IN THE FLORIDA SUPREME COURT

OSCAR TORRES-ARBOLEDO, :

Appellant, :

vs. : Case No. 66,354

STATE OF FLORIDA, :

Appellee. :

:

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

INITIAL BRIEF OF APPELLANT

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PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

The Appellant, OSCAR TORRES-ARBOLEDO, will be referred to by name in this brief. Page references to the record on appeal and the appendix to this brief will be designated by "R" and "A", respectively.

STATEMENT OF THE CASE

On July 22, 1981 a Hillsborough County grand jury returned an indictment charging Oscar Torres-Arboledo with the premeditated murder and attempted robbery with a firearm of Patricio Lorenzo. (R 1150)

This cause proceeded to a jury trial beginning on October 29, 1984, with the Honorable M. William Graybill presiding. (R 3) The jury found Torres-Arboledo guilty as charged on both counts of the indictment. (R 886,1385,1386)

The penalty phase of the trial was conducted on November 5, 1984. (R 894-974) After receiving additional evidence the jury recommended a life sentence by a seven to five vote. (R 970, 1387) The court adjudicated Oscar Torres-Arboledo guilty, but deferred sentencing. (R 974) Sentencing took place on November 8, 1984, at which time the court overrode the jury's recommendation and sentenced Oscar Torres-Arboledo to death by electrocution. (R 1140,1393)

In his written sentence imposing the death penalty the court found two aggravating circumstances: (1) The capital felony was committed while Torres-Arboledo was attempting to commit a robbery with a firearm (R 1396)(A1); and (2) Torres-Arboledo was previously convicted of a felony involving the use of violence to the person. (R 1396)(A1) The court found no statutory or nonstatutory mitigating circumstances, "notwithstanding expert testimony to the effect [Torres-Arboledo] is a very intelligent and rehabilitable person." (R1397)(A2)

Counsel for Oscar Torres-Arboledo filed a notice of appeal on November 30, 1984. (R 1412) The Public Defenders' Offices for the Tenth and Thirteenth Judicial Circuits were appointed to represent Torres-Arboledo in this appeal. (R 1444)

STATEMENT OF THE FACTS

According to testimony presented at Oscar Torres-Arboledo's trial, on June 24, 1981, Raymond Jacobs was riding with his girlfriend, Desiree Bell, in her parents' car when they stopped at a bar for cigarettes. (R 567-569) As Jacobs was on his way out of the bar he was approached by two "Spanish guys," one of whom was Oscar Torres-Arboledo. (R 569-570) In "broken language" Torres-Arboledo asked for a ride and offered Jacobs money. (R570) Jacobs agreed, and the two men got into the car with him and Bell. (R 570-572)

The men directed where they wanted to go by hand signals and pointing. (R 502,573) Eventually, the two Spanish-speaking men had the car stop and pick up another man. (R 504-505,573-575)

The car drove on until the three passengers motioned for Jacobs to stop near a church and told him to wait. (R 507,578,582-583)

Ten to 15 minutes later the men came running back and jumped into the car. (R 514,585,587) Torres-Arboledo had a gun in his hand. (R 521,587-588) He said, "Go." (R 522,589)

After they drove away from the church, Bell and Jacobs saw the police behind them. (R 523,590)

When the car stalled, Torres-Arboledo was getting ready to jump out. (R 524,591)

The car stopped at a laundromat, and the three Spanish-speaking men got out, as did Raymond Jacobs, who was on probation and afraid. (R 525,592-593) Desiree Bell drove away alone, but

stopped a short distance away and was taken into police custody. (R 525-526, 595)

Julio Rodriguez[1/] was in the back of Pat's Paint and Body Shop on the day in question when he heard one shot and saw Patricio Lorenzo coming toward a door with his hands full of blood. (R336) Lorenzo asked Rodriguez to take him to the hospital, but Rodriguez could not because he was too nervous. (R 339-340) After he heard the shot Rodriguez saw a "colored man" running. (R 340) He did not see anyone with a gun. (R 340) Rodriguez did not see that "colored man" in the courtroom at Torres-Arboledo's trial. (R 340)

Jose Nodarce was in a carport outside of Pat's Paint and Body Shop on June 24, 1981. (R 343-344) He heard "about two or three firing," but some compressors were working, and so he could not hear very well. (R 344) Shortly thereafter, Patricio Lorenzo came out the door bleeding, with his hands on his chest. (R 345) Nodarce did not see anyone leave the body shop (R 345-346), but he did see two people running toward the church. (R 348) He did not see them well, and could not recognize them, or even say whether they were white or black. (R 348)

On the day Patricio Lorenzo was shot, Francisco Aviles was outside Pat's Paint and Body Shop, in the back. (R 368) He

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1/ Rodriguez testified through an interpreter at Oscar Torres-Arboledo's trial. (R 333)

heard two shots, but could not see who fired them. (R 369) He saw Lorenzo come out of the shop holding his chest. (R 369-370) Aviles saw one or two people running down the street before Lorenzo came out. (R 371) They were black, but Aviles could not otherwise describe them. (R 371,373) He thought one of them had a gun in his hand. (R 371) Aviles was unable to identify anyone in the courtroom at Oscar Torres-Arboledo's trial who matched the general description of the man with the gun. (R 374-375)

George Williams[2/] worked for Patricio Lorenzo, painting and fixing cars. (R 720) He was painting a refrigerator on June 24, 1981. (R 719-720) Three men came into Pat's Paint and Body Shop wanting to speak to Patricio Lorenzo. (R 721) None of the men had a gun in his hand. (R 724)

Williams heard a shot and saw Lorenzo running. (R 721) He heard a second shot. (R 727) He asked Lorenzo what was the matter. (R 721,727)

Then one of the men pointed a gun at Williams. (R 721) Williams threw a tube at the man, who ran out the door. (R 721)

Williams saw a hole in Lorenzo's back and a lot of blood on his shirt. (R 729) Lorenzo told him "they wanted to take the chain away from him." (R 729) (This testimony of Williams was admitted over a defense objection.) The men did not get the chain. (R 730)

After Lorenzo was shot, Williams went to look for the men who did it. (R 731) He tackled one person he thought was involved,

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2/ Williams testified through an interpreter at Oscar Torres-Arboledo's trial. (R 718)

but then realized he had the wrong man. (R 731-732)

At trial Williams identified Oscar Torres-Arboledo as the man who pointed the gun at him and who shot Patricio Lorenzo. (R 724-725,734)3/

Doctor Victor Mallea treated Patricio Lorenzo at Centro Espanol Hospital on June 24, 1981. (R 362) Lorenzo had an entrance and exit wound in his arm, and another entrance wound in his chest. (R 362) Over defense objections, Dr. Mallea was permitted to testify at trial that Lorenzo told him a couple of people were trying to steal his medal (R 363), the people shot him (R 363), and it was black people who injured him. (R 365) Lorenzo died an hour to an hour and a half after Dr. Mallea first saw him in the emergency room. (R 362,364-365)

Doctor Charles Diggs, the Deputy Medical Examiner, performed an autopsy on Patricio Lorenzo on June 25, 1981. (R 553,556) He found two gunshot wounds, but no other trauma. (R 557-558,563) The cause of death was the gunshot to the chest. (R 562)

Oscar Torres-Arboledo and another man stayed at the home of Fernando Munoz4/ and his wife for several days after Patricio Lorenzo was shot. (R 634-635,639,666-667,673) Munoz spoke with Torres-Arboledo about the incident. Torres-Arboledo told him they went to the shop to try to take the chain the man had, and somebody

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3/ Williams' identification of Oscar Torres-Arboledo was the subject of a motion to suppress (R 1313-1315), which was heard on October 30, 1984 (R 247-288), and denied. (R 288,1315)

4/ Munoz, a Colombian, testified through an interpreter at Oscar Torres-Arboledo's trial. (R 631,634)

shot the individual. (R 635) Torres-Arboledo said he was present when the man was shot, but never told Munoz he did the shooting. (R 638-639,651-652) He also said to Munoz that the people he was with did not get the medallion (R 639); Torrez-Arboledo did not say he had tried to take it. (R 652)

One man allegedly involved in the shooting and attempted robbery of Patricio Lorenzo was taken into custody the same day the events occurred. (R 441-442,595-596,695-697) This man, Victoriano Sinisterra-Ballescya, entered into a contract of immunity with the state attorney's office. (R 755-779,1256) At the time of Oscar Torres-Arboledo's trial, his whereabouts were unknown. (R 755)

Torres-Arboledo was arrested for murder and attempted robbery on May 14, 1984. (R 717)

A third suspect in the incident at Pat's Paint and Body Shop was never apprehended. (R 301,481)

At the penalty phase of Oscar Torres-Arboledo's trial the State presented evidence concerning Torres-Arboledo's conviction in April, 1983 of a first degree murder with a firearm that occurred in California in 1982, for which he received a sentence of 27 years to life. (R 898-906,1550-1559)

The defense presented the testimony of Doctor Gerald Mussenden, a clinical psychologist, who interviewed Oscar Torres-Arboledo on two separate occasions and performed a psychological evaluation. (R 907-909) Torres-Arboledo's history showed that he had two years of college in his native Colombia. (R 915) He dropped out when his father died. (R 915) He came to the United

States for economic reasons, to advance himself. (R 915)

Dr. Mussenden's testing of Torres-Arboledo showed him to be extremely interested in advancing his skills. (R 913-914) He had made very good progress learning English while in the United States. (R913-914) Torres-Arboledo's intelligence quotient placed him in the bright/normal to superior intelligence range. (R 923). His score on the Visual Adult Wechsler Test was some 34-39 points higher than the typical score in prison populations. (R 924)

Torres-Arboledo's profile showed that he was a fairly sensitive, compassionate, positive type of person with a lot of potential. (R 920-921) Dr. Mussenden found him to be extremely open and honest, and found nothing to indicate that Torres-Arboledo might be lying. (R 915,919) Torres-Arboledo did not display any of the characteristics Dr. Mussenden would expect to find in a criminal. (R 921-922)

Dr. Mussenden concluded that Oscar Torres-Arboledo is in the top five to 10 percent of all applicants to succeed and/or benefit from any program, and falls within the best of all categories for rehabilitation. (R 924-925)

SUMMARY OF ARGUMENT

I. Inadmissible hearsay concerning what the victim, Patricio Lorenzo, said after he was shot was admitted at Oscar Torres-Arboledo's trial. Lorenzo's statements at the hospital to the doctor who treated him that a couple of black people tried to steal his medal and shot him, etc., were not admissible as statements for the purpose of medical diagnosis or treatment. Lorenzo's statement to George Williams that "they wanted to take the chain away from him" was not admissible as an excited utterance or spontaneous statement.

II. Oscar Torres-Arboledo's cross-examination of an important State witness, Raymond Jacobs, was unduly restricted by the trial court when he sustained a State objection to defense counsel's use of Jacob's deposition and refused to allow counsel to inquire into whether Jacobs had been arrested or convicted for obstructing justice and giving false information.

III. The victim's daughter should not have been allowed to testify before the jury. Her testimony involved irrelevant and immaterial matters, hearsay, and evidence that could have been obtained from other witnesses. Her emotional breakdown in front of the jury prejudiced Oscar Torres-Arboledo.

IV. Requiring Oscar Torres-Arboledo to appear for a portion of his trial in a jump suit with the words "County Jail" on the back thereof denied him the presumption of innocence to which he was entitled.

V. The record does not show that Oscar Torres-Arboledo's

failure to testify at either phase of his trial was his own decision, made freely and knowingly. The court should have conducted an on-the-record colloquy with Torres-Arboledo concerning his right to testify.

VI. The court below should have declared a mistrial, or at least granted Oscar Torres-Arboledo's motion to strike and request for a curative instruction, when the prosecutor's final argument to the jury during the guilt phase essentially asked the jurors to put themselves in the victim's position.

VII. The evidence presented below failed to show that the killing of Patricio Lorenzo was planned or premeditated in any way. Nor was there evidence of any force, violence, assault, or putting in fear occurring prior to or contemporaneous with any attempt to take Lorenzo's medallion; the record indicates that Lorenzo was shot only <u>after</u> the effort to obtain his property. Hence, there was no attempted armed robbery and no felony murder.

VIII. Oscar Torres-Arboledo should have been discharged when he was not tried on the charges pending against him in Florida within 180 days of his demand for disposition of said charges, as required by the Interstate Agreement on Detainers. He substantially complied with the terms of the Agreement.

IX. The life recommendation of the jury should have been accepted. It was certainly reasonable, especially in light of Dr. Mussenden's glowing testimony concerning Oscar Torres-Arboledo's capacity for rehabilitation, and the fact that the homicide involved herein was not particularly aggravated.

X. Oscar Torres-Arboledo's sentence for attempted robbery with a firearm constituted an improper departure from the recommended sentence under the guidelines. The scoresheet used by the court erroneously included points for victim injury, and the court failed to file proper written reasons for departure.

ARGUMENT

ISSUE I.

THE COURT BELOW ERRED IN PERMITTING THE STATE TO ELICIT HEARSAY TESTIMONY FROM ITS WITNESSES CONCERNING WHAT THE VICTIM, PATRICIO LORENZO, SAID TO THEM.

During the guilt phase of Oscar Torres-Arboledo's trial the prosecution was allowed to elicit, over defense objections, hearsay testimony from at least three of its witnesses as to what Patricio Lorenzo said after he was shot. Torres-Arboledo will focus upon the testimony of two of these witnesses, Doctor Vincent Mallea and George Williams.[5/]

Dr. Mallea treated Lorenzo at Centro Espanol Hospital for gunshot wounds on June 24, 1981. (R 362) He was permitted to testify, over objection,[6/] that Lorenzo told him a couple of black people tried to steal his medal and shot him. (R 363,365) Lorenzo also said, with regard to the attempt to take his medal, "They can't do that with me," or, "I am too strong." (R 363)

Hearsay evidence generally is inadmissible. §90.802, Fla. Stat.(1985). The court ruled Dr. Mallea's testimony admissible under the hearsay exception for statements made for the purpose of medical diagnosis or treatment. (R 360) This exception is codified in subsection 90.803(4) of the Florida Statutes as follows:

5/ The other witness, Julio Rodriguez, testified that Lorenzo asked him to take him [Lorenzo] to the hospital. (R 339)

6/ The objection and a proffer of Dr. Mallea's testimony were made before he testified in front of the jury. (R 349-360)

STATEMENTS FOR PURPOSES OF MEDICAL DIAGNOSIS OR TREATMENT.--Statements made for purposes of medical diagnosis or treatment by a person seeking the diagnosis or treatment, or made by an individual who has knowledge of the facts and is legally responsible for the person who is unable to communicate the facts, which statements describe medical history, past or present symptoms, pain, or sensations, or the inceptions or general character of the cause or external source thereof, insofar as reasonably pertinent to diagnosis or treatment.

The exception is very narrowly drawn, and Dr. Mallea's testimony went far beyond anything that might have been admissible thereunder. Information not necessary for diagnosis or treatment clearly does not fall within the scope of this provision. See <u>Begley v. State</u>, 483 So.2d 70 (Fla.4th DCA 1986) and <u>Brown v. Seaboard Airline Railroad Company</u>, 434 F.2d 1101 (5th Cir.1970).

Wharton explains the exception here at issue in this way:

> While a statement by a patient to a physician relating to a past event is ordinarily inadmissible, it is proper to show so much of a statement relating to the past as was necessary for the physician intelligently to diagnose and treat the patient's condition. [Footnote omitted.] Thus in a prosecution for murder where the death resulted from a fight, statements by the deceased to a physician on the examination of his wound, in explanation of the cause of his injury, were properly received as evidence, but the statement describing the person or instrument that inflicted the injury was inadmissible, as it constituted information which was not necessary on the occasion of the physician's examination. [Footnote omitted.]

II C. TORCIA, WHARTON'S CRIMINAL EVIDENCE §310 (13th ed.1972). Thus, Lorenzo's statement to Dr. Mallea that he had been shot arguably might have been admissible, but that he was shot by a

couple of black people who tried to steal his medal clearly was inadmissible, as it had nothing to do with the services Dr. Mallea was rendering.

In Hassell v. State, 607 S.W.2d 529 (Tex.Ct.Crim.App.1980) the court held inadmissible the treating physician's testimony that the victim told him her mother had hit her with a broom. The court noted that

> declarations descriptive of external events, such as the crime or accident which caused the injury to the declarant, even though made to a physician pursuant to treatment, are inadmissible as evidence of their truth. [Citations omitted.] The declarations made to the doctor did not relate to the injuries but rather related to the cause of the injuries. The declarations were presented for no other purpose other than for the truth of the matter asserted. Therefore, we conclude that the declarations made to Dr. Vogt were inadmissible as hearsay.

607 S.W.2d at 531.

The reasons why only those statements to a doctor which are in fact made for purposes of diagnosis or treatment are admissible is explained by McCormick:

> [T]heir reliability is assured by the likelihood that the patient believes that the effectiveness of the treatment he receives may depend largely upon the accuracy of the information he provides the physician....However, when statements of cause enter the realm of fixing fault it is unlikely that the patient or the physician regarded them as related to diagnosis or treatment. In such cases the statements lack any assurance of reliability and would properly be excluded. "Thus a patient's statement that he was struck by an automobile would qualify, but not his statement that the car was driven through a red light. [Quoting Advisory Committee Note, Fed.R.Evid. 803(4).]"

C. McCORMICK, McCORMICK ON EVIDENCE §292 (E.Cleary 3d ed.1984).

Beyond, possibly, the fact that his wounds were made by bullets, Lorenzo's remarks to Dr. Mallea did not bear the hallmark of reliability necessary to qualify them for admission under the hearsay exception set forth in subsection 90.803(4).

Dr. Mallea's testimony obviously was prejudicial to Oscar Torres-Arboledo; it provided evidence of the attempted robbery for which Torres-Arboledo was convicted, as well as identifying the perpetrators of the attempted robbery and homicide as black people. (Torres-Arboledo is black (R569-570).)

Other hearsay testimony came from George Williams. The court below allowed Williams to testify that, after Patricio Lorenzo was shot, Williams asked him what happened, and Lorenzo told him, "[T]hey wanted to take the chain away from him [Lorenzo]." (R 729) Presumably, the State would seek to justify admission of this testimony as an "excited utterance" under the hearsay exception set forth in subsection 90.803(2) of the Florida Statutes. (Lorenzo's statement to Williams was not a "spontaneous statement," subsection 90.803(1), Florida Statutes, because it was not spontaneous; it came as a direct result of questioning by George Williams.) The excited utterance exception applies where: (1) There is an event startling enough to cause nervous excitement. (2) The statement was made before there was time to contrive or misrepresent. (3) The statement was made while the person was under the stress of excitement caused by the event. Jackson v. State, 419 So.2d 394 (Fla.4th DCA 1982). When the State seeks to use this hearsay exception, it bears the burden of showing that the requirements

have been met. Begley. The State did not meet this burden in the court below. We are not told how long it was after the shooting that Williams spoke with Lorenzo. As for Lorenzo's emotional state, the record not only fails to show that he was excited when he spoke to Williams, but shows, on the contrary, that he was rather calm. When the prosecutor questioned Williams as to Lorenzo's condition, Williams replied, "He was all right. He was conversing." (R 729) Thus two prongs of the three-prong predicate set forth in Jackson are missing: There is no evidence the statement was made before there was time to contrive or misrepresent, and there is no evidence Patricio Lorenzo was under the influence of the stress of excitement when he spoke with George Williams.

It was error for the court to allow the prosecution to elicit such prejudicial testimony from its witnesses, and Oscar Torres-Arboledo should therefore be granted a new trial.

ISSUE II.

THE COURT BELOW ERRED IN IMPROPERLY RESTRICTING OSCAR TORRES-ARBOLEDO'S CROSS-EXAMINATION OF AN IMPORTANT PROSECUTION WITNESS, RAYMOND JACOBS.

The testimony of Raymond Jacobs was important in this case because the State relied upon it, in conjunction with other evidence, as circumstantial evidence of Oscar Torres-Arboledo's guilt. On direct examination Jacobs testified to his contact with Torres-Arboledo on the day Patricio Lorenzo was shot, including his driving of Torres-Arboledo and his two companions to a church near Pat's Paint and Body Shop where he let the men out, their hasty return to the car, the fact that Torres-Arboledo then had a gun in his hand, the subsequent pursuit by the police, etc. (R 578, 582-585,587-588,590-592) Jacobs also testified that he was on probation for grand theft at the time he gave the Spanish-speaking men a ride. (R 593)

On cross-examination Jacobs testified he went to jail for violating his probation. (R 607C) When defense counsel asked what he did to violate his probation, a general State objection that this was "improper" was sustained. (R 607C)

Later, defense counsel asked Jacobs whether he had ever been arrested any other time than the murder charge. (R 610) (Jacobs and Desiree Bell both were initially charged in the Patricio Lorenzo homicide. (R 530,609) The court sustained the prosecutor's general objection that this was an "improper question." (R 610)

Shortly thereafter, defense counsel read a portion of

Jacobs' deposition to him and asked if he remembered it. (R 614) The prosecutor stated that the deposition testimony was the same as Jacobs' trial testimony, and the court sustained this "objection." (R 614)

Toward the end of his cross-examination of Jacobs defense counsel asked whether the witness had ever been convicted of a crime. When Jacobs responded in the affirmative, counsel asked what the crime was. (R 624) The State lodged yet another general objection, saying the question was "improper." (R 624) A bench conference ensued during which counsel for Torres-Arboledo explained that he wished to elicit the fact that Jacobs was arrested for obstructing justice and giving false information, although counsel did not know if Jacobs had been convicted. (R 625) The court confined counsel's inquiry to whether Jacobs had ever been convicted of a felony, and, if so, how many times, and refused to allow counsel to ask whether Jacobs had been arrested for giving false information. (R 624-626) Jacobs then testified he had been convicted of a felony twice. (R 626)

The trial court unduly restricted Oscar Torres-Arboledo's cross-examination of Raymond Jacobs. With regard to the attempted use of Jacobs' deposition, it was up to the jury, not the court, to decide whether or not there was a discrepancy between Jacobs' trial testimony and the testimony he gave on deposition. See Gordon v. United States, 344 U.S. 414, 73 S.Ct. 369, 97 L.Ed. 447 (1953). Furthermore, if there were no differences, as the prosecutor claimed, it is difficult to see how the State would have been harmed by the use of the deposition.

As to the other questions, defense counsel was entitled to elicit whether Jacobs had ever been convicted of obstructing justice and giving false information, as this comes within the purview of subsection 90.610(1), Florida Statutes, which permits a party to impeach a witness by evidence the witness was convicted of a crime involving "dishonesty or a false statement." See also State v. Page, 449 So.2d 813 (Fla.1984) and Belton v. State, 475 So.2d 275 (Fla.3rd DCA 1985).

If Jacobs had only been arrested, and charges remained pending against him, this too was admissible for impeachment purposes. In Causey v. State, 484 So.2d 1263 (Fla.1st DCA 1986) the court explained:

> ....Generally, impeachment of a witness on the basis of a prior criminal activity or dishonesty is limited to past convictions, not past arrests or pending charges. Fulton v. State, 335 So.2d 280,282 (Fla.1976). There is an exception when a prosecution witness is under pending criminal charges by the same prosecuting agency: defense counsel is entitled to bring that fact [footnote omitted] before the jury for an impeachment based upon motive or bias. [Citations omitted.]

484 So.2d at 1264. Similarly, in Thornes v. State, 485 So.2d 1357 (Fla.1st DCA 1986) the court noted:

> ....The right of a defendant to cross-examine a prosecution witness about actual or threatened criminal investigation against that witness to show bias or self-interest is well-established.... The mere chance that a witness , in her own mind, may be attempting to curry favor is sufficient to allow for broad cross-examination in order to show bias. [Citation omitted.]

485 So.2d at 1359.

In Morrell v. State, 297 So.2d 579 (Fla.1st DCA 1974),

the court further elucidated why evidence of the type Torres-Arboledo sought to elicit is admissible:

> ....[I]t is clear that if a witness for the State were presently or recently under actual or threatened criminal charges or investigation leading to such criminal charges, a person against whom such witness testifies in a criminal case has an absolute right to bring those circumstances out on cross-examination or otherwise so that the jury will be fully apprised as to the witness' possible motive or self-interest with respect to the testimony he gives. Testimony given in a criminal case by a witness who himself is under actual or threatened criminal investigation or charges may well be biased in favor of the State without the knowledge of such bias by the police or prosecutor because the witness may seek to curry their favor with respect to his own legal difficulties by furnishing biased testimony favorable to the State.
>
> The consitutional right to confront one's accuser is meaningless if a person charged with wrongdoing is not afforded the opportunity to make a record from which he could argue to the jury that the evidence against him comes from witnesses whose credibility is suspect because they themselves may be subjected to criminal charges if they fail to "cooperate" with the authorities. See Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347, decided by the United States Supreme Court in February 1974.

297 So.2d at 580.

Full and fair cross-examination of the witnesses against him by a defendant in a criminal case is not merely a privilege, but an absolute right. E.g., Steinhorst v. State, 412 So.2d 332 (Fla.1982); Coxwell v. State, 361 So.2d 148 (Fla.1978); Coco v. State, 62 So.2d 892 (Fla.1953); Rivera v. State, 462 So.2d 540 (Fla. 1st DCA 1985). In Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065,

13 L.Ed.2d 923,927 (1965) the United States Supreme Court declared the right of confrontation and cross-examination to be "an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." Deprivation of this right is a denial of due process. Pointer. See also Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). Furthermore, "[a] defendant in a criminal case is normally accorded a wide range in the cross-examination of prosecution witnesses." Lutherman v. State, 348 So.2d 624,625 (Fla.3d DCA 1977). In Coxwell, this Court emphasized "the expansive perimeters of subject matter relevance which the constitutional guarantee of cross-examination must accommodate to retain vitality." 361 So.2d at 152. "Curtailment of a defendant's right to cross-examination of State witnesses is a power to be used sparingly" and any "rulings which limit a defendant's cross-examination of necessary State witnesses are subject to close appellate scrutiny." Salter v. State, 382 So.2d 892,893 (Fla.4th DCA 1980). And the right to confront adverse witnesses

> is particularly important in a capital case such as this [footnote omitted] where a defendant's right to cross-examine witnesses is carefully guarded, and limiting cross-examination on any matter plausibly relevant to the defense may constitute reversible error. [Citation omitted.]

Williams v. State, 386 So.2d 25,27 (Fla.2d DCA 1980). See also Coco.

By curtailing Oscar Torres-Arboledo's cross-examination of an important prosecution witness, the trial court denied him a right guaranteed by Article I, Section 16 of the Constitution of the State

of Florida and the Sixth and Fourteenth Amendments to the Constitution of the United States. As a result, Torres-Arboledo must be granted a new trial.

ISSUE III.

THE COURT BELOW ERRED IN PERMITTING THE VICTIM'S DAUGHTER TO TESTIFY FOR THE STATE AT OSCAR TORRES-ARBOLEDO'S TRIAL.

The seventh witness to testify for the prosecution at Oscar Torres-Arboledo's trial was Maria Ferrer, Patricio Lorenzo's daughter (R 378,382-383) The fourth question the assistant state attorney asked Ferrer was whether she knew a man named Patricio Lorenzo. (R 379) At that point the witness began crying, and the jury had to be removed until she regained her composure. (R 379)

Counsel for Torres-Arboledo complained that Ferrer's emotional response was probably prejudicial to the defendant's case and stated that the testimony the State wished to elicit from her could be obtained from other witnesses. (R 380-381)

After a recess Ferrer testified to receiving her father's medallion at the hospital. (R 383-384) She said the medallion was donated to the church, and the chain upon which it had hung was cut up and made into four bracelets for Ferrer, her mother, her sister, and her daughter. (R 384)

Ferrer also testified concerning George Williams, an alleged eyewitness to the shooting of Patricio Lorenzo (which Ferrer referred to as an "accident"). (R 384) A couple of days later he returned and eagerly asked Ferrer for a gun for protection from the people who killed Lorenzo, as they were after Williams. (R 385-386)

Maria Ferrer's testimony served no necessary or proper purpose. The fact that the medallion was given to Lorenzo's daughter,

if somehow relevant to the State's case, was established through the testimony of Doctor Victor Mallea and Michael Cary of the Tampa Police Department. (R 364,426) What happened to the chain and medallion afterward was immaterial. Equally immaterial was Ferrer's testimony concerning George Williams, much of which constituted hearsay.

It is clear that it is irrelevant, impertinent, and prejudicial to prove the decedent's family status in a homicide prosecution. Melbourne v. State, 51 Fla.69, 40 So.189 (Fla.1906); Rowe v. State, 120 Fla.649, 163 So.22 (Fla.1935); Wolfe v. State, 202 So.2d 133 (Fla.4th DCA 1967). Yet the only concrete impact of Ferrer's testimony was to establish that the victim had a family that included a wife, two daughters, and a granddaughter, and that Ferrer was distraught over her father's death.

In Mills v. State, 462 So.2d 1079 (Fla.1985) this Court addressed a situation similar to the one presented herein, where a close relative was called upon to identify property that belonged to the victim. The Court found this situation not to present the same potential for creating sympathy or prejudice in the minds of the jurors as does testimony from a relative as to the identity of the victim. See Welty v. State, 402 So.2d 1159 (Fla.1981). However, here, unlike Mills, the potential for creating prejudice and sympathy actually manifested itself in the witness' emotional breakdown before the jury, and in her giving of irrelevant and inadmissible testimony.

Attorneys for both the State and the accused bear a heavy responsibility to present their evidence in the manner most likely

to secure a fair trial for the accused, one free from influences extraneous to the issue of guilt or innocence. The jury that convicted Oscar Torres-Arboledo was exposed to matters not germane to the issue of his guilt or innocence, namely Maria Ferrer's display of emotionalism and her testimony regarding her father's status as a family man, which deprived Torres-Arboledo of his right to a fair trial and entitles him to a new one.

ISSUE IV.

THE COURT BELOW ERRED IN REQUIRING OSCAR TORRES-ARBOLEDO TO STAND TRIAL IN IDENTIFIABLE JAIL CLOTHING.

At the beginning of the third day of Oscar Torres-Arboledo's trial, defense counsel called the trial court's attention to the fact that his client was clad in a blue jump suit with the words "County Jail" written on the back thereof. (R 317) Torres-Arboledo had had a yellow shirt to wear, but the previous evening he found it "balled up and placed in the property basket" at the jail so that he was unable to wear it to court in the morning. (R 317) The court merely instructed the bailiffs to try to prevent the jury from seeing Torres-Arboledo's back during recesses, and the trial proceeded. (R 317-318)

A defendant in a criminal case may not be compelled to stand trial before a jury dressed in identifiable jail or prison clothing. 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). He should be clothed in civilian attire, except in extraordinary circumstances. Atkins v. State, 210 So.2d 9 (Fla.1st DCA 1968). Otherwise, the presumption of innocence to which the accused is entitled may be impaired or even denied. Estelle; Bentley v. Crist, 469 F.2d 854 (9th Cir.1972); Shultz v. State, 131 Fla.757, 179 So.764 (Fla.1938); Topley v. State, 416 So.2d 1158 (Fla.4th DCA 1982). Additionally, the Supreme Court of the United States recognized in Estelle that requiring an accused to stand trial in jail garb may be "repugnant to the concept of equal justice embodied in the Fourteenth Amend-

ment," 48 L.Ed.2d at 131, as defendants who are able to post bail or otherwise secure release prior to trial do not suffer the impediment to fair treatment that results from identifiable institution-issued clothing.

As the court stated in Brooks v. State of Texas, 381 F.2d 619 (5th Cir.1967):

> It is inherently unfair to try a defendant for crime while garbed in his jail uniform, especially when his civilian clothing is at hand. No insinuations, indications or implications suggesting guilt should be displayed before the jury, other than admissible evidence and permissible argument....

381 F.2d at 624. And in United States v. Dawson, 563 F.2d 149 (5th Cir.1977) the court opined:

> It is the extent to which the defendant's clothing is communicative of his status as a prisoner (and inferentially a criminal) which determines whether or not he was denied a fair trial.

563 F.2d at 152.

The clothing in which Oscar Torres-Arboledo was made to stand trial clearly labeled him as a prisoner. The words "County Jail" prominently displayed on his outfit proclaimed his status to the world. This brand of incarceration stripped Torres-Arboledo of the presumption of innocence in which he should have been clad, denying him a fair trial. As a result, he should be granted a new one.

V.

THE COURT BELOW ERRED IN FAILING TO CONDUCT AN INQUIRY ON THE RECORD TO ASCERTAIN WHETHER OSCAR TORRES-ARBOLEDO WAS VOLUNTARILY, KNOWINGLY, AND INTENTIONALLY RELINQUISHING HIS FUNDAMENTAL CONSTITUTIONAL RIGHT TO TESTIFY.

Oscar Torres-Arboledo did not testify at his trial, either at the guilt phase or at the penalty phase. During the guilt phase, immediately before the defense rested its case, there was a brief discussion among the court and counsel concerning whether or not Torres-Arboledo would take the stand. (R 790-792) Defense counsel informed the court that Torres-Arboledo had previously indicated that he wanted to testify, but then said he did not want to testify. (R 791) Ultimately, according to counsel, Torres-Arboledo stated he would testify only if the prosecutor's cross-examination could be restricted. (R 791-792) Counsel said he told his client cross could not be restricted "except certain limits." (R 792) The court then directed defense counsel to confer with Torres-Arboledo privately, and not to inform the court that Torres-Arboledo indicated he did not wish to take the stand. (R 792)

The Constitution of the State of Florida, in Article I, Section 16., guarantees the right of every person accused of a crime in this state to be heard in person, by counsel or both. This right "is a mandatory organic rule of procedure in all criminal prosecutions in all courts of this State." Deeb v. State, 131 Fla.362, 179 So. 894 (Fla.1937). See also Johnson v. State, 380 So.2d 1024 (Fla.1979).

The right of a criminal defendant to testify in his own defense is also secured by the due process clause of the Fourteenth Amendment to the Constitution of the United States. People v. Curtis, 681 P.2d 504 (Colo.1984). The Curtis court concluded that the right to testify is such a fundamental constitutional right that the trial court must ascertain on the record that any waiver of the right is voluntarily, knowingly, and intentionally made by the defendant himself. The court, therefore, should advise

> the defendant, outside the presence of the jury that he has a right to testify, that if he wants to testify then no one can prevent him from doing so, that if he testifies the prosecution will be allowed to cross-examine him, that if he has been convicted of a felony the prosecutor will be entitled to ask him about it and thereby disclose it to the jury, and that if the felony conviction is disclosed to the jury then the jury can be instructed to consider it only as it bears upon his credibility. [Footnote omitted.] In connection with the privilege against self-incrimination, the defendant should also be advised that he has a right not to testify and that if he does not testify then the jury can be instructed about that right. [Citation omitted.]

Curtis, 681 P.2d at 514. The court went on to note that besides ensuring that waiver of a fundamental constitutional right is intelligent and knowing, such an on-the-record colloquy helps preclude postconviction disputes between counsel and client over the issue and facilitates appellate review.

The court below failed to conduct even a minimal inquiry to determine if Oscar Torres-Arboledo's decision to forego his vital right to testify was his own and was made freely, with full knowledge of its implications. In fact, the court indicated he

did not want to be advised concerning Torres-Arboledo's decision not to become a witness.

The colloquy between the court and the accused called for in Curtis was especially needed here, because Torres-Arboledo had exhibited to his counsel uncertainty as to whether or not he should testify, and the decision may have been made on the basis of erroneous or, at least incomplete, advice from his attorney. (Torres-Arboledo was apparently concerned about the extent of cross-examination he would be forced to endure. His counsel's advice that cross could not be restricted "except for certain limits" did little to explain that cross-examination is not without bounds, or to assist his client in deciding whether or not to take the stand.)

As Oscar Torres-Arboledo's relinquishment of his fundamental right to testify was not shown to be intentional, knowing, and voluntary, he is entitled to a new trial.[7/]

7/ At least one district court of appeal has rejected the rationale of People v. Curtis. Cutter v. State, 460 So.2d 538 (Fla.2d DCA 1984). However, Torres-Arboledo is not aware of a decision by this Court directly addressing the issue he raises herein.

VI.

THE COURT BELOW ERRED IN REFUSING TO GRANT APPROPRIATE RELIEF TO OSCAR TORRES-ARBOLEDO WHEN THE PROSECUTOR MADE AN IMPROPER "GOLDEN RULE" ARGUMENT TO THE JURY DURING HIS FINAL ARGUMENT.

During the rebuttal portion of his final argument to the jury at the guilt phase of Oscar Torres-Arboledo's trial, the prosecutor made the following remarks (R 853--emphasis supplied):

> Now, what evidence has there been to show premeditation? A fully formed conscious intent to kill? The nature of the wounds. Two wounds. I discussed that when I opened my statement with you. Why do I shoot you twice? When I am the only possesser of a gun, and I can tell you, "stay where you are", and I can run, but I shoot you once through the arm and then once in the chest? Why do I do that?

Defense counsel immediately objected that the prosecutor had made an improper "Golden Rule" argument, moved to strike, requested a curative instruction, and moved for a mistrial. (R 853) The court merely sustained the objection, because the prosecutor's argument did not serve to rebut anything argued by defense counsel during his closing argument, but did not grant any further relief. (R 853) Later, after the prosecutor had completed his closing argument, the court made it clear that he was denying Torres-Arboledo's motion for a mistrial. (R 859-861)

The prosecutor essentially was asking the jurors to put themselves in the victim's place by his references to "you," which are underscored in the portion of his final argument quoted above. This type of "Golden Rule" argument frequently has been condemned

by the courts of this state as violative of the defendant's right to a fair trial by impartial jurors. E.g., Bertolotti v. State, 476 So.2d 130 (Fla.1985); Barnes v. State, 58 So.2d 157 (Fla.1952); Bullard v. State, 436 So.2d 962 (Fla.3d DCA 1983); Peterson v. State, 376 So.2d 1230 (Fla.4th DCA 1979); Lucas v. State, 335 So.2d 566 (Fla.1st DCA 1976). See also Adams v. State, 192 So.2d 762 (Fla.1966).

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

The court's sustaining of Torres-Arboledo's objection was not enough to cure the prejudice resulting from the prosecutor's improper remarks. At the very least the court should have acceded to the defense counsel's request to strike the comments and give a curative instruction to the jury.

In a case such as this, resting as it does largely upon

circumstantial evidence, particularly careful attention must be given to improper prosecutorial remarks. Ryan v. State, 457 So.2d 1084 (Fla.4th DCA 1984). It is impossible to determine from the record before this Court that the remarks of the assistant state attorney did not prejudice Oscar Torres-Arboledo, and so his convictions should be reversed. Pait v. State, 112 So.2d 380 (Fla.1959). See also Grant v. State, 194 So.2d 612 (Fla.1967) and Teffeteller v. State, 439 So.2d 840 (Fla.1983).

VII.

THE EVIDENCE ADDUCED BELOW WAS INSUFFICIENT TO ESTABLISH OSCAR TORRES-ARBOLEDO'S GUILT OF PREMEDITATED OR FELONY MURDER AND ATTEMPTED ARMED ROBBERY.

Oscar Torres-Arboledo was charged by indictment with murder in the first degree from a premeditated design to kill. (R 1150) At trial the State proceeded on alternative theories of premeditation and felony murder, using attempted armed robbery (which was charged in the second count of the indictment) as the underlying felony to support the felony murder. (R 808-810,853, 869-871) The jury verdict did not specify under which theory the jury convicted Torres-Arboledo. (R 886,1385)

At the close of all the evidence defense counsel moved for a directed verdict or judgment of acquittal on both the murder and attempted robbery counts. (R 796-801) He argued that the State had not proved premeditation as to the murder. (R 797-800) As to the attempted robbery, counsel contended the prosecution had not shown that Patricio Lorenzo was ever in fear or that Torres-Arboledo ever touched Lorenzo or attempted to grab his medallion. (R 800) The court denied the motions. (R 800-801)

The premeditation required for first degree murder is more than merely an intent to commit homicide. Littles v. State, 384 So.2d 744 (Fla.1st DCA 1980). In McCutchen v. State, 96 So.2d 152,153 (Fla.1957), which was cited with approval in Littles, this Court defined premeditation as requiring

> ...a fully formed and conscious purpose to take human life, formed upon reflection and deliberation, entertained in the mind before and at the time of the homicide....

See also Sireci v. State, 399 So.2d 964 (Fla.1981).

The State failed to prove that Oscar Torres-Arboledo had this requisite purpose. No evidence was presented below to show that Torres-Arboledo and his companions discussed killing Patricio Lorenzo before they entered Pat's Paint and Body Shop. Nor was there any testimony concerning any threats made toward Lorenzo by Torres-Arboledo or the others before Lorenzo was shot, even though one of the State's witnesses, George Williams, was supposedly an eyewitness to the incident. None of the men had a gun in his hand when he entered the shop, thus indicating that they were not planning to shoot anyone.

The circumstances here may be contrasted with those of Griffin v. State, 474 So.2d 777 (Fla.1985), in which this Court found sufficient evidence of premeditation from three facts: the defendant used a particularly lethal gun to shoot the victim, there was an absence of provocation by the victim, and the wounds, one lethal, the other less serious, were inflicted at close range (and thus were unlikely to have struck the victim unintentionally). None of the three factors cited in Griffin is present here. We do not know that the gun used to shoot Patricio Lorenzo was particularly lethal. No evidence was presented concerning an absence of provocation by Lorenzo. And there was no proof the shots were fired at close range.

As in Menendez v. State, 419 So.2d 315 (Fla.1982), there was no direct evidence of a premeditated murder. And the known circumstances surrounding Lorenzo's shooting did not establish that he was shot from a premeditated design to effect his death; they are equally susceptible to an inference that the shooting was merely a reflexive response when the men did not get what they wanted. This inference supporting Torres-Arboledo's innocence of premeditated murder must be accepted, McArthur v. State, 351 So.2d 972 (Fla.1977) and Mayo v. State, 71 So.2d 899 (Fla.1954), and this Court must presume that his conviction rests on the felony-murder theory. Menendez.

However, Torres-Arboledo's conviction for murder cannot be justified as a felony murder because the evidence was insufficient to prove the underlying felony of attempted armed robbery. Attempted armed robbery would be carrying a firearm or other deadly weapon while unsuccessfully endeavoring to take money or other property from another person by force, violence, assault, or putting in fear. §§777.04 and 812.13, Fla.Stat.(1985). All we know from the record is that three men entered Pat's Paint and Body Shop and unsuccessfully tried to obtain Patricio Lorenzo's medallion. We do not know what method they used. No proof was presented that Lorenzo was in fear or that the men used "force, violence, [or] assault" to attempt to compel him to part with his property. Nor was there any indication the firearm used to shoot Lorenzo was exhibited at any time prior to the shooting itself. Again, George Williams testified that none of the men had a gun in his hand when he entered

the shop. (R 724) The shots were fired immediately before the men left the building. (R 721) This Court has held that the "force, violence, assault, or putting in fear" needed to support a conviction for robbery (or attempt) must occur prior to or contemporaneous with the taking (or attempted taking) of property. Royal v. State, 490 So.2d 44 (Fla.1986) and Eutzy v. State, 458 So.2d 755 (Fla.1984). The record does not show that the firearm was either displayed or used prior to or contemporaneous with any effort to obtain Lorenzo's medallion; he was only shot afterward.

Torres-Arboledo could not properly be convicted of felony murder where the elements of the underlying felony were not established. State v. Jones, 377 So.2d 1163 (Fla.1979).

The State thus failed to prove Oscar Torres-Arboledo's guilt of murder in the first degree and attempted armed robbery, and he must be discharged from further criminal liability for these offenses.

VIII.

THE COURT BELOW ERRED IN DENYING OSCAR TORRES-ARBOLEDO'S MOTION FOR DISCHARGE, AS HE WAS NOT BROUGHT TO TRIAL WITHIN THE TIME LIMITS SET FORTH IN THE INTERSTATE AGREEMENT ON DETAINERS.

The State of Florida used the Interstate Agreement on Detainers to obtain Oscar Torres-Arboledo's transfer from California to Florida so that he could be tried for the murder and attempted robbery of Patricio Lorenzo. (R 1069-1070,1338-1342) This legislation is a compact which has been adopted by most of the states in the United States, the District of Columbia, and the United States, and which establishes procedures by which one jurisdiction may obtain temporary custody of a prisoner incarcerated in another jurisdiction in order to bring him to trial. Cuyler v. Adams, 449 U.S. 433, 101 S.Ct. 703, 66 L.Ed.2d 641 (1981), footnote 1.[8/] Among the main purposes of the Agreement is the expeditious and orderly disposition of criminal charges pending against one who is incarcerated in another jurisdiction. §941.45(1), Fla.Stat. (1985); §1389, Art.I, Cal.Pen. Code.

In the court below Torres-Arboledo filed a Motion for Discharge, dated October 26, 1984, which was based upon the denial

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8/ Florida and California are both party states to the Interstate Agreement on Detainers. It is found in Chapter 941 of the Florida Statutes, and in section 1389 of the California Penal Code.

of Torres-Arboledo's right to be brought to trial within 180 days pursuant to the provisions of the Interstate Agreement on Detainers. (R 1307-1309)

There are two time periods set forth in the Interstate Agreement on Detainers for bringing a person to trial. If the prisoner is brought into the "receiving state" (in this case, Florida) pursuant to a request for custody or availability made by officials in the receiving state, he must be tried within 120 days of his arrival in that state. §941.45(4)(c), Fla.Stat. (1985); §1389, Art.IV(c), Cal.Pen.Code. On the other hand, if the prisoner himself requests final disposition of the charges pending against him, he must be brought to trial within 180 days after he

> causes to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for final deposition....

§941.45(3)(a), Fla.Stat. (1985); §1389, Art.III(a), Cal.Pen.Code. The method by which the prisoner causes the written notice and request for final disposition to be delivered to the prosecuting officer and court is by giving or sending it to the warden, commissioner of corrections or other official having custody of the prisoner. §941.45(3)(b), Fla.Stat. (1985); §1389, Art.III(b), Cal. Pen.Code. That official then must promptly forward the document to the prosecutor and court by registered mail, return receipt requested, along with a certificate providing certain information relating to the prisoner's sentence. §941.45(3)(a) and (b), Fla.Stat. (1985); §1389, Art.III(a) and (b), Cal.Pen.Code.

Oscar Torres-Arboledo waived any right he may have had to be tried within 120 days after his arrival in Florida. We are only concerned here with his right to be tried within 180 days under subsection 941.45(3), Florida Statutes.

On January 19, 1983, the State of Florida notified the State of California that it wished to place a detainer against Torres-Arboledo. (R 1054) On January, 21, 1983, an extradition hearing was held in municipal court for the San Leandro-Hayward Judicial District in California, at which Torres-Arboledo three times clearly expressed his desire to return to Florida. (R 1076-1077,1332-1335)[9/] On June 6, 1983, California notified the Hillsborough County Sheriff's Office that Torres-Arboledo was available to Florida authorities pursuant to the Interstate Agreement on Detainers. (R 1055,1388) Then on July 25, 1983, Torres-Arboledo completed and sent to the district attorney in San Leandro County, California and the judge a form supplied to Torres-Arboledo by California authorities in which he demanded a hearing and trial of the criminal action pending against him in Tampa, Florida. (R 1055-1056,1063,1071-1073) He received the form back from the district attorney's office, via the officials of the institution where he was incarcerated, with a typewritten notation that the California action against him for being a fugitive from justice was dismissed

9/ The case style on the transcript of the January 21 hearing reads "The People of the State of California vs. Tony Rivera." (R 1332) Apparently, Torres-Arboledo was also known as Tony Rivera at that time.

on June 6, 1983. (R 1056,1072-1073,1331) Torres-Arboledo asked his California attorney to mail the form to the clerk's office in Tampa (R 1076), but neither the clerk nor the state attorney's office in Tampa received Torres-Arboledo's demand to be tried on the Florida charges. (R 1068-1069)

The court below ruled that Torres-Arboledo did not substantially comply with §941.45(3) of the Florida Statutes because the state attorney's office in Tampa did not receive notice of his desire for disposition of the Tampa charges. (R 1066-1067,1080) This ruling was in error. Although Torres-Arboledo did not initially give his state-supplied form to the warden of the prison where he was incarcerated, as a strict interpretation of the statute might require, the warden or his agent would have been aware of the document when it came back to Torres-Arboledo through the prison mail system. (R 1063) It was the warden's duty then promptly to forward it to the appropriate officials in Florida. §941.45(3)(b), Fla.Stat. (1985); §1389, Art.III(b), Cal.Pen.Code. Apart from this, Torres-Arboledo sent his notice to two responsible officials of the State of California, a district attorney and a judge. Under the terms of the Interstate Agreement on Detainers all "courts, departments, agencies, officers, and employees" of a party state are directed to cooperate with one another and with other party states in enforcing the agreement and effectuating its purpose. §941.47, Fla.Stat. (1985); §1389.2, Cal.Pen.Code. And compliance with the Interstate Agreement on Detainers is mandatory. State v. Moser, 445 So.2d 696 (Fla.2d DCA 1984). Therefore, the

judge and district attorney should have taken steps to see that Torres-Arboledo's rights under the Agreement were vindicated.

The Interstate Agreement on Detainers is to be liberally construed to effectuate its purposes. §941.47, Fla.Stat. (1985); §1389, Art.IX, Cal.Pen.Code. All that is required of the prisoner in order to trigger the 180-day period for bringing him to trial in the receiving state is that he substantially comply with the terms of the Agreement. State v. Roberts, 427 So.2d 787 (Fla.2d DCA 1983). Torres-Arboledo did substantially comply with the Agreement. The adverse consequences of the failure of the California officials to do their duty under the Agreement must be borne by the prosecuting officials in the receiving state, not by the prisoner. Romans v. District Court, 633 P.2d 477 (Colo.1981). Therefore, Torres-Arboledo should have been discharged when 15 months passed without a trial between the time he demanded disposition of the charges against him in Florida and the time he filed his motion for discharge.

IX.

THE TRIAL COURT ERRED IN SENTENCING OSCAR TORRES-ARBOLEDO TO DEATH OVER THE JURY'S LIFE RECOMMENDATION, AS THE RECOMMENDATION WAS FULLY JUSTIFIED UNDER THE FACTS OF THIS CASE, AND TORRES-ARBOLEDO DOES NOT DESERVE THE DEATH PENALTY.

At the outset Oscar Torres-Arboledo would note that the jury's seven to five life recommendation herein (R 970-971,1387) was returned despite several flaws in the way the penalty phase was conducted. For example, the court below refused to allow the defense to introduce into evidence the written report prepared by Dr. Gerald Mussenden, the clinical psychologist who interviewed and examined Torres-Arboledo, sustaining a State objection on hearsay grounds. (R 925-926) This was error for two reasons. Firstly, the person who prepared the report was present and testified at trial, and so it was not hearsay under subsection 90.801(1)(c), Florida Statutes. Secondly, hearsay is admissible during the penalty phase of a capital trial. §921.141(1), Fla.Stat. (1985). Dr. Mussenden was the sole defense witness presented at the penalty phase, and his testimony was crucial. Furthermore,

> [a]ny evidence reasonably related to a valid mitigating circumstance should, when profferred by the defendant, be admitted into evidence at the sentencing phase of a capital case.

Enmund v. State, 399 So.2d 1362,1371 (Fla.1981), rev'd on other grounds, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982). See also Messer v. State, 330 So.2d 137 (Fla.1976).

Another defect in the penalty phase was the prosecutor's improper argument to the jury in which he equated them with "the

system" and said they spoke "for all the community who are afraid and sick and tired of the lawlessness...." (R 953-955) See Bertolotti v. State, 476 So.2d 130 (Fla.1985); Williard v. State, 462 So.2d 102 (Fla.2d DCA 1985); and Boatwright v. State, 452 So.2d 666 (Fla.4th DCA 1984). The court sustained Torres-Arboledo's objection to the latter remark (R 956), but overruled his objection to the remark in which the assistant state attorney told the jurors they were the system and suggested it was up to them to deal with criminals. (R 954)

The penalty proceeding was also flawed in the manner in which the jury was instructed. The court actually instructed the jury twice. After he first instructed them, the court was reminded that he had forgotten to let counsel argue. (R 942-947) After counsel presented their arguments, the court instructed the jury again. (R 960-964) Pursuant to subsection 918.10, Florida Statutes and Florida Rule of Criminal Procedure 3.390, jury instructions are to be given "at the conclusion of argument of counsel," not repeated before and after. More importantly, in his initial round of instructions, the court incorrectly referred to a mitigating circumstance as an aggravating circumstance, as follows: (R 944)

> Among the aggrevating [sic] circumtances [sic] you may consider if established by the evidence are: Any aspect of the Defendant's character on record in [sic] any other circumstance of the offense.

This error is particularly glaring in light of the court's refusal of Torres-Arboledo's request for instructions on all mitigating factors set forth in the statute, and his decision to instruct only

on the "catchall" mitigating factor. (R 941-942)[10/]

Torres-Arboledo recognizes that the above-mentioned problems with the penalty phase may have been rendered moot as appellate issues when the jury returned its life recommendation. However, it is possible they affected the strength of that recommendation. Had the proceedings been conducted properly, it is very likely more than seven jurors would have cast their votes for life.

In the capital sentencing context, the life recommendation of a jury must be followed if there is a reasonable basis therefor. Malloy v. State, 382 So.2d 1190 (Fla.1979). The jury's recommendation of life must be given great weight, and

> [i]n order to sustain a sentence of death following a jury's recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ.

Tedder v. State, 322 So.2d 908 (Fla.1975); see also Herzog v. State, 439 So.2d 1372 (Fla.1983); Brookings v. State, 11 F.L.W. 445 (Fla. Aug.28,1986).

The recommendation of the jury represents the judgment of the community as to whether death is the appropriate penalty under the facts of the case being considered. Odom v. State, 403 So.2d 936 (Fla.1981).

10/ In his reinstruction after argument of counsel, the court did properly identify the circumstance in question as mitigating, rather than aggravating. (R 962)

Here there was ample justification for the jury's advisory verdict of life, particularly in the testimony of Dr. Mussenden. He found Torres-Arboledo to possess bright/normal to superior intelligence. (R 923) Torres-Arboledo was extremely interested in advancing his skills, and had made very good progress learning English since coming to this country from his native Colombia. (R 913-915) Torres-Arboledo's profile showed that he was a fairly sensitive, compassionate, positive type of person with a lot of potential. (R 920-921) Dr. Mussenden found him to be extremely open and honest, and found nothing to indicate that Torres-Arboledo might be lying. (R 915,919) Torres-Arboledo did not display any of the characteristics Dr. Mussenden would expect to find in a criminal. (R 921-922) Dr. Mussenden concluded that Oscar Torres-Arboledo is in the top five to ten per cent of all applicants to succeed and/or benefit from any program, and falls within the best of all categories for rehabilitation. (R 924-925)

Oscar Torres-Arboledo's positive intelligence and personality traits detailed through the testimony of Dr. Mussenden, which showed Torres-Arboledo's capacity for rehabilitation, may constitute proper non-statutory mitigation. McCampbell v. State, 421 So.2d 1072 (Fla.1982) Yet the court below rejected this uncontradicted testimony out of hand (R 1396,A1), which he was not free to do. Strickland v. Francis, 738 F.2d 1542 (11th Cir.1984).[11/]

11/ The court's oral remarks at the sentencing hearing of November 8, 1984, showed that he was relying upon Mikenas v. State, 407 So.2d 892 (Fla.1981) as authority for rejecting Dr. Mussenden's testimony (R 1133-1137). However, Mikenas did not involve a life override.

The jury also may have considered that the homicide involved herein was not especially aggravated. It was a simple shooting, and only two of the nine aggravating circumstances set forth in subsection 921.141(5) of the Florida Statutes were submitted to the jury for its consideration (R 943,961) and found by the court. (R 1396,A1)[12/] There was nothing to set this crime apart as one which calls for the death penalty.

Torres-Arboledo would also point out that he was only 22 years old when the crime occurred. (R 1152,1153)

It appears that the court below, as did the trial judge in Rivers v. State, 458 So.2d 762 (Fla.1984), merely disagreed with the jury's recommendation. He simply concluded that the aggravating circumstances clearly outweighed the possible nonstatutory mitigating circumstance, rendering the recommendation unreasonable, but did not analyze why he felt this to be true. (R 1397,A2) Judge Graybill had no information before him that was not before the jury and that might have justified his imposition of the death sentence. (R 1396, A1)[13/] As in Rivers, in Torres-Arboledo's case

> there was substantial evidence offered in mitigation which the jury could reasonably have relied upon in reaching its advisory verdict.

458 So.2d at 765.

12/ One of these circumstances, that the capital felony was committed while Torres-Arboledo was attempting to commit robbery with a firearm, should not have been submitted to the jury or found by the court, due to the lack of evidentiary support, as discussed in Issue VII.

13/ The court may have been influenced by the prosecutor's inflammatory and improper argument at the sentencing hearing. (R 1130-1131)

This Court has in the past vacated death sentences imposed over life recommendations where the trial court found no mitigating circumstances, but there was evidence in the record upon which the jury could have relied in mitigation. E.g., Thompson v. State, 456 So.2d 444 (Fla.1984); Gilvin v. State, 418 So.2d 996 (Fla.1982); Welty v. State, 402 So.2d 1159 (Fla.1981). The Court should do the same thing in this case.

Likewise, this Court has invalidated death sentences imposed over jury recommendations of life in many cases involving murders which were much more heinous than the one involved herein. For example, the defendant in Huddleston v. State, 475 So.2d 204 (Fla.1985) initially struck the victim several times with his elbows, knocking her to the floor. The victim began screaming and struggling, whereupon Huddleston struck her on the head with a chair. He then began to strangle her. When he noticed that the victim was not only still alive, but conscious, Huddleston took a steak knife and stabbed her repeatedly in the chest, neck and back. He finally had to stop when the knife blade bent. Noticing that there was some movement left in the victim's body, he stabbed her with a butcher knife until she died. The trial court found only one mitigating circumstance (no significant history of prior criminal activity), but this, along with other mitigating evidence appearing in the record, was enough for this Court to vacate the death sentence. In Brown v. State, 367 So.2d 616 (Fla.1979), the victim was beaten about the head, shot, and finally drowned. In McKennon v. State, 403 So.2d 389 (Fla.1981), the defendant murdered his employer by beating her head against the floor

and wall, strangling her, slicing her throat, breaking ten of her ribs, and stabbing her. The only mitigating circumstance was the defendant's age of eighteen. This Court found that there was a rational basis for the jury's recommendation and reduced the sentence to life imprisonment. In Welty, supra, the defendant stole the victim's car and stereo, then returned, struck the victim several times in the neck and set fire to his bed. And in Jones v. State, 332 So.2d 615 (Fla.1976), the victim was sexually assaulted, stabbed more than 38 times, and finally bled to death.

As the jury apparently concluded, the death penalty is a disproportionate punishment for the crime for which Oscar Torres-Arboledo was convicted.

The life recommendation of the jury was eminently reasonable and should have been accepted by the court below. The sentence of death imposed upon Oscar Torres-Arboledo must be vacated.

X.

IN SENTENCING OSCAR TORRES-ARBOLEDO ON THE CHARGE OF ATTEMPTED ROBBERY WITH A FIREARM, THE COURT BELOW ERRED IN USING A GUIDELINES SCORE-SHEET THAT ASSESSED POINTS FOR VICTIM INJURY, AND IN DEPARTING FROM THE RECOMMENDED GUIDELINES SENTENCE WITH-OUT FILING PROPER WRITTEN REASONS FOR DOING SO.

Oscar Torres-Arboledo, through counsel, elected to be sentenced for his conviction of attempted robbery with a firearm under the sentencing guidelines. (R 1108-1109). The guidelines scoresheet that was prepared, which defense counsel agreed was a proper scoresheet, showed a recommended sentencing range of seven to nine years in prison. (R 1388) It included an assessment of 21 points for death or severe victim injury. (R 1388)

The court departed from the recommended guidelines sentence and imposed a sentence of 15 years, with a three-year minimum mandatory. (R 1140,1395) This was the maximum possible sentence for attempted robbery with a firearm. §§775.082(3)(c), 777.04(4)(b), 812.13(2)(a), Fla.Stat.(1985).

As his reasons for departing from the recommended sentence, the court orally stated:

> Anyone convicted of attempted robbery with a firearm, which also results in a conviction for first degree murder deserves, warrants and mandates the maximum penalty provided by law, and that the score sheet, although it contains death, does not take into consideration first degree murder as a surrounding circumstance of the crime itself.

(R 1141) The clerk wrote these reasons onto the guidelines

scoresheet at the court's direction. (R 1141,1395)

The trial court is responsible for ascertaining the accuracy of a sentencing guidelines scoresheet. Abbot v. State, 482 So.2d 1391 (Fla.1st DCA 1986). In this case, the court erroneously used a scoresheet which included points for victim injury. Victim injury is not an essential element of attempted robbery with a firearm, and so no points should have been assessed therefor. Ritts v. State, 491 So.2d 1252 (Fla.2d DCA 1986); Smith v. State, 484 So.2d 649 (Fla.4th DCA 1986); Brown v. State, 474 So.2d 346 (Fla.1st DCA 1985); Hendry v. State, 460 So.2d 589 (Fla.2d DCA 1984); Massard v. State, 11 F.L.W. 1561 (Fla.4th DCA July 16,1986); Fla.R.Crim.P. 3.701 d.7. Had the 21 points for victim injury not been included, the recommended sentence would have been one cell lower. (R 1388-1389)

The court also erred in not providing written reasons for departing from the recommended guidelines sentence. Hendrix v. State, 475 So.2d 1218 (Fla.1985). His oral pronouncements were insufficient, Davis v. State, 476 So.2d 303 (Fla.1st DCA 1985), as were the unsigned notations written on the guidelines scoresheet. Bauza v. State, 491 So.2d 323 (Fla.3d DCA 1986); Echevarria v. State, 11 F.L.W. 1767 (Fla.3d DCA Aug.12,1986); Bouthner v. State, 489 So.2d 784 (Fla.5th DCA 1986).

Oscar Torres-Arboledo's sentence for attempted robbery with a firearm thus must be reversed and this cause remanded for resentencing.

CONCLUSION

Appellant, Oscar Torres-Arboledo, prays this Honorable Court for discharge from further criminal liability on the charges of first degree murder and attempted robbery with a firearm, for the reasons expressed in Issues VII. and VIII. herein. In the alternative, Torres-Arboledo requests a new trial, for the reasons explained in Issues I.-VI. If neither form of relief is granted, Torres-Arboledo asks that his death sentence be vacated and that he be sentenced to life in prison, for the reasons expressed in Issue IX., and asks that his sentence for attempted armed robbery be reversed and remanded for resentencing (Issue X.).

Respectfully Submitted,

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