxwell v. Bishop, 398 U.S. 262 (1969); Boulden v. Holman, 394 U.S. 478 (1970); Witherspoon v. Illinois, 391 U.S. 510 (1968).

These challenges for cause also violate the Defendant's right to trial by a jury selected from a representative cross-section of the community, as guaranteed by Amendments Six and Fourteen to the United States Constitution and by Sections 9 and 16 of Article I of the Florida Constitution. The Defendant's right to such a jury is violated for the following reasons:

> The jury does not finally impose sentence;
>
> Its advisory sentencing verdict occurs at the second stage of the bifurcated trial; and
>
> This advisory sentencing verdict is rendered by majority vote rather than unanimously.

Additionally, these challenges for cause subject the accused to trial by a jury which is not impartial, but is in fact biased in favor of the prosecution during the guilt phase of these trial. Because the trial court refused to preclude these challenges

for cause, the Defendant's convictions must be reversed, and this case remanded to the circuit court for a new trial.

ARGUMENT II

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO DECLARE FLORIDA STATUTE 921.141 UNCONSTITUTIONAL.

On July 23, 1982, the Public Defender, on behalf of the Defendant, filed a Motion to Declare Florida Statute Section 921.141 Unconstitutional (pages 1552-1556). The trial court denied the Motion on August 17, 1982 (page 1591).

Section 921.141, Florida Statutes (1981), is unconstitutional on its face in that it is violative of the Eighth and Fourteenth Amendments to the United States Constitution, as well as Article I, Sections 9 and 17 of the Florida Constitution. The aggravating and mitigating circumstances as enumerated in this section are impermissibly vague and overbroad.

Section 921.141(5)(a) states that an aggravating circumstance may result if the capital felony was committed by a person under the sentence of imprisonment. This circumstance is overbroad in that in makes no distinction between a person imprisoned for a non-violent crime and one imprisoned for a violent crime.

Section 921.141(5)(b) states that an aggravating circumstance may result if the person has been previosly convicted of another capital felony or a felony involving the use or threat of violence. This circumstance is overbroad in that the circumstances, other than violence, surrounding the prior felony are not considered.

Section 921.141(5)(c) states that an aggravating circumstance may result if the person knowingly creates a great risk to many persons. This circumstance is irrefutably vague simply due to its qualifying adjectives. Furthermore, although the Legislature intended that this circumstance was to be directed towards hijacking and bombings, it has been applied in fact to encompass almost any murder.

Section 921.141(5)(d) states that an aggravating circumstance may result if the person is involved in a felony murder. This circumstance is factually overbroad in that a capital felony committed during the enumerated felonies contained within

this section automatically produces an aggravating circumstance and thus carries with it a presumption of death without regard to the individual facts surrounding each case. Consideration of this aggravating circumstance could lead to a sentence of death which is totally disproportionate to the defendant's conduct. As stated in Coker v. Georgia, 97 S.Ct. 2861 (1977), "(A) punishment is excessive and unconstitutional if it is grossly out of proportion to the severity of the crime." Pursuant to this circumstance, a "wheelman" whose co-defendant accidentally kills someone during the commission of an enumerated felony would presumptively and automatically be considered for a death sentence, while a cold-blooded premeditated murderer could conceivably be exempt from any aggravating circumstance. The arbitrariness of the circumstance is self-evident.

Section 921.141(5)(e) states that an aggravating circumstance may result if the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody. Section 921.141(5)(g) states that an aggravating circumstance may result if the capital felony was committed to disrupt or to hinder the lawful exercise of any governmental function or the enforcement of law. Both these circumstances are so vague and overbroad as to render consistent application impossible. Examination of recent cases reveals that the silencing of a witness has been considered more that once to give rise to both agravating circumstances, either aggravating circumstance, or none at all. Meeks v. State, 336 So. 2d 1142 (Fla. 1976), as giving rise to circumstances (e) and (g); Knight v. State, 338 So. 2d 201 (Fla. 1976), as giving rise to only circumstance (e); and Gibson v. State, 351 So. 2d 948 (Fla. 1977), as giving rise to no aggravating circumstance at all.

Section 921.141(5)(h) states that an aggravating circumstance may result if the capital felony was especially cruel, heinous and atrocious. Almost any felony would appear especially cruel, heinous and atrocious to the layman, particularly any felony murder. Examination of the widespread application of this circumstance,

especially where no other circumstances are available with which to render a death sentence, indicates that reasonable and consistent application is impossible.

The mitigating circumstances enumerated in Section 921.141(6) are vague and overbroad as well. The qualifying adjectives used to describe the circumstances unconstitutionally limit the mitigating factors to be considered and foster an arbitrary application.

Section 921.141 is also unconstitutional on its face in that the State of Florida is unable to justify the death penalty as the least restrictive means available to further a compelling state interest, as is required by Roe v. Wade, 410 U.S. 113 (1973), where a fundamental right, such as life, is involved. A mere theoretical justification will not satisfy the requisite burden of proof incumbent upon the State.

Section 921.141 is finally unconstitutional as applied. The sentencing patterns of judges and juries under this section have in fact exhibited a pattern of arbitrary and capricious sentencing like that found unconstitutional in Furman v. Georgia, 408 U.S. 238 (1972). Death sentences in Florida are imposed irregularly, unpredictably and whimsically in cases which are no more deserving of capital punishment, under any rational standard that considers the character of the offender and the offense, than many other cases in which sentences of life imprisonment are imposed. Inconsistent and arbitrary jury attitudes and sentencing verdicts, uneven and inconsistent prosecutorial practices in seeking or not seeking the death penalty, divergent sentencing policies of trial judges, and the erratic appellate review by this Court all contribute to produce an irregular and freakish pattern of life or death sentencing results.

Because the trial court failed to declare Section 921.141 unconstitutional, the Defendant's convictions must be reversed, and the causes remanded to the circuit court for new trial.

ARGUMENT III

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR AN EVIDENTIARY HEARING AND THE DEFENDANT'S LATER MOTION TO DECLARE FLORIDA STATUTE 922.10 UNCONSTITUTIONAL.

On July 23, 1982, the Public Defender, on behalf of the Defendant, filed a Motion For Evidentiary Hearing regarding the constitutionality of Section 922.10, Florida Statutes (pages 1557-1558). The trial court denied the Motion on August 17, 1982 (page 1591). On March 9, 1983, the undersigned, on behalf of the Defendant, filed a Motion to Declare Florida Statute 922.10 Unconstitutional (pages 1804-1805). This trial court denied this Motion on March 11, 1983 (page 1838).

Section 922.10, Florida Statutes (1981), provides that a death sentence shall be executed by electrocution. Article I, Sections 9 and 17 of the Florida Constitution, as well as the Eighth Amendment to the United States Constitution, however, proscribes cruel and unusual punishment. Indeed, the United States Supreme Court has ruled that such punishment must not involve the unnecessary and wanton infliction of pain. Furman v. Georgia, 408 U.S. 392, 393 (1972).

Death by electrocution is cruel and unusual punishment. The procedure for electrocution employed by the State of Florida, including the procedure employed immediately preceeding execution, involves unnecessary and wanton infliction of pain in that the electric current does not render the subject immediately unconscious as has been previously supposed. It is quite clear that a simple review of the medical journals will show case after case of individuals who have survived lightning strikes or accidental electrocution and who testified that the current was extremely painful. There have also been medical reviews of death penalty cases, in which it has been shown that electrocution in those cases caused the spinal card of the defendant to undergo an immediate, abnormal massive arching that can only be considered painful to the utmost degree. There are also cases on record which have shown that the condemned defendant was not rendered unconscious from the

first jolt of electricity, but had to have several more jolts administered prior to death. This is why the executioner now delivers three two minute jolts to the defendant.

Electrocution also involves the unnecessary mutilation of the body of the accused. It has been shown time and time again that the electricity causes massive burns on the body of the accused. In addition, there have been many cases where the electricity caused such massive arching of the bones and muscles of the accused that broken bones and torn ligaments resulted. This is why the State requires the placing of a mask over the condemned man's face so that the witnesses will not see the face of the accused burn and contort in great pain as electrocution occurs.

Finally, electrocution causes the unnecessary and wanton infliction of psychological torture to the defendant. It is only obvious that while awaiting his death sentence, the accused has read or been told what pain and suffering the electrocution will render. He knows for many months in advance that his death will neither be instantaneous nor painless, and this can only have the most adverse effect on both his physical and mental well-being prior to execution.

Thus, death by electrocution is a cruel and unusual punishment proscribed by both the Eighth and Fourteenth Amendments to the United States Constitution, as well as by Article I, Sections 9 and 17, of the Florida Constitution. If an evidentiary hearing had been held on the painful effects of electrocution, the Defendant would at least have had a fair review by the trial court on the subject prior to trial. Instead, by its denial of said hearing, and by its later denial of the Defendant's Motion to Section 922.10 was unconstitutional, the trial court deprived him of his constitutional right to present all evidence favoring his defense, and subjected him to the cruel and unusual punishment of electocution. Therefore, the Defendant's convictions should be reversed, and the case remanded to the circuit court for a new trial.

ARGUMENT IV

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR INDIVIDUAL VOIR DIRE AND SEQUESTRATION OF THE JURORS DURING VOIR DIRE AND IN DENYING HIS REQUEST FOR SEQUESTRATION OF THE JURORS DURING TRIAL.

On July 23, 1982, the Public Defender, on behalf of the Defendant, filed a Motion for Individual Voir Dire and Sequestration of Jurors During Voir Dire (pages 1559-1560). On August 17, 1982, the court entered an Order stating that it would take the matter under advisement. On March 11, 1983, the court entered an Order denying the Motion (page 1839).

Additionally, counsel for the Defendant filed a Request for Sequestration of the Jury During Trial on March 9, 1983 (page 1801). Ruling on the Motion was reserved (page 913, lines 10-16). On March 17, 1983, during trial, counsel for the Defendant renewed the Motion, stating that there had been articles in the news media concerning testimony prejudicial to the Defendant made outside the Presence of the jury, but reported by the news media regardless. Counsel further stated that he expected similar coverage that evening (page 542, lines 10-25). The court denied the Motion (page 543, line 1).

In the case at bar, many articles had appeared in the news media during the period between the murder of Dorothy James and the trial of the Defendant. Some of these accounts contained lurid descriptions of the murder scene and somewhat prejudicial statements about the Defendant following his arrest on the first degree murder charge.

In a case such as this, where there has been somewhat extensive local media coverage, a strong possibility exists that at least one or more of the potential jurors will have had prior knowledge of the case and will speak of that knowledge during voir dire. If collective voir dire is held with the jurors as to their familiarity with the crime, the victim, or the probability of the Defendant's guilt or

innocence, other prospective jurors would become immediately cognizant of the possibly prejudicial material, thereby rendering it impossible to select a fair and impartial jury. By sequestering the prospective panel during voir dire, and conducting individual voir dire, there would have been no possibility of the collective body ever being influenced by past or present news media coverage of the case or by the knowledge or opinions of other prospective jurors.

Additionally, the issues in this case necessarily included the probing of each juror with sensitive and potentially embarrassing questions concerning that juror's possible bias or prejudice. An individual voir dire would have insured that each juror could answer such questions without fear or shame.

A collective voir dire would have also demonstrated to each prospective juror what grounds existed for challenges for cause, thus presenting the possibility that a juror might not give a truthful answer. Individual voir dire would have insured the complete candor and honesty of each juror, thus eliminating any possibility of prejudice to the Defendant.

Finally, the inconvenience and small amount of additional time required by individual voir dire was a small price to pay to ensure a fair and impartial jury for the Defendant. The court clearly abused its discretion in not granting individual voir dire. This abuse is most clearly shown by the court's prejudicial comment that it was "not going to spend an untold amount of days selecting this jury...I don't intend to individually examine each juror on the death penalty either." (page 911, lines 15-23). Such prejudicial rulings, without any findings made in support of the rulings, clearly entitle the Defendant to a new trial.

As stated in prior arguments, every Defendant is entitled to be tried by a fair and impartial jury. Kelly v. State, 371 So. 2d 162 (Fla. ... D.C.A. 1979). Rule 3.370, Florida Rules of Criminal Procedure, provides that the court, in its discretion, may sequester the jury. Although the Defendant concedes that the court has that discretion, the fact that there was extensive press coverage during the

year preceeding the trial, and such coverage continued throughout the trial (even on matters heard outside the presence of the jurors), due process required that the panel be sequestered during voir dire and the ensuing trial. The inconvenience suffered by sequestration of the jurors to prevent exposure to such excluded evidence was a small price to pay for insuring the Defendant's right to a fair trial. State ex rel Miami Herald Pub. Co. v. McIntosh, 340 So. 2d 904 (Fla. 1976). By failing to insure the Defendant's right to a fair trial, the court abused its discretion, thus entitling the Defendant to reversal of his convictions, and remand of this case back to the circuit court for new trial.

ARGUMENT V

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR PRESENTENCE INVESTIGATION.

On July 23, 1982, the Public Defender, on behalf of the Defendant, filed a Motion for Presentence Investigation (pages 1561-1562). The Motion was denied by the court on August 17, 1982 (page 1591).

The Defendant concedes that presentence investigation reports are not mandatory in death cases, but argues that the courts have approved sentences based upon such investigations. Tedder v. State, 322 So. 2d 908 (Fla. 1975); Songer v. State, 322 So. 2d 481 (Fla. 1975). This is because a jury must consider nonstatutory mitigating circumstances in deciding whether to impose the death penalty. Elledge v. State, 346 So. 2d 998, 1002 (Fla. 1977).

The purpose for such investigations is to provide to the court detailed background information concerning the Defendant and, as such, they are a source of information critically relevant to determining nonstatutory mitigating circumstances. Gibson v. State, 351 So. 2d 948 (Fla. 1977).

When death sentences are imposed in a non-arbitrary manner and are subject to proportionality review, it is constitutionally intolerable to accord some defendants the benefit of presentence investigations and deprive others of the same benefit. Proffitt. State, 428 U.S. 242, 96 S.Ct. 2965, 2968 (1976). In addition, the denial of a presentence investigatioon deprives the accused, in this case an indigent, of his right to due process of law, equal protection of the laws, effective assistance of counsel, and to be free from cruel and unusual punishment.

Finally, the Defendant must also be afforded all opportunities available to present relevant information to both the court and the advisory panel. A presentence investigation would have given the Defendant an additional opportunity to gather evidence supporting his nonstatutory mitigating circumstances. Messer v.

State, 330 So. 2d 137 (Fla. 1976). Because the trial court denied the Defendant's Motion for Presentence Investigation, his convictions must be reversed, and this cause remanded to the circuit court for new trial.

ARGUMENT VI

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

On July 23, 1982, the Public Defender, on behalf of the Defendant, filed a Motion to Dismiss the Indictment or to Declare That Death is Not a Possible Penalty (page 1563-1564). The court denied the Motion on August 17, 1982 (page 1591).

Article I, Section 15(a), of the Florida Constitution, as well as Rule 3.140(a)(1), Florida Rules of Criminal Procedure, require that an offense punishable by death be prosecuted by indictment. Rule 3.140(b), Florida Rules of Criminal Procedure, requires that an indictment be a "plain, concise, and definite written statement of the essential facts constituting the offense charged".

Section 921.141, Florida Statutes (1981), requires that a sentence of death be imposed only when aggravating circumstances are found to outweigh any mitigating circumstances. These aggravating circumstances are analogous to the carrying of a deadly weapon in a robbery or burglary, or the carrying of a firearm under Section 775.087, Florida Statutes (1981).

It is the presence of the firearm or deadly weapon that actually defines those crimes which are eligible for enhanced punishment, and those elements must be alleged in the indictment or information before such punishment may be imposed. Averheart v. State, 358 So. 2d 609 (Fla. 1st DCA 1978); Chapola v. State, 374 So. 2d 762 (Fla. 1st DCA 1977). The statutory aggravating circumstances enumerated in Section 921.141, Florida Statutes (1981), have also been held to define those crimes for which a defendant is eligible for the death penalty. State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973).

Aggravating circumstances are therefore the essential facts constituting any charged capital offense and must be alleged in the indictment in order to confer

jurisdiction on the trial court to impose a sentence of death. Additionally, aggravating circumstances must be alleged in the indictment to notice the Defendant that death is a possible penalty. Failure to provide notice of such essential allegations deprives a defendant of the opportunity to adequately prepare his defense, and therefore renders the entire sentencing phase of the trial unreliable and in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

Since no aggravating circumstances were alleged in the Indictment charging the Defendant with first degree murder, the indictment did not charge an offense punishable by death. By denying the Motion and failing to declare that death was a possible penalty, the trial court erred prejudicially, and this cause must be reversed and remanded to the circuit court with directions to dismiss the Indictment and release the Defendant until such time as a proper Indictment is returned by the grand jury.

ARGUMENT VII

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR STATEMENT OF AGGRAVATING CIRCUMSTANCES.

On July 23, 1982, the Public Defender, on behalf of the Defendant, filed a Motion for Statement of Aggravating Circumstances requesting the court to order the State to provide the Defendant with the precise grounds on which the State sought to impose the death penalty (pages 1565-1567). The trial court denied the Motion on August 17, 1982 (page 1591).

A review of the Indictment filed by the State shows that no notification of particular statutory aggravating circumstances which the State sought to establish against the Defendant was contained within the four corners of the document. No notice was given the Defendant at any time prior to trial as to what specific aggravating circumstances the trial court or the State intended to consider in passing sentence on the Defendant.

The absence of such notification in either the Indictment or in the form of a proper written notice from the State renders the use of aggravating circumstances to sentence the Defendant to death a violation of the Accusation Clause of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment to the United States Constitution, as well as Article I, Section 15(a), of the Florida Constitution.

The utilization of aggravating circumstances without notice further deprived the Defendant of essential safeguards "designed to limit the unbridled exercise of judicial discretion in cases where the ultimate penalty is possible". Provence v. State, 337 So. 2d 783 (Fla. 1976).

Failure to give timely and adequate notice of the precise grounds on which the State seeks the death penalty, or on which the Court would consider imposing the death penalty, deprives a defendant of a fair sentencing hearing, with the

accused being given a meaningful opportunity to rebut the aggravating circumstances. This results in a violation of the Defendant's right to effective assistance of counsel pursuant to the Sixth Amendment to the United States Constitution. This results because the Defendant nor his counsel are able to prepare and present any defensive evidence and arguments to meet the prosecutor's contentions as to what he may consider an aggravating circumstance to be or to determine the issues which the trial court may regard as controlling on the question of life or death.

The Florida Standard Jury Instructions in criminal cases contain instructions to be given in capital cases. The instructions tell the jury to consider the evidence already heard at trial. Therefore, the only way to confront and rebut aggravating circumstances during the course of the guilt phase of the trial is to give the defendant and his counsel notice thereof in advance. Proper notification of all aggravating circumstances claimed by the State in advance is essential to enable the defendant and his counsel to deal effectively with the allegations later raised at trial.

This Court vacated the death penalty and remanded for a new sentencing hearing in one case on the grounds that it was essential to permit defense counsel to have access to all information, and sufficient time to rebut in a meaningful manner. Barclay and Dougan v. State, 343 So. 2d 1266 (Fla. 1977). This decision is consistent with the United States Supreme Court's decision in Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1107 (1977). There the Court said at page 1205 as follows:

> "(I)t is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause. . .Our belief that debate between adversaries is often essential to the truth-seeking function of trials requires us also to recognize the importance of giving counsel an opportunity to commit on facts which may influence the sentencing decision in capital cases."

Thus a denial of advance notice of what aggravating circumstances the State

intends to rely upon at the sentencing phase of trial violates the Due Process Clause as interpreted in Gardner.

The United States Supreme Court also has upheld the giving of such notice in Gregg v. Georgia, ____ U.S. ____, 96 S.Ct. 2909 (1976), where it upheld Georgia's death penalty. The Georgia statute requires as follows:

> "the judge (or jury) shall hear additional evidence in extenuation, mitigation, and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty or pleas of nolo contendre of the defendant, or the absence of any prior conviction and pleas. Provided, however, that only such evidence in aggravation as the State has made known to the Defendant prior to his trial shall be admissible. The Judge (or jury) shall also hear argument by defendant or his counsel and the prosecuting attorney. . .regarding the punishment to be imposed." Gregg, at 2920.

Because the trial court denied the Motion for Statement of Aggravating Circumstances, and because the State failed to give such a Statement to the Defendant prior to trial, the Defendant's convictions must be reversed, and this cause remanded to the circuit court for new trial.

ARGUMENT VIII

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR VOIR DIRE OF THE GRAND JURORS.

On July 23, 1982, the Public Defender, on behalf of the Defendant, requested the Court to permit counsel for the Defendant to Voir Dire the members of the Grand Jury that returned the Indictment against the Defendant (pages 1568-1569). The trial court denied the Motion on August 17, 1982 (page 1591).

The Motion was made by the Public Defender on the basis that the unlawful and unconstitutional manner in which the Grand Jury was selected excluded representation of distinguishable classes of minorities. Such exclusion could only give rise to the presumption of bias and prejudice on the part of the Grand Jurors against the excluded minority classes, such as the Defendant, a Cuban Black.

The only way to determine if such prejudice had in fact existed was to conduct an extensive voir dire of the Grand Jurors through questioning of the Jurors as to their educational background, employment, place of residence, racial background, religious beliefs, relations with Latins, relations with young adults age eighteen to thirty, relations with Blacks, relations with poor people, age, marital status, and process of selection.

Only extensive voir dire would have disclosed any predetermined state of mind as to the events surrounding the return of the Indictment against the Defendant. By denying the Motion, the Defendant was denied his right to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution, and his convictions should be reversed, and his case remanded to the circuit court for new trial.

ARGUMENT IX

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR DISCHARGE DUE TO THE RUNNING OF SPEEDY TRIAL.

On April 8, 1982, the Defendant was arrested for possession of a stolen motor vehicle by members of the Florida Highway Patrol near Lake City, Florida. On April 16, 1982, the Defendant was arrested by Detective Daniel Nazarchuck of the Orange County Sheriff's Office for first degree murder (pages 1510-1512).

Following his arraignment on the charges, the Defendant was appointed the Public Defender in June, 1982 (page 1523). Trial was eventually set for August 31, 1982, at 9:00 A.M. (page 1527).

On August 17, 1982, the Public Defender moved to withdraw as the Defendant's appointed counsel, stating in his Motion to Withdraw that there was a conflict of interest due to the fact that the Public Defender had once represented one of the State's witnesses, Reinaldo Dorta (page 1588). On August 26, 1982, the Court granted the Public Defender's Motion to Withdraw, and appointed Anna Tangel Rodriquez and the undersigned to represent the Defendant (page 1594).

On August 31, 1982, trial was set to begin. At that time, the newly appointed counsel for the Defendant stated that the Defendant was not yet ready for trial due to the fact that his newly appointed counsel had received their appointments only four days earlier. Without moving for a continuance or waiving the Defendant's right to a speedy trial, counsel asked for an additional sixty to ninety days to prepare for trial. The trial court ordered the case continued, stating that the delay was not the fault of the State or the court, but was delayed solely because of the conflict of interest that had arisen within the Office of the Public Defender, who had discovered the conflict only a few weeks prior to trial.

The court also stated that the Defendant had also been given a choice as to whether he wished to waive the conflict and continue to be represented by the

Public Defender, or whether he wished the court to appoint new counsel for him. Upon the Defendant's response that he would leave the matter up to the court, the court decided, after full consideration of all the circumstances, that it would be in the Defendant's best interest to appoint two new conflict-free counsel, one of whom would speak Spanish fluently. Based on these "exigent circumstances", the court continued the case for ninety days (page 1600).

On October 29, 1982, counsel for the Defendant filed a Motion for Discharge as to both charges, stating that the Defendant had been arrested in early April, 1982, and since 180 days had passed since that date, speedy trial had run. Therefore, the Defendant was entitled to discharge.

A hearing on the Motion was held on November 5, 1982 (pages 890-902). After counsel for the Defendant stated his grounds supporting the Motion for Discharge (page 890, lines 15-25; page 891, lines 1-17), the State replied that the Motion should not be granted on the grounds that the Defense had failed to demand a speedy trial, had not yet completed discovery, and that the prior delay had not been attributed to the State (page 892, lines 15-25; page 893, lines 1-9). The court then observed that neither the newly appointed counsel nor the Public Defender had been prepared to go to trial back on August 31, 1982 (page 894, lines 11-18). The court then stated that it could find no reason to grant the Motion, but could find an additional reason not to grant it on the basis that counsel for the Defendant still had a pending motion (page 894, lines 19-25). The court then entered an order denying the Motion for Discharge (page 1678).

Rule 3.190(a)(1), Florida Rules of Criminal Procedure, provides that every person charged with a crime by indictment or information shall without demand be brought to trial within 180 days if the accused is charged with a felony. If he is not brought to trial withing that period of time, he shall be forever discharged from the crime, upon motion timely filed with the circuit court and served upon the prosecuting attorney.

Rule 3.190(d)(2)(ii), Florida Rules of Criminal Procedure, provides that the 180 day limit established in Rule 3.190(a)(1) may be extended by the written or recorded order of the court on the court's own motion if exceptional circumstances exist as outlined in Rule 3.190(f).

Rule 3.190(f), Florida Rules of Criminal Procedure, states that the court may order an extension of the 180 day speedy trial period where exceptional circumstances are shown to exist. The circumstances include: (1) the unexpected illness or unexpexted incapacity or unforeseeable and unavoidable absence of a person whose presence or testimony is uniquely necessary for a full and adequate trial; (2) a showing by the State that the case is so unusual and so complex, due to the number of defendants or the nature of the prosecution or otherwise, that it is unreasonable to expect adequate investigation or preparation within the 180 day time limit; (3) a showing by the State that specific evidence or testimony is not available despite diligent efforts to secure it, but will become available at a later time; (4) a showing by the accused or the State of the necessity for delay grounded on developments which could not have been anticipated and which will materially affect the trial; (5) a showing that the delay is necessary to accomodate a co-defendant, where there is a reason not to sever the cases in order to proceed promptly with the trial of the defendant; and (6) a showing by the State that the accused has caused major delay or disruption of proceedings, as by preventing the attendance of witnesses or otherwise.

It is immediately apparent that none of the above exceptional circumstances fit within the framework of the continuance granted by the court in its Order of September 1, 1982. The closest circumstance might be considered to be Rule 3.190(f)(4), but this delay must be requested either by the State or the accused. In the case at bar, neither the State nor the accused asked for a delay. This is especially true regarding the Defendant since any conflict in interest was not his fault but that of the Public Defender. Nor did he ever state that he wished the

Public Defender to withdraw (said withdrawal being made on the court's own motion). Thus, the Defendant's Motion for Discharge should have been granted. The trial court erred in denying the Motion for Discharge; therefore, the Defendant's convictions should be reversed and the Defendant forever discharged.

ARGUMENT X

THE TRIAL COURT ERRED IN DENYING BOTH THE DEFENDANT'S MOTIONS IN LIMINIE REQUESTING THE COURT TO PROHIBIT THE STATE FROM QUESTIONING ANY PROSPECTIVE JURORS AS TO THEIR ATTITUDES TOWARDS CAPITAL PUNISHMENT PRIOR TO THERE BEING A DECISION BY SUCH JURORS AS TO THE GUILT OR INNOCENCE OF THE DEFENDANT.

On July 23, 1982, the Public Defender, acting on behalf of the Defendant, filed a Motion In Liminie requesting the trial court to enter an Order prohibiting the prosecuting attorney from questioning any prospective jurors in the case about their opinions either in favor of or in opposition to the death penalty (page 1547-1549). The trial court denied the Motion on August 17, 1982 (page 1591). On March 9, 1983, the undersigned filed a Supplemental Motion in Liminie along the same lines as the Public Defender's Motion (pages 1794-1796). This Motion was denied on March 11, 1983 (page 1838).

Article I, Section 9, of the Florida Constitution states that no person shall be deprived of life, liberty or property without due process of law. This right is also guaranteed to him by the Fifth Amendment to the United States Constitution. Article I, Section 16, of the Florida Constitution provides that every person accused of a crime is entitled to a speedy and public trial by an impartial jury in the county where the crime was committed. This right is also guaranteed to an accused by the Sixth Amendment to the United States Constitution.

One of the prerequisites of a fair and impartial jury is the selection of that jury from a representative cross-section of the community at large. Taylor v. Louisiana, 419 U.S. 522 (1975); Hernandez v. Texas, 347 U.S. 425 (1954); Thiel v. Southern Pacific Co., 328 U.S. 217 (1946); Smith v. Texas, 311 U.S. 128 (1940). Without question, persons opposed to the imposition of the death penalty comprise a fair cross-section of the community. Gregg v. Georgia, 428 U.S. 195 (1976). Thus, exclusion of such jurors would be constitutionally impermissible.

Indeed, the questioning of jurors regarding their opinions on the imposition of the death sentence is inherently prejudicial to the accused because the sole purpose of the questioning is not for the purpose of selecting a fair and impartial jury, but to give the prosecutor an opportunity to exclude those jurors who are either adamantly opposed to the death penalty or those who merely have reservations about capital punishment. Thus, the panel is no longer one composed of fair and impartial jurors selected from a cross-section of the community, because part of that cross-section (those who are opposed to or have reservations about the death penalty) has been effectively weeded out by the State.

Additionally, there is the emotional impact such questioning has on the minds of the jurors at the outset of trial. Once questioning is allowed of the jurors about their feelings regarding the imposition of a death sentence, the spectre of prejudice immediately rises against the accused because the idea of death has been implanted in their minds from the very beginning of the trial. Instead of focusing their minds solely on the issue of the accused's guilt or innocence, they are also forced to deal, during trial, with the emotional maelstorm of trying to decide whether they will have the courage to vote for or against sentencing the accused to death should they find him guilty as charged.

Finally, there is no logical reason why the questioning, if constutionally valid, cannot be made during the penalty phase of the trial. At that point, the jurors have reached a decision on the guilt or innocence of the accused. If acquitted or found guilty of a lesser charge, there is no need for the penalty phase. If convicted as charged, the sole remaining issue is the decision to impose or not impose the death penalty on the accused. At this stage, the jurors' opinions regarding the imposition of the death penalty becomes all-important, and if there are any jurors who are opposed to or have reservations concerning the imposition of the death penalty, the prosecutor and court are free to excuse them as needed, filling their places with new jurors who have no such reservations. This would only

require the little additional time needed for a new voir dire, but would effectively protect the accused's constitutional right to a fair and impartial jury during the guilt or innocence trial phase. Because the trial court failed to prohibit such questioning, the Defendant's convictions should be reversed, and this cause remanded to the circuit court for a new trial.

ARGUMENT XI

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR DISCLOSURE OF RECORDS OF PRIOR CONVICTIONS OF SEVERAL OF THE STATE'S NON-LAW ENFORCEMENT WITNESSES.

On March 9, 1983, counsel for the Defendant filed a Motion for Disclosure of Records of Prior Convictions requesting the trial court to enter an Order directing the State to disclose to the defense any and all records of convictions, if any, of State witnesses Donald E. Potter, Michael E. White, Reinaldo Dorta, Barbara J. Andrews, Ruby L. Pate, Margaret Moore, and Gracie Moore (pages 1798-1799).

The Motion was made on the ground that the State had access to records of prior convictions of the witnesses, access the Defendant did not have because of his inability to access the records of the Orange County Sheriff's Office, the Florida Department of Law Enforcement and the Federal Bureau of Investigation. The Motion further stated that this information was required prior to trial so that counsel could verify the information and obtain certified copies of said convictions for use during cross-examination of the witnesses at trial.

A hearing was held on this Motion on March 11, 1983 (pages 12-19). At the hearing, the prosecutor argued that it was not his obligation to search out for the Defense the records requested if such records were not within his actual possession (page 917, lines 21-24). The court ruled that the prosecutor was only obligated to produce records of convictions that were within the confines of the State Attorney's office. Past that, the burden was upon the Defendant to use some due diligence, first by deposition, then by other means. If such records were disclosed, it was the Defendant's obligation to contact the clerk of the court of the appropriate circuit and obtain certified copies of the convictions (page 918, lines 2-12). The court then stated that it would go no further than to order the prosecutor to furnish by letter any prior convictions on the witnesses that he maintained in the State Attorney's office files (page 919, lines 16-23).

The Defendant contends that the trial court erred in limiting its ruling to just the records in the prosecutor's office. In State v. Coney, 294 So. 2d 82 (Fla. 1973), this Court ruled that the criminal records of potential State's witnesses do not have to be in the actual possession of the prosecutor before discovery may be had to the documents by the defense. Such records are properly discoverable by the defense whether the State has actual or constructive possession of the records, including data obtainable from the Federal Bureau of Investigation, and the Florida Department of Law Enforcement. By denying the Defendant disclosure of those records within the constructive possession of the prosecutor, the court committed reversible error. Therefore, the Defendant's convictions must be reversed, and the causes remanded to the circuit court for new trial.

ARGUMENT XII

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S REQUEST FOR AN ADDITIONAL PSYCHIATRIC EXAMINATION OF THE DEFENDANT.

On March 9, 1983, counsel for the Defendant filed a Motion for Additional Psychiatric Examination for the Defendant, requesting the appointment of an additional psychiatrist's examination because the Defendant appeared to be suffering from mental disturbances to such an extent that it was becoming difficult for counsel to prepare an adequate defense for the Defendant. The Motion further stated that only two psychiatrists had examined the Defendant up to that point, although he was entitled to a third by the Florida Rules of Criminal Procedure (page 1800). A hearing on the Motion was held on March 11, 1983. At the hearing counsel for the Defendant stated that his personal observations over the past few months indictated that the Defendant was suffering from severe mental and emotional problems, which required a third psychiatrist's examination (page 914, lines 3-19). The trial court denied the motion, statint that if there had been a split of opinion between the psychiatrists as to the Defendant's sanity, another psychiatrist would have been appointed. There, however, was no split of opinion (page 914, lines 20-24).

Rule 3.210(b), Florida Rules of Criminal Procedure, states that if, before the trial, the court on its own motion, or upon the 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 the hearing.

The Defendant contends the court committed reversible error in not granting

the Motion. The grounds stated by his counsel in the Motion were reasonable, especially as it concerned the Defendant's inability to assist his own counsel. Under those circumstances, the court abused its discretion in not appointing a third psychiatrist to examine the Defendant's competency. On that basis, and because the Defendant's later behavior during trial (which caused him to be shackled by the court, thus severely hampering his ability to effectively assist his counsel during trial), the Defendant's convictions must be reversed, and the cases remanded to the circuit court for new trial.

ARGUMENT XIII

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO VACATE THE DEATH PENALTY.

On March 9, 1983, counsel for the Defendant filed a Motion to Vacate the Death Penalty on the grounds that Section 921.141 is unconstitutional under Article V, Section 2(a) of the Florida Constitution (pages 1802-1803). the Motion was denied on March 11, 1983 (page 1838).

On December 8, 1972, former governer Rubin D. Askew, signed into law Chapter 72-724, Laws of Florida (1972), which is the present Section 921.141, Florida Statutes (1981). This section sets forth the procedure to be followed governing the imposition of the death penalty in Florida. The essential elements of this section are procedural, not substantive in nature. Dobbert v. Florida, 97 S.Ct. 2290 (1977); Lee v. State, 286 So. 2d 596 (Fla. 1st DCA 1973), modified at 294 So. 2d 305 (Fla. 1974).

Article V, Section 2(a), of the Florida Constitution provides that "The Supreme Court shall adopt rules for the practice and procedure in all courts. . .". This Court, however, has never adopted Section 921.141 as a rule of procedure. Because the legislature has no authority to enact any law relating to practice and procedure, Section 921.141 is void unless adopted by this Court. In re Classification of Florida Rules of Practice and Procedure, 281 So. 2d 204 (Fla. 1973); State v. Smith, 260 So. 2d 489 (Fla. 1971).

Thus, there being no lawful means of imposing death as a punishment in the State of Florida, the trial court should have granted the Defendant's Motion to Vacate the Death Penalty. By its denial of said Motion, the court committed reversible error, and this cause should be remanded to the circuit court with directions to reduce the Defendant's sentence to life imprisonment.

ARGUMENT XIV

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS THE ARREST OF THE DEFENDANT AND THE SUBSEQUENT SEIZURE OF EVIDENCE FROM HIM AND THE CADILLAC FOLLOWING HIS ARREST BY THE FLORIDA HIGHWAY PATROL.

On March 16, 1983, during the second day of trial, the court heard the Defendant's Motion to Suppress the arrest of the Defendant by the Florida Highway Patrol, and their subsequent seizure of evidence from the Defendant and the victim's Cadillac. In support of the Motion, the Defendant took the stand (on a proffer of evidence, of course). The Defendant stated that he was arrested on April 8, 1982, at the rest area near Lake City, Florida by two police officers (page 312, lines 1-6). He testified that he was alone in the car at the time of the arrest, that he had possession of the keys to the car, and that he had been driving the automobile (page 312, lines 7-18).

On cross-examination, the Defendant stated that he was asleep in the back seat of the Cadillac at the time the officers found him, and that no one else was in the car at that time (page 313, lines 1-13). He then admitted that he did not own the auto, but that the car had been given to him by its owner, Dorothy James, on Saturday, April 3, 1982 (page 313, lines 14-25). When questioned further, he admitted that Dorothy James had not given him ownership of the car, but that she had given him the keys and her permission to drive the vehicle (page 314, lines 22-23). He conceded that she had not given him permission to sell or to attempt to sell the car, although he had in fact attempted to sell the car while in Tampa because his brother-in-law, Michael, told him to sell the car (page 315, lines 4-14). He also admitted that Dorothy James had not given him permission to leave Orlando with the car (page 316, lines 8-9).

Following the Defendant's testimony, Trooper Robert A. Wilson of the Florida Highway Patrol was called by the State (pages 320-353). He testified that he was

on patrol on I-10 near the Lake City area on April 8, 1982, at 12:11 A.M., when he first came into contact with the Defendant (page 321, lines 2-21). He observed the Defendant, apparently asleep, in the driver's seat of a green over white Cadillac parked in an unlighted rest area. He also noticed that the vehicle's engine was running and there appeared to be a gas leak underneath the rear of the car. He advised his station that he would be checking out the driver to determine his physical condition (page 322, lines 1-24).

At the same time, he radioed in the car's tag number. Before he could check the condition of the driver, however, his station radioed back the tag number and the fact that the automobile had possibly been used in a homicide (page 323, lines 6-22). He testified that the information concerning the vehicle fit the description of the car, but could not recall if he was told whether the car had been stolen (page 323, lines 23-25; page 324, lines 1-4). In fact, he could only remember receiving information that the car was missing from the victim (page 325, lines 2-5).

Once in receipt of this information, Trooper Wilson pulled his patrol car back from the Cadillac, and radioed for his back-up, Trooper W.H. Hull. Upon his arrival, both troopers approached the car with weapons drawn, but found the doors to the Cadillac locked (page 324, lines 5-16; page 325, lines 8-21). The troopers then knocked on the vehicle's door, awoke the driver (who was later identified as the Defendant), and identified themselves (page 326, lines 7-18). After the Defendant unlocked the door, Trooper Wilson pulled the Defendant out of the car, placed him under arrest for possession of a stolen vehicle, escorted him to the rear of the vehicle, and advised him to place his hands on the trunk of the Cadillac (page 326, lines 19-22). While placing handcuffs on the Defendant, he resisted and the troopers had to wrestle him to the ground and handcuff him forcibly (page 327, lines 2-4).

Following his arrest, the troopers conducted a search of the vehicle at the

rest area itself (page 334, lines 22-24). Although Trooper Wilson characterized the search as an inventory search, both the prosecutor and trial court stated that they considered the search to be one incident to an arrest (page 335, lines 6-25). While conducting the search, the troopers found a silver colored, wood-handled knife underneath a hubcap lying on the back right floorboard of the vehicle. The troopers also found two Florida tags in the trunk of the car (page 337, lines 4-17).

On cross-examination, Trooper Wilson admitted that the Defendant was placed under arrest for possession of a stolen vehicle immediately upon being removed from the Cadillac (page 338, lines 21-24). When questioned as to whether he had received any BOLO information concerning the vehicle, Trooper Wilson stated that such information had been given to the station, but had not been given to him prior to the arrest. He admitted that when he had first entered the rest area, he was not looking for any type vehicle at all, as he had no reason to be looking for one (page 339, lines 12-23). He also admitted that he did not attempt to verify what little information he had received prior to arresting the Defendant. Not only did he not have personal knowledge as to whom the vehicle belonged, he also had no personal knowledge that the vehicle had even been stolen (page 340, lines 3-17). He admitted that at the time he first saw the Cadillac, he had no suspicion of criminal activity (page 340, lines 23-25).

Trooper Wilson further conceded that at the time of the arrest, he not only did not know the Defendant's name, but also had no other information about him, personally or from the dispatcher. He did not even ask the Defendant to identify himself prior to arresting him (page 341, lines 6-13). Trooper Wilson then repeated his earlier statement that the only information he had received from his dispatcher was that the Cadillac had possibly been used in a homicide. He also admitted that he had received no information that the Defendant himself had been involved in a homicide, or that he had been involved in the theft of a motor vehicle (page 342, lines 1-5). He also stated that he had received no information prior to the arrest

about the knife or tags later found in the vehicle (page 342, lines 6-9).

Following Trooper Wilson's testimony, the trial court denied the Defendant's Motion to Suppress on the grounds that the Defendant, having stolen the car (the court personally noting for the record that the Defendant was a thief), had no standing to object to the search of the car (page 354, lines 9-16).

Although the Defendant concedes that he had no standing to object to the search of the car under presnt Florida law, that particular point was moot since the search was the product of an illegal arrest based on the lack of probable cause. In fact, the Defendant would contend that Trooper Wilson lacked even a founded suspicion to detain him.

Under Florida law, a police officer may temporarily detain an individual on less than probable cause if the officer has a "well-founded suspicion" that the person has violated, is violating, or is about to violate the law. A "well-founded suspicion" is defined as a suspicion that has some factual foundation in the circumstances observed by the officer, and where those circumstances are interepreted in the light of the officer's knowledge. The suspicion, however, cannot be based on mere conjecture. Wilson v. State, 433 So. 2d 1301 (Fla. 2nd DCA 1983).

In the case at bar, the trooper observed no violation of the law by the Defendant or the vehicle prior to the Defendant's arrest. In fact, he stated that he was not looking for any vehicle upon his arrival, nor had he any suspicion whatsoever of criminal activity. The only reason he approached the car in the end was because he had been advised by his dispatcher that the vehicle had possibly been used in a homicide. He testified that the receipt of this information indicated to him that the vehicle was probably stolen. He admitted, however, that he made no attempt to verify the information received, and thus had no actual knowledge that the vehicle had been reported stolen, or that the Defendant had stolen the Cadillac.

The Defendant would contend that the actions taken by the officer were not those of an officer who had a "well-founded" suspicion that the Cadillac had been stolen, but that of a "mere" conjecture. As such, the officer had no reason to approach the vehicle or the Defendant.

Assuming, arguendo, that the information received by Trooper Wilson was sufficient to enable him to form a "well-founded" suspicion that criminal activity was taking place, and thus gave the trooper the right to temporarily detain the Defendant and the vehicle, the Defendant would next contend that this radio information certainly did not give the trooper probable cause to arrest him on the charge of possession of a stolen vehicle.

Under Florida law, probable cause must exist before an officer may make an arrest. In the Interest of P.L.R., 435 So. 2d 850 (Fla. 4th DCA 1983). The test to determine if probable cause exists is whether "the facts and circumstances within the officer's knowledge, and of which he had reasonably trustworthy information, are sufficient in themselves to warrant a man of reasonable caution to believe that an offense has been committed. Benefield v. State, 160 So. 2d 706 (Fla. 1964); Carr v. State, 353 So. 2d 58 (Fla. 2nd DCA 1978).

The lawfulness of the arrest must stand or fall upon the facts and circumstances then existing. Canney v. State, 298 So. 2d 495 (Fla. 2nd DCA 1974). In the case at bar, the Defendant would reiterate that at the time of arrival, the trooper had no personal knowledge of any criminal activity, involving the Defendant himself or the Cadillac. The only time he became apprised of "criminal" activity was after he had been told by his dispatcher that the Cadillac had possibly been used in a homicide. This information did not even amount to a BOLO, and even if it had, a "Be On The Lookout For" alert does not in and of itself constitute adequate probable cause to arrest, absent some supporting factual data in the possession of the arresting officer prior to making the arrest, which would support a finding of probable cause. D' Agostino v. State, 310 So. 2d 12 (Fla. 1975).

In D'Agostino, a motel guest had returned to her room from the pool, and found that jewelry had been taken from her room. She telephoned the hotel operator and stated that she had been robbed, with nothing more and no mention of what room she occupied. The hotel operator proceeded to call the police whose dispatcher issued a BOLO. Testimony conclusively established that the police talked to no one prior to arresting and searching the defendant (on whose person the missing jewelry was found), and accordingly could have acted only upon the general BOLO alert for someone.

This Court ruled that the information contained in the BOLO did not contain sufficient and actual data as the basis for probable cause for making an arrest or search. It was obvious that the facts within the possession of the officers were not sufficient as a matter of law to constitute probable cause for the arrest. The subsequently discovered stolen jewelry would not supply the missing data either, for it had become the "fruit of the poisonous tree", and required the granting of the Defendant's motion to suppress the evidence.

In the case at bar, the officers had no idea who the Defendant was at the time of the arrest, if the car was even stolen, or if stolen, that the Defendant had stolen it, or possessed it illegally. Without more information, the trooper could not make the arrest. It was just as probable at that time, based on the facts within the trooper's knowledge, that the Defendant was the co-owner of the Cadillac, that the victim was his wife, and that he was using the car for a trip.

Another case on point is Rogers v. State, 427 So. 2d 286 (Fla. 1st DCA 1983). At the time of the defendant's arrest, the sheriff's department knew the identity of the victim, the cause of her death, the description of the victim's car, the fact that the defendant had been seen driving a similar car and had been dating the victim, and that he had tried to evade the deputy sheriff who arrested him. The appellate court stated, in ruling that the deputy lacked probable cause to make the arrest, that even if all the information provided to the sheriff's

department were shown to be reliable, it could not justify a belief that Rogers had committed the murder. At most, the information raised a reasonable suspicion that Rogers had engaged in criminal activity so as to justify a police stop for questioning. See Caddie v. State, 406 So. 2d 117 (Fla. 2nd DCA 1981).

In the case at bar, not only did the troopers not have information like the sherrif's department in the Rogers case, neither did their dispatcher or the Orange County Sheriff's office. The best information available at that time was that Dorothy James had been murdered, and her car was missing.

In Lemus v. State, 158 So. 2d 143 (Fla. 2nd DCA 1963), the appellate court ruled that the defendant's mere presence on the premises of a grocery store suspected, at times, as a scene of lottery sales, at a time when events in the store indicated nothing inconsistent with the normal and legitimate operations of the store, did not constitute probable cause for the arrest and search of the defendant, and therefore, a bond ticket taken from him was not the product of a lawful search, and was inadmissible in evidence.

In Outten v. State, 197 So. 2d 594 (Fla. 2nd DCA 1967), a trooper was parked on the median on I-4 near Orient Road in Hillsborough County. Pursuant to a call from his station, he was watching for a blue Dodge automobile headed east on I-4 towards Gainesville. He was to stop the car and inform its occupants that they had left their football tickets in Pinellas County. While parked, he noticed a blue Dodge pass in an easterly direction. He caught up with the car, stopped it, looked in at the driver and asked for his driver's license. When the driver was unable to produce a license, the trooper arrested the driver and his passenger for "suspicion of auto theft". Subsequent information revealed that the Dodge had been stolen by the occupants. The appellate court ruled that the trooper had no probable cause to make the arrest.

Based on the facts and arguments of law cited above, it is clear that the trial court should have suppressed all evidence taken from the automobile because

of the illegal arrest of the Defendant. Failure to do so was irreversible error due to the fact that the evidence, including the knife, the two Florida tags, the Defendant's fingerprints, and the car itself, were the crucial evidence used by the State in its case-in-chief. State v. Rheiner, 297 So. 2d 130 (Fla. 2nd DCA 1974). The Defendant's convictions must be reversed, and the case remanded to the circuit court for new trial.

ARGUMENT XV

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION IN LIMINIE TO PREVENT TROOPERS WILSON AND HULL FROM TESTIFYING ABOUT THE INCIDENT IN WHICH THE DEFENDANT WAS CHARGED WITH RESISTING ARREST AND BATTERY UPON A LAW ENFORCEMENT OFFICER.

On March 10, 1983, counsel for the Defendant filed a Motion in Liminie requesting the trial court to direct the State and its witnesses to refrain from making any reference to the alleged battery on a law enforcement charge arising out of the arrest of the Defendant by the Florida Highway Patrol on April 8, 1982. As grounds in support of the Motion, counsel stated that pursuant to Section 90.404, Florida Statutes (1981), the Defendant was entitled to ten (10) days notice of the State's intent to rely on similar fact evidence, and that the prosecutor had failed to notice the Defense (page 1809). A hearing was held on the Motion on March 11, 1983, which the court denied, even though the prosecutor admitted that notice had not been given because he did not plan to use the evidence at trial (page 906, lines 3-5). The Court denied the Motion, and further stated that he would permit the prosecutor to use the evidence at trial (page 907, lines 6-13).

During trial, Trooper W.H. Hull testified that the Defendant resisted their attempts to place him under arrest by flinging his arms and twisting away from the troopers as they attempted to place handcuffs on him (page 451, lines 1-13). At that point, counsel for the Defendant objected, asked the court to strike the statement, and to instruct the jury to disregard the response on the grounds stated in his pre-trial Motion and on the ground that the alleged resisting was neither relevant nor material to the issues at trial. The court overruled the objection, and denied counsel's motion to strike or disregard (page 451, lines 14-20).

Although the Defendant concedes that it is within the trial court's discretion to allow similar fact evidence, he would state only that such testimony was elicited by the prosecutor for no other purpose than to malign his character contrary to the

Williams Rule, since the resistance was not great, nor was the action shown to be in the furtherance of escape or flight from the charges for which he was being tried.

The Defendant would contend, however, that the court committed reversible error by not conducting a Richardson inquiry prior to trial, or during trial outside the presence of the jury, as to why the State had failed to give proper notice of their intent to rely on the statements. Yanes v. State, 418 So. 2d 1247 (Fla. 4th DCA 1982); Clair v. State, 406 So. 2d 109 (Fla. 5th DCA 1981); McDonnough v. State, 402 So. 2d 1233 (Fla. 5th DCA 1981). The Defendant's convictions must be reversed, and the cause remanded to the circuit court for new trial.

ARGUMENT XVI

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO SUPPESS ADMISSIONS AND STATEMENTS MADE BY THE DEFENDANT TO DETECTIVES PAYNE AND NAZARCHUCK OF THE ORANGE COUNTY SHERIFF'S OFFICE.

On March 10, 1983, counsel for the Defendant filed a Motion to Suppress the Statements and Admissions made by the Defendant to Detective Daniel Nazarchuck on April 9, 1982 at the Columbia County Sheriff's Department (pages 1820-1821). A hearing on the Motion was held during trial on March 15, 1983 (page 195, lines 7-10).

Detective Daniel Nazarchuck was called as a witness for the State in response to the Motion (pages 196-207). He stated that he met with the Defendant on April 9, 1982, at the Columbia County Sheriff's Department, where the Defendant was being detained for Ornage County regarding the theft of Dorothy James' Cadillac (page 197, lines 17-25). The detective testified that he held both an oral interview, as well as a later taped interview, with the Defendant. Prior to each interview, Detective Nazarchuck explained the purpose of his visit and read the Miranda warnings off a standard rights card to the Defendant, with the Defendant answering the questions contained on that card as follows:

> ". . .(O)ne, you have the right to remain silent. Two, anything you say will be used in court against you. Three, you are entitled to talk to an attorney now and have him present now or at any time during questioning. If you acnnot afford an attorney, one will be appointed for you without cost. Do you desire to consult with an attorney first or to have one present during this interview? His response was, no. And I continued. If at any time hereafter you wish to remain silent ot have an attorney present, all questioning will be stopped. Has anyone at any time threatened, coerced, or promised you anything in order to induce you to make a statement now? His answer was, no." (page 199, lines 5-16).

Detective Nazarchuck stated that the Defendant spoke English to him and

appeared to have no problem understanding his rights or what the detective was explaining to him (page 200, lines 1-6). He then asked the Defendant if he understood his rights, to which the Defendant replied that he did. The Defendant also indicated that he wished to talk to the detective at that time (page 200, lines 10-15).

When asked if the Defendant signed the rights card, Detective Nazarchuck replied negatively, stating that the Defendant told him that he (the Defendant) would not sign the form because of his inability to read English (page 200, lines 16-25). Detective Nazarchuck admitted, however, that when first questioned as to whether he wished to make a statement, the Defendant verbally replied that he did not wish to. Detective Nazarchuck explained that he wasn't too sure what the Defendant meant by his answer and asked the Defendant to clarify his answer. He testified that the Defendant then told the detective that he (the Defendant) wished to tell him something, and the interview continued (page 201, lines 6-13). He also stated that the Defendant at no time during the interview ever indicated that he wished to stop the interview or consult with an attorney (page 202, lines 1-4). He later stated that the Defendant showed no hesitancy in giving first the oral interview followed by the taped interview (page 204, lines 7-12).

On cross-examination, Detective Nazarchuck admitted that the Defendant hesitated and paused a little bit when responding to his questions (page 205, lines 12-14). He also admitted that when the Defendant stated that he did not wish to talk to the detective following the reading of the rights card, he clearly understoof the Defendant's answer to be no (page 206, lines 12-22).

Following Detective Nazarchuck's testimony, the Defendant took the witness stand, testifying in support of the Motion to Suppress (pages 212-220). He stated that what Detective Nazarchuck told him concerning his rights on April 9, 1982, was probably correct. However, he did not understand the detective very well during the interview (page 213, lines 20-25; page 214, line 1). He explained that at

the time of the interview, he had trouble understanding the English language because he had only been in the United States for less than two years (page 214, lines 1-14).

The Defendant then testified that when asked by Detective Nazarchuck if he (the Defendant) wished to speak to the detective, he told the detective that he did not wish to talk. The Defendant stated that the detectives then continued to question him regardless, telling him that he had to answer yes or no. He further stated that he did not know if the detective was really a police officer since the man was dressed in plain clothes (page 214, lines 15-25). The Defendant was unable to tell, because he only understood that the detectives "had something to do with the law", like doctors and lawyers, as well as police officers (page 215, lines 1-6).

The Defendant then testified that Detective Nazarchuck told him not to say anything about the car or even admit that the car belonged to Dorothy James (page 215, lines 8-16). He stated that he was confused by some of the terms Detective Nazarchuck used in his questions, and thus answered automatically, without truly realizing what he was saying (page 215, lines 20-25; page 216, lines 1-2).

On cross-examination, the Defendant admitted that the tape was accurate, but stated that a long oral conversation had preceeded the taped interview. He also stated that he told the detective that he did not wish to talk to him prior to the tape recorder being turned on. He further stated that he asked several times who the detective was, but the detective never told him (page 217, lines 1-13). He then went on to relate that his understanding of the English language was based on listening to its sounds. After listening to the sounds, he would translate the English to Spanish in his mind. Because this process was taking place, he had trouble understanding the detective, and wasn't really sure that the detective understood what he (the Defendant) was trying to explain (page 213, lines 11-25). He did admit, however, that he didn't recall telling the detective that he did not understand him (page 220, lines 2-10).

Following the Defendant's testimony, the court heard argument on the Motion, eventually taking the matter under advisement (pages 221-226). The court denied the Motion the following day stating that the case law supplied by the State supported his denial of the Motion. The court then ruled that the statements made by the Defendant were done so freely and voluntarily (pages 307-309).

The Defendant would first contend that the statements given by the Defendant to Detective Nazarchuck should have been suppressed due to the fact that they were obtained following the illegal arrest of the Defendant by the Florida Highway Patrol, and therefore were inadmissible. Brown v. Illinois, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed 2d 416 (1975). State v. Rheiner, 297 So. 2d 130 (Fla. 2nd DCA 1974); Outten v. State, 197 So. 2d 594 (Fla. 2nd DCA 1967).

Assuming, arguendo, that the arrest was not illegal, the Defendant would next contend that the statements given by him should have been suppressed due to the fact that he had exercised his right to remain silent. Once a person in custody has asserted the right to remain silent, any statements obtained from that person are admissible only if the interrogating officer has scrupulously honored the accused's right to remain silent. Michigan v. Mosely, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed. 2d 313 (1975).

Moreover, where an accused who has refused to discuss a crime subsequently makes an incriminating statement, the State has the heavy burden of showing that the accused knowingly waived his right to remain silent. State v. Dixon, 348 So. 2d 333 (Fla. 2nd DCA 1977). To establish a waiver under these circumstances, the State must demonstrate that the interrogation was terminated at the accused's request and was resumed only when the accused has indicated his desire to make a statement. Rivera Nunez v. State, 227 So. 2d 324 (Fla. 4th DCA 1969).

In the case at bar, the evidence was clearly established by both the Defendant and Detective Nazarchuck that the Defendant had stated at the beginning of his interviews that he did not wish to talk to the detective. Such silence was

broken not by the Defendant, but by the repeated question of Detective Nazarchuck. In such a case, the Defendant's later statements should have been suppressed since the Defendant's right to silence had not been scrupulously guarded by the Detective Nazarchuck.

In Bowen v. State, 404 SO. 2d 145 (Fla. 2nd DCA 1981), the detective continued to question the Defendant concerning the burglary after he had stated that he did not wish to discuss it. The appellate court ruled that since the detective failed to scrupulously honor the defendant's right to remain silent, the case had to be reversed.

In Jones v. State, 346 So. 2d 639 (Fla. 2nd DCA 1977), the arresting officer asked the defendant if he understood his Miranda rights and the defendant responded that he did not want to say anything. The officer admitted that he continued to question the defendant who subsequently made incriminating statements. The appellate court held the admission of these statments violated the defendant's right to remain silent and reversed the defendant's conviction.

The validity of such a waiver depends on it being voluntarily, knowingly, and intelligently made. Lornitis v. State, 394 So. 2d 455 (Fla. 1st DCA 1981). In the case it bar, it is clear that the Defendant did not make a a voluntary, knowing and intelligent waiver of his right to remain silent. Although he did indicate that he wanted to tell the detective something, the detective failed to remind the Defendant that he was giving up his right to remain silent if he now made a statement. The detective had no idea if what the Defendant wanted to say related to the case, or if it pertained to some other subject. By failing to remind the Defendant that he was giving up his right to remain silent, especially in light of the Defendant's troubles understanding both the English language and the detective, it cannot be said that the Defendant's waiver was voluntary. Therefore, the Defendant's convictions must be reversed, and this cause remanded to the circuit court for new trial.

ARGUMENT XVII

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR SEVERANCE OF THE OFFENSES FOR THE PURPOSE OF TRIAL.

On March 15, 1983, counsel for the Defendant filed in open court a Motion for Severance of the auto theft charge from the first degree murder charge, stating that the evidence presented in the auto theft charge would highly prejudice the Defendant in the defense of his case as to either charge, but especially as to the murder charge. The Motion further stated that the alleged crimes were separate and distinct transactions (page 5, lines 19-23; pages 1820-1821). The trial court denied the Motion, stating that it had ruled on the issue once before when the court had consolidated the two cases for trial (page 5, lines 24-15; page 6, lines 1-2).

Although the Defendant concedes that the granting of a severance is discretionary with the trial court, Florida law also states that a severance should be granted liberally whenever potential prejudice is likely to arise during the course of a trial. Menendez v. State, 368 So. 2d 1278).

In the case at bar, such prejudice was likely since the only evidence the State had to link the Defendant to the murder scene was the victim's Cadillac and its contents. Additionally, it is clear that the two offenses were separate and distinct transactions in that the Defendant took the victim's Cadillac because he was frightened after finding Dorothy James' body in the bedroom of her apartment. By denying the Defendant's Motion for Severance, the trial court abused its discretion and committed irreversible error, thus entitling the Defendant to reversal of his convictions and a new trial.

ARGUMENT XVIII

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION IN LIMINIE AS TO THE ADMISSION OF TESTIMONY BY JAMES J. MCNAMARA REGARDING THE RESULT OF TESTS HE PERFORMED ON THE KNIFE FOUND IN THE VICTIM'S CAR.

On March 16, 1983, counsel for the Defendant filed in open court a Motion in Liminie requesting the trial court to enter an Order directing the State and its witnesses to refrain from making any reference to a substance having been found on the knife found in the victim's car, without there first being a proffer made to the court outside the presence of the jury to determine the admissibility of the evidence (page 580, Lines 22-25; pages 1829-1830). The court denied the Motion, but allowed counsel a standing objection (page 581, lines 2-7).

James McNamara, a serologist with the Sanford Regional Crime Laboratory, then testified in the presence of the jury that he had been able to get a positive screening for blood through the use of a color test on a substance found on the knife blade. He was not able, however, to state conclusively that the substance was blood, much less animal or human blood (page 596, lines 6-25; page 597, line 1).

Although the Defendant concedes that the court has discretion whether to allow testimony concerning evidence to be made through proffer, the Defendant would contend that the court abused its discretion in this case. Since the most that could be said about this substance was only that it tested positively for blood, the test result should not have been admitted into evidence without a proffer, due to the State's claim that the victim had been stabbed with a knife. This is especially true where the evidence was ultimately not relevant to the case, since the chemist could not state that the substance was in reality blood. By allowing the testimony in the presence of the jury, the resulting negative inference created by the test result would have prejudiced the jury against the Defendant, even if the court had later sustained counsel's objection to its introduction. Thus, the

Defendant's convictions should be reversed and this cause remended to the curcuit court for new trial.

ARGUMENT XIX

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION IN LIMINIE REGARDING THE ISSUE OF THE TWO ORANGE COUNTY CORRECTIONAL OFFICERS TESTIFYING ABOUT THE DEFENDANT'S ALLEGED ESCAPE ATTEMPT FROM THEIR CUSTODY.

On March 4, 1983, the State filed a Notice of Intent to Use Similar Fact Evidence regarding the fact that the Defendant allegedly attempted to escape from the police transportaion bus while being transported from Columbia County to Orange County on April 14, 1982 (page 1791). At a hearing on March 11, 1983, counsel for the Defendant requested that the State and its witnesses be refrained from mentioning the alleged escape attempt (page 927, lines 23-25). The court denied the Motion in Liminie (page 929, lines 22-24). During trial, testimony regarding the alleged escape attempt was introduced.

Although the Williams Rule does allow the use of collateral crimes to show identity, modus operandi, or escape, it is not allowed where the sole purpose of the entry of the testimony is to malign the character of the defendant. Additionally, it is not operative to show flight or escape where there have been intervening criminal acts between the crime charged, and the collateral crime claimed. United States v. Myers, 550 Fed. Rep. 2d 1036 (5th CCA).

In the case at bar, the alleged collateral crime of attempted escape should not have been introduced since the Defendant had been involved in criminal activities (such as the stabbing of Michael White and the battery on the Florida Highway Patrol troopers) between the time of the murder and the time of the alleged escape attempt. Because it is just as likely that he was attempting to escape from custody on these charges, the collateral evidence was not relative to the issues at trial. The introduction of such evidence severely prejudiced the Defendant, and thus his convictions must be reversed and this cause remanded to the circuit court for new trial.

ARGUMENT XX

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S SEVERAL MOTIONS FOR MISTRIAL REGARDING THE SHACKLING AND HANDCUFFING OF THE DEFENDANT IN FULL VIEW OF THE JURY.

During the first day of trial, counsel for the Defendant moved for a mistrial (page 68, lines 5-13). The grounds for this motion were based on the fact that the bailiffs had handcuffed the Defendant as he was being led out of the courtroom during recess, said hancuffing being seen by five or six of the jurors. This action was taken even though counsel had specifically asked the bailiff to make sure there were no jurors present so that the Defendant could be taken up one floor to use the bathroom. The court denied the motion (page 69, lines 1-24).

The next morning, prior to the resumption of trial, the court heard testimony from Orange County Correction Officers Mead and Whitted concerning a problem bringing the Defendant to the courtroom. Lieutenant Mead stated that he and Sergeant Whitted had gone to the fifth floor (trial was held on the third floor) to assist the bailiffs in bringing the Defendant to the courtroom. He stated that he heard a loud banging on the inside wall of the holding cell, along with hollering. Looking into the cell, he observed that that Defendant had torn a light fixture from the ceiling and was acting hostile towards everyone. He and the others attempted to calm the Defendant down to no avail, and then placed leg irons and handcuffs on the Defendant to prevent him from kicking them (page 227, lines 23-25; page 238, lines 1-16).

Lieutenant Mead then testified that he had observed the Defendant over the past several months and felt that he was completely unpredictable since he would become hostile for no reason at all. In addition, the jail had been forced to isolate him from the rest of the population because he had been a problem in each cell and had also been in several fights with the inmates (page 228, lines 17-25; page 229, lines 1-8).

Sergeant Whitted testified that the Defendant tended to be very hyper and hostile; that he often could not be calmed down (page 229, lines 21-25; page 230, lines 1-4).

When questioned by counsel for the Defendant, Lieutenant Mead stated that once handcuffed or shackled, however, the Defendant would calm down within an hour. Once calmed, the shackles would be removed and no further problem would occur. In addition, he stated that the Defendant had been attending school while in jail and had caused no problems there (page 231, lines 1-11). Lieutenant Mead then testified that while it might not be safe to bring the Defendant to the courtroom immediately, it would be safe to do so within thirty minutes to an hour (page 232, lines 4-10).

Following the officers testimony and consultation with his bailiff, the court directed that the defendant was to be placed in a belly belt, handcuffs and leg shackles for the remainder of trial (page 233, lines 8-19). Counsel for the Defendant objected, stating that it was unreasonable to expect the jury to sit through a week long trial without noticing that the Defendant had been physically restrained. Counsel further stated that such shackling would only raise the inference in the minds of the jurors that the Defendant was a violent person, causing them to reflect negatively on any credibility he might have as a witness, and on any issues raised in support of the Defendant during the trial (page 235, lines 1-21).

The court overruled the objection, stating that the Defendant's right to be present in the courtroom free of physical restraint had to be balanced against the right of the court personnel and public to be safe-guarded from possible violent outbursts (page 240, lines 3-17).

The next afternoon, counsel for the Defendant renewed his motion for mistrial, stating that the Defendant continued to remain shackled and handcuffed in the presence of the jury, even though his courtroom behavior had been calm and

mannered. Counsel argued that the only inference that could be drawn by the jury was a negative one, and that to continue the trial would be prejudicial to the Defendant. The court again denied the motion for mistrial (page 469, lines 8-22).

At the close of trial on March 17, 1983, counsel again moved for a mistrial, stating that the Defendant had been shackled in full view of the jury for two days, yet had not once caused any type of disturbance or disrupted th court in any way. By requiring him to remain shackled, the jury could only infer that the Defendant was a violent person with a violent nature, thus prejudicing their ability to reach a fair and impartial decision on the issues before them. The court once again denied the motion (page 636, lines 20-25; page 637, lines 1-14).

An individual cannot be forced over his objection to stand trial in prison garb or handcuffs. Estelle v. Williams, 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed. 2d 126 (1976); Neary v. State, 384 So. 2d 881 (Fla. 1980); Topley v. State, 416 So. 2d 1158 (Fla. 4th DCA 1982).

In the case at bar, the trial court committed reversible error by placing the Defendant in physical restraints for the entire trial. This action was taken over the Defendant's strenuous objection and numerous motions for mistrial on the issue. The court made no inquiry of the Defendant himself concerning his ability to remain calm in the courtroom, and made no attempt to warn him of the possibilty of shackling in order to prevent any physical outbursts. The Defendant had never once become physically violent in the courtroom prior to being shackled; he had just loudly argued with the court. This verbal outburst was cured by the court's warning to the Defendant not speak out loud again.

Pursuant to the above facts and case law, it is clear that the Defendant's right to a fair trial was denied, and this cause must be reversed and remanded to the circuit court for a new trial.

ARGUMENT XXI

THE TRIAL COURT ERRED IN UNDULY RESTRICTING THE CROSS-EXAMINATION OF STATE'S WITNESS, REINALDO DORTA, BY THE DEFENSE.

During trial, the State called Reinaldo Dorta as one of its witnesses (pages 365-389). During direct examination, the witness identified the brown cap found at the murder scene and testified that he had seen the Defendant wearing the cap on April 3, 1982, the night of the murder (page 369, lines 3-14). On cross-examination, counsel for the Defendant asked the witness if the cap he saw on the Defendant's head that evening was in fact a red cap. When the witness replied negatively, counsel attempted to impeach Reinaldo Dorta through answers the witness had given concerning the color of the cap at a deposition taken January 20, 1983 (page 373, lines 20-24).

The prosecutor objected to the use of the deposition, stating that he had not been present at the deposition and did not stipulate to the translator's qualifications on that date (page 374, lines 13-17). The prosecutor admitted, however, that the State had been noticed for the deposition, but he had not attended due to the death of his father (page 374, lines 24-25; page 375, line 1). The deposition was examined and the prosecutor noted that no oath to translate was given to the interpreter (page 375, lines 10-12). The court stated, however, that a prior inconsistent statement need not be given under oath to be impeached (page 376, lines 1-2). The court also noted that although the prosecutor could not be at the deposition, someone else from the State Attorney's office could have covered the deposition for him (page 377, lines 20-27).

The court eventually ruled that the witnesses' indication during the deposition that the cap was "sort of red" (instead of tan as testified by the witness at trial) was at most an immaterial and insignificant point, and then sustained the State's objection, ruling that counsel for the Defendant would not be allowed to go forward

with the deposition to impeach the witness concerning the color of the cap he observed on the Defendant's head the night of Dorothy James murder (page 385, lines 1-6).

An accused has an absolute right to a full and fair cross-examination of the State's witnesses, and any limitation on that right which prevents the Defendant from achieving this goal may result in reversible error. Steinhorst v. State, 412 So. 2d 332 (Fla. 1982). In the case at bar, the only evidence linking the Defendant to the murder scene was the brown cap, and the only witness who saw the Defendant with this cap on near Dorothy James' apartment was Reinaldo Dorta. Rather than being an insignificant point, the color of the cap Reinaldo Dorta observed on the Defendant's head the night of the murder was a crucial pieces of testimony the State needed to introduce to link the Defendant to the victim.

As such, counsel for the Defendant should have been allowed to go forward on the deposition to attempt to impeach Reinaldo Dorta with his earlier inconsistent statement. By limiting the Defendant's cross-examination of the witness, the court deprived the Defendant of his right to full confrontation of the state's witnesses, as guaranteed by the Sixth Amendment to the United States Constitution. Such deprivation can only be considered reversible error, entitling the Defendant to a reversal of his convictions and a new trial.

ARGUMENT XXII

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S SEVERAL MOTIONS FOR MISTRIAL FOLLOWING MICHAEL WHITE'S STATEMENTS TO THE JURY THAT HE HAD BEEN STABBED BY THE DEFENDANT 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 IMPROPER COMMENTS.

On March 18, 1983, the State prepared to call its final witness, Michael Eugene White. Prior to the presentation of his testimony, counsel for the Defendant approached the bench and reminded the court of its earlier approval of the Defendant's motion in liminie regarding Michael White's testimony. The court stated that the motion in liminie had been granted and instructed the prosecutor not to elicit from Michael White any evidence relative to the stabbing of of the witness by the Defendant. The prosecutor replied that he did not intend to, and had explained the same to the witness earlier that morning (page 641, lines 12-21).

During direct examination, however, the following exchange took place:

> "MICHAEL WHITE: . . .I was holding the door open, like, for him, looking down. See what he was doing. When he came up that's how I seen the knife, when he stabbed me.
>
> MR. SHARPE: Where did he have the knife, sir?
>
> MR. EDWARDS: Your Honor, may we approach the bench?
>
> MICHAEL WHITE: Up under the seat.
>
> THE COURT: Gentlemen of the jury, disregard the last comment of the witness. Simply have the witness describe the knife.
>
> MR. EDWARDS: May we approach the bench?
>
> THE COURT: Make it later.
>
> MR. SHARPE: Where did you see the knife?
>
> MICHAEL WHITE: When he stabbed me in the back.

MR. SHARPE: Where did you see the knife?

MICHAEL WHITE: That night when he stabbed me, that's the only time I seen it.

MR. EDWARDS: Your Honor, I'm going to object again.

THE COURT: All right. You may approach the bench." (page 647, lines 1-20; emphasis added)

Counsel for the Defendant then moved for a mistrial based on the fact that the witness had made reference to the exact testimony which had been prohibited by the Defendant's motion in liminie. The court denied the motion (page 647, lines 23-25; page 648, lines 1-7). The court then gave the following curative instruction to the jury:

"THE COURT: Members of the jury, you will disregard the last several questions and answers of the witness. They are totally unresponsive to the questions asked by the prosecutor. These will be stricken and not to be regarded by you as evidence in this case." (page 648, lines 21-25).

Following Michael White's testimony, counsel for the Defendant again moved for a mistrial, stating that the prosecutor had exceeded its examination of the witness by eliciting the prohibited comments, and that the resulting prejudice to the Defendant was irrevocable (page 654, lines 4-12). The court again denied the motion, stating that the prosecutor did not intentionally elicit the remarks, but that the comments were blurted out by the witness. The court further stated that a curative instruction had been given, one which the court was satisfied the jury would follow (page 654, lines 13-17).

Just how well the jury followed the court's curative instructions, was evidenced a short time later when the bailiff handed a note to the court, a note that had been written by Juror Cody. The note read as follows:

"I have heard the Defendant accused of the stabbing of the last witness. Up until this point in the trial, I had not ocnsidered him capable of or incapable of committing

> violence with a knife. I had formed no opinion. Now a shadow of suspicion has been cast. I for one (emphasis added) would like to give the Defense a chance to rebut this accusal. If this cannot be allowed, I must examine my own ability to disregard this accusal in reaching a verdict and act upon my findings." (page 663, lines 21-25; page 664, lines 1-7).

Following the reading of the note into the record, counsel for the Defendant again moved for a mistrial, stating that Juror Cody's note was indicative of the feelings of the panel. He argued that no one knew whether others on the panel felt the same way. Counsel further stated that since one juror had already evidenced his feelings with regard to the alleged stabbing, Michael White's testimony regarding the alleged stabbing had now become a volatile issue. The court once again denied the motion (page 664, lines 13-19).

Counsel for the Defendant then asked if Juror Cody could be questioned as to whether any of the othe jurors had discussed the testimony concerning the alleged stabbing or whether any of the other jurors had evidenced feelings concerning the matter similar to Juror Cody. The court replied that no such questioning would be allowed (page 665, lines 9-13). Juror Cody was then brought in separately from the other jurors, discharged, and replaced by one of the alternate jurors (page 666, lines 1-25).

The Florida Supreme Court has long held that when a defendant is on trial for the commission of a crime, testimony concerning other offenses commited by him is only admissible when relevant to some issue other that the defendant's bad character or his propensity to commit crime. Williams v. State, 110 So. 2d 654 (Fla. 1959). This rule of exclusion is additionally embodied in Section 90.404(2)(a), Florida Statutes (1981), and serves to avoid the uncontrollable and undue prejudice (and possible unjust condemnation) that might befall a defendant should the commission of some other act be placed before the jury. Hodges v. State, 403 So. 2d 1375 (Fla. 5th DCA 1981).

A corrollary to the Williams Rule is that unless and until the defendant places his character in issue before the jury, either through his own or his witnesses' testimony, the State may not assail his character either. Bates v. State, 422 So. 2d 1033 (Fla. 3rd DCA 1982); Wilt v. State, 419 So. 2d 924 (Fla. 3rd DCA 1982); Albright v. State, 378 So. 2d 1234 (Fla. 2nd DCA 1980).

The sole purpose for the Defendant's motion in liminie was to prevent exactly what happened at trial: an unwarranted attack upon the Defendant's character through the introduction of an unrelated criminal act tending to show an alleged propensity on the part of the Defendant to commit violent acts with a knife. When such a attack takes place, as happened at the Defendant's trial, the defendant is deprived of his constitutional right to a fair trial. Lewis v. State, 377 S0. 2d 640 (Fla. 1980); Wilt v. State, 410 So. 2d 924 (Fla. 3rd DCA 1982).

In Harris v. State, 427 So. 2d 234 (Fla. 3rd DCA 1983), the appellate court ruled that the trial court had committed reversible error in denying the defendant's timely motion for mistrial after a police detective, called at trial as a witness for the state, testified over objection before the jury that the defendant had a "prior felony past."

In Wilding v. State, 427 So. 2d 1069 (Fla. 2nd DCA 1983), one juror stated during voir dire that he would try and listen to the testimony presented during the trial and be fair and impartial, but he had some knowledge of previous charges against the defendant. The defendant's attorney immediately challenged the entire jury panel by moving for a mistrial. The trial court denied the motion. The appellate court reversed, ruling that an accused's right to a fair and impartial jury is violated when a jury is improperly made aware of a defendant's arrest for unrelated crimes either during the jury selection or during the trial proper.

In Clark v. State, 337 So. 2d 858 (Fla. 2nd DCA 1976), a police officer testifying for the state made the unsolicited comment that he had arrested the defendant for sale and possession of heroin after being asked by the prosecutor

when he first came into contact with the defendant. The defendant's attorney immediately moved for a mistrial. The court then instructed the jury to disregard the reference to other charges pending against the defendant and subsequently asked each juror if he could put such reference out of his mind. Upon receiving affirmative answers from each of the jurors, the motion for mistrial was denied. In reversing the defendant's conviction, the appellate court ruled that it was too much to ask a juror to put this type of evidence out of his mind while he was deliberating over the defendant's guilt of another crime.

Under the existing case law, it does not matter whether the attack is brought as a result of an overzealous prosecutor or an overzealous state witness (as in the case at bar) whom the prosecutor is unable to control. In Lawson v. State, 360 So. 2d 786 (fla. 2nd DCA 1978), the State's witness improperly remarked on several occasions that he had read in the paper that the defendant had robbed several other people. Each time the comment was made, defense counsel objected, moved for mistrial, and moved to strike. The court responded each time by sustaining the objection, granting the motion to strike, but denied defense counsel's motion for mistrial. The appellate court, in reversing the case, stated that the error occurred each time the witness made a reference to the other robberies. The appellate court specifically held that the trial court should have instructed the witness not to repeat the statement, and then made sure that the witness understood the court's instruction.

In determining whether such remarks constitute prejudicial error, a determination must be made of the probable impact of the remarks on the minds of an average jury. Williams v. State, 74 So. 2d 77 (Fla. 1954); Hodges v. State, 403 So. 2d 1375 (Fla. 5th DCA 1981); Kennedy v. State, 385 So. 2d 1020 (Fla. 5th DCA 1980). In Kennedy, the State's witness testified that the victim had told her that he feared the defendant. The appellate court, in reversing the conviction, held that such a remark was improper, stating that such remarks indicated that there

was more than a reasonable probability that the improper evidence contributed to the verdict, and further held that an average jury could have found the State's case less persuasive had this testimony not been brought before the jury.

In the case at bar, it is clear from the facts that the jury had probably been prejudiced by Michael White's comments. This is made even more evident by the fact that Juror Cody took the time to write a note to the court informing it of his probable prejudice (the court's curative instructions obviously having no effect on him). In denying the Defendant's motions for mistrial and the Defendant's request to inquire of Juror Cody as to how the other jurors felt, the trial court committed reversible error, entitling the Defendant to a new trial.

ARGUMENT XXIII

THE TRIAL COURT ERRED IN UNDULY RESTRICTING THE CROSS-EXAMINATION OF STATE'S WITNESS, MICHAEL WHITE, BY THE DEFENSE.

As stated earlier in prior arguments, the court had granted Defense counsel's motion in liminie prohibiting the State or Michael White from making any comments concerning the alleged stabbing of the witness by the Defendant (page 641, lines 14-18). The court at the same time cautioned counsel not to open the door to such inquiry either, or the State might be allowed to inquire regardless of the granted motion (page 641, lines 22-25).

During his testimony, however, Michael White mentioned three separate times that the Defendant had stabbed him with a knife (page 647, lines 2-18). On cross-examination, counsel began to question the witness regarding the alleged stabbing, knowing full well that the subject was on the minds of the jurors and that he was forced to explore the area to rebut the negative inferences raised by the comments. Upon hearing the question, the court summoned counsel to the bench. The court informed counsel that if he attempted to question the witness regarding the incident, the court would rule that he had waived any previously preserved errors regarding the comments since it had already instructed the jury to disregard the comments. (page 651, lines 2-15).

When asked by counsel whether the court was limiting his cross-examination on that point, the court replied that it was not; only that the State would be allowed to delve into the subject on re-direct if counsel continued his cross-examination in that area (page 652, lines 3-10). Counsel then objected to the course the court was taking at that time, which was overruled (page 652, lines 11-15).

Counsel then announced he had no further questions (page 652, lines 1-3). Moving for a mistrial, counsel stated that the court had restricted his cross-

examination of Michael White. The court replied that it had not restricted his cross-examination in any regard, but simply stated that if counsel approached the matter of the stabbing, it was the court's opinion that counsel had waived any error that may have resulted from Michael White's improper remarks (page 655, lines 14-21).

The court then denied the motion for mistrial. Counsel at that point did note for the record that the court had placed the Defendant in the position of waiving his appellate rights or waiving his right to cross-examination (page 656, lines 3-8).

The right of a criminal defendant to cross-examine adverse witnesses is derived from the Sixth Amendment to the United States Constitution. One accused of crime therefore has an absolute right to full and fair cross-examination. Coco v. State, 62 So. 2d 892 (Fla. 1953).

Although it may have appeared that the court was giving counsel a reasoned choice, the facts show that counsel had been placed in a no-win situation when Michael White made the comments that the Defendant had stabbed him. This situation was further compounded by the trial court's refusal to grant his motions for mistrial. In essence, counsel was now forced to delve into the area previously prohibited by his own motion in order to protect the Defendant's right to a fair trial by gentling the impact of the comments on the minds of the jurors through cross-examination of Michael White in that area. The court committed reversible error in limiting the Defendant's right of cross-examination by forcing the Defendant to choose between his appellate rights and his constittuional rights. The Defendant's convictions must be reversed and a new trial granted.

ARGUMENT XXIV

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL AT THE CLOSE OF THE STATE'S CASE-IN-CHIEF.

Following Michael White's testimony, the State rested (page 653, lines 14-16). At that point, counsel for the Defendant moved for a directed judgment of acquittal at the close of the State's case on various grounds, all of which the court denied (pages 656-661). The Appellant contends that the court committed error in not granting the Motion and that he is entitled to be discharged.

The test to be applied for determining whether a case was properly submitted to the jury rests on whether the evidence adduced by the prosecutor was legally sufficient to prove each and every element of the charge. If the State fails to meet its burden of proving each and every necessary element of the offense charged beyond a reasonable doubt, the case should not be submitted to a jury, and a judgment of acquittal should be granted. Owen v. State, 432 So. 2d 579 (Fla. 2nd DCA 1983).

It is also true, however, that when a defendant moves for a judgment of acquittal, he admits all facts in evidence at that point, along with every conclusion favorable to the State which may be fairly and reasonably inferred therefrom. Lipman v. State, 428 So. 2d 733 (Fla. 1st DCA 1983). The standard to be applied, however, is whether a jury might have reasonably concluded that the evidence excluded every reasonable hypothesis of innocence. Tavaris v. State, 414 So. 2d 1087 (Fla. 2nd DCA 1982).

Counsel argued first that the State had pursued its prosecution of the first degree murder charge based on an Indictment which stated that Dorothy James had died on April 4, 1982 (page 655 lines, 14-23). The evidence presented by the medical examiner, Dr. Gore, could prove nothing more than that Dorothy James had died within three hours of 11:00 P.M., Saturday, April 3, 1982 (page 410, lines 6-9).

The law is clear that where there is a material variance between the date alleged in an Indictment and the date proved during trial, the Defendant is entitled to be discharged. In the case at bar, the variance between the Indictment and the proof was clearly material.

Counsel next argued that there evidence produced at trial to show premeditation on the part of whoever killed Dorothy James (page 657, lines 12-15).

Premeditation is the one essential element that distinguishes first degree murder from second degree murder. Tien Wang v. State, 426 So. 2d 1004 (Fla. 3rd DCA 1983). It must be proven that before the commission of the act which results in death, the accused had to have formed in his mind a distinct and definite purpose to take the life of another human being, and deliberated or meditated upon such purpose for a sufficient length of time to be conscious of a well-defined purpose or intention to kill another human being. Snipes v. State, 17 So. 2d 93 (Fla. 1944). In essence, premeditation requires more than the showing of an intent to kill before a defendant may be convicted of first degree murder. Littles v. State, 384 So. 2d 744 (Fla. 1st DCA 1980).

In Tien Wang, no one witnessed the final altercation bewteen the defendant and the victim, his wife. Three people saw the defendant chasing the victim in the street, but only one of the witnesses saw the defendant strike the victim. No direct evidence was ever introduced by the State showing premeditation. While the State submitted that premeditation was circumstantially shown by the testimony of the witnesses who observed the chase, and the one who observed the repeated stabbing of the victim, such testimony, concededly not inconsistent with a premeditated design to kill, is equally consistent with the hypothesis that the intent of the defendant was no more than an intent to kill without any premeditated design.

In the case at bar, the only evidence produced by the State in its case-in-chief to show premeditation was that the Defendant was seen in the victim's

apartment complex on the night of the murder by Reinaldo Darto. Mr. Darto stated that the Defendant was wearing a brownish cap that he later identified to be the same as the cap found near the victim's body. The State further established that the Defendant had been a friend of the victim's, but not lovers. The State also established that the Defendant had possession of the victim's car following the murder and atempted to sell the car in Tampa. A knife found in this vehicle tested positively for blood.

The Defendant would submit that none of this evidence shows premeditation suufficient to return a verdict of guilt to first degree murder. No one saw the Defendant in the victim's apartment the night of the murder. No conversation was ever heard between the two prior to the murder. In essence, no one knew what took place in the victim's apartment when she was murdered, and thus there was no proof of premeditation.

Although the trial court denied the motion based on the fact that the victim died of multiple stab wounds, which evidenced to the court premeditation in and of itself (page 657, lines 16-21), Tien Wang proves that multiple stab wounds are not sufficient in and of themselves to get past a motion for directed verdict.

Counsel next argued that the State had not produced evidence of a sufficient basis to prove that the Defendant was indeed the individual who murdered Dorothy James (page 657, lines 23-25). The court found that sufficient evidence existed without detailing any grounds supporting its belief and denied the motion on this ground (page 658, lines 2-5).

Again the only evidence presented by the State to show that the Defendant was the individual who killed Dorothy James was the fact that he was seen in the apartment complex on the night of the murder, his hat was found in the victim's bedroom, and he was later found in possession of her 1973 Cadillac. Evidence that the defendant was present at the scene of the crime and fled after it had been committed does not exclude the reasonable inference that the defendant had no

knowledge of the crime until it actually occurred. J.H. v. State, 370 So. 2d 1219 (Fla. 3rd DCA 1979); Chaudoin v. State, 362 So. 2d 398 (Fla. 2nd DCA 1978).

In J.H. v. State, the victim was seated on a bus bench when she was approached by two males. One of the males sat next to the victim, while the defendant stood behind the bench. The one male struggled with the victim, grabbed her purse, and then fled the scene. The defendant took no part in the actual robbery, and did not talk to the other male, either before or after its commission. After the robber had taken the purse, however, the defendant ran away with him. The appellate court ruled that this was insufficient evidence to convict the defendant as an aider and abetter.

Counsel then argued that there had been no proof presented that the object used to murder the victim was a knife as alleged in the Indictment, nor had their been any proof presented that the knife found in the victim's car killed the victim (page 658, lines 6-11). The court denied this ground, stating that the medical examiner had testified that the wounds could have been made by a knife or other sharp instrument, and there was the evidence that the defendant was found in possession of a knife (page 658, lines 12-18).

Again, the defendant would submit that the State never proved beyond and to the exclusion of a reasonable doubt that the victim was killed with a knife, since they never were able to prove that the knife found in the victim's car was the murder weapon or even that the Defendant owned the knife. As for the testimony by James McNamara that the knife contained a substance that tested positively for blood, the Defendant would submit the case of Head v. State, 62 So. 2d 41 (Fla. 1952).

In Head, the body of the victim was found lying by the side of a highway. There was blood on the concrete culvert across the road just west of the location of the body and there was a trail of blood leading in the general direction of the body. At the same time, the defendant had been arrested for D.W.I. about eight

miles from where the body was found.

In overturning the defendant's conviction for vehicular manslaughter, this Court ruled that no positive evidence existed showing that the victim had been struck by an automobile. Although blood stain evidence was found on the front and side of the defendant's car, there was no credible evidence produced that the stains on the car were blood stains, and if so, that such stains were human blood.

In the case at bar, James McNamara could only state that the stain found on the knife tested positively for blood. He stated, however, that many household cleaning items caused the same reaction, and that he was unable to positively state that the stain was blood, much less animal or human blood. Thus, the evidence was not only insufficient to prove that the Defendant murdered the victim with the knife found in the victim's car, it was insufficient to prove that the victim was even murdered with a knife, and the motion for directed verdict should have been granted.

Finally, as to the murder charge, counsel argued that the evidence as a whole was legally insufficent to sustain a conviction of first degree murder. The court also denied this ground (page 659, lines 1-5).

Where the only proof of guilt is circumstancial, no matter how strongly the evidence may suggest guilt, a conviction cannot be sustained where the evidence is inconsistent with any reasonable hypothesis of innocence. McArthur v. State, 351 So. 2d 976 (Fla. 1977).

The Defendant would only reiterate that all the circumstantial evidence combined was insufficient to prove that the Defendant, with premeditation, murdered Dorothy James with a knife, especially in light of the evidence adduced by counsel of the possiblity that the victim's ex-boyfriend, Billy Andrews, who had lived with the victim in the past, was also a likely suspect to be considered by the jury. This was based on the fact the Andrews, who never was investigated by the State, had possessed a key to the victim's apartment in the past, had fought with the victim,

and at one time beaten her. As such, the Defendant's motion for judgment of acquittal at the close of the State's case-in-chief should have been granted as to the charge of first degree murder.

As to the evidence presented by the State concerning the auto theft charge, the court should have granted the Defendant's motion for judgment of acquittal as to this case also since the only evidence produced by the state was that the Defendant was found in possession of the vehicle after the victim's death. The Defendant would submit that this evidence was not sufficient to show that he did not have the victim's permission to take possession of or attempt to sell the vehicle following her death.

ARGUMENT XXV

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S REQUEST TO SUBMIT TO THE JURY SPECIAL INSTRUCTIONS ON THE ISSUE OF CIRCUMSTANTIAL EVIDENCE.

Following the testimony of the Defendant, the Defense rested. The court excused the jury for lunch and then went over the jury charges with the attorneys. During the charge conference, counsel for the Defendant requested the court to instruct the jury on circumstantial evidence, due to the fact that the case consisted almost entirely of circumstantial evidence. The request was denied (page 727, lines 2-5).

The Defendant concedes that the giving of an instruction on circumstantial evidence is discretionary with the court. Williams v. State, 437 So. 2d 133 (Fla. 1983). He would note, however, that this Court stated in In re Standard Jury Instructions in Criminal Cases, 401 So. 2d 594 (Fla. 1981), that "the elimination of the current standard instruction on circumstantial evidence does not totally prohibit such an instruction if a trial judge, in his or her discretion, feels that such is necessary under the peculiar facts of a specific case." Id. at 595. The Defendant would submit that the failure to give such an instruction was reversible error due to the fact that the case was based almost entirely on circumstantial evidence.

ARGUMENT XXVI

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S REQUESTED JURY INSTRUCTIONS ON THE THEORY OF THE DEFENSE AS TO BOTH CHARGES.

During the charge conference, counsel for the Defendant requested that an instruction be given on the theory of the defense (page 729, lines 6-10). The court denied the motion (page 730, lines 19-23). Following lunch, counsel again requested the court to give its special instruction as to the theory of the defense (pages 741-742). The court again denied the request (page 745, lines 6-7).

The Defendant's theory of the defense read as follows:

> It is the position of the Defendant, Pedro Medina, that he did not commit the homicide against the victim, DOROTHY JAMES, either with premeditation or an unlawful act imminently dangerous to another, evincing a depraved mind regardless of human life. It is further the position of the Defendant that he did not participate in or have any knowledge of the homicide of DOROTHY JAMES.
>
> The Defendant would contend that the homicide perpetrated against DOROTHY JAMES was committed by another individual. It is further the contention of the Defendant that had the law enforcement agencies involved in the homicide investigation continued in such investigation and had they been more thorough in their examination in the evidence against the Defendant, that the Defendant would not be accused of the crime of homicide.
>
> Before you may convict PEDRO MEDINA of the charge of homicide, you must be convinced beyond a reasonable doubt that it was PEDRO MEDINA who perpetrated said homicide, and no other individual. The burden of this proof, as to all elements, rests with the State; and the Defendant in a criminal trial is never required to prove his innocence. If you determine that the State has not met this burden of proof beyond and to the exclusion of every reasonable doubt, then you must find the Defendant not guilty.

Counsel also requested that the theory of the Defense be given as to the auto theft charge. This special instruction read as follows:

> It is the contention of the Defendant, PEDRO MEDINA, that he did not commit the crime of Grand Theft of a Motor Vehicle, Second Degree, due to the fact that he had the permission of the owner of the motor vehcile, Dorothy James, before he initiated the use and possession of said motor vehicle. It is further the position of the Defendant that at such time as he appropriated the vehicle for his use for his trip to Tampa on or about April 4, 1982, it was not with any intent to deprive the owner of said motor vehicle from her rightful possession.
>
> Before you may convict PEDRO MEDINA of the charge of Grand Theft of a Motor Vehicle, Second Degree, you must be convinced beyond a reasonable doubt, that PEDRO MEDINA, knowingly and unlawfully obtained the motor vehicle of Dorothy James, and that he did so with the intent to deprive Dorothy James of her right to the property or any benefit from it.

The Defendant is entitled to a jury instruction on the theory of the defense if there is evidence in the record to support it, regardless of how weak or improbable it may be, and it is error for the trial court to refuse to give such an instruction where there is evidence to support the defense. Bryant v. State, 412 So. 2d 347 (Fla. 1982); Palmes v. State; 397 So. 2d 648 (Fla. 1981); Soloman v. State, 436 So. 2d 1041 (Fla. 1st DCA 1983); Edwards v. State, 428 So. 2d 357 (Fla. 3rd DCA 1983); Holley v. State, 423 So. 2d 562 (Fla. 1st DCA 1982); Mellins v. State, 395 So. 2d 1207 (Fla. 4th DCA 1981); Laythe v. State, 330 So. 2d 113 (Fla. 3rd DCA 1976).

Particularly applicable to the case at bar is the Mellins case, which held that the defense's requested instruction on intoxication had to be given even though the only evidence of intoxication came from the cross-examination of a state witness, no empirical evidence supported the defense, and the defendant himself denied being intoxicated.

In the case at bar, the defendant's theory that another individual committed the murder was supported by the State witnesses who testified on cross-examination that the victim's ex-boyfriend, Billy Andrews, had argued with and beaten the victim in the past, no empirical evidence was introduced to support the fact that

Billy Andrews committed the murder, and the Defendant himself claimed that three revenge-minded Cubans probably killed the victim because the Defendant did not wish to traffic in marijuana with them. Additionally, as to the car theft charge, there was no evidence adduced that the victim had not given the Defendant permission to use the vehicle.

Based on the above stated facts and cited law, it is clear that the court committed reversible error by failing to give the Defendant's requested instructions on the theory of the defense. Brown v. State, 431 So. 2d 247 (Fla. 1st DCA 1983).

ARGUMENT XXVII

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL AT THE CLOSE OF ALL THE EVIDENCE, THE DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL POST-TRIAL, AND THE DEFENDANT'S MOTION FOR NEW TRIAL.

Following the close of his case, counsel for the Defendant moved for judgment of acquittal at the close of all the evidence on the same grounds as stated in his earlier motion made at the close of the State's case. The motion was denied (page 745, lines 23-25; page 746, lines 1-5).

Following the Defendant's convictions, counsel for the Defendant filed a post-trial motion for judgment of acquittal on March 28, 1983 (page 1863), as well as a Motion for New Trial (pages 1864-1867). These motions were later denied.

The only additional matters to be brought out after the close of the State's case-in-chief was the testimony by the Defendant that Dorothy James had lent the car to him, that he denied killing the victim, and that several revenge-minded Cubans must have killed her over the Defendant's refusal to help them traffic marijuana.

When the State relies on circumstantial evidence, the circumstances when taken together must be of a conclusive nature and tendency, leading on the whole to a reasonable and moral certainty that the accused, and no one else committed the offense charged; it is not sufficient that the facts create a strong probability of and be consistent with guilt, they must also eliminate all reasonable hypothesis of innocence. Owen v. State 432 So. 2d 579 (Fla. 2nd DCA 1983).

Based upon the fact that the Defendant's testimony did nothing to damage his case in any manner other than his admittance that he was in Dorothy James' apartment and that he did take her automobile after finding her dead, because he was frightened, the court committed reversible error by not granting the above motions.

ARGUMENT XXVIII

THE TRIAL COURT ERRED IN SENTENCING THE DEFENDANT TO DEATH FOLLOWING HIS CONVICTION FOR FIRST DEGREE MURDER.

At the sentencing phase of the trial, the jury returned with an advisory opinion of death. Acting upon the advisory sentence, the court sentenced thQ Defendant to death on April 11, 1983, after finding that there existed two aggravating circumstances which outweighed only one mitigating circumstance. The Defendant would submit that the court erred in sentencing him to death as no aggravating circumstances existed to support such a sentence.

The Court found first that the Defendant had committed the crime for pecuniary gain. The evidence shows otherwise. The only evidence presented by the State showing the Defendant guilty of pecuniary gain was his attempt, after the murder, to sell the car. No evidence was introduced to show that, at the time of the murder, the Defendant murdered the victim so that he could steal the car. Additonally, the Defendant himself stated that he took the car only because he had found the victim dead, and was frightened so much that the only thing on his mind was to leave the area as fast as he could.

A case on point is Peek v. State, 395 So. 2d 492 (Fla. 1982). This Court, in reversing a finding that the murder was committed for pecuniary gain, stated that although it appeared that the defendant had ransacked the victim's purse and made off with her automobile, there was no evidence that any money or household belongings were taken. The more reasonable inference is that the defendant stole the car in order to quicken his escape from the scene of the murder.

The facts are similar in the case at bar. The victim's purse here had also been ransacked, but the only thing missing was her car keys. This evidence is bolstered by the Defendant's own testimony that he took the car because he wanted to get away from the murder scene as soon as possible. Thus, the State did not

prove this aggravating circumstance beyond a reasonable doubt, and it should not have been considered by the trial court.

As to the murder being especially atrocious, heinous and cruel, the Defendant would submit that this Court has reduced death sentences to life in prior cases under worse circumstances. See Swan v. State, 322 So. 2d 488 (Fla. 1975), (wherein the defendant gave the victim, who was bound and gagged, a "severe beating", and the victim could not survive the torture administered); Halliwell v. State, (wherein the defendant beat the victim to death with an iron bar and mitilated the body); Tedder v. State, 322 So. 2d 908 (Fla. 1975), (wherein the defendant shot the victim and refused to allow anyone to aid her while she died a lingering death); Jones v. State, 322 So. 2d 615 (Fla. 1976), (wherein the defendant had been drinking, raped the victim, and stabbed her thirty-eight times); and Thomson v. State, 328 So. 2d 1 (Fla. 1976), (wherein the defendant committed armed robbery and stabbed the victim three times while fleeing).

Based on the above facts and citations of law, it is clear that the trial court had no legal basis to make a finding of any aggravating circumstances and thus should not have sentenced the Defendant to death.

CONCLUSION

Based upon the foregoing facts and arguments of law, it is clear that the trial court erred on the many points cited by the Appellant in his brief. As a result of the Court's failure to grant the Defendant's Motions for Judgment of Acquittal, this cause should be dismissed. In the alternative, the errors committed by the trial court entitle the Defendant to a reversal and new trial at the very least, or to have the death sentence commuted to life imprisonment at the very worst.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief of Appellant has been furnished to EVELYN GOLDEN, Assistant Attorney General, 125 North Ridgewood Avenue, Fourth Floor, Daytona Beach, Florida 32014, by mail delivery this 5th day of December, 1983.

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