IN THE SUPREME COURT OF FLORIDA

CASE NO: 63,700

ROBERT LACY PARKER,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR DUVAL COUNTY

BRIEF OF APPELLANT

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and
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INTRODUCTION

The appellant, Robert Lacy Parker, was the defendant in the trial court, the Circuit Court of the Fourth Judicial Circuit of Florida, in and for Duval County, and the appellee, the State of Florida, was the prosecution. In this brief, all parties will be referred to as they stood in the trial court. All emphasis is supplied unless otherwise indicated. The symbol "R." shall designate the three volumes labeled "Transcript of Record". The symbol "T." shall designate the stenographic transcript of in-court proceedings.

STATEMENT OF CASE

On February 25, 1982, an indictment charging the defendant with two counts of first degree murder in the deaths of Richard Padgett (Count I) and Nancy Sheppard (Count II) was filed in the Circuit Court of Duval County. (R. 3-5)

At arraignment on February 26, 1982, the Public Defender was appointed to represent the defendant; counsel stood mute and a plea of not guilty was entered by the court on the defendant's behalf. (T. 6-8)

On March 3, 1982, the defendant filed his Demand for Discovery, (R. 7-8); Motion for Statement of Particulars (R. 9-10); Motion to Dismiss Indictment or to Declare that Death is not a Possible Penalty (R. 11-12); Motion to Declare that Death is not a Possible Penalty (R. 16-31); and Motion for Production of Favorable Evidence (R. 44-45). On April 2, 1982, the lower court denied the Motion to Dismiss Indictment or to Declare that Death is not a Possible Penalty (R. 82; T. 42-43) and the Motion to Declare that Death is not a Possible Penalty (R. 84, T. 35-37). The Motion for Production of Favorable Evidence was granted after argument on April 2, 1982. (R. 88, T. 90-92).

On March 30, 1982, the defendant filed his Motion in Limine (R. 57), Motion to Vacate Death Penalty (R. 61-67), Motion to Declare Section 922.10 Florida Statutes Unconstitutional (R. 68-70), Motion for Individual and

Sequestered Voir Dire (R. 71-75), Motion to Declare Florida Statute 921.141 Unconstitutional (R. 77-79), and Motion for Additional Peremptory Challenges (R. 8-81). On April 2, 1982, after hearing oral argument, the lower court denied the Motion in Limine (R. 89, T. 43-51), the Motion to Vacate the Death Penalty (R. 90, T. 58-77), the Motion to Declare Section 922.10 Florida Statutes Unconstitutional (R. 91, T. 77-78), the Motion to Declare Florida Statute 921.141 Unconstitutional (R. 94, T. 51-58), and the Motion for Individual and Sequestered Voir Dire (R. 92, T. 78-83). Ruling on the Motion for Additional Peremptory Challenges was reserved on April 2, 1982 (R. 83-64).

On April 2, 1982, the defendant filed his Motion for Discovery of Prosecutorial Investigations of Prospective Jurors, or for funds to Conduct a Similar Investigation (R. 95). This motion was denied after argument on April 23, 1982. (R. 110, T. 130-134).

On April 23, 1982, the lower court denied pertinent portions of the defendant's previously filed Motion for Statement of Particulars. (R. 109, T. 117-126).

The defendant filed his Motion to Suppress Statements, Admission, and Confessions on May 18, 1982 (R. 125),an evidentiary hearing on the motion was conducted on June 25, 1982, and the lower court denied the motion. (R. 152, T. 194-217).

On May 20, 1982, an amended indictment was filed, charging the defendant with three counts of first degree murder concerning the deaths of Richard Padgett (Count I,) Nancy Sheppard (Count II), and Jody Dawn Dalton (Count III). (R. 133). At his arraignment on May 21, 1982,the defendant stood mute and a plea of not guilty was entered on his behalf. (T. 160).

On November 2, 1982, the defendant filed his Motion to Adopt Arguments and Previously Heard Motions to Apply to Count III of the Indictment (R. 240). This motion was granted on January 19, 1983 (R. 255, T. 276-280).

On December 22, 1982, the defendant filed his Motion in Limine RE: Evidence

of Other Crimes, Wrongs, or Acts. (R. 247). This motion was denied after hearing on January 19, 1983. (R. 256, T. 284-297).

On February 28, 1983, prior to Voir Dire, the defendant presented his Motion for Change of Venue; the lower court announced that ruling on the motion would be reserved while an attempt was made at jury selection. (R. 275, T. 341-344). The defendant also renewed his Motion for Individual and Sequestered Voir Dire, which was again denied (T. 344-348), and his Motion for Additional Peremptory Challenges, which was granted to the extent that the state and defense were given 15 peremptory challenges. (T. 354-356). An oral Motion in Limine was made relating to the Fifth Notice of Intent to Offer Evidence of other Crimes, Wrongs, or Acts filed by the prosecution. (R. 273); the motion was denied. (T. 350-354).

Jury selection began on Feburary 28, 1983 and continued through March 1, 1983, at which time the defendant renewed his motion relating to jury selection, for change of venue, and his objections to the manner in which voir dire had been conducted. (T. 871-2). The trial began on March 1, 1983, before the Honorable R. Hudson Olliff, Judge of the Circuit Court of the Fourth Judicial Circuit of Florida in and for Duval County. (T. 874-888). On March 9, 1983, the jury returned a verdict of guilty as charged as to Counts I and II, and guilty of third degree murder as to Count III. (R. 409-411, T. 2307).

On March 14, 1983, the capital sentencing hearing was conducted. (T. 2313-2515). The jury returned with a verdict of life imprisonment as to both counts. (R. 434-435, T. 2516-2517). The lower court ordered a Pre-Sentence Investigation.

On March 22, 1983, the defendant filed his Motion for Judgment of Acquittal (R. 439) and his Motion for New Trial (R. 440). Both motions were denied by the lower court on April 29, 1983 (R. 467-468, T. 2519-2526).

On April 26, 1983, the defendant filed his Objections and Exceptions to P.S.I. (R. 448). On April 29, 1983, the defendant filed his Amendment to Motion for New Trial (R. 464). This motion was also denied on April 29, 1983 (R. 469,

T. 2526-2530).

On April 29, 1983, the lower court sentenced the defendant to life imprisonment as to Count I, Death as to Count II, and 15 years imprisonment as to Count III, all sentences to run consecutively. (R. 470-475, 476-509, T. 2577-2578).

A notice of appeal was timely filed. (R. 514). This appeal follows.

STATEMENT OF THE FACTS

At trial, the following evidence was presented:

On the morning of Friday, February 5, 1982, the defendant asked Morris Johnson and Richard Padgett, to come to his trailer to sand and paint a pick-up truck that belonged to Charlie Brown. (T. 1125, 1815-1816). The defendant told them that he would give them some "T" (T. 1125) or that Charlie Brown would give them some "T" to get high on. (T. 1815-1816). Phencycladine is commonly called "PCP", "T", and "angel dust". (T. 1811-1812). Johnson and Padgett agreed, and the defendant drove them over to the trailer in Charlie Brown's truck. (T. 1125, 1816).

The trailer belonged to Elaine Parker. (T. 1809). Elaine Parker was the defendant's ex-wife; they were divorced twice but had been living together in her trailer with their two children for almost a year. (T. 1805-1806). The defendant had been selling T for three or four months; his supplier was Charlie Brown. (T. 1811-1812). After Johnson, Padgett, and the defendant began work on the truck, Tommy Groover came over in his sister's car to do some body work on it. (T. 1125-1126, 1816). Charlie Brown and another acquaintance, David McDonald, arrived later and left with the defendant to get everyone something to eat. (T. 1140, 1816-1817).

That morning, the defendant had given a gram of T to Tommy Groover. (T. 1817). Groover was going to sell the T at a profit and then pay the defendant after the sale, keeping the profit for himself. (T. 1813-1814). While everyone else was gone, Groover offered to get Padgett and Johnson "high" if they had some "works".

(T. 1128-1129).Groover said nothing about charging Padgett or Johnson for the drugs, and they assumed it was a free "turn-on". (T. 1140). After they injected the drugs and "got high", the defendant returned with Brown and McDonald. (T.1817). When the defendant returned, he became upset at Groover for getting everyone too high to work on the truck, and was also concerned that Groover would not be able to pay him for the T. (T. 1817).

The defendant told Groover he was going to "kick his ass" or "get straight with him". (T. 1141). The defendant was not the least bit angry at Johnson or Padgett. (T. 1141). Padgett told Groover that he would give him half a gram of the T he got for sanding and painting the truck in exchange for the turn-on, and said that he would meet Groover at a bar called The Sugar Shack that night. (T. 1141). Groover's sister telephoned for her car and Groover left about 5:30 P.M. (T. 1817-1818). After Groover left, Johnson and Padgett were paid their T (T. 1130-1131), apparently getting it from Charlie Brown. (T. 1928). Groover told the defendant that he still had "three quarter sacks" that he was going to sell that night, and that he would have his money for him. (T. 1817).

Just as the work was being finished on the truck, the defendant's cousin, Brother Caps, and another acquaintance, Michael Green, came to the Parker trailer. (T. 1132, 1163, 1818). Green gave a .22 caliber pistol to the defendant. (T. 1165, 1818). Green testified he owed the defendant $30.00 for T he had purchased in the past (T. 1165); the defendant testified that Green traded the gun for a ten dollar bag of T that Green "snorted" that evening. (T. 1818-1819). Green did admit that he was "pretty sure" he had gotten high on T that Friday night. (T. 1207). Bringing the pistol to the defendant as a trade was Green's idea; the defendant had not asked him for a gun. (T. 1199, 1818-1819). The gun was in poor working order. (T. 1197-8, 1819).

On Saturday, Green and the defendant drove to the home of Billy Long. (T. 1182, 1825). Tommy Groover lived in the house with Long and Long's mother as a guest; he paid no rent. (T. 1334-1335). When Green and the defendant

arrived at Long's house, they saw Long and Groover coming out the door. (T. 1825). Groover had a shotgun in his hands. (T. 1212, 1825). Long had just been fired from his job that day. (T. 1333-1334). Groover and Long were going to spend the day trying to collect money that was owed to them for drugs they had sold. (T. 1361). Groover and Long took the shotgun along to use as a "good persuader" to obtain payment. (T. 1378).

The defendant asked Groover if Groover had the money he owed the defendant, and Groover told the defendant that he did not, but he was going to get it. (T. 1825). Groover gave the defendant a gold cross and chain to hold as collateral until he could pay the defendant in cash (T. 1826). The defendant had previously accepted the same cross as collateral for one of Billy Long's debts, and had returned it to Billy when Billy had given him the money (T. 1826). The defendant did tell Groover he was going to "hang his ass" if he didn't come up with the money (T. 1827). Groover asked Green where he could find Johnson and Padgett, and Green told him they were probably over at Johnson's house. (T. 1183).

Long drove Groover in Long's mother's car to visit four different people who owed him drug money, including Morris Johnson. (T. 1361-1378). Wayne Johnson, Morris' brother, told Long and Groover that Morris and Richard Padgett had gone fishing. (T. 1685). Groover told Wayne that Morris and Padgett owed him for four quarter sacks of T, and that he was going to get his money "one way or the other". (T. 1686-1687). Wayne Johnson testified that Groover had a loaded shotgun held between his legs, sitting in the car with Long, when he made those statements. (T. 1685-1686). Long and Groover were unable to find Johnson and Padgett; they returned to Long's house, ate dinner, and went to The Sugar Shack. (T. 1382-1383).

Joan Bennett testified that she saw the defendant, Elaine Parker, Billy Long and Tommy Groover at The Sugar Shack between 6:00 and 8:00 P.M. on Saturday night. (T. 1533-1534). Bennett claimed she heard the defendant tell the others that he was tired of people owing him money for drugs, and that he was

going to kill "the mother fucker", (T. 1506), while the others sat around and laughed. (T. 1534-1535). Long, however, testified that he and Groover were at his house from 5:00 to 8:00 Saturday evening, (T. 1383-1384), that he and Groover were not at the bar with the defendant or Elaine Parker (T. 1384) and that he did not see Joan Bennett there. (T. 1386-7). The defendant, Michael Green, and Jerry Buruce, said that Green, the defendant, and Elaine Parker, went to Jerry Buruce's house for an oyster roast, (T. 1183, 1703-1704, 1827-1828), not to The Sugar Shack. (T. 1831).

Richard Padgett and Nancy Sheppard went to The Sugar Shack and met Billy Long and Tommy Groover. (T. 1245-1246). Long was driving his mother's car, and was asked by Groover, Padgett and Sheppard to take them to Parker's trailer to get a chain to pull out a car that was stuck outside The Sugar Shack. (T. 1387). Long agreed, and let Groover drive his car to the Parkers' trailer. (T. 1390). Groover had not forced Padgett to go with them. (T. 1390). At the trailer, the defendant and Padgett went outside together, leaving the others inside. (T. 1390). The defendant had the pistol Michael Green had given him in his pants. (T. 1832). Long testified that he heard a gunshot outside and saw the defendant putting a gun in his pants when he and Padgett came inside. (T. 1391). The defendant testified that he did not fire the gun or threaten Padgett with it. (T. 1832-1833). He was not upset with Padgett; Padgett did not owe him any money. (T. 1832-1833). Padgett told the defendant that he had thought Groover was just "turning him on" to the T, but that he would "straighten everything up" with Groover. (T. 1832).

When they came back into the trailer, Padgett told Parker that he would "get it straightened out", (T. 1391-1392), and the defendant told Padgett that "everything was all right". (T. 1392). Padgett was not upset at all when he came inside (T. 1393, 1834). Padgett used the telephone at the trailer (T. 1392), and then everyone left to go to The Sugar Shack to try to pull the car out. (T. 1833). Long drove Padgett and Sheppard in his mother's car, and Elaine

Parker drove Groover, the defendant, and the defendant's son in Elaine's car. (T. 1392, 1833-1834). The defendant was too drunk to drive; he still had the gun Michael Green had given him in his pants because he had had trouble in the bar the night before. (T. 1834).

In Long's car, Padgett was not upset or concerned about anything, but Sheppard offered her ring to Padgett to give to Groover for the money he owed Groover. (T. 1248-1249). Padgett told her not to worry, that he had it taken care of. (T. 1249, 1394). When they arrived at The Sugar Shack, the car that had been stuck was gone. (T. 1835). Groover then told Padgett that Padgett should go with him to get the money that he owed him. (T. 1835). Groover asked Long to take Sheppard home (T. 1249) and Padgett told her that it would be all right for Long to take her. (T. 1395, 1836). Padgett then asked the defendant and Elaine Parker if they would take him and Groover around to a few bars to see if he could find Charlie Brown. (T. 1836). Long proceeded to take Sheppard home in his mother's car, and did not re-join Groover until after 6:30 A.M. on Sunday, February 7, 1982. (T. 1250-1252).

Elaine Parker drove the defendant, Padgett and Groover from bar to bar, looking for Charlie Brown. (T. 1836). They had a cooler of beer in the car, and were drinking as they went from place to place (T. 1837). They found Charlie Brown in the parking lot of a lounge and called him over to the car. (T. 1837). Padgett asked Brown if he had some T that he could give to Groover, or if he could get $50.00 from him to pay Groover. (T. 1837). Brown told Padgett that he had no T right then, and refused to give Padgett money because Padgett already owed him $100.00. (T. 1837). The defendant pulled up his shirt, exposing the pistol still stuck in his pants, and told Brown he would "just take care of it for you, if you want me to". (T. 1837). This was intended as a joke, not as a threat to Padgett, and everyone laughed about it (T. 1838). Brown then said the he would "square up" with Groover on the T that Padgett had gotten from him on the following day. (T. 1838). The defendant assumed that

this would alleviate any problem between Padgett and Groover, (T. 1838), but they continued to argue about money.

Elaine Parker drove them all to the defendant's mother's house, where they dropped off the defendant's son. (T. 1839). The boy had gotten upset when he saw the gun. (T. 1838-1839). When he took his son to his mother's house, the defendant left the gun in the car between the two front seats. (T. 1839). When he got back in the car, Groover and Padgett were starting to fight, so the defendant told Elaine to drive across the street to his parents' junkyard where they could fight if they wanted to. (T. 1839-1840). Groover and Padgett got out of the car in the junkyard and started fighting. (T. 1840). When Groover started beating on Padgett with some brass knuckles, the defendant broke up the fight because he was afraid Padgett would get hurt. (T. 1840-1841).

The fight occurred outside the home of Carl Barton, who lived in a trailer in the junkyard. (T. 1457-1458). Barton heard the noise and, looking out his kitchen window, saw Groover standing over Padgett, with the defendant and Elaine Parker standing some eight to ten feet away. (T. 1468-1469). Padgett was asking Groover to leave him alone, and told him he would get him the money by Sunday or Monday morning, by 9 o'clock. (T. 1469). The defendant knocked on Barton's door and asked if they could come in. (T. 1469, 1841-1842). When Barton let them in, the defendant asked for a washcloth so he could clean up Padgett. (T. 1470, 1842). Padgett was bleeding, (T. 1461, 1842), and the defendant wanted to see if he was hurt badly. (T. 1842). Groover continued to argue with Padgett even while Padgett was cleaning himself up (T. 1470, 1842). During the argument, Groover said something to Padgett about, "That's all right, I will get rid of you anyway". (T. 1464). Groover told Padgett that he tore his shirt and owed him for the shirt, and Padgett told him that he would take care of that problem, also. (T. 1470, 1842). When Padgett got through cleaning up, they all started to leave Barton's trailer. (T. 1462). The defendant walked out the door first. (T. 1470). As they were leaving, Groover said, "Give me the gun".

(T. 1470-1471). Barton saw a gun in Groover's hand, but did not see from where he obtained it. (T. 1463). Groover also told Padgett that if he ran, he would kill him right there. (T. 1463-1464). The defendant and Elaine Parker were already out the door when this was said, (T. 1463-1464, 1473), and did not hear the threat. (T. 1842-1843). Groover was holding the gun down at his side as he was leaving. (T. 1472-1473). The gun looked to Barton like a .22 target pistol. (T. 1471).

The defendant thought the gun was still out in Elaine's car (T. 1841); he did not give it to Groover when they were inside the trailer. (T. 1842, 1934-1935). Carl Barton testified that the defendant could not have concealed the weapon so that he would not have been able to see it on the defendant's body. (T. 1471-1472). Elaine Parker, however, was carrying a large purse with her when she came into Barton's trailer. (T. 1472). They all left in Elaine's car. (T. 1464). Barton did not call the police because he did not really believe that Groover was going to kill Padgett; he thought it was "a hoax, a scare". (T. 1473).

When they left the junkyard, Elaine was driving her car. (T. 1844). Groover and Padgett were in the back seat. (T. 1844). Groover started saying that they should not take Padgett home and drop him off because he had gotten in a fight with Padgett two or three weeks earlier, and that Padgett's brothers and cousins had jumped on Groover and beaten him up. (T. 1843). Groover then suggested that they take Padgett somewhere and just drop him off. (T. 1843). Groover told Elaine where to drive, and Elaine drove them all back into a wooded area. (T. 1844). Groover said that he wanted to talk to Padgett for a minute, and the two of them got out of the car. (T. 1844). The defendant and Elaine were sitting in the car when they heard a gunshot. (T. 1844). The defendant jumped out of the car and ran around to where Padgett was laying on the ground. (T. 1845). Groover told the defendant to back up , and proceeded to shoot Padgett again. (T. 1845). The gun misfired several times, and Groover

took out his knife and stabbed Padgett with it. (T. 1845-1846). The defendant went back to the car and sat down next to his ex-wife. (T. 1846). He recognized the gun that Groover was using on Padgett as being the gun that Michael Green had given him. (T. 1845). The defendant had believed that they were simply going to drop Padgett off out in the woods, not kill him. (T. 1844). He did not become aware that Groover had the gun until he heard the shot. (T. 1845, 1935).

The medical examiner, Dr. Lipkovic, testified that Padgett had been shot one time in the back of the head with a .22 caliber bullet (T. 1019), and that the gunshot wound was fatal and would have caused immediate unconsciousness. (T. 1024). There were two stab wounds to the chest that would also have been fatal (T. 1020), and non-fatal slash wounds across his neck. (T. 1020-1021). There was also a small triangular wound to the head that was consistent with a graze wound from a gunshot. (T. 1043). His findings were not inconsistent with Padgett being shot first and stabbed shortly thereafter. (T. 1042). Dr. Lipkovic also found that Padgett was under the influence of phencycladine (PCP) and had a blood alcohol level of .18 (T. 1043-1045).

As Elaine Parker drove the car from the scene, Groover said to go to Billy Long's house, because he had to find out where Nancy Sheppard lived. (T. 1847). Groover warned the defendant and Elaine to keep their "mouths shut" about the murder or he would "get" them, or "get" their children, or "get somebody to get them". (T. 1847). Groover also said that, if he went to jail, he would say that Elaine and the defendant were involved in it too. (T. 1848). Groover told them to drive back to the defendant's parents' junkyard to melt the gun down. (T. 1848-1849).

When they reached the junkyard, it was approximately 12:15 A.M. on Sunday, February 7, 1982. (T. 1480). The defendant knocked on the door at the home of Spencer Hance, who also lived at the junkyard. (T. 1480-1849). Groover had given the unloaded pistol to the defendant (T. 1850). Hance told the

defendant that there was no oxygen in the acetylene torches, and refused to get rid of the gun for him. (T. 1481-1482). The defendant, Groover and Hance then went to the garage by Hance's house, where Groover and the defendant melted the gun down with an arc welder. (T. 1482-1484, 1849). Hance noticed that the defendant and Elaine seemed to be "pretty high" at the time, but that Groover was "straight". (T. 1497). Hance did not see a gun other than the one they melted, but did notice that Groover had something stuck in his pants off to one side, covered by his shirt hanging over it. (T. 1497-8). The defendant saw that it was, in fact, a gun, another ".22 pistol". (T. 1850). While they were using the arc welder, Hance walked out to Elaine who was seated in her car in the junkyard driveway. (T. 1484). Hance asked Elaine what was going on, and she said they had killed somebody. (T. 1485). Hance went back to his house, and the defendant and Groover came in soon after. (T. 1485-1486). They cooled off the melted gun in Hance's sink. (T. 1486-1487). Groover washed his knife off in the sink. (T. 1487, 1495, 1850-1851). Groover then said, "We better check each other for blood." (T. 1487, 1851). Hance could not tell if there was blood on the defendant or not. (T. 1495-1496). The defendant did not think there was any blood, but he was "going along" with whatever Groover said at the time. (T. 1851). Groover was doing most of the talking while they were in Hance's house. (T. 1495).

Groover wanted to go to Billy Long's house, but when they went there, Long was not home. (T. 1851). Groover said to go to the Out of Sight Lounge, a topless bar, to see if Long was there. (T. 1851-1852). The defendant was hoping that, if they found Long, Groover would just leave them and go with Long. (T. 1852). At the Out of Sight Lounge, Groover saw Jody Dalton and invited her to come with them. (T. 1852). Groover and Long had known Ms. Dalton for "a couple of months". (T. 1341). She had slept with Groover on several occasions at Long's house and had also stayed with Long. (T. 1342). Dalton had been coming over to Long's house when Long and Groover weren't there.

(T. 1342-1343). Long's mother disapproved of this practice and Long had told Groover that she was bothering his mother. (T. 1343). Dalton agreed to go with Groover, Elaine, and the defendant. (1853).

Groover told Elaine to drive to the St. Johns River, where he got out of the car and threw the pistol into the river. (T. 1853). The gun was wrapped up in a rag, and Dalton asked no questions about it. (T. 1880). The defendant did not think that she saw the gun. (T. 1880). They drove to Billy Long's house again; he still was not home. (T. 1853). Groover suggested going to the Parker's trailer, so Elaine drove them there. (T. 1853-1854). After spending some time at the Parker's trailer, the defendant and Elaine were going to go out to get more beer. (T. 1854). Groover, however, insisted on going along with them, and they left Jody Dalton alone at the trailer. (T. 1854). They bouth more beer at a Minit Market, then Groover stated that Joan Bennett knew where Nancy Sheppard lived. (T. 1855-1856). Groover knew that the defendant knew where Joan lived, and told the defendant to tell Elaine to drive them to Bennett's home. (T. 1855).

The defendant testified that he did not see Joan Bennett that night until they went to her trailer, and that they did not stop by The Sugar Shack after Padgett's death. (T. 1949). Bennett testified that she stopped by The Sugar Shack at about 2:30 A.M. and saw the defendant Elaine, and Groover in the parking lot behind the bar. (T. 1536-1537). She said that she heard the defendant boasting that he had "killed a motherfucker" and was not scared to kill another "motherfucker". (T. 1537-1538). Groover responded, "Shit, you ain't did shit; you ain't killed nobody". (T. 1538). Bennett also testified that she saw both Elaine and the defendant take some "acid", and that all three of them were "high". (T. 1540-1541).

Elaine Parker drove her car containing the defendant and Groover over to Joan Bennett's trailer. (T. 1508, 1805). Elaine got Bennett up and they went outside to the car. (T. 1508, 1855). Bennett testified that Elaine asked her

if she knew Nancy Sheppard, and that Bennett replied that she lived out by Bennett's mother. (T. 1508-1509). According to Bennett,they did not ask her where Ms. Sheppard lived, (T. 1509), and they did not know where Bennett's mother lived. (T. 1541-1542). Bennett said she did not show them where Sheppard lived; they simply went to the Parker's trailer directly. (T. 1541-1542). The defendant testified that Groover asked Bennett to show him where Sheppard lived, and that Bennett directed them to Sheppard's house. (T. 1855). Bennett even went and knocked at the front door of Sheppard's house, but no one answered the door. (T. 1855). Then they all went to the Parker's trailer. (T. 1856).

When they returned to the Parker's trailer, Jody Dalton was holding a bag of Quaaludes. (T. 1509, 1856). The defendant became upset, but Groover said that he had told her it was all right. (T. 1543). Bennett testified that the defendant and Groover went outside the trailer for about 15 minutes, then Groover came inside and asked if everyone wanted to go to Donut Lake. (T. 1512-1513). The defendant testified that Groover was outside alone for a period of time, and that he went out to see what Groover was doing. (T. 1537-1538). Bennett admitted that she had previously told a police detective that she did not know whether the defendant or Groover had left the trailer at all before they left for the lake, because she was not paying any attention. (T. 1545). Bennett, Groover, and Dalton sat in the back seat of Elaine's car, the defendant sat in the front passenger seat, and Elaine drove them all to Donut Lake, to "drink some beer and party". (T. 1513, 1858).

Joan Bennett testified that, on the way to Donut Lake, Groover told the defendant that "he was going to waste Jody because she seen the piece that we used on Richard". (T. 1514). Bennett said that the defendant agreed that Groover should waste Jody. (T. 1551). However, Bennett admitted that, in Tommy Groover's trial, she had testified that Groover said he had to waste Jody because she knew about the piece <u>he</u> used on Richard, (T. 1547) and that, when

he said it, "nobody paid any mind to it". (T. 1551). Bennett and Dalton became involved in a fist fight, but Elaine broke it up. (T. 1515). After the fight, Dalton performed oral sex on Groover in the back seat, with everyone else present in the car. (T. 1516). When they got to the lake, Groover, the defendant, and Dalton got out of the car. (T. 1517). Groover told Elaine Parker and Ms. Bennett to stay in the car. (T. 1517). Bennett could not see the defendant, Dalton, or Groover, who were all behind the car, but heard Dalton making moaning sounds. (T. 1517). She then saw Groover drag Dalton by the hair to the side of the car. (T. 1518). Dalton was naked. (T. 1518). Groover was kicking Dalton (T. 1518-1519, 1555). She asked him why he was doing it and he said, "You know why". (T. 1519). Groover then pulled a gun from out of his boot and shot Dalton "at least" five or six times in the head. (T. 1519, 1558). The defendant had been leaning against the car, about fifteen feet from Groover and grabbed him. (T. 1519). The defendant shouted, "What are you doing, you crazy mother fucker".(T1559).He also said, "You are making too much noise". (T. 1519, 1559). Elaine told Bennett that Groover was crazy. (T. 1557-1558).

Bennett further testified that Groover got the car keys from Elaine and opened the back of the car. (T. 1520). They took rope and concrete blocks out of the car, tied them to Dalton's body, and took the body out into the lake. (T. 1520-1521). After they took her out into the lake, the defendant said he wanted to stay there for a few minutes "to make sure the bitch stayed down". (T. 1522). Bennett admitted that at Groover's trial she had attributed a similar comment to Groover, not the defendant. (T. 1560-1561). She eventually said that she had lied in Groover's trial. (T. 1561-1562).

Bennett further testified that, as Elaine drove them from the lake, Groover told Bennett that he would kill her if she said anything, and that even if he was in jail he would have somebody kill her. (T. 1563-1564). She believed that Groover could have her killed because he had connections with

with people in the drug trade and with the Outlaws motorcycle gang.(T. 1564). After the shooting, the defendant didn't say anything, he just sat there looking "scared or paranoid". (T. 1562-1563). They all returned to the Parker's trailer, where they burned Dalton's clothes and their own and their shoes. (T. 1524-1525). They then went back to Donut Lake because the defendant lost his knife. (T. 1525). The defendant found his wallet there, (T. 1527), and he and Groover threw some water on the blood in the dirt. (T. 1527). When they took Bennett home, she heard the defendant say that he had to get to the junkyard to change the tires on the car before someone woke up, and that they had to go find Billy Long. (T. 1528). Groover came by Bennett's trailer looking for her that afternoon, but Bennett hid from him. (T. 1564-1565).

Joan Bennett testified that she had denied any knowledge of the murder until her arrest on May 18, 1982, for first degree murder. (T. 1566). The prosecutor reduced the charge from first degree murder to accessory after the fact in exchange for a guilty plea on September 8, 1982. (T. 1578-1582). On December 23, 1982, the prosecutor arranged for her release from jail without having to post bond, and she remained out of jail after that while awaiting sentencing. (T. 1582-1583). Bennett was awaiting sentencing at the time she testified against the defendant. (T. 1583).

The defendant testified that, on the way to Donut Lake, Joan Bennett had told Jody Dalton to perform oral sex on Groover. (T. 1859). After Dalton complied, she and Bennett got into a fight until Elaine broke it up. (T. 1859-1860). After they got to the lake, Bennett made Dalton take her clothes off. (T. 1860). Groover then began having sex with Dalton on the hood of Elaine's car. (T. 1860-1861). Groover suddenly stopped, said that he did not want her anyway, pulled Dalton off the hood of the car and knocked her down. (T. 1861). Groover started kicking her, then pulled the pistol out of his boot and shot her. (T. 1861). The defendant ran up to Groover saying, "What are you doing, you crazy mother fucker?"(T1861). Groover still had the gun in his hand, and

told the defendant to "back off". (T. 1861-1862). The defendant did not know Groover was going to kill Jody Dalton (T. 1861), nor did he have any reason to want to kill her. (T. 1879). He did not know the rope and concrete blocks were in the trunk of Elaine's car until Groover opened it up. (T. 1862). He was not concerned about how much noise Groover made in shooting Jody Dalton. (T. 1862-1863). Groover told the defendant to tie the blocks to the body and take it into the lake, and the defendant did so. (T. 1863-1864). The defendant did what Groover said because he was afraid of Groover. (T. 1863). Groover again said that everyone should keep quiet "if they knew what was good for them". (T. 1865). After they burned their clothes and took Joan Bennett home, Groover wanted Elaine and the defendant to take him to find Billy Long. (T. 1866-1867).

Dr. Floro, an Assistant Medical Examiner, testified that Jody Dalton had received four .22 caliber gunshot wounds to the head. (T. 1060-1061). Two of the gunshot wounds would have been fatal; each would have caused immediate unconsciousness. (T. 1065). He could not determine which gunshot wound had been inflicted first. (T. 1065). Dr. Floro also found that, at the time of her death, Dalton had been under the influence of alcohol, with a .11 blood alcohol level, as well as cocaine and doxalamine (a prescription antihistamine). (T. 1064).

Elaine Parker drove her car, with Groover and the defendant inside, to Billy Long's house. (T. 1252, 1397, 1867). Between 6:30 and 6:45 A. M., Long arrived home and saw Elaine's car pulling out of his driveway. (T. 1252). Long parked his car and Elaine backed up to where he was parked. (T. 1252).

Billy Long testified that either Groover or the defendant told him that Richard Padgett wanted to see his girlfriend, Nancy Sheppard, and that they wanted Long to take them to her house. (T. 1252-1253, 1397-1398). Long got in the back seat, Elaine got in the back seat, the defendant remained in the front passenger seat, and Groover took over driving Elaine's car. (T. 1255, 1402). To Long, it "seemed like" everyone in the car was "high" (T. 1401-1402).

Long told Groover how to get to Sheppard's house. (T. 1253, 1402). Groover told Long to go to the door to get Sheppard, but Long refused. (T. 1253, 1402). Groover and the defendant then told Elaine to get the girl. (T. 1253).

The defendant testified that Groover got out of Elaine's car and talked to Long briefly at Long's house before they got into Elaine's car. (T. 1867). Because Joan Bennett had already shown Groover where Nancy Sheppard lived, the defendant assumed that Long knew what was going on. (T. 1868). The defendant had seen Long with a hand gun in the past. (T. 1868). Groover first told Long to get Sheppard from her house, then told Elaine to go get her. (T. 1869). The defendant was hoping that Elaine would not come out with Sheppard, but she did. (T. 1869). Groover told Sheppard that "Richard wanted to see her," and drove her out to where he had killed Padgett. (T. 1869).

Long testified that, as Groover drove them to where Padgett's body was, the defendant told Sheppard that Padgett was "out in the woods, wandering around high, wanting to see Nancy". (T. 1403). When they came to where Padgett's body lay in a ditch, Groover stopped the car and the defendant got out and told Long to get out. (T. 1256-1257). Long got out and walked with the defendant to the ditch, where the defendant showed him Padgett's body and said, "Either you kill her or you are going to lay in the ditch with them". (T. 1257, 1404). Long said he was afraid of the defendant because the defendant had shot him during a domestic argument with his wife, Denise Long, in February of 1980. (T. 1257-1259, 1336-1338). Long is six feet, two inches tall and weighs 240 pounds, and admitted that he "probably" would have knocked the defendant out if the defendant had not shot him. (T. 1337-1338).

Long said that he and the defendant walked back to Elaine's car, and that the defendant asked Sheppard to get out. (T. 1260, 1404). Elaine handed Long a .22 pistol and said, "Here, you better do it or he'll kill you, too". (T. 1260). She obtained the weapon from her purse. (T. 1404-1405). Ms. Sheppard walked over to the ditch, saw Padgett's body, fell to her knees and

and said, "Oh my God". (T. 1260). Long then shot her in the back of the head twice. (T. 1260, 1406). When Groover and the defendant told him to shoot her again, Long fired the gun until it wouldn't shoot anymore. (T. 1260-1261, 1410). Groover told Long to cut her throat, but Long refused. (T. 1261, 1410). The defendant then took the knife from Groover and cut Sheppard's throat. (T. 1261, 1410-1411). The defendant took Sheppard's necklace and class ring, and Long threw her in the ditch. (T. 1261, 1427-1429).

Long testified that he assumed the defendant was armed that morning, (T. 1259-1260), even though he did not see him with a gun, (T. 1418) and the defendant did not say he had a gun. (T. 1420). The day after his arrest, however, Long called the police and gave them a written statement in which he said that the defendant had a gun in his hand when he told him to get out of the car. (T. 1414-1417). After the written statement, he gave a court-reported, sworn statement in which he said that the defendant was standing there with a gun pointed at him when Long shot Nancy Sheppard. (T. 1411-1414, 1417-1421, 1424, 1432). Long also had apparently told his lawyer that the defendant had pointed a gun at his head at the time of the shooting. (T. 95-97).

Long's deal with the prosecutor, Ralph Greene, was that unrelated charges of Sale and Possession of Quaaludes and Sale and Possession of Cocaine would be dropped, and that the first degree murder charge would be reduced to second degree murder, with no minimum mandatory sentence. (T. 1436-1440). Long was awaiting sentencing on the second degree murder charge, having been told that "they would be as lenient as they could" in exchange for Long's testimony. (T. 1446-1447). After he made his deal with the prosecutor, Long was overheard by jail inmate Donald Foy telling Tommy Groover, "If you don't want to get the electric chair, you better do like I did and say Robert made you do it." (T. 1749). Jail inmate Richard Ellwood heard Long boasting that he would lie to see to it that the defendant got the death penalty. (T. 1765). Ellwood further testified that Long told him that he, not the defendant, had cut Nancy Sheppard's

throat. (T. 1765). Long told Ellwood that he and Groover were outside the car when Nancy Sheppard was killed, and that the defendant was in the passenger seat of the car, high on drugs. (T. 1766). Ellwood testified that Tommy Groover had also told him that the defendant was back in the car when Nancy Sheppard was murdered. (T. 1788). Billy Walters, another jail inmate, testified that Billy Long had told him that he, not the defendant, had cut Nancy Sheppard's throat. (T. 1799-1800). In his conversation with Walters, Long referred to prosecutor Ralph Greene as "my buddy Ralph". (T. 1798-1799).

The defendant testified that Groover and Long got out of the car, went over to Padgett's body, and talked briefly. (T. 1870). Long then returned to the car and said that Groover wanted Sheppard to come over there. (T. 1870). The defendant got out of the car so that Sheppard could get out. (T. 1870). She walked to the ditch, fell to her knees, and was shot by Billy Long. (T. 1870-1871). The defendant did not see where the gun came from. (T. 1871). The defendant heard Groover tell Long to cut her throat, then turned and sat back down in the front passenger seat of Elaine's car. (T. 1871). Elaine was still in the back seat. (T. 1871). The defendant did not see who cut Sheppard's throat. (T. 1871). Though he knew Nancy Sheppard was going to be killed, the defendant did nothing to prevent it because he was afraid of Groover and Long, and because he was high on drugs and alcohol. (T. 1880-1881).

Dr. Lipkovic testified that five .22 caliber gunshot wounds caused Nancy Sheppard's death. (T. 1031). Two gunshot wounds were to the back of the head, one over the eye, and two in the chest. (T. 1025-1029). She had been stabbed seven times in the neck. (T. 1029). The stab wounds were superficial, very shallow, and were not fatal. (T. 1032, 1049). The gunshot wounds to the head would have caused immediate unconsciousness. (T. 1032-1033). The drug morphine was detected in her system. (T. 1049).

Billy Long testified that Groover drove them from the scene of Sheppard's murder to Donut Lake. (T. 1264-1265). Groover and the defendant got

out of the car and walked around by the bank of the lake. (T. 1265-1266). When they got back in the car, the defendant said that he did not think they had to "worry about her coming up". (T. 1266). The defendant said, "I took her out so far I'd like to have drowned". (T. 1266). The defendant testified that he got out to find his knife. (T. 1872-1873).

Morris Johnson went to the Parker's trailer on Sunday after he found out Groover and Long had been looking for him and Padgett. (T. 1696). The defendant told Johnson that "you and Richard ain't got nothing to do with it, it's Tommy, Tommy owes me money". (T. 1697). Johnson noticed that the defendant was acting scared at the time. (T. 1697).

On Sunday morning, after dropping Long at his home, Elaine, Groover and the defendant stopped at Spence Hance's house again. (T. 1489). According to Hance, the defendant held up two fingers and said, "We wasted two of them". (T. 1489). The defendant testified that Hance had asked him if they had really killed somebody, and in response, he held up three fingers. (T. 1958-1959).

Elaine Parker's gun was used to kill Jody Dalton and Nancy Sheppard. (T. 1811). Michael Green had seen it sitting out on a cabinet shelf next to a box of shells in the Parker's trailer, in a place where Tommy Groover could have seen it. (T. 1213-1214). The defendant melted Elaine's gun, too, and disposed of his knife and Groover's knife, as well. (T. 1878).

On Monday (February 8, 1982), Spence Hance overheard Groover and the defendant talking at a cook out at the junkyard. (T. 1491). Hance heard the defendant say that he had cut up the knives and thrown them in a swamp. (T. 1491). Hance also heard Groover say that he (Groover) had cut Richard Padgett's throat after Padgett was shot. (T. 1494). Groover said that he (Groover) "had made Billy Long shoot the girl". (T. 1494). Hance heard the defendant say that he (the defendant) did not know Padgett was going to be killed, and that he thought Padgett was going to be left in the woods to walk home. (T. 1494).

On Thursday, (February 11, 1982), Michael Green went to the junkyard and

saw the defendant and Groover burning a rope very similar to the rope that had been in the defendant's tree. (T. 1214). The defendant was arrested on Thursday on a warrant for Aggravated Assault, in an incident that did not involve any of the murder victims. (T. 197-198, 200-201). Detective John Bradley of the Jacksonville Sheriff's Office said that the defendant told him he "didn't have a gun, did not own a gun, had not had a gun in his possession or had anything to do with guns". (T. 1650).

Elaine Parker was not called as a witness by the prosecution because she could not rebut the defendant's testimony. (T. 2053-2054, 2-56-2058).

Following the jury's verdicts, and at the conclusion of the sentencing hearing, the jury returned with its life recommendations. (R. 434-435, T. 2516-2517).

POINTS ON APPEAL

I

WHETHER THE TRIAL COURT'S REFUSAL TO INSTRUCT THE JURY UPON THE LAW OF INDEPENDENT ACT UNDER THE FELONY-MURDER DOCTRINE PREVENTED THE DEFENDANT FROM EFFECTIVELY DEFENDING AGAINST THE CAPITAL HOMICIDES IN COUNTS I AND III OF THE INDICTMENT, AND PREVENTED THE JURY FROM CONSIDERING HIS DEFENSE TO THOSE CHARGES, IN VIOLATION OF THE DEFENDANT'S RIGHT TO A FAIR TRIAL BY AN IMPARTIAL JURY, AND DUE PROCESS OF LAW, AS GUARANTEED BY THE FIFTH, SIXTH AND COURTEENTH AMENDMENTS TO THE U. S. CONSTITUTION AND ARTICLE I, SECTIONS 9, 16, AND 22 OF THE FLORIDA CONSTITUTION.

II

WHETHER THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT DURESS IS NOT A DEFENSE TO HOMICIDE, WITHOUT REGARD TO WHETHER THE ACCUSED WAS AN AIDER AND ABETTOR AS OPPOSED TO A PRINCIPAL, AND WITHOUT REGARD TO WHETHER THE HOMICIDE WAS A PREMEDITATED OR A FELONY MURDER, IN VIOLATION OF THE RIGHT OF AN ACCUSED TO HAVE THE JURY INSTRUCTED IN ACCORD WITH HIS DEFENSE, AND HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL, AS GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION.

III

WHETHER THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTION TO PRESENT, IN ITS CASE IN CHIEF AND IN CROSS-EXAMINATION OF THE DEFENDANT, COLLATERAL CRIMINAL ACTS AND ATTACKS ON THE DEFENDANT'S CHARACTER WHICH WERE WHOLLY IRRELEVANT TO THE CRIMES CHARGED AND WHOSE SOLE EFFECT WAS TO DEMONSTRATE A PROPENSITY TO COMMIT CRIME, IN VIOLATION OF THE DEFENDANT'S RIGHT TO A FAIR TRIAL AND DUE PROCESS OF LAW, AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION, AND ARTICLE I, SECTION 9 OF THE FLORIDA CONSTITUTION.

IV

WHETHER THE TRIAL COURT ERRED IN THE MANNER IT CONDUCTED VOIR DIRE, REBUKING AND REPRIMANDING DEFENSE COUNSEL IN THE PRESENCE OF THE JURY, IN COMMENTING ON THE CREDIBILITY OF WITNESSES, AND IN PERMITTING THE PROSECUTION TO ATTEMPT TO EXPLAIN AND JUSTIFY PLEA BARGAINING WITH THEIR WITNESSES DURING THE JURY SELECTION PROCESS, SO AS TO DENY THE DEFENDANT A FAIR TRIAL BY AN IMPARTIAL JURY, IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE I, SECTION 9 AND 16 OF THE FLORIDA CONSTITUTION.

V

WHETHER THE TRIAL COURT ERRED IN FAILING TO DECLARE A MISTRIAL DUE TO THE IMPROPER, PREJUDICIAL, AND INFLAMMATORY REMARKS OF THE PROSECUTORS IN THEIR CLOSING ARGUMENTS AND THE CUMULATIVE EFFECT OF THESE COMMENTS SERVED TO DEPRIVE THE DEFENDANT OF HIS RIGHT TO A FAIR TRIAL BY AN IMPARTIAL JURY, AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION.

VI

WHETHER THE TRIAL COURT ERRED IN FAILING TO GRANT A NEW TRIAL WHERE IT WAS SHOWN THAT THE PROSECUTION HAD FAILED TO DISCLOSE FAVORABLE EVIDENCE TO THE DEFENSE, IN VIOLATION OF THE DEFENDANT'S RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL AND DUE PROCESS OF LAW, AS GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE I, SECTION 9 AND 16 OF THE FLORIDA CONSTITUTION.

VII

WHETHER THE TRIAL COURT ERRED IN PERMITTING THE PROSECUTORS TO REPEATEDLY ADVISE THE JURY THAT CO-DEFENDANT ELAINE PARKER HAD PLEADED GUILTY AND HAD BEEN GIVEN A PLEA BARGAIN IN EXCHANGE FOR HER TESTIMONY AGAINST THE DEFENDANT, WHERE THE CO-DEFENDANT WAS NOT CALLED AS A WITNESS DURING THE TRIAL, IN VIOLATION OF THE DEFENDANT'S DUE PROCESS RIGHT TO A FAIR TRIAL BY AN IMPARTIAL JURY AS GUARANTEED BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTUION AND ARTICLE I, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION.

VIII

WHETHER THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN A JUDGEMENT OF GUILTY OF FIRST DEGREE MURDER AS TO COUNT I OF THE INDICTMENT.

IX

WHETHER THE TRIAL COURT ERRED IN ALLOWING INTO EVIDENCE, OVER OBJECTION, THE TESTIMONY OF A WITNESS WHERE THE STATE BREACHED ITS DUTY TO DISCLOSE HIS NAME AND ADDRESS AS REQUIRED BY FLA. R. CRIM. P. 3.220 (a)(1)(i), AND THE COURT FAILED TO CONDUCT AN INQUIRY INTO THE CIRCUMSTANCES SURROUNDING THE DISCOVERY BREACH.

X

WHETHER THE TRIAL COURT ERRED IN ALLOWING A POLICE DETECTIVE TO TESTIFY AS TO THE REPUTATION OF DEFENSE WITNESS RICHARD ELLWOOD FOR TRUTH AND VERACITY, IN VIOLATION OF § 90.609, FLA. STAT. (1981), ARTICLE I, § 9 OF THE FLORIDA CONSTITUTION AND THE FIFTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION.

XI

WHETHER THE TRIAL COURT ERRED IN PERMITTING THE PROSECUTION TO QUESTION DEFENSE WITNESS RICHARD ELLWOOD ABOUT SPECIFIC PRIOR CONVICTIONS AND GETTING THE WITNESS TO CLAIM HIS FIFTH AMENDMENT PRIVILEGE, IN VIOLATION OF THE DEFENDANT'S RIGHT TO DUE PROCESS AND A FAIR TRIAL, AS GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION.

XII

WHETHER THE TRIAL COURT ERRED IN PERMITTING THE PROSECUTOR TO ELICIT FROM DEFENSE WITNESS RICHARD ELLWOOD THAT THE DEFENDANT REMAINED SILENT AND DID NOT DISCUSS HIS CASE WHILE IN JAIL AWAITING TRIAL, IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION.

XIII

WHETHER TRIAL COURT ERRED IN PERMITTING THE PROSECUTOR TO CROSS-EXAMINE THE DEFENDANT, OVER OBJECTION, ABOUT

THE NUMBER OF TIMES HE HAD CONSULTED WITH DEFENSE COUNSEL, AND ABOUT THE FACT THAT HE HAD CONSULTED WITH DEFENSE COUNSEL DURING A RECESS IN CROSS-EXAMINATION, IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION.

XIV

WHETHER THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS STATEMENTS, ADMISSIONS, AND CONFESSIONS AND IN PERMITTING THE STATE TO USE THOSE STATEMENTS IN ITS CASE IN CHIEF, IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE I, SECTION 9 AND 16 OF THE CONSTITUTION OF THE STATE OF FLORIDA.

XV

WHETHER THE TRIAL COURT ERRED IN PERMITTING THE STATE TO USE THE DEFENDANT'S STATEMENTS MADE AT THE ARREST FOR AN UNRELATED OFFENSE AS EVIDENCE OF GUILT, AND IN SO INSTRUCTING THE JURY, IN VIOLATION OF THE DEFENDANT'S DUE PROCESS RIGHT TO A FAIR TRIAL AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 9 OF THE FLORIDA CONSTITUTION.

XVI

WHETHER THE TRIAL COURT ERRED IN PROHIBITING DEFENSE COUNSEL FROM ASKING STATE WITNESS DENISE LONG ABOUT HER STATUS ON PROBATION, IN VIOLATION OF THE DEFENDANT'S RIGHT TO CONFRONTATION AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE I, SECTION 16 OF THE FLORIDA CONSTITUTION.

XVII

WHETHER THE TRIAL COURT ERRED IN OVER-RULING DEFENSE OBJECTIONS AND FAILING TO DECLARE A MISTRIAL WHEN THE PROSECUTION INTRODUCED EVIDENCE OF PRIOR CONSISTENT STATEMENTS BY WITNESS BILLY LONG BEFORE THE WITNESS'S CREDIBILITY HAD BEEN ATTACKED, IN VIOLATION OF § 90.801 (2)(b), FLA. STAT. (1981), AND THE DUE PROCESS CLAUSE OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE U. S. CONSTITUTION AND ARTICLE I, SECTION 9 OF THE FLORIDA CONSTITUTION.

XVIII

WHETHER THE TRIAL COURT ERRED IN REQUIRING THE DEFENSE TO TURN OVER TO THE PROSECUTION A DEPOSITION OF STATE WITNESS BILLY LONG, IN INTERRUPTING CROSS-EXAMINATION, AND IN PERMITTING THE PROSECUTOR AN OVERNIGHT RECESS TO PREPARE THE WITNESS FOR ADDITIONAL CROSS-EXAMINATION, IN VIOLATIONS OF FLA. R. CRIM. P. 3.220 (b)(4)(i) and (iii) AND THE DEFENDANT'S RIGHT OF CONFRONTATION AND TO THE EFFECTIVE ASSISTANCE OF COUNSEL, AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE I, SECTION 16 OF THE FLORIDA CONSTITUTION.

XIX

WHETHER THE TRIAL COURT ERRED IN ITS SUMMARY DENIAL OF DEFENDANT'S MOTION IN LIMINE AND IN DENYING DEFENDANT'S REQUEST FOR FUNDS TO CONDUCT AN EVIDENTIARY HEARING ON THE MATTER, WHICH RULING HAD THE EFFECT OF DENYING THE DEFENDANT HIS RIGHT TO BE TRIED BY A FAIR AND IMPARTIAL JURY CONSISTING OF A REPRESENTATIVE CROSS-SECTION OF THE COMMUNITY, AND HIS RIGHT TO EQUAL PROTECTION OF THE LAW, AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 16 AND 22 OF THE FLORIDA CONSTITUTION.

XX

WHETHER THE DEFENDANT'S SENTENCE OF DEATH MUST BE VACATED BECAUSE § 921.141, FLA. STAT. (1981), IS UNCONSTITUTIONAL, BOTH ON ITS FACE AND AS APPLIED IN THE STATE OF FLORIDA, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, NINTH, AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE I, SECTION 9, 16, AND 17 OF THE FLORIDA CONSTITUTION.

XXI

WHETHER THE DEFENDANT'S SENTENCE OF DEATH CANNOT BE CARRIED OUT BECAUSE DEATH BY ELECTROCUTION IS CRUEL AND/OR UNUSUAL PUNISHMENT, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION.

XXII

WHETHER THE TRIAL COURT ERRONEOUSLY SENTENCED THE DEFENDANT TO DEATH ON COUNT II, WHERE THE JURY'S JUDGEMENT IN FAVOR OF LIFE WAS WELL-SUPPORTED BOTH IN FACT AND IN LAW.

ARGUMENT I

THE TRIAL COURT'S REFUSAL TO INSTRUCT THE JURY UPON THE LAW OF INDEPENDENT ACT UNDER THE FELONY-MURDER DOCTRINE PREVENTED THE DEFENDANT FROM EFFECTIVELY DEFENDING AGAINST THE CAPITAL HOMICIDES IN COUNTS I AND III OF THE INDICTMENT, AND PREVENTED THE JURY FROM CONSIDERING HIS DEFENSE TO THOSE CHARGES, IN VIOLATION OF THE DEFENDANT'S RIGHT TO A FAIR TRIAL BY AN IMPARTIAL JURY, AND DUE PROCESS OF LAW, AS GUARANTEED BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 9, 16, AND 22 OF THE FLORIDA CONSTITUTION.

In a prosecution for first degree murder, if the accused was present, aiding and abetting the commission or attempt of one of the violent felonies listed in §§ 782.04 (1)(a), Fla. Stat. (1981), and a homicide results from the commission of the underlying felony, the accused is as guilty of first degree murder as is the actual perpertrator; State v. Aguiar, 418 So. 2d 245 (Fla. 1982); Enmund v. State, 399 So. 2d 1362 (Fla. 1981). However, the liability of a felon for the acts of his co-felons is subject to the limitation that the lethal act must be in furtherance of the common design or unlawful act the felons set out to accomplish. Adams v. State, 341 So. 2d 765 (Fla. 1977); Pope v. State, 84 Fla. 428, 94 So. 865 (1922). Because it is the commission of a homicide in conjunction with the intent to commit the felony that substitutes for the requirement of premeditation for first degree murder, it is necessary that there be some causal connection between the homicide and the felony. Bryant v. State, 412 So. 2d 347 (Fla. 1982). Thus, if the homicide was committed as the independent act of a co-felon, and not a part of the common scheme or design, the accused is not guilty of first degree murder. Id. Florida is not alone in recognizing the "independent act" defense to felony-murder. See People v. Wood, 8 N.Y. 2d 48, 201 N.Y. S. 2d 328, 167 N.E. 2d 736 (Ct. App. 1960); People v. Kauffman, 152 Cal. 331, 92 P. 861, (Sup. Ct. 1907); Mumford v. State, 19 Md. App. 640, 313 A. 2d 563 (Ct. Sp. App. 1974).

The prosecution theory as to Count I was multiple; that the defendant and Tommy Groover committed a premeditated murder of Richard Padgett because

they were afraid of being killed by Padgett's family if his family found out that they had beaten Padgett up, (T. 2130-2131); that the defendant wanted Padgett killed to show he meant business in collecting money for drugs (T. 2184-2185); or that Padgett was killed during a kidnapping for the purpose of inflicting bodily harm or to terrorize the victim, and that the defendant was assisting in the kidnapping. (T. 2263, 2274). The state's theory as to Count III was that Jody Dalton was killed to cover up the murder of Richard Padgett, a premeditated murder. (T. 2261, 2275).

As to Count I, there was substantial evidence to support the independent act defense to the charge of felony-murder. There was evidence that the defendant was not the least bit upset with Padgett. (T. 1141). Padgett owed the defendant nothing . (T. 1832-1833). The defendant had Groover's jewelry to hold as collateral for any money Groover owed, (T. 1826) so there was no urgency for the defendant to collect money. Charlie Brown was going to take care of the debt the following day, (T. 1838), so there was no reason for Groover to kill Padgett for a drug debt. The defendant prevented Padgett from being injured seriously by Groover when Groover hit him with brass knuckles (T. 1840-1841), and took Padgett to Carl Barton's house to clean his wounds. (T. 1470, 1842). There was evidence that the defendant was unaware of Groover threatening Padgett with a gun. (T. 1845, 1935). The evidence indicated that the defendant did not know Padgett was going to be killed, that he simply intended for them to drop Padgett in the woods to walk home. (T. 1844, 1494). Padgett's body had over $16 in his wallet when it was found (T. 1117-1118), which shows he was not killed for money. (T. 2130). The evidence showed that the defendant and Padgett were good friends (T. 1138, 1816). However, it was common knowledge that there was "bad blood" between Groover and Padgett. (T. 1138, 1636, 1843). From this evidence counsel could have argued that Groover killed Padgett for totally personal reasons, unreleated to any supposed scheme or design to terrorize him to collect drug money, and totally outside the scope

of any felony in which the defendant might have been participating. Counsel did make this argument in the penalty phase. (T. 2475-2476).

Defense counsel submitted a number of independent act instructions (R. 361, T. 2090; R. 362, T. 2090; R. 363, T. 2091), including the same one that counsel submitted in Bryant, supra. (R. 362). The court perfunctorily denied each instruction, and, in effect, left counsel in the posture of having a defense that was unsupported by any jury instruction. Rather than argue a defense that was not supported by the standard instruction, counsel argued that the defendant was guilty of third degree felony murder in Count I, (T. 2241-2242), since the defendant had clearly agreed to participate in the false imprisonment of Padgett that occurred when he was taken into the woods rather than home. The independent act instruction would have provided the basis for a defense argument for acquittal as to Count I.

Likewise, an independent act instruction might well have prevented the jury from convicting the defendant in Count III. The jury obviously did not accept the state's theory that the defendant aided in the premeditated murder of Jody Dalton. There was no instruction on first degree felony murder as to Count III (R. 388), but the jury was instructed on third degree felony murder as to Count III. (R. 392).

There was evidence that Dalton did not know anything about Richard Padgett's murder. (T. 1880). However, she had been visiting Groover at Billy Long's house, and Groover was aware that Long's mother did not want her coming around. (T. 1341-1343). There was evidence that Groover felt a personal dislike for Dalton (T. 1861). From this evidence the argument could have been made, and, in fact, was made, that the murder of Jody Dalton was exclusively due to personal motives on the part of Groover. (T. 2204-2205). An independent act instruction could well have provided the jury with a basis for acquittal as to Count III, as well.

There was evidence to support the independent act theory of defense,

but counsel could not argue it because it was not supported by an instruction to the jury. However, when there is any evidence introduced at trial which supports the theory of the defense, a defendant is entitled to have the jury instructed on the law applicable to his theory of defense when he so requests . Motley v. State, 155 Fla. 545, 20 So. 2d 798 (1945); Bryant, supra. The submitted instructions were legally correct and supported by the evidence. Denial of the instructions denied the jury a legal basis for accepting the defense and had the effect of preventing counsel from arguing it, except in mitigation. The remedy is a new trial as to Counts I and III.

ARGUMENT II

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT DURESS IS NOT A DEFENSE TO HOMICIDE, WITHOUT REGARD TO WHETHER THE ACCUSED WAS AN AIDER AND ABETTOR AS OPPOSED TO A PRINCIPAL, AND WITHOUT REGARD TO WHETHER THE HOMICIDE WAS A PREMEDITATED OR A FELONY MURDER, IN VIOLATION OF THE RIGHT OF AN ACCUSED TO HAVE THE JURY INSTRUCTED IN ACCORD WITH HIS DEFENSE, AND HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL, AS GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION.

During the trial, the defendant testified that he became afraid of Tommy Groover when Groover murdered Richard Padgett. (T. 1846, 1851, 1861, 1863, 1872 , 1878-1879, 1880-1881, 1924, 1945, 1979); that Groover threatened he, his wife, and his family with violent retribution (T. 1847-1848, 1849, 1865, 1942); that Groover had another gun in addition to the first one the defendant melted down (T. 1850, 1861, 1934, 1951-1952); and that the defendant did not have a weapon (T. 1863). When Billy Long got into Elaine Parker's car, the defendant believed Long knew of Groover's plan, and he had seen Long with a gun in the past (T. 1868). Long was seated behind him and next to Elaine (T- 1870); and he was frightened of Long and Groover acting in concert. (T. 1880-1881, 1962). On cross-examination by the prosecutor, he stated that he was co-erced into doing everything he did. (T. 1979).

The state's theory of prosecution as to Count II, the murder of Nancy

Sheppard, was in the alternative: premeditated murder, or felony (robbery) murder, and the state requested the jury be so instructed. (T. 2001-2003). This request was granted over objection (T. 2109-2112). The prosecutor argued felony murder in his summation, (T. 2274-2275), as well as premeditated murder.

At the charge conference in this cause, the defense submitted Defense Requested Jury Instruction No. 35. (R. 360, T. 2087-2090). This duress instruction was denied, and the court instead chose to give State's Requested Jury Instruction Number 4 (R. 320, T. 2093-2096), which stated that duress is not a defense to homicide. This instruction was granted over objection (T. 2119-2122, 2265-2266). During summation, prosecutors argued that the defendant was guilty, even if his testimony was believed, because duress or co-ercion was not a defense to homicide. (T. 2147-2149, 2153).

It is fundamental that an accused is entitled to a jury instruction regarding any valid legal defense which he asserts if there is any evidence to support it. Bryant v. State, 412 So. 2d 347 (Fla. 1982); Brown v. State, 431 So. 2d 247 (Fla. 1st D.C.A. 1983); Laythe v. State, 330 So. 2d 113 (Fla. 3rd D.C.A. 1976). The duress or co-ercion defense was recognized in Florida in Hall v. State, 136 Fla. 644, 187 So. 392 (1939), which was a prosecution for perjury. Florida courts have likewise recognized duress as a defense to robbery. Koontz v. State, 204 So. 2d 224 (Fla. 2nd D.C.A. 1967); Jackson v. State, 412 So. 2d 381 (Fla. 3rd D.C.A. 1982). In Cawthon v. State, 382 So. 2d 796 (Fla. 1st D.C.A. 1980), the defendant said he attempted to murder the victim because a third party had threatened to harm some non-present member of the defendant's family in the future. The appellate court held that a duress instruction was lawfully refused because the evidence did not support it, and also because "the co-ercion defense is not available in a case of homicide or attempted homicide". id. at 797. In Wright v. State, 402 So. 2d 493 (Fla. 3rd D.C.A. 1981), the defendant shot the victim first, then gave the gun

to the co-defendant, who continued shooting. Only one gun was involved in this "contract" murder. The defendant's duress defense was rejected, as in Cawthon, because it was not supported by the evidence, and because "...duress is not a defense to an intentional homicide". Wright, supra, at 498. These authorities were relied upon by the court and the prosecution. (T. 2109-2112).

It is important to note that both Cawthon and Wright involved defendants who personally injured or attempted to injure their victims, and that the state did not proceed on a felony murder theory in either case. Here, the defendant, if his testimony is accepted, did nothing to assist in the murder of Nancy Sheppard except to stand up so Sheppard could get out of the car. His chief culpability lay in his failure to do anything to prevent the killing, which occurred in his presence. The facts of this case are therefore unlike Cawthon and Wright and are more similar to those in Goodwin v. State, 405 So. 2d 1970 (Fla. 1981). In Goodwin, the defendant aided and abetted in the kidnapping of three persons who were killed by two co-defendants. There was evidence that the defendant acted in fear of the co-defendants. The trial court apparently instructed the jury that duress was a defense: "The trial judge properly instructed the jury on the defense of duress...." Id. 172. Language in the opinion indicated this Court's acceptance of the proposition that duress is a defense to an aider and abettor of a felony murder: "The sole defense of the appellant was co-ercion and this was rejected by the jury". Id.; "Although the jury rejected this fear as coercion by its verdict of guilty..." Id. If duress were not a defense, the jury could not have rejected it.

That duress can be a defense to felony-murder where an accused does not participate in the killing is a principal of law that has been accepted, both implicitly and explicitly, in other jurisdictions. In People v. Merhige, 212 Mich. 601, 180 N.W. 418 (1920), the accused's guilty plea was set aside because of an indication that he had acted as a "wheelman" in a robbery-murder only because his life had been threatened, and had entered his plea without under-

standing that he had a defense to the charge. In People v. Pantano, 239 N.Y. 416, 146 N.E. 646 (1925), the accused's liability was predicated on a robbery-murder theory, since he, by the prosecution's version, helped plan the robbery that resulted in the murder for ten percent of the "loot". Duress was held to be a valid defense to the robbery and, therefore, to the murder. In State v. Milam, 156 N.E. 2d 840 (Ohio 1959), a defendant's first degree murder conviction, (based on his participation in a robbery which resulted in the murder of a policeman during the getaway) was reversed due to compelling evidence of coercion by the two co-defendants. In another case cited with approval in Wright, duress was ruled to be unavailable as a defense to felony murder where the defendant was the killer:

> According to (defendant), one of his companions in the commission of the robbery ... told him he would kill him if he didn't kill (victim). This is not a case where one is co-erced into the commission of a lesser felony and a homicide is committed by a companion during the perpetration of the lesser felony. Jackson v. State, 558 S.W. 2d 816 (Mo. 1977).

Other jurisdictions have assumed, without deciding, that duress can be a defense to premeditated murder where the accused is an accomplice, People v Repke, 103 Mich. 459, 61 N.W. 861 (1895); State v. Clay, 264 N.W. 77 (Iowa 1935); State v. Roche, 341 So. 2d 348 (La. 1977), Rizzolo v. Commonwealth, 126 Pa. 54, 17 A. 520 (1889); or even the principal, Arp v. State, 97 Ala. 5, 12 So. 301 (1893). At least one court has held that duress can be a defense to premeditated murder, even for a principal in the killing: People v. Moran, 39 Cal. App. 3d 398, 114 Cal. Rptr. 413 (1974).

The defendant's position is that the lower court should not have granted the state's instruction that duress is not a defense to homicide for the following reasons:

1. It is an incorrect statement of law, because duress is and and should be a defense to felony-murder for an accomplice, and to premeditated murder for a mere accomplice who does not actually

participate in the killing.

2. If this court were to rule that duress is not a defense to an aider and abettor to a premeditated murder, the instruction still should not have been given. On it face, it precludes the assertion of duress as a defense to an accomplice to a felony murder. Since the jury was instructed on both premeditated and felony murder, and because the prosecution argued both theories to the jury, and because the court denied the Defendant's Requested Verdict Form (R. 366), it is impossible to determine upon which theory the jury convicted the defendant. The jury was precluded from considering duress as a defense under either theory.

3. Even were this Court to rule that coercion is not a defense to homicide under any theory, the giving of the state's instruction under the circumstances herein was erroneous and prejudicial. The defense asserted to Count II was not that the defendant was coerced into participating in the murder. The defense was the defendant did not participate in the murder, but that he did nothing to prevent it because of fear for his own and his family's safety. (T. 2121-2122, 2237). No instruction that duress was not a defense was necessary when duress was not argued as a defense. The giving of the instruction, in effect, told the jury that the defendant's fear of Tommy Groover was irrelevant, and was tantamount to directing a verdict of guilt. At the very least, in order to correct the false impression given by this instruction, the lower court should have given the Defense Requested Jury Instruction No. 25 (R. 350), which would tell that jury that mere presence at the scene and knowledge that a crime is being committed does not prove guilt. The defendant's explanation for his presence was his fear of Groover; when the jury was told that duress or coercion is no defense, his presence became evidence of guilt. At the very least, no instruction

relating to duress at all should have been given.

The prejudice of the Cawthon instruction was complete. The remedy is a new trial as to Count II.

ARGUMENT III

THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTION TO PRESENT, IN ITS CASE IN CHIEF AND IN CROSS-EXAMINATION OF THE DEFENDANT, COLLATERAL CRIMINAL ACTS AND ATTACKS ON THE DEFENDANT'S CHARACTER WHICH WERE WHOLLY IRRELEVANT TO THE CRIMES CHARGED AND WHOSE SOLE EFFECT WAS TO DEMONSTRATE A PROPENSITY TO COMMIT CRIME, IN VIOLATION OF THE DEFENDANT'S RIGHT TO A FAIR TRIAL AND DUE PROCESS OF LAW, AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION, AND ARTICLE I, SECTION 9 OF THE FLORIDA CONSTITUTION.

At trial, the state presented evidence that, on Friday, February 5, 1982,

(1). the defendant became upset at Tommy Groover because Groover owed him money for drugs, and threatened to "kick his ass" (T. 1141);

(2). the defendant waived a gun at Morris Johnson and asked Brother Caps "did he want to settle it right quick" (T. 1133)

(3). the defendant was pointing a pistol at Mike Green, Morris Johnson, David McDonald, and Charlie Brown, telling them that he needed his money from the sale of drugs (T. 1165)

(4). the defendant threatened to hang Groover with a rope if he did not pay his money (T. 1177)

(5). the defendant got into a fight with someone named Ox Baker at a bar (T. 1221)

The state further presented evidence that, on Saturday, February 6, 1982:

(1). the defendant and Michael Green went to the home of someone named Anthony to collect money for drugs the defendant had sold Anthony. The defendant slapped Anthony and Anthony paid the defendant. (T. 1210-1212)

(2). Green asked Elaine Parker to go to Jerry Buruce's oyster roast to calm the defendant down "because he was all pissed off". (T. 1184)

(3). at Jerry Buruce's house, the defendant got into a fight with

Brother Caps. (T. 1185)

(4). the defendant tried to fire his gun through the windows of Buruce's house. (T. 1186)

The state presented evidence that on Sunday, February 7, 1982:

(1). the defendant and Groover went into Lewis Bradley's house with a gun in an effort to collect money owed to each of them by Denise Long (T. 1269-1270, 1599-1601, 1735-1737).

(2). the defendant and Groover returned to Bradley's house and fired shotguns at Denise Long's car. (T. 1606-1608).

The state also presented evidence that in February of 1980, the defendant had shot Billy Long in a domestic argument started by Long's wife, Denise. (T. 1257-1259).

On cross-examination of the defendant, the prosecutor asked

(1) if the defendant had concealed evidence of other violent acts before (T. 1885)

(2) whether he had used Elaine Parker's pistol to shoot at anyone before (T. 1885)

(3) about an incident wherein his father-in-law had shot him (T. 1885-1887)

(4) about threatening other people with a pistol before (T. 1887-1888)

(5) alleged that "people are absolutely terrorized" of the defendant (T. 1889)

(6) inquired about the defendant's ownership and use of gun from 1980 - 1982 (T. 1890-1892)

(7) crossed the defendant about the collateral incidents the state had introduced in their case in chief (T. 1900, 1902, 1905-1906, 1907-1908, 1909-1911, 1915-1919, 1980, 1983)

(8) alleged that the defendant had Groover "terrorized", and that Groover was the defendant's "enforcer" (T. 1906-1907)

(9) alleged that the defendant had "shot people before" (T. 1908-1909)

(10) called the defendant a liar (T. 1915, 1937, 1959, 1978)

(11) alleged that the defendant's son is "terrorized" of the defendant (T. 1926)

(12) inquired about the defendant having broken his mother's arm (T. 1930-1931)

(13) questioned the defendant by alleging facts not in evidence (T. 1938-1939, 1941, 1943, 1946, 1988).

(14) inquired about the defendant having broken into his mother's house to get some guns the day after the murders (T. 1947-1948)

(15) accused the defendant of being well coached by his attorney (T. 1963-1966)

The test for admissibility of evidence of other crimes or "bad acts" of the defendant is relevancy. Williams v. State, 110 So. 2d 654 (Fla. 1959). Such evidence is admissible if it is relevant to one of the essential or material issues framed within the charge being tried. Duncan v. State, 291 So. 2d 241 (Fla. 2nd D.C.A. 1974). Here, the issue was whether the defendant aided and abetted the commission of the first degree murders of Richard Padgett, Nancy Sheppard, and Jody Dalton. The prosecutor sought to justify the use of these miscellaneous acts of misconduct in order to show the defendant's motive, intent, "degree of anger" (T. 291-293) and as a "conspiracy". (T. 1071). However, none of the acts of misconduct involve Padgett, Sheppard, or Dalton. Indeed, the defendant did not even know Dalton before the morning of February 7, barely knew Nancy Sheppard, and was a friend of Richard Padgett's. Because the prosecutors could find no real motive for the defendant to want to kill Richard Padgett, they sought to invent one by innuendo, character assassination, and wild allegations unsupported by evidence. The mere fact that some of these incidents occurred on the same weekend as the murders does not mean they are relevant. See: Pack v. State, 360 So. 2d 1307 (Fla. 2d D.C.A. 1978): Johnson v. State, 432

So. 2d 583 (Fla. 4th D.C.A. 1983). The fact that some of the incidents involved witnesses called by the prosecution does not make them relevant. Pack, supra; Donaldson v. State, 369 So. 2d 691 (Fla. 1st D.C.A. 1979); Groebner v. State, 342 So. 2d 94 (Fla. 3rd D.C.A. 1977).

In a criminal prosecution, a witness' state of mind is irrelevant unless it supplies an essential element of the crime. Thus, the fact that a store employee was suspicious of an accused because another employee had seen him steal before was irrelevant in a shoplifting prosecution. Long v. State, 407 So. 2d 1018 (Fla. 2nd D.C.A. 1981). Evidence that the defendant had shot Billy Long in 1980 in a domestic argument was not relevant to the defendant's guilt in any way, shape, or form. Long's alleged fear of the defendant did not supply any element of the crime of murder as it applies to the defendant, and was therefore irrelevant.

Evidence of the defendant using or threatening to use force to collect money from persons other than the victims (Groover, Anthony, Denise Long) was relevant solely to show the propensity of the defendant to use force to collect money for drugs. It is precisely this type of evidence that is to be excluded under the Williams rule. Green v. State, 190 So. 2d 42 (Fla. 2nd D.C.A. 1966). For this reason, evidence that a defendant had previously sold marijuana to the same informant was inadmissible because it "showed only his propensity to sell marijuana", Roche v. State, 326 So. 2d 448 (Fla. 2nd D.C.A. 1976), evidence showing propensity to commit homosexual acts is inadmissible in a homosexual rape prosecution, Phillips v. State, 350 So. 2d 837 (Fla. 1st D.C.A. 1977), Andrews v. State, 172 So. 2d 505 (Fla. 1st D.C.A. 1965), and evidence tending to show propensity to commit deviant sexual acts was inadmissible in a child rape prosecution, Coler v. State, 418 So. 2d 238 (Fla. 1982).

The evidence that the defendant waived a gun at Morris Johnson, argued with Ox Baker, fought with Brother Caps, and tried to shoot into Jerry Buruce's house, was even more peripheral. Such evidence was not even related to collecting

money for drugs, and showed only a propensity towards violence in general. Attacking the defendant's character in such a fashion is wholly improper; appellate courts have been quick to reverse convictions where less extensive evidence was introduced. See Perkins v. State, 349 So. 2d 776 (Fla. 2nd D.C.A. 1977); Chapman v. State, 417 So. 2d 1028 (Fla. 3rd D.C.A. 1982); Hunt v. State, 429 So. 2d 811 (Fla. 2nd D.C.A. 1983); Greene v. State, 376 So. 2d 396 (Fla. 3rd D.C.A. 1979).

It is improper for a prosecutor to use cross-examination to intentionally get irrelevant and inflammatory evidence before the jury, Chapman v. State, 417 So. 2d 1028 (Fla. 3rd D.C.A. 1982); nor may a prosecutor ask compound questions assuming facts not in evidence, Carter v. State, 332 So. 2d 120 (Fla. 2nd D.C.A. 1976); nor may he cross-examine by insult and innuendo, Groebner v. State, 342 So. 2d 94 (Fla. 3rd D.C.A. 1977), Stanton v. State, 349 So. 2d 761 (Fla. 3rd D.C.A. 1977); nor may he cross-examine to bring out irrelevant acts of violence, Witt v. State, 410 So. 2d 924 (Fla. 3rd D.C.A. 1982), Johnson v. State, 432 So. 2d 583 (Fla. 4th D.C.A. 1983). The prosecutor here was guilty of all these shortcomings; his improper tactics were recognized by this court in Straight v. State, 397 So. 2d 903 (Fla. 1981). Some of these improprieties were objected to, others were not. Some of the objections were sustained, others were not. The overall effect of the collateral crimes, bad acts, and improper cross-examination was to deny the defendant a fair trial by virtue of an overwhelming attack on his character and propensities. See Albright v. State, 378 So. 2d 1234 (Fla. 2nd D.C.A. 1980). The remedy is a new trial.

ARGUMENT IV

THE TRIAL COURT ERRED IN THE MANNER IT CONDUCTED VOIR DIRE, REBUKING AND REPRIMANDING DEFENSE COUNSEL IN THE PRESENCE OF THE JURY, IN COMMENTING ON THE CREDIBILITY OF WITNESSES, AND IN PERMITTING THE PROSECUTION TO ATTEMPT TO

EXPLAIN AND JUSTIFY PLEA BARGAINING WITH THEIR WITNESSES DURING THE JURY SELECTION PROCESS, SO AS TO DENY THE DEFENDANT A FAIR TRIAL BY AN IMPARTIAL JURY, IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE I, SECTION 9 AND 16 OF THE FLORIDA CONSTITUTION.

Jury selection in this cause began on February 28, 1983. (T. 341). The trial court reserved ruling on the defendant's Motion for Change of Venue (T. 341-347) and denied the defendant's Motion for Individual and Sequestered Voir Dire. (T. 344-347). Instead, twenty-one prospective jurors were seated for voir dire. (T. 361-362). The prosecutors repeatedly told the jury that three co-defendants had pleaded guilty, described the nature of their plea bargains, and sought to explain and justify their "dealing". (T. 436-442, 443-447, 659-663, 763-766, 848-849). Defense counsel repeatedly and vainly objected to the inquiry (T. 436-7, 442, 444, 660-661, 765, 849). Due to the fact that twenty-one venireman were to be questioned at once, defense counsel had difficulty keeping track of the prospective juror's names (T. 463). Counsel began questioning the veniremen individually, but was admonished by the court that questions had to be asked collectively. (T. 508-509). Despite finding that counsel's questions were proper, the court repeatedly admonished counsel to ask them collectively, of all twenty-one jurors. (T. 518-519). Eventually, the court began prohibiting counsel from asking certain questions even though no objection had been raised by the prosecution. (T. 539-540). On March 1, 1983, the court again admonished counsel to ask questions collectively, and defense counsel objected to the restrictions on voir dire and the procedure being followed. (T. 554-556). Additional admonishments in the presence of the jury occurred on the second day of jury selection (T. 584, 706-709, 718, 719, 724, 725). Such exchanges included the prosecution objecting on the basis that counsel was wasting the jury's time, due the juror being disqualified as a matter of law. (T. 718). This practice was in clear violation of the previous rulings by

the court relating to excusing such jurors for cause. (T. 78-83). The court began sustaining non-existant objections (T. 719) and personally accused counsel of "wasting time", all in the presence of the venire. (T. 725). When a venireman used the word "bribed" in inquiring about plea bargained testimony, and counsel agreed, the prosecution objected. (T. 729). The prosecutor and the judge told the jury that no witness had been bribed, and that no one had been paid for anything and implied bad faith on the part of defense counsel for agreeing with the characterization. (T. 729-731). Ironically, several of the state's witnesses were paid money. (R. 464-465, T. 2526-2531).

It is elementary that a trial judge "... should endeavor to avoid the type of comment or remark that night result in bringing counsel into disfavor before the jury at the expense of the client". Hunter v. State, 314 So. 2d 174, 175 (Fla. 4th D.C.A. 1975). Here, the trial court openly berated defense counsel for "wasting time", repeatedly admonished counsel to "move along" and to ask collective questions, and prevented counsel from asking some questions even where there was no objection by the prosecution. Similar conduct required reversal in Jones v. State, 385 So. 2d 132 (Fla. 4th D.C.A. 1980), and James v. State, 388 So. 2d 5 (Fla. 5th D.C.A. 1980).

The lower court further violated its duty to appear impartial by commenting on the credibility of state witnesses whose testimony had been purchased through plea bargaining. Even the prosecutors referred to their arrangements as "deals". (T. 445, 660). The word "bribe" is defined as

> (1) Money or favor given or promised to a person in a position of trust to influence his judgment or conduct (2) something that serves to induce or influence. Webster's New Collegiate Dictionary, G&C Merriam Co.(8th ed. 1980)

Clearly, a witness who testifies on behalf of the prosecution in exchange for a reduced charge and lenient treatment has been "bribed" according to the common definition. Defense counsel's agreement with the venireman's characterization cannot, therefore, be considered so improper as to require the

type of rebuke counsel received. This rebuke, in addition to throwing disfavor on defense counsel, was also an improper comment on the credibility of the witnesses. Since the credibility of these "bribed" witnesses was the central issue in the trial, the comments can hardly be considered to be harmless error. Judicial comments on the credibility of a witness for the defense are always improper, and where it relates to a critical issue, is reversible error. See: Parise v. State, 320 So. 2d 444 (Fla. 4th D.C.A. 1975); Cooper v. State, 376 So. 2d 477 (Fla. 1st D.C.A. 1979); Moore v. State, 386 So. 2d 590 (Fla. 5th D.C.A. 1980); James, supra; Cooper v. State, 413 So. 2d 1244 (Fla. 1st D.C.A. 1982). The prosecutor reminded the jury of this rebuke in his closing argument while castigating defense counsel. (T. 2253).

None of this would have occurred had the court not permitted the prosecutors to explain in detail the nature of their plea bargains with their witnesses, to express their distaste for making deals, and to attempt to justify it in the eyes of the jury. This extensive questioning went far beyond the simple inquiry to determine possible bias that was approved in Moody v. State, 418 So. 2d 989 (Fla. 1982). Here, the questioning was an attempt to gain the jury's advance approval for the deals they had made, as well as an attempt to get the venire to prejudge the credibility of the witnesses, by telling them what the participation of each co-defendant witness supposedly had been. Such abuse of the voir dire process has been held to require reversal. See Smith v. State, 253 So. 2d 465 (Fla. 1st D.C.A. 1971); and Harmon v. State, 394 So. 2d 121 (Fla. 1st D.C.A. 1980), where Mr. Greene was also the prosecutor.

The manner in which the voir dire was conducted in conjunction with the improper questioning by the prosecutor and improper remarks by the trial judge, served to deprive the defendant of his right to a fair trial by an impartial jury, and his right to the effective assistance of counsel. The remedy is a new trial.

ARGUMENT V

THE TRIAL COURT ERRED IN FAILING TO DECLARE A MISTRIAL DUE TO THE IMPROPER, PREJUDICIAL, AND INFLAMATORY REMARKS OF THE PROSECUTORS IN THEIR CLOSING ARGUMENTS. THE CUMULATIVE EFFECT OF THESE COMMENTS SERVED TO DEPRIVE THE DEFENDANT OF HIS RIGHT TO A FAIR TRIAL BY AN IMPARTIAL JURY, AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION.

During the course of summation by both prosecutors, numerous prejudicial and inflammatory remarks were made; objections were voiced to some, though not all, of these comments. In the state's first argument, the prosecutor referred to the defendant as a "predator", one of "those sharks that feed off human misery produced by this drug culture, vicious, ugly, terrorizing, threatening kill". (T. 2127-2128).Shortly thereafter,he called the defendant a "vicious animal". (T. 2131), then a "wounded, wounded vicious animal". (T. 2135). The defense motion for mistrial was denied, though an instruction to disregard was given. (T. 2136). The prosecutor then shifted his attack to the tactics of defense counsel, accusing the defense of giving a vague opening statement and then "constructing" the defendant's testimony. (T. 2140-2141). The defense motion for mistrial was denied; the court stated that the comment was "proper". (T. 2141). The defendant was then called a "devil". (T. 2142). Despite the fact that all the evidence showed there were only two guns used in these three homicides, the prosecutor said, "I tell you, I submit to you, there were guns everywhere before and after". (T. 2150). Counsel objected, but the prosecutor was permitted to continue the argument. (T. 2150). The defendant was again assailed as a "screaming (sic) evil person" who would "have a license to kill" if acquitted. (T. 2183-2184). The defense objection was over-ruled. (T. 2184).

After the defense summation, T. Edward Austin, the State Attorney for the Fourth Judicial Circuit, gave the rebuttal argument. He first accused defense counsel of laying down a "smokescreen". (T. 2248). Mr. Austin then

utilized the stature of his office and told the jury that "... we prosecute about 6,000 felony cases a year and we don't have time to sit down and coach them as much as Mr. Link wants you to think we sit down and coach them". (T. 2252). He then further attacked defense counsel and the defendant:

> Mr. Link got up here and he accused us and you heard Judge Olliff the first day tell him not to use the phrase bribery in addressing the State, and not using the word bribery of (sic) getting Joan Bennett to testify. And the Judge told him, but he went on and did it. Now, he's up to the mark, I mean, in his zeal to get this killer off, he's going too far. Because we haven't bribed anybody and that's not the proper phrase for a lawyer to use anyway. It's improper type of conduct and he just went too far, his zeal to walk this killer out of here for one reason. (T. 2253).

The defense objections and motion for mistrail was ignored; the court simply told the State Attorney to "proceed". (T. 2253-2254). At the end of the State Attorney's argument, defense counsel again objected and moved for a mistrial, again in vain. (T. 2277).

In Wilson v. State, 294 So. 2d 327 (Fla. 1974), the law applicable to improper prosecutorial comment was succinctly stated:

> The State points out that in some instances there was an absence of objection in the present trial and in other instances an objection to the improper inferences was sustained. Such absence will not suffice where the comments or repeated references are so prejudicial to the defendant that neither rebuke nor retraction may entirely destroy their influence in attaining a fair trial. Id. at 329.

The improprieties in argument by the prosecutor should comprise textbook examples of what a prosecutor should not do in summation:

1). A prosecutor may not engage in vitriolic name-calling of the defendant. See Peterson v. State, 376 So. 2d 1230 (Fla. 4th D.C.A. 1979): "pushers"; "slime"; Groebner v. State, 342 So. 2d 94 (Fla. 3rd D.C.A. 1977): "burglar, venomous, extortionist, a leopard who never changes his spots"; Reed v. State, 333 So. 2d 542 (Fla. 1st D.C.A. 1976): "dope peddlers"; Blunt v. State, 397 So. 2d 1047 (Fla. 4th D.C.A. 1981): "animals belong in cages"; Meade v. State, 431 So. 2d 1031 (Fla. 4th D.C.A. 1983): "a real live murderer". Here, the defendant was called a "predator", a "shark",

a "wounded, vicious animal", a "devil", a "screaming evil person", and a "killer". This Court reversed a first degree murder conviction in Johnson v. State, 88 Fla. 461, 102 So. 549 (1924), and eloquently stated the law:

> It is a delicate matter to undertake to restrict the argument of counsel to deductions logically drawn from the evidence, or to restrict his illustractions that may be drawn from a wide knowledge of history and great learning, or to confine his powers of imagination within the narrow limits of the facts supported by competent evidence upon the trial, but there are undoubtedly some limitations to his freedom of speech. It is undoubtedly improper in the prosecution of persons charged with crime for the representative of the state to apply offensive epithets to defendants or their witnesses, and engage in vituperative characterizations of them. Denouncing the defendant as a "brute" and asserting that he went "out there for what cats and dogs fight for," alluding either to the home of the deceased or the place where she was killed, was scarcely within the limitation of counsel's privilege in the matter of debate, and when used by an officer of the ability and generally known competency and influence of the learned counsel for the state, cannot be said to be without prejudicial effect upon the defendant against whom the evidence was compellingly conclusive, to say the least. Id., at 550.

2). The prosecutor's use of the term "smokescreen", is improper where it is, as here, intended to convey the impression of improper motives or tactics of defense counsel. Westley v. State, 416 So. 2d 18 (Fla. 1st D.C.A. 1982); Porter v. State, 386 So. 2d 1209 (Fla. 3rd D.C.A. 1980).

3). It is improper for the prosecutor to comment on the consequences of the defendant being "set free" to infer future crimes, as was done here. (T. 2183-2184). See Porter v. State, 347 So. 2d 449 (Fla. 3rd D.C.A. 1977), Gomez v. State, 415 So. 2d 822 (Fla. 3rd D.C.A. 1982); Harris v. State, 414 So. 2d 557 (Fla. 3rd D.C.A. 1982); McMillan v. State, 409 So. 2d 197 (Fla. 3rd D.C.A. 1982); Sims v. State, 371 So. 2d 197 (Fla 3rd D.C.A. 1979); Chavez v. State, 215 So. 2d 750 (Fla. 2nd D.C.A. 1968); Grant v. State, 194 So. 2d 612 (Fla. 1967).

4). It was improper for the prosecutor to venture his personal belief that there were more than two guns involved in the homicides particularly where such belief was not supported by the evidence. (T. 2150). It was

likewise improper for the State Attorney to place himself in a testimonial capacity and give evidence to the jury as to how many cases he prosecutes, in an effort to dispel the indication of coached witnesses. (T. 2252). See Richmond v. State, 387 So. 2d 493 (Fla. 5th D.C.A. 1980); Glassman v. State, 377 So. 2d 208 (Fla. 3rd D.C.A. 1979); Romani v. State, 429 So. 2d 332 (Fla. 3rd D.C.A. 1983).

5). It is improper for the prosecuting attorney to comment upon the role or tactics of defense counsel in an effort to cast doubt on the integrity of the defense. Cochran v. State, 280 So. 2d 42 (Fla. 1st. D.C.A. 1973); Simpson v. State, 352 So. 2d 125 (Fla. 1st D.C.A. 1977); Reed v. State, 333 So. 2d 524 (Fla. 1st D.C.A. 1976). Here the prosecutor accused defense counsel of intentionally giving a vague opening statement and then constructing the defendant's testimony around the state's case. (T. 2140-2141). The court magnified the error by describing the comment as "proper". (T. 2141). The prosecutor made a very similar argument in Hufham v. State, 400 So. 2d 133 (Fla. 5th D.C.A. 1981). Unlike the present case, reversal was not required in Hufham because of the lack of proper objection; the argument was ruled to be improper. Id., at 136. See also, Dyson v. U.S., 450 A. 2d 432 (D.C. 1982).

The State Attorney continued his personal attack upon defense counsel by characterizing counsel's summation (which was delivered without objection) as improper conduct for a lawyer, stating that defense counsel had deliberately disobeyed an order of the court, and arguing that counsel had gone too far "in his zeal to get this killer off". (T. 2253). In Carter v. State, 356 So. 2d 67 (Fla. 1st D.C.A. 1978), the prosecutor accused defense counsel of trying to mislead the jury and of being "almost criminal" herself. In reversing the conviction, the appellate court's language is equally relevant here:

> The public interest is ill served by conduct such as that exhibited by the prosecuting attorney in this case. The right of a person accused of a crime to be represented by counsel and to be fairly tried is basic to the concept of due process. Lack of respect for this essential requirement by an officer of the court cannot be tolerated, even at the expense of requiring a new trial. Id., at 68.

When considered in their totality, both prosecutors' summations were prejudicial, inflammatory, totally improper, and a virtual "mail order catalogue of prosecutorial misconduct". Peterson v. State, 376 So. 2d 1230, 1233 (Fla. 4th D.C.A. 1979). See also, Harris v. State, 414 So. 2d 557 (Fla. 3rd D.C.A. 1982); Jackson v. State, 421 So. 2d 15 (Fla. 3rd D.C.A. 1982). The remedy is a new trial.

ARGUMENT VI

> THE TRIAL COURT ERRED IN FAILING TO GRANT A NEW TRIAL WHERE IT WAS SHOWN THAT THE PROSECUTION HAD FAILED TO DISCLOSE FAVORABLE EVIDENCE TO THE DEFENSE, IN VIOLATION OF THE DEFENDANT'S RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL AND DUE PROCESS OF LAW, AS GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I, SECTION 9 AND 16 OF THE FLORIDA CONSTITUTION.

Subsequent to the trial and advisory sentencing proceeding in this cause, it came to defense counsel's attention that prosecuting attorney Ralph Greene had paid twenty dollars cash to three state witnesses, during the trial and before the witnesses testified. (R. 464, T. 2526-2527). Counsel had previously filed a Motion for Production of Favorable Evidence (R. 44) and a Motion to Compel Discovery (R. 156-158). The prosecution admitted these actions at the hearing on defendant's Amendment to Motion for New Trial (R. 464-465), but excused the payments as "lunch money". (T. 2527-2530).

It is well settled that a withholding by the prosecution of knowledge of evidence known to be useful to the defendant, even though useful only for impeachment purposes, can be grounds for a new trial. Matera v. State, 254 So. 2d 843 (Fla. 3rd D.C.A. 1971), Pitts v. State, 247 So. 2d 53 (Fla. 1971).

Payment of money to a witness for any purpose is favorable evidence that bears on the credibility of the witnesses. Antone v. State, 355 So. 2d 777 (Fla. 1978). When a pre-trial request for specific evidence is made (as was done here), and such evidence is withheld by the prosecution, a new trial must be ordered if the evidence "might have affected the outcome of the trial". Antone v. State, 382 So. 2d 1205 (Fla. 1980); U.S. v. Agurs, 427 U.S. 97 (1976).

During the voir dire, a prospective juror, in the presence of the entire venire, inquired about accomplice testimony and characterized it as "bribed". (T. 729). When defense counsel agreed, the prosecution objected and succeeded in getting the court to instruct the juror that "no one has been paid for anything". (T. 730). Defense counsel was unaware that any witnesses had been paid money, and during summation stated that they had not been given money. (T. 2217-2219). The prosecutor in argument stated that witness Joan Bennett had received nothing for her testimony , (T. 2254), and castigated defense counsel for his use of the word "bribery". (T. 2253).

Had counsel known of the cash payments to witnesses, the prosecutor's indignation at counsel's use of the term would have rung hollow before the jury. To say that twenty dollars would have no effect on a witness's testimony when, by the state's own theory, three people were murdered over a fifty dollar drug debt, is contradictory. The fact that cash payments were made to state witnesses was material to more than impeachment of the witnesses themselves. Under the circumstances of this case, a cloud was cast over the defense from the outset of the trial, and remained there. Had the cash payments been brought to the jury's attention, that cloud would have shifted to the prosecution. Because the failure to reveal this favorable evidence might have affected the outcome of the trial, reversal is mandated.

ARGUMENT VII

THE TRIAL COURT ERRED IN PERMITTING THE PROSECUTORS TO REPEATEDLY ADVISE THE JURY THAT CO-DEFENDANT ELAINE PARKER HAD PLEADED GUILTY AND HAD BEEN GIVEN A PLEA BARGAIN IN EXCHANGE FOR HER TESTIMONY AGAINST THE DEFENDANT, WHERE THE CO-DEFENDANT WAS NOT CALLED AS A WITNESS DURING THE TRIAL, IN VIOLATION OF THE DEFENDANT'S DUE PROCESS RIGHT TO A FAIR TRIAL BY AN IMPARTIAL JURY AS GUARANTEED BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION.

During the voir dire examination the prosecutors, over objection, were permitted to inform the jury that co-defendant Billy Long had pled guilty to second degree murder for shooting Nancy Sheppard in the head and killing her, that Joan Bennett had pled guilty to accessory after the fact of one murder, and that Elaine Parker, "the former wife of defendant Robert Tinker Parker", had pled guilty to second degree murder and "may testify in this case". (T. 436-446, 659-663, 763-766, 848-849). The prosecutors called Long and Bennett as witnesses, but did not call Elaine Parker. After the state rested, the defense moved for a mistrial on that basis. (T. 1667-1668, 1671). The prosecution responded that Ms. Parker might very well be a rebuttal witness (T. 1669-1671). The motion for mistrial was denied. (T. 1673-1674). After the defense rested, the prosecutors did not call Elaine Parker as a rebuttal witness and the defense renewed its motion for mistrial. (T. 2052). The prosecutors justified not calling Ms. Parker because the defendant "testified to what his wife would have testified to either in whole or in part". (T. 2053-2054). In cross-examination and summation, the prosecutors repeatedly called the defendant a liar, even though Elaine Parker corroborated his testimony. (T. 1959, 2269).

The general rule in that it is improper for the state to disclose to the jury that another defendant has been convicted. Jacobs v. State, 396 So. 2d 1113, 1117 (Fla. 1981). In Moore v. State, 186 So. 2d 56 (Fla. 3rd D.C.A. 1966), the court informed the jury that a co-defendant had pleaded guilty during a recess in the trial. In Thomas v. State, 202 So. 2d 883 (Fla. 3rd D.C.A. 1967),

the prosecutor informed a juror once during voir dire, and once in opening statement, that an accomplice had been convicted. Reversal was required in both cases. Here, the error was much more egregious, because the prosecutors were permitted to explain in detail the nature of the plea bargain, to express the fact that Elaine Parker was the former wife of the defendant, and that she was a potential state witness testifying against the defendant. The court's instruction (R. 324) was hardly sufficient to erase the prejudice of telling the jury that the defendant's former wife, with whom he was living at the time of the offense, had made a deal with the state to testify against the defendant. The remedy is a new trial.

ARGUMENT VIII

THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN A JUDGEMENT OF GUILTY OF FIRST DEGREE MURDER AS TO COUNT I OF THE INDICTMENT.

The general rule is that, where the only proof of guilt is circumstantial, no matter how strongly the evidence may suggest guilt, a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence. McArthur v. State, 351 So. 2d 972 (Fla. 1977); Davis v. State, 90 So. 2d 629 (Fla. 1956); Head v. State, 62 So. 2d 41 (Fla. 1952). A corollary to this rule is that the defense version of a homicide must be believed if the circumstances do not prove that version to be false. Mayo v. State, 71 So. 2d 899 (Fla. 1954); McArthur, supra, at 976, footnote 12. Here, there was no contention that the defendant himself killed or stabbed the deceased, Richard Padgett. (T. 914).

As to Count I, the undisputed evidence showed:

(1) that Padgett owed money to Groover, not Parker (T. 1141, 1832-1833).

(2) that Padgett and Parker were friends (T. 1138)

(3) that there was bad blood between Groover and Padgett (T. 1138, 1636).

(4) that Groover went looking for Padgett with a shotgun (T. 1183, 1686-1687)

(5) that Padgett came over to the defendant's trailer voluntarily (T. 1390)

(6) that the defendant told Padgett, at his trailer, that "everything was all right". (T. 1392)

(7) that Padgett was not upset while at the trailer (T. 1393, 1834)

(8) that Padgett was not upset or concerned when Long drove he and Nancy Sheppard back to the Sugar Shack, because he "had it taken care of". (T. 1249, 1394)

(9) that Padgett was not forced to go with the defendant, Groover, and Elaine Parker from the Sugar Shack (T. 1395)

(10) that the defendant brought Padgett into Carl Barton's house after Groover beat him up, to clean his injuries (T. 1468-1469)

(11) that the defendant did not threaten Padgett in Barton's trailer (T. 1472)

(12) that the defendant did not give the gun to Groover in Barton's trailer (T. 1471-1472)

(13) that the defendant was already outside when Groover threatened to kill Padgett (T. 1473)

(14) that the defendant melted down the murder weapon (T. 1482-1484)

(15) that Groover's knife was used to stab Padgett (T. 1495)

(16) that Groover admitted cutting Padgett's throat (T. 1494)

(17) that the defendant told Groover that he did not know Padgett was going to be killed, and that he thought Padgett was going to be left in the woods to walk home (T. 1494)

The evidence therefore corroborates the defendant's testimony that Padgett voluntarily accompanied he, Elaine, and Groover, at least until they left Carl Barton's trailer. There was no evidence that the defendant knew Groover had

the firearm or threatened Padgett with it. The only evidence as to what happened after leaving Carl Barton's trailer was the defendant's testimony, which could not be rebutted by Elaine Parker. (T. 2053-2054, 2056-2058).

The defendant's testimony indicates that he and Elaine agreed to take Padgett into the woods to leave him there. (T. 1844). Since there was no intent by the Parkers to "terrorize" or inflict bodily harm on Padgett, this conduct, at most, constitutes false imprisonment. Since the killing of Padgett occurred during the commission of this felony, the defendant would only be guilty of third degree murder (assuming his defense of independent act, a question for the jury, failed).

Here, the state's entire case was based on argument that the defendant's version was not true. There was no other version of Padgett's murder in evidence other than the defendant's. There was no evidence to disprove any material fact testified to by the defendant, and most independent evidence corroborated the defendant's testimony. Under such circumstances, the defendant's version of the homicide must be accepted. Wright v. State, 348 So. 2d 26 (Fla. 1st D.C.A. 1977), Mayo, supra; Holton v. State, 87 Fla. 65, 99 So. 244 (1924); Kelly v. State, 99 Fla. 387, 126 So. 366 (1930). Where the defendant is charged as an aider and abettor, circumstantial evidence relied upon to show his intent to participate must preclude every reasonable inference that he did not intend to participate. K.W.U. v. State, 367 So. 2d 647 (Fla. 3rd D.C.A. 1979). Mere presence at the scene of the crime and efforts to avoid detection afterwards is not sufficient to justify a conviction. D.M. v. State, 394 So. 2d 520 (Fla. 3rd D.C.A. 1981); J. J. v. State, 408 So. 2d 641 (Fla. 3rd D.C.A. 1981).

The state's case against the defendant in Count I was based on conjecture, insult and innuendo. The remedy is to reduce the judgment to a conviction of third degree murder.

ARGUMENT IX

THE TRIAL COURT ERRED IN ALLOWING INTO EVIDENCE, OVER OBJECTION, THE TESTIMONY OF A WITNESS WHERE THE STATE BREACHED ITS DUTY TO DISCLOSE HIS NAME AND ADDRESS AS REQUIRED BY FLA. R. CRIM. P. 3.220 (a)(1)(i), AND THE COURT FAILED TO CONDUCT AN INQUIRY INTO THE CIRCUMSTANCES SURROUNDING THE DISCOVERY BREACH.

In an attempt to rebut the testimony of defense witness Richard Ellwood, the prosecution called Pete Mittleman, a detective with the Jacksonville Sheriff's Office. (T. 2041-2044). The defense was not furnished with Detective Mittleman's name until the day he was called as a rebuttal witness. (T. 2013). Defense counsel objected because the witness "was not listed on discovery until today". (T. 2014, 2037). The lower court ignored this objection, considered the admissibility of the testimony on other grounds, and allowed the witness to testify over objection. (T. 2037-2040).

Where the prosecution attempts to call a witness not listed on discovery, the trial court must hold a hearing to make an adequate inquiry into whether the state's violation of the rule was inadvertent or willful, whether the violation was trivial or substantial, and what effect, if any, it had upon the ability of the defendant to properly prepare for trial. Richardson v. State, 246 So. 2d 771, (Fla. 1971); Wilcox v. State, 367 So. 2d 1020 (Fla. 1979). When the defense interposes an objection, it is error to permit an unlisted witness to testify without holding a Richardson hearing. Boynton v. State, 378 So. 2d 1309 (Fla. 1st D.C.A. 1980); Lightsey v. State, 350 So. 2d 824 (Fla. 2nd D.C.A. 1977); Garrett v. State, 335 So. 2d 876 (Fla. 4th D.C.A. 1976). Once a discovery violation is brought to the trial court's attention by objection, it is the court's duty to make a full inquiry into all the circumstances surrounding the breach to determine whether the defendant has been prejudiced by the state's noncompliance with discovery rules. Cumbie v. State, 345 So. 2d 1061 (Fla. 1977), Cooper v. State, 377 So. 2d 1153 (Fla. 1980). Rebuttal witnesses are not exempt

from the operation of discovery rules, and a Richardson hearing is required to determine whether unlisted rebuttal witnesses may testify. Kilpatrick v. State, 376 So. 2d 386 (Fla. 1979); Fasenmyer v. State, 383 So. 2d 706 (Fla. 1st. D.C.A. 1980); Witmer v. State, 394 So. 2d 1096 (Fla. 1st D.C.A. 1981).

Here, the prosecutor himself brought the discovery violation to the court's attention in order to "save time because Mr. Link is going to object to him being called". (T. 2013). After the prosecutor stated the circumstances of the violation, defense counsel objected to the witness's testimony on two grounds, one of which was the discovery violation. (T. 2-13-2014). It was then incumbent upon the trial court to conduct a Richardson hearing at which it was the state's burden to affirmatively show that the defense was not prejudiced. McClellan v. State, 359 So. 2d 869 (Fla. 1st D.C.A. 1978); Lavigne v. State, 349 So. 2d 178 (Fla. 1st D.C.A. 1977).

It is never harmless error where a Richardson hearing is required but not had, Cumbie, supra, unless circumstances establishing non-prejudice to the defendant affirmatively appear in the record. Poe v. State, 431 So. 2d 266 (Fla. 5th D.C.A. 1983). Defense counsel here could have attempted to locate witnesses who were friends or relatives of Ellwood's to testify that Ellwood had a good reputation for truth and veracity, had the prosecutor complied with the discovery rule. With adequate notice, defense counsel could have taken the detective's deposition, or at least interviewed him, in order to properly prepare a cross-examination, to investigate the basis of the detective's opinion, or to investigate the detective's own reputation. Because of the violation of Fla. R. Crim. P. 3.220 by the prosecution, defense counsel had no opportunity to counter the effect of the detective's testimony. The prosecution took full advantage of the situation in closing argument, referring to Ellwood as a "pathological liar". (T. 2270). The prejudice to the defense is evident; the remedy is reversal. Richardson, supra; Cumbie, supra.

ARGUMENT X

THE TRIAL COURT ERRED IN ALLOWING A POLICE DETECTIVE TO TESTIFY AS TO THE REPUTATION OF DEFENSE WITNESS RICHARD ELLWOOD FOR TRUTH AND VERACITY, IN VIOLATION OF § 90.609, FLA. STAT. (1981), ARTICLE I, § 9 OF THE FLORIDA CONSTITUTION AND THE FIFTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION.

To rebut the testimony of defense witness Richard Ellwood, the prosecution called as a witness P. R. Mittleman, a detective with the Jacksonville Sheriff's Office. (T. 2041-2044). The officer testified that he was a burglary detective who had known Richard Ellwood since November of 1981, that he was able to learn Ellwood's reputation for truth and veracity, and that it was "extremely bad". (T. 2042). In order to lay a predicate for the detective's testimony, a proffer was had out of the jury's presence.(T. 2027-2036). Mittleman testified that he met Ellwood because he had arrested him for burglary. (T. 2028). Mittleman stated that he had been involved in investigating Ellwood's criminal activities from November 1981, through the date of the trial, and that based on his investigation he had learned that Ellwood had a bad reputation for truth and veracity. (T. 2032). Mittleman admitted that he was neither Ellwood's friend or neighbor, nor was he an associate of any of Ellwood's friends or neighbors. (T. 2032-2033). Mittleman stated that he had spoken to friends and neighbors of the defendant, and that some of them resided in the Jacksonville community. (T. 2033-2034, 2036).

Reputation as to a witness' truthfulness is admissible as impeachment, § 90.609, Fla. Stat. (1981). The general rule is that testimony as to reputation for truth and veracity must be bottomed upon the reputation in the person's community of residence and neighborhood. Stanley v. State, 93 Fla. 372, 112 So. 73 (1927); Florida East Coast Railway Co. v. Hunt, 322 So. 2d 68 (Fla. 3d D.C.A. 1975). Witnesses are not generally competent to testify as to a person's reputation unless they are neighbors or people in the community in which he

resides. Stanley, supra; Florida East Coast Railway Co., supra. An exception to this rule was recognized in Hamilton v. State, 129 Fla. 219, 176 So. 89 (1937). In Hamilton, there was a showing of an unavailability of reputation witnesses from the community or neighborhood where the person lived, and a further showing that the person was well known among the people with whom she worked. Based on such evidence, it was held that co-workers should have been permitted to testify as reputation witnesses.

The Hamilton exception requires proof that residents of the person's community are not available before others will be permitted to testify as to the person's reputation. In Hawthorne v. State, 377 So. 2d 780 (Fla. 1st D.C.A.1979), it was held to be error for the trial court to admit the testimony of four witnesses as to the reputation of the victim based on having seen him where he worked, or at a service station and at a barber shop where he traded, because the state did not prove that testimony from the community where the victim resided was unavailable. As in Hawthorne, the state made no showing that witnesses from Ellwood's neighborhood or community were unavailable; to the contrary, the evidence showed that friends and neighbors did exist and still lived in the Jacksonville community. (T. 2033-2034). The detective knew persons in Jacksonville who knew Ellwood when he was living in Jacksonville. (T. 2036). There was no evidence that any attempt had been made to locate those persons, or that they were unavailable.

The prosecution tried to justify the use of Detective Mittleman because "he learned it through hard work and investigating the individual". (T. 2037). In effect, the prosecution was seeking to use Mittleman as their "expert" on Richard Ellwood. Such "expert opinion", whether offered as such or not, invades the province of the jury and is clearly inadmissible. Lamazares v. Valdez, 353 So. 2d 1257 (Fla. 3rd D.C.A. 1978); General Telephone Co. v. Wallace, 417 So. 2d 1022 (Fla. 2nd D.C.A. 1982). It is inappropriate for one who is a

detective or stranger sent out to learn the character of a witness to be permitted to testify as to the result of his or her inquiries. Stripling v. State, 349 So. 2d 187, 192 (Fla. 3rd D.C.A. 1977). The fact that Mittleman may not have been "sent out" to learn Ellwood's reputation while investigating him is irrelevant; Mittleman was not a neighbor or resident of any community in which Ellwood resided, and he was certainly "sent out" to learn about him.

In Baxter v. State, 294 So. 2d 392 (Fla. 4 D.C.A. 1974), and Bowles v. State, 381 So. 2d 326 (Fla. 5 D.C.A. 1980), trial courts permitted police officers to testify as to the defendant's bad reputation for truth and veracity. Trial counsel made no objection in either case to the competency of the officers to testify. These cases are no support for the state's position. The conviction in Bowles was reversed because the officers were permitted, over objection, to state that they would not believe the defendant under oath. It was held that permitting such testimony was not harmless error because:

> Police officers, by virtue of their position, rightfully bring with their testimony an air of authority and legitimacy. A jury is inclined to give great weight to their opinions as officers of the law ... Id. at 328.

It would be an extremely poor precedent in the law to permit police officers who do not reside in a person's community of residence and neighborhood to testify as to that person's reputation for truth and veracity. This is particularly true in a criminal case where the witness is the defendant or, as here, a jail inmate. Where there are close ties between the reputation witnesses and the matter in controversy, such "testimony" becomes, not "general reputation", but reputation as viewed under the predominant cloud of the specific controversy at hand. Florida East Coast Railway Co., supra, at 69-70. In a criminal case, it would be a rare occasion indeed that a policeman would feel comfortable testifying that a defendant or a defense witness had a good reputation for truth and veracity, because it would be as much as telling the jury that the police were wrong and the defendant innocent.

Permitting the reputation testimony of Detective Mittleman was error. The evidence was damaging because Ellwood's testimony was that Billy Long had told him that the defendant was not involved in the murder of Nancy Sheppard, and that Long was intentionally lying in order to put the defendant in the electric chair. The remedy is a new trial.

ARGUMENT XI

THE TRIAL COURT ERRED IN PERMITTING THE PROSECUTION TO QUESTION DEFENSE WITNESS RICHARD ELLWOOD ABOUT SPECIFIC PRIOR CONVICTIONS AND GETTING THE WITNESS TO CLAIM HIS FIFTH AMENDMENT PRIVILEGE, IN VIOLATION OF THE DEFENDANT'S RIGHT TO DUE PROCESS AND A FAIR TRIAL, AS GUARANTEED BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION.

During the prosecutor's cross-examination of defense witness Richard Ellwood, the prosecutor inquired into the nature of the witness's prior convictions and into the nature of pending charges, (T. 1780-1781), eventually getting Ellwood to claim his Fifth Amendment privilege against self-incrimination in response to the interrogation. (T. 1780-1781).

The rule in Florida has long been established that any witness who testifies in court in his own behalf may be asked if he has ever been convicted of a crime and, if so, how many times, §§ 90.610(2), Fla. Stat. (1981); Fulton v. State, 335 So. 2d 280 (Fla. 1976). It does not "open the door" to inquiry into the specific nature of the convictions for the direct examiner to first ask these questions. Leonard v. State, 386 So. 2d 51 (Fla. 2d D.C.A. 1980). No additional questioning is permitted. McArthur v. Cook, 99 So. 2d 565 (Fla. 1957), Leonard, supra.

The interrogation of a critical defense witness by the prosecution to the extent that the witness asserted his privilege against self-incrimination was clearly improper and was certainly damaging to the witness' credibility. Because his testimony was that Billy Long had told him that Robert Parker did not participate in Nancy Sheppard's murder, his credibility was most important to the

defense. The prejudice is evident. The remedy is a new trial.

ARGUMENT XII

THE TRIAL COURT ERRED IN PERMITTING THE PROSECUTOR TO ELICIT FROM DEFENSE WITNESS RICHARD ELLWOOD THAT THE DEFENDANT REMAINED SILENT AND DID NOT DISCUSS HIS CASE WHILE IN JAIL AWAITING TRIAL, IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION.

During the cross-examination of defense witness Richard Ellwood, the prosecutor asked the witness what the defendant had told him, and elicited from him the fact that the defendant did not assert his innocence while awaiting trial in the jail and that the defendant did not discuss his case at all. (T. 1787-1788). The prosecutor called attention to the fact that the defendant had said nothing, and that he had not asserted his innocence in talking to a fellow inmate of the jail while awaiting trial and inferred that an innocent man would not have said nothing. (T. 1787-1788).

In Willinsky v. State, 360 So. 2d 760 (Fla. 1978), this court discussed the right of an accused to be free from fear of attack by the use of post-arrest silence:

> Impeachment by disclosure of the legitimate exercise of the right to silence is a denial of due process. It should not be material at what stage the accused was silent so long as the right to silence is protected at that stage. The language in Doyle v. Ohio, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976) and United States v. Hale, 422 U.S. 171, 95 S. Ct. 2133, 45 L. Ed. 2d 99 (1975), although set in the context of silence at arrest, reflects a general policy. The essence of these holdings is that impeachment by disclosure of the exercise of the right to silence is a denial of due process. The general terms used by the Supreme Court of the United States are not limited to arrest, but apply at any stage where the right to silence is protected. Ibid., at 762.

The defendant's right to remain silent had clearly attached where he was an inmate of the jail awaiting trial. His refusal to discuss his case with other inmates, or even his silence in the face of accusation by an inmate, has

little probative value when it is considered that the defendant was charged with a serious crime, represented by counsel, and undoubtedly had been told by counsel not to talk to anyone about his case. To use the silence of the accused under such circumstances is highly prejudicial; such prejudice certainly outweighs any probative value. See U.S. v. Hale, 422 U.S. 171, (1975); Doyle v. Ohio, 426 U.S. 610, (1976).

A prosecutor may not use the fact that an accused's attorney is the only person to whom he has spoken about his defense since his arrest, as evidence of guilt. Flynn v. State, 351 So. 2d 377 (Fla. 4th D.C.A. 1977): Torrence v. State, 430 So. 2d 489 (Fla. 1st D.C.A. 1983). It is likewise improper to infer guilt from an accused's silence based on his attorney's advice, Weiss v. State, 341 So. 2d 528 (Fla. 3rd D.C.A. 1977), or his silence when a third party makes a contradictory statement in his present. Brooks v. State, 347 So. 2d 444 (Fla. 3rd D.C.A. 1977).

The prosecutor here intentionally used the defendant's post-arrest silence to infer guilt. This misuse of the defendant's right to remain silent requires reversal.

ARGUMENT XIII

THE TRIAL COURT ERRED IN PERMITTING THE PROSECUTOR TO CROSS-EXAMINE THE DEFENDANT, OVER OBJECTION, ABOUT THE NUMBER OF TIMES HE HAD CONSULTED WITH DEFENSE COUNSEL, AND ABOUT THE FACT THAT HE HAD CONSULTED WITH DEFENSE COUNSEL DURING A RECESS IN CROSS-EXAMINATION, IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION.

While the defendant was on the witness stand, the court took a recess during cross-examination. (T. 1953-1957). After the recess, the prosecutor questioned the defendant about the fact that he had consulted with defense counsel during the recess. (T. 1963). The defense objection and motion for mistrial was over-ruled, and the court permitted further cross-examination about how many times the defendant had consulted with counsel. (T. 1963-1966).

The questioning inferred that the defendant's testimony was the product of improper influences by defense counsel (T. 1963, 1966, 1977).

The right of a defendant in a criminal prosecution to have the effective assistance of counsel is absolute and is required at every essential step of the proceedings. Gideon v. Wainwright, 372 U.S. 335, (1963); Powell v. Alabama, 287 U.S. 45, (1932). This right to counsel includes the right of the defendant to consult with counsel during a recess in his cross-examination, no matter how brief the recess. Bova v. State, 410 So. 2d 1343 (Fla. 1982); Stripling v. State, 349 So. 2d 187 (Fla. 3rd D.C.A. 1977); Geders v. U.S., 425 U.S. 80, (1976).

In the instant case, the prosecutor brought out the fact that counsel had consulted with the defendant during the recess in an effort to infer impropriety on the part of defense counsel to impeach the defendant. The prosecution justified the questioning because, "He's just like any other witness when he's on the witness stand". (T. 1965). This notion that a defendant in a criminal case is a witness like any other person when he takes the stand is patently erroneous. Stripling, supra; Geders, supra; Bova, supra.

It is well settled that a defendant may not be cross-examined about his assertion of his Fifth Amendment right to remain silent at any stage when that right is protected. Simpson v. State, 418 So. 2d 984 (Fla. 1982); Willinsky v. State, 360 So. 2d 760 (Fla. 1978); Bennett v. State, 316 So. 2d 41 (Fla. 1975). Likewise, when an accused requests the advise of counsel after being given Miranda warnings, the fact that he asserted his right to counsel may not be used against him in cross-examination or rebuttal. Acee v. State, 330 So. 2d 496 (Fla. 4th D.C.A. 1976); Garcia v. State, 351 So. 2d 1098 (Fla. 3rd D.C.A. 1977); Burwick v. State, 408 So. 2d 722 (Fla. 1st D.C.A. 1982).

The fact that a defendant refused to testify at an administrative hearing based on his attorney's advice is also not a proper subject for cross-examination, Weiss v. State, 341 So. 2d 528(Fla. 3rd D.C.A. 1977).

The prosecutor here sought to impeach the defendant by interrogating him about the fact that he had exercised his Sixth Amendment right to counsel during the recess, and had consulted with his attorney on numerous other occasions. The prosecutor then used the fact that the defendant had exercised a constitutional right to infer that he was fabricating his testimony. Because the defendant had an absolute right to consult with counsel, and counsel had a duty to consult with the defendant, the cross-examination lacked any real probative value. Because it both penalized the defendant for the exercise of a fundamental right and inferred impropriety by defense counsel ("Coaching"), the cross-examination was highly prejudicial. See Dyson v. U.S., 450 A. 2d 432 (D.C. 1982); U.S. v. Hale, 422 U.S. 171, (1975). The remedy is reversal.

ARGUMENT XIV

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS STATEMENTS, ADMISSIONS, AND CONFESSIONS AND IN PERMITTING THE STATE TO USE THOSE STATEMENTS IN ITS CASE IN CHIEF, IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE I, SECTION 9 AND 16 OF THE CONSTITUTION OF THE STATE OF FLORIDA.

On June 25, 1982, the lower court heard evidence on the defendant's Motion to Suppress Statements, Admissions and/or Confessions. (R. 64, 82: T. 194-217). The only witness in the hearing was Detective John Bradley of the Jacksonville Sheriff's Office, who testified that the defendant was arrested pursuant to an arrest warrant in his parents' junkyard on February 11, 1982. (T. 199-200). The warrant was for an aggravated assault on Lewis Bradley.(T. 200-201, 203). There was no probable cause to arrest the defendant for any homicide. (T. 206-207).

Bradley testified that the defendant was initially detained by other

officers who had their guns drawn. (T. 207-208). Bradley approached the defendant with his gun drawn, told him to put his hands up, and handcuffed him. (T. 208). After he was handcuffed, a uniformed officer searched him. (T. 208-209). Before the defendant was placed in the back seat of a patrol car, he was told that he was under arrest. (T. 200, 209). The defendant was placed in the back of a patrol car and sat there while Bradley talked to Spencer Hance, who was also at the junkyard. (T. 200). After talking with Hance, Bradley went back to the patrol car, sat in the front seat, and began talking to the defendant. (T. 200-201). It is undisputed that neither Detective Bradley nor anyone else had advised the defendant of his constitutional rights as required by Miranda v. Arizona, 384 U.S. 436, (1966). (T. 201-202, 210). The detective summarized the facts of the aggravated assault incident as he knew them. (T. 209-210). In response to this summary, the defendant made the statements that were introduced against him in trial. (T. 201, 203-204-1650).

In Miranda, supra, the Supreme Court of the United States established the procedural safeguards to be employed prior to the admission into evidence of any statements of an accused made while in police custody:

> (W)e hold that when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized. Procedural safeguards must be employed to protect the privilege and unless other fully effective means are adopted to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored, the following measures are required. He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Ibid, at 478-479.

The prosecution in the lower court contended that there was no questioning of the defendant, so the statements were admissible even though no Miranda warnings were given. (T. 216-217). Such an argument ignores the fact that Miranda is not limited to express questioning by police of a suspect in custody.

The United States Supreme Court has stated the test to be applied under such circumstances:

> It is clear therefore that the special procedural safeguards outlined in Miranda are required not where a suspect is simply taken into custody, but rather where a suspect in custody is subjected to interrogation. "Interrogation", as conceptualized in Miranda opinion, must reflect a measure of compulsion above and beyond that inherent in custody itself.
>
> We conclude that the Miranda safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term "interrogation" under Miranda refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. Rhode Island v. Innis, 100 S. Ct. 1682, 1689-90 (1980).

The term "incriminating response" means any response, inculpatory or exculpatory, that the prosecution may seek to introduce at trial. Innis, supra, at 1689, footnote 5.

Here, Detective Bradley did not advise the defendant of his rights when the defendant was arrested, handcuffed, searched,and placed in a patrol car. He instead walked away and interviewed a witness, then returned and began speaking to the defendant. He did much more than simply advise the defendant he was under arrest for aggravated assault. He gave the defendant a summary of the facts as he believed them to be. This is previsely the sort of statement that is "reasonably likely" to elicit an incriminating response. The reaction of someone confronted by a description of the crime he has been arrested for, will normally be to deny, explain, or admit one or more of the facts described. Only after being advised of his rights could the defendant be expected to make an intelligent decision as to whether to respond to the allegations made by the detective. Without being told that any response will be used against him, the average citizen would feel compelled to give some response.

A similar interrogation tactic was utilized by a police officer in Jones v. State, 346 So. 2d 639 (Fla. 2nd D.C.A. 1977). In Jones, the defendant, after being advised of his rights, asked to talk to his attorney. The officer

then "told him what I had through investigation learned," and the defendant corrected the officer. Jones, supra, at 639-640. The explanatory statements made by the defendant were suppressed because it was obvious that the police officer was subtly trying to obtain incriminating statements.

The state cannot justify the use of the same tactic condemned in Jones simply because it occurred prior to giving Miranda warnings rather than afterwards. The tactic is more likely to elicit a response when used as Detective Bradley did here, without benefit of Miranda at all. To permit the use of such tactics to obtain statements from arrested suspects would "place a premium on the ingenuity of the police to devise methods of indirect interrogation, rather than to implement the plain mandate of Miranda". Innis, supra, at 1689, footnote 3, quoting from Commonwealth v. Hamilton, 445 Pa. 292, 297, 285 A. 2d 172, 175. This practice cannot be condoned. The defendant's statements to Bradley should be been suppressed. Reversal is mandated.

ARGUMENT XV

THE TRIAL COURT ERRED IN PERMITTING THE STATE TO USE THE DEFENDANT'S STATEMENTS MADE AT HIS ARREST FOR AN UNRELATED OFFENSE AS EVIDENCE OF GUILT, AND IN SO INSTRUCTING THE JURY, IN VIOLATION OF THE DEFENDANT'S DUE PROCESS RIGHT TO A FAIR TRIAL AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I, SECTION 9 OF THE FLORIDA CONSTITUTION.

The state introduced, through the testimony of Detective Bradley, allegedly false exculpatory statements that were made when the defendant was arrested by Bradley for an aggravated assault against Lewis Bradley. (T. 197-198, 200-201, 1650). The statements were made in response to Bradley explaining to the defendant the circumstances of the aggravated assault incident as he knew it. (T. 209-210). The trial court granted, over objection, the State's Requested Jury Instruction No. 7 (R. 323, T. 2098-2102, 2122-2123). The prosecutor argued the statements as evidence of guilt. (T. 6165-2166, 2177).

The general rule is that statements of a defendant that relate to collateral crimes are inadmissible unless relevant to prove any facts in issue before the jury. Green v. State, 190 So. 2d 42 (Fla. 2nd D.C.A. 1966); Curry v. State, 355 So. 2d 462 (Fla. 2nd D.C.A. 1978). A statement is not relevant simply because the defendant was heard to utter it, even though it may have to do with the offense for which the defendant is on trial. Jenkins v. State, 177 So. 2d 756 (Fla. 3rd D.C.A. 1965); Owens v. State, 273 So. 2d 788 (Fla. 4th D.C.A. 1973); McBride v. State, 338 So. 2d 567 (Fla. 1st D.C.A. 1976).

Here, the defendant's statements about having nothing to do with guns came in response to the detective's telling him the allegations of an aggravated assault at Lewis Bradley's house. The statements can in no way be considered a false exculpatory statement about the three homicides that occurred before the incident at the Bradleys' home. The homicides were not mentioned to the defendant, nor was he under arrest for any homicide, nor was he questioned about his activities during the times when the homicides occurred. The marginal probative value of the statements was far outweighed by the prejudicial effect upon the jury when compounded by the court's instruction. See Green, supra. The remedy is a new trial.

ARGUMENT XVI

THE TRIAL COURT ERRED IN PROHIBITING DEFENSE COUNSEL FROM ASKING STATE WITNESS DENISE LONG ABOUT HER STATUS ON PROBATION, IN VIOLATION OF THE DEFENDANT'S RIGHT TO CONFRONTATION AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE I, SECTION 16 OF THE FLORIDA CONSTITUTION.

During the testimony of state witness Denise Long, counsel attempted to cross-examine her about the fact that she was on probation. (T. 1626). The state's objection was sustained. (T. 1626-1627).

The general rule is that counsel is to be allowed great latitude in cross-examination into the areas of bias, interest, prejudice or corruption. Harmon v. State, 394 So. 2d 121 (Fla. 1st D.C.A. 1980). Matters tending to show

bias or prejudice in a criminal prosecution may be inquired about even though not mentioned on direct examination, Lewis v. State, 335 So. 2d 336 (Fla. 2nd D.C.A. 1976), McDuffie v. State, 341 So. 2d 840 (Fla. 2nd D.C.A. 1977); and one need not lay a foundation before showing bias and interest on the part of the witness, Alford v. State, 41 Fla. 1, 36 So. 436 (1904), Telfair v. State, 56 Fla. 104, 47 So. 863 (1908). The fact that a prosecution witness is on probation is a proper subject for cross-examination to show bias and interest. Daniels v. State, 374 So. 2d 116 (Fla. 2nd D.C.A. 1979); McKnight v. State, 390 So. 2d 485 (Fla. 4th D.C.A. 1980); Davis v. Alaska, 415 U.S. 308 (1974). Denise Long's testimony contradicted that of the defendant and tended to show the defendant as an active participant in the incidents at Lewis Bradley's house following the murders. The defense was prejudiced in not being permitted to demonstrate her bias and interest by her probationary status. The law is clear that such cross-examination was proper. The remedy is reversal.

ARGUMENT XVII

THE TRIAL COURT ERRED IN OVER-RULING DEFENSE OBJECTIONS AND FAILING TO DECLARE A MISTRIAL WHEN THE PROSECUTION INTRODUCED EVIDENCE OF PRIOR CONSISTENT STATEMENTS BY WITNESS BILLY LONG BEFORE THE WITNESS'S CREDIBILITY HAD BEEN ATTACKED, IN VIOLATION OF § 90.801 (2)(b), FLA. STAT. (1981), AND THE DUE PROCESS CLAUSE OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE I, SECTION 9 OF THE FLORIDA CONSTITUTION.

When the prosecution called Billy Long as a witness, Long testified that he was arrested on February 11, 1982, and called the police the next day because he wanted to talk to someone. (T. 1237). He was permitted to testify, over objection, that he gave the police "a full testimony" and that the "best thing to do was to tell the truth on my behalf". (T. 1238). He was also permitted, again on direct examination, to testify that he told the police on February 12, 1982, the same thing as he said at trial. (T. 1274). The defense motion for mistrial was denied, and no curative instruction was given. (T. 1277).

The general rule is that a witness's testimony cannot be corroborated by a prior consistent statement, unless it is offered to rebut an express or implied charge against him of improper influence, motive, or recent fabrication. McRae v. State, 383 So. 2d 289 (Fla. 2d D.C.A. 1980); §§ 90.801 (2)(b), Fla. Stat. (1981). "The rationale for prohibiting the use of prior consistent statements is to prevent 'putting a cloak of credibility' on the witness's testimony". Perez v. State, 371 So. 2d 714, 716-717 (Fla. 2nd D.C.A. 1979), citing Brown v. State, 344 So. 2d 641 (Fla. 2d D.C.A. 1977). The use of prior consistent statements is prohibited when the statements are repeated by others to corroborate the witness's testimony. Roti v. State, 334 So. 2d 146 (Fla. 2d D.C.A. 1976), Lamb v. State, 357 So. 2d 437 (Fla. 2d D.C.A. 1978). It is equally impermissible for the witness himself to introduce evidence of his own prior consistent statements. Van Gallon v. State, 50 So. 2d 882 (Fla. 1951); Kellam v. Thomas, 287 So. 2d 733 (Fla. 4th D.C.A. 1974); Trainer v. State, 346 So. 2d 1081 (Fla. 1st D.C.A. 1977).

The error in the instant case was even more grievous because the testimony by the witness that he told the police the same story on February 12, 1982, was not the truth. The witness was repeatedly impeached from both written and stenographic statements that he had made to the police on February 12, 1982. (T. 1412-1413, 1414-1421). He finally admitted that he had made a false statement to the police on February 12. (T. 1424, 1432). He had apparently lied to his attorney, as well. (T. 95-97).

The prosecution attempted to justify its use of consistent statements because the defense attacked the credibility of the witness in opening statement. (T. 1274-1275). However, an opening statement is not evidence, and it is improper to bolster a witness's credibility before the witness's credibility has been attacked on cross-examination or by other evidence. See Whitted v. State, 362 So. 2d 668 (Fla. 1978). The defense contention was not that Long had recently fabricated his story, but that he had made it up when he called

the police on February 12 and later changed it to fit the facts. (T. 1419-1420, 2205-2209). There was no basis for the admission of evidence of prior consistent statements; there was even less justification for allowing false testimony (i.e., that his statements of February 12 were the same as his trial testimony) to be used to enhance the witness's credibility. Considering that Billy Long was the most important prosecution witness, the prejudice from these erroneous rulings is clear; the remedy is a new trial.

ARGUMENT XVIII

THE TRIAL COURT ERRED IN REQUIRING THE DEFENSE TO TURN OVER TO THE PROSECUTION A DEPOSITION OF STATE WITNESS BILLY LONG, IN INTERRUPTING CROSS-EXAMINATION, AND IN PERMITTING THE PROSECUTOR AN OVERNIGHT RECESS TO PREPARE THE WITNESS FOR ADDITIONAL CROSS-EXAMINATION, IN VIOLATIONS OF FLA. R. CRIM. P. 3.220 (b)(4)(i) and (iii) AND THE DEFENDANT'S RIGHT OF CONFRONTATION AND TO THE EFFECTIVE ASSISTANCE OF COUNSEL, AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE I, SECTION 16 OF THE FLORIDA CONSTITUTION.

During cross-examination of state witness Billy Long, defense counsel attempted to impeach Long from a deposition that Long had given in a civil lawsuit in 1979. (T. 1282-1285). The prosecution objected on the gound that such impeachment was irrelevant and that the deposition had not been provided to the state. (T. 1285-1314). The court ruled that the deposition should be provided to the state and that the state be permitted an overnight recess in order to prepare their witness for questioning from that deposition. (T. 1310-1313). After the recess, the court permitted the state to recall the witness for further direct examination. (T. 1321, 1322). This negated any effective impeachment of the witness from the deposition. (T. 1323-1332).

Prior inconsistent statements need not be written, signed, or under oath to be admissible. Any person in whose presence an oral statement was made may testify about it. Morris v. State, 100 Fla. 850, 130 So. 582 (1930). Fla. R. Crim. P. 3.220 (b)(4)(i) requires the defense to disclose the statement of

any person the defense "expects to call as a trial witness". Here, of course, counsel had no expectation of calling Billy Long as a trial witness, and was under no obligation to notify the state of a prior statement of a state witness. Fla. R. Crim. P. 3.220 (b)(4)(iii), relied upon the trial court, refers to "tangible papers or objects" that the defense intends to use at trial. It is defendant's position that this provision of the rule relates to physical evidence, charts, exhibits, documents, etc., that the accused may seek to introduce into evidence. A deposition that is not going to be introduced into evidence does not come within the ambit of subsection (iii), above, so that disclosure would not be required.

The defense was prejudiced by the court's ruling in that the effectiveness of counsel's cross-examination of Billy Long was destroyed by the recess and subsequent recall of the witness. Long's credibility was of critical importance. The remedy is a new trial.

ARGUMENT XIX

THE TRIAL COURT ERRED IN ITS SUMMARY DENIAL OF DEFENDANT'S MOTION IN LIMINE AND IN DENYING DEFENDANT'S REQUEST FOR FUNDS TO CONDUCT AN EVIDENTIARY HEARING ON THE MATTER, WHICH RULING HAD THE EFFECT OF DENYING THE DEFENDANT HIS RIGHT TO BE TRIED BY A FAIR AND IMPARTIAL JURY CONSISTING OF A REPRESENTATIVE CROSS-SECTION OF THE COMMUNITY, AND HIS RIGHT TO EQUAL PROTECTION OF THE LAW, AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE U. S. CONSTITUTION AND ARTICLE I, SECTIONS 16 AND 22 OF THE FLORIDA CONSTITUTION.

On April 2, 1982, the court heard argument on the defendant's Motion in Limine (R. 57-60) and denied the motion without permitting an evidentiary hearing. (T. 43-51). Counsel intended to present proof that a "death qualified" jury is more prone to convict than a jury selected without regard to their beliefs in capital punishment, and that the exclusion of death-scrupled jurors serves to deprive an accused of his right to a jury comprised of a representative cross-section of the community. During voir dire, five jurors were excused for cause because, although they could be impartial as to guilt, they could

not vote for the death penalty. (T. 593-5, 595-7, 597-8, 735, 736).

This court has previously rejected the "cross-section of the community" argument. Riley v. State, 366 So. 2d 19 (Fla. 1979). The "guilt proneness" of the "death-qualified" jury is an issue that this court has not addressed, however. Nettles v. State, 409 So. 2d 85 (Fla. 1st. D.C.A. 1982). This issue can properly be litigated only after a full-blown evidentiary hearing; the denial of an evidentiary hearing by the trial court was error. Grigsby v. Mabry, 637 F. 2d 525 (8th Cir. 1980). Such a hearing was conducted pursuant to the remand in Grigsby, supra, and the federal district court found:

> "To summarize, death qualification skews the predispositional balance of the jury pool by excluding prospective jurors who unequivocally express opposition to the death penalty. The evidence .... clearly establishes that a juror's attitude toward the death penalty is the most powerful known predictor of his overall predisposition in a capital criminal case. That evidence shows that persons who favor the death penalty are predisposed in favor of the prosecution and are uncommonly predisposed against the defendant. The evidence shows that death penalty attitudes are highly correlated with other criminal justice attitudes. Generally, those who favor the death penalty are more likely to trust prosecutors, distrust defense counsel, to believe the state's witnesses, and to disapprove of certain of the accepted rights of defendants in criminal cases. A jury so selected will not, therefore, be composed of a cross section of the community. Rather, it will be composed of a group of persons who are uncommonly predisposed to favor the prosecution, a jury 'organized to convict". Grigsby v. Mabry, Case No. PB-C-78-32, (E.D.Ark. filed August 5, 1983).

The defendant requests this court to accept the studies and findings in Grigsby, supra, or, at the very least, to remand this cause to the trial court for an evidentiary hearing.

ARGUMENT XX

THE DEFENDANT'S SENTENCE OF DEATH MUST BE VACATED BECAUSE § 921.141, FLA. STAT. (1981), IS UNCONSTITUTIONAL, BOTH ON ITS FACE AND AS APPLIED IN THE STATE OF FLORDA, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, NINTH, AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE I, SECTION 9 , 16, AND 17 OF THE FLORIDA CONSTITUTION.

The arguments and authorities contained in defendant's Motion to Declare F. S. 921.141 Unconstitutional (R. 77-79, T. 5158); Motion To Vacate Death Penalty

(R. 6167, T. 58-77), and Motion To Declare That Death Is Not A Possible Penalty (R. 16-31), T. 35-37), are adopted herein.

ARGUMENT XXI

THE DEFENDANT'S SENTENCE OF DEATH CANNOT BE CARRIED OUT BECAUSE DEATH BY ELECTROCUTION IS CRUEL AND/OR UNUSUAL PUNISHMENT, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION.

The arguments and authorities contained in defendant's Motion To Declare F. S. 922.10 Unconstitutional (R. 68-70, T. 77-78), are adopted herein.

ARGUMENT XXII

THE TRIAL COURT ERRONEOUSLY SENTENCED THE DEFENDANT TO DEATH ON COUNT II, WHERE THE JURY'S JUDGEMENT IN FAVOR OF LIFE WAS WELL-SUPPORTED BOTH IN FACT AND IN LAW.

The Florida capital sentencing process contemplates that, after receipt of the jury's recommended sentence, the trial judge will "weigh evidence of aggravating and mitigating circumstances in order to arrive at a reasoned judgment as to the appropriate sentence to impose". Brown v. Wainwright, 392 So.2d 1327, 1331 (Fla. 1981). A comparison of the evidence introduced at the trail and sentencing proceedings with the trial court's sentencing order (R. 476-509) reveals findings of fact that are unsupported by, if not contrary to, the evidence, erroneous consideration of aggravating circumstances, and a total disregard for mitigating circumstances and for the weight to be given a jury advisory sentence.

At the trial of this cause, the defendant testified in his own behalf and admitted being present when three murders were committed. His version of the homicide of Richard Padgett (Count I), was uncontradicted; the defendant's version of the murder of Nancy Sheppard (Count II) was contradicted by Billy Long, but supported by the testimony of other witnesses. The defendant's version

of the murder of Jody Dalton (Count III) was contradicted by Joan Bennett.

It is clear that the jury predicated the defendant's liability in Count III on a felony-murder theory, since that is the only way third degree murder can occur. (R. 392). It is equally clear that from their verdict, the jury did not believe Bennett's testimony that the defendant and Groover plotted, planned, and intended Dalton's death.

It cannot be said that the jury believed Long as to Count II, or disbelieved the defendant as to Count I, when one considers that the prosecution argued that the defendant was guilty of first degree murder on both counts even if the defendant's version of the homicides was believed. (T. 2147-2149, 2264). Defense counsel expressed this view of their verdicts in his penalty phase summation. (T. 2464-2465).

Aggravating Circumstances: During the advisory sentence proceeding, the prosecution argued the following aggravating circumstances as to Count II:

(1) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person. § 921.141 (5)(b), Fla. Stat. (1981).

The state argued the first degree murder of Padgett, third degree murder of Dalton, and prior aggravated battery conviction as applicable. (T. 2423-2425). This aggravating circumstance was found by the trial court. (R. 497-498).

(2) The defendant knowingly created a great risk of death to many persons. § 921.141 (5)(c) Fla. Stat. (1981).

The state argued that this circumstance applied. (T. 2425-2426). The trial court did not find this circumstance present, apparantly due to imprecise statutory language. (R. 498).

(3) The capital felony was committed while the defendant was engaged in the commission of a robbery. § 921.141 (5)(d), Fla. Stat. (1981).

The state argued the existence of this circumstance because

Sheppard's necklace and ring were taken after she was killed, but admitted that the primary motive was to cover up Padgett's murder. (T. 2428-2429). The trial court found this circumstance (R. 500). However, it is clear that robbery was not the motive. In Hall v. State, 403 So. 2d 1319 (Fla. 1981), the victim was a police officer who was shot to death with his own gun by the defendants. The gun was found later in the defendant's possession. This Court reduced the conviction from first degree murder to second degree murder due to insufficient evidence of premeditation. Apparently, a felony (robbery) murder justification for the first degree conviction was considered too tenuous to even address, even though the gun had to be taken from the officer before he was shot. In Moody v. State, 403 So. 2d 989 (Fla. 1982), the defendant stabbed the victim to death, set fire to his house, and left the scene in the victim's van. This court found the aggravating circumstances of felony (arson) murder to be unsupported by the evidence, because the fire was set after the victim was killed. Id., at 995. Because it is clear that the taking of the ring and necklace was an incidental afterthought of the murder, this aggravating circumstance is not supported by the evidence and should not have been considered by the trial court.

(4) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest. §§ 921.141 (5)(e), Fla. Stat. (1981).

The state argued this circumstance because Sheppard was killed to prevent her from being a witness, (T. 2429-2430), and the trial court agreed. (R. 500-501).

(5) The capital felony was committed for pecuniary gain. §§ 921.141 (5)(f), Fla. Stat. (1981).

The state argued this circumstance was present because the defendant killed Padgett and Sheppard in the furtherance of a "conspiracy to sell drugs". (T. 2430-2431). The trial court accepted this argument and also found the taking of the ring and necklace to be an additional basis for this aggravating circumstance. The use of the taking of the jewelry as a basis for the finding this circumstance constitutes an improper doubling of this circumstance with the felony murder circumstance. Provence v. State, 337 So. 2d 783 (Fla. 1976). Regardless, this circumstance cannot be justified under either theory. There must be proof beyond a reasonable doubt of a pecuniary motivation for the murder in order to sustain a finding of this aggravating circumstance. Simmons v. State, 419 So. 2d 316 (Fla. 1982), Peek v. State, 395 So. 2d 492 (Fla. 1981). The motive was clearly witness elimination, not to take a ring and necklace. Nor can it be said that killing Nancy Sheppard would in any way enhance the defendant's profits from dealing drugs. The drug dealing was for peculiary gain, the murder was not. See Steinhorst v. State, 412 So. 2d 332, 339 (Fla. 1982). This aggravating circumstance was not proven and should not have been considered. The prosecution had previously argued that money was not the motive for Padgett's murder. (T. 2130-2131).

(6) The capital crime was especially heinous, atrocious, or cruel. § 921.141 (5)(h), Fla. Stat. (1981).

The prosecutor argued that the circumstance applied because Sheppard was taken to see Padgett's body before she was shot, and the trial court agreed. (R. 503-504). However, the court acknowledged that Sheppard did not know she was going to be killed during a charge conference. (T. 2010-2011). She was shot from behind when she fell to her knees (T. 1260), and the shooting rendered her unconscious immediately. (T. 1032-1033). The stab wounds that the state contended were later

inflicted by the defendant were shallow, superficial, and non-fatal. (T. 1032, 1049).

An execution-style murder is not normally sufficient to prove this aggravating circumstance beyond a reasonable doubt, Cooper v. State, 336 So. 2d 1133 (Fla. 1976); Menendez v. State, 368 So. 2d 1278 (Fla. 1979). This is particularly true where the victim was not even aware she was going to be killed. Lewis v. State, 398 So. 2d 432 (Fla. 1981); Maggard v. State, 399 So. 2d 973 (Fla. 1981). The fact that the victim was female is likewise not sufficient to qualify an execution-style murder as especially heinous, within the meaning of this aggravating circumstance, Tedder v. State, 322 So. 2d 908 (Fla. 1975), nor is the fact of luring the individual to an isolated area for the purpose of murder. Downs v. State, 386 So. 2d 788 (Fla. 1980). It is submitted that the facts do not support this aggravating circumstance.

(7) The homicide was committed in a cold, calculated and premeditated manner, without any pretense of moral or legal justification. § 921.141 (5)(i), Fla. Stat. (1981). The prosecution argued, and the trial court found, the existence of this aggravating circumstance. (R. 504-505).

Mitigating Circumstances: During the advisory sentencing proceeding, the defense presented the following evidence in mitigation:

(1) The defendant's mother, Hattie Parker, explained the circumstances of the defendant's up-bringing, including that they had a very close family to which the defendant contributed his share of "chores" (T. 2231-2232); that the defendant's father was an alcoholic who beat his mother in the defendant's presence (T. 2322-2323); and that the defendant's father began giving the defendant alcoholic beverages and taking him to bars at an early age (T. 2323-2324). She testified that the defendant began dating Elaine, his ex-wife, when he was 14 years old and Elaine was 16 years old. (T. 2325). The defendant married Elaine when

he was 16, because she was pregnant, (T. 2326-2327). Elaine supported them with money from her job; the defendant was unemployed and took care of his son and daughter. (T. 2327-2330). The defendant developed a drug and alcohol problem and sought professional help, but Elaine was not supportive. (T. 2330). For shooting Billy Long, the defendant served a six-month jail sentence in a work-release center and then successfully completed a term of probation (T. 2331-2332).

The defendant had attempted suicide when Elaine left him. (T. 2332). Elaine was the dominant figure in the marriage. (T. 2333). The defendant was a good father and was very close to his two children, ages 11 and 9. (2338-2339).

(2) Nellie Filbert, the defendant's grandmother, testified that the defendant was not a selfish child, but had always gone out of his way to help her; that his father drank too much and mistreated his mother; that the defendant's behavior changed after he began seeing Elaine Parker and using drugs; and that he was a good father to his children. (T. 2342-2344).

(3) Nellie Ballard, a neighbor of the defendant's, told the jury about how the defendant had taken her husband to the hospital three or four times a month for over a year, as a favor and without re-imbursement (T. 2346-2348), that he was a good father to his children, (T. 2348), that the defendant had always been polite and courteous towards her, (T. 2346), and that she would not hesitate to ask him for help if she needed it. (T. 2348).

(4) Gail Palmer, the defendant's cousin, testified that the defendant was a good father who was very close to his children (T. 2351-2352), and that he had comforted her through a crisis involving her baby. (T. 2352-2354).

(5) Wilma Urgman, the defendant's sister, testified that their father beat their mother when he was drinking (T. 2355-2356); that the defendant met Elaine when he was 14 and Elaine was 16 (T. 2356-2357); that Elaine got the defendant started using drugs (T. 2357-2358); that the defendant and Elaine were married when the defendant was 16 and Elaine was pregnant (T.2358); that the defendant was chiefly a house-husband while his wife worked (T. 2358-2359); that he supported his sister, financially and emotionally, when she was in marital distress (T. 2359-2360); that Elaine was the dominant figure in the household (T. 2361); and that the defendant was a good and loving father to his children (T. 2361).

(6) Eva Mae Sapp, a minister, testified that she had visited the defendant in jail while the defendant was awaiting trial, at his request, and that the defendant had a very sincere interest in religion. (T. 2363-2364).

The defense introduced the written negotiated plea of Elaine Parker, in which the state had dropped two first degree murder charges and reduced the murder of Nancy Sheppard from first degree to second degree, in exchange for a guilty plea and her promise to testify for the state. (T. 2366). The defense introduced the indictment against Tommy Groover (T. 2377), the jury's advisory sentence for Groover (T. 2378), and the sentence imposed by the lower court on Groover. (T. 2378). These documents showed that Groover had been convicted of three counts of first degree murder, that the jury had recommended life for the murders of Padgett and Sheppard but death for the murder of Dalton, and that the trial court had sentenced Groover to death for the murders of Padgett and Dalton and life for the murder of Sheppard.

The defense argued the presence of statutory mitigating circumstance § 921.141 (6)(b), Fla. Stat. (1981), that the defendant was under the influence of extreme mental or emotional disturbance, and § 921.141 (6)(f), that his capacity to appreciate the criminality of his conduct, or to conform his conduct to the requirements of law, was substantially impaired. (T. 2481-2483). The basis for this impairment was the defendant's intoxication on drugs and alcohol, which was supported by the testimony of the defendant (T. 1834, 1837, 1880-1881), Denise Long (T. 1619), Spencer Hance (T. 1497), Hal Johns (T. 1738-1739), Lewis Bradley (T. 1632), Joan Bennett (T. 1540-1541), Billy Long (T. 1401-1402), and Richard Ellwood (T. 1766). The trial court refused to find any mitigating circumstance under either (6)(b) or (6)(f), in part because the defendant presented no psychiatric testimony. (R. 489-490, 494-495). It is clear that drug and alcohol intoxication can support a finding under these statutory mitigating circumstances, Kampff v. State, 371 So. 2d 1007 (Fla. 1979), or a finding as a non-statutory mitigating circumstance, Buckrem v.State, 355 So. 2d 111 (Fla. 1978). Where the jury recommended life, it cannot be assumed that the jury did not find mitigation due to drug and alcohol intoxication. Where the evidence was uncontradicted, it was improper for the lower court to reject intoxication as any type of mitigation.

The defense argued mitigation under § 921.141 (6)(e), that the defendant acted under extreme duress or under the substantial domination of another person. (T. 2483-2484). The defendant's testimony supported a finding under this mitigating circumstance, due to threats by Tommy Groover. (T. 1847-1848, 1851, 1852, 1863, 1865, 1880-1881). Joan Bennett and Morris Johnson verified that the defendant was acting scared. (T. 1697, 1562-1563). Though the lower court rejected this mitigating circumstance, (R. 493), the jury's evaluation of the evidence may have reasonably been different. See Goodwin v. State, 405 So. 2d 170 (Fla. 1981).

The defense also argued for mitigation under § 921.141 (6)(d), that the defendant was an accomplice in the capital felony committed by another person and his participated was relatively minor. (T. 2484-2487). The trial court rejected this circumstance with several patently erroneous findings of fact: the gun used to kill Nancy Sheppard was Elaine Parker's, not the defendant's; the car used in the murder was Elaine Parker's, not the defendant's; the defendant did not drive the car; Elaine and Groover did. There was substantial evidence from Donald Foy (T. 1749); Richard Ellwood (T. 1765-1766, 1788); Billy Walters (T. 1799-1800); Spencer Hance (T. 1494), and the defendant himself (T. 1870-1871), that Long was told by Groover to kill Sheppard, that Long both shot and cut Sheppard while the defendant was by the car, and that Long was lying to protect himself and Groover, his room-mate and best friend. It would, therefore, not have been unreasonable for the jury to find mitigation under this section. See Slater v. State, 316 So. 2d 539 (Fla. 1975); Taylor v. State, 294 So. 2d 648 (Fla. 1974); Hawkins v. State, 436 So. 2d 44 (Fla. 1983).

As additional non-statutory mitigation, the defense argued that, if the state's case was to be believed, the defendant actually saved the lives of several people in Lewis Bradley's house by taking the gun away from Tommy Groover. (T. 2487-2488). Though the jury recommended life, this aspect was ignored by the lower court.

The defense argued the significance of the evidence presented by the defense witnesses in the penalty phase trial. None of this evidence was even addressed by the trial court, but it should have been considered. See McCampbell v. State, 421 So. 2d 1072 (Fla. 1982).

The trial court also ignored the fact that the defendant was the father of two small children for whom he cared, though it was argued to the jury as a mitigating circumstance. (T. 2490-2491). This factor too, could have formed a reasonable basis for the jury's life recommendation. Jacobs v. State, 396

So. 2d 713 (Fla. 1981).

Another factor ignored by the trial court was the sentences of the co-defendants. Even had the jury recommended death, this is an important factor that the lower court should have considered. Gafford v. State, 387 So. 2d 333 (Fla. 1980). The factors of fairness and equal justice with regard to the sentences of the co-defendants were presented to the jury, (T. 2491-2496), and unquestionably form a reasonable basis for the jury life recommendation. The concept of "equal justice under law" would have a hollow ring indeed if only the defendant were to receive the ultimate sentence for the murder of Nancy Sheppard. See Barclay v. State, 343 So. 2d 1266, 1271 (Fla. 1977); Slater, supra; Messer v. State, 330 So. 2d 137 (Fla. 1976).

The lower court found no mitigating circumstance under § 921.141 (6) (g), the age of the defendant at the time of the crime. However, the defense argued to the jury that it should be considered, because at the age of 28, the defendant would be 78 before he was even eligible for parole if he were given life sentences. (T. 2497-2499). It is submitted that this factor was properly considered by the jury in mitigation.

There are clear indications from the sentencing order that the trial court did not exercise a "reasoned judgment" in imposing a death sentence. The statement that Nancy Sheppard was not a drug user (R. 486), is in conflict with scientific evidence she had been using morphine (T. 1049). The statement that Richard Padgett was shot to death while on his knees begging for mercy, (R. 501-502) is totally without any evidentiary foundation whatsoever. The physical evidence and the uncontradicted testimony of the defendant indicated that Padgett was shot from behind, in the back of the head, probably while taking off his shirt. Nowhere in the sentencing order is there any indication that the court considered any non-statutory mitigating factors. The failure of the court to find any mitigating circumstances, even in the Padgett murder (where a life sentence was imposed), is not surprising. Judge Olliff has never found a

mitigating circumstance in a capital case. See Barclay v. Florida, 103 S. Ct. 3418, 3440 (1983), (Marshall, J., dissenting).

The jury recommendation:

This Court first explained the importance of a jury recommendation of life in Tedder v. State, 322 So. 2d 908 (Fla. 1975):

> A jury recommendation under our trifurcated death penalty statute should be given great weight. In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ. Tedder, supra at 910.

In applying the Tedder standard, the Court must determine if there was a reasonable basis for the jury recommendation. If there is a reasonable basis, then the jury recommendation must stand. Malloy v. State, 382 So. 2d 1190 (Fla. 1979). A jury life recommendation eliminates any presumption that death is the appropriate penalty when one or more aggravating circumstances are present. Williams v. State, 386 So. 2d 538 (Fla. 1980).

All of the mitigating circumstances presented by the defendant have been found by this Court to form a reasonable basis for a jury life recommendation:

(1) Intoxication on drugs and alcohol. Kampff, supra; Buckrem, supra, Norris v. State, 429 So. 2d 688 (Fla. 1983).

(2) Duress or coercion. Goodwin, supra.

(3) Relatively minor participation, or dispute as to participation. Taylor, supra; Slater, supra; Malloy, supra; Hawkins, supra.

(4) Parent of 2 young children. Jacobs, supra.

(5) The defendant's family background. McCampbell, supra; Washington v. State, 432 So. 2d 44, (Fla. 1983).

(6) Sentences of co-defendants. Slater, supra; Malloy, supra; Neary v. State, 384 So. 2d 881 (Fla. 1980); Barfield v. State, 402 So. 2d 377 (Fla. 1981); McCaskill v. State, 344 So. 2d 1276 (Fla. 1977).

Because there was ample evidence of non-statutory mitigation upon which the jury could have based its life recommendation, even the existence of numerous aggravating circumstances does not compel a death sentence. See Welty v. State, 402 So. 2d 1159 (Fla. 1981); Gilvin v. State, 418 So. 2d 996 (Fla. 1982). The guilty verdict as to Count II in no way permits the assumption that the jury believed Billy Long. As in Malloy, supra, the jury could very well have believed the defendant's story and still convicted him of first degree murder. The jury verdict form demonstrates that the jury exercised a reasoned judgement: there were sufficient aggravating circumstances to justify death, but the mitigating circumstances outweighed the aggravating circumstances. (R. 435).

Over-ruling the jury life recommendation was error; the remedy is to remand with directions to impose a sentence of life imprisonment.

CONCLUSION

The death sentence in this case was imposed without compelling reason, over a life recommendation that was firmly supported both in fact and in law. The remedy required, however, is not simply vacating the sentence. The defendant was prevented from fully and fairly presenting his defense by jury instructions that effectively directed a verdict on the ultimate issues of fact. The "over kill" tactics of the prosecution sought a verdict of passion and emotion. The integrity of our fact-finding process, and the defendant's right to fundamental fairness, requires no less than a new trial where death is not a possible punishment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Barbara Butler, Office of the Attorney General, Duval County Courthouse, Jacksonville, Florida 32202, by mail delivery, this 25 day of October, 1983.

Robert J. Link

ROBERT J. LINK, ESQUIRE