IN THE SUPREME COURT OF FLORIDA

CASE NO. 64,148

BOBBY MARION FRANCIS, :

Appellant, :

vs. :

THE STATE OF FLORIDA, :

Appellee. :

_____ :

****

AN APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

CRIMINAL DIVISION

****

INITIAL BRIEF OF APPELLANT

GITLITZ, KEEGAN & DITTMAR, P.A.
Suite 807, Biscayne Building
19 West Flagler Street
Miami, Florida 33130
(305) 374-1600

By: STUART H. GITLITZ and
JAMES D. KEEGAN
Special Assistant Public Defenders

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS:

STATUTES AND RULES:

INTRODUCTION

The parties hereto shall be referred to as they were in the Trial Court or by name. The Record on Appeal, consisting of pleadings, papers, excerpts, partial transcripts and the transcript of the hearing on the Motion For New Trial, as prepared by the Clerk of the Circuit Court for the Eleventh Judicial Circuit, is prepared in four (4) volumes and consists of pages 1 through 979. In this Brief, this will be referred to as "R."followed by an arabic numeral indicating a page. The Transcript of Proceedings is contained in a Supplemental Record bound in several volumes and numbered pages 1 through 1308. In this Brief, the Transcript of Proceedings will be referred to as "T." followed by an arabic numeral indicating a page. All emphasis is supplied unless otherwise indicated.

STATEMENT OF THE CASE

On August 27, 1975, the Defendant was indicted for First Degree Murder in the Circuit Court of the Sixteenth Judicial Circuit, in and for Monroe County, Florida. R. 1-4. On or about November 5, 1975, the Defendant filed a Motion For Production Of Favorable Evidence. R. 34-5. The subsequent history of this matter, until the present trial, which is the subject of this appeal, is not generally relevant and will not be included herein except as needed. On or about July 27, 1979, the Clerk of the Circuit Court for the Eleventh Judicial Circuit, in and for Dade County, Florida, was appointed as Deputy Clerk for the Clerk of the Circuit Court for the Sixteenth Judicial Circuit, in and for Monroe County, Florida, in the instant cause. R. 253. On or about June 4, 1982, this Court, through acting Chief Justice Overton, appointed the Honorable Phillip W. Knight, a Judge of the Eleventh Judicial Circuit, in and for Dade County, Florida, to try this cause. R. 485. On July 2, 1982, the Defendant filed a Motion For Change Of Venue on the grounds that he could not receive a fair trial in Monroe County, Florida. R. 487-521. On July 6, 1982, the Trial Court held a hearing on the Defendant's Motion For Change Of Venue and on the same date granted the Motion and ordered a change of venue to Dade County, Florida. R. 522, 523.

Trial by jury began on March 22, 1983. R. 788-90. Before the voir dire examination began, counsel for the Defendant informed the Trial Court that he had just learned that one of the State's key witnesses, Ms. Deborah Wesley Evans, was recently charged with Second Degree Murder by the same State Attorney's Office that was prosecuting the Defendant in the instant cause. T. 6, 7. The Defense further indicated that this was a discovery violation, that the failure of the State to disclose this information

constituted prosecutorial misconduct and that the Defendant needed the opportunity to depose Ms. Evans concerning these charges, as well as an opportunity to conduct an independent investigation. T. 7-10. The Court denied the Motion To Dismiss finding no prosecutorial misconduct and denied the Defendant's request to delay the matter so as to have time to investigate independently. T. 11-12. The Court did indicate that the Defendant could depose this witness concerning these new charges after the voir dire examination was completed. T. 12. The State objected to any questions being posed to Ms. Evans concerning the pending charges. T. 12. The Court indicated that such questions would be inadmissible for evidence at trial, but would be permissible in a pre-trial discovery deposition. T. 12.

The voir dire examination concluded on March 22, 1983, with the swearing of the Trial Jury. T. 264. On March 23, 1983, prior to opening statements, the Court ruled that the Defense could not question Deborah Wesley Evans concerning the fact that she had current pending charges with the State Attorney's Office for the Sixteenth Judicial Circuit. The Court ruled that the fact that a person had pending charges is not admissible unless it could be shown that the person had made a deal or agreement with the State in connection with that person's testimony. T. 275-78. The Court directed that the Defense refrain from eliciting testimony in this area, under pain of contempt. It was later noted by Defense Counsel that for some reason his proffer concerning his attempted or expected cross-examination of Deborah Evans was not put on the record, even though it had been made before the Court's ruling. T. 617. The Court allowed the Defendant to make the proffer at that time, for the record, noting that the proffer had been made before the Court's ruling and that the questions were not asked on

cross-examination because of the Court's directive. T. 618. The Defense proffered that, although it had no information concerning a specific deal between Ms. Evans and the State, it still felt that the area was proper cross-examination because the Jury should know about the fact of the pending charges against Ms. Evans and should have this information in deciding whether or not she was trying to gain favor with the State by her testimony and, consequently, the charges might affect her testimony. T. 617. The Court further allowed the Defense to supplement this proffer with the arrest form for the new charges and indicated that it would take judicial notice that the Defendant first found out about these charges the night before the trial, so as to obviate the need for calling a newspaper reporter to substantiate that fact. R. 797; T. 833-34.[1/] Additionally, the Defense proffered that it wanted to cross-examine Deborah Evans concerning the fact that a First Degree Murder Indictment was possible on these new charges, even though she was only arrested for Second Degree Murder. T. 1044. This would illustrate further bias. Her testimony on behalf of the State in this case might convince them not to seek a First Degree Murder Indictment.

The last witness to testify for the State was Charlene Duncan. During her testimony, Ms. Duncan misrepresented certain aspects of the agreement she had with the State concerning her testimony. T. 1010. Ms. Duncan neglected to reveal that, although her agreement with the State was contingent upon a successful appeal, her appeal was unsuccessful. R. 835, 837. Additionally, Ms. Duncan did not reveal that her Motion For Post

---

[1/] It is interesting to note that when the defense sought to question another State witness, Donald Batey, concerning his pending charges and whether he was attempting to curry favor with the State Attorney's Office in exchange for his testimony, the State had no objection to these questions. T. 651. This position is completely inconsistent with the position the State took concerning the proffered cross-examination of Deborah Evans.

Conviction Relief was sworn to before the same Assistant State Attorney who was prosecuting the Defendant herein, R. 834-40, nor did she or the State indicate that in that Post Conviction Motion they were asking the Court to do that which it did not have the power to do, that is, to vacate a valid prior conviction without any legal basis or justification. R. 835-37.

On March 28, 1983, the State rested. At that time, the Defense moved for a Judgment Of Acquittal or, in the alternative, a reduction to Second Degree Murder, which was denied. R. 800; T. 1048-49. At this point the Defense rested and renewed its Motion For Judgment Of Acquittal, which was denied. R. 800; T. 1048-49. Thereafter, closing arguments were made, the Jury was instructed and retired to deliberate on its verdict. R. 801; T. 1227. When the Court was informed that the Jury had reached a verdict, the Court had a conversation with the Defendant's Attorney, during which it offered the Defendant an opportunity to plead guilty to First Degree Murder and avoid the imposition of the death penalty if he would do so before the Court received the Jury's verdict. App. 6, 14-15, 17. The Court gave Defense Counsel an opportunity to discuss this with the Defendant and inquired whether the Defendant had anything to announce before the Jury's verdict was received. T. 1228-29. After the Defendant refused the Court's offer, the Court received the Jury's verdict of guilty of First Degree Murder and adjudicated the Defendant guilty. R. 801-02; T. 1230.

On March 29, 1983, the penalty phase of the trial began. The State presented no evidence other than to request that the Court take judicial notice of the trial proceedings and of the Defendant's 1976 conviction for sale and delivery of a controlled substance. R. 803-04; T. 1247, 1251. Thereafter, the Defendant presented sentencing witnesses, arguments and instructions were made and the Jury retired to deliberate on its advisory

sentence. R. 804; T. 1290. The Jury returned in less than an hour with an advisory sentence of life imprisonment. R. 804; T. 1290-91.

That afternoon, the Trial Court dictated its findings and sentence into the Record. The Court found there were three (3) aggravating circumstances proven. First, that the homicide was committed to hinder the lawful exercise of the police powers of the State of Florida and the County of Monroe. R. 921-24; T. 1297-98. Second, that the homicide was especially wicked, evil, atrocious and cruel. R. 922; T. 1298-99. Third, that the homicide was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. R. 922; T. 1299-1300. The Court went on to find a statutory mitigating factor of no prior significant criminal history. R. 123; T. 1300. The Court indicated that it had considered the Defendant's good behavior in jail and attempts at preventing injury to guards, although it did not indicate whether it found this to be a non-statutory mitigating factor. R. 923; T. 1301. Finally, the Court indicated that it considered and weighed heavily the Jury's recommendation, however, decided not to follow it and to instead impose a sentence of death. R. 907, 924; T. 1302.

On June 16, 1983, the Court held a hearing on the Defendant's Motion For A New Trial. R. 941-72. Defendant, through counsel, raised the issue of the Court's restriction of his cross-examination of Deborah Evans concerning her pending charges and indicated that the purpose of this intended cross-examination was to show bias on the part of the witness and not to attack the witness' character. R. 959. Additionally, the Defendant, on his own, raised the issue of the State's knowing use of false testimony in connection with the testimony of Charlene Duncan and the fact that she subsequently received more favorable treatment than that which she had

originally bargained for. R. 967, 978. Included therein was the fact that the State Attorney notarized her Motion For Post Conviction Relief and that the treatment Ms. Duncan received was contrary to the law, in that a valid conviction was vacated without showing any error in her first trial. R. 963, 965-66, 972. On June 23, 1983, the Motion For A New Trial was denied. R. 929. Thereafter, on July 20, 1983, a timely Notice Of Appeal was filed. R. 930. This appeal follows.

POINTS INVOLVED ON APPEAL

I. WHETHER THE TRIAL COURT ERRED IN IMPROPERLY PROHIBITING THE DEFENDANT FROM CROSS-EXAMINING DEBORAH WESLEY EVANS CONCERNING HER THEN PENDING CHARGES BEFORE THE SAME STATE ATTORNEY'S OFFICE WHO WAS PROSECUTING THE DEFENDANT, THEREBY DENYING THE DEFENDANT HIS SIXTH AMENDMENT RIGHT TO CONFRONT HIS ACCUSERS?

II. WHETHER THE DEFENDANT WAS DEPRIVED OF DUE PROCESS OF LAW AND A FAIR TRIAL THROUGH THE ACTIONS OF THE STATE IN CONNECTION WITH THE TESTIMONY OF CHARLENE DUNCAN, INCLUDING THE USE OF FALSE, FRAUDULENT OR MISLEADING TESTIMONY; ACTING OUTSIDE OF ITS AUTHORITY; AND FAILING TO INFORM THE DEFENDANT OF EXCULPATORY MATERIAL IN ITS POSSESSION, ALL IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 9 OF THE FLORIDA CONSTITUTION?

III. WHETHER THE TRIAL COURT ERRED IN FINDING AN AGGRAVATING CIRCUMSTANCE OF DISRUPTING OR HINDERING THE EXERCISE OF ANY GOVERNMENTAL FUNCTION OR THE ENFORCEMENT OF LAWS IN THAT THE EVIDENCE DID NOT PROVE THIS AGGRAVATING CIRCUMSTANCE BEYOND AND TO THE EXCLUSION OF EVERY REASONABLE DOUBT?

IV. WHETHER THE TRIAL COURT ERRED IN FINDING AN AGGRAVATING CIRCUMSTANCE OF ESPECIALLY, WICKED, EVIL, ATTROCIOUS AND CRUEL IN THAT THE EVIDENCE DID NOT SUSTAIN THIS AGGRAVATING CIRCUMSTANCE BEYOND AND TO THE EXCLUSION OF A REASONABLE DOUBT?

V. WHETHER THE TRIAL COURT ERRED IN FINDING AN AGGRAVATING CIRCUMTANCE OF COLD, CALCULATED MURDER IN THAT (A) THE EVIDENCE DID NOT SUSTAIN THIS AGGRAVATING CIRCUMSTANCE BEYOND AND TO THE EXCLUSION OF EVERY REASONABLE DOUBT, AND (B) THIS AGGRAVATING CIRCUMSTANCE WAS IMPROPERLY APPLIED RETROACTIVELY IN VIOLATION OF ARTICLE I, SECTION 10 OF THE UNITED STATES CONSTITUTION, AS WELL AS ARTICLE I, SECTION 10 OF THE CONSTITUTION OF THE STATE OF FLORIDA?

VI. WHETHER THE TRIAL COURT ERRED IN OVERRIDING THE JURY RECOMMENDATION OF LIFE AND IMPOSING A SENTENCE OF DEATH IN THAT THERE WAS A REASONABLE BASIS FOR THE JURY'S RECOMMENDATION AND THE FACTORS SUGGESTING THE SENTENCE OF DEATH WERE NOT SO CLEAR AND CONVINCING SUCH THAT NO REASONABLE PERSONS COULD DIFFER AS TO THEIR APPLICABILITY?

VII. WHETHER THE TRIAL COURT UNCONSTITUTIONALLY SENTENCED THE DEFENDANT TO DEATH IN THAT SAID SENTENCE WAS IMPOSED AS A PENALTY FOR THE DEFENDANT'S EXERCISE OF HIS CONSTITUTIONAL RIGHTS AND REJECTION OF THE COURT'S PLEA OFFER OF LIFE IMPRISONMENT?

STATEMENT OF THE FACTS

To prove its case the State called some of the various and sundry residents of the seamy side of Key West, Florida. These included Elmer Wesley a/k/a Peaches, a transvestite heroin addict, who the United States Army had determined was one hundred (100%) percent disabled because of psychological disorders. T. 406, 481-82, 484. Arnold Moore a/k/a Peanut a/k/a Katrina, also a transvestite and cousin of Elmer, who drank every day until he passed out and then started drinking again the next day, and who believed that he was now a woman because Arnold had died in a car crash in 1975. T. 326, 332, 374, 388, 397, 402. Deborah Wesley Evans, the sister of Elmer and the cousin of Arnold and the victim, who was dependent on Elmer for financial support and, at the time she testified, had pending charges of Second Degree Murder before the authorities in Monroe County. T. 6, 7, 530, 573. Charlene Duncan, a resident of Broward Correctional Institution, who was serving a life sentence for the instant homicide and had an agreement with the State to testify in exchange for a subsequent reduction in her sentence. T. 951-55, 1010, 1027.

On August 16, 1975, Opal Lee, Charlene Duncan, Donald Batey and Arnold Moore dressed in women's clothes, were together in Key West, Monroe County, Florida. T. 331-32, 654, 961. They met the victim, Titus Walters, who tried to run the girls over with a car and took some shots at them. Mr. Walters subsequently threatened the girls and beat them to the point that Opal Lee's face was swollen and bruised. T. 335, 656, 658, 963-64, 1000-01. Charlene Duncan felt her life was in danger. T. 1002-06. Ms. Duncan called the Defendant in Miami and told him of the beating by Mr. Walters and requested that he come to Key West to pick them up. T. 966-67. The next morning, Sunday, August 17, 1975, the Defendant and Willie Orr, his

brother, arrived at Elmer Wesley's house in Key West. T. 410-412. After picking up Ms. Lee and Ms. Duncan, they all returned to Mr. Wesley's house. T. 414. A short while later, the victim, Arnold Moore and Deborah Wesley Evans unexpectedly arrived at the house. T. 337, 421, 531. After the three (3) entered the house, the Defendant, Opal Lee, Willie Orr and Charlene Duncan came from behind the curtains which separated the living room from the kitchen. T. 342, 423, 535. The Defendant, using his own weapon, disarmed Titus Walters of his firearm. T. 971. The Defendant, after telling Titus Walters to get on his knees, asked him "man, why you punch my woman in the mouth." T. 343-44. Further, the Defendant stated that he "hates to see a man that beats on a woman." T. 539. At this point, Willie Orr, Charlene Duncan, Deborah Evans, Arnold Moore and Elmer Wesley went into the kitchen which was separated from the living room. T. 344, 424.

The Defendant continued to question the victim concerning the incident the night before, where the victim had beaten up the Defendant's friends. The victim attempted to explain and calm the Defendant's rage over the beating incident and offered to permit Ms. Lee to beat him as retribution. The Defendant's anger, however, continued. T. 344, 424, 974. At this point, the witnesses in the kitchen heard one (1) shot. T. 344-45, 424, 538. The Defendant had fired into the floor. T. 974. The Defendant came into the kitchen and asked for some tape and then sent Mr. Moore and Ms. Duncan to get some. T. 345-46, 426, 974-75. At this point, the Defendant and Opal Lee took the victim to a back room of the house. T. 974-75. When Mr. Moore and Ms. Duncan returned with the tape, they remained in the kitchen with the others where they began to smoke marijuana. T. 346-58, 976-77. The occupants of the kitchen, while peering through the curtains, observed the victim in the toilet with his hands bound with tape and Ms. Lee

wiping sweat off his face. T. 348-49, 351, 429, 547, 982-83. The curtains blocked the view of the victim from the kitchen. T. 539.

Thereafter, the Defendant came into the kitchen and requested needles and Drano, which Elmer Wesley went to obtain. T. 351, 428, 549. Mr. Wesley returned with Johnny Williams, another State witness, who brought with him a bag of heroin. T. 352, 431-33, 625. Mr. Williams stayed for a while in the kitchen and joined the others in the use of drugs. During this time, he did not hear anything unusual and left the house after observing a gun in the Defendant's pocket. T. 628-30. Thereafter, the Defendant came into the kitchen carrying a pillow and commented about having to purchase a new one for Mr. Wesley. He further stated that the victim wouldn't die. T. 353, 430, 554, 985. The Defendant left the kitchen and the witnesses heard two (2) shots. T. 353, 434, 555, 986. The Defendant then came back into the kitchen and everyone except him ran outside the house. While outside, the witnesses heard a final shot. T. 356, 438, 558, 987.

Mr. Wesley, Mr. Moore and Ms. Evans then went to a bar where they proceeded to drink heavily. T. 356, 439, 559. The Defendant, Mr. Orr, Ms. Duncan and Ms. Lee, drove back to Miami. T. 727. On the way, they stopped at the Seven Mile Bridge where the shells from the thirty-eight (.38) caliber revolver were discarded, but the gun was not thrown away. T. 988, 1019. Subsequently, Mr. Wesley, Mr. Moore and Ms. Evans took someone from the bar back to the house where the body was subsequently discovered. T. 348, 441. When the police arrived, Mr. Wesley was crying, carrying on, upset and out of control. T. 682, 683, 692. Each of the witnesses told the police that they did not know anything about the homicide. T. 359, 498, 562.

Some days later, Elmer Wesley was questioned concerning this homicide.

After being advised of his rights, not being mistreated, understanding his rights, and being in a better condition than he was on the day of the incident, Mr. Wesley confessed to this homicide. T. 451, 465-67, 469, 741, 746, 747, 749-50, 813-14. After learning of Mr. Wesley's confession, Deborah Evans gave the police a statement implicating the Defendant. T. 563, 609. Arnold Moore was also present when Mr. Wesley confessed. T. 379-80. Mr. Wesley and Mr. Moore, because of this confession, were charged with First Degree Murder. T. 365, 515, 764. Subsequently, after implicating the Defendant before the Grand Jury, the First Degree Murder charges against Mr. Wesley and Mr. Moore were dropped. T. 381-82, 515.

The police officers who arrived on the scene found the victim in the bathroom with his hands bound behind his back, a washcloth taped in his mouth and two (2) bullet holes in his head. T. 698, 789, 790. There did not appear to be any injection marks or caustic burns on the victim's body. T. 821. The police officers also found a pillow with six (6) holes and a black substance on it which were consistent with gunshots being fired through it. T. 703-04, 887, 889. There were three (3) projectiles found in the body and, although the police looked thoroughly, there were no other projectiles found in the house. T. 767. An autopsy determined that the victim had been shot once in the right rear of the head, a back to front trajectory which did not penetrate the skull and was not a mortal wound. T. 867. The second shot, behind the right ear, penetrated the base of the skull and was a serious though not mortal wound which would render the victim unconscious. T. 868. The third shot, to the middle of the chest, was a penetrating and perforating wound which perforated the heart, lung and chest wall and caused internal hemorrhaging resulting in death. T. 868-69. The medical examiner concluded that since there were no signs of dragging,

the victim was shot in the bathtub. T. 869-70. Tests performed on the body established that there was no exposure to Drano or other foreign substances. There were no burns or marks on the body which these substances would have left. T. 873-75. Further, there was no evidence of pillow residue or foreign substance in the head wounds, although a substance found in the victim's hair was consistent with pillow material. T. 878-79.

A warrant was subsequently issued for the Defendant's arrest for First Degree Murder and was served in Dade County, Florida. T. 723-24. When Officer Charles Rogers went to the Defendant's house to arrest him, he found a thirty-eight (.38) caliber revolver which was subsequently turned over to the crime lab. T. 823, 825-26. Criminalist Robert Hart, concluded that the three (3) projectiles found in the victim's body were fired from this gun. T. 843. Mr. Hart further testified that the gun was defective in that it did not properly align automatically after firing. It was necessary to manually align the gun. T. 850-52. Subsequent to the Defendant's arrest and advice of rights, he advised Officer Robert Lastres that he had arrived at Elmer Wesley's house in Key West on Sunday, August 17, 1975, at approximately 1:00 P.M. T. 726. Upon arrival, he was informed by Mr. Wesley and Mr. Moore that they had tried to overdose the victim, who was dead in the bathroom at that time. T. 727. While in Key West, the Defendant purchased the thirty-eight (.38) caliber revolver from Elmer Wesley for Thirty ($30.00) Dollars. T. 738. This was denied by Mr. Wesley. T. 742. Subsequent to the Defendant's arrest, Opal Lee and Charlene Duncan were arrested and charged with this murder. T. 744, 990-91.

Larry Dollar, former agent with Florida Department of Law Enforcement, testified that Titus Walters, the victim, was a confidential informant for

him in an undercover operation that was occurring in Monroe County, Florida, during August, 1975. T. 918. Further, the victim was also a confidential informant, at that time, for the Monroe County Sheriff's Office. T. 921, 938. The victim had been working as a confidential informant for approximately three (3) weeks before his death. T. 919. On August 1, 1975, Monroe County Sheriff's Deputy Charles Majors met the victim at a motel in Key West where, because of a conversation with the victim, Deputy Majors met and subsequently arrested the Defendant. T. 366, 939-41. There was some testimony that the Defendant was angry at the victim because of this incident and had threatened his life. T. 367, 566.

During the penalty phase, the State presented no additional evidence. T. 1248, 2350. The Defendant presented Rochester Jordan, a correctional officer with the Dade County Jail, who knew the Defendant in that capacity. T. 1252. Mr. Jordan testified that the Defendant was well behaved and was extremely helpful to the officers in dealing with the other inmates. T. 1253. Specifically, the Officer testified that the Defendant had prevented injury to some correctional guards and other inmates by pointing out the aggressive inmates and helping to uncover illegal weapons. T. 1254-55. Additionally, the Defendant presented the testimony of Michael Smith, a counselor with the Dade County Jail, who knew the Defendant professionally. T. 1256-57. Mr. Smith, who had encountered the Defendant every day for the past year, felt that the Defendant was a mediator between aggressive inmate groups and was extremely helpful to the correctional officers. T. 1258. Mr. Smith testified that the Defendant had prevented injury to others by helping the correctional officers find illegal weapons, T. 1259, and was a good role model for the other inmates. T. 1260.

SUMMARY OF ARGUMENTS

In this Brief, the Defendant raises two (2) issues of constitutional dimension concerning the guilt or innocence phase of the trial below. Arguments I and II, infra. In considering them, this Court must keep in mind that these errors require reversal unless this Court is satisfied, beyond and to the exclusion of every reasonable doubt, that they did not affect the findings of the trier of fact.

The Defendant also raises three (3) issues concerning the propriety of the Trial Court's finding of the existence of three (3) statutory aggravating circumstances. Arguments III, IV and V, infra. Further, the Defendant challenges the Trial Court's complete disregard of the Jury's recommended sentence when it imposed the death penalty. Argument VI, infra. Finally, the Defendant challenges the imposition of the death penalty herein as constituting punishment for the Defendant's exercise of his constitutional rights to trial by jury and against compulsory self-incrimination. Argument VII, infra.

Although this Court, like courts of numerous other state jurisdictions, as well as the federal courts, have laid to rest, for now, the absolute constitutionality of the death penalty as a punishment for certain categories of criminal offenses, the issue of the constitutional requirements of due process, as they apply to the imposition of the ultimate sanction, are still subject to the proscriptions implicit in the guarantee of due process of law contained in the Fourteenth Amendment to the United States Constitution. Some of the errors complained of herein impact directly upon the fundamental concept of a defendant's ability to confront adverse witnesses, by cross-examination, before the trier of fact. This is an organic right implicit in the fundamental jurisprudence of civilized

men. Under these and the other issues presented to this Court in the instant case, the right of due process is examined. Due process is guaranteed to all litigants under our system of jurisprudence, although the procedures required to guarantee that right vary, depending upon the relative interests at stake. Goldberg v. Kelly, 397 U.S. 254, 262-63, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970). In this case, the Defendant's interest is the ultimate right, the right to continued existence. It is in that context that the adequacy of the due process procedures employed below must be examined.

> Because the death penalty, unlike other punishments, is permanent and irrevocable, the procedures by which the decision to impose a capital sentence is made bring into play constitutional limitations not present in other sentencing decisions. (Citations omitted).
>
> Proffit v. Wainwright, 685 F.2d 1227, 1253 (11th Cir. 1982).
>
> Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases. The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in non-capital cases.
>
> Lockett v. Ohio, 438 U.S. 586, 605, 98 S.Ct. 2954, 2965, 57 L.Ed.2d 973 (1978).

ARGUMENT I

THE TRIAL COURT ERRED IN IMPROPERLY PROHIBITING THE DEFENDANT FROM CROSS-EXAMINING DEBORAH WESLEY EVANS CONCERNING HER THEN PENDING CHARGES BEFORE THE SAME STATE ATTORNEY'S OFFICE WHO WAS PROSECUTING THE DEFENDANT, THEREBY DENYING THE DEFENDANT HIS SIXTH AMENDMENT RIGHT TO CONFRONT HIS ACCUSERS.

The Sixth Amendment to the United States Constitution provides a defendant with the right to confront the witnesses against him. The Constitution of the State of Florida provides a similar right in Article I, Section 16. The Sixth Amendment right of confrontation is made binding and applicable to the States by virtue of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965). The primary interest secured by the confrontation clause is the right of cross-examination. Douglas v. Alabama, 380 U.S. 415, 418, 85 S.Ct. 1074, 1076, 13 L.Ed.2d 934, 937 (1965). This Court has recognized that a defendant has an absolute right to full and fair cross-examination. Coco v. State, 62 So.2d 892 (Fla. 1953). "A limitation of cross-examination that prevents the Defendant from achieving the purposes for which it exists may be harmful error." Steinhorst v. State, 412 So.2d 332, 337 (Fla. 1982). Further, this Court has recognized that this is especially true in a capital case and has opined that a curtailment of relevant inquiry on cross-examination by a trial judge may easily constitute reversible error. Coxwell v. State, 361 So.2d 148, 152 (Fla. 1978).

In Alford v. United States, 282 U.S. 687, 51 S.Ct. 218, 75 L.Ed. 624 (1931), the Supreme Court in recognizing that cross-examination of a witness is a matter of right, stated:

> [p]rejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test,

> without which the jury cannot fairly appraise them. (Citations omitted)
>
> Id., 282 U.S. at 692, 51 S.Ct. at 219, 75 L.Ed. at 628.

One of the primary purposes of cross-examination is, ". . . to impeach the credibility of the witness, which may involve, among other things, showing his possible interest in the outcome of the case." (Citations omitted) Steinhorst v. State, supra, 412 So.2d at 337. The exposure to a jury of the reasons why a witness is testifying is a proper function of the constitutionally protected right of cross-examination. Kufrin v. State, 378 So.2d 1341, 1342 (Fla. 3d DCA 1980).

> Any evidence which tends to establish that a witness is appearing for the state for any reason other than merely to tell the truth should not be kept from the jury.
>
> Cowheard v. State, 365 So.2d 191, 193 (Fla. 3d DCA 1978), cert. denied, 374 So.2d 101 (Fla. 1979). (Emphasis in original)

It has been repeatedly recognized by courts of this State that bias or prejudice of a witness has an important bearing on that witness' credibility and evidence showing that bias is clearly relevant. It has further been held that a jury must know of any improper motives of a state witness in determining that witness' credibility. Davis v. Alaska, 415 U.S. 308, 315-16, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974); Powe v. State, 413 So.2d 1272 (Fla. 1st DCA 1982); Mendez v. State, 412 So.2d 965 (Fla. 2d DCA 1982); Holt v. State, 378 So.2d 106 (Fla. 5th DCA 1980); McDuffie v. State, 341 So.2d 840, 841 (Fla. 2d DCA 1977).

In Fulton v. State, 335 So.2d 280 (Fla. 1976), this Court recognized an exception to the general rule that a witness may not be cross-examined or impeached concerning criminal charges which have not resulted in a conviction. This Court held that this general prohibition is not applicable when a prosecution witness is under criminal charges at the time that the

witness testifies against a defendant and that the defendant is entitled to bring out that fact. Id., at 283. This constituted approval by this Court of prior decisions of District Courts of Appeal which have held that,

> . . . it is clear that if a witness for the State were presently or recently under actual or threatened criminal charges or investigation leading to such criminal charges, a person against whom such witness testifies in a criminal case has an absolute right to bring those circumstances out on cross-examination . . .
>
> Morrell v. State, 297 So.2d 579, 580 (Fla. 1st DCA 1974).

See also, Lee v. State, 318 So.2d 431, 432-33 (Fla. 4th DCA 1975). These Courts recognized that the purpose behind such cross-examination was not to discredit the witness by showing that he was charged with a crime, but, rather, to show that the witness' testimony was biased because the witness may have been trying to curry favor with his current accusers. Alford v. United States, supra, 282 U.S. at 693. Since Fulton, this rule has repeatedly and consistently been recognized and reaffirmed by courts throughout this State. Moreno v. State, 418 So.2d 1223, 1226 (Fla. 3d DCA 1982); Mendez v. State, supra, 412 So.2d at 966; Williams v. State, 386 So.2d 25, 27 (Fla. 2d DCA 1980); Holt v. State, supra, 378 So.2d at 108; Kufrin v. State, supra, 378 So.2d at 1342; Daniels v. State, 374 So.2d 1166, 1167 (Fla. 2d DCA 1979); Sarmiento v. State, 371 So.2d 1047, 1052 (Fla. 3d DCA 1979), approved, 397 So.2d 643 (Fla. 1981); Cowheard v. State, supra, 365 So.2d at 192; Blanco v. State, 353 So.2d 602, 604 (Fla. 3d DCA 1977); Stripling v. State, 349 So.2d 187, 191 (Fla. 3d DCA 1977), cert. denied, 359 So.2d 122 (Fla. 1978)[the jury must be fully apprised as to the witness' possible motive for self-interest with respect to the testimony he or she gives.].

It is beyond question that a trial court has discretion to control the scope and manner of cross-examination, but this discretion must be carefully

exercised so as not to amount to a curtailment of the right to effective cross-examination.

> While the trial court may exercise discretion over the scope of cross-examination, it must insure that there will be ample latitude for pertinent inquiry and that such limitations as are placed on the cross-examination are done with solicitude for the defendant's Sixth Amendment rights. (Citations omitted)
>
> Lee v. State, 422 So.2d 928, 931 (Fla. 3d DCA 1982), pet. for rev. denied, 434 So.2d 889 (Fla. 1983).

Further, the discretionary authority to limit cross-examination,

> . . . comes into play only after there has been permitted as a matter of right sufficient cross-examination to satisfy the Sixth Amendment. (Citations omitted)
>
> Greene v. Wainwright, 634 F.2d 272, 275 (5th Cir. 1981).

Limiting the scope of cross-examination in such a way as to keep from the jury relevant and important facts bearing on the trustworthiness of crucial prosecution witnesses can amount to a complete denial of the right to cross-examination. Kelly v. State, 425 So.2d 81, 84 (Fla. 2d DCA 1982); Mendez v. State, supra, 412 So.2d at 966. The fact that proposed cross-examination may have a tangential effect of somehow attacking a witness' character, is an insufficient basis to deny a defendant's Sixth Amendment right to effective cross-examination. Brown v. State, 424 So.2d 950, 955 (Fla. 1st DCA 1983). In Brown, a burglary case, the Defendants tried to explain their fingerprints through cross-examination of the victim which would have shown their presence in the residence at a time other than the date charged. This was dissallowed because it would have implicated the victim in illicit activity. The District Court of Appeal reversed and held that the purpose of the proffered cross-examination was to show a possible bias or motive on the part of the victim for testifying the way he did and that this was a proper subject of cross-examination. The incidental effect

of attacking the witness' character is insufficient to overcome the denial of the constitutional right. Id., at 955. Similarly, in Greene v. Wainwright, supra, the Defendant's cross-examination concerning a witness' mental condition and bizarre criminal activity was prohibited as an attempt to smear the reputation of the witness and to put him on trial. 634 F.2d at 274. In granting habeas corpus relief, the Fifth Circuit recognized that the incidental effect of attacking the witness' character was insufficient to overcome the denial of the Defendant's right to pursue relevant cross-examination. The Appellate Court recognized that the cross-examination was relevant and permissible under either of two (2) theories, that the witness was testifying in order to avoid prosecution for other illegal activities, or, that the witness' alleged actions might have cast doubt on his mental stability. The Court recognized that whether or not the witness had a concrete "deal" with the State concerning his testimony was not crucial to the right of the defendant to inquire into this area on cross-examination. Rather, the significant factor is whether the witness ". . . may be shading his testimony in an effort to please the prosecution." 634 F.2d at 276.

> A desire to cooperate may be formed beneath the conscious level, in a manner not apparent even to the witness, but such a subtle desire to assist the state nevertheless may cloud perception.
>
> Burr v. Sullivan, 618 F.2d 583, 587 (9th Cir. 1980).

In the instant case, the Defense proffered that it had just learned that the witness, Deborah Wesley Evans, had pending charges of either First or Second Degree Murder before the Circuit Court of the Sixteenth Judicial Circuit. T. 7. Defense Counsel went on to state that, although there was no information concerning a specific deal made with the State in relation to her testimony, he should still be allowed to cross-examine her concerning

those charges in order for the Jury to have an opportunity to determine whether the existence of those charges would have any effect on her testimony and whether she was testifying in such a manner as to gain favor from the State. This went to the witness' possible bias. T. 617. The Defense Attorney went on to state that no cross-examination occurred in this area because of the Court's prior ruling prohibiting the Defense from, in any way, exploring this area. T. 618. This was especially relevant cross-examination because there was the possibility that the State might seek a First Degree Murder Indictment against the witness for these current charges and that the witness might be attempting, by her testimony, to curry favor with the State and convince it not to seek the greater Indictment. T. 1044-45. Finally, at the hearing of the Motion For New Trial, the Defense again reiterated that the Defendant was not seeking to attack the witness' character, but, rather, to allow the Jury to understand the circumstances surrounding the witness' testimony, the fact of her pending charges and their possible relation to bias. R. 957, 959. The Trial Court completely misperceived the rule of law described above when it ruled that the fact of the pending charges is inadmissible unless it can be shown that a specific deal has been made with the State Attorney's Office. T. 275. Clearly, this runs afoul of the above quoted authorities. The complete prohibition imposed upon the Defense concerning this area of inquiry deprived the Defendant of the opportunity of demonstrating bias. As the Supreme Court recognized,

> [t]o say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial.

* * *

> The purpose obviously was not, as the trial court seemed to think, to discredit the witness by showing that he was charged with crime, but to show by such facts as proper cross-examination might develop, that his testimony was biased because given under promise or expectation of immunity, or under the coercive effect of his detention by officers of the United States, which was conducting the present prosecution.
>
> Alford v. United States, supra, 282 U.S. at 692, 693, 51 S.Ct. at 219, 75 L.Ed. 628.

The prejudice to the Defendant of this denial of cross-examination is manifest when the testimony of this witness is analyzed in context with the other testimony presented by the State. The State's other three (3) "eye witnesses" could also be characterized as co-participants. Elmer Wesley and Arnold Moore had previously been charged with this murder and Mr. Wesley had even confessed to it. T. 451. Elmer Wesley had received a one-hundred (100%) percent psychiatric disability from the Army. T. 406. Arnold Moore believed that he died a few years before and that he was now existing as Katrina, a female. T. 374. It was also established that each of them had motive, reason and opportunity to fabricate. Charlene Duncan, the other witness, was presently serving a sentence of life imprisonment for this homicide and had entered into an illegal agreement with the State concerning her testimony as will be more fully set forth in Argument II, infra. Therefore, all of the State's supposed eye-witnesses, with the exception of Deborah Wesley Evans, were clearly attackable and impeachable. When the Defendant was not allowed to attack or impeach Deborah Wesley Evans' testimony, though he should have been allowed to do so, the Jury was thereby allowed to use her testimony to bolster the testimony of the other witnesses. Clearly, had the Defendant been allowed to cross-examine Deborah Evans concerning her pending charges, such corroboration might not have been possible. Instead, the Jury was deprived of the information necessary to

properly evaluate her credibility.

As this Court long ago recognized,

> [if the witness] had been sufficiently discredited . . . in the minds of the jurors, the ultimate result of this case could have been entirely different. We do not say that it would or should have been different; we merely hold that if the correct rule of evidence had been applied, it could have been.
>
> McArthur v. Cook, 99 So.2d 565, 568 (Fla. 1957).

See also, Fulton v. State, supra, 335 So.2d at 285.

The Sixth Amendment right of confrontation requires that the Defendant be allowed to impeach the credibility of prosecution witnesses by showing possible bias of the witness due to the witness' status as an offender subject to punitive measures by the State.

> . . . denial of cross-examination [in such circumstances] would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.
>
> Smith v. Illinois, 390 U.S. 129, 131, 88 S.Ct. 748, 749, 19 L.Ed.2d 956, 959 (1968).

The error by the Trial Court in curtailing the Defendant's cross-examination is constitutional error of the first magnitude which may have contributed to the Defendant's conviction. Therefore, this Court cannot say it was harmless beyond a reasonable doubt. Drake v. State, 441 So.2d 1079, 1082 (Fla. 1983). See also, Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Accordingly, this constitutes reversible error which requires a new trial.

ARGUMENT II

THE DEFENDANT WAS DEPRIVED OF DUE PROCESS OF LAW AND A FAIR TRIAL THROUGH THE ACTIONS OF THE STATE IN CONNECTION WITH THE TESTIMONY OF CHARLENE DUNCAN, INCLUDING THE USE OF FALSE, FRAUDULENT OR MISLEADING TESTIMONY; ACTING OUTSIDE OF ITS AUTHORITY; AND FAILING TO INFORM THE DEFENDANT OF EXCULPATORY MATERIAL IN ITS POSSESSION, ALL IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 9 OF THE FLORIDA CONSTITUTION.

The Due Process clause of the Fourteenth Amendment which safeguards our liberties is fundamental to our system of justice.

> It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through the pretence of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured.
>
> Mooney v. Holohan, 294 U.S. 103, 112, 55 S.Ct. 340, 79 L.Ed. 791, 794 (1935).

Thus, the Supreme Court established that the Due Process Clause is offended when the State obtains a conviction through the use of perjured testimony. The Supreme Court reaffirmed this principle in Alcorta v. Texas, 355 U.S. 28, 78 S.Ct. 103, 2 L.Ed.2d 9 (1957), where it reversed a murder conviction because the State had allowed to go uncorrected a witness' false and misleading testimony concerning his relationship with the victim. Again, in Miller v. Pate, 386 U.S. 1, 87 S.Ct. 785, 17 L.Ed.2d 690 (1967), a unanimous Court held that the Defendant's conviction was invalid because it was obtained through the use of evidence that the State knew to be false.

In Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 217 (1959), a unanimous Supreme Court reversed a murder conviction because it violated this due process requirement. In that case, a witness, who was then serving a one hundred ninety-nine (199) year sentence for the same murder, testified

that he had received no promises of consideration in return for his testimony. Even though the State had promised him consideration, it did nothing to correct the witness' testimony. The Jury was informed only that a public defender had promised "to do what he could" for the witness. Id., 360 U.S. at 265. The Supreme Court held that the Due Process Clause prohibits a conviction based on false evidence even when the State does not solicit the false evidence, but, rather, ". . . allows it to go uncorrected when it appears." Id., 360 U.S. at 269. The Court went on to hold that this principle prohibiting the knowing use of false evidence,

> . . . does not cease to apply merely because the false testimony goes only to the credibility of the witness. The jury's estimate of the truthfullness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend.
>
> * * *
>
> "A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth. . . . That the district attorney's silence was not the result of guile or a desire to prejudice matters little, for its impact was the same, preventing, as it did, a trial that could in any real sense be termed fair."
>
> Id., 360 U.S. at 270, quoting, People v. Savvides, 1 N.Y.2d 554, 557, 136 N.E.2d 853, 854-55 (1956).

The Supreme Court held that the fact that the jury was apprised of other grounds for impeaching the witness' testimony did not operate to alleviate the taint of the false testimony. In Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), the Supreme Court reversed a conviction because a government witness had testified that he did not receive any promises of immunity for his testimony when, in fact, he had been so promised. The Assistant United States Attorney who handled the trial and

the testimony of this witness was not aware of the falseness of this witness' testimony or the prior offer of immunity. The Court held that this factor is not controlling.

> The prosecutor's office is an entity and as such it is the spokesman for the government. A promise made by one attorney must be attributed, for these purposes, to the government.
>
> * * *
>
> . . . a new trial is required if the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury . . .
>
> Id., 405 U.S. at 154, 92 S.Ct. at 766.

The courts of this State have uniformly recognized these principles. In Wolfe v. State, 190 So.2d 394 (Fla. 1st DCA 1966), a co-defendant/witness testified that the only promise made to him was that his sentence would be concurrent with any federal sentence he might receive. The witness was not asked by either the State or the Defense, nor did he voluntarily testify that the same promise of a concurrent sentence had been made to him in connection with a plea of guilty to a different armed robbery in which the Defendant was not involved. The Prosecutor was fully aware of this arrangement, but did nothing to correct this false impression. Id., at 395. The Court held that the State's failure to fully inform the Jury regarding the full consideration promised the witness for testifying against the Defendant deprived him of due process of law and required a new trial, notwithstanding the fact that the Jury knew the witness had been promised some consideration. Id., at 397.

> But who is to say whether the jury would have reached the same conclusion had it known that the promise to [the witness] of concurrent sentences was made with respect to judgments of conviction to be imposed against him in both of the cases of armed robbery to which he had pleaded guilty.

* * *

> These are speculations which cannot be resolved by this court, the trial court or the prosecuting attorney, but only by an impartial jury in possession of the full facts of the case.
>
> 190 So.2d at 396.

The Court went on to state that the fact that the Defendant's counsel was aware of the witness' plea of guilty in both cases did not change the result. See, Porterfield v. State, 442 So.2d 1062, 1063 (Fla. 1st DCA 1983); Bogan v. State, 211 So.2d 74, 77 (Fla. 2d DCA 1968), appeal after remand, 222 So.2d 28 (Fla. 2d DCA 1979).

In Lee v. State, 324 So.2d 694 (Fla. 1st DCA 1976), the Court reversed a conviction where the State had failed to fully inform the Jury concerning the extent of plea negotations with a State witness, thereby denying it necessary facts to properly pass upon the witness' credibility, stating,

> [t]he State prosecutor has an affirmative duty to correct what he knows to be false and to elicit the truth. Even though the State itself does not solicit the false evidence, it may not allow it to go uncorrected when it appears.
>
> 324 So.2d at 697 (emphasis in original).

See also, Enmund v. State, 399 So.2d 1362, 1368 (Fla. 1981), rev'd on other grounds sub nom, Enmund v. Florida, 458 U.S. 782 (1982)[the failure to inform the Jury of the interest of a witness which could have in any reasonable likelihood affected the decision of the Jury, requires a new trial].

In Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), the Supreme Court held that the Due Process Clause requires that the State turn over any material in its possession which would be exculpatory to the Defendant. In United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976), the Court held that the rule of Brady applies in three

(3) situations, each of which involve the discovery after trial of information which had been known to the prosecution but unknown to the defense. The first situation involves undisclosed evidence which demonstrates that the prosecution's case includes perjured testimony which the State knew or should have known was perjurious. The Court held that if there is any reasonable likelihood that this false testimony could have affected the judgment of a jury, a new trial must be granted. 427 U.S. at 103, 96 S.Ct. at 2397. This situation applies whether or not a specific request for exculpatory evidence was made. The second situation occurs when a pre-trial request for specific evidence is made. If the evidence is material, that is, it might have affected the outcome of the trial, a failure to respond to this request requires a new trial. 427 U.S. at 106, 96 S.Ct. at 2398. The third situation covers a general request for Brady information. In this situation, a failure to disclose only requires a new trial if ". . . the omitted evidence creates a reasonable doubt that did not otherwise exist, . . ." 427 U.S. at 113, 96 S.Ct. at 2402. The Court went on to state that

> . . . if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.
>
> 427 U.S. at 113, 96 S.Ct. at 2402.

In Blankenship v. Estelle, 545 F.2d 510 (5th Cir. 1977), the Government did not inform the defense of a pre-trial agreement with two (2) witnesses that their charges would be dismissed in exchange for their testimony. The Government asked both witnesses if they were currently under indictment, to which they replied that they were. On cross-examination, the witnesses denied that they were testifying against the Defendant to "get themselves off the hook." Thus, the testimony created the appearance that the

witnesses were themselves facing trial and, therefore, would negate any possibilities that they were cooperating with the Prosecution in exchange for leniency. Id., at 513. The Court held that the failure of the Government to inform the Defense of the true nature of the agreement as well as its failure to correct the false trial testimony tainted the conviction. The Court held that although the testimony of the witnesses that they were "under indictment" may have been technically true,

> [i]t left the erroneous impression of an impending trial and the absence of leniency as an inducement to testify. This Court has recently made clear that we will not tolerate prosecutorial participation in technically correct, yet seriously misleading, testimony which serves to conceal the existence of a deal with material witnesses.
>
> 545 F.2d at 513.

In Dupart v. United States, 541 F.2d 1148 (5th Cir. 1976), the Government allowed a witness to testify that he was not working with the Government because of a case pending against him. Further, the witness testified that he was cooperating with the Government voluntarily. The Defendant, in his habeas petition, alleged that the witness was a paid informant and had been promised immunity against pending charges. The Court held that the Defendant was entitled to an evidentiary hearing on his habeas claim because of the possibility that the witness' testimony may have been misleading even though technically correct.

> This Court is aware that "charges" rather than a "case" may be pending against a witness. Likewise, a course of conduct though motivated by legally coercible alternatives such as testifying or facing criminal prosecution, may be considered to be voluntary. However, assuming the allegations to be true, such a formalistic exchange of testimony even though technically not perjurious, would surely be highly misleading to the jury, a body generally untrained in such artful distinctions.
>
> 541 F.2d at 1150.

In Commonwealth v. Hallowell, 383 A.2d 909 (Pa. 1978), a State witness testified that he had no expectations of leniency in his own case because of his testimony and was only testifying in order to "clear it all up." Further, an Assistant District Attorney testified that there had been no offer of leniency to the witness other than a recommendation for reduced bail and a request that no detainer be lodged against him. Approximately one and a half (1 1/2) years after the trial and conviction of the Defendant, based in part on the testimony of the witness, the witness came up for sentencing in his own case. At that time he indicated he had felt that the Government would recommend a lesser sentence for him because of his cooperation in testifying against the Defendant. The District Attorney's Office corroborated this testimony and indicated that they had negotiated a plea with the witness whereby he would plead guilty to Second Degree Murder and receive a lesser sentence. The Government indicated that since he did testify at the trial and met his end of the bargain, it was encumbent on the Court to uphold the plea negotiations which were entered into prior to the Defendant's trial. The Court did so and imposed the lesser sentence. 383 A.2d at 910. The Supreme Court of Pennsylvania reversed the conviction upon a holding that the District Attorney's Office had perpetrated a falsehood and fraud upon the Court, the Jury and the people of the State of Pennsylvania. The Court held that the nondisclosure by the Government violated due process irrespective of the good or bad faith of the Prosecution.

> The good faith, or lack thereof, by the prosecutor is immaterial because the concern is not punishment of society for misdeeds of the prosecutor, but avoidance of an unfair trial to the accused.
>
> 383 A.2d at 911.

In this case, the State elicited testimony from Charlene Duncan that she, her attorney and Kelly Hancock, Assistant State Attorney for Broward County, [a former prosecutor in this case] entered into an agreement in 1979 whereby Ms. Duncan agreed to testify and be a witness for the State. T. 954-55. On cross-examination, this witness testified that she had no knowledge of a new deal being arranged; that she expected the State to keep its promise to her; that she had a hearing set in Key West on April 4, 1983; and that she did not know what her sentence would be changed to. T. 1008, 1009. She further testified that this same hearing was scheduled before the Court in Key West at least three (3) or four (4) times since 1979, but had not yet been heard. T. 1010. Additionally, she testified that she did not expect her testimony in this case to affect the resentencing on April 4. T. 1010-11. On re-direct examination, the Assistant State Attorney, Garringer, questioned Ms. Duncan concerning the 1979 agreement. T. 1033. The witness testified that the agreement was that in exchange for her being a witness for the State, she would receive, ". . . a new trial to plea guilty to third degree. I would get ten years or either a pardon." T. 1034. At the hearing held on the Defendant's Motion For A New Trial on June 16, 1983, it was revealed, for the first time, that at her resentencing Ms. Duncan had received a different deal than that which was negotiated in 1979. R. 963-73. The 1979 agreement provided that Charlene Duncan would be a witness for the State and in exchange for her testimony, the State agreed that:

> A. <u>In the event of any successful post conviction relief on behalf of Charlene Duncan including the successful appeal and reversal of her current conviction</u>, the State of Florida will allow Charlene Duncan to either:
>
> 1. Enter a plea to Third Degree Murder and receive a sentence of no more than ten years incarceration,
>
> or

2. Face the charges of First Degree Murder in a remanded trial.

* * *

Should the current appeal produce unsuccessful results on behalf of Charlene Duncan, the State will actively solicit, assist and participate in proceedings to procure clemency or pardon from the Governor of the State of Florida on behalf of Charlene Duncan regarding her mandatory twenty-five year sentence without parole for First Degree Murder.

R. 837.

Further, in a deposition, the Defense was informed, by Charlene Duncan's attorney, that in the event her appeal was unsuccessful, the State's only assistance to her would be in the form of soliciting and participating in a clemency or pardon proceeding. R. 838. Charlene Duncan's appeal of her conviction of First Degree Murder, for the instant homicide and her sentence of life was unsuccessful. R. 835. The Defendant was not aware until the hearing on the Motion For A New Trial that a Motion For Post Conviction Relief had been filed in the Circuit Court of the Sixteenth Judicial Circuit on behalf of Charlene Duncan. R. 835-36, 957, 966. This Motion sought to have Ms. Duncan's conviction vacated and set aside so that she could exercise the options available to her under the agreement dated August 9, 1979, and, further, reflects that the State, through Assistant State Attorney Lester A. Garringer, Jr., has agreed to actively assist her in obtaining this post conviction relief. R. 835-36. This Motion For Post Conviction Relief was notarized by Assistant State Attorney Lester Garringer on March 3, 1983, almost one month before the Francis trial. R. 836. The Motion was granted and Ms. Duncan was released. R. 967. It is clear that what Charlene Duncan ultimately received was more than what she had bargained for in her agreement dated August 9, 1979. R. 837, 967. This

additional consideration was not disclosed to the Defendant or the Jury.[2/]

Just as in the instant case where Charlene Duncan's Motion For Post Conviction Relief was notarized by the Assistant State Attorney and actively supported by him, R. 836, in Napue v. Illinois, supra, the former Prosecutor filed the pleading on behalf of the witness to seek to have his sentence reduced. The former Prosecutor

> . . . prayed that the Court would effect "consummation of the compact entered into between the duly authorized representatives of the State of Illinois and [the witness]."
>
> Napue v. Illinois, supra, 360 U.S. at 266-67.

This scenario is identical to this case where the Prosecutor, Mr. Garringer, agreed to actively assist Ms. Duncan in obtaining the vacation of her valid conviction so that she could exercise the option available to her under the 1979 agreement. R. 836. Significantly, Ms. Duncan was exercising an option that was not available to her under that agreement. R. 837. Clearly, as in the cited cases, the Jury herein was not fully informed, but rather was

---

[2/]The record does not reveal the full extent of the consideration promised and received by Ms. Duncan, nor does it fully reveal the extent of the participation by the Prosecutor, Mr. Garringer, in securing this consideration for Ms. Duncan. R. 955. The Defendant tried to show this Court the particulars of this consideration through his Motion To Supplement Record On Appeal with certified copies of papers from other courts showing the extent of the consideration promised and received by Ms. Duncan. This Court has denied the Motion To Supplement Record On Appeal. Respectfully, the Defendant strongly urges the reconsideration of that decision which has prevented the Defendant from completely detailing and documenting the due process violation committed by the State. The Proposed Supplemental Record On Appeal shows that the State told the Defendant and the Jury that it promised the witness one thing, but in reality promised the witness something more. The State allowed the witness' false and misleading testimony concerning what she was promised to go uncorrected before the Jury. The State failed to inform the Defendant of the full extent of the consideration promised and received. Finally, the State agreed to and succeeded in having a valid conviction vacated without any legal basis whatsoever, something it does not have the authority to do. The extraordinary consideration provided Ms. Duncan and the cover-up of it from the Defendant and the Jury was done solely to procure a conviction of the Defendant. Such a conviction is a nullity.

mislead, as to all of the terms of Ms. Duncan's agreement with the State. Further, they were not informed that the State was undertaking, without a legal basis, to vacate the valid conviction of this witness. What stronger inducement to testify falsely could an individual have than the possibility of escaping punishment for a crime for which that witness had already been lawfully convicted. Manifestly, had this Jury had this information they might have evaluated Ms. Duncan's testimony in a different light. When you analyze this in connection with the other witnesses presented by the State, it is inescapable that while each State witness standing alone was not credible, together they bolstered each other to tip the scales against the Defendant. The Jury should have been apprised of all of the facts surrounding each of the witnesses' motivations so that each witness' testimony could be evaluated independently.

The State had no authority to seek to vacate Ms. Duncan's valid conviction. Nonetheless, they did so. Not only did the State fail to inform the Defendant of their intention to take this action, but, rather, knowingly permitted the Defendant, and ultimately the Jury, to believe that an entirely different arrangement was to be carried out. The Prosecutor in this case pointed out to the Jury that he was only validating an agreement made by another State Attorney. T. 954-55. The truth was that he was providing Ms. Duncan with more than she was entitled to under that prior agreement. He further allowed Ms. Duncan's statement that her testimony would not affect her resentencing to go uncorrected by remaining silent and by successfully objecting to the Defendant's attempt to explore this area on re-cross-examination. T. 1010, 1039. This conduct by the State of Florida, through its Prosecuting Officer, was manifestly improper.

> The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty

> whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor -- indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.
>
> Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed.2d 1314 (1935).
>
> The prosecuting attorney in a criminal case has an even greater responsibility than counsel for an individual client. For the purpose of the individual case he represents the great authority of the State of Florida. His duty is not to obtain convictions but to seek justice, and he must exercise that responsibility with the circumspection and dignity the occasion calls for. His case must rest on evidence, not innuendo. If his case is a sound one, his evidence is enough. If it is not sound, he should not resort to innuendo to give it a false appearance of strength. Cases brought on behalf of the State of Florida should be conducted with a dignity worthy of the client.
>
> Kirk v. State, 227 So.2d 40, 42-3 (Fla. 4th DCA 1969).

This conduct effectively deprived Bobby Marion Francis of receiving fair consideration of his guilt or innocence by the Jury. At a minimum, a new trial is required. The Defendant would submit, however, that these actions of the State are so inimical and destructive to the fundamental notion of fairness implicit in our system of justice as to require this Court to conclude that the State has thereby forfeited its right to again prosecute him in this matter.

ARGUMENT III

THE TRIAL COURT ERRED IN FINDING AN AGGRAVATING CIRCUMSTANCE OF DISRUPTING OR HINDERING THE EXERCISE OF ANY GOVERNMENTAL FUNCTION OR THE ENFORCEMENT OF LAWS IN THAT THE EVIDENCE DID NOT PROVE THIS AGGRAVATING CIRCUMSTANCE BEYOND AND TO THE EXCLUSION OF EVERY REASONABLE DOUBT.

In the Trial Court's Sentencing Order, it stated:

> 6) The Court finds that one of the primary motives in the killing of the decedent by the defendant, Mr. Francis, was to hinder the lawful existence [sic] of the police powers of the State of Florida and the County of Monroe in that the defendant, Mr. Francis, knew that the decedent was a confidential informant and that the decedent was actively participating in a narcotics' investigation in Key West, Florida, and that information furnished by the decedent led to the arrest of the defendant, Mr. Francis, who advised a witness that, "The victim would have to die."
>
> Additionally, the defendant, Mr. Francis, told another witness that the, "Victim would be dead in two weeks."
>
> Thus the Court finds this aggravating circumstance has been proven beyond a reasonable doubt.
>
> R. 921-22; App. 1-2.

The most important factual finding of the Trial Court, as set forth above, is not supported by the evidence. Specifically, there is absolutely no evidence in the record below that the Defendant was aware that the decedent was actively participating in a narcotics investigation at the time of the homicide. Without this unsupported finding, the only record evidence to support the aggravating circumstance contained in Florida Statutes § 921.141(5)(g) is the fact that the Defendant, through statements of witnesses, indicated his suspicion that his narcotics arrest in Key West in early August was the result of the victim's conversations with the police and the quoted statements that the victim would have to die or would be dead in two (2) weeks. T. 367, 566. It should be noted, however, that the Trial

Court explicitly recognized in its Sentencing Order, that there were other motives for the homicide of the decedent by the Defendant demonstrated by the record.

Two (2) State witnesses, Donald Batey and Charlene Duncan, testified at trial that on the evening before the homicide the victim, Titus Walters, had an altercation with two (2) of the Defendant's women, Charlene Duncan and Opal Lee. T. 653-56, 958-59, 961. The nature of the altercation was that the victim approached these two (2) women, attempting somehow to interact with them, threatened and pursued them, ultimately severely beat Opal Lee, shot at both Opal Lee and Charlene Duncan with a firearm, and attempted to run over both of these women with a car. T. 653-56, 963-64. It was the opinion of Charlene Duncan that, as a result of the victim's attacks upon her and Opal Lee, they narrowly escaped death. T. 1000-06. Opal Lee's face was swollen and severely bruised as a result of this altercation. T. 414. After running away from the victim's assaults, Charlene Duncan contacted the Defendant by telephone, explained what had occurred and asked that he come to Key West to pick them up because they were afraid of what Titus Walters might do to them. T. 658, 966-67. Further, the evidence showed that the homicide occurred the next morning when the victim unsolicitedly presented himself at the house where the Defendant was present. T. 337. The trial testimony showed that one of the first things the Defendant said to the victim was "man, why you punch my woman in the mouth." T. 344. The Defendant at this time also stated, "I hate to see a man that beats on a woman." T. 539. It is, therefore, manifest that the victim's murderous assault upon the Defendant's female friends immediately before the homicide constituted an even more compelling motive or reason for the Defendant's act than the victim's status as a confidential informant.

Florida Statute § 921.141(5) provides, in pertinent part, that aggravating circumstances shall be limited to the following:

> (g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

This aggravating circumstance addresses the motive for the crime and is, in its meaning, strikingly similar to Florida Statute § 921.141(5)(e), which provides:

> The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effectuating an escape from custody.

The latest decisions of this Court have discussed the similarities or factual overlap inherent in these two (2) aggravating circumstances. See, e.g., Francois v. State, 407 So.2d 885, 891 (Fla. 1981), cert. denied, 458 U.S. 1122 (1982); Blair v. State, 406 So.2d 1103, 1108 (Fla. 1981); White v. State, 403 So.2d 331 (Fla. 1981), cert. denied, ___ U.S. ___, 103 S.Ct. 3571 (1983). Thus, the prior decisions of this Court in construing § 921.141(5)(e) are instructive in deciding whether the facts of this case support the finding of the aggravating circumstance of hindering or disrupting law enforcement.

In Menendez v. State, 368 So.2d 1278 (Fla. 1979), appeal after remand, 419 So.2d 312 (Fla. 1982), this Court, in vacating a death sentence, held that where the facts fail to establish that the dominant or only motive for the homicide was the elimination of witnesses, the finding of the aggravating circumstance of avoiding arrest is improper. Id., at 1282, citing, Riley v. State, 366 So.2d 19 (Fla. 1978). Accord, Clark v. State, 443 So.2d 973, 977 (Fla. 1983); Pope v. State, 441 So.2d 1073, 1976 (Fla. 1983); Herzog v. State, 439 So.2d 1372, 1378-79 (Fla. 1983); White v. State, supra. Under the facts of this case, it cannot be said that the only

motivating reason for the homicide in question was the Defendant's knowledge that the victim might have implicated him in a narcotics transaction which resulted in his arrest, where there was a much more compelling reason for the Defendant's animosity towards the victim. That is, the victim's assault upon and attempt to kill the Defendant's friends. Cf., Routly v. State, 440 So.2d 1257, 1264 (Fla. 1983).

As discussed and analyzed in detail in Argument VI, infra, the Jury returned an advisory sentence of life imprisonment. R. 804. Implicit therein is their failure to find that hindering law enforcement was a primary motiviation, or for that matter, that it played any part in the Defendant's motivation for the commission of the offense in question. Given this fact and the presence of a much more logical motivation for the offense, the asault and attempted murder of Charlene Duncan and Opal Lee, it could hardly be concluded that this aggravating circumstance was proven beyond a reasonable doubt. State v. Dixon, 283 So.2d 1, 9 (Fla. 1973).

Assuming arguendo that Titus Walters' involvement in the Defendant's prior arrest in some way played a part in the Defendant's motivation, such fact cannot logically be characterized as coming within the ambit of Florida Statute § 921.141(5)(g). Again, the record reveals no knowledge on the part of the Defendant of the victim's activities as a confidential informant at the time of the homicide. Although the record reflects that Mr. Walters was acting as confidential informant in ongoing criminal investigations at the time of the homicide, there is no evidence that the Defendant had any knowledge of these actions or that the Defendant was in any way involved in any investigation being conducted which involved the victim. T. 918-19, 921, 938. The only possible motivation the Defendant could have had with respect to the victim's role in informing against him was revenge for past

acts and not to prevent future acts that the Defendant had no knowledge of.

The majority of cases construing this aggravating circumstance concern homicides of police officers in uniform engaged in their lawful duties. See, Jones v. State, 440 So.2d 570 (Fla. 1983); Tafero v. State, 403 So.2d 355 (Fla. 1981), cert. denied, 455 U.S. 983 (1982); Songer v. State, 322 So.2d 481 (Fla. 1975), vacated on other grounds sub nom, Songer v. Florida, 430 U.S. 952 (1977). In those cases where the victim of the homicide was a civilian, this Court has sustained the finding of this aggravating circumstance only where the motivation of disrupting or hindering governmental function and law enforcement was manifest from the facts. In Barclay v. State, 343 So.2d 1266 (Fla. 1977), cert. denied, 439 U.S. 892 (1978), the Defendant's random murder of a totally innocent citizen was an attempt to instigate race war and revolution. The only decision where this Court has upheld the finding of this aggravating circumstances to the homicide of a police informant is the case of Bolender v. State, 422 So.2d 833 (Fla. 1982), cert. denied, ___ U.S. ___, 103 S.Ct. 2111 (1983). In that case, however, this Court found that the victim's status as a known police informant was evidence that he was killed by the Defendant to avoid arrest for the kidnapping and assault perpetrated on the victim prior to the homicide. 422 So.2d at 838. In the instant case, to the contrary, Titus Walters was not a known police informant. T. 385, 771.

Under the facts of this case, and in light of the Jury's recommendation of a life sentence, it cannot be said that it has been established beyond and to the exclusion of every reasonable doubt that the Defendant's motivation in killing the victim was to disrupt governmental function or hinder law enforcement and, accordingly, this aggravating circumstance could not be properly found by the Trial Court.

ARGUMENT IV

THE TRIAL COURT ERRED IN FINDING AN AGGRAVATING CIRCUMSTANCE OF ESPECIALLY WICKED, EVIL, ATROCIOUS AND CRUEL IN THAT THE EVIDENCE DID NOT SUSTAIN THIS AGGRAVATING CIRCUMSTANCE BEYOND AND TO THE EXCLUSION OF EVERY REASONABLE DOUBT.

In the Trial Court's Sentencing Order it stated:

> 5) The Court finds the Defendant, Mr. Francis, forced the victim to crawl on his hands and knees and beg for his life. The victim was taped with his hands behind his back, placed on a toilet stool for a period of in excess of two hours. He was in an obvious state of panic. He was sweating profusely. He was placed in fear of death by way of injection of Drano or other foreign substances into his body.
>
> The victim was displayed to the witnesses in the house. The victim previously begged to be beaten by the party or the witnesses, rather than be killed and was further taunted by the Defendant and then forced into the bathroom where the victim was gagged and finally the Defendant shot the decedent in the heart causing his death, and thus the Court finds beyond a reasonable doubt that this aggravating circumstance does apply.
>
> R. 922; App. 2.

These findings are not supported by the evidence. There is absolutely no evidence that the victim was injected with Drano or any foreign substance. Rather, the evidence establishes conclusively that there was no injection of any foreign substance into the victim. T. 821, 866, 870, 873-75. More significantly, there is no evidence whatsoever that the victim was placed in fear of death by, or threatened in any way with, injection. There is nothing in the record to indicate that the victim had any knowledge of the Drano, as there is no evidence that he was ever in the bedroom where it was found. T. 703[3/] There is no evidence in the record that the victim was

---

[3/] The record establishes that the victim was initially in the living room, T. 342, 423, 535, and was then taken directly to the bathroom. T. 348-49, 429, 547, 982-83. After the victim was placed in the bathroom,

sweating profusely, but merely testimony that one of the participants, Opal Lee, was wiping the victim's brow. T. 349, 351. Further, there is nothing in the record to support the Trial Court's finding that the victim was taunted by the Defendant or that the period involved was in excess of two (2) hours. The testimony of all of the witnesses was that they were in the kitchen taking drugs and socializing during this period and only observed the victim for brief moments. T. 348-49, 352, 353, 391-93, 429, 431-33, 538, 546-47, 625-27, 972, 976-77, 982-83.

The Trial Court determined that death was caused by a gunshot wound to the chest. This finding is consistent with the testimony of the Medical Examiner, who testified that the victim had three (3) bullet wounds, two (2) in the head, which were not mortal, but did render the victim unconscious, and one (1) in the chest, which caused death. T. 866-69. The testimony of the other witnesses indicated that two (2) shots were fired in rapid succession with a third shot sometime later. T. 353, 356, 434, 438, 555, 558, 986. The record establishes that all three (3) shots were fired in a short period of time. T. 353, 356, 434, 438, 555, 558, 986.

The law requires that the aggravating circumstances must be proven beyond and to the exclusion of every reasonable doubt. Jent v. State, 408 So.2d 1024, 1032 (Fla. 1981), cert. denied, 457 U.S. 1111 (1982). In order for this aggravating circumstance to be applied, it must be found beyond a reasonable doubt that the murder was consciousless or pitiless in the sense that it was unnecessarily torturous to the victim. State v. Dixon, supra, 283 So.2d at 9. Stripping away the unsupported findings of the Trial Court

(Footnote continued)the Defendant came into the kitchen, a separate room, and requested the Drano. T. 351, 428, 549. The Drano was ultimately found in the bedroom. T. 703. Finally, there is absolutely nothing in the record concerning the victim being threatened with any other foreign substances.

from those findings which are reflected in the record, we find that the evidence shows, at best, that the victim voluntarily came to the residence where he was held at gunpoint by the Defendant and others. T. 337, 339, 342, 343, 421, 423-24, 531, 534, 535, 971. Then, the victim was disarmed of his firearm, T. 971, bound and held in the bathroom of the residence for an indeterminate period of time. Thereafter, the victim, within a short period of time, received gunshot wounds of undetermined sequence, one of which rendered him unconscious and another one of which killed him. T. 867-69. It is unclear from the record what punishment, or fear and apprehension, if any, the victim suffered prior to the murder itself. Nor is it reflected in the record that the victim was in any way aware of the impending gunshot wounds which caused his death. Absence of documentation in the record of these factors makes it impermissible for the Trial Court to have found this aggravating circumstance. Herzog v. State, supra, 439 So.2d at 1378; Simmons v. State, 419 So.2d 316, 319 (Fla. 1982); cf., Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 298 (1980).

As discussed and analyzed in detail in Argument VI, infra, the Jury returned an advisory sentence of life imprisonment. R. 804. In light of the lack of record support for the Trial Court's findings in justifying this aggravating circumstance and the implicit conclusion by the Jury in its recommended sentence that this aggravating circumstance was not proven, the homicide in question was not especially wicked, evil, atrocious and cruel beyond and to the exclusion of every reasonable doubt. Therefore, it was error to find that this aggravating circumstance existed.

ARGUMENT V

THE TRIAL COURT ERRED IN FINDING AN AGGRAVATING CIRCUMSTANCE OF COLD, CALCULATED MURDER IN THAT (A) THE EVIDENCE DID NOT SUSTAIN THIS AGGRAVATING CIRCUMSTANCE BEYOND AND TO THE EXCLUSION OF EVERY REASONABLE DOUBT, AND (B) THIS AGGRAVATING CIRCUMSTANCE WAS IMPROPERLY APPLIED RETROACTIVELY IN VIOLATION OF ARTICLE I, SECTION 10 OF THE UNITED STATES CONSTITUTION, AS WELL AS ARTICLE I, SECTION 10 OF THE CONSTITUTION OF THE STATE OF FLORIDA.

In the Trial Court's Sentencing Order, it stated:

> 8) The Court finds that the Defendant, Mr. Francis, has been convicted of murder that was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. There was absolutely no necessity for the taking of a human life in this case.
>
> The Defendant planned to kill the decedent who was rendered helpless and unable to defend himself, and the Defendant, Mr. Francis, ordered witnesses to purchase tape and obtain a can of Drano and syringes. This took an extended period of time, clearly demonstrating a clear premeditation on the part of the Defendant, Mr. Francis.
>
> Additonally, the Defendant, Mr. Francis, displayed a pillow to the witnesses and advised the observing witnesses that he was going to have to buy a new one, referring to the pillow, and thereafter, coldly and caculatedly used the pillow to muffle the shots fired into the victim.
>
> The Defendant discussed the disposal of the body before firing a third shot into the body of the victim, thus the Court finds beyond a reasonable doubt this aggravating factor does apply.
>
> R. 922-23; App. 2-3.

(A)

THE EVIDENCE DID NOT SUSTAIN THIS AGGRAVATING CIRCUMSTANCE BEYOND AND TO THE EXCLUSION OF EVERY REASONABLE DOUBT

The finding that the homicide was committed without any pretense of moral or legal justification is not supported by the record. There was, in fact, justification for the homicide in light of the dastardly and murderous

attack upon the Defendant's female associates, by the victim, immediately preceding the homicide. T. 653-56, 958-64, 1000-06. This Court considered an analogous situation in the case of Halliwell v. State, 323 So.2d 557, 561 (Fla. 1975), where this Court found that the victim's mistreatment of the Defendant's lady friend did not support the finding of an aggravating circumstance sufficient to uphold a death sentence recommended by the Jury and imposed by the Trial Court.

The purchase of the Drano and syringes, under the facts of this case, do not support the Trial Court's determination of this aggravating circumstance. The record conclusively establishes that neither the Drano nor the syringes were used in any fashion in the homicide. Supp. T. 870-79. If anything, these facts contradict the Trial Court's finding that the homicide was committed in a cold and calculating fashion. Obtaining the syringes and the Drano demonstrate that the Defendant's intentions with regard to the victim were unsettled during the interval between when the victim first appeared, unexpectedly, at the residence and when he was ultimately killed by gunshot. Significantly, a State witness, Charlene Duncan, testified that when she went to get the items, as instructed by the Defendant, she thought the Defendant would merely beat up the victim and let him go. T. 974-77. Clearly, a reasonable interpretation of the evidence could be that the Defendant was angry with the victim for his recent murderous assault upon Charlene Duncan and Opal Lee and intended to punish him somehow. During the period when the victim was bound, the Defendant, while considering the victim's deeds and other factors, became so angered that he impulsively shot the victim. Where the facts and circumstances concerning this aggravating factor are susceptible of conclusions other than a finding of cold, calculated, premeditated murder, the evidence does not

meet the requirement of proof beyond a reasonable doubt and this aggravating circumstance is not properly found. Peavy v. State, 442 So.2d 200, 202 (Fla. 1983), citing, Harris v. State, 438 So.2d 787 (Fla. 1983); Jent v. State, supra; Williams v. State, 386 So.2d 538 (Fla. 1980); State v. Dixon, supra.

Similarly, the length of time that elapsed between the Defendant and the victim's initial interaction and the homicide, in this case, is inconsistent with the finding of a cold, calculated, premeditated homicide. This particular aggravating circumstance is applicable to those types of homicides characterized as executions or contract murders. McCray v. State, 416 So.2d 804, 807 (Fla. 1982), citing, Jent v. State, supra; Combs v. State, 403 So.2d 418 (Fla. 1981), cert. denied, 456 U.S. 984 (1982). The significant length of time under the facts of this case allowed various parties to leave the premises and return, anyone of whom could have summoned authorities and, thus, interfered with the Defendant's allegedly murderous intentions. T. 346-48, 426-27, 549. Further, during this period, a complete stranger, Johnny Williams, stopped by the scene of the homicide to smoke marijuana with the occupants of the house and left after ten (10) minutes. T. 624-30. The Defendant was armed with a firearm which was the ultimate murder weapon during this entire period. Certainly, his behavior during this period is inconsistent with a well reasoned and preconceived intention to execute the victim and, therefore, negates rather than supports the Trial Court's finding of this aggravated circumstance. Peavy v. State, supra.

Further, the use of the pillow, which was located at the premises, apparently to muffle the shots fired at the victim, is not satisfactory evidence sufficient to establish the aggravating circumstance of cold,

calculated, premeditated murder. In King v. State, 436 So.2d 50 (Fla. 1983), this Court found that a defendant's action in leaving the homicide victim unattended after inflicting a severe beating, which did not render her unconscious, going to another room, securing a pistol from its place of concealment, then returning and shooting the victim, once in the face and once in the back of the head, was insufficient to establish this aggravating circumstance. Id., at 52, 55. The use of the pillow by the Mr. Francis in this case is totally analogous to the actions of the Defendant in leaving the victim and securing a weapon from its place of concealment in King v. State, supra. Although this shows some premeditation, it is not sufficient to prove this aggravating circumstance. 436 So.2d at 55. Finally, the fact that the Defendant may have fired a third shot into the victim after discussing the disposal of the body, while indicating some premeditation, is not sufficient, under the facts of this case, to establish the heightened form of premeditation required to prove this aggravating circumstance. Preston v. State, 444 So.2d 939 (Fla. 1974); King v. State, supra.

(B)

THIS AGGRAVATING CIRCUMSTANCE WAS IMPROPERLY APPLIED RETROACTIVELY IN VIOLATION OF ARTICLE I, SECTION 10 OF THE UNITED STATES CONSTITUTION, AS WELL AS ARTICLE I, SECTION 10 OF THE CONSTITUTION OF THE STATE OF FLORIDA.

The Defendant was convicted of the murder of Titus Walters which occurred on August 17, 1975, in Monroe County, Florida. The aggravating circumstance in question, Florida Statute § 921.141(5)(i), was enacted by the Florida Legislature subsequent thereto and became effective on July 1, 1979. Laws of Florida, Chapter 79-353. The application of this aggravating circumstance to this case constitutes a violation of the prohibition against enactment of ex post facto laws by the States as provided by Article I,

Section 10 of the United States Constitution, as well as the similar provisions contained in Article I, Section 10 of the Constitution of the State of Florida. The Defendant is mindful of the fact that this issue has been resolved by this Court in Combs v. State, supra, 403 So.2d at 421, to the detriment of Defendant's position, but respectfully submits that it was wrongly decided under applicable federal and Florida law.

This Court held, in Combs v. State, supra, that the addition of Florida Statutes § 921.141(5)(i) did not add any new elements to the offense, but merely limited the use of these elements in aggravation. 403 So.2d at 421. This interpretation, it is respectfully submitted, makes no sense in light of the express language of the Statute and the construction and interpretation given the entire Statute by numerous decisions of this Court. In the seminal case of State v. Dixon, supra, this Court first passed upon the constitutionality of Florida Statute § 921.141, and held the Statute constitutional because the Statute establishes specific limited criteria which must be considered before imposing the death penalty. It was in this light that this Court determined that the new Statute met the requirements enunciated by the United States Supreme Court in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). That is, the Statute limits discretion in imposing death sentences to an absolute minimum such that ultimately, under the Statute,

> . . . the sentencing process becomes a matter of reasoned judgment rather than an exercise in discretion at all.
>
> State v. Dixon, supra, 284 So.2d at 10.

The Statute itself is crystal clear on the significance of the listed aggravating circumstances "[a]ggravating circumstances shall be limited to the following: . . ." F.S. § 921.141(5). Thus, despite this Court's reasoning in Combs, the addition of subparagrpah (i) does not limit the

consideration of the elements of a premeditated murder as an aggravating circumstance. Prior to the addition, these elements were not permissible considerations in aggravation. To hold otherwise is to construe § 921.141(5) exactly opposite to its plain meaning and to permit a jury, or a trial court, inferentially, to consider any element of a capital felony as an aggravating circumstance in addition to those listed in the Statute. Clearly, this construction would render the entire procedure for the imposition of the death penalty, under the Statute, unconstitutional under Furman v. Georgia, supra. See, Elledge v. State, 346 So.2d 998, 1003 (Fla. 1977), citing, Proffit v. Florida, 428 U.S. 242, 258, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976).

As this Court acknowledged in Combs,

> [i]f the legislature had added an entirely new factor as an aggravating circumstance, the retroactive consideration would have violated the prohibition against ex post facto laws.
>
> 403 So.2d at 421.

This is precisely what has occurred. The Statute requires that only the aggravating circumstances listed in the Statute, and not the elements of the capital felony itself, are to be considered in determining the appropriateness of the imposition of the death penalty. Therefore, this Court's reasoning in Combs, that the "elements of the specific offense charged are and must be inherently part of the circumstances taken into consideration when imposing a sentence in a capital case" is incorrect. Id., at 421.

As pointed out in State v. Dixon, supra, the Statute in question sets forth a step by step process that jurors and judges must follow in considering the imposition of the ultimate penalty:

> [i]t is necessary at the onset to bear in mind that all defendants who will face the issue of life imprisonment or death will already have been found guilty of a most serious crime, one which the Legislature has chosen to classify as capital. After his adjudication, this defendant is nevertheless provided with five steps between conviction and imposition of the death penalty -- each step providing concrete safeguards beyond those of the trial system to protect him from death where a less harsh punishment might be sufficient.
>
> * * *
>
> With the issue of guilt or innocence disposed of, the jury can then view the question of penalty as a separate and distinct issue. The fact that the defendant has committed the crime no longer determines automatically that he must die in the absence of a mercy recommendation. They must consider from the facts presented to them -- facts in addition to those necessary to prove the commission of the crime -- whether the crime was accompanied by aggravating circumstances sufficient to require death, or whether there were mitigating circumstances which require a lesser penalty.
>
> * * *
>
> Discrimination or capriciousness cannot stand where reason is required, and [written findings] is an important element added for the protection of the convicted defendant. Not only is the sentence then opened to judicial review and correction, but the trial judge is required to view the issue of life or death within the framework of rules provided by the statute.
>
> 283 So.2d at 7, 8.

Thus, the only appropriate interpretation consistent with the plain meaning of the Statute and this Court's own pronouncements, as well as the requirements of Furman v. Georgia, supra, is that only the aggravating circumstances listed in the Statute, and no other criteria, can be considered in justifying the imposition of the death penalty.

As pointed out in numerous State and Federal decisions, and as acknowledged implicitly by this Court in Combs v. State, supra, where a statutory change is applied retrospectively, that is, to events occurring before its enactment, and its effect is to the disadvantage of the offender,

it is deemed to offend the ex post facto prohibitions of the State and Federal Constitutions. Weaver v. Graham, 450 U.S. 24, 29, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981), citing, Lindsey v. Washington, 301 U.S. 397, 401, 57 S.Ct. 797, 81 L.Ed. 1182 (1937) and Calder v. Bull, 3 Dall. 386, 390, 1 L.Ed. 648 (1798); Thompson v. Utah, 170 U.S. 343, 351, 18 S.Ct. 620, 42 L.Ed. 1061 (1898); State v. Williams, 397 So.2d 663, 665 (Fla. 1981); Rodriguez v. State, 380 So.2d 1123, 1124 (Fla. 1980); Wilensky v. Fields, 267 So.2d 1, 5 (Fla. 1972); Higgenbotham v. State, 88 Fla. 26, 101 So. 233, 235 (Fla. 1924).

Courts of this State have consistently held that statutory changes affecting the nature or extent of punishment which a criminal defendant would be subject to, applied retrospectively, violate the ex post facto prohibition. Wilson v. State, 414 So.2d 512 (Fla. 1982); Bilyou v. State, 404 So.2d 744 (Fla 1981); Myles v. State, 399 So.2d 481 (Fla. 3d DCA 1981). Clearly, the application of this aggravating circumstance inured to the Defendant's disadvantage. Here, the Trial Court found three (3) aggravating circumstances in imposing the death sentence. R. 921-24; App. 1-4. Even assuming, arguendo, that the other two (2) aggravating circumstances are deemed to have been properly found, the addition of this aggravating circumstance into the Trial Court's sentencing equation prejudiced the Defendant. This is because the Trial Court found two (2) mitigating circumstances and further, the Jury recommended a life sentence. R. 804. Mikenas v. State, 367 So.2d 606, 610 (Fla. 1979); Elledge v. State, supra, 346 So.2d at 1003, citing, Miller v. State, 332 So.2d 65 (Fla. 1976) and Messer v. State, 330 So.2d 137 (Fla. 1976).

Under the strict dictates of the statutory requirements in issue, it is improper to consider circumstances not specifically listed in § 921.141(5)

as aggravating circumstances in imposing a sentence of death. Mikenas v. State, supra 367 So.2d at 610; Riley v. State, supra; Provence v. State, 337 So.2d 783, 786 (Fla. 1976), cert. denied, 431 U.S. 969 (1977). The consideration of non-statutory aggravating circumstances has no place in the reasoned judgment required by the Statute and the constitutional requirement announced in Furman v. Georgia, supra. Elledge v. State, supra, 346 So.2d at 1003, citing, State v. Dixon, supra. At the time of the homicide herein, cold, calculated, premeditated murder was not a statutory aggravating circumstance. Accordingly, this aggravating circumstance was impermissibly applied in the instant case.

ARGUMENT VI

THE TRIAL COURT ERRED IN OVERRIDING THE JURY RECOMMENDATION OF LIFE AND IMPOSING A SENTENCE OF DEATH IN THAT THERE WAS A REASONABLE BASIS FOR THE JURY'S RECOMMENDATION AND THE FACTORS SUGGESTING THE SENTENCE OF DEATH WERE NOT SO CLEAR AND CONVINCING SUCH THAT NO REASONABLE PERSONS COULD DIFFER AS TO THEIR APPLICABILITY.

Florida Statute § 921.141 provides that after a trial jury's determination of guilt of First Degree Murder, a separate sentencing hearing is held where that jury determines whether the sentence should be life imprisonment or death. The jury's recommended sentence then goes to the trial judge who has the ultimate responsibility for determining the sentence. The trial court's discretion is limited in that it must carefully consider and weigh heavily the jury's recommended sentence as the jury speaks for the community. That determination of the appropriate penalty by the community cannot be lightly disregarded. In its sentencing Order, the trial court should indicate why it is not following the advisory sentence of the jury.

> Although a jury's sentencing recommendation is only advisory, it is an integral part of the death sentencing process and cannot properly be ignored.
>
> Teffeteller v. State, 439 So.2d 840, 845 n.2 (Fla. 1983).

As this Court has stated,

> [t]he primary standard for our review of death sentences is that the recommended sentence of a jury should not be disturbed if all relevant data was considered, unless there appear strong reasons to believe that reasonable persons could not agree with the recommendation. (Citation omitted).
>
> LeDuc v. State, 365 So.2d 149, 151 (Fla. 1978), cert. denied, 444 U.S. 885 (1979).

In Swan v. State, 322 So.2d 485 (Fla. 1975), this Court reversed a sentence of death where the Jury had recommended a life sentence. The

homicide therein involved the beating death of a forty-nine (49) year old woman, in the course of a robbery and/or burglary, who was found with her hands, neck and left foot ". . . tied so that any effort she might have made to free herself could have choked her to death." Id., at 486. In reversing the Trial Court's override of the Jury's recommended sentence, this Court stated:

> [w]hile we recognize that the statute leaves the sentencing to the trial court, there is a specific duty imposed on this Court to consider the record in order to assure that the punishment accorded a criminal will meet the standards prescribed in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). Having considered the total record, we are of the opinion that there were insufficient aggravating circumstances to justify the imposition of the death penalty.
>
> Id., at 489.

In the seminal case of Tedder v. State, 322 So.2d 908 (Fla. 1975), this Court established the principle which governs all cases in which a trial court overrides a jury recommendation of life and imposes a death sentence.

> 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.
>
> Id., at 910.

This Court held that the ambush death of the Defendant's mother-in-law, did not provide sufficient reason to override the Jury's recommendation of life.

In Thompson v. State, 328 So.2d 1 (Fla. 1976), the Defendant was convicted of the stabbing death of a restaurant manager during a robbery. The Judge overrode the Jury's recommended sentence and imposed death. This Court reversed and opined that the effect of the Jury's recommendation was a finding that the mitigating circumstances indicated that death was not the proper penalty.

> This court is well aware that the recommendation of sentence by the jury is only advisory and is not binding on the trial court. However, the advisory opinion of the jury must be given serious consideration, or there would be no reason for the legislature to have placed such a requirement in the statute. It stands to reason that the trial court must express more concise and particular reasons, based on evidence which cannot be reasonably interpreted to favor mitigation, to overrule a jury's advisory opinion of life imprisonment and enter a sentence of death than to overrule an advisory opinion recommending death and enter a sentence of life imprisonment.
>
> Id., at 5.

The Court went on to remind us that ". . it was the legislative intent to extract the penalty of death for only the most aggravated and the most indefensible of crimes." Id., citing State v. Dixon, supra.

In various cases where the jury and trial court have disagreed and the trial court has overruled a jury recommendation and imposed a death sentence, this Court has expanded upon and amplified the rule of law announced in Tedder v. State, supra. Justice England's concurring opinion in Chambers v. State, 339 So.2d 204 (Fla. 1976), most succinctly summarizes the status of the evolving jurisprudence in this area.

> . . . the judge's role is primarily to insure the jury's adherence to law and to protect against a sentence resulting from passion rather than reason.
>
> * * *
>
> Where a jury and a trial judge reach contrary conclusions because the facts derive from conflicting evidence, or where they have struck a different balance between aggravating and mitigating circumstances which both have been given an opportunity to evaluate, the jury recommendation should be followed because that body has been assigned by history and statute the responsibility to discern truth and mete out justice. Given that the imposition of a death penalty "is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances, but rather a reasoned judgment . . .", both our Anglo-American jurisprudence and Florida's death penalty statute favor the judgment of jurors over that of jurists.

> On the record before us, it does not appear that the jury struck an impassioned and unreasoned balance when it recommended life imprisonment.
>
> Id., at 208-09 (England, J., concurring), quoting, State v. Dixon, supra, 283 So.2d at 10.

A comparison of the decided cases with the facts sub judice will demonstrate that this Jury's recommended sentence is reasonable and ". . . the facts suggesting a sentence of death [are not] so clear and convincing that virtually no reasonable person could differ." Tedder v. State, supra, 322 So.2d at 910.

In the following cases, this Court vacated sentences of death imposed after jury recommendations of life under the Tedder principle. Walsh v. State, 418 So.2d 1000 (Fla. 1982)[Defendant convicted of First Degree Murder, Aggravated Assault and Trespass With A Firearm for the killing of a deputy sheriff which occurred while the sheriff was responding to a complaint of trespassers firing shots on a ranch.]; McCray v. State, supra [Defendant shot victim, gunstore manager, three (3) times in the stomach after burglary of the victim's van. The Defendant, before the shooting, stated that he "didn't want to leave empty handed" and "this is for you, mother fucker."]; Jacobs v. State, 396 So.2d 713 (Fla. 1981)[Defendant convicted of two (2) counts of First Degree Murder and one (1) count of Kidnapping for the killing of a Florida Highway Patrolman and a Canadian Constable on vacation.]; Phippen v. State, 389 So.2d 991 (Fla. 1980)[Defendant killed his mother and stepfather, shooting one four (4) times and the other six (6) times, both through the left side and the back. Defendant had stated at least four (4) or five (5) times in the forty-eight (48) hours preceding the killings that he was going to, or wanted to, kill his parents.]; Brown v. State, 367 So.2d 616 (Fla. 1979)[Defendant stole victim's car to use in a bank robbery. The victim was struck and forced

into the trunk of his car, then forced into a lake and struck several times with fists and boards and then shot. Still alive, the victim was then held below the surface of the water until he drowned.]; Buckrem v. State, 355 So.2d 111 (Fla. 1978)[Defendant convicted of First Degree Murder and Assault With Intent To Commit First Degree Murder based upon a revenge shooting with a shotgun.]; Chambers v. State, supra, [Defendant beat his girlfriend so severely that she was bruised all over the head and legs, had a deep gash under her left ear, her face was unrecognizable, and had various internal injuries.]; Provence v. State, supra [Defendant killed victim by stabbing him at least eight (8) times during the negotiations and arrangement of a marijuana transaction.].

In the following cases this Court vacated death sentences imposed after jury recommendations of life upon the conclusion that there were reasonable bases for the jurys' recommendations thereby precluding the trial courts from properly overruling same. Hawkins v. State, 436 So.2d 44 (Fla. 1983)[Defendant convicted of two (2) counts of First Degree Murder, one (1) count of Robbery and two (2) counts of Burglary, for the killing of two (2) persons in their house by multiple gunshot wounds to the head and body.]; Gilvin v. State, 418 So.2d 996 (Fla. 1982)[Defendant convicted of the First Degree Murder of an Episcopal Priest who had made homosexual advances towards the Defendant. The victim had sustained at least fifteen (15) blows to the head, five (5) of which were large, including some inflicted through the use of a claw hammer. The evidence showed that the major blows were inflicted while the victim laid face down.]. This Court noted that the Jury could have based its life recommendation on nonstatutory mitigating factors which the Trial Court was not necessarily compelled to find. Id., at 999. Goodwin v. State, 405 So.2d 170 (Fla. 1981)[Three (3) victims who happened

upon a location where a marijuana smuggling operation was taking place were tied-up and held for a substantial period of time and later killed]; McKennon v. State, 403 So.2d 389 (Fla. 1981)[Defendant killed his employer by beating her head against the floor and wall, strangling her, slicing her throat, breaking ten (10) of her ribs and stabbing her.]; Stokes v. State, 403 So.2d 377 (Fla. 1981)[Defendant convicted of two (2) counts of First Degree Murder for the brutal and senseless beating of two (2) members of a rival motorcycle gang.]; Welty v. State, 402 So.2d 1159 (Fla. 1981)[Victim killed in his bedroom by being struck eight (8) or nine (9) times and then having his bed and pillows set afire. The victim had a larynx fractured by repeated blows, a hyoid fractured in two (2) areas and extensive hemorraghing caused by manual strangulation.]. This Court found that nonstatutory mitigating factors could have influenced the Jury to return the life recommendation. Id., at 1164. Barfield v. State, 402 So.2d 377 (Fla. 1981)[Defendant procured individuals to commit a murder, suggested an appropriate location for the murder and was to share in the proceeds of a Four Hundred Thousand ($400,000.00) Dollar insurance policy on the victim's life.]; Williams v. State, supra, 386 So.2d at 539 [Defendant convicted of First Degree Murder and Attempted First Degree Murder for the shooting of two (2) individuals while they slept in their apartment.]. Despite the fact that there was one (1) aggravating circumstance and no mitigating circumstance present, this Court held that the Jury recommendation should still have been followed because,

> [a]lthough a sentence of death is normally presumed in this situation, (citation omitted), the jury's recommendation of life imprisonment militates against such a presumption.
>
> 386 So.2d at 543.

Neary v. State, 384 So.2d 881 (Fla. 1980)[Defendant convicted of First Degree Murder, Robbery, Burglary and Sexual Battery of a sixty-six (66) year old woman who was found half clothed, raped and strangled with certain diamond rings missing from her trailer.]; Malloy v. State, 382 So.2d 1190 (Fla. 1979)[Victims forced to stand in their bathtub at gunpoint while their apartment was burglarized. The Defendant then placed heavy tape over the eyes and mouths of the victims, covered their heads with pillow cases, transported them to a nearby factory where each was led separately from the car and shot them each once in the head. Prior to the shooting, the Defendant had stated that "one of the victims knew him and had to be killed, dead men tell no tales."].

This Court has often stated that the jury recommendation is the conscience of the community, must be weighed heavily and should be followed unless there are compelling reasons not to. Washington v. State, 432 So.2d 44 (Fla. 1983)[Deputy Sheriff killed by four (4) shots fired by the Defendant when the Sheriff was investigating the Defendant's attempt to sell stolen guns.]; McCampbell v. State, 421 So.2d 1072 (Fla. 1982)[Defendant, during a robbery, killed a security guard by shooting him in the back of the head while the security guard was squatting down.]; Odom v. State, 403 So.2d 936 (Fla. 1981), cert. denied, 456 U.S. 925 (1982)[Victim killed in his bed by a shot through his bedroom window.]; McCaskill v. State, 344 So.2d 1276 (Fla. 1977)[Victim killed by shotgun blast during the escape from the robbery of a liquor store.].

A trial judge who overrules a jury recommendation of life should state the reasons or justification for this override. Where the reasons or justifications are not stated or discernable from the record, the decision to override must be reversed. Norris v. State, 429 So.2d 688 (Fla.

1983)[Defendant killed a ninety-seven (97) year old woman during the burglary of the residence that the woman occupied with her seventy (70) year old daughter. Both women were beaten, the house was ransacked and money and jewelry were stolen.]; Smith v. State, 403 So.2d 933 (Fla. 1981)[Defendant, a motorcycle gang enforcer, beat and stabbed to death a woman who needed to be "trained" because of her friendship with Blacks. The Defendant stated that the woman had to be killed because she was a witness and it was improper to "run a sloppy act".]. In vacating the death sentence, this Court stated,

> [t]he trial judge did not articulate any reason for rejecting the jury's recommendation of a life sentence. The record does not show that he had any more information than the jury did; the trial judge did not demonstrate how reasonable men would not differ on the matter of sentencing. Whatever his rationale, we are unable to discern a basis which would be sufficient to reject a life-sentence recommendation.
>
> It is the final responsibility of the trial judge to pass sentence, but his sentencing to death is restricted in the light of a jury's recommendation of life.
>
> Id., at 935.

Burch v. State, 343 So.2d 831 (Fla. 1977)[Defendant attempted to rape and then stabbed to death a young woman who was found with thirty-five (35) or thirty-six (36) puncture wounds to her badly decomposed body.].

Where, as in the instant case, there is no indication that the jury was mislead; or has made its recommendation because of an emotional appeal of defense counsel; or the trial judge did not base his decision on new information, unavailable to the jury at sentencing, which would justify his divergence from the jury's recommendation; the decision to override cannot be sustained. Herzog v. State, supra [Defendant killed his paramour by strangling her to death with a telephone cord.]; Richardson v. State, 437 So.2d 1091 (Fla. 1983)[Victim found dead in his house from massive head

injuries with multiple fractures, caused by a large instrument wielded with great force and other wounds, caused by a cutting instrument of some kind. Signs of forced entry into the house and a great deal of blood spattered on the walls and floor.]. This Court will not allow any "denegration" of the jury's role in the sentencing process. Id., at 1095. Cannady v. State, 427 So.2d 723 (Fla. 1983) [Victim, a minister, was robbed, kidnapped and driven to a remote wooded area where he was shot five (5) times.]. There was no specific finding by the Trial Judge that the Jury had based its recommendation of a life sentence upon emotional sympathy, rather than on the proven mitigating circumstances. Id., at 732. Cf., McKennon v. State, supra.

The foregoing review of pertinent decisions of this Court, when applied to the facts of this case, points to the inescapable conclusion that there was a reasonable basis for the Jury's advisory sentence of life imprisonment. Accordingly, the Trial Court erred in overruling this recommended sentence. The Jury could have reasonably concluded that the homicide was committed out of revenge for the beating of Opal Lee and Charlene Duncan and not for the purpose of eliminating a confidential informant. The Jury could have reasonably concluded that because this was a revenge killing, the Defendant did not commit this crime in a cold, calculated and premeditated manner without any moral or legal pretense or justification. Rather, the Defendant merely intended to scare the victim, as he had done to the girls, and got caught up in the rage of the situation and committed the homicide. The Jury could have reasonably concluded that the victim was not aware of his impending death because the evidence established that any statements concerning the needles, Drano, or pillows were not made in his presence. Therefore, the homicide was not especially

wicked, evil, atrocious and cruel. Additionally, the Jury could have reasonably questioned the credibility of the State's witnesses. This is especially true as to Elmer Wesley, Arnold Moore and Charlene Duncan. For example, the Jury knew that Charlene Duncan, a co-participant, was receiving some benefit for her testimony, although it was never fully and accurately informed of the extent of that benefit. See, Argument II, supra. Further, there was non-statutory mitigating evidence presented concerning the Defendant's good record while in prison and his valuable assistance to prison guards, which prevented injury to them and other inmates. All of these are reasonable bases for the Jury to have concluded that death was not the appropriate sentence for this crime.

The Trial Court did not find that the Jury's recommended sentence was based on any emotional appeal by the Defendant's Attorney. See, White v State, supra, 403 So.2d at 340. Further, the Trial Court did not find, nor did the record indicate, that it had considered any information not known to the Jury. Finally, the Sentencing Order makes no findings as to why the Trial Court disregarded the Jury's recommendation. Clearly, the fact that the Trial Court and the Jury, in evaluating the same facts and circumstances, came to two (2) different conclusions, without any improper factors affecting either, illustrates that reasonable persons could differ as to the appropriateness of the death sentence in this case. Accordingly, the standard of Tedder is not met and the Jury's recommended sentence, as it represents the conscience of the community, must be followed. McCaskill v. State, supra.

In Argument VII, infra, the Defendant presents additional arguments which he submits persuaded the Trial Judge to overrule the Jury's recommendation. As is pointed out, infra, those considerations were

improper. To allow the Jury's recommended sentence, under the facts and circumstances of this case, to be disregarded, is to make a mockery of Florida's trifurcated sentencing process. If the Jury's recommendation means nothing in this case, there will never be a case presented where it has significance. The community has spoken and spoken reasonably when the Jury stated that Bobby Marion Francis should live. Thus, there is no reason that he should die.

ARGUMENT VII

THE TRIAL COURT UNCONSTITUTIONALLY SENTENCED THE DEFENDANT TO DEATH IN THAT SAID SENTENCE WAS IMPOSED AS A PENALTY FOR THE DEFENDANT'S EXERCISE OF HIS CONSTITUTIONAL RIGHTS AND REJECTION OF THE TRIAL COURT'S PLEA OFFER OF LIFE IMPRISONMENT.

The Fifth Amendment to the United States Constitution provides the right against compulsory self-incrimination. The Sixth Amendment to the United States Constitution provides the right to a jury trial. Basic notions of due process and fundamental fairness require that defendants be allowed to freely exercise these rights. Any action by a legislative or judicial body whose purpose or effect is to chill the free assertion of constitutional rights, by penalizing those who choose to exercise them, would be patently unconstitutional. United States v. Jackson, 390 U.S. 570, 581, 88 S.Ct. 1209, 1216, 10 L.Ed.2d 138 (1968).

> No matter how heinous the offense charged, how overwhelming the proof of guilt may appear, or how hopeless the defense, a defendant's right to continue with his trial may not be violated. His constitutional right to require the Government to proceed to a conclusion of the trial and to establish guilt by independent evidence should not be exercised under the shadow of a penalty -- that if he persists in the assertion of his right and is found guilty, he faces, in the view of the Trial Court's announced intention, a maximum sentence, and if he pleads guilty, there is the prospect of a substantially reduced term. To impose upon a defendant such alternatives amounts to coercion as a matter of law.
>
> United States v. Tateo, 214 F. Supp. 560, 567 (S.D.N.Y. 1963).

In reviewing cases in which it is alleged that certain conduct had a chilling effect on the exercise of constitutional rights,

> [t]he question is not whether the chilling effect is "incidental" rather than intentional; the question is whether that effect is unnecessary and therefore excessive.

United States v. Jackson, supra, 390 U.S. at 582, 88 S.Ct. at 1216.

Sentencing is perhaps the greatest of all powers given to a trial court. Accordingly, it is fundamentally unfair to permit a trial court to use this great power to coerce a defendant into making an unfree choice. North Carolina v. Pearce, 395 U.S. 711, 724, 89 S.Ct. 2072, 2080, 23 L.Ed.2d 656 (1969). It is for that reason that appellate courts have held that ". . . a trial court may not impose a greater sentence on a defendant because such defendant avails himself of his constitutional right to a trial by jury." (Citations omitted). Gallucci v. State, 371 So.2d 148, 150 (Fla. 1st DCA 1979), cert. denied, 383 So.2d 1194 (Fla. 1980). Nor can a trial court impose an additional penalty, in the form of a harsher sentence, on a defendant who refuses to admit his guilt even after he has been convicted. Thomas v. United States, 368 F.2d 941, 942 (5th Cir. 1966). Further, it is impermissible for a trial court to adjudicate a juvenile delinquent because the juvenile insisted on asserting his Fifth Amendment right to remain silent and to plead not guilty. R.A.B. v. State, 399 So.2d 16, 18 (Fla. 3d DCA 1981). See also, Scott v. United States, 136 U.S.App.D.C. 377, 419 F.2d 64 (1969); McEachern v. State, 388 So.2d 244, 248 (Fla. 5th DCA 1980).

In United States v. Jackson, supra, the Supreme Court held a statute which provided for the death penalty only if recommended by the jury unconstitutional because only those defendants who exercised their right to contest their guilt before a jury faced the imposition of death. The statute had the impermissible effect of discouraging the assertion of the Sixth Amendment right to demand trial by jury and the Fifth Amendment right not to incriminate oneself and to plead not guilty. Id., 390 U.S. at 581, 88 S.Ct. at 1216. The Court went on to state that, ". . . the evil in the federal statute is not that it necessarily coerces guilty pleas and jury

waivers but simply that it needlessly encourages them." 390 U.S. at 583, 88 S.Ct. at 1217 (emphasis in original). Similarly, in United States v. Tateo, supra, the Defendant's guilty plea was set aside because it had been entered after the Defendant was informed by the Court that if he were found guilty by the jury he would receive a life sentence plus consecutive sentences as opposed to the Court's plea offer of twenty-two and one-half (22 1/2) years.

In Fraley v. State, 426 So.2d 983 (Fla. 3d DCA 1983), the Court vacated a sentence of twenty-five (25) years imprisonment upon a holding that the sentence was presumptively unlawful. Id., 426 So.2d at 986. The Trial Court had made an offer to the Defendant of six (6) years incarceration in exchange for a guilty plea, which was rejected. After all the evidence was presented to the Jury, the offer was repeated and again rejected. The Jury returned a verdict of guilty and the Trial Court entered the twenty-five (25) year sentence. The District Court of Appeal stated,

> [w]hen a trial judge imposes a sentence upon a defendant after trial, which is more severe than the plea offer made by the court after it has heard all the evidence, the reasons for the more severe sentence must affirmatively appear in the record so as to assure the absence of vindictiveness.
>
> Id., at 985.

Similarly, in Gillman v. State, 373 So.2d 935 (Fla. 2d DCA 1979), quashed on other grounds sub nom State v. Gillman, 390 So.2d 62 (Fla. 1980), the District Court of Appeal reversed a sentence imposed by the Trial Court because it appeared that the Defendant's choice of plea was unconstitutionally considered in sentencing. The Trial Court indicated that it would have been more lenient with the Defendant if he had acknowledged his responsibility and pled guilty as opposed to requiring a jury trial. Id., 373 So.2d at 938.

In the instant case, the Trial Court had, on numerous occasions before

the trial began, made a plea offer to the Defendant that if he would plead guilty to a charge of First Degree Murder, the Court would impose a sentence of life imprisonment and not the death penalty. App. 13-17. All these offers were rejected by the Defendant. After all of the evidence had been presented and the Court was informed that the Jury had reached a verdict concerning the guilt or innocence of the Defendant, the Trial Court repeated the same offer through counsel. Specifically, if the Defendant would plead guilty to First Degree Murder and not receive the Jury's verdict, the Court would not impose the death sentence. App. 13-17. This is reflected in the transcript of March 28, 1983:

> (Thereupon, there was a recess until 7:10 p.m., after which time the following proceedings were had in open court:)
>
> THE COURT: We have a verdict.
>
> Mr. Zenobi, would you like to confer with your client for a few minutes before the jury announces their verdict?
>
> MR. ZENOBI: Yes.
>
> THE COURT: Nothing to announce?
>
> MR. ZENOBI: I don't understand.
>
> THE COURT: Nothing to announce?
> No motions to make or anything?
>
> MR. ZENOBI: I would renew my motions.
>
> THE COURT: No.
> I mean other than that?
>
> MR. ZENOBI: Nothing.
>
> THE COURT: All right.
> Bring the jury in, Mr. Spell [Baliff].
> Okay.
> Bring the jury in.
>
> (Thereupon, at 7:10 p.m., the jury returned to the courtroom with their verdict, after which time the following proceedings were had in open court:)

* * *

T. 1228-29; App. 18-19.

Thereafter, the Jury's verdict of guilty was received and the penalty proceedings began the next day. At the penalty proceedings, the State presented no evidence other than asking the Trial Court to take judicial notice of the trial testimony and of the Defendant's one (1) prior conviction. R. 804; T. 1250-51. The Trial Court was already aware of this prior conviction. T. 721. The penalty phase continued with the Defendant presenting evidence in mitigation. R. 804; T. 1252-60. Thereafter, the Jury returned a recommended sentence of life imprisonment. R. 804; T. 1291.[4/]

It is clear, therefore, that when the Trial Court reiterated its plea offer to the Defendant of life rather than death, it was possessed of the same knowledge of the facts and circumstances concerning this offense as it was when it made its decision to override the jury recommendation and impose a sentence of death on the Defendant.[5/] Therefore, logic dictates that

---

[4/] The Defendant had moved to return this matter to the Trial Court to have an evidentiary hearing in order to fully develop the record concerning this particular point. App. 5-12. However, in light of the State's Response, which accepts the allegations in the Defendant's Motion To Relinquish Jurisdiction as true, the Defendant submits that the State has stipulated that no further evidentiary hearing is necessary. App. 20-22. Therefore, the State has deposited the issue before this Court, as a question of law, which can be decided without further evidentiary hearing. This Court denied said Motion. In the event that this Court believes that a further evidentiary hearing is necessary, however, the Defendant stands ready to renew his Motion To Relinquish Jurisdiction for purposes of that hearing.

[5/] Significantly, the record shows that at the time the Trial Court made its decision to override the Jury's recommended sentence, it knew of more favorable information concerning the Defendant than when the Trial Court renewed its plea offer of life. Specifically, the only additional information presented after the renewed plea offer was the uncontradicted testimony concerning the Defendant's conduct while in custody, where he had been instrumental in maintaining order and preventing injury in the jail.

the death sentence is presumptively unlawful in that it is ". . . more severe than the plea offer made by the court after it [had] heard all the evidence, . . ." Fraley v. State, supra, 426 So.2d at 985.

The Defendant submits that in a case such as this, where the disparity in sentence between the plea offer and the sentence actually imposed is the difference between life and death, the Trial Court's action in imposing death must be subject to the closest scrutiny. Lockett v. Ohio, supra; Coppedge v. United States, 369 U.S. 438, 82 S.Ct. 917, 8 L.Ed.2d 21 (1962); Proffit v. Wainwright, supra. It is therefore encumbent upon this Court to assure the absence of vindictiveness from the sentence imposed. This Court must be convinced, beyond a reasonable doubt, that the Trial Court did not penalize the Defendant's exercise of his constitutional rights. United States v. Jackson, supra. As was shown previously in Argument VI, supra, the Trial Court impermissibly overrode the Jury's recommendation of life in this case. The Defendant submits that the reason for this impermissible override was the Trial Court's desire to punish the Defendant, through the imposition of the ultimate penalty, for the exercise of his constitutional rights. Civilized society cannot tolerate this. Due process demands that, at the very least, the death sentence be vacated. Moreover, fundamental fairness dictates that he never again face the death penalty and that any punishment at a new trial be limited to life imprisonment.

(Footnote continued) T. 1252-60. Interestingly, the Trial Court, in its Sentencing Order, acknowledged this information and indicated that it had considered same. R. 923; App. 3.

CONCLUSION

Based upon the foregoing reasons, authorities, facts and argument, the Defendant submits that the Judgment and Sentence be reversed and either (1) the Defendant be discharged, or (2) this cause be remanded for a new trial with instructions that the maximum penalty which can be imposed upon the Defendant in the event of a conviction is life imprisonment, or (3) this cause be remanded for a new trial. In the alternative, that the sentence of death be vacated and this cause be remanded with instructions that a sentence of life imprisonment be imposed.

Respectfully submitted,

GITLITZ, KEEGAN & DITTMAR, P.A.
Suite 807, Biscayne Building
19 West Flagler Street
Miami, Florida 33130
(305) 374-1600

By: _____
STUART H. GITLITZ

BY: _____
JAMES D. KEEGAN
Special Assistant Public Defenders

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to Richard E. Doran, Esq., Assistant Attorney General, 401 N.W. Second Avenue, Miami, Florida 33128 this 1st day of June, 1984.

By: _____
STUART H. GITLITZ
Special Assistant Public Defender