IN THE SUPREME COURT OF THE STATE OF FLORIDA

DAVID EUGENE JOHNSTON,

Appellant,

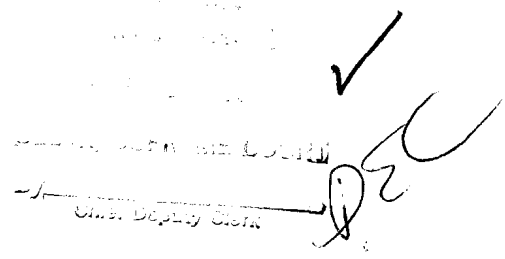
vs.

CASE NO. 65-525

STATE OF FLORIDA,

Appellee.

_____/



INITIAL BRIEF OF APPELLANT

RONALD R. FINDELL, ESQUIRE
Suite 402, Bradshaw Building
65 N. Orange Avenue
Orlando, Florida 32801
(305) 425-7676

Attorney for Appellant

TABLE OF CONTENTS

CITATION OF AUTHORITIES

CASES — PAGE

STATUTES PAGE

IN THE SUPREME COURT OF THE STATE OF FLORIDA

DAVID EUGENE JOHNSTON,

Appellant,

vs. CASE NO. 65-525

STATE OF FLORIDA,

Appellee.

_____/

PRELIMINARY STATEMENT

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

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

STATEMENT OF THE CASE AND FACTS

During the early morning hours of November 5, 1983, the Defendant, DAVID EUGENE JOHNSTON, called the Orlando Police Department and asked them to respond to 406 E. Ridgewood Avenue in reference to a possible homicide. Upon their arrival, the officers went to the southwest upstairs bedroom and found the dead body of Mary Hammond. After interviewing the Defendant and determining that there were discrepancies in his tale of finding the victim, the police placed the Defendant under arrest for the murder of Mary Hammond (TR: Pages 1898-1908).

A preliminary hearing was held on November 21, 1983, before Judge Thomas R. Kirkland. After hearing the testimony of the medical examiner and the police officers investigating the murder, the judge found probable cause to hold the Defendant on the charge of murder in the first degree (TR: Pages 1910-1911).

On November 23, 1984, Clyde E. Wolfe, the Asssistant Public Defender appointed to represent the Defendant, filed a Motion for Notification of the Convening of the Grand Jury and a Motion to Voir Dire the Individual Grand Juror Members (TR: Pages 1912-1915). The Motions were denied following a hearing on the Motions held on December 2, 1983 (TR: Page 1916). On December 5, 1983, the Grand Jury returned an Indictment charging the Defendant with the first degree murder of Mary Hammond (TR: Page 1918).

On December 28, 1983, the Office of the Public Defender filed a Motion to Withdraw as counsel for the Defendant based on the fact that an irreconcilable conflict had developed between their office and the Defendant due to his refusal to follow the advice and direction of his counsel (TR: Pages 1945-1946). The court took the Motion under advisement (TR: Page 1947).

On January 3, 1984, Counsel for the Defendant filed a Notice of Intent to Rely Upon the Defense of Insanity and a Motion for Psychiatric Evaluation (TR: Pages 1949-1951). On January 4, 1984, the court granted the Defendant's Motion for Psychiatric Evaluation and entered its Order appointing Dr. J. Lloyd Wilder and Dr. Robert Pollack to examine the Defendant regarding his competency to stand trial (TR: Pages 1953-1954). On January 17, 1984, Dr. Wilder filed his report finding that the Defendant, in spite of a past history of mental illness, was not only competent to stand trial, but was also sane at the time of the commission of the murder (TR: Page 1961).

On January 27, 1984, Counsel for the Defendant filed a Motion for Appointment of an Expert to examine the Defendant regarding both his competency to stand trial and his sanity at the time of the commission of the murder (TR: Pages 2006-2008). The court granted the Motion on February 21, 1984, and appointed Dr. William Tell to examine the Defendant. A hearing on the Defendant's competency to stand trial was held on March 2, 1984. Following the hearing, the court ruled that the Defendant was competent to stand trial (TR: Pages 2142-2143).

On March 6, 1984, the court entered its Order denying the Defendant's Motion to discharge his court-appointed counsel and allow him to represent himself (TR: Page 2144). On April 18, 1984, Counsel for the Defendant filed a Motion to Produce the Criminal Record of the Defendant (TR: Pages 2213-2214). On April 24, 1984, his attorney filed a Motion to Enforce Section 914.04, Florida Statutes (1983), alleging that the Statute was self-executing and automatically granted use immunity to the Defendant (TR: Pages 2226-2227). On the same day, his attorney also filed a Memorandum of Law in support of his Motion to Strike Death As a Possible Penalty (TR: Pages 2228-2232). A hearing was held on the the above three Motions. Following the hearing, the court granted the Motion to Produce the Criminal Record of the Defendant (TR: Page 2258).

On April 26, 1984, Counsel for the Defendant filed more motions, including a Motion to Dismiss the Indictment or to Declare That Death Is Not a Possible Penalty, a Motion to Vacate the Death Penalty, a Motion to Dismiss the Indictment, a Motion for Statement of Aggravating Circumstances, a Motion to Preclude Challenges for Cause, a Motion in Liminie requesting that the prosecuting attorney be prohibited from questioning any prospective jurors as to whether they possessed opinions either in favor of or opposed to the death penalty, and a Motion for Individual Voir Dire and Sequestration of Jurors during Voir Dire (TR: Pages 2234-2257).

On April 27, 1984, Counsel for the Defendant filed a Motion for Additional Peremptory Challenges, a Motion for a List of the Prospective Jurors, and a Motion for Individual and Sequestered Voir Dire (TR: Pages 2268-2281). On May 1, 1984, Counsel for the Defendant filed a Motion in Liminie requesting the court to enter an Order prohibiting the State from introducing into evidence a statement of the Defendant tape-recorded on December 19, 1984 (TR: Pages 2285-2285).

Trial in this cause was held from May 14, 1984, through May 18, 1984. After deliberating, the jury returned a verdict finding the Defendant guilty of murder in the first degree (TR: Page 1022, lines 17-25). The court then adjudicated the Defendant to be guilty of the crime and remanded him to custody pending the penalty phase hearing scheduled for May 29, 1984 (TR: Page 1029, lines 2-16).

On May 29, 1984, the court reconvened to conduct the penalty phase of the trial. After hearing the of testimony and evidence regarding the aggravating and mitigating circumstances surrounding the Defendant's murder of Mary Hammond, the jury returned with an advisory sentence of death (TR: Pages 1225, lines 5-20). The court set sentencing for June 1, 1984 (TR: Page 1229, lines 14-25).

On June 1, 1984, following its denial of the Defendant's Motion for New Trial, the court sentenced the Defendant to death by electrocution (TR: Pages 1232-1252). It is from this judgment and sentence that the Defendant takes his appeal.

QUESTIONS PRESENTED

ARGUMENT I

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO VOIR DIRE INDIVIDUAL GRAND JUROR MEMBERS AND HIS MOTION FOR NOTIFICATION OF CONVENING OF GRAND JURY.

ARGUMENT II

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

ARGUMENT III

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

ARGUMENT IV

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

ARGUMENT V

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

ARGUMENT VI

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

ARGUMENT VII

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO ENFORCE SECTION 914.04, FLORIDA STATUTES (1983) AND HIS MOTION IN LIMINIE REQUESTING THE COURT TO PROHIBIT THE STATE FROM INTRODUCING INTO EVIDENCE THE STATEMENT OF THE DEFENDANT DISCUSSING TWO LETTERS FORWARDED TO HIS ATTORNEY'S, CLYDE E. WOLFE AND KENNETH J. COTTER.

ARGUMENT VIII

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO DISMISS THE INDICTMENT.

ARGUMENT IX

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

ARGUMENT X

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO DISCHARGE HIS COURT APPOINTED COUNSEL AS WELL AS HIS COURT APPOINTED COUNSEL'S MOTION TO WITHDRAW.

ARGUMENT XI

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

ARGUMENT XII

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR NEW TRIAL REGARDING THE COURT'S DENIAL OF THE DEFENDANT'S SEVERAL MOTIONS FOR MISTRIAL CONCERNING IMPROPER WILLIAMS RULE EVIDENCE OF OTHER OFFENSES THE DEFENDANT MAY HAVE BEEN CHARGED WITH OR ACCUSED OF COMMITTING.

ARGUMENT XIII

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR NEW TRIAL REGARDING THE COURT'S DENIAL OF THE DEFENDANT'S OBJECTION PRIOR TO AND DURING TRIAL TO THE SHACKLING OF THE DEFENDANT'S LEGS.

ARGUMENT XIV

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR NEW TRIAL REGARDING THE DEFENDANT'S OBJECTIONS TO THE VOIR DIRE PROCESS.

ARGUMENT XV

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR NEW TRIAL REGARDING HIS OBJECTIONS TO THE PROSECUTOR'S QUESTIONING OF KAREN FRITZ AND OFFICER KENNETH RAY ROBERTS IN AREAS WHICH WERE OUTSIDE THE SCOPE OF CROSS-EXAMINATION.

ARGUMENT XVI

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR NEW TRIAL REGARDING HIS OBJECTION TO THE INTRODUCTION OF A GRUESOME, PREJUDICIAL COLOR PHOTOGRAPH OF THE DECEDENT AND IN DENYING HIS MOTION FOR NEW SENTENCING PROCEDURE REGARDING HIS OBJECTION TO THE PUBLISHING OF ANOTHER GRUESOME COLOR PHOTOGRAPH OF THE DECEDENT TO THE JURY.

ARGUMENT XVII

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR NEW TRIAL REGARDING HIS OBJECTION TO THE TESTIMONY OF EVIDENCE TECHNICIAN DONALD OSTERMEYER ABOUT A LUMINOL TEST FOR BLOOD HE HAD PERFORMED ON THE DEFENDANT'S CLOTHING.

ARGUMENT XVIII

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR NEW TRIAL REGARDING HIS REQUEST THAT THE COURT GIVE INSTRUCTIONS TO THE JURY ON AGGRAVATED BATTERY, BATTERY AND ASSAULT.

ARGUMENT XIX

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR NEW TRIAL REGARDING HIS REQUEST THAT THE COURT GIVE AN INSTRUCTION TO THE JURY ON CIRCUMSTANTIAL EVIDENCE.

ARGUMENT XX

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR NEW SENTENCING PROCEDURE REGARDING THE IMPROPER COMMENT BY THE PROSECUTOR TO THE JURY DURING THE PENALTY PHASE OF THE TRIAL.

ARGUMENT XXI

THE DEFENDANT'S CONSTITUTIONAL RIGHT TO A FAIR TRIAL WAS DENIED TO HIM THROUGH COMMENTS MADE BY A STATE WITNESS AND THE PROSECUTOR HIMSELF ON THE DEFENDANT'S RIGHT TO REMAIN SILENT.

ARGUMENT XXII

THE TRIAL COURT ERRED IN SENTENCING THE DEFENDANT TO DEATH FOLLOWING THE RENDERING BY THE JURY OF AN ADVISORY OPINION OF DEATH TO THE COURT.

ARGUMENT I

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO VOIR DIRE INDIVIDUAL GEAND JUROR MEMBERS AND HIS MOTION FOR NOTIFICATION OF CONVENING THE GRAND JURY.

On November 22, 1984, Counsel for the Defendant filed a Motion to Voir Dire Individual Grand Jurors and a Motion for Notification of Convening the Grand Jury (TR: Pages 1912-1915). On December 2, 1983, the court denied the Motions (TR: Page 1916). As a result of the denial of the Motions, the Defendant was indicted by the Grand Jury on December 5, 1983 (TR: Page 1918).

Section 905.02, Florida Statutes (1983), provides that a person who has been to held to answer may challenge the panel or individual grand jurors. Section 905.04, Florida Statutes (1983), provides that a person who has been held to answer may challenge an individual prospective grand juror on the ground that the juror:

> "a. Does not have the qualifications required by law;
>
> b. Has a state of mind that will prevent him from acting impartially and without prejudice to the substantial rights of the party challenging;
>
> c. Is related by blood or marriage within the third degree to the defendant, to the person alleged to be injured by the offense charged, or to the person on whose complaint the prosecution was initiated."

The Grand Jury, in and for Orange County, Florida, Fall Term, 1983, was empaneled and sworn on October 17, 1983. Although Section 905.05, Florida Statutes (1983), states that a challenge or objection to the grand jury may not be made after it has been empaneled and sworn, Section 905.05 further provides that the section "shall not apply to a person who did not know or have reasonable

ground to believe at the time the grand jury was empaneled and sworn, that cases in which he was or might be involved would be investigated by the grand jury".

Since the murder in this case was not committed until November 5, 1983, the Defendant obviously could not have known on October 17, 1983, that his case might be investigated by the Grand Jury. As such, he was entitled to notification of the date the Grand Jury would convene to consider whether to return a True Bill against the Defendant for murder in the first degree so that the Defendant could properly exercise his right to challenge the individual grand jurors as outlined above.

By denying the Motions, the trial court violated the Defendant's right to due process of law as guaranteed to him by the Fifth and Fourteenth Amendments to the United States Constitution, as well as by Article I, Sections Nine, Fifteen and Sixteen of the Florida Constitution. Therefore, the Defendant's conviction should be reversed and the Defendant discharged as a result of the violation of his right to due process of law or, in the alternative, his conviction should be reversed, and this cause remanded to the lower court for a new trial.

ARGUMENT II

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

On April 26, 1984, Counsel for the Defendant filed a Motion to Preclude Challenge for Cause (TR: Pages 2251-2252). During a hearing on this and other Motions held on May 4, 1984, the trial court denied the Motion (TR: Page 1072, line 2). As a result of the denial of the Motion, several jurors were challenged for cause by the State and removed as potential jurors simply on the ground that they did not think it was legally or morally right to vote for the imposition of the death penalty if they found the Defendant guilty of murder in the first degree.

The Sixth and Fourteenth Amendments to the United States Constitution, as well as Article I, Sections Nine and Twenty-Two of the Florida Constitution, guarantee the Defendant the right to a fair trial represented by jurors selected from a representative cross-section of the community. The exclusion of prospective jurors who might not vote for the imposition of the death penalty unconstitutionally violates the above-mentioned sections of the Florida and United States Constitution by effectively denying the Defendant a trial by a jury selected from a representative cross-section of the community. Davis v. Georgia, 429 U.S. 122, 97 S.Ct. 399, 50 L.Ed. 2d 339 (1976); Mathis v. New Jersey, 403 U.S. 946, 91 S.Ct. 2277, 29 L.Ed. 2d 855 (1971); Maxwell v. Bishop, 398 U.S. 262, 90 S.Ct. 1578, 26 L.Ed. 2d 222 (1969); Boulden v. Holman, 394 U.S. 478, 89 S.Ct. 1138, 22 L.Ed. 2d 433 (1970); Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1170, 20 L.Ed. 2d 776 (1968).

Furthermore, the practice of excluding these potential jurors for this one reason furthers no permissible State interest since:

> The jury does not render the final imposition of sentence, but only acts in an advisory capacity to the court;
>
> The advisory sentence rendered by the jury occurs at the second stage of the bifurcated trial, not during the first stage where the jury sits solely to determine the guilt or innocence of the Defendant; and
>
> The advisory sentence is not rendered unanimously, but by majority vote.

It is clear that this practice ultimately subjects the Defendant to a trial by a jury that is neither a representative cross-section of the community nor impartial. Instead, the Defendant is tried by a jury biased in favor of the prosecution, both during the trial proper and the penalty phase. Even if it could be argued that the granting of this challenge for cause is a permissible State interest, the State and court would certainly suffer no harm or prejudice, other than a little loss of time, in allowing this challenge for cause to be used during the selection of a new jury for the penalty phase of the trial. Thus, the Defendant's conviction should be reversed and this cause remanded to the lower court for a new trial.

ARGUMENT III

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

On April 26, 1984, Counsel for the Defendant filed a Motion to Vacate Death Penalty (TR: Pages 2236-2244). During a hearing on this and other Motions held on May 4, 1984, the trial court denied the Motion (TR: Page 1071, line 20). As a result of the denial of the Motion, the Defendant was sentenced to death following his conviction for murder in the first degree.

Section 921.141, Florida Statutes (1983), is unconstitutional on its face in that it is violative of the Eighth and Fourteenth Amendments to the United States Constitution, as well as Article I, Sections Nine and Seventeen of the Florida Constitution. The aggravating and mitigating circumstances as enumerated in this section are impermissibly vague and overbroad.

Section 921.141(5)(a), Florida Statutes (1983), states that an aggravating circumstance may result if the capital felony was committed by a person under the sentence of imprisonment. This circumstance is overbroad in that in makes no distinction between a person imprisoned for a non-violent crime and one imprisoned for a violent crime.

Section 921.141(5)(b), Florida Statues (1983), states that an aggravating circumstance may result if the person has been previously convicted of another capital felony or a felony involving the use or threat of violence. This circumstance is overbroad in that the circumstances, other than violence, surrounding the prior felony are not considered.

Section 921.141(5)(c), Florida Statutes (1983), states that an aggravating circumstance may result if the person knowingly creates a great risk to many persons. This circumstance is irrefutably vague simply due to its qualifying adjectives. Furthermore, although the Legislature intended that this circumstance was to be directed towards hijacking and bombings, it has been applied in fact to encompass almost any murder.

Section 921.141(5)(d), Florida Stautes (1983), states that an aggravating circumstance may result if the person is involved in a felony murder. This circumstance is factually overbroad in that a capital felony committed during the enumerated felonies contained within this section automatically produces an aggravating circumstance and thus carries with it a presumption of death without regard to the individual facts surrounding each case. Consideration of this aggravating circumstance could lead to a sentence of death which is totally disproportionate to the defendant's conduct. As stated in Coker v. Georgia, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed. 2d 982 (1977), "(A) punishment is excessive and unconstitutional if it is grossly out of proportion to the severity of the crime." Pursuant to this circumstance, a "wheelman" whose co-defendant accidentally kills someone during the commission of an enumerated felony would presumptively and automatically be considered for a death sentence, while a cold-blooded premeditated murderer could conceivably be exempt from any aggravating circumstance. The arbitrariness of the circumstance is self-evident.

Section 921.141(5)(e) Florida Statutes (1983), states that an aggravating circumstance may result if the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody. Section 921.141(5)(g), Florida Statutes (1983), states that an aggravating circumstance may result if the capital felony was committed to disrupt or to hinder the lawful exercise of any governmental function or the enforcement of law. Both these

circumstances are so vague and overbroad as to render consistent application impossible. Examination of recent cases reveals that the silencing of a witness has been considered more that once to give rise to both aggravating circumstances, either aggravating circumstance, or none at all. Meeks v. State, 336 So. 2d 1142 (Fla. 1976), as giving rise to circumstances (e) and (g); Knight v. State, 338 So. 2d 201 (Fla. 1976), as giving rise to only circumstance (e); and Gibson v. State, 351 So. 2d 948 (Fla. 1977), as giving rise to no aggravating circumstance at all.

Section 921.141(5)(h), Florida Statutes (1983), states that an aggravating circumstance may result if the capital felony was especially cruel, heinous and atrocious. Almost any felony would appear especially cruel, heinous and atrocious to the layman, particularly any felony murder. Examination of the widespread application of this circumstance, especially where no other circumstances are available with which to render a death sentence, indicates that reasonable and consistent application is impossible.

The mitigating circumstances enumerated in Section 921.141(6), Florida Statutes (1983), are vague and overbroad as well. The qualifying adjectives used to describe the circumstances unconstitutionally limit the mitigating factors to be considered and foster an arbitrary application.

Section 921.141, Florida Statutes (1983), is also unconstitutional on its face in that the State of Florida is unable to justify the death penalty as the least restrictive means available to further a compelling state interest, as is required by Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed. 2d 147 (1973), where a fundamental right, such as life, is involved. A mere theoretical justification will not satisfy the requisite burden of proof incumbent upon the State.

Furthermore, Section 921.141, Florida Statutes (1983), is unconstitutional as applied. The sentencing patterns of judges and juries under this section have in fact exhibited a pattern of arbitrary and capricious sentencing like that found unconstitutional in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed. 2d 346 (1972). Death sentences in Florida are imposed irregularly, unpredictably and whimsically in cases which are no more deserving of capital punishment, under any rational standard that considers the character of the offender and the offense, than many other cases in which sentences of life imprisonment are imposed. Inconsistent and arbitrary jury attitudes and sentencing verdicts, uneven and inconsistent prosecutorial practices in seeking or not seeking the death penalty, divergent sentencing policies of trial judges, and the erratic appellate review by this Court all contribute to produce an irregular and freakish pattern of life or death sentencing results.

Finally, on December 8, 1972, former Governor Rubin D. Askew signed into law Chapter 72-724, Laws of Florida (1972), which is the present Section 921.141, Florida Statutes (1983). This section sets forth the procedure to be followed governing the imposition of the death penalty in Florida. The essential elements of this section are procedural, not substantive in nature. Dobbert v. Florida, 97 S.Ct. 2290 (1977); Lee v. State, 286 So. 2d 596 (Fla. 1st DCA 1973), modified at 294 So. 2d 305 (Fla. 1974).

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

Thus, there is no lawful means of imposing the sentence of death as a punishment in the State of Florida. Because the trial court failed to declare Section 921.141, Florida Statutes (1983), unconstitutional, the Defendant's convictions must be reversed, and this cause remanded to the lower court for new trial.

ARGUMENT IV

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

On April 26, 1984, Counsel for the Defendant filed a Motion for Individual Voir Dire and Sequestration of Jurors During Voir Dire (TR: Pages 2256-2257). On April 27, 1984, Counsel for the Defendant filed a more extensive Motion for Individual and Sequestered Voir Dire (TR: Pages 2276-2281). During a hearing on this and other Motions held on May 4, 1984, the court denied the Motion for Indvidual Voir Dire and Sequestration of Jurors During Voir Dire (TR: Page 1072, lines 3-5).

The Court did announce, however, that it was going to take under advisement the Motion for Individual and Sequestered Voir Dire in so far as it concerned the questioning of the jurors as to their opinions concerning capital punishment (TR: Page 1072, lines 3-8). The court did advise that it was the intent of the court to allow each side to collectively voir dire the jury on all issues except knowledge of the case and the Witherspoon issue, and if any jurors did indicate they had knowledge of the case, they would be allowed to approach the bench individually and explain that knowledge out of the hearing of the rest of the panel (TR: Page 1076, lines 13-21).

Although the court was correct in its ruling allowing individual questioning of the jurors regarding their knowledge of the case and their feelings concerning the death penalty, the court erred when it denied the Defendant's request in his Motions to have the venire sequestered and individually questioned as to all aspects of the case, including their knowledge of the parties and the witnesses. This was especially true since it was acknowledged prior to trial that there had been media

coverage of the case (TR: Page 1076, lines 3-7), and acknowledged at the start of the trial that the news media was going to be covering the case (TR: Page 17, lines 9-25).

Rule 3.370, Florida Rules of Criminal Procedure, provides that the trial court, in its discretion, may sequester the jury. Due to the media coverage, a strong possibility existed that at least one or more of the potential jurors had knowledge of the case and the parties and witnesses to the case, and thus would speak of that knowledge during voir dire. By holding collective voir dire with the jurors as to their familiarity with the parties, the witnesses or the probability of the Defendant's guilt or innocence, other prospective jurors would become immediately cognizant of the possibly prejudicial material, thereby rendering it impossible to select a fair and impartial jury. By sequestering the prospective panel during voir dire, and conducting individual voir dire, there would have been no possibility of the collective body ever being influenced by past or present news media coverage of the case or by the knowledge or opinions of other prospective jurors.

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

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

Finally, the inconvenience and small amount of additional time required by individual voir dire was a small price to pay to ensure a fair and impartial jury for the Defendant. The court clearly abused its discretion in not granting individual voir dire.

Although the Defendant concedes that the court has that discretion, the fact that there was press coverage during the time preceeding the trial, and such coverage continued throughout the trial, due process required that the panel be sequestered during voir dire and the ensuing trial. The inconvenience suffered by sequestration of the jurors to prevent exposure to such excluded evidence was a small price to pay for insuring the Defendant's right to a fair trial. State ex rel Miami Herald Pub. Co. v. McIntosh, 340 So. 2d 904 (Fla. 1976). By failing to insure the Defendant's right to a fair trial, the court abused its discretion, thus entitling the Defendant to reversal of his conviction, and remand of this cause back to the lower court for new trial.

ARGUMENT V

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

On April 26, 1984, Counsel for the Defendant filed a Motion for Statement of Aggravating Circumstances requesting the court to order the State to provide the Defendant with the precise grounds on which the State sought to impose the Death penalty (TR: Pages 2248-2250). During a hearing on this and other Motions held on May 4, 1984, the trial court denied the Motion (TR: Page 1071, lines 20-21). As a result of the denial of the Motion, the prosecutor was permitted to potentially argue for the existence of all aggravating circumstances to the jury during the penalty phase of the trial, thereby forcing his counsel to prepare a rebuttal at to all aggravating circumstances, thus diminishing his overall effectiveness in defending his client at trial.

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

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

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

Failure to give timely and adequate notice of the precise grounds on which the State seeks the death penalty, or on which the Court would consider imposing the death penalty, deprives a defendant of a fair sentencing hearing, with the accused being given a meaningful opportunity to rebut the aggravating circumstances. This results in a violation of the Defendant's right to effective assistance of counsel pursuant to the Sixth Amendment to the United States Constitution. This occurs because the Defendant nor his counsel are able to prepare and present any defensive evidence and arguments to meet the prosecutor's contentions as to what he may consider an aggravating circumstance to be or to determine the issues which the trial court may regard as controlling on the question of life or death.

The Florida Standard Jury Instructions in criminal cases contain instructions to be given in capital cases. The instructions tell the jury to consider the evidence already heard at trial. Therefore, the only way to confront and rebut aggravating circumstances during the course of the guilt phase of the trial is to give the defendant and his counsel notice thereof in advance. Proper notification of all aggravating circumstances claimed by the State in advance is essential to enable the defendant and his counsel to deal effectively with the allegations later raised at trial. .pp This Court vacated the death penalty and remanded for a new sentencing hearing in one case on the grounds that it was essential to permit defense counsel to have access to all information, and sufficient time to rebut in a meaningful manner. Barclay and Dougan v. State, 343 So. 2d 1266 (Fla. 1977). This decision is consistent with the United States Supreme Court's decision in

Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1107, 51 L.Ed. 2d 393 (1977). There the Court said at page 1205 as follows:

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

Thus a denial of advance notice of what aggravating circumstances the State intends to rely upon at the sentencing phase of trial violates the Due Process Clause as interpreted in Gardner.

The United States Supreme Court also has upheld the giving of such notice in Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed. 2d 859 (1976), where it upheld Georgia's death penalty. The Georgia statute requires as follows:

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

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

ARGUMENT VI

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

On April 25, 1984, Counsel for the Defendant filed a Motion to Strike Death as a Possible Penalty (TR: Pages 2228-2232). On April 26, 1984, Counsel for the Defendant filed a Motion to Dismiss the Indictment or to Declare That Death is Not a Possible Penalty (TR: Pages 2234-2235). During a hearing on these and other Motions held on May 4, 1984, the trial court denied the Motions (TR: Page 1071, lines 21-24). As a result of the denial of the Motions, the jury was later allowed by the court to render an advisory opinion recommending the death penalty for the Defendant.

Article I, Section 15(a) of the Florida Constitution, as well as Rule 3.140(a)(1), Florida Rules of Criminal Procedure, require that an offense punishable by death be prosecuted by indictment. Rule 3.140(b), Florida Rules of Criminal Procedure, requires that an indictment be a "plain, concise, and definite written statement of the essential facts constituting the offense charged". Without question, all of the essential elements of the crime must be alleged in the charging document, and no essential elements may be left to inference. State v. Dye, 345 So. 2d 538 (Fla. 1977); Radford v. State, 260 So. 2d 1303 (Fla. 2nd DCA 1978).

Section 921.141, Florida Statutes (1983), requires that a sentence of death be imposed only when aggravating circumstances are found to outweigh any mitigating circumstances. These aggravating circumstances are analogous to the carrying of a deadly weapon in a robbery or burglary, or the carrying of a firearm under Section 775.087, Florida Statutes (1983).

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

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

Additionally, for the State to seek the death penalty without informing the Defendant of the basis of its decision to seek said penalty, the Defendant is denied his right to due process of law, a right guaranteed to him by the Fifth and Fourteenth Amendments to the United States Constitution, as well as by Article I, Sections Nine, Fifteen and Sixteen of the Florida Constitution.

Since no aggravating circumstances were alleged in the Indictment charging the Defendant with first degree murder, the indictment did not charge an offense punishable by death. By denying the Motions and failing to declare that death was a possible penalty, the trial court erred prejudicially, and this cause must be reversed and remanded to the lower court with directions to dismiss the Indictment

and release the Defendant until such time as a proper Indictment is returned by the grand jury.

ARGUMENT VII

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO ENFORCE SECTION 914.04, FLORIDA STATUTES (1983) AND HIS MOTION IN LIMINIE REQUESTING THE COURT TO PROHIBIT THE STATE FROM INTRODUCING INTO EVIDENCE THE STATEMENT OF THE DEFENDANT DISCUSSING TWO LETTERS FORWARDED TO HIS ATTORNEYS, CLYDE E. WOLFE AND KENNETH J. COTTER.

On April 25, 1984, Counsel for the Defendant filed a Motion to Enforce Section 914.04, Florida Statutes (1983) (TR: Pages 2226-2227). On May 1, 1984, Counsel for the Defendant filed a Motion in Liminie requesting the trial court to enter its Order prohibiting the State from introducing into evidence those portions of a statement given by the Defendant on December 19, 1983, to Investigator Robert Mundy of the Orlando Police Department, in which the Defendant discussed two letters sent to his attorneys, Clyde E. Wolfe and Kenneth J. Cotter (including the contents of the letters). During a hearing on this and other Motions held on May 4, 1984, the trial court denied the Motion (TR: Page 1071, line 15). As a result of the denial of the Motion, the letters which had been previously subpoenaed from the Defendant's attorney's, as well as the Defendant's statements regarding the letters, were introduced into evidence against him during the trial (TR: Pages 824-829).

Section 914.04, Florida Statutes (1983), provides as follows:

> "No person, having been duly served with a subpoena or subpoena duces decum, shall be excused from attending and testifying or producing any book, paper, or other document before any court having felony trial jurisdiction, grand jury, state attorney, or county solicitor, upon investigation, proceeding, or trial for a violation of any of the criminal statutes of this state upon the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to convict him of a crime or to subject him to a penalty or forfeiture, but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any

> transaction, matter, or thing concerning which he may so testify or produce evidence, documentary or otherwise, and no testimony so given or produced shall be received against him upon any criminal investigation or proceeding."

On December 22, 1983, Counsel for the Defendant and the Defendant's attorney on other matters, Kenneth J. Cotter, were served with subpoenas duces tecum from the Office of the State Attorney. Both attorneys moved to quash the subpoenas duces tecum and appealed the trial court's adverse ruling by Petition for Writ of Certiorari to the Fifth District Court of Appeal. On March 21, 1984, the Petition for Writ of Certiorari was denied by the appellate court. The attorneys then responded to the subpoena duces tecum and turned over to the prosecutor the letters sought by the subpoena duces tecum.

The Defendant contends that since these letters were sent to his attorneys for their own personal viewing, the documents then became subject to the attorney-client privilege. As such, a subpoena duces tecum issued to his attorney for the letters was no different than if the State had issued a subpoena duces tecum to the Defendant himself. Thus, once the letters were turned over by his attorneys to the State, and the Defendant sought to avail himself of Section 914.04, Florida Statutes (1983), use immunity should have been granted the Defendant regarding these letters, prohibiting the introduction of the letters at trial and the introduction of any statements the Defendant may have made concerning the letters in his statement of December 19, 1984, to Investigator Mundy. State v. Jenny, 424 So. 2d 142 (Fla. 4th DCA 1982); State v. Dawson, 290 So. 2d 79 (Fla. 1st DCA 1974). Since the trial court denied the Motions and allowed introduction of the letters into evidence at trial, the Defendant's conviction should be reversed, and this cause remanded to the lower court for a new trial.

ARGUMENT VIII

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO DISMISS THE INDICTMENT.

On April 26, 1984, Counsel for the Defendant filed a Motion to Dismiss the Indictment (TR: Pages 2245-2247). During a hearing on this and other Motions held on May 4, 1984, the trial court denied the Motion (TR: Page 1071, lines 18-19). As a result of the denial of the Motion, the court allowed the case to proceed to trial, resulting in the Defendant's conviction for murder in the first degree and sentence of death.

The Defendant in this cause was charged by Indictment with the first degree murder of Mary Hammond. As argued previously Argument VI of this Initial Brief, the Indictment was subject to dismissal under Rule 3.140(d), Florida Rules of Criminal Procedure, since by failing to contain a statement of the aggravating circumstances the State intended to rely upon in seeking the death penalty, the Indictment failed to contain all the essential elements of the crime of first degree murder.

Additionally, the Indictment should have been dismissed as vague, indistinct and indefinite, since the Defendant was not placed on notice of the charged offense, a violation of his rights to due process of law and to a fair trial accorded the Defendant by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, as well as by Article I, Sections Nine, Fifteen and Sixteen of the Florida Constitution. Specifically, the Indictment is vague, indistinct and indefinite in the following ways:

> (a) The allegation "from a premeditated design" did not enable the Defendant to understand the nature of the charged offense or the elements thereof.

(b) The allegation "from a premeditated design" requires the Defendant to guess as to whether the State intends to charge and prove a premeditated murder or a felony-murder.

(c) The allegation "from a premeditated design", as used in this Indictment, was vague, confusing and misleading since it appeared to allege two (2) separate and distinct types of first degree murder (i.e., premeditated murder or felony murder, wach of which require proof of separate and distinct elements).

The Indictment in this case should also have been dismissed since its vagueness makes it impossible for the Defendant to receive effective assistance of counsel, a violation of the rights accorded the Defendant by the Sixth and Fourteenth Amendments to the United States Constitution, as well as by Article I, Section Sixteen of the Florida Constitution. Specifically, ineffectiveness of counsel occurs in the following ways:

(a) The allegation "from a premeditated design" does not enable defense counsel to effectively apprise the Defendant of the nature of the charge or the elements thereof.

(b) The allegation "from a premeditated design" is so vague, indistinct and indefinite, that it does not allow defense counsel to properly prepare a defense against the accusation.

Finally, the Indictment should have been dismissed because it failed to properly allege which Florida Statute the Defendant violated, in that the State failed to allege which subsection of Section 782.04, Florida Statutes (1983), the Defendant was charged with violating. Therefore, the Defendant's conviction should be reversed, and this cause remanded to the lower court with instructions to dismiss the Indictment and discharge the Defendant from further prosecution.

ARGUMENT IX

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

On April 26, 1984, Counsel for the Defendant filed a Motion in Liminie requesting the trial court to issue an Order prohibiting the prosecutor from questioning any prospective jurors in the cause as to whether they possessed opinions either in favor of or adverse to the death penalty (TR: Pages 2253-2255). During a hearing on this and other Motions held on May 4, 1984, the trial court denied the Motion (Page 1072, line 1). As a result of the denial of the Motion, two jurors were excused for cause because of their opposition to the death penalty prior to the start of the first stage of trial determining the guilt or innocence of the Defendant.

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

One of the prerequisites of a fair and impartial jury is the selection of that jury from a representative cross-section of the community at large. Taylor v. Louisiana, 419 U.S. 522 (1975); Hernandez v. Texas, 347 U.S. 425 (1954); Thiel v. Southern Pacific Co., 328 U.S. 217 (1946); Smith v. Texas, 311 U.S. 128 (1940).

Without question, persons opposed to the imposition of the death penalty comprise a fair cross-section of the community. Gregg v. Georgia, 428 U.S. 195 (1976). Thus, exclusion of such jurors would be constitutionally impermissible.

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

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

Finally, there is no logical reason why the questioning, if constutionally valid, cannot be made during the penalty phase of the trial. At that point, the jurors have reached a decision on the guilt or innocence of the accused. If acquitted or found guilty of a lesser charge, there is no need for the penalty phase. If convicted as charged, the sole remaining issue is the decision to impose or not impose the death penalty on the accused. At this stage, the jurors' opinions

regarding the imposition of the death penalty becomes all-important, and if there are any jurors who are opposed to or have reservations concerning the imposition of the death penalty, the prosecutor and court are free to excuse them as needed, filling their places with new jurors who have no such reservations. This would only require the little additional time needed for a new voir dire, but would effectively protect the accused's constitutional right to a fair and impartial jury during the guilt or innocence trial phase. Because the trial court failed to prohibit such questioning, the Defendant's conviction should be reversed, and this cause remanded to the lower court for a new trial.

ARGUMENT X

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO DISCHARGE HIS COURT APPOINTED COUNSEL AS WELL AS HIS COURT-APPOINTED COUNSEL'S MOTION TO WITHDRAW.

On December 29, 1983, Counsel for the Defendant filed a Motion to Withdraw as counsel for the Defendant (TR: Pages 1945-1946). That same day a hearing was held on this Motion and the Defendant's oral Motion to Discharge the Office of the Public Defender (TR: Pages 1270-1294).

At the hearing, the Public Defender, Joseph DuRocher, stated that the Defendant had sent his office a letter discharging the Office of the Public Defender as his counsel, saying that he was sorry, but that he didn't need Mr. DuRocher or Clyde Wolfe and, in any event, he had given them enough time to work out his case to a satisfactory conclusion (TR: Page 1271, lines 15-25; Page 1272, lines 1-21). Mr. DuRocher felt that his office could no longer represent the Defendant since the Defendant had disregarded his office's advice and direction by placing calls to the Orlando Police Department inviting them over to the jail so that he could give statements about the murder, although he had been specificaly advised by his attorney's not to make any statements to the police for fear that the statements could be used adversely against him at trial (TR: Page 1275, lines 1-9).

Furthermore, the Defendant himself had expressed to the Public Defender, personaly and in writing, a lack of confidence in the Office of the Public Defender to handle his defense. Instead, the Defendant wanted to be his own attorney and to run his own case (TR: Page 1275, lines 10-17). In fact, the Defendant had specifically requested the Public Defender to assert a defense (which the Public Defender could not disclose to the court because of the attorney-client privilege)

and follow a course of conduct that Mr. DuRocher could not ethically proceed upon (TR: 1275, lines 17-21).

Following the argument of the Public Defender, the court advised the Defendant that he had three alternatives with regard to representation: (1) he could elect to retain his own attorney privately from his own source of funds, (2) he could elect to continue to be represented by the Public Defender, or (3) he could elect to represent himself (TR: Page 1276, lines 4-25). The court went on to advise the Defendant that he would be better off to elect continued representation by the Public Defender since Mr. Durocher's office had attorney's who were specially trained in death penalty cases and had a staff of investigators available to investigate matters for the Defendant on a twenty-four basis, reserves the Defendant would not have had available to him if the court had appointed a member of the Bar to represent him (TR: Page 1277, lines 9-20).

When asked by the court if he understood what had just been explained to him, the Defendant replied positively, but stated that Mr. DuRocher and Mr. Wolfe were violating his rights (TR: Page 1279, lines 8-18), specifically his right to privacy. For that reason, he no longer wished to be represented by them (TR: Page 1280, lines 18-23).

When asked to explain how their office had violated his right to privacy, the Defendant replied that Mr. DuRocher and Mr. Wolfe had possession of several letters he had written to his family, but had failed to discuss with him the fact that they had possession of the letters or how they had come into possession of the letters (TR: Page 1281, lines 1-24). The court then explained to the Defendant that their office did not violate his right to privacy since his stepmother had received the letters as sent to her by the the Defendant, and then had forwarded the letters on her own volition to Mr. Wolfe (TR: Page 1284, lines 9-25; Page 1285, lines 1-6).

The Defendant then complained that Mr. Roger Butcher, another Assistant Public Defender, had advised him not to testify at the preliminary hearing. The court replied that Mr. Butcher's advice to the Defendant had possibly been the best advice he had received so far in the case (TR: Page 1286, lines 4-12). The Defendant went on to state that he did not want the Public Defender to represent him because he didn't stand a chance being tried in Orange County (TR: Page 1287, lines 24-25; Page 1288, lines 1-2).

The Defendant also stated that it was not in his own best interest to follow the Public Defender's advice (TR: Page 1289, lines 9-14). He then repeated his desire not to have an attorney represent him (TR: Page 1291, lines 9-11), and stated that he had a right to represent himself (TR: Page 1292, lines 18-19). At the conclusion of the hearing, the Court announced that it would take the Motions under advisement (TR: Page 1292, lines 20-22). On January 19, 1984, the court denied the Public Defender's Motion to Withdraw (TR: Pages 1985-1986). On March 6, 1984, the court denied the Defendant's Motion to Discharge his court-appointed counsel (TR: Page 2144).

The Appellant contends that his trial counsel should have been allowed to withdraw. When a personal conflict between an accused and his court-appointed counsel produces or results in a lack of such counsel's effectiveness, a different attorney should be appointed. It is a necessary part of an accused's right to counsel that such counsel be effective. Donald v. State, 166 So. 2d 453 (Fla. 1964). Additionally, counsel for an accused has only been found to be effective when he is free of any influences or prejudices which might substantially impair his ability to render independent legal advice to his indigent client. Nelson v. State, 274 So. 2d 256 (Fla. 4th DCA 1973).

In the case at bar, it is clear that the Public Defender had already been hampered in its efforts to effectively represent the Defendant since the Defendant had disregarded his advice not to make any statements whatsoever to members of any law enforcement agency, especially where he was making statements adverse to his case. Furthermore, a severe conflict existed between the Public Defender and the Defendant brought on by the Defendant's efforts to have his attorney's pursue a defense and course of conduct that the Public Defender considered completely unethical, although the Defendant was obviously not of the same opinion. The Public Defender made it abundantly clear on the record that because of this difference in trial strategy, his office could not effective represent the Defendant. For these reasons, the Office of the Public Defender should have been allowed to withdraw and Kenneth J. Kotter, who had previously represented the Defendant (and was able to effectively work with and had the complete trust of the Defendant), shuld have been appointed in his stead.

The Defendant's Motion to Discharge his court-appointed counsel should also have been granted by the court. The Defendant made it very clear during the hearing that the Office of the Public Defender had concealed from him the fact that they had possession of his stepmother's letters, that his attorney's were not acting in the Defendant's best interest, and that his attorney's were not acting in his best interest in representing him. The record is also clear that the Defendant understood the alternatives explained to him by the court concerning his right to counsel, and that the Defendant still wished to represent himself. As a result of the denial of the Motions, the Defendant was unabe to receive effective assistance of counsel; therefore, his conviction should be reversed and this case remanded to the lower court for a new trial.

ARGUMENT XI

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

At the close of the State's case-in-chief, Counsel for the Defendant moved for a judgment of acquittal based on the following grounds:

> 1. The State's evidence proved the Defendant's affirmative defense that the murder was not committed by the Defendant, but by another person.
>
> 2. The circumstantial evidence in the case showed that more than one reasonable hypothesis could be considered in the case and the State's evidence did not exclude the Defendant's reasonable hypothesis that the murder was committed by a third person, as yet unknown.
>
> 3. There was insufficient evidence on the issues of specific intent or premeditation to allow the case to be submitted to the jury. (TR: Page 907, lines 5-25; Page 908, lines 1-16).

The trial court denied the Motion for Judgment of Acquittal on each ground (TR: Page 908, lines 4-5; Page 908, line 16).

The State's evidence for their case-in-chief was presented over the course of several days. Following opening arguments, the State called Mary Tucker Fritz, the granddaughter of the victim, Mary Hammond (TR: Pages 468-482). She stated that she last spoke to her grandmother in the front yard of their duplex at approximately 10:45 P.M. of November 4, 1983 (TR: Page 469, lines 2-15). When she left her apartment at 11:15 P.M., Karen noticed that her grandmother had gone back into the house and that the front door was shut (TR: Page 470, lines 3-10). When she arrived home again at 2:00 A.M., she did not notice anything unusual about her grandmother's apartment, including the kitchen window (TR: Page 470, lines 11-25).

Between 3:30 A.M. and 3:40 A.M., she was awakened by the Defendant who told her that her grandmother had been murdered. The Defendant appeared to be very upset and was crying, with his head hung down. She noticed at this point that her grandmother's front door was slightly ajar. The Defendant then said that he had called the police (TR: Page 471, lines 5-25; Page 472, lines 1-22).

When asked if she had ever seen the Defendant prior to the morning of November 5, 1983, the witness replied that she had seen him October 31, 1983, in her grandmother's apartment. She saw him in her grandmother's kitchen apparently cleaning up the dishes (TR: Page 473, lines 1-19). She never saw the Defendant at her grandmother's again, even though she saw her grandmother on a daily basis and their front doors were only inches apart (TR: Page 474, lines 9-22).

She recalled that the Defendant told the police that morning that he had been friends with the victim for three years and that he took her to church often, including Wednesday, November 2, 1983. To her personal knowledge, however, the Defendant had not known her grandmother for three years nor had he taken her to church, since her grandmother had not attended church for a long time (TR: Page 475, lines 3-14).

When asked about his appearance that morning, Karen recalled that the Defendant had a scratch on his face underneath his eye. She was not sure, however, if it had healed (TR: Page 477, lines 9-25; Page 478, lines 1-4). She was then shown a key case and key which she identified as the key case and key her grandmother normally kept in her purse (TR: Page 478, lines 11-24).

On cross-examination, Karen testified that the lights were on in her grandmother's apartment when she arrived home at 2:00 A.M.; other than that, she noticed nothing unusual (TR: Page 479, lines 18-22). When asked who had keys to

the victim's apartment, the witness replied that she, her mother, and her sister all had keys to her grandmother's front door (TR: Page 480, lines 21-25).

On redirect-examination, Karen testified that she did not hear anything from her grandmother's apartment after going to bed at 2:20 A.M. because she is a very sound sleeper. She concluded her testimony by stating that the apartments were very soundproof and that sounds did not travel well through the walls of her grandmother's apartment. Furthermore, when her grandmother was up and about in her apartment, she still could not hear through the walls separating the apartments (TR: Page 482, lines 2-24).

The State then called Dorothy Lynne Stickley, a nine month officer with the Orlando Police Department (TR: Pages 484-503). She testified that she was dispatched at 3:45 A.M. on November 5, 1983, to the victim's apartment (TR: Page 485, lines 4-24). Upon her arrival, she observed the Defendant talking to another officer. She then entered the apartment and noticed that the living room appeared to be in a state of disarray, with overturned chairs and papers lying on the floor (TR: Page 488, lines 1-25; Page 489, lines 1-6).

Upon going upstairs, she entered the victim's bedroom with two other officers and observed the victim lying on the bed on her back with a large wooden-handled knife imbedded in her chest area. There were multiple wounds on her face and body. Dorothy also noticed a large amount of blood on the bed. The victim appeared to be dead (TR: Page 490, lines 6-25; Page 491, lines 1-6).

After roping off the scene, she was directed to the Defendant who was standing on the north corner curb of the duplex and talking to Officer Steve Kleir. The Defendant identified himself as David Johnston, gave a birth date of November 3, 1956, and stated that he lived at 613 North Highland Avenue, Orlando, Florida (TR: Page 491, lines 7-25; Page 492, lines 1-16).

After asking him these questions and trying to calm the Defendant down, Officer Stickley walked to the north side of the apartment and observed a broken window in the kitchen area. She also noticed a ten speed men's bicycle parked in the driveway on the east side of the apartment (TR: Page 493, lines 4-20).

A few minutes later, the Defendant approached the witness and repeated to her how upset he was over the victim's murder. He remarked that he couldn't understand how the burglar had entered throught the front door of the apartment (TR: Page 494, lines 1-8). He then told her that he had found the door unlocked and had gone inside. Upon noticing the disarray in the living room, he called out the victim's name, but received no answer. He ascended the stairs, turned on the light in the victim's bedroom and observed her lying in her bed dead. He then went downstairs and called the police (TR: Page 494, lines 9-24).

A few minutes after being read his rights, the Defendant again began talking to the officers about how he found the apartment. When asked what he found at the apartment, the Defendant replied that he found the front door unlocked and entered the apartment. He then went to the kitchen refrigerator and drank a soda and ate a few crackers, one of which he gave to the victim's dog. He found a bloody towel at the bottom of the stairs. After finding the victim upstairs, he came back downstairs and called the police (TR: Page 497, lines 1-13).

When asked if she noticed anything unusual about the Defendant's appearance that morning, Officer Stickley testified that while completing the field interview report, she noticed a red stain on his right tennis shoe, and red dots on his right bicep (TR: Page 498, lines 1-23).

On cross-examination, Officer Stickley stated that when she first saw the Defendant, he appeared to be very upset and confused. She conceded that the Defendant never actually stated that the victim's front door was locked (TR: Page

500, lines 14-25). She also admitted that she saw no cuts or nicks on the Defendant's hands (TR: Page 502, lines 3-5).

The State next called Kenneth Ray Roberts, a two year officer with the Orlando Police Department (TR: Pages 504-514). He testified that he was dispatched to the murder scene at 3:45 A.M. on November 5, 1983. After helping to inspect and seal the murder scene, he observed the Defendant talking to Officer Stickley. Other than trying to calm the Defendant down, Officer Roberts asked him no questions. He did observe brown colored splatters on the Defendant's tennis shoe, socks and arm, which appeared to be blood (TR: Page 507, lines 5-19). Outside the apartment, he observed the broken kitchen window with glass lying outside the apartment. He also noticed bicycle tracks leading away on the side lot of the west side of the apartment (TR: Page 508, lines 5-11). Out on the street, directly in front of the apartment, he located a light tan key holder. On the east side of the apartment, he observed a red ten speed bicycle (TR: Page 508, lines 21-25; Page 509, lines 1-24).

On cross-examination, Officer Roberts admitted that he could not identify that the brownish stains on the Defendant's socks were either blood or some other substance (TR: Page 510, lines 21-25). He conceded that he was unable to tell if the red ten speed bicycle had made the tracks or how long the tracks had lain there (TR: Page 511, lines 10-24). He also stated that he did not smell the odor of the impurities of alcohol on or about the Defendant while trying to calm him down (TR: Page 512, lines 9-25; Page 513, lines 1-5).

Following the luncheon recess, the State called Rogelio Candalaria, a three year officer with the Orlando Police Department (TR: Pages 518-535). He testified that he was dispatched to the murder scene at 3:45 A.M. on November 5, 1983. He was the first officer to arrive on the scene and, upon his arrival, observed the

Defendant and Karen Fritz in the front door of the apartment (TR: Page 519, lins 1-22).

When asked by the officer why he was there, the Defendant replied that he knew the victim and was passing by the apartment when he noticed the front kitchen light window on. He considered this unusual, stopped and went to the window, which he observed to be broken. At this point he noticed the front door was ajar (TR: Page 520, lines 16-25).

During the conversation, the Orlando Fire Department arrived and Officer Candalaria went with the paramedics as the first persons (other than the Defendant) into the apartment that morning. The officer noticed the disarray in the living room, which appeared to him as if a struggle had ensued. He then went upstairs and observed the victim lying on the bed dead. The bedroom light was on (TR: Page 521, lines 1-21).

He observed the victim to be on the bed at an angle with her feet toward the entrance to the bedroom doorway as someone would in turning to get off the bed. Most of her body was still on the bed. He observed two or three stab wounds to her stomach area and a knife in her stomach. The wound appeared to be postmortem. The bloodiest portions of the wounds were around her head area (TR: Page 521, lines 22-25; Page 522, lines 1-24).

He then observed large amounts of blood around the pillow area, the head area of the victim, and some splatters on the wall which were at the head of the bed facing to the west wall of the bedroom. Outside her normal night wear, the victim had a towel folded across her forehead (TR: Page 523, lines 1-19).

The bedroom itself appeared to be the site of a struggle. Drawers had been removed from the dresser and some furniture had been overturned. He noticed little metal beads on the floor. Officer Candalaria then went back downstairs, and

out the apartment to have the scene inspected and roped off (TR: Page 523, lines 20-25; Page 524, lines 1-21).

While examining the west side of the apartment, the witness observed an uncovered brass candelabra near the fence. He also observed a glass vase directly under the broken kitchen window. Against the east wall of the driveway, he observed a red men's ten speed bicycle (TR: Page 525, lines 8-25; Page 526, lines 1-17).

Officer Candalaria testified that he was able to observe the Defendant at close range with his flashlight. While shining the light on the Defendant's clothes, he observed speckles of blood on the Defendant's left bicep, his left leg, his socks, and his shoe laces (TR: Page 527, lines 3-25; Page 528, lines 1-2).

After leaving the scene for several hours, Officer Candalaria returned around 9:00 A.M. He went to the upstairs bathroom and noticed a gold and silver man's watch sitting on top of the sink counter. The watch appeared to have blood stains on it. When asked if he had ever seen the watch before, the officer replied that he had seen the watch on the Defendant's hand at 1:45 A.M. when he had responded to the Southern Nights Bar on Bumby Avenue concerning a purse theft (TR: Page 528, lines 6-25); Page 529, lines 1-22). While talking to the Defendant at the Southern Nights Bar earlier in the morning, Officer Candalaria testified that he observed no blood stains on the Defendant's person or clothing (TR: Page 530, lines 22-25; Page 531, lines 1-19).

On cross-examination, Officer Candalaria described the speckles on the Defendant's arm as pinhead or pinpoint size and admitted that no testing was performed on the speckles. He conceded that the Defendant was hysterical at the scene, but that he had smelled no odor of the impurities of alcohol about his

person, either at the murder scene or at the Southern Nights Bar earlier that morning (TR: Page 532, lines 22-25; Page 533, lines 1-14).

When asked about the stains on the Defendant's socks, Officer Candalaria stated that they were bloodstains, but admitted that he did not test the sock for blood (TR: Page 534, lines 1-8). The witness concluded his testimony by stating that he first saw the Defendant at the Southern Nights Bar at about 1:45 A.M. and saw him for the second time at the murder scene about 3:45 A.M. (TR: Page 534, lines 22-25).

The State then called Richard Dupuis, an investigator with the Orlando Police Department (TR: Pages 536-557). He testified that he received a phone call about 7:00 A.M. on November 5, 1983, to come to the station. Upon his arrival, he observed the Defendant standing with other officers in the office area (TR: Page 537, lines 1-21). He was asked by his other officers to look at the Defendant's clothing and render an opinion as to whether there were any bloodstains on the clothing (TR: Page 538, lines 16-20).

When asked if he had any education or training in bloodstain analysis, Investigator Dupuis stated that he had attended a one-week school on blood stain analysis several years ago. Since attending the school, he had attended four or five other week long programs conducted by Judy Bunker, a student of a national bloodstain expert by the name of McDonald (TR: Page 538, lines 21-25; Page 539, lines 1-7).

After explaining what blood analysis is to the jury, Investigator Dupuis stated that he observed a reddish stain on the Defendant's right sock, which was porous in material. The stain projected in a downward motion. He also observed a dark stain on the Defendant's brown shoes, as well as a single red stain on the groin

area of his shorts (TR: Page 540, lines 14-22). He observed nothing unusual, however, on the Defendant's person.

He then opined, based on his experience and training, that the stains appeared to be blood, although he admitted that he performed no chemical testing on the stains. He also opined that the clothing was a target for the blood, explaining that the blood was either projected or cast-off something else and then came into contact with the Defendant's clothing (TR: Page 541, lines 7-23). Investigator Dupuis further stated that the blood was in motion when it came into contact with the clothing since it was not a smear type pattern (TR: Page 542, lines 1-11).

At 7:30 A.M., Investigator Dupuis arrived at the murder scene and went directly to the victim's bedroom. He observed the victim on her bed and noticed that the drawers had been pulled out of the dresser and the night stand (TR: Pages 542-544). He also observed blood stains on the bed as well as on the south and west walls of the bedroom. The staining on the bed was a large accumulation of blood, the majority of which was dried up and coagulated. There was smearing of the blood on the top sheet of the bed (TR: Page 544, lines 13-22).

Investigator Dupuis also observed blood on the lamp shade and night stand table. The blood appeared to have dropped on the night stand, the telephone and the south wall. There were at least three arches of staining on the west wall (TR: Page 544, lines 23-25; Page 545, lines 1-3). After the body was removed, he pulled the bed away from the south wall and observed that blood had impacted on the wall, and then drained down the wall into the carpet (TR: Page 545, lines 9-15).

When asked about the three arches of staining on the west wall, Investigator Dupuis categorized the stains as cast-off stains because a bloody object had been in motion and more to the right side of the body (TR: Page 545, lines 21-25; Page

546, lines 1-8). He also observed projected staining on the south wall to which the bed was parallel, as well as on the night stand and the side of the telephone (TR: Page 546, lines 9-16).

On cross-examination, Investigator Dupuis stated that he did not see any blood speckles on the Defendant's arms, legs or knees (TR: Page 547, lines 3-12). When asked if he saw any stains on the victim's stairway, he replied negatively. When asked if he saw any staining in the victim's kitchen, he stated that he saw a stain on the floor, one on the refrigerator and one on the light switch. He conceded that without testing the blood it was impossible to tell if the blood had come from the victim upstairs or from someone else who had pricked their finger (TR: Page 548, lines 1-25; Page 549, lines 1-4).

When asked about the projected blood in the victim's bedroom, Investigator Dupuis replied that the blood was on the south wall, the night stand, under the lamp shade and to the left on the sheet area. He stated that the farthest blood stains were to the left of the body at the end of the bed a foot to eighteen inches away (TR: Page 549, lines 5-23). There was also blood on the right side of the body (TR: Page 550, lines 10-12). He found no blood, however, on the bedroom floor (TR: Page 553, lines 3-4).

When asked from his experience if he was able to express an expert opinion as to whether the person that created the cast-off blood staining was right handed or left handed, Investigator Dupuis opined that the person was right handed (TR: Page 553, lines 16-21). When asked if projected blood would stick to a surface after hitting it, he replied positively. When asked if he or anyone else would have gotten blood on thier hands by touching the victim's body or lifting her head, the witness again replied positively (TR: Page 534, lines 5-24).

The State next called Gary Steven Kleir, a nine year officer with the Orlando Police Department (TR: Pages 558-567). He testified that he arrived at the murder scene at 3:45 A.M. on November 5, 1983. Upon his arrival, he observed the Defendant standing near his lieutenant and some firefighters (TR: Page 559, lines 2-18). He took the Defendant out to the sidewalk, where the Defendant explained that he had found the deceased in the apartment with a knife between her. The Defendant appeared to be crying (TR: Page 561, lines 6-11).

The Defendant then told the officer that he had come by the apartment to check on the victim, noticed that her kitchen light was on (which seemed unusual), and went into the apartment only to find her dead upstairs (TR: Page 561, lines 16-25). Fifteen to twenty minutes after their initial conversation, the Defendant identified himself as Martin White (TR: Page 562, lines 5-9).

The officer then testified that a short time later he took his K-9 dog to an area outside the apartment where he had seen bicycle tracks or footprints. The dog went from the southwest corner of the property to Robinson Street, south from there east to the next street, and north on that street to Ridgewood and back to the apartment (TR: Page 563, lines 7-24). He conceded, however, that the dog did not track up to the Defendant (TR: Page 564, lines 1-2).

After tracking the property, Officer Kleir again talked to the Defendant, asking him if it was unusual to come by an apartment at two or three o'clock in the morning to check on someone. The Defendant replied that this was the usual time he came by to check on her. The Defendant then stated that the victim was his grandmother and that he had known her for two or three years (TR: Page 564, lines 19-25; Page 565, lines 1-10).

On cross-examination, Officer Kleir admitted that the dog's actions in tracking were inconclusive (TR: Page 565, lines 17-20). He then stated that when first seen, the Defendant was upset and crying (TR: Page 565, lines 21-25). When asked about the presence of the odor of the impurities of alcohol on the Defendant's breath, the officer replied that he did notice a strong odor of alcoholic impurities (TR: Page 566, lines 3-12). The officer also admitted that the Defendant could have stated that the victim was an friend who was like a grandmother to him instead of actually being the Defendant's grandmother.

The State the called Patricia Mann, the former fiancee of the Defendant, as its next witness (TR: Pages 568-578). She testified that she had known the Defendant for nine months at the time of trial (TR: Page 568, lines 15-23). She stated that she had gotten off work at the 7-Eleven store on Summerlin Avenue and saw the Defendant at about 12:00 A.M. of November 5, 1983, while she was waiting for a friend to come by and pick her up (TR: Page 569, lines 7-25). He came to the store on a ten speed bicycle, although she could not recall its color.

After they came into contact with each other, an argument ensued over a friend she was talking to outside the store. He left on his bicycle about 12:30 A.M. without telling her where he was going (TR: Page 570, lines 12-25). Between 2:00 A.M. and 2:30 P.M., while still waiting for her friend inside the store, she observed the Defendant enter the store (TR: Page 571, lines 7-23). He was wearing a gold chain that had an engraved crystal butterfly pendant in pink hanging from the chain, which she had given him as a gift (TR: Page 572, lines 11-23). When she left the store between 2:30 A.M. and 2:45 A.M., the Defendant was still in the parking lot of the store.

On cross-examination, the witness was asked if she had ever dated the Defendant. She replied that she had not, stating that she saw him mostly at the store when she was working (TR: Page 574, lines 16-24). When asked if she

rememberd him wearing a heart-shaped pendant also that morning, she replied that it was possible (TR: Page 576, lines 1-3). When asked if she smelled the impurities of alcohol on his breath that morning, she replied negatively. She stated that he looked tired that morning and that she had told him to go home and get some sleep (TR: Page 576, lines 15-25). She then admitted that he was wearing no other necklace that morning than the heart-shaped pendant (TR: Page 577, lines 5-12).

The State then called Ernestine Reyer, an eight year crime scene technician with the Orlando Police Department (TR: Pages 579-607). She testified that she arrived at the murder scene at 9:20 A.M. on November 5, 1983. Upon her arrival she photographed the exterior of the apartment, including the kitchen area, a front end loader near the south end of the apartment, the ground below the window area, and a window screen on the west side of the apartment (TR: Page 580-584). She also took photgraphs of the interior of the victim's apartment, including the victim's bedroom and the victim. She stated that the bedroom dresser drawers were pulled out and clothes were scattered around the bedroom. A few purses were laying on the floor (TR: Page 586, lines 1-10).

She also took photographs of the adjacent bedroom and its bathroom (TR: Page 587, lines 16-25; Page 588, lines 1-17). She then took photographs of the downstairs and described the condition of the livingroom area, which was in a state of disarray, with papers strewn all over the floor and overturned furniture (TR: Page 588, lines 18-25; Page 589, lines 1-9).

When asked if she remembered seeing a watch on the sink in the upstairs bathroom, she replied positively and described the scene through a photograph of that area (TR: Page 590, lines 9-25; Page 591, lines 1-5). When asked if she recalled finding a knife, she replied positively, stating that she discovered a reddish-brown stained butcher type knife between the mattress and box springs of the victim's bed on November 6, 1983 (TR: Page 596, lines 4-25; Page 597, lines 1-

2). She then testified that she spent three hours dusting for fingerprints in the kitchen area, on the kitchen countertops, the refrigerator and inside window, but was unable to lift any prints (TR: Page 598, lines 7-23).

On cross-examination, Officer Reyer again testified that she found no fingerprints in the areas she processed. She concluded her testimony by stating that she did not process the window screen found on the west side of the apartment (TR: Page 607, lines 3-25).

The State called as its next witness Geovanni Rey, an investigator with the Orlando Police Department (TR: Pages 608-622). He testified that he arrived on the scene on November 5, 1983, and first observed the Defendant talking to a uniformed police officer (TR: Page 611, lines 6-13). Upon entering the victim's apartment, he observed that furniture had been overturned in the dining room area, and that the window above the kitchen sink was broken (TR: Page 612, lines 10-25; Page 613, lines 1-5).

When asked if there was anything unusual about the way the kitchen window was broken, Investigator Rey stated that the window wasn't broken in the normal way since there was no glass scattered in the immediate area (TR: Page 613, lines 15-25). He observed a stone setting on the counter three feet away from the kitchen window. He opined that the window had not been opened in some time since there was a large accumulation of dirt on the window (TR: Page 614, lines 1-15).

Upon entering the bedroom area, he observed the victim lying dead on her bed and noticed that that dressers looked as if they had been ransacked. There were blood splatters on the lamp next to the bed, and on the southwest wall next to the bed (TR: Page 614, lines 16-25; Page 615, lines 1-4). The adjacent bedroom also appeared to have been looked through, but was not ransacked. A drawer had

been opened and two or three items of clothing were thrown on the bed (TR: Page 615, lines 5-18).

On cross-examination, Investigator Rey admitted that the downstairs furniture had been placed over as opposed to hurriedly turned over. He specifically recalled a T.V. tray by the kitchen entrance which appeared to have had a flower vase removed from it prior to being turned over because of the way the flowers were setting in the vase (TR: Page 617, lines 13-25). He opined that a heavy lamp had also been placed down on the floor since the lamp shade would have been tilted back had it fallen (TR: Page 618, lines 8-17).

While in the kitchen, Investigator Rey noticed that there were no glass fragments in the door, in the kitchen window, or on the kitchen window below the sink (TR: Page 618, lines 18-25). He did notice, however, that the sink had dirt in it arranged in a loose pattern consistent with someone's shoes. There was also dirt on the kitchen floor, but no glass fragments (TR: Page 619, lines 1-14). The rock appeared to have been placed on the counter since it could not have landed in the position found if the stone had been thrown through the window (TR: Page 619, lines 15-20).

When asked if he recalled stating that there was glass on the floor in his deposition, Investigator Rey replied negatively, but conceded that if he had made the remark at the deposition when he had his notes, there must have then been glass on the kitchen floor. If there was glass on the kitchen floor, it appeared that the glass had been carefully broken and placed on the floor since there was no glass in the sink or on the dining room carpeting (TR: Page 619, lines 21-25; Page 620, lines 1-25)

Investigator Rey did not recall the Defendant as having any odor of alcoholic impurities on his breath (TR: Page 621, lines 2-6). He was unable to express an opinion regarding the disarray in the victim's bedroom since such disarray could have happened naturally or a deliberate attempt could have been made to make the bedroom look ransacked. He did feel, however, that a deliberate effort had been made in the adjacent bedroom to make that room appear to be in a state of disarray. Overall, there were a lot of things about the upstairs and the downstairs that were not consistent with his experience in working burglaries (TR: Page 621, lines 7-22).

The State next called Clay Oehlert, the crime scene technician supervisor for the Orlando Police Department (TR: Pages 622-633). He arrived at the murder scene at 4:55 A.M. on November 5, 1983, and began to collect evidence and stain samples. He also dusted for fingerprints, processing the items with a super glue fuming process to enhance any faint prints that might be found (TR: Page 625, lines 1-17). He obtained several fingerprints using this process on the door frame of the victim's bedroom (TR: Page 625, lines 16-24)

In the upstairs bedroom, he found a wristwatch on the sink and tested a red stain underneath the watch, which proved positive for blood (TR: Page 627, lines 3-12). He located a six inch long rock on the counter next to the kitchen sink, but could not process the stone for fingerprints because of the rock's grainy texture (TR: Page 628, lines 1-16). Outside the apartment, he observed footprints in the area directly below the windows of the victim's apartment and her granddaughter's apartment. He then made a plaster cast of the footprints (TR: Page 628, lines 20-25; Page 629, lines 1-25). He also discovered a key case in front of the apartment (TR: Page 631, lines 9-23).

The State called Donald Ostermeyer, a twelve year evidence technician with the Orlando Police Department (TR: Pages 634-654). He arrived at the murder scene at 4:30 A.M. on November 5, 1983, and processed several Coca-Cola cans for latent prints, as well as the dresser within the victim's bedroom (TR: Page 636, lines 6-14). He also observed the wristwatch in the upstairs bathroom (TR: Page 637, lines 1-22)

Officer Ostermeyer also testified that he took into evidence the Defendant's clothing. On March 12, 1984, he ran a presumptive blood test on the stains on the clothing which tested positive for blood (Pages 641-644). Reactions to the Luminol were also observed on the back of the Defendant's shirt, his sleeves, his waistband, the front of his shorts, the back pocket area of his shorts, and his right tennis shoe (Page 648, lines 3-25; Page 649, lines 1-6).

On cross-examination, Officer Ostermeyer admitted that Luminol tends to react with other substances besides blood, including iron compounds and copper (TR: Page 651, lines 12-19). He conceded that Luminol was not a conclusive test for the presence of blood because of the chemical's tendency to react with other substances. Further testing must be done to obtain conclusive results (TR: Page 652, lines 3-14). He also admitted that he did not make a controlled spraying of the Luminol to make sure the chemical did not react to any impurities in the water. He concluded his testimony for the day by conceding that he was neither a chemist nor a serologist (TR: Page 653, lines 10-17). The court then recessed for the evening.

Trial resumed on Thursday, May 17, 1984, with the testimony of David Burdette, a demolition contractor in Orlando (TR: Pages 664-670). He testified that his company was working a demolition project at the corner of Broadway and Robinson in October, 1983. On the first day of the job, he observed the Defendant

working around the project, although no one had hired fim. Thereafter, Mr. Burdette employed the Defendant for a half day (TR: Pages 665-666).

On November 5, 1983, Mr. Burdette arrived at the demolition site about 9:00 A.M. When he went to move his front end loader away from the roped off crime scene, he discovered a pillowcase full of items inside the loader, which he immediately turned over to the police (TR: Page 668, lines 8-24). When asked how long the Defendant had been around the demolition site, the witness replied that the Defendant had been there about three weeks (TR: Page 669, lines 16-25). He did recall that the Defendant had talked about some pictures that the victim had shown him at one time, but never saw him talking directly to her (TR: Page 630, lines 1-13).

The State next called Evelyn Hammond Thacker, the victim's daughter (TR: Pages 671-679). She testified that she saw her mother two or three times a week, but had never personally met the Defendant. She had talked to her mother, however, about the Defendant on November 3, 1983, and again on November 4, 1983 (TR: Page 672, lines 2-17). On November 8, 1983, she went to the Orlando Police Department to look at some silver tableware, flatware, a silver candlestick, a wine bottle, and a brass teapot (TR: Page 672, lines 18-25). She recognized and identified the items as belonging to her mother. The items had been in the pillowcase found in the front end loader at the demolition site (TR: Page 673, lines 1-24).

The State then recalled crime scene technician Ernestine Reyer (TR: Pages 679-683). She testified that she took photographs of footprints near the front end loader at the demolition site (TR: Page 680, lines 2-7).

The State then recalled crime scene technician Donald Ostermeyer (TR: Pages 684-688). He testified that he processed a silver candleholder found outside a chain link fence near the victim's apartment for latent prints, but found no latents of value on it (TR: Page 685, lines 1-20). He also processed the green wine bottle found outside the front kitchen window, but found no latent prints of value on this item either (TR: Page 686, lines 15-25; Page 687, lines 1-4).

The State called as its next witness Gene Hitechew, a certified latent print examiner with the Orlando Police Department (TR: Pages 689-698). He testified that he examined fourteen latent print cards processed at the murder scene, of which four were suitable for comparison (TR: Page 681, lines 1-19). He then did a comparison analysis of the four cards with the Defendant's known prints, but was not able to identify any of the cards with the Defendant's prints. He also did a comparison analysis of the four cards with the known fingerprints of a man named Kevin Williams, reaching the same negative result (TR: Page 682, lines 4-20). The four usable comparison cards were prints which had been lifted from a Coca-Cola can found inside the victim's kitchen (TR: Page 698, lines 3-9).

The State then called Farron Martin, a former roommate of the Defendant (TR: Pages 699-715). He testified that the Defendant had lived with him at one time for a week. On November 4, 1983, the Defendant, Farron Martin, and another friend named Jose Mena went to the Colonial Plaza Mall where the Defendant purchased a puppy. They then went back to their apartment at 613 N. Highland Avenue for a short time before going to a movie at the Cinema Pub and Draft on South Orange Blossom Trail. Prior to seeing the movie (which started at 11:00 P.M.), and during the movie itself, the Defendant and Jose Mena drank two pitchers of beer and fourteen six ounce bottles of champagne (TR: Pages 699-704).

After the movie, the threesome returned to Martin's apartment. The Defendant left the apartment about 1:00 A.M. When asked if the Defendant had been scratched while playing with his new puppy, the witness replied negatively (TR: Page 705, lines 3-25; Page 706, lines 1-25). Mr. Martin stated that the Defendant was under the influence of alcohol when he left the apartment at 1:00 A.M. (TR: Page 707, lines 5-25; Page 708, lines 1-2).

The witness testified that when the Defendant left the apartment, he was wearing jeans and a Buffalo jersey, which the witness found later in the front seat of his car. When arrested, the Defendant was wearing Mr. Martin's shorts and shirt which had been in the dirty laundry in his bathroom (TR: Pages 708-710). He also stated that when he found his clothes, he also discovered a bag of pot (TR: Page 710, lines 1-9). On cross-examination, the witness stated that the Defendant left the apartment wearing a heart shaped pendant with a birthstone in the center (TR: Page 713, lines 14-17).

The State then called Dr. Thomas Hegert, Orange County's Medical Examiner (TR: Pages 716-739). He performed an autopsy on the victim on November 6, 1983, at 8:00 A.M. (TR: Page 719, lines 17-22). Examination of the head revealed a stab wound on the right sie of the neck which had severed the jugular vein and the two carotid arteries that carry the blood to the brain, as well as her windpipe (TR: Page 720, lines 2-22).

An examination of the neck area revealed a fracturing of the voice box area indicating that the victim had been manually strangled by someone else's hand (TR: Page 720, lines 23-25; Page 721, lines 1-12). A second stab wound was found which penetrated one inch into the tissues of the right cheek, but otherwise did no real damage (TR: Page 721, lines 13-16). A series of three stab wounds produced by the same stabbing motion was also found in the neck area. A superficial cutting

wound was found on the front portion of the neck (Page 721, lines 17-25; Page 722, lines 1-4).

Further examination revealed a stab wound to the left chest which did not penetrate the chest cavity. A cutting wound was found on the left side of the left forearm. A superficial cutting injury was found on the fingers of the right hand (TR: Page 722, lines 8-17). Two large stab wounds were found in the upper abdomen, one of which still had the knife protuding from it. The highest wound extended through the liver and severed the right kidney. The second stab wound passed through the stomach and severed the ureter. Dr. Hegert opined that these two stab wounds were produced after death since there was no blood associated with the path of the wounds (TR: Page 722, lines 21-25; Page 723, lines 1-16).

Two areas of bruising consistent with manual strangulation were found on the right side of the neck. Four areas of abrasions, consistent with fingernail scratch abrasions, were found on the left side of the neck, again indicating manual strangulation. A number of areas of small bruising were found on both sides of the upper chest (TR: Page 723, lines 17-25; Page 724, lines 1-3). Dr. Hegert then explained the concept of defensive injuries and stated that the superficial cutting wound on the victim's hand and left wrist were defensive type wounds (TR: Page 724, lines 4-16).

Dr. Hegert continued his testimony by stating that the stab wounds made to the Defendant's face and neck were consistent with the knife found in the victim's mattress, and not with the knife found in the victim's abdomen (TR: Page 725, lines 6-25). While examining the victim's head, he discovered a thin gold chain with a butterfly medallion attached to it that was tangled in her hair, but not around her neck (TR: Page 726, lines 1-8). The chain was unclasped (TR: Page 727, lines 2-4).

When asked to give an estimate of the time of death, Dr. Hegert opined that the victim had died between 12:00 A.M. and 4:00 A.M. of November 5, 1983 (TR: Page 727, lines 5-18). He then opined that the cause of death was due to extensive hemorrhage resulting from the severing of the blood vessels to the right side of the neck by the stabbing of the victim (TR: Page 728, lines 7-13).

On cross-examination, Dr. Hegert reiterated that the abrasions on the neck indicated that the strangulation was attempted by a right handed person (TR: Page 729, lines 14-20). He stated that although the victim would have died of the intensive bleeding in three to five minutes after the blood vessels were severed, she would have lost consciousness in a matter of several minutes (TR: Page 733, lines 13-25; Page 734, lines 1-6). The loss of blood would have been even faster, however, because the act of strangulation would have tended to move the neck wound to open and accelerate the amount of bleeding. He then stated that if the strangulation was attempted by a right handed individual, the victim would have been stabbed by the left hand of that individual (TR: Page 734, lines 7-25; Page 735, lines 1-8).

On redirect-examination, Dr. Hegert stated that it was just as possible for the act of strangulation to have taken place at a separate time as opposed to all the action having taken place simultaneously. The strangulation, however, certainly would have occurred before the time of the stabbing or at the time of the stabbing (TR: Page 735, lines 13-23).

When asked when the different stab wounds occurred, Dr. Hegert stated that all the stab wounds, other than those to the abdomen, were inflicted while the victim was still alive, although he could not determine which wounds were inflicted first (TR: Page 737, lines 21-25; Page 738, lines 1-7). He concluded his testimony by stating that the blood splattering found on the wall of the bedroom was not projected from the victim's body as she bled to death, but was instead the result of

blood projected from the murder weapon or some other bloody surface (TR: Page 738, lines 8-25; Page 739, lines 1-10).

The State then called Terrell W. Kingery, a latent and shoe print examiner with the Sanford Crime Lab (TR: Pages 740-752). He testified that he had received some plaster casts, a pair of shoes, photographs of shoe tracks, and a watch for comparison in this case (TR: Page 742, lines 8-13). From an examination of the photographs and the plaster casts, he was able to determine that the tread designs could be compared with the Defendant's tennis shoes (TR: Page 744, lines 5-10). After comparison, he determined that the prints could have been made with the Defendant's left shoe (TR: Page 745, lines 20-25; Page 746, lines 1-17).

On cross-examination, the witness stated that he performed the examination on December 15, 1983, by inking the bottom of the shoes, putting the shoes on his feet, and then making the prints personally, although he admitted that he did not have the same shoe size as the Defendant, nor did he use test soil from the murder site (TR: Page 750, lines 3-25). This examination took place after serologist Keith Paul had performed his tests on the shoe to avoid contamination with the printing ink (TR: Page 751, lines 1-12). The witness stated that he also examined the watch for latent prints, but found none suitable for comparison (TR: Page 752, lines 1-15).

The State next called Jose Mena, a friend of the Defendant, as its final witness before the noon recess (TR: Pages 753-760). He testified that he was living with Farron Martin at 613 North Highland Avenue during the first week of November, 1983, and that the Defendant was staying there also. He had originally met the Defendant in jail (TR: Page 754, lines 5-20).

He stated that during the evening of November 4, 1983, the threesome had gone to the movies. While there, he and the Defendant drank about three glasses of beer apiece (TR: Page 756, lines 4-24). He also saw the Defendant drink two bottles of champagne (TR: Page 757, lines 7-15).

After the movie concluded, the threesome went back to Martin's apartment, arriving about 12:25 A.M. (TR: Page 757, lines 16-25). The Defendant later left wearing a pair of blue jeans. The witness did not notice whether the Defendant was wearing a watch at that time (TR: Page 758, lines 3-14). He did recall that the Defendant had purchased a dog at the mall earlier that evening (TR: Page 758, lines 15-19). Although the Defendant was scratched on his leg by the puppy, the witness never observed the dog scratch the Defendant on his face or neck nor did he see any scratches in that area (TR: Page 759, lines 1-20).

Following the noon recess, the State called Robert Mundy, an investigator in the Homicide Unit of the Orlando Police Department (TR: Pages 761-804). He arrived at the murder scene and was advised by his superiors that he would be the lead investigator in the case (TR: Page 762, lines 5-16). After viewing the crime scene, he came downstairs and talked to the Defendant. He then asked the Defendant to come down to the station and give a taped statement, which the Defendant agreed to do (TR: Page 764, lines 16-25).

At the station, Investigator Mundy and Investigator Rey conducted an interview with the Defendant (TR: Page 772, lines 1-15). The taped interview was played for the jury, who followed along with a transcript of the tape (TR: Page 777, lines 2-21). During the interview, Investigator Mundy noticed that the Defendant had a couple of red stains on his clothing, as well as a scratch underneath his eye and on his neck (TR: Page 780, lines 22-24).

On November 10, 1983, he again interviewed the Defendant after receiving a message from the Defendant to see him at the jail about his case (TR: Page 781, lines 14-22). A brief tape-recorded interview was had with the Defendant. This tape was also published to the jury. On November 17, 1983, the Defendant left another message that he wished to talk to Investigator Mundy. Investigator Mundy and Investigator Rey again conducted a taped interview with the Defendant, which was published to the jury (TR: Page 782, lines 16-25; Page 783, lines 1-19; Page 786, lines 7-15).

Investigator Mundy testified that the Defendant also left messages for another interview on December 5, 1983. Each time, a taped interview was made with the Defendant. Each of the interviews was then published to the jury, who followed alon with transcripts of the tape (TR: Pages 797-804).

The State then called Randall Morgan, a ten year investigator with the Orlando Police Department (TR: Pages 806-812). He testified that the Defendant had phoned a report of a theft of his property on January 25, 1984 (TR: Page 807, lines 16-22). Investigator Morgan and Investigator Oestreich went to the jail to take a report on the theft. During the interview, the Defendant stated that he also wished to talk about his murder charge (TR: Page 809, lines 12-22). Investigator Morgan then taped the interview, which was published to the jury (TR: Page 812, lines 2-16).

Detective Mundy was then recalled as a witness by the State (TR: Pages 818-849). He testified that he conducted his last interview with the Defendant on January 25, 1984. The Defendant told Investigator Mundy that he had been high on drugs the night of the murder, including L.S.D., Blotter Acid, Blue Star, and others. The Defendant also stated that he had been to the Southern Nights Bar, where he had consumed alcohol, and had then gone to the 7-Eleven Store where Patricia Mann worked (TR: Page 821, lines 7-25).

At the murder scene, the Defendant stated to Investigator Mundy that he found a bent-up knife next to the victim's bed, that he straigtened the knife and placed it between the mattresses, although he didn't know why. During this time, he was hallucinating and saw maggots and worms on his arms. Because of these hallucinations, he removed his wristwatch and washed his arm off in the upstairs bathroom. He admitted that the watch found in the upstairs bathroom belonged to him (TR: Page 822, lines 8-25; Page 823, line 1).

He also admitted taking the items found later found in the pillow case from the victim's apartment and placing the pillowcase in David Burdette's front end loader (TR: Page 823, lines 2-7). He went on to tell Investigator Mundy that upon discovering the victim, he went up to her and placed his right hand under her head. While holding her, he stated that the victim was still alive and appeared to be trying to speak to him, although he had said in an earlier interview that she was already dead when he first discovered her (TR: Page 823, lines 8-20).

The Defendant further admitted that Investigator Mundy that he had actually written the letters allegedly written by Kevin Williams because he didn't want people to think that he had killed the victim (TR: Page 824, lines 5-17). The letters were then published to the jury (TR: Pages 827-829).

The Defendant further stated to Investigator Mundy that he had given the butterfly necklace to the victim on a previous occasion and that his fiance, Patricia Mann, had lied at the preliminary hearing concerning him wearing the necklace on the night of the murder (TR: Page 829, lines 13-25). The Defendant also stated that he had ridden a bicycle that he borrowed from a friend that evening which he rode from the Southern Nights Bar to the 7-Eleven Store (TR: Page 830, lines 3-14). The Defendant admitted that he had lied when he had said in an earlier interview that he had seen a bearded man running out of the victim's apartment after the murder (TR: Page 830, lines 2-25; Page 831, lines 1-8).

Investigator Mundy then testified that he had one last telephone conversation with the Defendant after January 25, 1984. In that conversation, the Defendant stated that he wanted to make a deal with the judge and also asked the investigator if he had ever heard of a crime called passion. The Defendant went on to state that he was scared because he had already been in jail for two years for another crime (TR: Page 832, lines 4-25; Page 833, lines 1-12).

The Defendant continued the conversation by stating that he did not want to go to prison for something he didn't do or didn't mean to do (TR: Page 836, lines 11-17). The Defendant also stated that he had found a candlestick holder at the scene and had thrown it over the fence into the demolition site (TR: Page 836, lines 11-25; Page 837, lines 1-7). He concluded his telephone conversation by stating that although he did not kill the victim, he was guilty of a burglary because of the things he had taken from her apartment (TR: Page 837, lines 8-18).

On cross-examination, Investigator Mundy admitted that while interviewing Patricia Mann, he did not mention any other necklace that the Defendant might have been wearing the night of the murder except for the butterfly chain. He conceded that there were different routes to the victim's apartment from the 7-Eleven Store, some longer and some shorter (TR: Page 844, lines 3-23). He also conceded that he had not ridden a bicycle over the route taken by him to the victim's apartment, and that a bicycle could be ridden at a speed greater or less than six to eight mles per hour (TR: Page 845, lines 4-8).

Investigator Mundy concluded his testimony by stating that although the Defendant had inconsistencies in his statements, he was emphatically consistent in his denial of the victim's murder (TR: Page 845, lines 9-23). Following Investigator Mundy's testimony, the court recessed for the night (TR: Page 850, lines 11-12).

On Friday, May 18, 1984, trial resumed with the testimony of State's witness Keith Paul, a forensic serologist with the Sanford Crime Lab (TR: Pages 851-879). He testified that he tested the Defendant's clothing for the presence of blood and determined that there was human blood present on the stretchband of the Defendant's shorts (TR: Page 854, lines 3-25). He then tested the stretchband for blood type, but obtained inconclusive results (TR: Page 855, lines 8-22).

On December 14, 1983, he conducted tests on the stains found on the Defendant's tennis shoes and determined that the stains were human blood (TR: Page 867, lines 6-25; Page 868, lines 1-4). He also conducted tests on other items of the Defendant's clothing and the watch found in the upstairs bathroom. He again determined that any blood present was human blood, but was unable to determine blood type because of an insufficient quantity of blood to type (TR: Pages 868-870).

On cross-examination, Mr. Paul testified that he examined the Defendant's socks, as well as his underwear, but found no blood on the items of clothing (TR: Page 871, lines 1-10; Page 872, lines 3-8). When asked what chemical he used to test for blood, the witness stated that he had used phenolphtalein instead of Luminol, since Luminol reacts with metal compounds as well as with blood (TR: Page 874, lines 3-19).

On redirect-examination, Mr. Paul stated that no tests were conducted on rubbings taken from the Defendant's body, or from his shorts and shorts, since the chemical papers used to do the rubbings add their own chemicals to the items tested, and would react with his blood-detecting chemicals (TR: Page 877, lines 1-12). He also conducted no tests on the fingernails submitted for examination because the amount of tissue scraped would be so insignifigant to preclude any useful results (TR: Page 877, lines 13-25; Page 878, lines 1-5).

On recross-examination, Mr. Paul indicated that there appeared to be minute quantities of blood on the submitted fingernails, but he nevertheless conducted no tests on the nails because the amounts would be useless for testing purposes, and he would be out of his field of expertise to attempt an examination (TR: Page 879, lines 1-18).

The State next called Kevin Williams, an acquaintance of the Defendant (TR: Pages 880-883). He testified that he had originally met the Defendant in Eola Park during the summer of 1983, but that he had moved away from Orlando on October 31, 1983 (TR: Page 881, lines 1-14). He stated further that he had never written or sent any letters to attorney Ken Cotter (TR: Page 882, lines 6-13). After examining the letters, he stated that he had never seen the letters before, did not know the victim, nor had he ever been to her apartment (TR: Page 882, lines 14-25).

The State next called Robert Goldman, a questioned document analyzer with the Orlando Police Department (TR: Pages 885-891). He testified that he was assigned to compare the handwriting of the letters to the Defendant's known handwriting. When he went to obtain a sample of the Defendant's handwriting on May 2, 1984, however, the Defendant refused to give him a sample. He tried once again on May 7, 1984, but the Defendant again refused to give a sample (TR: Pages 886-889).

On cross-examination, the witness admitted that the Defendant stated on May 2, 1984, that he could not give a writing sample at that time because his hand or arm was bothering him (TR: Page 890, lines 18-22). On redirect-examination, the witness stated that the Defendant on May 4, 1984, had refused to give a handwriting sample, but gave no reason for his refusal (TR: Page 891, lines 2-9).

The State called as its next witness Jose Gutierrez, a friend of Karen Fritz and her husband Neil (TR: Pages 892-895). He testified that he went to their apartment on November 4, 1983, to meet Neil anout 8:30 P.M., so that both could attend a downtown musical festival (TR: Page 893, lines 9-19). He did not know however, that Mary Hammond lived next door. He waited for an hour for Neil to arrive home and then left for the musical festival (TR: Page 893, lines 18-25); Page 894, lines 1-4).

The State called Linda Milan, a dispatcher with the Orlando Police Department, as its last witness in the case (TR: Pages 896-901). She testified that she received a telephone call from the victim's apartment at 3:34 A.M. on November 5, 1983. The caller identified himself as Martin White and stated that someone had killed his grandmother (TR: Page 898, lines 2-25; Page 899, lines 1-6). The caller also stated that he had used a key to enter the apartment and was actually in the apartment making the call (TR: Page 899, lines 7-14).

On cross-examination, Ms. Milan testified that the caller had an emotional tone in his voice, and sounded distraught and hysterical. She had trouble understanding certain things he was saying because of the emotional tone of voice (TR: Page 900, lines 15-25; Page 901, lines 1-11). The State the rested its case (TR: Page 904, lines 23-24).

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

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

The only element of the first degree murder charge that the State conclusively proved was that the victim had been stabbed to death. The scientific evidence introduced by the State showed conclusively that someone else besides the Defendant had committed the crime. The State was obviously able to show that the Defendant was at the murder scene and that his footprints and bicycle were out side the apartment. This took no great effort since the Defendant in his statements to the police admitted that he had ridden by the apartment, noticed the kitchen light was on, and went up the window to check things out, since he considerd it unusual for his friend to leave that light on at night.

The State was also able to show that the Defendant had blood on his clothing. Again, the Defendant's statements corroborated the scientific evidence. He told Investigator Mundy that he had gone into the victim's bedroom and lifted up her head because she still appeared to be alive and trying to say something to him. Obviously, that action would have caused the victim's blood to fall upon him in the clothing areas mentioned. Indeed, the fact the the victim bled as much as she did, especially with her jugular vein and carotid arteries severed, would indicate that the Defendant did not commit the murder since that type of projected bleeding would have gotten all over his clothing in large amounts, not just on the small areas mentioned in Keith Paul's testimony. The fact that the victim was already dead when the Defendant lifted her head is explained by the fact that he was

admittedly on L.S.D. and hallucinating that night. His hallucinations might very well have caused him to think and see that the victim was still alive and trying to tell him the name of her murderer.

This was the only conclusive scientific evidence that the State could bring to bear, however, against the Defendant. The fingerprint evidence showed no connection between the Defendant and the victim, but did conclusively show that some other individual's fingerprints were on the items tested. If the Defendant had committed the murder, the State should have been able to easily find his fingerprints and connect them to the crime. No other scientific evidence was introduced by the State to link the Defendant to the crime; all other evidence linking him to the crime was purely circumstantial.

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

The Defendant admitted that he was present at the scene of the crime, but only after the murder occurred. Although there were inconsistencies in his statements to the police, these are easily explained away by the Defendant's past history of mental and emotional problems. His paranoid fear of the legal system would naturally cause him to make statements to protect himself since the police had focused on him, and him only, as the perpetrator of the murder. In his mind, he had known the victim for a lengthy period of time, and it was only natural for him to think of her as his grandmother due to her kindness to him, something he had never known from his own mother or father. Thus, the Defendant's past

history, in and if itself, would lead to the inescapable conclusion that he was incapable of murdering someone who had been kind to him.

Secondly, if the Defendant had committed the murder, doesn't it make sense that he would have fled the scene since almost no one knew that he had ever met the victim. The real murderer would have fled the scene, and most certainly would not have called the police to report the crime, knowing that the reporter of the crime would definitely be thought of as a suspect, especially in light of the Defendant's story as to how he found the victim at 3:30 A.M. Instead, the Defendant having discovered that his dear friend was murdered, immediately reported the crime to the police and to the victim's grandaughter next door and then stayed until the police arrived and made a full report as to how he came to find the victim.

Thirdly, the State's attempt to link the butterfly necklace found in the victim's hair with the Defendant was an utter failure. Patricia Mann initially stated that she had seen the Defendant wearing this necklace at the 7-Eleven Store prior to the murder. On recross-examination, however, she admitted that what she saw was around his neck was actually a heart-shaped pendant. The fact that the Defendant was wearing a heart-shaped necklace that evening was later confirmed by the testimony of Farron Martin who stated that the Defendant was wearing a heart-shaped pendant when he left the apartment at 1:00 A.M.

Finally, there was no evidence presented by the State to prove beyond and to the exclusion of a reasonable doubt that the Defendant, even if he was arguably the murderer, committed the murder with premeditation. The court denied the motion for judgment of aquittal based on a failure to show premeditation because the State had been able to show that the victim had been repeatedly stabbed by the murderer.

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

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

In the case at bar, the only evidence produced by the State to show premeditation was the fact that the Defendant was in the victim's apartment after the murder had occurred and that the Defendant had taken some items belonging to the victim after the murder had occurred. Based on this insufficiency of proof as to premeditation, and the State's failure to conclusively show that the Defendant actually committed the murder, the Defendant's conviction should be reversed, and this case remanded to the lower court with instructions to discharge the Defendant.

ARGUMENT XII

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR NEW TRIAL REGARDING THE DEFENDANT'S SEVERAL MOTIONS FOR MISTRIAL CONCERNING IMPROPER WILLIAMS RULE EVIDENCE OF OTHER OFFENSES THE DEFENDANT COULD HAVE BEEN CHARGED WITH OR ACCUSED OF COMMITTING.

Three separate times during the trial, remarks were made by State witnesses in violation of the Williams Rule. The first remark was made while the prosecutor was questioning State witness Farron Martin, a friend of the Defendant, as follows:

> "Q. You testified earlier that when you saw Mr. Johnston leave the apartment he had on, I believe, jeans of some sort and a Buffalo shirt, I believe you said, Sir?
>
> A. Yes, sir, a jersey.
>
> Q. Did you ever have an occasion to see those items again after Mr. Johnston had been arrested?
>
> A. I did.
>
> Q. All right, and when did you next see these items?
>
> A. The following morning I found them in my car.
>
> Q. And where was, did you find them in your car?
>
> A. In the front seat.
>
> Q. And did you examine them?
>
> A. I did.
>
> Q. Was there anything unusual about them?
>
> A. They shouldn't have been there. There was a bag of pot in them." (TR: Page 709, lines 19-25; Page 710, lines 1-9).

At this point, Counsel for the Defendant objected to the reference to the bag of pot as being irrelevant to the case and also sufficiently prejudicial to permit the court to grant a mistrial since the error was not one that was curable by an

instruction from the court to the jury to disregard the statement (TR: Page 710, lines 13-25; Page 711, lines 1-3). The court replied that it had nothing before it to rule upon at that point and ordered the proceedings to continue (TR: Page 711, lines 11-17).

The second remark occurred during the questioning by the prosecutor of State's witness Jose Mena, another acquaintance of the Defendant, as follows:

> "Q. Sir, could you please state your full name?
>
> A. Jose Rafael Mena.
>
> Q. All right. And do you know David Eugene Johnston?
>
> A. Yes.
>
> Q. How do you know Mr. Johnston?
>
> A. I met him in jail." (TR: Page 754, lines 3-8).

After four more questions and answers, Counsel for the Defendant objected to the remark made by the witness and moved for a mistrial. The court overruled the objection and denied the motion for mistrial on the ground that both were untimely made (TR: Page 755, lines 1-11).

The third remark occurred during the questioning by the prosecutor of State's witness Robert Mundy, an investigator with the Orlando Police Department, as follows:

> "Q. Okay. At this point in time were you asking Mr. Johnston any questions or were you just listening to what he was saying?
>
> A. I was listening to what Mr. Johnston was telling me.
>
> Q. All right, and did he go on to tell you anything further?
>
> A. Yes, he did. He stated that he was scared because he had already gone to jail for two years for something." (TR: Page 833, lines 4-12).

At this point, Counsel for the Defendant objected to the remark and moved for a mistrial. The court sustained the objection, but denied the motion for mistrial, instructing the jury to disregard the statement (TR: Page 833, lines 13-25; Page 834, lines 1-20).

At the close of the State's case, Counsel for the Defendant renewed his motions for mistrial because of the prejudicial nature of the remarks (TR: Pages 905-906). The court, however, denied the motions as renewed (TR: Page 907, lines 2-3)

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

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

The sole purpose for this rule is to prevent exactly what happened at trial: an unwarranted attack upon the Defendant's character through the introduction, although inadvertent, of evidence showing a prior criminal past. When such an attack takes place, as happened at the Defendant's trial, the defendant is deprived

of his constitutional right to a fair trial. Lewis v. State, 377 SO. 2d 640 (Fla. 1980); Wilt v. State, 410 So. 2d 924 (Fla. 3rd DCA 1982).

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

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

In Clark v. State, 337 So. 2d 858 (Fla. 2nd DCA 1976), a police officer testifying for the state made the unsolicited comment that he had arrested the defendant for sale and possession of heroin after being asked by the prosecutor when he first came into contact with the defendant. The defendant's attorney immediately moved for a mistrial. The court then instructed the jury to disregard the reference to other charges pending against the defendant and subsequently asked each juror if he could put such reference out of his mind. Upon receiving affirmative answers from each of the jurors, the motion for mistrial was denied. In reversing the defendant's conviction, the appellate court ruled that it was too much to ask a juror to put this type of evidence out of his mind while he was deliberating over the defendant's guilt of another crime.

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

In determining whether such remarks constitute prejudicial error, a determination must be made of the probable impact of the remarks on the minds of an average jury. Williams v. State, 74 So. 2d 77 (Fla. 1954); Hodges v. State, 403 So. 2d 1375 (Fla. 5th DCA 1981); Kennedy v. State, 385 So. 2d 1020 (Fla. 5th DCA 1980). In Kennedy, the State's witness testified that the victim had told her that he feared the defendant. The appellate court, in reversing the conviction, held that such a remark was improper, stating that such remarks indicated that there was more than a reasonable probability that the improper evidence contributed to the verdict, and further held that an average jury could have found the State's case less persuasive had this testimony not been brought before the jury.

In the case at bar, it is clear from the facts that the statement concerning the Defendant having been in possession of a bag of cannabis and the statements concerning the Defendant having been in prison prior to the commission of the murder were neither material nor relevant to the crime charged. The cumulative

effect of the errors in allowing this testimony to be heard by the jury resulted in fundamental prejudice to the Defendant and denied to him his constitutional right to be prosecuted only for the crime charged and his right to receive a fair trial. As such, the Defendant's conviction should be reversed and this case remanded to the lower court for new trial.

ARGUMENT XIII

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR NEW TRIAL REGARDING HIS OBJECTIONS PRIOR TO AND DURING TRIAL TO THE SHACKLING OF HIS LEGS.

Prior to voir dire of the jury on May 14, 1984, Counsel for the Defendant objected to the shackling of the Defendant's legs since there was a possibilty the jury might see the Defendant at some point in trial in that condition and be prejudiced against the Defendant (TR: Pages 4-9). The court overruled the objection on the ground that the Defendant had proved troublesome to his jailors in the past and thus presented a security risk to the bailiffs during the trial, although he had caused no disturbances in the courtroom as of that point (TR: Page 9, lines 9-11). At the close of the proceedings for the day, Counsel for the Defendant again requested the Court to allow removal of the shackles from the Defendant's legs for the remainder of the trial. The court denied the request (TR: Page 156, lines 20-25; Page 157, lines 1-11).

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

In the case at bar, the trial court committed reversible error by placing the Defendant in physical restraints for the entire trial. This action was taken over the Defendant's strenuous objections on the issue. The court made no inquiry of the Defendant concerning his ability to remain calm in the courtroom and the Defendant even stated to the court that he would remain calm and speak only when addressed by the court. It is clear that the Defendant's right to a fair trial was

denied, and the Defendant's conviction must be reversed and this case remanded to the lower court for a new trial.

ARGUMENT XIV

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR NEW TRIAL REGARDING HIS OBJECTIONS TO THE VOIR DIRE PROCESS.

During the voir dire process, the following exhange and objection occurred between Counsel for the Defendant, Christine Warren, and the court:

> "THE COURT: Ms. Warren, do you want to put on the record your objection to this voir dire process?
>
> MS. WARREN: Yes, Your Honor. I object to the Court requiring the defense counsel to exercise the challenge immediately after questioning of each individual juror. I object to the juror being sworn in which (sic) she was sworn in. I object to not being able to back strike.
>
> THE COURT: Objection is overruled. I want to say that I am not doing this to prevent backstriking in general. You have your seating chart available to you as to how each juror is coming up in sequence. Yesterday, you all cnducted three and a half to four hours collectively of voir dire and you all had benefit of that yesterday. All right. Ask juror John Keen to step in." (TR: Page 167, lines 2-17).

Florida case law holds that prospective jurors may be challenged at any time before the jury is sworn to try the case. Thus "backstriking", or back challenging, should not be prohibited by the trial court. Denhan v. State, 421 So. 2d 1082 (Fla. 4th DCA 1982). Although the court stated that its swearing in of each individual juror as selected was not done to prevent backstriking in general, the net effect still denied defense counsel the opportunity to backstrike since once sworn, no previous juror could be stricken by defense counsel. As this bar to backstriking was taken by the court prior to the swearing-in of the entire panel, the Defendant's conviction should be reversed, and this case remanded to the lower court for a new trial with instructions not to swear in and jurors until the panel has been selected as a whole. Grant v. State, 429 So. 2d 758 (Fla. 4th DCA 1983).

ARGUMENT XV

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR NEW TRIAL REGARDING HIS OBJECTIONS TO THE PROSECUTOR'S QUESTIONING OF KAREN FRITZ AND OFFICER KENNETH RAY ROBERTS IN AREAS WHICH WERE OUTSIDE THE SCOPE OF CROSS-EXAMINATION.

During the redirect-examination of Karen Fritz, the prosecutor pursued the following line of questions:

> "Q. Would sounds travel through the walls from your grandmother's apartment next door?
>
> A. No. They didn't.
>
> MR. WOLF (sic): I object as that is outside the scope of cross examination.
>
> THE COURT: Objection overruled.
>
> BY MR. AYRES:
>
> Q. I didn't get all of your answer.
>
> A. No, the apartments were very soundproof. We could turn the stereo up pretty loud and she didn't hear it.
>
> Q. Did you ever hear things from her apartment when you were in your apartment?
>
> A. No, I didn't." (TR: Page 482, lines 12-13).

During the redirect examination of Officer Kenneth Ray Roberts, the prosecutor pursued the following line of questions:

> Q. Did there ever come a point in time when he got hostile?
>
> A. Yes, sir.
>
> Q. When did that occur?
>
> A. He was --

MR. WOLF (sic): Excuse me. That is outside the scope of cross.

THE COURT: Objection overruled.

MR. WOLF (sic): Thank you.

BY MR. AYRES:

Q. Go ahead.

A. He was taken to one of the investigators, and I believe they were going to the station for some type of interview. As I recall I was talking to one of the key investigators, and we got close to the vehicle and Mr. Johnston took a fighting stance. He removed his teeth and laid it on the floor, some type of silver or gold inlay or something. He made several karate type moves.

Q. Did he calm down?

A. Yes, sir." (TR: Page 513, lines 18-25; Page 514, lines 1-12).

The main purpose for not allowing a party to pursue a line of questioning outside the scope of the previous party's examination is to ensure that the trial proceeds in an orderly and efficient manner. When the State is allowed to go into areas outside the scope of the Defendant's prior examination, the orderly trial process is subject to breakdown and the Defendant's trial strategy is then ambushed and destroyed, thus denying him the right to a fair and impartial trial (as in the case at bar). Therefore, the Defendant's conviction should be reversed, and this case remanded to the lower court for a new trial.

ARGUMENT XVI

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR NEW TRIAL REGARDING HIS OBJECTION TO THE INTRODUCTION OF A GRUESOME, PREJUDICIAL COLOR PHOTOGRAPH OF THE DECEDENT AND IN DENYING HIS MOTION FOR NEW SENTENCING PROCEDURE REGARDING HIS OBJECTION TO THE PUBLISHING OF ANOTHER GRUESOME COLOR PHOTOGRAPH OF THE DECEDENT TO THE JURY.

During the testimony of crime scene technician Ernestine Reyer, the State moved to introduce various photographs of the murder scene taken by the witness (TR: Page 599, lines 11-13). After inspecting the photographs contained in State's Composite Exhibit K, Counsel for the Defendant objected to Number 15, a close-up color photograph of the victim lying in her bed with a knife in her abdomen, on the ground that it was gruesome and therefore prejudicial to the Defendant (TR: Page 600, lines 1-4). The court sustained the objection, deleted this photograph until sentencing, but allowed the substitution of another photograph showing the same view as the close-up, only taken from five or six feet further back (TR: Page 602, lines 4-23). Counsel for the Defendant objected to this photograph on the same ground, but was overruled by the court (TR: Page 603, lines 4-7).

Counsel for the Defendant then objected to the photograph being shown in color, since black-and-white photographs were available. The court also overruled this objection. (TR: Page 604, lines 14-25; Page 605, lines 1-14). The substituted photograph was then published to the jury (TR: Page 606, lines 12-17).

Prior to the start of the penalty phase of the trial, Counsel for the Defendant objected to the State's planned publication of the original color close-up photograph of the decedent to the jury as being gruesome and designed to influence the minds of the jury. The court overruled the objection (TR: Page 1096, lines 16-25; Page 1097, lines 1-22). Counsel for the Defendant renewed his objection during

the penalty phase, and was again overruled by the court (TR: Page 1116, lines 6-16).

The test of the admissibility of an allegedly gruesome or gory photograph is its relevancy to the issue required to be proved. Welty v. State, 402 So. 2d 1981 (Fla. 1981); O'Berry v. State, 348 So. 2d 670 (Fla. 3rd DCA 1977). In O'Berry, the State offered a color photograph of the deceased, covered with blood, showing a gaping hole in his forehead where the bullet had penetrated. The photograph was allegedly offered to identify the victim and to show the location of the fatal wound. Defense counsel objected on the grounds of relevancy, materiality and undue prejudice. The objections were overruled and the photograph admitted into evidence. At the conclusion of the trial, the jury returned with a verdict of guilty to the lesser included charge of manslaughter. The appellate court affirmed the conviction on the basis of harmless error, but stated that the trial court erred in admitting the photograph since it was neither relevant nor material to any issue involved in the trial and thus prejudicial to the defendant, but not so prejudicial as to deny him a fair trial.

Such is not the case, however, with the Defendant. It is clear that the photographs submitted by the State were neither relevant nor material to prove any issue in its case, since identity and cause of death were established by Dr. Hegert and other witnesses. Additionally, there was no need to show the victim with the knife still in her abdomen, since there was evidence and testimony that conclusively proved that this knife was not the murder weapon, and was actually placed in the victim after she had already died.

The sole purpose for the publication of the photographs to the jury during the trial proper and the penalty phase was to portray the Defendant as a senseless butcher, thereby prejudicing the jury. Even if these errors were harmless in and of themselves, the errors cannot be considered harmless in light of all the other errors

committed by the State and the court cited in this brief. As such, the Defendant's conviction should be reversed, and this case remanded to the court for a new trial.

ARGUMENT XVII

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR NEW TRIAL REGARDING HIS OBJECTION TO THE TESTIMONY OF EVIDENCE TECHNICIAN DONALD OSTERMEYER ABOUT A LUMINOL TEST TO PERFORMED BY HIM ON THE DEFENDANT'S CLOTHING TO DETECT BLOOD.

During the testimony of evidence technician Donald Ostermeyer, Counsel for the Defendant objected to the testimony of the technician concerning his adninistration of a chemical test he performed on the Defendant's clothing and his opinion regarding the results of such testing on the ground that he was not qualified by the State as an expert in any kind of scientific testing nor had the State established the value and accuracy of the test so as to permit the witness, even if qualified as an expert, to render an opinion about the results of the testing (TR: Page 640, lines 19-25; Page 641, lines 1-16). The court overruled the objection, stating that the witness could testify that he ran the test and render his opinion that the substance detected was blood (TR: Page 641, lines 24-25; Page 642, lines 1-3).

Florida case law holds that a non-expert is incompetent to testify that certian stains found on clothing by him are blood, although he may testify to the fact that the stains were found, and may state the color of the stains. Gantling v. State, 23 So. 857 (Fla. 1898). In the case at bar, Mr. Ostermeyer was never offered as an expert witness, nor did the court independently determine the sufficiency of his qualifications and enter a ruling that he was an expert in the detection of blood pursuant to Section 90.105, Florida Statutes (1983). As such, the testimony of Mr. Ostermeyer as to his conduction of the Luminol test on the Defendant's clothing, and the rendering of his opinion as to the results of the test, were inadmissible at trial. The Defendant's conviction should therefore be reversed

because of the highly prejudicial nature of the testimony, and this case remanded to the lower court for a new trial.

ARGUMENT XVIII

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR NEW TRIAL REGARDING HIS REQUEST THAT THE COURT GIVE INSTRUCTIONS TO THE JURY ON AGGRAVATED BATTERY, BATTERY AND ASSAULT.

During the charge conference, Counsel for the Defendant requested the court to instruct the jury regarding the lesser included offenses of aggravated battery, battery and assault. The court denied the request (TR: Page 844, lines 4-23).

It is reversible error if the trial court fails to instruct the jury as to lesser included offenses. Francis v. State, 412 So. 2d 931 (Fla. 1st DCA 1981). Since the trial court refused to give instructions regarding the offenses of aggravated battery, battery and assault, the Defendant's conviction should be reversed, and this case remanded to the lower court for a new trial.

ARGUMENT XIX

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR NEW TRIAL REGARDING HIS REQUEST THAT THE COURT GIVE A SPECIAL INSTRUCTION TO THE JURY ON CIRCUMSTANTIAL EVIDENCE.

During the charge conference, Counsel for the Defendant submitted a Special Jury Instruction on circumstantial evidence, requesting the court to give this instruction the the jury (TR: Page 2379). The trial court denied the request (TR: Page 930, lines 12-19).

The Defendant concedes that the giving of an instruction on circumstantial evidence is discretionary with the court. Williams v. State, 437 So. 2d 133 (Fla. 1983). He would note, however, that this Court stated in In re Standard Jury Instructions in Criminal Cases, 401 So. 2d 594 (Fla. 1981), that:

> "...the elimination of the current standard instruction on circumstantial evidence does not totally prohibit such an instruction if a trial judge, in phis or her discretion, feels that such is necessary under the peculiar facts of a specific case." Id. at 595.

The Defendant would submit that the failure to give such an instruction by the trial court constituted reversible error since the State's case was based almost exclusively upon circumstantial evidence and the Defendant was thus entitled to the full benefits of this special jury instruction. Since the instruction was not given, the Defendant's conviction should be reversed, and this case remanded to the lower court for a new trial.

ARGUMENT XX

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR NEW SENTENCING PROCEDURE REGARDING THE IMPROPER COMMENT BY THE PROSECUTOR TO THE JURY DURING THE PENALTY PHASE OF THE TRIAL.

While making his closing argument during the penalty phase of the trial, the prosecutor made the following remarks:

> "Ladies and gentlemen, throughout this trial and in the penalty phase, we talked about evidence and burglary proof, and we talked about justice in this case. And one thing that you shouldn't forget is that Mary Hammond had some rights, too." (TR: Page 1202, lines 3-8).

At the close of the charge to the jury, Counsel for the Defendant made a motion for mistrial on the ground that the comment had irreparably tainted the sentencing phase of the trial making it impossible for the jury to come back with an unprejudiced recommendation to the court. The court denied the motion (TR: Page 1222, lines 22-25; Page 1223, lines 1-7).

An accused is entitled to a fair trial where no inflammatory remarks are made on either side. Washington v. State, 343 So. 2d 908 (Fla. 3rd DCA 1977). The comments made by the prosecutor seeking justice on behalf of the victim are an improper appeal to the jury for sympathy, the natural effect of which would produce hostility on the part of the jury toward the Defendant. As such, the Defendant is entitled to a new sentencing procedure with a different jury. Grant v. State, 171 So. 2d 361 (Fla. 1965); Edwards v. State, 428 So. 2d 357 (Fla. 3rd DCA 1983).

ARGUMENT XXI

THE DEFENDANT'S CONSTITUTIONAL RIGHT TO A FAIR TRIAL WAS DENIED TO HIM BY THE COMMENTS MADE BY A STATE'S WITNESS AND THE PROSECUTOR HIMSELF ON THE DEFENDANT'S RIGHT TO REMAIN SILENT.

During the testimony of Officer Dorothy Lynne Stickley, the following exchange occurred between the prosecutor and the witness:

> "Q. After obtaining those things, what did you do next?
>
> A. The other officers that he had spoken to were also listening to what he had to say. No one was asking him any type of questions. Officer Roberts then instructed me to read the subject Johnston his Miranda warnings, his constitutional rights.
>
> Q. Upon doing that, did you have another conversation with Mr. Johnston?
>
> A. I read him his rights. He said that he didn't want to talk to us at that time." (TR: Page 495, lines 22-25; Page 496, lines 1-6).

During his final argument to the jury, the prosecutor made the following remrk concerning the Defendant:

> "Why would David Eugene Johnston hide the weapon that killed Mary Hammond? Why would he put it under the mattress?
>
> He had no explanation for that in his statement with Detective Mundy." (TR: Page 983, lines 7-11).

A prosecutor's comment on the Defendant's failure to testify is a serious constitutional violation, and any comment which is fairly susceptible to being interpreted by the jury as referring to the Defendant's right not to testify constitutes reversible error, without resort to the harmless error doctrine. David v. State, 369 So. 2d 943 (Fla. 1979); Adjmi v. State, 139 So. 2d 179 (Fla. 3rd DCA

1962). Thus, the Defendant is automatically entitled to a reversal of his conviction and a new trial because of the prejudicial comments on his right to remain silent.

ARGUMENT XXII

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

At the penalty phase of the trial held on May 29, 1984, the jury returned with an advisory opinion of death (TR: Pages 1225, lines 5-20). The court set sentencing for June 1, 1984 (TR: Page 1229, lines 14-25). On June 1, 1984, the Defendant was sentenced to death by the trial court following its denial of the Defendant's Motion for New Trial (TR: Pages 1232-1252).

In sentencing the Defendant to death, the court found the following aggravating circumstances to exist:

> 1. The Defendant was previously convicted on June 26, 1981, of terroristic threat, a felony in the State of Kansas involving the threat of violence. The Defendant was also convicted on June 28, 1982, of battery on a law enforcement officer, a felony in the State of Florida involving the use of violence.
>
> 2. The capital felony for which the Defendant was sentenced was committed while the Defendant was engaged in the commission of a burglary of the victim's dwelling.
>
> 3. The capital felony for which the Defendant was sentenced was especially heinous, atrocious and cruel.

The court found no mitigating circumstances.

The Defendant would submit that the court erred in sentencing him to death as two of the three aggrvating circumstances failed to exist and the one aggravating circumstance that actually existed should not be enough to sustain a sentence of death because of the background of the convictions. Additionally, there were at least four mitigating circumstances that should have been recognized by the court in its findings that support a sentence of life imprisonment.

The Defendant concedes that he had previously been found guilty of and convicted of the felony crimes of making a terroristic threat in the State of Kansas and of battery on a law enforcement officer in the State of Florida. These convictions, however, should not support a death sentence since no harm actually came to the individuals the Defendant was accused of harming.

During the penalty phase of the trial, Troy Higgins, a police officer with the Olathe Police Department, in Olathe, Kansas, testified that while booking the Defendant on other charges, the Defendant threatened to kill him after he got out of jail or would get some bikers to do the job (TR: Page 1105, lines 14-25; Page 1106, lines 1-7). As a result of this threat, the Defendant was charged with and convicted of the crime of Terroristic Threat, a class E felony in the State of Kansas. It is clear from the record, however, that the Defendant was merely making an idle threat at the time, much as a schoolboy would tell someone that he would get his father to beat the individual up if that perosn didn't stop bothering him. It is also clear from the record that the Defendant never made any attempt to carry out his "threat".

The State also produced the fact that the Defendant was convicted of the crime of battery on a law enforcement officer, a felony in the State of Florida (TR: Pages 1113-1114). The record in this case is also clear that the only "battery" actually committed in this case was that he and a corrections officer had briefly struggled, with a result that both men fell over a bench. The corrections officer suffered no harm as a result of the incident.

The record also supports the Defendant's contention that the State failed to prove beyond and to the exclusion of a reasonable doubt that the Defendant committed the murder while engaged in the commission of a burglary. During the testimony of Geovanni Rey, the investigator stated that the ransacked appearance of the house was not caused by the actions of a burglar, but by an individual who

wanted it to appear that a burglary had taken place. He explained that the downstairs furniture appeared to have been placed over deliberately, rather that thrown over as the items would be during a burglary. He especially remembered a T.V. tray by the kitchen entrance which appeared to have had a flower vase removed from it prior to the tray being turned over (TR: Page 617, lines 13-25). Additionally a large lamp had also apparently beeen placed down since the lamp shade would have tilted back had it fallen (TR: Page 618, lines 8-17).

Investigator Rey went on to state that any glass found on the kitchen floor must have been broken and placed there deliberately since there was no glass found in the kitchen sink or on the dining room carpeting (TR: Page 619, lines 21-25; Page 620, lines 1-25). He also felt that the adjacent upstairs bedroom had the appearance of having deliberately been set up to make it look like a burglary had taken place. Overall, the condition of the upstairs and the downstairs was not consistent with his years of experience in working burglaries (TR: Page 621, lines 7-22).

The only other evidence concerning the Defendant's actions were presented by the Defendant himself in his statements to Investigator Mundy. His statements, however, only indicated that he was guilty not of burglary, but of grand theft second degree, since he took the items only as an afterthought after the victim was already dead. Therefore, there was no evidence to support the finding that the murder was committed during the commission of a burglary by the Defendant.

The court also found that the victim's murder was especially atrocious, heinous and cruel, stating that the victim was strangled and stabbed three times completely through the neck and twice in the upper chest with a knife, that she took three to five minutes to die after the fatal knife wound severed her jugular veins, although she lapsed into unconsciousness sooner (TR: Page 1248, lines 7-15). The Defendant would submit that this Court has reduced death sentences to life in

prior cases under worse circumstances. See Thomson v. State, 328 So. 2d 1 (Fla. 1976), where the defendant committed armed robbery and stabbed the victim three times while fleeing; Jones v. State, 322 So. 2d 615 (Fla. 1976), where the defendant had been drinking, raped the victim, and stabbed her thirty-eight times; Tedder v. State, 322 So. 2d 615 (Fla. 1975), where the defendant shot the victim and refused to allow anyone to aid her while she died a lingering death; and Swan v. State, 322 So. 2d 488 (Fla. 1975), where the Defendant gave the victim, who was bound and gagged, a "severe beating", and the victim could not survive the torture administered.

The Defendant would also cite the case of Teffeteller v. State, 349 So. 2d 840 (Fla. 1980). In Teffeteller, the victim was walking back to his home in Ormond Beach after jogging on the beach. He was stopped by the defendant in a car driven by the defendant. The co-defendant asked for the victim's wallet. The victim stated that he had no money. A shotgun was then pointed out the passenger side window at the victim and fired. The car sped away. The victim sustained massive damage due to the shotgun blast, but remained conscious and coherent for three hours before dying on the operating table.

In reversing the trial court's finding that this murder was especially atrocious, heinous or cruel, this Court stated that the criminal act that ultimately caused death was indeed the single blast from the shotgun. The fact that the victim lived for a few hours in undoubted pain, and knew that he was facing imminent death, horrible as this prospect may have been, did not set this murder apart from the norm of capital felonies.

The same is true of the case at bar. Although the victim was stabbed several times, only the single knife thrust that severed the jugular vein and the carotid arteries ultimately caused the victim's death. It is clear from the evidence that this stabbing murder was proportionately less atrocious, heinous or cruel, than

the shotgun murder in Teffeteller, and therefore, the trial court erred in finding this to be an aggravating circumstance.

The Defendant would also contend that the court erred in failing to find any mitigating circumstances. The court stated that it did not find from the evidence that the Defendant was under the influence of extreme mental or emotional disturbance at the time of the murder, although the Defendant himself admitted that he was on L.S.D. and other substances that evening and had been hallucinating. It goes without saying that L.S.D. is a mentally and emotionally altering drug, surely capable of having perhaps caused the Defendant to see the victim as one of the foul creatures of his nightmare "trip".

The evidence is also clear that the Defendant was suffering from the mental illness known as schizophrenia at the time of the murder, as the records from his home State of Louisiana showed that the Defendant had spent his early childhood years abused and mistreated while in the custody of his mother. The records further showed that he had spent the rest of his childhood being shuffled from one mental institution to another, and that the only time he was not suffering from schizophrenia was when he was taking prescribed medication, which he definitely was not taking during the time prior to and on the night of the murder.

The State's sole evidence to support its contention that the Defendant was not suffering from any type of mental disorder at the time of the murder was the testimony of Dr. Robert Pollack, who rendered his opinion of sanity based upon a fifty minute interview with the Defendant on January 17, 1984, and a later review of the Defendant's medical and mental records from the State of Louisiana (TR: Page 1168, lines 24-25; Page 1169, lines 1-12; Page 1171, lines 18-25; Page 1172, lines 1-14). He admitted that he had not talked with any of the Defendant's friends or the police officers to find out what the Defendant's mental state may have been prior to and at the time of the murder (TR: Page 1172, lines 15-25). He

also conceded that he gave the Defendant none of the standard mental or physical tests designed to determine whether an individual is suffering from a mental illness (TR: Pages 1173-1177). He further admitted that schizophrenia is an incurable mental disease (TR: Page 1178, lines 3-23). It is clear that a fifty minute interview falls woefully short of the standard of beyond and to the exclusion of a reasonable doubt, and the court should have made a finding of this mitigating circumstance.

The court should have also found that the Defendant's age was a mitigating factor. Although the Defendant was twenty-three years old at the time of the commission of the crime, the evidence produced by the State's own witness at the Defendant's competency hearing on March 2, 1984, supports the finding of age as a mitigating factor.

Dr. Pollack testified that his evaluation of the Defendant indicated that the Defendant suffered from a significant amount of Narcissism, defined as an individual who is extremely self-centered to the point of excluding other people in terms of his primary thoughts and interactions (TR: Page 1042, lines 5-13). He went on to describe that he really saw the Defendant to be in an infant delayed state, since like an infant, the Defendant believed everything revolved around him and that his position was always the one of prime importance (TR: Page 1042, lines 5-23). Dr. Pollack also testified that the Defendant was of average intelligence, but exceptionally immature since the Defendant reacted to extremes like a child (TR: Page 1045, lines 14-22).

Finally, the court should have also found the Defendant's history of being abused by his natural mother and father, and the constant periods of time he was kept in state mental institutions as a non-statutory mitigating factor. Since there was only one minor aggrvating circumstance proved by the State beyond and to the exclusion of a reasonable doubt, and four mitigating circumstances proved in favor

of the Defendant, it is clear that the trial court had no legal basis to enter a sentence of death; therefore, the Defendant's sentence of death should be reversed, and this case remanded to the lower court with instructions to resentence the Defendant to life imprisonment.

CONCLUSION

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

Respectfully submitted,

RONALD R. FINDELL, ESQUIRE
Suite 101, Bradshaw Bldg.
65 N. Orange Avenue
Orlando, Florida 32801
(305) 425-7676

Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief of Appellant has been furnished to RICHARD W. PROSPECT, Assistant Attorney General, 125 North Ridgewood Avenue, Fourth Floor, Daytona Beach, Florida 32014, by mail delivery this 28th day of January, 1985.

Ronald R. Findell
RONALD R. FINDELL, ESQUIRE
Suite 101, Bradshaw Building
65 N. Orange Avenue
Orlando, Florida 32801
(305) 425-7676

Attorney for Appellant