IN THE FLORIDA SUPREME COURT

KENNETH MICHAEL GARDNER, :

Appellant, :

vs. : Case No. 64,541

STATE OF FLORIDA, :

Appellee. :

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APPEAL FROM THE CIRCUIT COURT
IN AND FOR PINELLAS COUNTY
STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

JERRY HILL
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TENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

On March 23, 1983, Joseph Holda's body was found in the paint department of Polk's Hardware Store in Clearwater, where he had worked for about 35 years. (R1698,1702,1707) Holda was 72 years old. (R38) He had been stabbed and cut a number of times, primarily in the chest area, but also in the abdomen and neck. (R2563,2566-2567) He had defensive wounds on both hands. (R2567) He died from stab wounds to the chest, which injured the heart and lungs. (R2576-2577) The cutting wounds to Holda's neck and abdomen were inflicted after his death. (R2569-2570)

A back pocket of Holda's trousers was pulled out, and there was no wallet to be found. (R2284)

Until April 22, 1983 the police did not have any solid leads as to who committed the crimes at the hardware store. On that day they came into contact with Larry Hadley. (R949,2305-2306) Pursuant to their discussions with Hadley the police placed an electronic listening device on Hadley and accompanied him to look for the Appellant, Kenneth Michael Gardner. (R2830-2832) They found Gardner at Angel's Bar. (R2832) Following his instructions from the police Hadley persuaded Gardner to come outside the bar, where he engaged Gardner in an incriminating conversation concerning the murder at Polk's Hardware, which conversation was tape-recorded by the police. (R2830-2839,2932-2935) Gardner was thereafter arrested inside the bar, frisked, and transported to the police

station. (R2307-2310,2321-2322) At no time did he resist or attempt to flee. (R2361,2416)

On May 24, 1983 a Pinellas County grand jury returned an indictment charging Ken Gardner with murder in the first degree and robbery. (R16-17) The first count alleged that he committed the premeditated murder of Joseph Holda by stabbing him with a knife. (R16) Count two alleged that he robbed Holda of his wallet and its contents and carried a deadly weapon (a knife) in the course of committing the robbery. (R16)

The night he was arrested Ken Gardner made statements to the police which were the subject of a pretrial motion to suppress (R226) that was heard on October 4, 1983 by the Honorable Gerard O'Brien.[1/] (R948-1035) Detective Richard McManus of the Clearwater Police Department was the sole witness to testify at the suppression hearing. (R948-1022) He testified that the police did not have a warrant to arrest Ken Gardner. (R985) Gardner was not told at the arrest scene why he was being arrested. (R952) He was taken to the Clearwater Police Department rather than being booked into the Pinellas County Jail so that the police could question him and complete a booking advisory sheet. (R984-986) McManus told Gardner he was under arrest for homicide when Gardner was taken to the interview room at the police station. (R954,956)

[1/] In at least one place in the record (R871) on appeal the judge is incorrectly referred to as Gerald O'Brien.

At approximately 10:40 p.m., McManus read Gardner his Miranda rights from a card issued by the state attorney's office. (R956,957-958) McManus testified that no promises were made to Gardner prior to questioning, nor did anyone threaten or coerce him. (R958) McManus opined that Gardner had been drinking, but was not drunk at the time of the interview. (R959-960) However, his eyes were bloodshot, a condition which could have been caused by drinking alcohol. (R1020)

Gardner initially told McManus that he, Larry Hadley, Tony Capers, and Debra Tyler had gone into Polk's Hardware Store where Capers grabbed the victim and forced him to the ground, and Hadley stabbed him. (R960) He then changed his story and told the police that Hadley waited in the car when the other three went into the store, and it was Capers who stabbed the old man. (R961) Gardner said Capers had been in the store a few days before, and it was his idea to rob the man. (R961-962)

Although the police more often tape-recorded statements, Gardner then gave a statement that was typed at his request. (R961-963) In the typed statement Gardner said Tony Capers grabbed the victim around the neck and Larry Hadley stabbed him while Debra Tyler held the victim's feet and shouted, "Kill him, kill him." (R25) Hadley had said they were not going to leave any witnesses. (R25)

During the interview Gardner more than once indicated he wanted medical attention because he was "going into the

D.T.'s." (R1003-1004) He did not receive medical attention, nor was he given anything to eat or drink. (R1011-1012)

On cross-examination defense counsel asked McManus whether anything came up during the interview as to Kenneth Gardner having been threatened. (R1006) The State objected on relevancy grounds. (R1006-1007) Counsel for Gardner pointed out that in his typed statement Gardner said he had been threatened by Larry Hadley. (R1009) The court sustained the State's objection, expressing his view that the threats by Hadley had nothing to do with the voluntariness of Gardner's confession to the police. (R1010-1011)

After hearing the testimony of Detective McManus and argument of counsel, the court denied Gardner's motion to suppress. (R310,1031-1034)

Gardner filed various other pretrial motions, including a Motion for Sequestered Voir Dire, Proper Death Qualifying Question, and Specific Jury Instructions (R322-323), a Motion for Sanctions or in the Alternative Motion in Limine (R247-248), and separate motions for sanctions and in limine (R244-246,241-243), all of which were heard by Judge O'Brien on October 4, 1983. (R872-948) The Motion for Sanctions or in the Alternative Motion in Limine dealt with the fact that defense counsel had attempted to depose Larry Hadley on approximately seven occasions and each time Hadley failed and refused to appear. The remedy Gardner sought in the motion was the exclusion of any testimony or evidence, direct or indirect, relating to Larry Hadley.

As of September 26, 1983, the final time counsel for Gardner attempted to depose him, Hadley's mental condition had deteriorated so that he was not competent to testify. (R876-877) Counsel argued that Hadley had been in the custody of the State for many months in the Pinellas County Jail and so the prosecutor should have been aware of his mental condition, especially in view of the fact that in 1977 Hadley had been found not guilty by reason of insanity on an arson charge in Pinellas County Circuit Court. (R881-883)

The prosecutor acknowledged that Hadley had failed to appear the first three times his deposition was set. (R879) The first two times he was legitimately subpoenaed. (R881) The third time he had moved, and the State had not given defense counsel the correct address. (R881) The fourth through the seventh time the deposition was attempted,"it was merely an accommodation of all parties" that caused the deposition not to be taken. (R879)[2/]

The court in effect denied the motion, but took it under advisement to the extent that he might reconsider if Hadley did "show up as a witness for the State." (R885-886)

The Motion in Limine and Motion for Sanctions both dealt with a discovery violation by the State, to-wit: failure

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[2/] One of the unsuccessful attempts by defense counsel to depose Larry Hadley occurred on September 21, 1983. This attempt precipitated a hearing before Judge Susan F. Schaeffer. Because no transcript of this hearing was available for inclusion in the record on appeal, this Court relinquished partial jurisdiction to the circuit court for 30 days for the purpose of reconstructing the record as to what occurred at the September 21 hearing. (R3162-3163) A transcript of the hearing at which the record was reconstructed appears at pages 3165-3181 of the record that is now before the Court.

to notify defense counsel of the names of witnesses Tony Capers and Debra Tyler until late afternoon on Friday, September 30, 1983 for the trial that was to begin on Tuesday, October 4. (R241-246,886-891) The motions sought to exclude from Gardner's trial any testimony from either Capers or Tyler. Defense counsel noted at the hearing on these motions that he had not been advised by the State until that very morning that Tony Capers was actually going to be called as a witness against Ken Gardner at trial. (R889) Counsel said he had deposed Capers that morning (October 4) at the direction of the court, and needed time to prepare to cross-examine Capers and to develop leads that were revealed during the deposition. (R899-906,921-946) He also argued that the entire defense strategy would be altered if Capers were to testify against Gardner. (R899-906, 921-946) The court denied the motions. (R937) He continued the trial for one week, until October 11, at the suggestion of the prosecutor. (R944-948)

On October 11 the court and counsel discussed the number of peremptory challenges each side would have. (R1101-1108) Gardner argued that he should have 16 or 20, as he was charged in a two-count indictment with first-degree murder and robbery. (R1101-1102) The court ruled that each side would have 10 challenges, but that he would probably allow six additional challenges per side if they were warranted. (R1106-1108)

Also on October 11 the court heard a Motion to Suppress Tangible Evidence filed by Gardner. (R277-280,1108-1187) Among other things, the motion sought suppression of the testi-

mony of Tony Capers, suppression of statements made by Gardner while in custody, suppression of physical evidence (including Gardner's tennis shoes) obtained as a result of in-custody statements of Gardner, and suppression of the wire-intercepted communication of April 22, 1983 between Gardner and Larry Hadley. (R277)

Larry Hadley's attorney, Douglas Prior, was called as a witness at the suppression hearing. (R1108-1120) Prior testified that he had seen Hadley's mental condition deteriorate to the point that he was incompetent to stand trial. (R1111-1118)

Defense counsel argued for suppression of the evidence because he had not been permitted to depose Larry Hadley through the State's fault, and all evidence against Gardner flowed from the "body bug" Hadley wore when he spoke with Gardner outside Angel's Bar. (R1125-1145) He also argued that the authorities had failed to comply with Florida Rule of Criminal Procedure 3.111 when they arrested Gardner. The court denied the motion. (R1172)

After pretrial hearings were completed on October 11, defense counsel stated he was not ready for trial for several reasons (R1213-1223): (1) He had not been able to depose Larry Hadley. (2) Tony Capers and Debra Tyler had been listed by the State as witnesses at the last minute. (3) He did not receive the transcript of Tony Capers' deposition until October 10, the day before trial was to begin, and had not had an adequate opportunity to review it in order to prepare to cross-

examine Capers. (4) Capers' deposition produced the names of five witnesses, only one of which defense counsel had been able to depose. (5) The State had waited until October 10 to provide defense counsel with the name of Evelyn Seltzer, a witness to Gardner's sobriety on the night of his arrest. (6) The State intended to use a scale diagram of the hardware store which defense counsel had not seen.

Court recessed until the next day, October 12. (R1226)

When court resumed further argument was held on the admissibility of evidence derived from the body bug worn by Larry Hadley. (R1228-1242) The court preliminarily denied Gardner's motion to suppress this evidence, without prejudice to renew it later. (R1241-1242)

The process of jury selection then began.

During questioning of prospective juror Truong, the prosecutor asked whether she had any problems listening to the testimony of a co-defendant, to which she answered, "No." (R1391) He then asked:

> Okay, there are a lot of people that just say I can't believe the testimony of a co-perpetrator or somebody else involved in the crime under any circumstances. That is why I asked this question. The bottom line here today is can you sit there and listen to this person and evaluate this testimony under the same rules of law as every other witness that takes the stand?

(R1391-1392) Gardner objected to this question and moved for a mistrial[3/] on grounds it was an incorrect statement of the

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[3/] This was one of 15 motions for mistrial Gardner made (R1295-1296,1392-1395,1482-1486,1687-1692,1770-1776,1890-1891,1908-1911, 1984-2001,2089-2091,2155-2158,2290-2294,2363-2365,2602-2608, 2786-2787,2839-2841).

law. (R1392-1395) The court refused to grant a mistrial and denied Gardner's request that he instruct the jury regarding testimony of accomplices. (R1394-1395) The court did, however, ask the prosecutor to rephrase his question. (R1395) Counsel for the State then asked (R1395):

> Miss Truong, that question was phrased very awkwardly and probably incorrectly. What I'm asking you is the Judge will give you the law at the end of the trial which, you know by now, there is law that applies to a co-perpetrator. Can you follow that law?

Truong responded in the affirmative. (R1395)

The State later exercised one of its peremptory challenges to excuse Truong from the jury. (R1571)

Gardner challenged three prospective jurors for cause: Lombardo, Bedard, and Eversole. Each challenge was denied, and counsel for Gardner exercised peremptory challenges to excuse these jurors. (R1459-1461,1482-1486,1564-1565) The challenge to Lombardo was Gardner's tenth peremptory. (R1565) He requested additional peremptories, pursuant to the court's pretrial ruling, as he wished to challege jurors Briles and Furgerson. (R1565-1582) The court denied additional peremptories, but later said he would consider the matter overnight. (R1581-1582, 1586) The next morning the court expressed satisfaction with the jury and adhered to his decision to refuse to allow additional peremptory challenges. (R1594)

Trial testimony began on October 13 with Joseph Holda's widow, Carrie Holda. (R1697) Her husband was fine when she telephoned the hardware store at about 11:00 a.m. on

March 23. (R1699) When she called later, at about 3:30 p.m., someone else answered the phone. (R1699)

Lester Stewart testified that he was manager of an apartment complex in March of 1983. (R1710) He was in the habit of going into Polk's Hardware Store three to five times a day. (R1711) On March 23 he went there about five times. (R1711-1712) He noticed nothing unusual when he visited the store at 9:00 a.m. and 11:30 a.m. (R1712) At 2:30 in the afternoon when he went into the store, Stewart did not see the proprietor. (R1713) He went back across the street to the apartment complex, but soon returned to the hardware store. (R1713) He still did not see Holda. (R1713) Stewart went back across the street, but returned to the store again because he was concerned about Holda. (R1713) He looked around and saw Holda lying in the paint department. (R1713) Stewart walked out the door and went back to work. (R1715) He returned to the store later, when an ambulance arrived. (R1715) Stewart spoke with the police and told them he had been in the store, but did not mention seeing the body because he was too scared. (R1715) Also, Stewart was on probation for checks he had written seven years ago, and he did not want any trouble. (R1716) Stewart did finally admit to the police that he had seen Holda's body, the third time he talked to them. (R1715,1723)

Stewart usually carried a pocket knife, which he gave to the police when they asked for it. (R1719)

In mid-afternoon on the day Holda died, a black man whom Stewart had never seen before approached him to inquire

if there was an apartment for rent. (R1716) During his fifth visit to the police station Stewart was shown about six photographs from which he selected one as depicting the black man he saw on March 23. (R1732-1734)

During the testimony of Richard Vellucci, a paramedic for the City of Clearwater, Gardner made another motion for mistrial. (R1770-1776) The motion was based on the court commenting on the evidence, and was denied. (R1770-1776)

Kevin Noppinger testified as an expert witness in the field of forensic serology. (R1799-1886) He examined certain items for the presence of blood. (R1812) His visual inspection and chemical test failed to reveal the presence of blood on State Exhibit Number Five, which was the knife the police seized from Lester Stewart. (R1816-1819)

Noppinger also examined scrapings taken from a display counter and shelf in Polk's Hardware Store, and from the floor beside Holda's body and underneath his body. (R1821-1823) Gardner objected to any testimony concerning these scrapings, as the State had not advised him as part of discovery that Noppinger would be providing such testimony. (R1823-1854) A recess was taken and defense counsel took a quick deposition of the witness and received copies of various documents from his file. (R1850) His continuing objection to Noppinger's testimony was overruled. (R1853-1854)

Noppinger testified that the blood scrapings were consistent with the sample of blood he had from Joseph Holda, which was Type A blood. (R1857-1866)

Noppinger also examined a pair of shoes, State Exhibit Number Seven, for the presence of blood. (R1869) He found Type A blood on the right shoe and no blood on the left shoe. (R1870-1874)

Detective Ronald Luchan of the Clearwater Police Department identified State Exhibit Number Seven as a pair of white tennis shoes he took from Gardner on April 22, 1983. (R1929-1930)

James Ford, an identification technician with the Clearwater Police Department, testified as an expert in fingerprint identification. (R2008,2016) Ford examined a number of latent fingerprints lifted from Polk's Hardware Store. (R2023, 2027,2030-2031) He did not find the fingerprints of Gardner, Debra Tyler, Tony Capers, or Larry Hadley in the store. (R2019) He was able to identify only three fingerprints as belonging to particular individuals: two prints on the front door belonged to Lester Stewart, and the third belonged to Richard Wilkie, who found Holda's body and called an ambulance. (R1702-1703,2026,2029)

When trial resumed on October 14 Gardner renewed his objections to Tony Capers' testimony. (R2053-2055)

Gardner asked the court to read Florida Standard Jury Instruction 2.04(b), on testimony of an accomplice, before Capers testified, but he refused. (R2074-2075)

Capers testified that he had entered a guilty plea to charges of first-degree murder and robbery. (R2076-2077) He had been promised that the death penalty would be waived in return for his in-court testimony, but had not been made any other promises. (R2077)

Capers had known Gardner since February. (R2078) They had worked together at the Lemon Tree Restaurant. (R2077)

Gardner, Capers, and Debra Tyler lived with Larry Hadley at Hadley's house in Clearwater from March 22 until April 1. (R2079-2080)

Capers had gone to Polk's Hardware Store several weeks before the episode involving Holda to have a key made. (R2080-2081)

On the morning of March 23, 1983 Capers bought two six-packs of beer and some extra potent marijuana called sensama. (R2081-2082,2158,2165-2166) He brought the beer and marijuana back to Hadley's house where he rolled 13 "joints". (R2160) Capers shared the beer and marijuana with the others. (R2082) Gardner smoked one or two marijuana cigarettes and drank three and one-half beers. (R2083) Capers had never before seen Gardner smoke a marijuana cigarette. (R2170)

The four people then drove to Tarpon Springs in a car Larry Hadley borrowed from his neighbor. (R2083) They stayed in Tarpon Springs for a few hours, where they bought two or three more quarts of beer, which they shared. (R2088) They smoked the rest of the sensama marijuana. (R2201) None of them ate any food. (R2164-2165)

Capers acknowledged that he had a "pretty good buzz on" that day, and that all four of them were "flying pretty high." (R2200-2201)

On the way back to Clearwater, Gardner mentioned Polk's Hardware Store and asked Capers whether he thought

there was any money there, to which Capers responded in the affirmative. (R2091-2092) Gardner suggested that they "rip off" the store, and all agreed to participate. (R2094) Gardner said if he had to he would "waste the guy" [in the store]. (R2094) At that point Gardner asked Debra Tyler for a knife. (R2095) She had one which she kept in a small purse, and she handed it to Gardner, who was driving. (R2095)

Capers said he would not go into the store if Gardner intended to kill the man, and suggested it would be better to get the money, knock the old man out, and leave the store. (R2094-2095) Gardner agreed to go along with this plan. (R2095)

The four arrived at Polk's Hardware Store and parked. (R2096) Capers, Gardner, and Tyler got out of the car. (R2096) The prosecutor asked Capers whether Hadley got out. Capers answered, "No, Larry said that he wasn't going to." A defense objection to this response on hearsay grounds and grounds that counsel had not been allowed to depose Hadley was overruled. (R2096-2099) Hadley said he would look out for the others when they went into the store. (R2099)

The plan that had been discussed in the car called for Gardner and Tyler to divert the clerk's attention while Capers grabbed him from behind and rendered him unconscious. They would then take money from the cash register and leave. (R2100-2101)

Once inside the store they asked Holda about some paint. Gardner and Tyler were in front of him and Capers was behind. Holda showed them some paint. Gardner looked up and

nodded his head as a signal for Capers to go ahead. (R2101) Capers grabbed Holda around the neck under the chin. After a struggle Capers put him down on the floor using a choke hold or sleeper hold to cut off his oxygen supply. (R2101-2102,2142) The man was still alive after Capers put him down. (R2102)

Capers looked in the cash register and found only pennies. He told the others there was no money and suggested they leave. (R2103-2104)

Holda was almost getting up off the floor. (R2104) Debra Tyler tripped him by pulling his legs up and started yelling, "Kill him, kill him, kill him." (R2104) Gardner pulled the already-open knife from his pants pocket and inflicted a wound near Holda's stomach. (R2105) Capers went toward Holda to intervene, but Gardner told him to stay away and leave him alone. (R2105) Capers backed off. (R2105) Gardner "started going crazy" and stabbed and cut Holda numerous times like a "maniac." (R2105,2187-2188)

Debra Tyler told Gardner to check Holda's pockets for money. (R2106) When he tried to turn the man over to take his wallet, he resisted. Gardner slit his throat and took his wallet. (R2106)

Gardner had blood on his shoes, pants, shirt, and hands. (R2107)

They all left through the front door and took a back road to Larry Hadley's place. (R2108) On the way they looked through Holda's wallet and found $11. (R2109)

At Hadley's house Gardner told the others to take their clothes off so they would not be recognized. (R2111) They put the clothes in a brown grocery bag which they deposited in a dumpster behind Hadley's house. (R2111) They flushed the papers from Holda's wallet down the toilet, and tore up the wallet itself and put it in the kitchen garbage. (R2111) Gardner wiped some of the blood off his shoes, then went over them with shoe polish. (R2112)

Five dollars of the money in Holda's wallet went to Larry Hadley to give his friend for the use of his car. (R2109) Gardner sent Tyler to the store with the remaining $6 to buy beer. (R2109)

The prosecutor asked Capers what Larry Hadley said he was going to do when he got back to the house, to which defense counsel objected, but was overruled. (R2110) Hadley said he was going to return his friend's car. (R2110-2111) When he returned, Hadley said his friend was mad at him for burning all his gasoline and not giving him enough money for it. (R2111)

The four shared the beer Debra Tyler brought back from the store. (R2112)

Hadley was told by the others that Gardner had killed a man. (R2112) Hadley confronted Gardner and asked, "Did you really kill that man?" Gardner responded, "Well, I didn't have a choice. Debra kept saying, 'Kill him, kill him, kill him.'" (R2112)

On April 1 Gardner and Capers went their separate ways, while Tyler remained with Hadley. (R2113)

Tony Capers was arrested on April 23. (R2114) A couple of months later he had a discussion with Gardner at the Pinellas County Jail. (R2114) Gardner said he was going to stick to his story that all four people entered the hardware store, where Larry Hadley stabbed the man and then threatened to kill Gardner if he told anyone. (R2114-2115) Gardner wanted Capers to change his story to match Gardner's, but Capers refused. (R2115-2116)

Capers saw Gardner on another occasion in a holding cell. Gardner again asked Capers to change his story, and Capers again refused. (R2116)

Gardner made another motion for mistrial during his cross-examination of Tony Capers due to remarks made by the prosecutor. (R2152-2158)

Victor Chiaia testified at trial that he loaned his car to Larry Hadley on March 23, 1983. (R2209-2210) Hadley was supposed to have the car for only 20 minutes, but he kept it from 10:15 or 10:30 a.m. until 2:00 p.m. (R2211)

A white man was driving the car when it came back. (R2212) Chiaia identified Gardner as that man. (R2215) In the car with him were Hadley, a black woman, and another black man. (R2212) They got out of the car and went quickly toward Hadley's house. (R2212) Hadley came over to Chiaia. Chiaia did not see any blood on him. (R2212) A few minutes later Hadley gave Chiaia $5 for the gas he had used. (R2213)

Chiaia did not notice any blood in his car when it was returned to him. (R2217) He noticed nothing unusual except that a blue duffel bag had been left in the car on the back floorboard. (R2214,2217) Gardner came over to Chiaia and asked for the bag, but Chiaia refused to give it to him. Chiaia intended to hold it until Larry Hadley paid him the remainder of the $10 Hadley had promised to pay for the gas he had used. (R2215) When Gardner came to ask for the duffel bag he was walking and talking all right, but his eyes were bloodshot and "looked high." (R2218,2228)

After Chiaia testified, the court and counsel discussed the testimony of Detective Luchan, who was to be recalled as the next State witness. (R2241-2242) Gardner objected to Luchan testifying as to any statements made by him as no predicate had been established. The objection was overruled. (R2241-2242)

Luchan testified that he had a conversation with Gardner on April 22, 1983 when he seized the tennis shoes from Gardner. (R2243) The conversation took place in the detective bureau. As Gardner was untying the shoes he pointed toward black blotches on the toes, which he said was shoe polish concealing the blood of the victim. (R2243-2244)

On cross-examination defense counsel asked when Luchan's active involvement with this case began. (R2244) Luchan said it began about 2:00 in the afternoon on April 22, 1983. (R2244) Defense counsel then asked, "You did not go to the Polk Hardware Store on March 23, 1983?" (R2244) The prose-

cutor objected on grounds that this question was outside the scope of direct examination. Defense counsel responded that he wanted to impeach the witness by showing that his involvement with the case actually began on March 23, 1983 at the hardware store, and wanted to show that a witness [Colleen Barnhouse[4/]] had told the police that she saw Tony Capers acting as a lookout at the store. (R2244-2248) The State's objection was sustained. (R2247-2248)

After Luchan testified the State announced that Detective McManus would be the next witness. (R2256) Gardner objected to any testimony from McManus regarding conversations with Gardner until a proper predicate was laid. (R2264) He also objected to testimony regarding anything Larry Hadley said, as well as testimony concerning the tape recording made by the body bug worn by Hadley. (R2264-2265) The prosecutor said he intended to lay a predicate for Gardner's statements, and did not intend to go into the other matters referred to by defense counsel. (R2265-2266)

Gardner also objected to any testimony concerning State Exhibit Number 13, which was a photopack. (R2267) His counsel said the photopack had not been listed in the State's answer to his demand for discovery, and had not been made available when he went to the police station to view all of

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[4/] Colleen Barnhouse's first name appears in the record spelled two different ways: "Colleen" and "Collene."

the evidence. (R2267-2268) He had seen the photopack in the courtroom. (R2272) The prosecutor said the photopack was listed, and that defense counsel had known about it since July. (R2268) The court overruled the objections. (R2272)

Detective Richard McManus of the Clearwater Police Department testified that he had gone to Polk's Hardware Store on March 23, 1983, where he observed the body of a white male. (R2274-2276,2282)

A check of the neighborhood was conducted which produced some leads for the police to pursue. (R2287-2288)

At one point Detectives McManus and Moore both viewed Lester Stewart as a potential suspect in this case. (R2288) McManus testified that he and Moore had spoken with Stewart several times, and the last time Stewart agreed to take a polygraph test. (R2290) Defense counsel immediately moved for a mistrial due to the polygraph reference. (R2290-2294) The court denied the motion but instructed the jury to disregard the last statement by McManus with reference to a polygraph test. (R2294-2295)

McManus testified that in his opinion Stewart was no longer a suspect after the police completed their investigation. (R2295-2296)

McManus testified that the police had no solid leads as to who committed the murder as of the last part of April. (R2300) On April 22, 1983 McManus came into contact with Larry Hadley, and Gardner was thereafter arrested at Angel's Bar. (R2306)

On April 22 McManus showed Lester Stewart the group of eight photographs which made up State Exhibit Number 13. (R2310-2311) Stewart selected a picture of Larry Hadley as the man who approached him at the apartment complex on March 23. (R2311-2320)

McManus testified concerning the statements Gardner made to the police after he was arrested, as he had at the pre-trial suppression hearing. (R2324-2344) McManus testified on direct examination that Gardner never said during the interview that he was intoxicated on beer or marijuana. (R2337-2339) Gardner objected to this line of questioning on several grounds, including the ground that it constituted comment on his right to remain silent. (R2339-2343) The court overruled the objection. (R2342) McManus then testified that Gardner never said he was so intoxicated at the time of the offense that he did not know right from wrong. (R2343-2344) Gardner answered every question McManus asked of him. (R2389)

During his cross-examination of McManus, Gardner again moved for a mistrial because the court was summarizing or characterizing the evidence presented to the jury. (R2362-2365) The court did not grant the motion. (R2363-2365)

Detective Allen Moore of the Clearwater Police Department responded with McManus to the hardware store. (R2398-2399)

Moore seized a buckknife from Lester Stewart. (R2401) Stewart had dots of red paint on his shoes and pantlegs. (R2402,2420) Moore did not submit these dots to a chemist for analysis. (R2420)

After Moore testified, defense counsel said he had not gone into conversations Moore had with Colleen Barnhouse on cross-examination because of the court's prior ruling. (R2423-2425) A lengthy discussion ensued as to the admissibility of this testimony. (R2426-2455) The court took the matter under advisement over the weekend.

On October 17, 1983 the court and counsel discussed further the reference to Lester Stewart passing a polygraph, as well as the Colleen Barnhouse matter. (R2457-2466) The court did not change his earlier rulings.

Detective McManus was recalled as a State witness and asked to give the jury some insight into Larry Hadley's mental condition and personality. (R2468-2469) He described Hadley as being like a "big puppy dog" who was easily led, easily influenced, and easily led astray if someone had a dominant personality. He said Hadley did not have a dominant personality whatsoever. (R2469) Gardner objected to this testimony and asked that it be stricken, but the court overruled the objection. (R2469-2475)

Also over objection McManus testified as to what Tony Capers told the police after he was arrested. (R2481-2486)

Paul Skalnick was another prosecution witness at Gardner's trial. (R2520) He was a seven-time convicted felon who shared a cellblock with Gardner in the Pinellas County Jail for about one month. (R2521-2523,2529) According to Skalnick, he had discussed Gardner's case with him, and Gardner admitted stabbing the man in the hardware store nine times in

the heart, but said the State would never be able to prove it. (R2523-2525) Gardner did not mention alcohol to Skalnick, or that he was under the influence of high-potency, high-grade marijuana when he went into the store. (R2528-2529)

Dr. Joan Wood, medical examiner for the Sixth Judicial Circuit, performed an autopsy on Joseph Holda on March 24, 1983. (R2557,2560-2561) She opined that he died at around 2:00 or 2:30 on March 23. (R2575-2576) He had 42 stab wounds in the left chest area, 17 of which were to his heart. (R2566-2567,2570) Two of the ribs in the left chest had been fractured as a result of the stabbing. (R2572) A stab wound to the abdomen and cutting wounds to the neck were inflicted post-mortem. (R2569-2570)

Once the wounds were inflicted which injured Holda's heart and lungs, death was fairly rapid, coming within five minutes, or probably less. (R2571,2582)

Dr. Wood believed the injuries to the chest could have been inflicted by either a right- or left-handed person, although right-handed was more likely. (R2572-2573) The cutting wound on the right side of the neck had to be inflicted by a right-handed person. (R2573) The cutting wound on the left side of the neck was compatible with a right-handed person facing the individual and pulling the knife toward them. (R2573-2574)

Dr. Wood examined Ken Gardner's right hand in court at the request of the prosecutor. (R2595) He was missing parts of his index finger, second finger, and ring finger from this hand. (R406,2596) The prosecutor asked whether Dr. Wood was

of the opinion that Gardner's right hand could hold a knife and inflict the wounds found on Holda's body. (R2595) She answered, "Presuming a normal range of motion and normal strength in that hand, yes." (R2595)

The State rested after Dr. Wood's testimony. (R2598)

Gardner renewed his motions for mistrial and made a new cumulative motion for mistrial. (R2602-2608) The court denied the motions. (R2609)

Gardner also moved for a judgment of acquittal, which motion was denied. (R2609-2611)

Gardner asked the court to instruct the jury on the defense of voluntary intoxication, and on the lesser included offenses of second- and third-degree felony murder, aggravated battery, aggravated assault, and attempts. (R2615-2617,2639-2647) The court denied all these requested instructions. (R2623-2625,2647)

The court gave over Gardner's objection an instruction suggested by the State that co-defendants Hadley and Tyler were unavailable to either side and the jury should draw no inference from their absence. (R2652-2656,2742-2743)

The court instructed the jury on the crimes of first-degree premeditated murder and first-degree felony murder, second-degree (depraved mind) murder, manslaughter, robbery, and theft. (R2735-2742)

After deliberating, the jury found Gardner guilty as charged of murder in the first degree and robbery with a deadly weapon. (R372-373,2759-2760)

The penalty phase of Gardner's trial was held on October 19, 1983. (R2797,2828-2927)

Over objections of the defense, Detective McManus was allowed to testify concerning the placing of the electronic transmitter on Larry Hadley and Hadley's conversation with Gardner outside Angel's Bar. (R2817-2818,2830-2844) A tape recording of the conversation was played to the jury, and copies of a transcript of the recording were given to the jurors. (R2835-2839)[5/] Gardner objected that the transcript was not accurate and moved for a mistrial, which was denied. (R2839-2841)

Detective Allen Moore also was called as a State witness during the penalty phase. (R2845) Over objections of the defense he testified to statements made by Debra Tyler when he interviewed her at the Tampa Police Department on April 25. (R2820-2825) Tyler said she, Gardner and Capers went into the store where Gardner stabbed Holda with a knife multiple times. (R2848) Holda was yelling for help and for Gardner to stop. (R2849) Tyler said Larry Hadley remained outside the store. (R2848)

Counsel for Gardner said he wished to question the witness about the fact that Collene Barnhouse identified a photograph of Tony Capers as being the person who was standing

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5/ A copy of the transcript has been included as part of the record on appeal. (R2932-2935) However, the written record does not reflect what the jurors actually heard when the tape was played, but merely notes that it was, in fact, played. (R2839) The tape itself should have been forwarded to this Court with the other exhibits introduced at trial. (See second page of index to exhibits in volume XXII of record on appeal.)

lookout outside the hardware store, but he was not allowed to pursue this line of questioning. (R2853-2855)

The State rested after Moore's testimony. (R2856)

Gardner then called Moore as his own witness. (R2858) Since Gardner's arrest, Moore had not secured any evidence of significant prior criminal involvement by Gardner. (R2859)

Colleen Barnhouse told Moore that she was driving on Fort Harrison in Clearwater [on the day Holda died] when she looked toward the hardware store and saw a black male leaning against the southside door. (R2863-2864) He seemed to be waiting for something. He began to fidget while Barnhouse was looking at him. (R2863-2864) After Tony Capers was arrested on April 23, Barnhouse called Moore and told him that a picture of Capers she saw in the newspaper was a picture of the man she had seen outside the hardware store. (R2864-2866) The photographs from the newspaper were introduced into evidence by the State. (R2874)

After Moore testified the defense rested. (R2883)

Following argument of counsel to the jury the court instructed on the following aggravating circumstances (R2912): (1) The crime for which Gardner was to be sentenced was committed while he was engaged in commission of a robbery. (2) The crime for which Gardner was to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody. (3) The crime for which Gardner was to be sentenced was especially wicked, evil, atrocious, or cruel. (4) The crime for which Gardner was to be sentenced was committed in a cold, calculated, and premeditated manner without any pre-

tense of moral or legal justification. Instructions on all but the first of these aggravating circumstances were given over Gardner's objections. (R2768-2772)

The court instructed the jury on the following mitigating circumstances (R2913): (1) Gardner had no significant history of prior criminal record. (2) Gardner was an accomplice in the offense for which he was to be sentenced but the offense was committed by another person and Gardner's participation was relatively minor. (3) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. (4) Any other aspect of the defendant's character or record, and any other circumstances of the offense.

The court further instructed the jury that their sentencing recommendation could be made by a majority. (R2914-2915) At one point he told the jury that an advisory sentence of life could be returned by a vote of six or more (R2915), but he later said it would require agreement of seven or more to make a recommendation as to sentence. (R2916-2917)

The verdict forms given to the jury read as follows:

> A majority of the jury, by a vote of_____ advise and recommend to the Court that it impose the death penalty upon the Defendant, Kenneth Gardner. So say we all.

(R2916)

> The jury advises and recommends to the court that it impose a sentence of life imprisonment upon Kenneth Gardner, without possibility of parole for twenty-five years. So say we all.

(R2916)

The jury recommended the death penalty by a vote of 9-3. (R382,2924)

The court ordered a presentence investigation. (R2927)

On November 4, 1983 a hearing was held on Gardner's motion to substitute Larry Bergman in place of Myron Mensh as his attorney. (R2936-2947) Bergman asked that sentencing be continued so that he could prepare to represent Gardner. (R2936) The court denied the motion to substitute counsel but did authorize Bergman to appear as co-counsel at any future proceedings in this cause. (R2945-2946)

Gardner filed a motion for new trial (R394-403), which was heard on November 9, and denied. (R2951-3058)

Sentencing was held immediately thereafter. (R3061-3105) The court sentenced Gardner to death for the murder. (R407,410-419,3097) The oral statements the court made at the sentencing hearing were the same as the written reasons the court filed for imposing the death penalty. (R410-419,3080-3097, Appendix, pp.1-10) Judge O'Brien found the following aggravating circumstances to exist (R410-416,3081-3092, Appendix pp.1-7): (1) The homicide was committed while Gardner was engaged in a robbery and flight after committing the robbery. (2) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest and effecting an escape from custody. (3) The capital felony was committed for pecuniary gain. (4) The capital felony was especially heinous, atrocious or cruel. (5) The capital felony was a homicide committed in a cold, calculated and premeditated manner without

any pretense of moral or legal justification. In mitigation the court found that Gardner had no significant history of prior criminal activity and had a troubled background. (R416-417,418-419,3093,3095-3097, Appendix, pp.7-8,9-10)

The presentence investigation report, to which Judge O'Brien referred in his sentencing order (R418-419, Appendix, pp.9-10), revealed that Gardner was born in New York. Although his father was listed as Anthony Gardner, his true father was Walter Kusmersik. (R3150) Gardner was one of 10 children born to Helen Gardner Kusmersik. (R3150) Gardner and a brother, David, were placed in Father Baker's Orphanage at a very young age and were in foster care for four or five years. (R3150) David was adopted, but Ken remained a ward of New York State. (R3150) When he was 18 Gardner found his mother, but was rejected by her. (R3150)

Gardner had been married twice. (R3150) He was the father of two children, a girl, Michelle, and a boy, Kenneth Michael. (R3150)

Gardner's work history was filled with assorted jobs. (R3150-3151) He suffered chronic absenteeism, largely attributable to alcohol abuse. (R418,3096,3150-3151, Appendix, p.9) He was hospitalized seven times between 1976 and 1982 for alcohol abuse. (R3150) He suffered heart attacks in 1982 and 1983. (R3150)

The court found nothing about Gardner's "life history that sets him apart as being criminally involved in society." (R418,3096, Appendix, p.9) However, the court believed that

certain aspects of Gardner's behavior carried "the mark of a professional, street-wise criminal-type personality." (R419, 3097, Appendix, p.10)

The court concluded that the aggravating circumstances outweighed the mitigating. (R419,3097, Appendix, p.10)

As to Count Two of the indictment the court sentenced Gardner to a consecutive sentence of 90 years and retained jurisdiction over 30 of those years. (R408,3103) He adopted his findings with regard to the first count as his justification for retaining jurisdiction over the robbery sentence. (R408, 3104)

Gardner timely filed his notice of appeal on November 15, 1983. (R443) His court-appointed private attorney was allowed to withdraw, and the Public Defenders for the Sixth and Tenth Judicial Circuits were appointed to represent him on appeal. (R459)

ARGUMENT

ISSUE I.

THE COURT BELOW ERRED IN REFUSING TO TAKE CORRECTIVE MEASURES AFTER THE ASSISTANT STATE ATTORNEY ASKED AN IMPROPER VOIR DIRE QUESTION WHICH MISSTATED THE LAW.

During voir dire examination the prosecutor asked prospective juror Truong whether she had any problems listening to the testimony of a co-defendant. She answered, "No." (R1391) The assistant state attorney then asked (R1391-1392):

> Okay, there are a lot of people that just say I can't believe the testimony of a co-perpetrator or somebody else involved in the crime under any circumstances. That is why I asked the question. The bottom line here today is can you sit there and listen to this person and evaluate this testimony under the same rules of law as every other witness who takes the stand?

Gardner objected to this question and moved for a mistrial because the prosecutor had misstated the law in suggesting that the testimony of an accomplice was to be judged the same as the testimony of any other witness. (R1392-1395) The court denied the motion for mistrial and refused Gardner's request to instruct the jury regarding testimony of accomplices. (R1394-1395) The court did ask the prosecutor to rephrase his question. (R1395) The assistant state attorney then asked (R1395):

> Miss Truong, that qeustion was phrased very awkwardly and probably incorrectly. What I'm asking you is the Judge will give you the law at the end of the trial which, you know by now, there is law that applies to a co-perpetrator. Can you follow that law?

Truong answered in the affirmative. (R1395)

Clearly, the first question quoted above gave the jury an erroneous impression of the law regarding accomplice testimony. Florida Standard Jury Instruction in Criminal Cases 2.04(b) directs the jury to use "great caution" in relying on the testimony of one who claims he helped the defendant commit the crime. Thus it is not the law in Florida that accomplice testimony is to be considered the same as the testimony of every other witness who takes the stand, as the prosecutor led the jury to believe.

The mischief done by the prosecutor's improper voir dire is similar to that which occurred in Smith v. State, 253 So.2d 465 (Fla.1st DCA 1971). There the State asked prospective jurors whether they would convict on the testimony of a person who had been granted immunity if the State proved its case beyond a reasonable doubt. The district court of appeal found this line of questioning to be improper, and noted that

> [a] juror may not be interrogated as to his attitude toward a particular witness who is expected to testify in the case, and especially when he knows in advance that the prosecution has only the one primary witness to prove its case.

253 So.2d at 470-471. Here Tony Capers was the key witness for the prosecution, and the assistant state attorney improperly sought a commitment from Truong that she would scrutinize Capers' testimony in a more favorable light than required by law.

In Liebold v. State, 386 So.2d 17 (Fla.3d DCA 1980), the court rejected a claim that the prosecutor had violated Smith in his questions to prospective jurors, but observed that

the State must exercise great caution in asking potential jurors for their views on the value of testimony of accomplices.

The court below apparently recognized that the question asked of Truong was not entirely proper, as he asked the prosecutor to rephrase it. However, the question as rephrased did nothing to correct the previous incorrect statement of the law.

The jury was instructed on accomplice testimony at the end of the trial. (R2747-2748) But by then they had already heard Tony Capers' testimony and considered it in light of the incorrect statement made by the prosecutor. (It is important to keep in mind that the court refused Gardner's request to give the standard jury instruction on accomplice testimony immediately before Capers testified (R2074-2075))

The fact that the juror to whom the improper question was directed was ultimately excused from service on this jury is irrelevant. As counsel for Gardner noted when he made his objection and motion for mistrial at the bench, the entire venire had been "poisoned." (R1393)[6/]

Because the court below failed to correct the incorrect statement of the law conveyed by the prosecutor, either by the granting of the motion for mistrial or, at the very least, by the giving of a timely curative instruction, Gardner is entitled to a new trial.

6/ This issue would be moot if the court had granted Gardner's motion for sequestered voir dire (R322-323), as the other jurors would not have been present to hear the prosecutor's improper question.

ISSUE II.

THE COURT BELOW ERRED IN REFUSING TO GRANT DEFENSE CHALLENGES FOR CAUSE TO PROSPECTIVE JURORS, FORCING GARDNER TO EXERCISE PEREMPTORY CHALLENGES TO EXCUSE THESE JURORS, AND IN REFUSING TO ALLOW GARDNER TO EXERCISE MORE THAN TEN PEREMPTORY CHALLENGES AFTER TELLING COUNSEL HE WOULD PROBABLY ALLOW EACH SIDE A TOTAL OF SIXTEEN PEREMPTORY CHALLENGES.

On October 11, 1983, before beginning jury selection, the court and counsel discussed the number of peremptory challenges to which each side would be entitled. (R1101-1108) Defense counsel argued that Florida Rule of Criminal Procedure 3.350 could be interpreted either to give each side 10 challenges, or to give 10 challenges with respect to the first count (for murder), and either six or 10 challenges on the second count (for robbery), for a total of 16 or 20. (R1101-1102) Counsel stressed that it was very important for him to know in advance how many challenges he would have. (R1103) The prosecutor similarly asked the court "to definitively rule" on the number of peremptory challenges. (R1104) The court ultimately ruled as follows (R1107-1108):

> THE COURT: All right, I would be inclined, if you go through the ten, I feel it is appropriate that with the way the voir dire is going there would be additional challenges allowed because of this fact there are two distinct and separate charges, I would be inclined to go with sixteen.
>
> * * * *
>
> THE COURT: So you know that in advance. In other words, if you go through the ten and you feel you are getting to the point where you are going to have to use another six, I would

> suggest you approach the Bench, advise us, tell us you feel it is appropriate for the Court to exercise its discretion, allow another six. I will probably do it, but I want to wait to see how the first ten go. We may never reach that point. It might be we could have a jury, so you don't have to worry about having sixteen challenges, you could get a jury within the first ten, then that will be it. You have got to be able to approach the Court and ask me to exercise my discretion that there are extenuating circumstances that require it and that failing to do so would create prejudice, retract the statute at the appropriate time. Then I'll consider it. But if I do consider it, I do grant it, it will be sixteen.

During the jury selection process Gardner challenged three prospective jurors for cause: Bedard, Lombardo, and Eversole. Each challenge was denied, and Gardner exercised three of his peremptory challenges to excuse these jurors. (R1459-1461,1482-1486,1564-1565) He objected to having to expend peremptory challenges to remove Eversole and Lombardo from the jury. (R1564-1565)

Bedard was a private-duty nurse's aid companion who expressed concern about having to sit through a long trial. (R1324-1325) She was her own sole support and would be losing income while she was on the jury. (R1324,1350-1351) She did not feel she could sit on the jury beyond the weekend. (R1432)[7/] If she was on the jury, she would be wanting the process to be over in a hurry so that she could resume her work and be able to pay her bills. (R1433) Gardner's challenge to her was based

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7/ The trial did in fact extend well beyond the weekend, finally ending on Wednesday of the following week. (R393,2797)

upon her inability to devote her full attention to the trial. (R1459-1460)

Lombardo worked at the Clearwater Police Department for about two years. (R1479) She knew four of the prospective witnesses in this case--James Ford, Barry Glover, Detective Moore, and Sergeant Kronschnabl. (R1479,1527-1528)[8/] She had worked very closely with Ford and Glover on a day-to-day basis at the police department and knew them very well. (R1480) Lombardo said she did not believe she would attach any greater credence to the testimony of the two men by virtue of having worked with them. (R1481)

Lombardo had also worked at the Dunedin Police Department for almost 11 years and had some very good friends there. (R1498,1547) She felt close to all the police personnel with whom she had worked. (R1548)

Gardner's challenge for cause was based upon the necessary prejudice against him that Lombardo would have due to her lengthy association with the police, particularly in view of the fact that a number of members of the Clearwater Police Department with whom she had worked were going to be called as State witnesses. (R1553)

Eversole knew State witness Detective Moore. (R1481) Moore was in charge of a robbery case in which Eversole was a

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[8/] Of these four men, all except Glover did in fact testify for the State at Gardner's trial. (R1777-1798,2008-2046,2398-2423,2845-2853)

witness, and was also in charge of an armed robbery at a gas station where Eversole had been employed in which Eversole's brother was shot. (R1481,1495) Eversole stated that he would not attach more credibility to Moore's testimony than that of other witnesses because of his acquaintance with him. (R1486)

Eversole was employed as a fire fighter and emergency medical technician, which brought him into contact with the police. (R1516-1517) In addition, he was a witness to a "snatch-and-run" robbery, which had not yet gone to trial, and had been to the state attorney's office several times, most recently in August (1983). (R1494-1495,1539-1540)

Eversole had very strong feelings against drinking to the point of intoxication. (R1542)

Gardner challenged Eversole because of his ongoing active working relationship with the state attorney's office and police officers. (R1554-1555) Although he denied Gardner's challenge for cause, the court did express concern because of Eversole's "experience with so many crimes." (R1559)

Gardner's challenges to jurors Bedard, Lombardo, and Eversole should have been granted. Each juror had a state of mind that would prevent him or her from deciding this case fairly and impartially. In Bedard's case, her understandable concern over losing revenue while she was sitting on the jury rendered her incapable of keeping her attention focused on a lengthy trial. Lombardo and Eversole each had close ties to law enforcement personnel, including some who were witnesses in this case, and Eversole had a continuing relationship with

the same state attorney's office that was prosecuting Gardner. Under these circumstances Lombardo and Eversole could not possibly avoid being biased toward the side of the prosecution.

Where, as here, there is any doubt a juror has the state of mind to render an impartial verdict, the defendant should be given the benefit of the doubt and the juror excused. Leon v. State, 396 So.2d 203 (Fla.3d DCA 1981), pet.for rev.den., 407 So.2d 1106 (Fla.1981). Jurors should be beyond even the suspicion of partiality and, if there is doubt as to the juror's sense of fairness or his mental integrity, he should be excused. Singer v. State, 109 So.2d 7 (Fla.1959).

The fact that the jurors in question may have stated that they could, in effect, be impartial is not determinative of this issue. In Irby v. State, 436 So.2d 1047 (Fla.1st DCA 1983), pet.for rev.den., 447 So.2d 888 (Fla.1984) and Williams v. State, 440 So.2d 404 (Fla.1st DCA 1983) the First District Court of Appeal reversed convictions because certain prospective jurors should have been excused for cause, despite their assurances that they would be impartial.

The court below committed reversible error in denying Gardner's challenges for cause to the above-named jurors, forcing him to exercise his limited number of peremptories in order to obtain a fair jury, and abridging his right to exercise peremptory challenges. Williams and Leon, both supra.

The peremptory challenge Gardner used to remove Lombardo was his tenth. (R1565) He then attempted to exercise two more peremptories. (R1571-1586) His counsel believed he

had additional challenges available, pursuant to the court's pretrial ruling. (R1566) He wished to excuse juror Briles because he ran an insurance adjusting firm and juror Furgerson because he worked for the City of Kenneth City and serviced police cruisers for that municipality. (R1572-1573) Counsel pointed out that he had been forced to use three of his peremptory challenges to excuse jurors who should have been excused for cause. (R1574-1575)

Judge O'Brien said they had a fair, impartial jury and indicated he was not inclined to grant additional peremptories, but agreed to consider the matter overnight. (R1581-1582,1586) The next morning the judge said he would adhere to his earlier ruling and not grant any additional peremptory challenges. (R1594) He expressed satisfaction with the jury. (R1594)[9/]

Florida Rule of Criminal Procedure 3.350(e) provides that ordinarily where, as here, two or more counts are alleged in a single indictment, each party shall have the number of peremptory challenges which would be permissible in a single case. That number here would be 10, as the crimes charged in the indictment are punishable by death (in the case of the murder charge) or life imprisonment. Fla.R.Crim.P. 3.350(a);

[9/] The jurors Gardner tried to challenge, Briles and Furgerson, did in fact sit on the jury that found him guilty and recommended a sentence of death. (R386,2762,2926) Briles became the subject of controversy when defense counsel charged that he appeared to be sleeping during the trial. (R2028) This sleeping juror was one of the grounds Gardner included in his motion for new trial. (R394)

§§775.082(1), 782.04(1)(a), 812.13(2)(a), 913.08(1)(a), Fla. Stat. (1983). However, the rule also permits the trial court to grant additional peremptories up to the accumulate maximum for all counts charged in the indictment if it appears that there is a possibility the State or the defendant may be prejudiced if challenges are limited. As noted above, each of the two charges lodged in this indictment would carry 10 peremptory challenges (if tried separately). Therefore, pursuant to Rule 3.350(e) the court was authorized to grant up to 10 challenges in addition to the 10 already provided, or a total of 20 peremptory challenges per side.

Gardner, similar to the defendant in Thomas v. State, 403 So.2d 371 (Fla.1981), relied to his detriment in exercising his peremptory challenges on the trial court's ruling as to how many challenges he would have. Gardner was expecting to receive 16, but was only given 10. The prejudice spoken of in Rule 3.350(e) became manifest when Gardner attempted to exercise his eleventh and twelfth peremptory challenges but was prohibited from doing so. (Gardner would have had sufficient peremptory challenges remaining to excuse Briles and Furgerson had he not been required to expend peremptories in challenging Bedard, Lombardo, and Eversole.) At that point it became an abuse of discretion for the court to deny the additional peremptories he had all but promised he would grant.

It should be noted that the court was not necessarily required to grant all the additional challenges allowable under the rule; if counsel needed only the two additional challenges

to excuse Briles and Furgerson, that was all the court needed to grant. See Jacobs v. State, 396 So.2d 713 (Fla.1981); Johnson v. State, 222 So.2d 191 (Fla.1969).

Apparently, the reason the court refused to grant Gardner peremptories which would have allowed him to excuse Briles and Furgerson was that the court did not believe Gardner had shown cause for excusing them. (R1573-1574) However, the nature of the peremptory challenge is an arbitrary and capricious one, for which no reason need be assigned. Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965). See also, Meade v. State, 85 So.2d 613 (Fla.1956).

In Swain the Supreme Court of the United States emphasized that the right to challenge prospective jurors peremptorily is one of the most important rights secured to an accused. Denial or impairment of the right, noted the High Court, is reversible error without a showing of prejudice. Similarly, in Bell v. State, 338 So.2d 1328 (Fla.2d DCA 1976), cert.den., 346 So.2d 1250 (Fla.1977), the Second District Court of Appeal observed that where the defendant was denied the full amount of peremptory challenges to which he was entitled, he did not need to demonstrate prejudice by showing that any juror selected to hear the case was biased or unfair. The opinion stated:

> The right to use a peremptory challenge has long been regarded as a cherished tool in the selection of an impartial jury. An improper limitation of that right necessarily inheres in the jury verdict.

388 So.2d at 1329.

In the case presently before this Court Gardner was denied the full use of this "cherished tool" in attempting to select an impartial jury when he relied to his detriment on the trial court's pretrial ruling that he would probably permit each side a total of 16 peremptory challenges. As a result of this denial, Gardner is entitled to a new trial.

ISSUE III.

THE COURT BELOW ERRED IN FAILING TO CONDUCT ADEQUATE INQUIRIES CONCERNING SEVERAL DISCOVERY VIOLATIONS COMMITTED BY THE STATE AND IN NOT PROVIDING APPROPRIATE RELIEF TO GARDNER FOR THESE VIOLATIONS.

A. Deposition Of Larry Hadley

After a person has been indicted for a crime he may take the deposition of any person who may have information relevant to the offense charged. Fla.R.Crim.P. 3.220(d). As an alleged participant in the crimes for which Gardner was indicted, Larry Hadley obviously possessed relevant information which Gardner could seek by deposing him. At the hearing of September 21, 1983 Judge Schaeffer ruled that counsel for Gardner was entitled to take Hadley's deposition, at a time when Hadley's attorney was available to attend. (R3177)

Counsel for Gardner attempted to take Hadley's deposition on seven occasions, but each attempt proved unsuccessful. (R63,119,131,139,191,200,208,213,223,247,279,875-876,883) Counsel alleged that his attempts to depose Hadley had all been thwarted by State operatives. (R278,1135) He sought exclusion from Gardner's trial of the taped conversation which allegedly took place between Hadley and Gardner outside Angel's Bar immediately before Gardner was arrested, as well as exclusion of any testimony from Hadley himself, and any direct or indirect testimony or evidence relating to Hadley. (R248,279-280)

Where, as here, the defendant alleges a discovery violation by the State, the trial court must conduct an inquiry

to ascertain, at the least, whether any violation that occurred was inadvertent or willful, whether it was trivial or substantial, and what effect, if any, it had on the defendant's ability to properly prepare for trial. Richardson v. State, 246 So.2d 771 (Fla.1971); Kilpatrick v. State, 376 So.2d 386 (Fla.1979); Wilcox v. State, 367 So.2d 1020 (Fla.1979). It is the State's burden to show that its violation of the discovery rules did not prejudice the defendant. Hill v. State, 406 So.2d 80 (Fla.2d DCA 1981); Cumbie v. State, 345 So.2d 1061 (Fla.1977); Brey v. State, 382 So.2d 395 (Fla.4th DCA 1980). And the circumstances establishing non-prejudice must affirmatively appear in the record. State v. Del Gaudio, 445 So.2d 605 (Fla.3d DCA 1984).

Gardner recognizes that the prosecution ordinarily is not responsible for producing witnesses so that they may be deposed by defense counsel. State v. Jackson, 436 So.2d 985 (Fla.3d DCA 1983). However, neither may the state attorney's office impede the defense investigation of the case. Fla.R. Crim.P. 3.220(e). See also State v. Pelliccio, 388 So.2d 19 (Fla.4th DCA 1980).

Here Gardner made allegations that his preparation to defend against the murder and robbery charges was improperly hindered by the State. These contentions were never fully resolved by the trial court.

It is significant to keep in mind that the State knew or should have known of Larry Hadley's mental problems, which ultimately led to his unavailability as a witness for either

side, early on in the proceedings. The same state attorney's office had prosecuted Hadley in 1975 or 1976 for arson, a case in which he was found not guilty by reason of insanity. (R1117-1118,1128-1129) One of the assistant state attorneys who prosecuted Gardner, Bruce Young, was advised by counsel for Larry Hadley as early as July 15, 1983 that Hadley's mental condition was deteriorating. (R1115-1116) Furthermore, Hadley had been in the custody of the State of Florida throughout the proceedings in Gardner's case. (R881-882)

Somewhat vague reasons were given for Larry Hadley's failure to show up for his deposition any of the seven times it was scheduled. Prosecutor Young acknowledged at least some dereliction on the part of the State at the hearing on Gardner's Motion for Sanctions or, in the Alternative, Motion in Limine when he admitted that the State had not given defense counsel Larry Hadley's correct address when Hadley moved. (R881) At a hearing held on October 11, 1983 the prosecutor acknowledged that the last two times the deposition could not be taken "it was essentially the State's fault" because the State was trying to accommodate three attorneys. (R1176)

Although there were allegations and some evidence of conduct on the part of the State which prevented defense counsel from deposing Larry Hadley, the court below did not definitively rule on whether the State had committed a willful or inadvertent violation of the discovery rules. The court also failed to address the other two prongs of the tripartite inquiry mandated by Richardson and its progeny: whether the State committed a

trivial or substantial discovery violation and whether Gardner had been prejudiced in his ability to prepare to defend himself, probably because the court put undue emphasis on whether the State was going to call Larry Hadley as a witness at trial. (The court took Gardner's Motion for Sanctions or in the Alternative Motion in Limine under advisement to the extent that he said he might reconsider it if Hadley showed up as a witness for the State (R885-886).) But the defense needed to depose Hadley whether or not he actually testified at trial for the prosecution. As mentioned previously, Hadley was an alleged participant in the events at Polk's Hardware Store, and as such it was vital for defense counsel to know what he saw and heard there. It was particularly important for defense counsel to know if Hadley would corroborate Gardner's statement to the police that it was Hadley, rather than Gardner, who stabbed Joseph Holda, a fact highly relevant, especially to the issue of whether Gardner would be sentenced to death.

Additionally, even though Hadley did not testify at trial, he was nonetheless omnipresent in the testimony of the witnesses who did testify. For example, Tony Capers testified to the relatively minor role Hadley supposedly played in the robbery/murder, remaining outside the hardware store (R2096), and testified to statements Hadley made when the four people returned to Hadley's house after the crimes. (R2110-2112) Victor Chiaia testified concerning Hadley borrowing his car on the day of the crimes. (R2209-2213) Detective McManus was permitted to testify about Hadley's personality. (R2468-2469)

And, of course, the tape of the conversation which allegedly took place between Larry Hadley and Ken Gardner outside Angel's Bar on the night Gardner was arrested was played and transcripts thereof supplied to the jury during the penalty phase of the trial (R2835-2839), with Gardner having no opportunity to depose Hadley concerning the events which led to the conversation and to question him concerning his consent to wear the "body bug." (Please see Issue XIV. A. for further argument regarding the propriety of admitting this conversation into evidence.)

Despite the fact that there was considerable discussion below about the Hadley deposition, the court failed to fulfill its obligations to address all three parts of the Richardson inquiry and rule thereupon. See Poe v. State, 431 So.2d 266 (Fla.5th DCA 1983); Hutchinson v. State, 397 So.2d 1001 (Fla.1st DCA 1981); Easterling v. State, 397 So.2d 999 (Fla.1st DCA 1981); Hill, supra. As a result, Gardner is entitled to a new trial.

B. Names Of Tony Capers And Debra Tyler As State Witnesses

Gardner filed a pretrial Motion in Limine and Motion for Sanctions to preclude the State from using at his trial any testimony or evidence relating to Tony Capers and Debra Tyler. (R241-243,244-246) The motions alleged that the names of Capers and Tyler as witnesses in this case had not been furnished to counsel for Gardner until approximately 4:51 p.m. on September 30, 1983, one working day before Gardner's trial was scheduled to begin. The State's Additional List of Witnesses bearing the

names of Capers and Tyler reflects that it was indeed delivered to defense counsel on September 30, 1983. (R231)

At the October 4, 1983 hearing on these motions, defense counsel noted that his entire preparation for trial had been premised on the State's representation that Larry Hadley--not Tony Capers or Debra Tyler--would be testifying against Gardner at his trial. (R890) It was not until that very morning (October 4) that counsel was informed by the state attorney's office that they had made a bargain with Tony Capers and he would be testifying for the prosecution. (R889) At the direction of the court counsel for Gardner deposed Tony Capers prior to the hearing on his motions. (R904-905,919,940) This deposition produced a wealth of new information which defense counsel required time to pursue, such as the fact that on the day of the alleged crimes the participants had all been drinking beer and smoking marijuana, and information about Tony Capers' background, as well as the names of witnesses to be interviewed relative to the critical issue of Capers' credibility. (R905-906,940-942)

In denying Gardner's motions the court apparently found no violation of the discovery rules in the failure of the state attorney's office to list Capers and Tyler as witnesses until September 30, 1983, but did not specifically rule whether the discovery rules had been violated by the failure to notify defense counsel until the last minute that Tony Capers would be entering a change-of-plea and testifying for the State. (R908-909,932-933,936) (The assistant state attorney believed the court had ruled that he was in violation of the discovery rules. (R932).)

Clearly the court should have definitively ruled on whether or not a discovery violation existed. By failing to do so he short-circuited the requirements of Richardson concerning the three-part inquiry that should have been made once the defense alleged a discovery violation. See Kilpatrick, supra.

With regard to the issue of whether or not the State was in fact guilty of a violation of the discovery rules, it is important to keep in mind that the state attorney's office was, or should have been, aware of Larry Hadley's uncertain mental state for some time, as discussed in part A. above, and hence of the possibility that one of the other defendants would have to be substituted as a witness at Gardner's trial. The prosecutor conceded that Tony Capers had been willing for a long time to plead in exchange for a waiver of the death penalty (R934), and hence Capers was available to the State as a witness early on in the proceedings.

Even though counsel for Gardner may have known from the "cover sheet" supplied to him by the state attorney's office that Capers was a co-defendant (R924), the crucial event occurred when Capers entered his plea on October 4 and agreed to testify. Until that time his constitutional protection against self-incrimination would have protected him from being deposed by defense counsel. Carnivale v. State, 271 So.2d 793 (Fla.3d DCA 1973), cert.den., 277 So.2d 534 (Fla.1973).

The court did continue the trial for one week at the suggestion of the prosecutor (R943-944,947-948), but this did not give defense counsel sufficient time to revamp his defense

in consideration of Tony Capers' testimony. When court convened on October 11, counsel advised the court that he was not ready for trial. (R1215) He had not received the transcript of Tony Capers' deposition until the previous day (October 10) and had not had adequate time to review it and prepare to cross-examine Capers. (R1215-1216) Also, Capers' deposition had revealed the names of five new witnesses, only one of whom counsel had been able to depose, despite efforts to find them all. (R1216)

Besides being ineffectual to cure the prejudice resulting from the discovery violation, the continuance could not excuse the court's failure to hold a Richardson hearing that would have determined whether Capers' testimony should have been excluded altogether, which was the relief Gardner sought.

With regard to Debra Tyler, although she did not testify in person at Gardner's trial, her statement to the police was placed into evidence during the penalty phase over objection. (R2821-2822,2846-2853) The record does not reflect that counsel for Gardner was even afforded an opportunity to depose Tyler concerning this statement.

C. Photopack Viewed By Lester Stewart

Before Detective Richard McManus of the Clearwater Police Department took the witness stand, Gardner objected to testimony from him concerning a photopack, which was State Exhibit 13, that had been shown to Lester Stewart. (R2267-2273) The objection was overruled and McManus was permitted to testify that Stewart had selected from the photopack a picture of Larry

Hadley as the man who approached him on the day of the homicide to inquire about an apartment. (R2310-2319)

McManus' testimony was important because it served to negate Gardner's exculpatory statement to the police that it was Larry Hadley who actually stabbed Joseph Holda.

Gardner's objection to the photopack testimony rested upon the fact that his counsel had not seen the photopack prior to trial, despite having gone to the Clearwater Police Department to examine all the tangible evidence in the case, where he was shown what was represented to be all the evidence the state attorney had. (R2267-2270) The State offered no explanation as to why the photopack was not shown to defense counsel at that time.[10/] The only reason the court gave for overruling the objection was that defense counsel knew of the existence of the photopack, and it was incumbent upon him to make inquiry when it did not appear in the items he was shown at the police station. (R2270-2272)

As in the other discovery violations discussed above, the court below failed to conduct an adequate inquiry into the circumstances surrounding the State's non-production of the photopack. There was no determined inquiry into whether this action was willful or inadvertent, whether the discovery violation was trivial or substantial, or whether Gardner was prejudiced in the preparation of his defense.

10/ After the trial, in arguing against Gardner's motion for new trial, the prosecutor claimed that the photopack had not been shown to defense counsel at the police station because it was kept upstairs in the detective bureau. (R3017)

D. Lab Results On Scrapings Taken From Polk's Hardware Store

Kevin Noppinger, a forensic serologist with the Florida Department of Law Enforcement, testified at Gardner's trial as an expert in forensic serology over defense objections to his lack of qualifications. (R1799,1810-1811) At one point during Noppinger's testimony, defense counsel alleged a discovery violation by the State because he had not been advised of a lab report dated September 26, 1983 in which Noppinger compared blood scrapings taken from Polk's Hardware Store with the known blood of Joseph Holda. (R1823-1854) He asked the court to exclude any testimony concerning this report. (R1824)

The prosecutor claimed he never received Noppinger's report (R1824,1839), but Noppinger himself said the report was sent to the state attorney's office. (R1836-1837,1840) The prosecutor further asserted his recollection that he advised defense counsel by telephone that Noppinger had such a report (R1840), but defense counsel flatly denied being told by anyone in the state attorney's office that Noppinger would testify concerning this report. (R1848-1849) Counsel for Gardner further alleged that the State intentionally concealed the report from him. (R1843)

The trial court ruled there was no "intentional violation of discovery procedures," and that there was no prejudice to Gardner. (R1846)

Noppinger was permitted to testify that blood scrapings obtained from various parts of Polk's Hardware Store were the same type of blood as that of the victim, Joseph Holda. (R1855-1867)

Whether or not the prosecutor in fact received the lab report Noppinger sent him is essentially irrelevant; because the report was in the custody of a state agency, he was chargeable with knowledge of it, and had a duty to disclose it to defense counsel. State v. Coney, 294 So.2d 82 (Fla.1973); see also Hutchinson, supra.

The court below never definitively resolved the conflict between the assertions of counsel for Gardner and counsel for the State concerning whether defense counsel had been advised of the existence of the report; the court merely found no intentional violation by the State. Even if the prosecutor did tell defense counsel that the report existed, he obviously did not and could not have advised him of its contents, as the prosecutor had never seen the report. (R1850)

The court also failed to address the question of whether the State's discovery violation was trivial or substantial, as required by Richardson.

With regard to the issue of prejudice, the assistant state attorney relied upon the nature of the testimony Noppinger was going to give (that is, testimony that blood at the crime scene was that of the victim) to show a lack of prejudice to Gardner. (R1833-1834) But the procedural prejudice to Gardner was there regardless of the nature of the testimony, as Gardner was unable to prepare to conduct his defense and to cross-examine the witness in consideration of the surprise lab report. Although defense counsel was able to take a quick deposition of Noppinger is the middle of his testimony and examine his file

(R1850-1851), this could hardly substitute for the orderly and studied preparation of the defense which would have been possible had the contents of the report been disclosed in a timely manner as the discovery rules required, and Gardner properly renewed his objections after deposing Noppinger. (R1850-1852)

E. Conclusion

The court below erred in failing to make adequate inquiry pursuant to Richardson and its progeny into the various discovery violations by the State and to afford Gardner appropriate relief due to these breaches of the discovery rules. As a result Gardner is entitled to a new trial.

ISSUE IV.

THE COURT BELOW ERRED IN ALLOWING THE STATE TO INTRODUCE INTO EVIDENCE PRIOR CONSISTENT STATEMENTS MADE BY KEY PROSECUTION WITNESS TONY CAPERS IN ORDER TO BOLSTER THE TESTIMONY HE GAVE AT TRIAL.

Late in Gardner's trial, after Tony Capers had testified, the State was permitted to introduce through Detective Richard McManus of the Clearwater Police Department (over defense objections) a confession Capers made after he was arrested. (R2481-2486,3124) This confession was essentially consistent with Capers' trial testimony.

The general rule is that the prior consistent statement of a witness is not admissible to corroborate his in-court testimony. Van Gallon v. State, 50 So.2d 882 (Fla.1951); Holliday v. State, 389 So.2d 679 (Fla.3d DCA 1980); Lamb v. State, 357 So.2d 437 (Fla.2d DCA 1978); Brown v. State, 344 So.2d 641 (Fla.2d DCA 1977). An exception to the rule exists when the prior consistent statement is being introduced to rebut an express or implied charge against the witness of improper influence, motive or recent fabrication. §90.801(2)(b), Fla. Stat. (1983); McElveen v. State, 415 So.2d 746 (Fla.1st DCA 1982); Van Gallon, supra. The State relied upon this exception to justify its introduction of Tony Capers' consistent statement. (R2481)

Capers' testimony was not admissible under the aforementioned exception. Contrary to the prosecutor's assertion, defense counsel did not suggest that Capers might have lied in return for waiver of the death penalty. (R2481) The State first

elicited testimony on direct examination that Capers had been promised waiver of the death penalty in return for his testimony in court. (R2077) Understandably, Gardner explored the parameters of the plea bargain during cross-examination. (R2123, 2128-2129,2132) However, he did not dwell on the subject, nor did his examination suggest that Capers had recently fabricated his story in order to avoid a sentence of death. Thus this is not a case such as Wilson v. State, 434 So.2d 59 (Fla.1st DCA 1983) or Jackman v. State, 140 So.2d 627 (Fla.3d DCA 1962) in which defense counsel extensively examined the witnesses concerning disposition of charges against them in order to suggest a motive to testify falsely.

Nor did the consistent statements act to rehabilitate Capers after he was impeached by prior inconsistent statements. Denny v. State, 404 So.2d 824 (Fla.1st DCA 1981). Although Gardner did employ certain inconsistent statements made by Capers in order to impeach him, his consistent statement in no way tended to rehabilitate him on the subjects on which he was impeached. See Denny. For example, Gardner impeached Capers by showing that on deposition Capers had said that the inhabitants of Larry Hadley's house had not smoked marijuana on the day of the incident at the hardware store. (R2160-2161) However, the confession Capers gave to McManus did not deal with the subject of marijuana at all. (R2481-2486,3124)

Where, as here, the witness who provides the corroborating statement is a police officer the danger of improperly influencing the jury is particularly grave, as a jury will

generally regard the officer as disinterested and objective, and therefore highly credible. Perez v. State, 371 So.2d 714 (Fla.2d DCA 1979). The testimony of McManus bolstered the testimony of the State's key witness and "cloaked it with a vicarious integrity which undoubtedly enhanced its probative value." Roti v. State, 334 So.2d 146,148 (Fla.2d DCA 1976).

The error in admitting McManus' testimony cannot be harmless, as Tony Capers' credibility obviously was critical to the State's case. McRae v. State, 383 So.2d 289 (Fla.2d DCA 1980). Gardner is therefore entitled to a new trial.

ISSUE V.

THE COURT BELOW ERRED IN ALLOWING THE STATE TO ELICIT TESTIMONY FROM DETECTIVE RICHARD McMANUS CONCERNING LARRY HADLEY'S CHARACTER AND PERSONALITY.

During the late stages of Gardner's trial Detective McManus of the Clearwater Police Department was recalled as a State witness and asked to give the jury some insight into Hadley's mental condition and personality. (R2468-2469) McManus said Hadley was like a big puppy dog who was easily led, easily influenced, and easily led astray by someone who had a dominant personality. (R2489) Hadley, said McManus, did not "have much of a dominant personality whatsoever." (R2489)

Gardner objected to McManus' testimony on several grounds, but to no avail. (R2469-2475)

After the objections were overruled McManus went on to describe Hadley as

> the type of person that was mentally very weak, very docile individual, and that could be influenced very easily, especially with someone with a more dominant personality.

(R2476)

McManus' testimony concerning Hadley's personality was inadmissible for several reasons (in addition to the denial of an opportunity for Gardner to depose Hadley, as discussed in Issue III. A. herein). Firstly, it was irrelevant. It did not tend "to prove or disprove a material fact." §90.401, Fla.Stat. (1983).

Secondly, there was no proper predicate for the admission of the testimony. Section 90.604 of the Florida Statutes requires that the witness have personal knowledge of the matter about which he testifies. Prior to his initial testimony regarding Hadley's character, McManus did not testify to having any basis for assessing Hadley in this manner. After Gardner's objection, he did state that he had spent about five hours with Hadley on one day (April 22, 1983), and had talked to him since then. (R2475-2476) Such meager contact with Hadley by a lay-person with no apparent training in psychiatry or psychology was hardly an adequate predicate for the admission of an analysis of psyche.

Finally, defense counsel alleged a violation of a court rule in that the prosecutor had conversed with McManus since his previous testimony despite the court's instruction that the witnesses were not to converse with the attorneys while they were on the stand. (R2470-2472) This was a rule which the court could properly invoke. See Geders v. United States,

425 U.S. 80, 96 S.Ct. 1330, 47 L.Ed.2d 592 (1976). The prosecutor stipulated that he had indeed discussed with McManus the reason for calling him as a witness. (R2471) At the very least the court should have conducted the voir dire examination out of the presence of the jury which defense counsel requested (R2470) in order to ascertain whether McManus' testimony should have been excluded for violation of the rule. See Thomas v. State, 372 So.2d 997 (Fla.4th DCA 1979); Dumas v. State, 350 So.2d 464 (Fla.1977); Atkinson v. State, 317 So.2d 807 (Fla. 4th DCA 1975), cert.den., 330 So.2d 21 (Fla.1976).

Admission of McManus' testimony was not harmless. His characterization of Hadley served to bolster Caper's testimony that Hadley played a minor role in the homicide, remaining outside. It also tended to undercut Gardner's statement to the police (R2330-2331,3121) and defense counsel's argument to the jury (R2683,2723) that Hadley did the stabbing by suggesting that meek, docile Larry was not capable of such an act, or that if he did do the stabbing it was only because he was goaded by his (more culpable) cohorts into doing so. In fact, the prosecutor referred to Hadley's "puppy dog" personality and "mind of a child" when arguing to the jury that Hadley could not have done the stabbing. (R2708,2710)

McManus' testimony concerning Hadley's character and personality was improperly admitted and was prejudicial to the defense. Gardner is entitled to a new trial.

ISSUE VI.

THE COURT BELOW ERRED IN UNDULY RESTRICTING GARDNER'S CROSS-EXAMINATION OF SEVERAL STATE WITNESSES, THUS DEPRIVING HIM OF HIS CONSTITUTIONAL RIGHT TO CONFRONT HIS ACCUSERS.

In Coxwell v. State, 361 So.2d 148 (Fla.1978) this Court recognized the importance to the defendant of cross-examination. The Court emphasized "the expansive perimeters of subject matter relevance which the constitutional guarantee of cross-examination must accomodate to retain vitality." (at 152) Pursuant to Coxwell the criminal defendant in a capital case, such as the one presently before the Court, should be allowed to inquire into matters germane to the witness' testimony on direct examination and plausibly relevant to the defense. See also Jones v. State, 399 So.2d 67 (Fla.5th DCA 1981); Williams v. State, 386 So.2d 25 (Fla.2d DCA 1980).

Gardner was unduly restricted in his cross-examination of several important State witnesses.

Detective Ronald Luchan was recalled as a prosecution witness to testify to statements Gardner made on April 22, 1983 when Luchan seized a pair of tennis shoes from him. (R2243-2244) On cross-examination counsel for Gardner asked how Luchan came to be at the police station when Gardner was there. (R2244) Luchan answered that he was still actively involved in the case. (R2244) Defense counsel then asked when Luchan's active involvement began. (R2244) Luchan answered that it began about two o'clock on April 22, 1983. (R2244) When defense counsel asked, "You did not go to the Polk Hardware Store on March 23,

1983?" a State objection on grounds the question was "beyond the scope" was sustained. (R2244-2249) This question should have been permitted because it went to the credibility and trustworthiness of the testimony, and the witness' ability to recall. See §90.608, Fla.Stat. (1983).

Perhaps even more important was the court's refusal to allow defense counsel to question either Detective Luchan or Detective Moore with regard to what Colleen Barnhouse had told the police. (R2246-2248,2423-2425,2460-2466) On the day of the crimes at Polk's Hardware Store Barnhouse told the police she had seen a black male, whom she described, standing outside the store. She later identified this person as Tony Capers from a photograph in a newspaper. (R2427-2431)[11/]

The testimony Gardner wished to elicit was important for at least two reasons. It would have served to impeach the testimony of Detective McManus that the police had no substantial leads until the latter part of April when they talked to Hadley. (R2301)(Although Barnhouse apparently did not identify Capers from the newspaper photo until after the police interviewed Hadley, she had already told the police about seeing the black male in front of the hardware store and given them a description. (R2427-2432) It also would have impeached the State's key witness, Tony Capers, who claimed it was not he but Hadley

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11/ Gardner did develop the Barnhouse identification during the penalty phase of his trial by calling Detective Moore as his own witness. (R2858-2866)

who waited outside the store as a lookout. (R2099,2186,2193-2194) Florida's Evidence Code provides for the admissibility of this type of impeachment evidence. §90.608(1)(e), Fla.Stat. (1983).

In Coco v. State, 62 So.2d 892 (Fla.1953), cert.den., 349 U.S. 931, 75 S.Ct. 774, 99 L.Ed. 1261 (1955) this Court spoke of the absolute right of full and fair cross-examination to which criminal defendants are entitled. In Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923,927 (1965) the United States Supreme Court declared the right of confrontation and cross-examination to be "an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." Deprivation of this right is a denial of due process. Pointer. See also Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974).

By curtailing Gardner's cross-examination of State witnesses the trial court denied him a right guaranteed by Article I, Section 16 of the Constitution of the State of Florida and the Sixth Amendment to the Constitution of the United States. As a result, Gardner must be granted a new trial.

ISSUE VII.

THE COURT BELOW ERRED IN REFUSING TO GRANT GARDNER'S REQUEST FOR A MISTRIAL WHEN DETECTIVE McMANUS TESTIFIED THAT LESTER STEWART HAD AGREED TO TAKE A POLYGRAPH TEST.

Detective Richard McManus of the Clearwater Police Department testified at Gardner's trial to, among other things, statements Lester Stewart made to the police. (R2288-2290,2296)

(Stewart had testified earlier in the trial. (R1710-1734)) McManus testified that at one point Stewart was viewed as a potential suspect. (R2288) Stewart admitted being in the hardware store several times on the day Joseph Holda died, but denied seeing Holda's body, which McManus found difficult to believe. (R2289)

McManus further testified that the last time the detectives brought Stewart in, after having conversed with him at least three times before, Stewart agreed to take a polygraph test. (R2290) Gardner immediately moved for a mistrial due to the reference to the polygraph. (R2290-2294) The prosecutor conceded that admission of this testimony was error, but did not believe it to be reversible error. (R2291) The court denied Gardner's motion for mistrial, whereupon Gardner moved the court to strike the last answer of McManus (in which the polygraph reference occurred) and to instruct the jury to disregard any mention of a polygraph. (R2294) The court then instructed the jury as follows (R2294-2295):

> THE COURT: Ladies and gentlemen of the Jury, the Court will ask you to please disregard the last statement by the detective with reference to a polygraph test. Just take that statement out of your mind as if it was never even mentioned from the detective's testimony. I am excluding, in other words, that portion of his remarks from the record in this case.

Detective McManus went on to testify that after the police finished investigating, Lester Stewart was no longer a suspect. (R2295-2296)

McManus also testified that Stewart viewed a photographic array from which he selected a picture of Hadley as the

man who approached him on March 23 at the apartments where he was working, across the street from the hardware store. (R2310-2320)

In the absence of consent by both the State and the defendant, polygraph evidence is inadmissible at trial in Florida courts. Walsh v. State, 418 So.2d 1000 (Fla.1982).

In Kaminski v. State, 63 So.2d 339 (Fla.1953), cert. den., 348 U.S. 832, this Court recognized that a reference to taking a polygraph may be prejudicial in and of itself, even it there is no testimony concerning the results of the test. The jury in the case presently before the Court was left with the impression that Stewart must have taken and passed a lie detector test, because on the heels of the polygraph reference Detective McManus testified that the police discounted Stewart as a suspect when their investigation was completed. (R2295-2296)

Although the court below gave a purportedly curative instruction to the jury, it was not enough to "unring the bell" and allay the mischief occasioned by the improper testimony. In Dean v. State, 325 So.2d 14 (Fla.1st DCA 1975), cert.den., 333 So.2d 465 (Fla.1976) the court found that even the "thorough" cautionary instruction given by the trial court could not offset the prejudice caused by a witness' testimony concerning the lie detector tests he had taken. And in Walsh, supra, this Court noted that the defendant's comment during his first trial that he had taken and passed a lie detector test is the type of testimony which it is difficult for jurors to disregard and which is likely to influence their decision, even where they are given a precautionary instruction. See also Frazier v. State, 425 So.2d 192 (Fla.3d DCA 1983).

Stewart's testimony was important to the State's case for several reasons. Stewart was present at the hardware store, where he was detained by the police (R2299), under very suspicious circumstances. He admitted entering the store several times on the day of the crimes. (R1711-1712) He was found carrying a knife, and the victim had been stabbed to death. (R2401,2420,2576-2577) He had a red substance on his clothing and shoes. (R2402) He lied to the police several times before finally admitting he had seen Joseph Holda's body. (R1715) These incriminating facts might well have led the jury to conclude that Stewart himself was involved in the Holda murder. However, as Stewart was cloaked with the mantle of credibility when Detective McManus referred to his offer to take a lie detector test, and to the fact that Stewart was later cleared as a suspect, any reasonable doubt the jury may have had that Stewart, rather than Gardner, committed the killing was removed.

Perhaps more importantly, the testimony that came from Stewart directly, and indirectly through Detective McManus, tended to corroborate, in part, the testimony of the State's key witness, Tony Capers, and to contradict, in part, the statement Gardner gave to the police in which he denied personally killing Joseph Holda. The combined testimony of Stewart and McManus was that on the afternoon of the Holda murder Stewart was approached at his place of employment by a black male, whom Stewart later identified from a photopack as Larry Hadley. (R1716-1719, 1729-1730,1732-1733,2319) This testimony supported Capers' testimony that Hadley remained outside the hardware store, and was counter to Gardner's statement to the police that Hadley was the one who stabbed Holda.

Because the polygraph reference served improperly to bolster the credibility of Stewart (see Bollinger v. State, 402 So.2d 570 (Fla.1st DCA 1981) and Kaminski, supra) while also shoring up the testimony of the main prosecution witness, Capers, and undermining the credibility of Appellant, Gardner is entitled to a new trial.

ISSUE VIII.

THE COURT BELOW ERRED IN REFUSING TO CONSIDER RELEVANT EVIDENCE BEARING UPON THE VOLUNTARINESS OF STATEMENTS GARDNER MADE TO THE POLICE WHILE IN THEIR CUSTODY AND IN ADMITTING THESE STATEMENTS INTO EVIDENCE WHEN THE STATE HAD FAILED TO PROVE THEY WERE MADE VOLUNTARILY.

Gardner, through his counsel, made two pretrial motions to suppress statements he made to the police while in their custody. (R226,277-280) One of the motions was heard by the court on October 4, 1983 (R948-1034) and denied. (R310,1031-1034) The other was heard on October 11, 1983, and also denied. (R330, 1108-1172)

Several statements made by Gardner were introduced against him at trial over objection. Detective Luchan testified that he seized a pair of tennis shoes from Gardner on April 22, 1983. (R1929-1931) The prosecutor asked Luchan whether there was any conversation between he and Gardner regarding the shoes. (R1931) Luchan said there was, and began to recount the conversation, but was interrupted by a defense objection. (R1931-1940) The objection was overruled, but the prosecutor did not ask Luchan to complete his answer. (R1940) Later in the trial, how-

ever, Luchan was recalled as a State witness. (R2240) This time he was permitted to testify that when Gardner was untying his shoes he pointed to black blotches on them which he said was shoe polish. (R2243-2244) When Luchan asked him why the black blotches were on the shoes Gardner replied that they were concealing blood from the victim. (R2244)

The State also introduced at trial, over the renewed objections of defense counsel, testimony from Detective McManus of the Clearwater Police Department concerning the more formal confessions Gardner made to the police (R2324-2336), about which McManus had testified at the pretrial hearing on the first motion to suppress. (R948-1022) These essentially consisted of two oral statements and one statement that was typed by a police stenographer. In each statement Gardner admitted being inside the hardware store. In the typed statement and one of the statements that was not reduced to writing he blamed Hadley for the stabbing (R2330-2331,2336), while in the other statement he said it was Capers who wielded the knife. (R2331)

In order to introduce a defendant's out-of-court statements at his trial the State bears the burden of proving that, under the totality of the circumstances, the statements were freely and voluntarily given. Brewer v. State, 386 So.2d 232 (Fla.1980); McDole v. State, 283 So.2d 553 (Fla.1973); DeConingh v. State, 433 So.2d 501 (Fla.1983), cert.den., 104 S.Ct. 995, 79 L.Ed.2d 228 (1984); Reddish v. State, 167 So.2d 858 (Fla.1964).[12/]

12/ The trial court may have mistakenly believed only the jury could consider Hadley's threats, as the court commented, "It (cont'd)

Gardner would first note that the trial court erroneously refused to consider certain relevant evidence bearing upon the voluntariness of his statements to the police, to-wit: threats made against Gardner by Larry Hadley. (R1010-1011) In fact, the court sustained an objection by the prosecutor during the testimony of the sole witness at the October 4 suppression hearing to the general question of whether anyone threatened Gardner. (R1006-1011) This question certainly was relevant to whether or not Gardner's statements were freely and voluntarily given. A confession should not be received into evidence when it has been influenced by fear or threat. Frazier v. State, 107 So.2d 16 (Fla.1958); Collins v. Wainwright, 311 So.2d 787 (Fla.4th DCA 1975), cert.dism., 315 So.2d 97 (Fla.1975); Brewer and Reddish, both supra.

Furthermore, the following factors established at the October 4 suppression hearing show that the statements Gardner made were not the product of his willingness to confess, but were tainted by improper influences.

For example, Gardner was arrested late at night, at around 10:30 p.m. (R977,984), and spent approximately two hours at the police department before his final statement was completed. (R996) He was taken to the police station for questioning instead of to the Pinellas County Jail, where people accused of murder are normally booked. (R983-985) He was not told at the initial

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12/ (cont'd) [the threats] may have some aspect as far as the trial is concerned, but I don't think it has any bearing on the voluntariness of the confession to the police...." (R1010-1011) However, it was up to the court, not the jury, to consider all the evidence and make the initial determination as to whether the statements were voluntary. McDole v. State, 283 So.2d 553 (Fla.1973).

arrest scene why he was being arrested (R952), and at the police station was only told he was being arrested for homicide, not first-degree capital murder. (R954,956)

Detective McManus was unable to testify concerning what Detectives Moore and Luchan said when they arrested Gardner at Angel's Bar (R982), nor could he say what if anything was said to Gardner between 10:50 when the initial interview was stopped and 11:30 when the stenographer arrived and the typed statement began, as McManus was in a different area of the police department. (R995,1021-1022) Neither Moore nor Luchan testified at the suppression hearings, and so the State did not show that they did not make any promises or threats to Gardner, which would have rendered his confessions involuntary. See Collins and Reddish, both supra.

Additionally, Gardner was sitting in a bar prior to his arrest and had been drinking. (R952,958-959,978) Two or three or four times during his questioning by the police Gardner said he was going into the "D.T.'s" and wanted medical attention (R1003-1004), but he did not receive any during the two hours he was at the police station. (R1011) Nor was Gardner given any food or drink during this time. (R1011-1012)

The elements above combine to render incorrect any decision that the State proved Gardner's statements were the free and voluntary product of a will to confess.

Gardner would also point out that no predicate whatsoever was established at trial for the introduction of his remarks about the blotches on the shoes. There was no testimony to show

that Gardner was advised of his Miranda rights before being questioned about the shoes, or any other testimony by which the State attempted to carry its burden of proving the voluntariness of the comments. (R2243-2244)

Gardner should be granted a new trial due to the improper submission to the jury of the statements he made to the police.

ISSUE IX.

THE COURT BELOW ERRED IN ALLOWING THE STATE TO ELICIT TESTIMONY FROM ONE OF ITS WITNESSES WHICH CONSTITUTED COMMENT ON GARDNER'S ABSOLUTE RIGHT TO REMAIN SILENT.

During his testimony about the statements Gardner made to the police, Detective McManus testified that Gardner never indicated he was under the influence of "pot" or any other kind of narcotic at the time of the crimes at the hardware store. (R2337-2338) The prosecutor asked, "So, if you hear that today in court, that would be the first time you heard the defendant making such allegations, is that correct?" (R2338) McManus responded that that was absolutely correct. (R2338) He further testified that there were no conversations between Gardner and him about Capers having supplied him with marijuana and beer and gotten him drunk. (R2338-2339) Nor did Gardner ever indicate at all during the first part of the interview that he was drunk. (R2339)

Gardner objected to the preceding line of questioning on several grounds, including the ground that it reflected a comment on his right to remain absolutely silent. (R2339-2343)

The court did not find the questions to be "highly objectionable," and overruled the objections. (R2342)

The prosecutor then elicited testimony from McManus that at no time during the typed statement did Gardner indicate he was so intoxicated on high-grade marijuana that he did not know the difference between right and wrong. (R2343-2344)

On cross-examination McManus conceded that Gardner answered every question that was asked of him during his interview with the police. (R2389)

Any comment which is fairly susceptible of being construed by the jury to refer to the defendant's right to remain silent constitutes reversible error without regard to the doctrine of harmless error. David v. State, 369 So.2d 943 (Fla. 1979); Samosky v. State, 448 So.2d 509 (Fla.3d DCA 1983), pet. for review denied, 449 So.2d 265 (Fla.1984); see also Trafficante v. State, 92 So.2d 811 (Fla.1957). What the jury hears or may understand or infer is critical in deciding whether there has been comment on the defendant's right to remain silent. Harris v. State, 381 So.2d 260 (Fla.5th DCA 1980).

The prosecutor improperly called the attention of the jury to Gardner's exercise of his right to remain silent in two respects. The first, obviously, was the eliciting of testimony about what Gardner did not say when he was questioned by the police. Merely because he did make statements about certain aspects of the crimes did not justify questioning McManus about Gardner's remaining silent on other points. See Pinkney v. State, 351 So.2d 1047 (Fla.4th DCA 1977), rem., 364 So.2d 892

(Fla.1978). This is especially true in view of the fact that McManus never questioned Gardner about marijuana or beer or being intoxicated. (R2389)

Additionally, the prosecutor's question to McManus about hearing the defendant make such allegations in the courtroom for the first time was fairly susceptible of being construed as a comment on Gardner's impending failure to take the witness stand during his trial and was improper. Roberts v. State, 443 So.2d 192 (Fla.3d DCA 1983) and cases collected therein; see also Andrews v. State, 443 So.2d 78 (Fla.1983).[13/]

Because of the improper comments during the State's case on his exercise of his right to remain silent, Gardner is entitled to a new trial.

ISSUE X.

THE COURT BELOW ERRED IN DENYING GARDNER'S MOTIONS FOR MISTRIAL DUE TO SEVERAL INSTANCES OF IMPROPER COMMENTS BY THE COURT AND BY THE PROSECUTING ATTORNEY.

Gardner, through his counsel, made no less than 15 motions for mistrial during the course of his trial. (R1295-1296,1392-1395,1482-1486,1687-1692,1770-1776,1890-1891,1908-1911, 1984-2001,2089-2091,2155-2158,2290-2294,2363-2365,2602-2608,2786-2787,2839-2841) Two of the motions have already been discussed. Issue I. of this brief dealt with an improper question asked by the assistant state attorney during voir dire. Issue VII. in-

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13/ Gardner did not testify or present any evidence during the guilt phase of his trial.

volved testimony that Stewart offered to take a polygraph examination. This discussion will focus on several of the other motions for mistrial, in which either the court itself or one of the prosecuting attorneys made improper remarks in the presence of the jury.

One motion for mistrial occurred during defense counsel's opening statement. He asked the jurors to listen to see if they heard the words from Hadley that the prosecutor said he would put into evidence. (R1687) The State objected to this comment in the presence of the jury on the grounds that defense counsel knew Hadley was under a criminal charge and the State could not produce him. (R1687) Gardner moved for a mistrial based on the prejudicial comment made by the State.

The prosecutor's remark was inaccurate and misled the jury. If Hadley was not available to testify for the State, it was because he was mentally incompetent, not because he was under a criminal charge. (R2654-2655) The State could have compelled his testimony pursuant to Section 914.04 of the Florida Statutes. (Please see Issue XI. for a related discussion.) Furthermore, the State's remark undoubtedly suggested to the jury that Hadley had been charged, like Gardner, with first-degree murder, when in truth he had only been charged as an accessory after the fact. (R1120,2652)

Another motion for mistrial occurred during the testimony of the State's main witness, Tony Capers. A discussion had been held at the bench on a State objection to a question on cross-examination pertaining to Capers' purchase of marijuana.

Defense counsel asked his next question of the witness, whereupon the prosecutor said, in the presence of the jury, "Judge, just for the record, that is in direct contravention of what the court just ruled at the bench, and I will object." (R2155) When defense counsel asked to approach the bench, the prosecutor said, "Judge, what is the point if he'll turn around and do it against the court's ruling?" (R2155)

The prosecutor's remarks were highly prejudicial, as they ascribed to defense counsel the unethical disregarding of the court's ruling. Verbal attacks such as this one on the integrity of opposing counsel are wholly inconsistent with the prosecutor's role. Briggs v. State, __So.2d__ (Fla.1st DCA Case No. AU-125, opinion filed August 17, 1984).

Florida courts recognize that among attorneys the prosecuting authorities must be especially circumspect in the comments they make within the hearing of the jury, because of the quasi judicial position of authority which prosecutors enjoy. Adams v. State, 192 So.2d 762 (Fla.1966); Gluck v. State, 62 So.2d 71 (Fla.1952); Stewart v. State, 51 So.2d 494 (Fla.1951); McCall v. State, 120 Fla. 707, 163 So. 38 (Fla.1935); Washington v. State, 86 Fla. 533, 98 So. 605 (Fla.1923); Knight v. State, 316 So.2d 576 (Fla.1st DCA 1975); Kirk v. State, 227 So.2d 40 (Fla.4th DCA 1969). See also Cochran v. State, 280 So.2d 42 (Fla.1st DCA 1973). The prosecutor's duty is not to convict but to seek justice. Cochran. Part of that duty is to refrain from improper remarks or acts which would or might tend to affect the fairness and impartiality to which a defendant is entitled.

Cochran. In the two instances discussed above the prosecutor fell short of fulfilling this duty, and Gardner was prejudiced as a result.

The other motions for mistrial to be discussed herein relate to remarks by the trial court in the presence of the jury. The first occurred during cross-examination of State witness Richard Vellucci, a paramedic with the City of Clearwater. The State objected to a line of questioning as having been asked and answered once by the witness. (R1770) The court said (R1770):

> Well, I was curious as to whether you were going to ask any more questions in this area that you hadn't asked before. You seem to be just repeating yourself, Mr. Mensh [defense counsel]. If this is all that the witness is supposed to say, I think he said it many times.

Another judicial comment occurred during direct examination of Capers by the assistant state attorney, who was questioning Capers about the time of day he and the others returned to Clearwater from Tarpon Springs. Capers said it was around noon, but he was not wearing a watch. (R2088) When the prosecutor asked whether it could have been a little earlier or later than 12:00, Capers said it was possible. (R2088) Defense counsel objected on grounds the question was leading and called for speculation, whereupon the court remarked (R2089):

> She [the assistant state attorney] only asked him if he was wearing a watch. He said no. The implication is how did he, I suppose, know it was noon without a watch. You shouldn't suggest any other time because he said it was noon.

Gardner made another motion for mistrial during the testimony of Detective McManus. On cross-examination McManus

said he believed Gardner was handcuffed in back when he was arrested because this was normal procedure, but he could not be certain. (R2360) Gardner's attorney then read a question and answer from McManus' deposition. The question was: "Were his [Gardner's] hands handcuffed in front or in back?" The answer was: "I cannot be specific on that. I know he was handcuffed." (R2362) The State objected, saying there was no impeachment between the deposition and McManus' in-court testimony. (R2362-2363) Defense counsel argued that it was for the jury to determine whether there was an inconsistency. (R2363) The court sustained the objection and made the following comments in the presence of the jury (R2363):

> That doesn't sound like an inconsistency to me. I think you are trying to make it appear there is an inconsistency, but I don't see it. I will sustain the objection.

In each of the three instances referred to above, the trial judge commented on the evidence, in violation of Section 90.106 of the Florida Statutes. This Court discussed the impropriety of any judicial comment on the evidence in Whitfield v. State, __So.2d__ (Fla.Case No. 64,051, opinion filed June 14, 1984):

> A trial court should scrupulously avoid commenting on the evidence in a case. Lee v. State, 324 So.2d 694 (Fla.1st DCA 1976). Especially in a criminal prosecution, the trial court should take great care not to intimate to the jury the court's opinion as to the weight, character or credibility of any evidence adduced. Seward v. State, 59 So.2d 529 (Fla.1952).

See also James v. State, 388 So.2d 35 (Fla.5th DCA 1980); Hamilton v. State, 109 So.2d 422 (Fla.3d DCA 1959).

With regard to the use of McManus' deposition as impeachment, defense counsel was correct in saying that it was for the jury to evaluate whether or not the deposition testimony was inconsistent with the witness' testimony in court. See Gordon v. United States, 344 U.S. 414, 73 S.Ct. 369, 97 L.Ed. 447 (1953).

The court also was wrong in castigating defense counsel before the jury for repeating himself and allegedly trying to manufacture an inconsistency in testimony.

> The single most dominant factor in the administration of a trial is the conduct of the judge; the manner in which he exercises control over such proceedings is reflected through his remarks and comments.

Hunter v. State, 314 So.2d at 174 (Fla.4th DCA 1975). The judge therefore should refrain from remarks which might inhibit counsel from fully representing his client or which might result in bringing counsel into disfavor in the eyes of the jury, at the expense of his client. See also Jones v. State, 385 So.2d 132 (Fla.4th DCA 1980); Seaboard Coast Line Railroad Company v. Wiesenfeld Warehouse Company, 316 So.2d 567 (Fla.1st DCA 1975), cert.den., 328 So.2d 846 (Fla.1976).

The cumulative effect of the comments made by the prosecutor and the court was to prejudice Gardner before the jury, and he must be given a new trial as a result.

ISSUE XI.

THE COURT BELOW ERRED IN GIVING THE JURY INCORRECT AND MISLEADING JURY INSTRUCTIONS, AND IN REFUSING TO INSTRUCT ON THE DEFENSE OF VOLUNTARY INTOXICATION AND ON ALL PROPER LESSER INCLUDED OFFENSES.

A. Incorrect And Misleading Instructions

At the behest of the prosecution, over Gardner's objection, the court gave the jury this instruction (R2742-2743):

> The Co-Defendants, Larry Hadley and Debra Tyler, are not available to either side as witnesses. The Jury should draw no inference from their absence.

This instruction was false. Hadley may have been unavailable due to his mental condition, although this was never definitively proven. Tyler, however, could have been compelled by the State to testify pursuant to Section 914.04, Florida Statutes; the State had merely to subpoena her. See Menut v. State, 446 So.2d 718 (Fla.4th DCA 1984). The jury was misled and defense counsel was unnecessarily hampered in arguing to the jury that there was a lack of evidence because the State did not present all available witnesses. In his closing argument counsel asked the jury whether they had heard from Debra Tyler or Larry Hadley, as the assistant state attorney had said they would in her opening statement. (R2665) Although the State's objection to this argument was, in effect overruled (R2666), any impact it might have had was destroyed by the court's erroneous charge to the jury.

Also over Gardner's objection (R2625-2626) the court gave the following instruction on intent from the standard jury instruction on burglary (R2742):

> Proof of intent. The intent with which an act is done is an operation of the mind and, therefore, is not always capable of direct and positive proof. It may be established by circumstantial evidence like any other fact in a case.

This instruction was wholly inappropriate, as Gardner was not charged with burglary.

B. Defense Of Voluntary Intoxication

Gardner, through his attorney, asked the trial court to instruct the jury on the defense of voluntary intoxication. (R2639-2647) The court acknowledged (as did the prosecutor) that Gardner had used alcohol and marijuana, but nevertheless denied the request. (R2641,2644,2647)[14/]

In his closing argument to the jury defense counsel referred to the fact that "everybody got loaded" on beer and marijuana. (R2678) The prosecutor, in his closing argument, told the jury intoxication was not a defense. (R2717) Knowing that the court was not going to give the intoxication instruction, the prosecutor also said, "Well, if the Judge tells you intoxication is a defense, cut him loose." (R2717)

Voluntary intoxication is a defense to a crime which requires specific intent, as a person who is intoxicated may not be capable of forming the requisite intent. Graham v. State, 406 So.2d 503 (Fla.3d DCA 1981); Presley v. State, 388 So.2d 1385 (Fla.2d DCA 1980); Fouts v. State, 374 So.2d 22 (Fla.2d DCA 1979), disapproved in part, 408 So.2d 1037 (Fla.1982); Harris

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14/ In his sentencing order the court likewise acknowledged that Gardner had been drinking beer and smoking marijuana prior to the crimes. (R3094)

v. State, 415 So.2d 135 (Fla.5th DCA 1982), pet.for rev.den., 419 So.2d 1198 (Fla.1982); Linehan v. State, 442 So.2d 244 (Fla. 2d DCA 1983); Cirack v. State, 201 So.2d 706 (Fla.1967); Garner v. State, 28 Fla. 113, 9 So. 835 (Fla.1891); Mellins v. State, 395 So.2d 1207 (Fla.4th DCA 1981), pet.for rev.den., 402 So.2d 613 (Fla.1981); Edwards v. State, 428 So.2d 357 (Fla.3d DCA 1983). Both crimes with which Gardner was charged, first degree murder and robbery, are crimes involving specific intent, and so the defense of voluntary intoxication was applicable both charges. Woods v. State, 152 Fla.417, 12 So.2d 111 (Fla.1943); State v. Goepel, 68 So.2d 351 (Fla.1953); Bell v. State, 394 So.2d 979 (Fla.1981); Graham, Linehan, Cirack, Garner, and Edwards, all supra.

The question of whether a defendant was too intoxicated to form the intent necessary to complete the crime charged is ordinarily a question for the jury. Hamilton v. State, 133 Fla. 481, 182 So. 854 (Fla.1938); Harris, Garner, Woods, Mellins, Edwards, all supra.

It is axiomatic that a trial court is obligated to instruct the jury on the theory of defense of the accused where there is any evidence to support the defense, regardless of the court's own view as to the strength of that evidence. Koontz v. State, 204 So.2d 224 (Fla.2d DCA 1967); Williams v. State, 356 So.2d 46 (Fla.2d DCA 1978); Motley v. State, 155 Fla. 545, 20 So.2d 798 (Fla.1945); Monroe v. State, 384 So.2d 50 (Fla.2d DCA 1980); Bagley v. State, 119 So.2d 400 (Fla.1st DCA 1960); Canada v. State, 139 So.2d 753 (Fla.2d DCA 1962); Solomon v.

State, 436 So.2d 1041 (Fla.1st DCA 1983); Laythe v. State, 330 So.2d 113 (Fla.3d DCA 1976), cert.den., 339 So.2d 1172 (Fla.1976); Mellins, supra.

Here there was more than sufficient evidence of Gardner's intoxication to require the court to submit the issue to the jury. Capers testified that on the morning preceding the events at Polk's Hardware Store he bought some beer and "some extra-special, extra-potent very heavy-duty marijuana" called sensama, which he rolled into 13 "joints." (R2081-2082,2158,2160,2165-2166) Gardner drank three and one-half of the beers and smoked one or two of the powerful marijuana cigarettes. (R2083) Before going to the hardware store, Capers, Gardner, Hadley, and Tyler drove to Tarpon Springs, where they drank two or three more quarts of beer and smoked the rest of the sensama marijuana. (R2088,2201) None of the four had any food to eat while they were driving around Tarpon Springs. (R2164) They were all "flying pretty high." (R2200-2201)

Capers testified he had never seen Gardner smoke a marijuana cigarette before, although he had known him for more than a month. (R2078,2149,2170) Thus the potent drug Gardner smoked may well have altered his mental state markedly, as he had not built up a tolerance for the drug. Capers' testimony that Gardner was stabbing and cutting Holda like a "maniac" (R2187) lends further support to the proposition that Gardner was acting under the influence of the alcohol and drug he consumed when he allegedly committed the offenses. (In his normal state of mind, Gardner is a man of "incredibly calm disposition," as the trial court specifically found. (R418,3095))

Capers also testified that Gardner was slurring his speech a little on the day in question. (R2199)

Another State witness, Victor Chiaia, saw Gardner minutes after the incident at Polk's Hardware Store. He testified that Gardner's eyes were bloodshot and "looked high." (R2228)

The evidence outlined above certainly was adequate at least to raise a jury question as to whether Gardner was intoxicated from alcohol and marijuana to the extent that he could not form the specific intents needed to support convictions of first degree murder and robbery. The court below invaded the province of the jury when he refused to give them the opportunity to consider this issue during the guilt phase of Gardner's trial.

C. Lesser Included Offenses--Murder In The First Degree

The indictment in this case charged Gardner with first degree premeditated murder. (R16-17) On this charge, the State elected to proceed on both premeditation and felony murder as methods of proving the crime. (R2694-2699) Jury instructions on both alternate theories of prosecution were correctly given. (R2735-2737) See, e.g., Knight v. State, 338 So.2d 201 (Fla. 1976). However, the court refused to instruct the jury on third degree felony murder as a lesser included offense of first degree felony murder. (R2617-2623) This Court must reverse this case for a new trial. See Lomax v. State, 345 So.2d 719 (Fla.1977).

Third degree felony murder is defined as:

> (4) The unlawful killing of a human being, when perpetrated without any design to effect death, by a person engaged in the perpetration of, or in the attempt to perpetrate, any felony other than any:
> (a) Trafficking offense prohibited by s.893.135(1),
> (b) Arson,
> (c) Sexual battery,
> (d) Robbery,
> (e) Burglary,
> (f) Kidnapping,
> (g) Escape,
> (h) Aircraft piracy,
> (i) Unlawful throwing, placing, or discharging or a destructive device or bomb, or
> (j) Unlawful distribution of opium or any synthetic or natural salt, compound, derivative, or preparation of opium by a person 18 years of age or older, when such drug is proven to be the proximate cause of death of the user,
>
> is murder in the third degree and constitutes a felony of the second degree, punishable as provided in s.775.082, s.775.083, or s.775.084.

§782.04(4), Fla.Stat. (1983). The evidence in this case supported a third degree felony murder. When Capers put a choke hold on Holda with the intent to commit the felony of robbery (R2101-2102), he committed an aggravated assault under Section 784.021(1)(b) of the Florida Statutes. And when Gardner pulled a knife, then began stabbing Holda, he committed first an aggravated assault and then an aggravated battery. §§784.021(1) and 784.045(1), Fla.Stat. (1983). Neither felony, aggravated assault nor aggravated battery, is one of the enumerated felonies supporting a first degree felony murder charge. §782.04(4), Fla.Stat. (1983). Consequently, the jury could have concluded, if given the appropriate instruction, that the homicide occurred during an aggravated assault or aggravated battery--a third degree murder.

Refusing to instruct upon third degree felony murder was not harmless error. Under the facts of this case, third degree felony murder was the next lesser included offense of first degree felony murder. Second degree felony murder did not apply because of the requirement that an innocent party actually kill the victim. §782.04(3), Fla.Stat. (1983); State v. Jefferson, 347 So.2d 427 (Fla.1977). (The prosecutor below conceded that second degree felony murder was not factually applicable. (R2616)) Therefore third degree felony murder is the next lesser included offense of first degree felony murder. The two steps removed rule of State v. Abreau, 363 So.2d 1063 (Fla. 1978) does not apply. Since the State requested and obtained instructions on first degree felony murder, Gardner was entitled to instructions on the lesser felony murder offenses supported by the evidence in this case.

D. Lesser Included Offenses--Robbery With A Deadly Weapon

With regard to the robbery count, the prosecutor told the judge that instructions were required on the lesser included offenses of robbery with a weapon and robbery. (R2614) However, the court instructed only on robbery and theft under this count. (R2739-2742) He should have followed the prosecutor's advice and instructed on all three forms of robbery. §812.13(2), Fla.Stat. (1983); Reddick v. State, 394 So.2d 417 (Fla.1981); Growden v. State, 372 So.2d 930 (Fla.1979); Stephens v. State, 396 So.2d 741 (Fla.5th DCA 1981).15/

15/ The current Florida Standard Jury Instructions in Criminal Cases, at page 257a, draw a technical distinction between true (cont'd)

Gardner also requested instructions on the lesser included offenses of aggravated assault and assault. (R2623-2625) Because the indictment alleged and the proof tended to show that the robbery was perpetrated with a deadly weapon, it was necessary to prove an aggravated assault and its lesser included offense, simple assault, in order to prove the offense charged, and so these two crimes were proper lesser included offenses which should have been submitted to the jury. Brown v. State, 394 So.2d 1023 (Fla.4th DCA 1981), pet.for rev.den., 402 So.2d 613 (Fla.1981); Jackson v. State, 355 So.2d 137 (Fla. 3d DCA 1978), cert.den., 361 So.2d 835 (Fla.1978); Young v. State, 330 So.2d 532 (Fla.3d DCA 1976); Fountain v. State, 353 So.2d 608 (Fla.4th DCA 1977); Houston v. State, 360 So.2d 468 (Fla.3d DCA 1978); Hammer v. State, 343 So.2d 856 (Fla.1st DCA 1976), cert.den., 352 So.2d 175 (Fla.1977); Morrison v. State, 259 So.2d 502 (Fla.3d DCA 1972).

Failure of a court to instruct on the next immediate lesser included offense constitutes error that is per se reversible. Abreau, supra.

E. Conclusion

The improper instructions given to the jury deprived Gardner of a fair trial. The remedy which this Court must afford is to grant him a new one.

15/ (Cont'd) lesser included offenses and crimes which involve enhancement if certain events occur (i.e., robbery with or without a weapon or deadly weapon). This page of the instructions makes clear, however, that the jury should be instructed on all forms of the crimes involving enhancement.

ISSUE XII.

THE COURT BELOW ERRED IN REFUSING GARDNER'S REQUEST TO CONDUCT INDIVIDUAL, SEQUESTERED VOIR DIRE ON THE DEATH PENALTY.

Pretrial, Gardner moved the court to conduct individual, sequestered voir dire of prospective jurors on their feelings concerning the death penalty. (R322-323) The motion was denied. Gardner renewed it before voir dire began, but to no avail. (R1251)

Hovey v. Superior Court of Alameda County, 616 P.2d 1301 (Cal.1980) contains an excellent in-depth discussion of the effects of death-qualifying voir dire examination on prospective jurors, including a review of the studies that have appeared on this issue. The Hovey court concluded that the process renders the jurors much more likely to convict a defendant and sentence him to death. (See also Grigsby v. Mabry, 569 F.Supp. 1273 (E.D. Ark. 1983).) The court held that the best way to minimize the damaging effects of death-qualification is individualized sequestered voir dire, which is precisely what Gardner requested.

One of the many problems with conducting voir dire regarding the death penalty in the presence of other jurors may be seen in the record of this case. On at least two occasions, prospective jurors Ackren and Patterson stated their views on the death penalty merely by agreeing with statements made by one another (R1624,1627), rather than each articulating their own views in their own words.

It is perhaps ironic that the court did conduct individual voir dire concerning what prospective jurors had heard or

read about this case (R1252-1290), but refused it on the all-important death penalty question. As the Hovey court stated:

> Given the frailty of human institutions and the enormity of the jury's decision to take or spare a life, trial court's [sic] must be especially vigilant to safeguard the neutrality, diversity and integrity of the jury to which society has entrusted the ultimate responsibility for life or death.

616 P.2d at 1354-1355.

ISSUE XIII.

THE COURT BELOW ERRED IN REFUSING TO ALLOW GARDNER TO SUBSTITUTE PRIVATE COUNSEL FOR HIS COURT-APPOINTED ATTORNEY AND TO ALLOW NEW COUNSEL ADEQUATE TIME TO PREPARE FOR THE SENTENCING HEARING.

The private attorney who represented Gardner throughout the proceedings below, Myron Mensh, was appointed by the trial court to undertake the representation. (R5) After his trial, but prior to his scheduled sentencing, Gardner asked the court to allow private counsel he had retained, Larry Bergman, to be substituted for Mensh, and asked that his sentencing be continued so that Bergman would have time to prepare to represent him. A hearing was held before Judge O'Brien on November 4, 1983, at which both Mensh and Bergman were present. (R2936-2947) Bergman expressed his willingness to represent Gardner. (R2940-2941) The court refused to allow Bergman to be substituted for Mensh, but did say Bergman could appear as co-counsel.

The court rendered a disservice to the taxpayers and violated Florida Rule of Criminal Procedure 3.111 when he refused to allow Gardner's counsel of choice to represent him. Subsec-

tion (b)(1) of the Rule provides for the appointment of counsel only for indigent defendants. Once Gardner was able, with the help of his family (R2939), to retain private counsel, he was no longer entitled to appointed counsel. (See definition of "indigent" in Fla.R.Crim.P. 3.111(b)(4) and Roy v. Wainwright, 151 So.2d 825 (Fla.1963).)

More importantly, Gardner was entitled to be represented by an attorney of his own selection. Watts v. State, 409 So.2d 222 (Fla.2d DCA 1982); see also Chandler v. Fretag, 348 U.S. 3, 75 S.Ct. 1, 99 L.Ed. 4 (1954); Reynolds v. Cochran, 365 U.S. 525, 81 S.Ct. 723, 5 L.Ed.2d 754 (1961).

In order to represent him effectively, his new attorney required time to prepare. Valle v. State, 394 So.2d 1004 (Fla. 1981). Therefore, in addition to allowing Bergman to take over representation of Gardner, the court below should have continued the sentencing for a reasonable time.

ISSUE XIV.

THE JURY WHICH RECOMMENDED THE PENALTY OF DEATH FOR GARDNER WAS TAINTED BY HEARING INADMISSIBLE EVIDENCE IN AGGRAVATION.

The jury's sentencing recommendation is an integral part of Florida's death penalty sentencing scheme. §921.141(1), (2), Fla.Stat. (1983); State v. Dixon, 283 So.2d 1 (Fla.1973), cert.den., 416 U.S. 943. Consequently, taints in the jury recommendation process fatally taint any resulting death recommendation and sentence imposed in accordance with it. See Elledge v. State, 346 So.2d 998 (Fla.1977), Gardner's sentencing jury was tainted and his death sentence violates the Eighth and Fourteenth Amendments to the United States Constitution.

During the penalty phase of Gardner's trial the State introduced over objection a tape recording of the conversation Gardner and Hadley purportedly had in front of Angel's Bar immediately before Gardner was arrested, and gave to the jury copies of a transcript of this recording. (R2830-2843) This evidence was inadmissible for several reasons. The discovery violation relating to the taking of Hadley's deposition has already been discussed in Issue III.A. Also, the tape was not relevant to any of the aggravating circumstances set forth in §921.141, Fla.Stat., and only these circumstances can be considered in the sentencing weighing process. Dixon and Elledge, both supra.

Furthermore, no proper predicate was established to show that Hadley consented to wear the "body bug," as required by §934.03(2)(c), Fla.Stat. This Court has held that the party giving consent to the warrantless recording of a conversation with the defendant must himself testify to that consent. Tollett v. State, 272 So.2d 490 (Fla.1973). See also Franco v. State, 376 So.2d 1168 (Fla.3d DCA 1979); Lopez v. State, 372 So.2d 1136 (Fla.2d DCA 1979); State v. Scott, 385 So.2d 1044 (Fla.1st DCA 1980). (Even Detective McManus did not specifically testify that Hadley consented to wearing the "body bug." (R2830-2844))

Because Hadley did not testify, Gardner was deprived of constitutional right to confront and cross-examine him, as discussed in Engle v. State, 438 So.2d 803 (Fla.1983), cert.den., 79 L.Ed.2d 753 (1984).

Engle is particularly applicable to the admission of Tyler's statement to the police at the penalty phase of Gardner's trial. In Engle this Court held it improper for the court to

consider in deciding whether to sentence Engle to death the confessions and statements of another person who was found guilty at a separate trial of the same murder as Engle. The Court cited the lack of opportunity for confrontation and cross-examination. Engle would seem to be directly on point and controlling as to the admissibility of Tyler's statement. However, it was also inadmissible because it was not relevant to any statutory aggravating circumstance, and because of the discovery violation discussed in Issue III. B.

ISSUE XV.

THE TRIAL COURT ERRED IN SENTENCING GARDNER TO DEATH BECAUSE THE SENTENCING JUDGE ANNOUNCED THAT HE WOULD GIVE UNDUE WEIGHT TO THE JURY'S RECOMMENDATION, AND THE WEIGHING PROCESS INCLUDED INAPPLICABLE AGGRAVATING CIRCUMSTANCES AND EXCLUDED AN EXISTING MITIGATING CIRCUMSTANCE.

The trial court improperly applied §921.141, Fla.Stat. when sentencing Gardner to death. This misapplication of Florida's death penalty sentencing scheme renders Gardner's death sentence unconstitutional in violation of the Eighth and Fourteenth Amendments. See, Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960,49 L.Ed.2d 913 (1976); State v. Dixon, 283 So.2d 1 (Fla.1973). For clarity, the specific misapplications are discussed separately in the remainder of this argument.

A.

The Trial Court Erred In Announcing That He Would Give Great Weight To The Jury's Recommendation That Gardner Be Sentenced To Death.

At least twice during voir dire examination of prospective jurors the court below told them he would "be guided" by and give "great weight" to the jury's recommendation as to penalty. (R1334,1506)

The jury's recommendation of death was not entitled to "great weight" under Florida law; only a recommendation of life is entitled such added weight in the sentencing process. Ross v. State, 386 So.2d 1191 (Fla.1980); Tedder v. State, 322 So.2d 908 (Fla.1975). Addressing the identical error in Ross, supra, this Court reversed Ross's death sentence saying,

> ...the trial court gave undue weight to the jury's recommendation of death and did not make an independent judgment of whether or not the death penalty should be imposed. This error requires that the sentence be vacated and that the cause be remanded to the trial court for reconsideration of the sentence.

386 So.2d at 1191.

The rationale behind not giving great weight to a jury's recommendation of death is the preservation of the third step in Florida's procedure for imposing a death sentence--the interposition of the reasoned judgment of the trial judge between the emotions of the jury and a death sentence. §921.141(3), Fla.Stat.; Ross and Dixon, both supra. Such a reasoned independent judgment was not made in this case. Even though the judge did not recite in his written findings, as did the court in Ross, that he gave the death recommendation great weight, he did announce that fact orally.

Besides evidencing a lack of independent judgment, the court's erroneous instruction to the jury that he would be

guided by and give great weight to their recommendation tainted the jury vote on the penalty to be imposed.

B.

The Trial Court Erred In Instructing The Jury On, And Finding The Existence Of, The Aggravating Circumstance That The Capital Felony Was Committed For The Purpose Of Avoiding Or Preventing A Lawful Arrest And Effecting An Escape From Custody.

In order to establish this aggravating circumstance where the victim is not a law enforcement official, proof of intent to avoid arrest and detection must be very strong. Riley v. State, 366 So.2d 19 (Fla.1978), cert.den., 74 S.Ct. 294 (1982); Menendez v. State, 368 So.2d 1278 (Fla.1979). That proof was lacking here. Although there may have been some initial discussion about eliminating witnesses, Gardner agreed to go along with Capers' suggestion merely to knock the old man out and leave the store. (R2094-2095) The trial judge erred in saying that Gardner still planned to "waste" the old man after Capers suggested otherwise (R411, Appendix, p.2); this statement was made before Capers suggested rendering the man unconscious. (R2094) Thus the plan, if there was one, to get rid of witnesses had been abandoned by the time the people entered the store. It appears that the killing of Holda, then, was rather a frenzied response to Capers' announcement that the cash register contained no money (R2103-2104) than an attempt to eliminate witnesses.

C.

The Trial Court Erred In Instructing The Jury On, And Finding The Existence Of, The Aggravating Circumstance That The Capital Felony Was Especially Heinous, Atrocious Or Cruel.

In support of this aggravating circumstance the court below relied upon the manner in which the multiple knife wounds were administered. (R413-415) However, stabbing deaths do not qualify for this aggravating circumstance unless accompanied by additional evidence proving suffering of the victim or cruelty in inflicting the wounds. See Demps v. State, 395 So.2d 501 (Fla.1981), cert.den., 454 U.S. 933, 102 S.Ct. 430, 70 L.Ed.2d 239 (1981). As this Court said in Dixon, supra:

> What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies--the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

283 So.2d at 9. No such additional acts occurred in this case. The court referred to the final cutting wound to the neck of Holda (R414, Appendix, p.5), but this occurred post-mortem (R2569-2570), and so cannot be used to justify this aggravating circumstance. Blair v. State, 406 So.2d 1103 (Fla.1981); Halliwell v. State, 323 So.2d 557 (Fla.1975).

The evidence showed that only a short time passed between the entry of the people into the store and Holda's death. Capers testified they were only in the store for four or five minutes. (R2175) And Holda was dead before they left because, as mentioned above, the final cut (as well as a cut to the abodmen) was made post-mortem. (R2569-2570) Therefore, Holda was not made to suffer, either mentally or physically, for any prolonged period of time. (Contrast with Demps in which stabbing victim lingered for some time before expiring.)

The court's reliance upon Spinkellink v. State, 313 So.2d 666 (Fla.1975), cert.den., 428 U.S. 911, 96 S.Ct. 3227, 49 L.Ed.2d 1221 (1976) in support of its finding of this aggravating circumstance is wholly misplaced. In Spinkellink this Court did not specify what aspects of the crime it was relying upon to find it especially heinous, atrocious or cruel. Furthermore, Spinkellink may be an aberration. In many cases since this decision the Court has found simple shootings not to qualify for this aggravating circumstance. E.g., Armstrong v. State, 399 So.2d 953 (Fla.1981), cert.den., 78 L.Ed.2d 177 (1983); Clark v. State, 443 So.2d 973 (Fla.1983); Maggard v. State, 399 So.2d 973 (Fla.1981), cert.den., 454 U.S. 1059.

The court below also completely ignored Gardner's mental condition in evaluating this aggravating circumstance. This court has frequently recognized the interrelationship of a defendant's mental condition and the infliction of egregious wounds. E.g., Mann v. State, 420 So.2d 578 (Fla.1982); Miller v. State, 373 So.2d 882 (Fla.1979); Huckaby v. State, 343 So.2d 29 (Fla.1977), cert.den., 434 U.S. 920. The evidence showed that Gardner was "high" from drinking beer and smoking marijuana on the day of the crimes. (See Issue XI. B. in this brief.) Gardner's impaired capacity at the time of the crimes vitiates the heinous, atrocious or cruel aggravating circumstance.

D.

The Trial Court Erred In Instructing The Jury On, And Finding The Existence Of, The Aggravating Circumstance That The Capital Felony Was Committed In A Cold, Calculated And Premeditated Manner Without Pretense Of Moral Or Legal Justification.

The trial court appears to have misconstrued this aggravating circumstance and equated it with premeditation. Because he found ample proof of premeditation, he found this circumstance to exist. (R415-416, Appendix, pp.6-7) This error is revealed most starkly in the court's heavy reliance upon Spinkellink, supra, in its discussion. Spinkellink was decided in 1975. The aggravating circumstance of cold, calculated and premeditated was not added to the statutes until 1979. Ch.79-353, §§1,2, Laws of Florida. Therefore, Spinkellink can have no applicability here. The discussion in Spinkellink to which the court below made reference in his sentencing order (R415-416, Appendix, pp.6-7) dealt merely with evidence of premeditation, not with this aggravating circumstance, which requires something more than premeditation. Jent v. State, 408 So.2d 1024 (Fla.1981), cert.den., 457 U.S. 1111, 102 S.Ct. 2916, 73 L.Ed.2d 1322 (1982); Combs v. State, 403 So.2d 418 (Fla.1981), cert.den., 456 U.S. 984, 102 S.Ct. 2258, 72 L.Ed.2d 862 (1982). (This circumstance ordinarily applies to executions or contract murders. King v. State, 436 So.2d 50 (Fla.1983).) The State here did not prove anything beyond premeditation (if it proved even that). While multiple stab wounds may give rise to an inference of premeditation, they do not demonstrate beyond a reasonable doubt that the killing was cold, calculated or premeditated, without any pretense of moral or legal justification.

E.

The Trial Court Should Have Found Gardner's Intoxication At The Time Of The Crimes To Be A Mitigating Circumstance.

In his sentencing order the court rejected any finding that Gardner's capacity to appreciate the criminality of his conduct was impaired. (R417-418, Appendix, pp. 8-9) However, some of the factual premises relied upon by the court were incorrect. For example, the court stated that Victor Chiaia did not believe Gardner to be functionally "high" or intoxicated shortly after the crimes. (R417, Appendix, p.8) On the contrary, Chiaia testified Gardner's eyes did look "high." (R2228) The order also stated that Capers testified that Gardner's speech was not impaired. (R418, Appendix, p.9) But Capers in fact testified that Gardner was slurring his speech a little on the day of the crimes. (R2199)

Additional evidence in support of the fact that Gardner was substantially impaired has already been discussed under Issue XI. B. One aspect of that evidence, however, bears further examination. In his sentencing order the court found Gardner to be a man of "incredibly calm disposition." (R418, Appendix, p.9) However, Capers described Gardner as acting like a "maniac" when he stabbed Holda. (R2187) The only explanation for Gardner's out-of-character behavior is that he was so affected by the beer and sensama marijuana that he was, in effect, a different person. Thus the court should have found his intoxication mitigating.

It may be that the court felt constrained not to find Gardner's intoxication to be a mitigating circumstance because of the wording of Section 921.141(6)(f), Florida Statutes, which refers to substantial impairment of the defendant's capacity to appreciate the criminality of his conduct or to conform his con-

duct to the requirements of the law. (He may have felt Gardner was impaired to some degree that was less than substantial.) However, the Constitution of the United States requires the sentencer to consider all evidence in mitigation and not be fettered by limitations such as the statute would seem to impose. See Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 793 (1978). Therefore, at the very least this cause should be remanded for the trial court to reconsider this mitigating circumstance.

CONCLUSION

Upon the arguments presented in Issues I. through XII., Ken Gardner asks this Honorable Court to reverse his convictions for a new trial. If he is not granted a new trial Gardner asks this Court to reverse his death sentence with directions to impose a life sentence, or grant him a new sentencing trial, for the reasons discussed in Issues XIII. through XV.

Respectfully submitted,

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