IN THE SUPREME COURT OF FLORIDA

MELVIN EUGENE DANIELS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 67,357

PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the Defendant and Appellee was the Prosecution in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit of Florida, in and for Broward County. In the brief the parties will be referred by name.

The symbol "R" will denote the Record on Appeal and the symbol "SR" will denote the Supplemental Record [Videotape].

STATEMENT OF THE CASE

On November 17, 1983, Petitioner, Melvin Daniels, was informed against for kidnapping (Count I), burglary of a structure (Count II), and attempted sexual battery, in that he "did forcibly remove [the victim's] clothing, threaten her, and did rub his genitals on her person" (Count III) (R 732). The alleged offenses occurred and Mr. Daniels was arrested for them on July 10, 1983 (R 765). Mr. Daniels' January 26, 1984 motion for speedy trial discharge (R 733) was denied (R 23), the State having been granted an emergency 60-day extension of the speedy trial time period on January 6, 1984 (R 9). Further extensions were later granted to April 1, 1984 (R 736), May 21, 1984 (F 737), and May 16, 1984 (R 741), over Mr. Daniels' objections (R 9, 11-12, 26, 147, 154, 156, 177, 280). The purpose for the extensions was to allow the State to attempt, through speech therapy, to render the alleged victim of the crime, who had in the interim suffered a stroke, capable of testifying (R 9, 126, 145, 159-160). A renewed motion for discharge was also denied (R 279-283, 745).

On May 8, 1984, Mr. Daniels moved to have the alleged victim, Lillie Mae Runyons, determined incompetent to testify, since she was able to respond only by "yes" or "no" answers to simple sentence inquiries and could not be relied on for accurate responses even within this limited framework (R 742-743). After hearing (R 192-270), the trial court determined that Ms. Runyons would be allowed to testify (R 270), but her evidence would be videotaped so that Mr. Daniels would be "protected" (R 260, SR). Mr. Daniels renewed objection to Ms. Runyons' competence to

testify, made at trial, was denied (R 339-340).

Immediately prior to jury trial in this cause, the State moved to amend the attempted sexual battery charge, adding the allegation that the offense was committed with physical force not likely to cause serious personal injury (R 293-294). That motion was granted (R 300) over Mr. Daniels' objection (R 302), founded in part on the fact that an earlier motion to dismiss the charge as originally alleged had been denied (R 296, 685-686).

During trial, at which Ms. Runyons testified (R 343-420), a police officer responded to the prosecutor's questioning:

> [Mr. Daniels] stated he didn't want to make a statement. I wasn't prepared to take a full statement." (R 501)

Although defense counsel, the trial judge, and the court reporter all clearly heard the officer state that Mr. Daniels did not want to give a statement (R 502), the trial judge accepted the officer's representation that he meant to say that Mr. Daniels did give a statement (R 502), even though no statement was subsequently introduced, in conformity with the State's objection that anything Mr. Daniels said would be hearsay (R 516-520). Mr. Daniels' objection to the comment on his exercise of his right to remain silent at his arrest was overruled, and his motion for mistrial on those grounds was also denied (R 503, 631, 687-689).

On conclusion of the evidence, the jury retired to deliberate and then returned its verdicts finding Mr. Daniels guilty of each count as alleged in the information (R 746-748). Mr. Daniels was immediately adjudged guilty of those offenses (R 749). On June 13, 1984, the trial judge acceded to the State's request to aggravate Mr. Daniels' sentence from the seven to nine year range

suggested under the sentencing guidelines (R 752-757), by sentencing Mr. Daniels to twenty-two (22) years in prison for kidnapping (R 758). He was also given the maximum five (5) year sentence possible on each of the other two counts for which he had been convicted, to run concurrently with the kidnapping sentence (R 728).[1] His probation on a trespass charge, Circuit Court Case No. 82-11172 was revoked, and sentence of one year in prison was imposed, also to run concurrent with the kidnapping sentence (R 760). Credit for time served while awaiting disposition of the trespass case and since his arrest on the charges underlying the instant prosecution was given on the trespass sentence. "If it goes beyond 364 days then anything additional should be applied to this case." (R 728). The written sentencing order reflected no credit for the time spent in jail awaiting trial on the instant charge was given to Mr. Daniels on any of the felony sentences imposed (R 759-760).

On appeal, the District Court affirmed Mr. Daniels' convictions but remanded his sentence for correction by giving credit for time served on each of Mr. Daniels' two concurrent sentences. Mr. Daniels thereupon noticed his invocation of discretionary jurisdiction of this Court, which accepted jurisdiction of this cause on November 20, 1985.

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[1] As reflected in the transcript of the sentencing hearing:

> MR. GAETA [defense counsel]: Thank you, Judge. As far as counts two and three, they would run concurrent?
>
> THE COURT: They will run concurrent including the sentence 82-11172 (R 728).

The written sentencing order erroneously indicates that the sentences on counts II and III are to run consecutive to each other and to count I (R 759-760).

STATEMENT OF THE FACTS

Mr. Daniels testified in his own behalf at trial, stating that while at the Embassy Club, he noticed Lillie Mae Runyons arguing with a man in the bar's parking lot (R 639-640). When the man left, Ms. Runyons approached Mr. Daniels, first asking him if he would buy her a drink and then inquiring whether he wanted a date (R 641). Taking this as an invitation to sexual intercourse, Mr. Daniels agreed. He walked with Ms. Runyons, anticipating she would lead him to a convenient location. During their walk, Ms. Runyons, who was intoxicated from the liquor she had been drinking, was loud and rambunctious, complaining noisily about the treatment she had received from the other man with whom she had been arguing (R 644). Once, she stopped to tap on the window of a house, breaking it before leaving. Ms. Runyons, believing she knew someone who lived there and had intended to go there with him, was not alarmed (R 644, 659). He continued to follow Ms. Runyons into a vacant house next door (R 645), where they both undressed and lay on a couch (R 646, 672). Ms. Runyons was still being very loud, and the police arrived to investigate after a few minutes (R 647). At that point, Ms. Runyons changed her mind about having sex, telling the police that Mr. Daniels was trying to rape her (R 672). Ms. Runyons was on probation (R 421), and the house which she entered with Mr. Daniels was posted "No Trespassing" (R 547).

Ms. Runyons' testimony consisted of yes or no answers accompanied with gestures to the prosecutor's leading questions, many of which had to be repeated several times before the "right" response was elicited (R 344, 346, 354, 355, 358, 367, 369, 378-380, 393, 394, 396, 398-399). In this manner, she indicated that she accepted a ride from Mr. Daniels and another man to the Embassy Club while she was walking from the Blue Flame, another bar (R 345, 348, 351). Instead of taking her home, the men drove her to the vacant house (R 364-365). She screamed and struggled, trying to break a window at a neighbor's house (R 357-358), but Mr. Daniels succeeded in getting her inside the house and ripping off her clothes (R 359, 365). He took off his clothes, but the police then arrived and arrested him before any sexual assault could take place (R 366, 369). Asked whether she wanted to have sex with Mr. Daniels, Ms. Runyons responded, "No. I don't know." (R 373).

Also called as State witnesses were two neighbors who heard screams which stopped but started again (R 424, 468). When they looked out the window, they saw a black man and woman struggling (R 433, 469). The man got the woman on the ground and was hitting her (R 435, 470). He then pulled her back into the vacant house (R 437, 474). These neighbors never saw either a truck or the second man that Ms. Runyons claimed picked her up (R 445-446, 488). Nor did they ever hear the woman call for help or the police (R 449, 469). Another neighbor, who reported that his window was indeed broken that night (R 459), did not hear or see anything unusual (R 459, 462).

SUMMARY OF ARGUMENT

POINT I

Mr. Daniels was entitled to credit on his concurrent sentences for kidnapping, burglary, and attempted sexual battery for the time he served in jail since his arrest on those charges, nothwithstanding that in the interim a no-bond probation violation hold was placed against him. The allegation of violation of probation arose from the same kidnapping, burglary, and attempted sexual battery charges as Mr. Daniels was sentenced for, and the sentence he received on the revocation of his probation was also concurrent to the sentences for the substantive charges.

POINT II

The information filed against Mr. Daniels failed to allege a crime in Count III, purporting to charge sexual battery. By allowing the State to amend that charge on the day of trial to allege a crime totally different from that indicated by Count III's reference to a statute, the trial judge erred, prejudicing Mr.Daniels thereby since he was now forced to defend against a charge of which he had no prior notice.

POINT III

Lillie Mae Runyons, who suffered a stroke which rendered her incapable of speech other than yes or no responses to leading questions, was incompetent to testify. Moreover, meaningful

cross-examination of the witness was completely impossible, thus denying Mr. Daniels his right to confront the witnesses against him.

POINT IV

The State failed to show that the grounds for extending speedy trial were unknown to it prior to its application, since it knew for some four or five months of Ms. Runyons' incapacity to testify. Moreover, the State failed to demonstrate that any reasonable likelihood existed that Ms. Runyons would become competent to testify in the foreseeable future. Therefore, the trial court should not have granted the State's motion for extension of time, and, upon expiration of the period for speedy trial Mr. Daniels' motion for discharge should have been granted.

POINT V

When the prosecutor elicited evidence that Mr. Daniels exercised his right to remain silent when being arrested, a mistrial was mandated upon Mr. Daniels' motion. That the police officer later stated he meant to say that Mr. Daniels gave a statement did not mean that the objection was not well-founded: the jury had already heard that no statement was given. And the State's objection to introduction of the exculpatory statement made by Mr. Daniels at that time means that the jury did not hear the non-incriminating remarks made by Mr.Daniels.

POINT VI

Once the State introduced an inculpatory portion of Mr. Daniels' statement to police made at his arrest, Mr. Daniels was entitled to introduce the rest of that statement, including the exculpatory portions thereof, through cross-examination.

POINT I

THE TRIAL COURT ERRED IN REFUSING TO GIVE MR. DANIELS CREDIT FOR TIME SERVED SINCE HIS ARREST FOR THE INSTANT CASE.

Section 921.16(1), Florida Statutes, which provides that

> A sentence of imprisonment shall not begin to run before the date it is imposed, but the court imposing a sentence shall allow a defendant credit for all of the time he spent in the county jail before sentence. The credit must be for a specific period of time and shall be provided for in the sentence.

Clearly, it is the legislature's intent that a defendant actually receive credit for the time he spends in jail. This intent is in accord with the constitutional requirements set forth in North Carolina v. Pearce, U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), where the High Court of this land held that the constitutional prohibition against double jeopardy requires that

> punishment already exacted must be fully "credited" in imposing sentence upon a new conviction for the same offense.

395 U.S. at 718-719. In North Carolina v. Pearce, it was held that one who is reconvicted after retrial is entitled to credit for all the time he had already served on his original sentence. In this way, the time served on his sentence imposed as the result of legally tainted conviction could at least be "returned" to him via the credit on the next sentence. In exactly the same way, the time spent in jail after arrest but before sentencing must be "returned" to an defendant who is ultimately found guilty and sentenced, by crediting that time against the sentence imposed.

Florida courts have not been loathe to apply this principle. Thus, credit will be given, on a sentence imposed after revocation of probation, for time spent in custody as a condition of probation, Jackson v. State, 449 So.2d 309 (Fla. 5th DCA 1984), and for time spent in jail awaiting disposition of a prior violation of probation charge for which the defendant was subsequently acquitted. Thompson v. Wainwright, 447 So.2d 383 (Fla. 4th DCA 1984). Indeed, it has been held that time served for a conviction later determined to be invalid should be credited to any other sentence being served by the defendant. Lamar v. State, 443 So.2d 414 (Fla. 4th DCA 1984).

In Jenkins v. Wainwright, 285 So.2d 5 (Fla. 1973), this Court addressed a prisoner's claim that he was entitled to credit for time served in jail awaiting trial on each of his concurrent sentences being served in the State prison. The trial court's sentencing order had granted credit on one sentence but was silent with respect to credit on the second sentence. This Court interpreted the ambiguity to require that the prisoner be given on each of the sentences. Its rationale was based on the realization that failure to grant equal credit on concurrent sentences results in an effective denial of any credit whatsoever, since the defendant will have to serve the longer sentence, computed without credit for time served, even after the shorter sentence with credit has expired. In the words of Justice Ervin:

> To conclude the sentencing judge only intended to grant Petitioner credit time on the first concurrent sentence and not on the other would necessarily result in Petitioner serving the longer sentence on Count II and in not having the benefit of the credit time granted by the

> trial court. To adopt the interpretation of the Respondent would be tantamount to granting the Petitioner credit time and then taking it away, in short a meaningless act, resulting in no credit time whatsoever. We are not persuaded by such an absence of logic.

Id., at 6.

The Second District Court of Appeal took this reasoning to its logical conclusion in Kinney v. State, 458 So.2d 1191 (Fla. 2d DCA 1984), where it held that credit for time served must be given on each of concurrent sentences. See also, Daniels v. State, 10 F.L.W. 1443 (Fla. 4th DCA June 12, 1985). The contrary position espoused in Green v. State, 450 So.2d 1275 (Fla. 5th DCA 1984) and Shepard v. State, 459 So.2d 460 (Fla. 3d DCA 1984), would lead to exactly those disparate results condemmed in Jenkins v. Wainwright, supra, and would be in violation of the principles stated in North Carolina v. Pearce, supra, and expressed in the legislative intent behind Section 921.161. Consequently, the Second and Fourth District Court of Appeal, which require credit for time served on each of concurrent sentences, have correctly stated the applicable principle of law. The decision of the lower appellate court in the present case should therefore be affirmed.

ARGUMENT

POINT II

THE TRIAL COURT ERRED IN REFUSING TO DISMISS THE FUNDAMENTALLY DEFECTIVE INFORMATION AND PERMITTING THE STATE TO AMEND THE DEFECTIVE ATTEMPTED SEXUAL BATTERY CHARGE IN A MATERIAL WAY JUST PRIOR TO TRIAL.

Count III of the information filed against Mr. Daniels purported to charge an attempted sexual battery in the following way:

> AND MICHAEL J. SATZ, State Attorney of the Seventeenth Judicial Circuit of Florida, as Prosecuting Attorney for the State of Florida in the County of Broward, by and through his undersigned Assistant State Attorney, charges that MELVIN EUGENE DANIELS on the 10th day of July A.D. 1983, in the County and State aforesaid, did unlawfully attempt to commit a sexual battery upon Lillie Mae Runyons, a person over the age of eleven (11) years, without her consent, and in furtherance of said attempt, did forcibly remove her clothing, threaten her, and did rub his genitals on her person, with the intent to commit sexual battery, contrary to F.S. 777.04(1), F.S. 777.04(4) and F.S. 794.011(4)(a),

Even the most cursory examination of this charge reveals that virtually none of the elements of sexual battery are alleged, other than that the non-consenting victim was over the age of eleven (11) years. As such, the defect in the charge is a fundamental one: very simply, no crime has been alleged. Gray v. State, 404 So.2d 388 (Fla. 5th DCA 1981).

The only portion of the charge as originally laid which gives even a clue as to what sort of sexual battery the State intended to charge is the statutory citation to Section - 794.011(4)(a), which provides that it is a first degree felony for anyone to commit a sexual battery upon a non-consenting

person over the age of eleven (11) years "when the victim is physically helpless to resist." However, a mere statutory citation cannot suffice to supply the elements missing from the charging document itself. For example, an incorrect statutory citation is considered non-prejudicial and non-misleading so long as the information otherwise fully alleges the elements of the offense charged. Sanders v.State, 386 So.2d 256 (Fla. 5th DCA 1980). Thus it is to the verbal allegations that one looks to determine what charge is being made out, not to the statutory references. Otherwise, an information would need to do no more than set out the statutory citation to be held sufficient to provide the notice required under the Due Process Clause of the United States Constitution, and not even the broadest interpretation of the pleading requirements goes that far. Since the information filed below was fundamentally defective, Mr. Daniels's motion to dismiss it (R 296) should have been granted.

Instead, the trial court denied the motion but, at a subsequent hearing held just prior to the commencement of trial, allowed the State to "amend" its information by deleting the reference to Section 794.011(4)(a), substituting Section 794.011(5), and adding that Mr. Daniels "used physical force and violence not likely to cause serious personal injury." (R 293-294, 300, 732). This amendment was no mere technical correction of a typographical or other minor defect. It made out a completely different crime. See, Bashans v. State, 388 So.2d 1303, 1304 (Fla. 1st DCA 1980). The State's tardy amendment was therefore obviously a material one, for the late timing of which

there could be no excuse, since the defect had much earlier been brought to its attention by Mr. Daniels. Moreover, since Mr. Daniels was now being called upon, at the eleventh hour, to defend to an entirely different crime than had heretofore been the case, the record demonstrates the same kind of prejudice as was held to require reversal in Stang v. State, 421 So.2d 147 (Fla. 1982) [State amended bill of particulars after defense attorney told jury in essence that his only defense would be State's inability to prove date specified.]. The trial judge thus compounded its earlier error in refusing to dismiss the charge by allowing the State to completely alter Count III just before trial. Mr. Daniels' conviction for attempted sexual battery must be reversed as a result.

POINT III

THE TRIAL COURT ERRED IN ALLOWING LILLIE MAE RUNYONS TO GIVE EVIDENCE AT TRIAL WHEN THE WITNESS WAS NOT COMPETENT TO TESTIFY.

The test for determination of a witness's competence to testify requires that he understand the nature and obligations of the oath and that he can perceive, remember and narrate the incident. Powell v. State, 373 So.2d 73 (Fla. 1st DCA 1979). Where a witness has recently been adjudged insane, a presumption of continued insanity is raised, which may be rebutted if it is shown that the witness had a lucid interval, has an understanding of the oath, and can understand and intelligently answer the questions asked of him. Florida Power & Light Company v. Robinson, 68 So.2d 406, 413 (Fla. 1953). Although a trial court generally has broad discretion in its determination of a witness's competence, it is "not, however, a discretion without bounds. It is a sound judicial discretion subject to appellate review." Bell v. State, 98 So.2d 575, 577 (Fla. 1957). In that case, the trial court's finding of a witness's competency was reversed where the nine-year-old witness did not have the moral and spiritual foundation to tell the truth.

In the present case, the alleged victim of the attempted sexual battery for which Mr. Daniels was charged, Lillie Mae Runyons, suffered a stroke and possible brain infection very shortly after her encounter with Mr. Daniels.[2] As a result,

[2] This stroke was entirely unrelated to any injuries Ms. Runyons may or may not have received on the night of the alleged offense (R 697). On the other hand, her alcoholism may very likely have predisposed her to the infection which destroyed a portion of her brain (R 113).

she was rendered incapable of talking or communicating in any manner (R 40-42, 96, 103). Her ability to speak improved only "very little" in the following months (R 73), and she was given a "very, very poor prognosis" by the general practitioner who saw her in that time (R 58). Even in February, 1984, more than six (6) months after she became ill, a neurologist was able to detect only "some comprehension but that was quite impaired." (R 125). She couldn't follow verbal instructions (R 125), although there was marked improvement in her ability to move about (R 124). It was this neurologist's opinion that Ms. Runyons "possibly" could relearn some communication skills with the help of a speech therapist, but he conceded that where such profound damage had existed for some months, the outlook was less favorable (R 129). He further agreed that Ms. Runyons would perhaps never be able to answer in complete sentences (R 135) but would be limited to making yes or no responses. Even this would be a major improvement over her present condition, since her answers even to simple questions were by no means reliable at this point: she often answered yes when she meant no (R 72). In fact, her accuracy was estimated as only 50% (R 168, 192).

It was not until the beginning of March, 1984, that Ms. Runyons began seeing a speech therapist once or twice a week (R 152-153). After about six weeks, the speech pathologist, Bonnie Beck testified that Ms. Runyons had achieved maximum improvement (R 169). She could follow the "gist of a conversation", answer

very simple questions with a yes or no response which was estimated "correct" about 90% of the time. However, it was easy to confuse her (R 168).

At the hearing on Ms. Runyons' competence to testify, Ms. Beck testified that Ms. Runyons' accuracy now approached 100%, so long as the words used were kept simple and the sentences short (R 197). However, Ms. Beck admitted that this conclusion was based on a mere forty-five minute examination earlier that week wherein Ms. Runyons was able to perform about ten tasks (R 204). However, Ms. Beck noted that Ms. Runyons "runs into trouble when she needs to formulate language." (R 205). And Ms. Beck had no opinion at all on the accuracy of Ms. Runyons' memory: she had performed no examinations or tests related to that area of inquiry (R 207).

Ms. Runyons herself testified to a limited degree at the hearing on her competency. Her responses to questions by the defense attorney regarding the relatively simple matter of her age demonstrate the basis for Mr. Daniels' objections to her competency. (Ms. Runyons was actually 48 years old.):

Q: What is your name?

A: Lillie Mae.

Q: I'm sorry?

A: Lillie Mae.

Q: What is your last name?

A: Runyons.

Q: Are you 46 years old?

A: Uh-huh. Yes.

MR. GAETA: Can the record reflect that she answered yes to that.

THE COURT: Yes.

Q: Ma'am, are you 52 years old?

A: Yes. (Negative nod.) No, no.

MR. GAETA: Judge, can the record reflect that she initially said yes and then said --

MR. DUPREE: At the same time she was saying yes she shook her head no.

Q: Ma'am, are you 42 years old?

MR. GAETA: Can the record reflect she said uh-huh, in the affirmative.

THE COURT: I didn't understand. Ask her again.

Q: Ma'am, are you 42 years old?

A: Old - nine.

MR. GAETA: I didn't catch the response.

MISS BECK: She is correcting you.

Q: Ma'am, are you 42 years old?

A: No.

Q: Are you 49 years old?

MR. GAETA: Can the record reflect the answer was yes and then no way. (R 246-247).

Defense counsel's "cross-examination" was, of course, quite restricted, since, as stated by the prosecutor, Ms. Runyons' answers of "uh-huh" and "no way" were the "limits of her language." (R 226). The accuracy of even these simple responses must be seriously questioned, however, in view of, for instance, the great difficulty Ms. Runyons had when asked to point out her assailant in the courtroom (R 234-235). During the course of the

prosecutor's attempt to have her identify Mr. Daniels, he asked her whether she saw the man who assaulted her in court. She said, "Yes," but gave a negative nod of her head (R 236). And asked to point to the prosecutor in an attempt to show she was capable of correctly identifying people she knew, she pointed first to Ms.Beck and then herself (R 235). Apart from such instances of demonstrated inaccuracy, Ms. Runyons' testimony at the hearing on her competency consisted entirely of responses to the State's leading questions with the unsurprising result that the "right" answers were generally elicited (R 240).

On conclusion of the evidence, defense counsel objected to admission of Ms. Runyons' testimony at trial, both on grounds of inaccuracy and because he would be unable to effectively cross-examine her, so that Mr. Daniels would be denied the right to confront the main witness against him. Moreover, defense counsel noted that the efforts of Ms. Beck and the prosecutor to prepare Ms. Runyons to testify by going over her story with her repeatedly had very likely resulted in her memorization of her responses to the questioning (R 261-264). Ms. Runyons was capable of rote learning (R 209) and her answers of such questions was automatic: "they bypass the level of conscious thought." (R 194). How, indeed, could defense counsel in any way test the accuracy of such memorized responses?

The trial judge rejected Mr. Daniels' motion to preclude Ms. Runyons from testifying (R 270), in conformity with its earlier expression of opinion that , "I don't think anyone has to answer cross-examination questions fully and completely." (R 134).

However, the right of confrontation and cross-examination guaranteed to the defendant by the Sixth Amendment to the United States Constitution has been jeolously guarded. Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974):

> "The main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination. The opponent demands confrontation, not for the idle purpose of gazing upon the witness, or of being gazed upon by him, but for the purpose of cross-examination, which cannot be had except by the direct and personal putting of questions and obtaining immediate answers." Id., 415 U.S. at 315-316, 39 L.Ed.2d at 353. (Emphasis original, citing 5 J. Wigmore, Evidence, §1395, p. 123 (3d ed. 1940).

Thus, in Davis, the Supreme Court reversed the defendant's conviction because the trial court had precluded cross-examination of the State's key witness regarding the fact that he was on juvenile probation. The cross-examination permitted, asking whether the witness was biased, was not sufficient. From this rather broad query, the jury may have believed that the defendant was engaged in a speculative fishing expedition. To counter this conclusion, the defendant should have been permitted to adduce specific facts from which the jury could draw its own permissible inferences as to the witness's reliability. Id., 415 U.S. at 318, 39 L.Ed.2d at 355.

In the present case, it was the witness's incompetence which not only rendered her evidence subject to doubt at every turn, but also deprived defense counsel of any means to effectively test her recollections and accuracy in communicating them through the only means available to him, cross-examination. The double burden placed on Mr. Daniels by Ms. Runyons' inability to speak

was amply demonstrated at trial. During direct testimony, Ms. Runyons repeatedly answered first one way, then another, sometimes both at once, as to important points in the factual history of her case. This pattern, coupled with a persistent inability to comprehend simple verbal directions, began at the very onset of Ms. Runyons' appearance and continued throughout her testimony.[3]

The prosecutor commenced his examination by asking Ms. Runyons to answer yes or no rather than simply nodding or shaking her head, and received the following response:

A: (Affirmative nod.) (R 343).

The inquiry then continued:

Q: Do you live in Fort Lauderdale?

A: (Affirmative nod.)

Q: Yes or no?

A: No.

Q: Do you live in Fort Lauderdale?

A: Yes.

Q: Yes?

A: Yes. (R 344).

Later, asked whether a truck stopped to give her a ride, Ms. Runyons responded:

A: (Negative nod.) Um-hum. (R 348).

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[3] The following transcript excerpts are by no means an exhaustive listing of the inconsistencies and inaccuracies present in Ms. Runyons' testimony. They do serve to exemplify, however, the extensive nature of the problems arising from Ms. Runyons' disability.

This dual contradictory response had been described by the neurologist treating Ms. Runyons as an attempt to correct an erroneous verbal response (R 315). But Ms. Runyons' testimony indicated that the accuracy of her verbal answers could not be predictably ascertained. For instance, when defense counsel asked Ms. Runyons whether she was too drunk on the night of the offense to remember what happened, she answered with an affirmative nod, but asked to respond, yes or no, answered "No" (R 377-378). Or again,

> Q: ...Now, Miss Runyons, isn't it true you were at the Embassy Club that night and you were with a man in a pick-up truck?
>
> A: Yes.
>
> Q: Did you have an argument with that man in that pick-up truck.
>
> A: Yes, yes. (Negative nod.)
>
> Q: My question is did you have any argument with the man in the pick-up truck at the Embassy?
>
> A: No. (Affirmative nod.) No.
>
> Q: Do you recall seeing a man in a pick-up truck at the Embassy Club?
>
> A: No.
>
> Q: You don't recall --
>
> MR. DUPREE: I object. She said no. Then Mr. Gaeta rephrased it and said she doesn't recall.
>
> THE COURT: Ask it again just to make sure.
>
> Q: Did you have an argument with a man in the pick-up truck at the Embassy Club?
>
> A: No way. (Raises left hand.)

THE COURT: Did the jury get that answer? The answer was no way.

THE JURY: Okay. (R 386-387)

It was certainly true, as the jury had to be told, that Ms. Runyons' final response was "No". But there had been responses on each side of that question earlier. Which one was the correct one? And which was "correct" not just in terms of what Ms. Runyons might have consciously wanted to say, but in terms of what actually happened that night? In, view of Ms. Runyons' simultaneous rendering of mutually exclusionary answers, how, other than by sheer speculation, could the jury determine which answer was correct? And how could defense counsel test her responses in any meaningful way?

There is no way of knowing. The fact that the "no" answer sometimes came second is no accurate indication. If a question was asked often enough by the prosecutor, Ms. Runyons almost always eventually came up with the "right" answer. This technique of the State to obtain the responses it anticipated pervaded Ms. Runyons' testimony:

Q: Did the big man say he was going to hurt you?

A: No (unintelligible) (Points up.)

Q: Did the big man say he was going to hurt you?

A: (Affirmative nod.) Uh-hum.

Q: Yes?

A: Yes. (Unintelligible) (R 354).

Q: Were you afraid of the men?

A: No.

Q: Were you afraid of the men?

A: Yes.

* * *

Q: Did you think they were going to rape you?

A: (Affirmative nod.) Uh-hum.

Q: Yes?

A: Yes. (R 355)

Q: When you broke the window, did you run away from the man?

A: No, I didn't. (Unintelligible).

Q: After you broke the window of the house, did you try to run away from the man; from the big man?

A: Yes. (Affirmative nod.) (R 358)

Q: Did he tell you that he wanted to have sex with you? Yes or no?

A: No.

Q: Yes or no?

A: Yes.

Q: Yes?

A: Yes. (R 366-367).

Q: Did he try to have sexual intercourse with you?

A: (Negative nod.)

Q: Did he try to have sex with you?

A: Uh-hum. (Affirmative nod.)

Q: Yes?

A: Yes.

Q: Lillie, were you screaming when you were in the house?

A: No.

Q: Were you screaming?

A: Yes, sir. (R 368).

But sometimes, especially during defense counsel's cross-examination, it took three or even four repetitions before Ms. Runyons' answers changed:

Q [by prosecutor]: Did you have any clothes on [when the police arrived]?

A: Yes.

Q: Or yes?

A: Yes.

Q: No or yes?

A: Yes.

Q: Did you have any clothes on?

A: Yes. No.

Q: No?

A: No. (R 370).

Q: You talked to Mr. Daniels; didn't you?

A: No.

Q: Yes?

A: No.

Q: No what?

A: Yes.

THE COURT: Talked to him where?

Q: Did you talk to Mr. Daniels that night?

A: No.

Q: No?

MR. DUPREE [prosecutor]: I'd like the record to reflect she nodded yes. May we have the question reasked? (R 388).

Q: Okay. Miss Runyons, isn't it true that you also indicated that when you arrived at the house, that both men got out of the truck?

A: No. Go way. (Unintelligible.)

Q: Did both men go out of the truck?

A: (Affirmative nod.) Uh-hum.

Q: Both men got out of the truck initially; ist hat what you're saying?

A: Yes. (Affirmative nod.)

Q: Okay. Are you saying that the little man stood there and drank your --

A: No. (Negative nod.)

Q: You are not saying - Let me ask that again. Are you indicating that the little man drank your liquor?

A: (Affirmative nod.) No.

Q: He didn't drink her liquor?

MR. DUPREE: She nodded yes.

Q: Are you indicating that the little man stood there by his vehicle and drank you liquor?

A: (Inaudible) Nods.

Q: Yes?

A: No way.

THE COURT: Instead of using the word indicating, you say are you telling us.

Q: Miss Runyons, are you telling us that the little man, the shorter man --

A: (Affirmative nod.) (Affirmative nod.)

Q: Stood there and drank your liquor?

A: Liquor.

Q: Yes?

A: Yes.

Q: So he was standing there in front of the house drinking your liquor?

A: (Affirmative nod.)

Q: Is this the vacant house we are talking about?

A: No way. (Unintelligible).

Q: Let's take one question at a time. The house he was drinking your liquor in front of, that was the vacant house; is that correct?

A: No, (Unintelligible) (Affirmative nod.)

MR. DUPREE: Was it the abandoned house?

Q: Was it the abandoned house?

A: (Affirmative nod.) (Unintelligible)

Q: Let's try it again. Miss Runyon's [sic], you are telling us that the little man drank you liquor?

A: (Affirmative nod.)

Q: And he drank your liquor outside of the truck?

A: Uh-hum. (Affirmative nods.)

Q: All right and he drank the liquor in front of the house; correct?

A: Uh-hum.

Q: So he was in front of the house along with Mr. Daniels, you are saying?

A: (Affirmative nod.) Uh-hum.

Q: Okay. (R 392-394).

Q: When the police came you started yelling; is that right?

A: No way. No way. No way there.

Q: Let's slow down. When the police came you started yelling?

A: (Unintelligible.)

Q: Yes?

A: Yes. No way.

Q: All right. Let's try --

THE COURT: Maybe it's the word started that is bothering her.

Q: All right. When the police came, you yelled?

A: No way. (Affirmative nod.) Yes.

Q: Yes?

A: That's right. (R 397).

Q: All right. Before July 10, 1983, did you have those little scrapes?

A: No.

Q: You did not?

A: No.

Q: How did you get those?

A: That (Unintelligible) no way.

Q: Did you ever cut your nose? I mean was your nose ever cut before July 10, 1983?

A: He --

Q: Was your nose ever scraped before July 10, 1983?

A: No.

Q: You never had your nose scraped before July 10, 1983?

A: (Unintelligible.)

Q: No or yes?

A: Yes.

Q: You did have it scraped prior, before July 10th?

A: (Negative nod.) (Affirmative nod.)

Q: Let's try it again. Before July 10, 1983 was your nose scraped?

A: Yes. (Affirmative nod.)

MR. DUPREE: Judge, I have to object as to relevancy unless there is a time span. I mean she could have cut her nose when she was four years old.

Q: (By Mr. Gaeta) I'll go further. Miss Runyons, had you scraped or injured your nose before July 10, 1983, within, let's say, a month period?

A: No way I do that.

Q: Not within a month?

A: Right.

Q: Can you give me an idea of when you scraped or injured your nose?

A: (Points to face.) (Unintelligible.)

Q: Prior, before July 10, 1983, when was the last time? Can you give me an indication?

A: (Inaudible)

Q: Can you show me with fingers or anything?

A: (Points to face.)

Q: But as far as the time period before July 10, 1983, for instance, in weeks can you tell me how many weeks before you injured your nose?

A: No.

Q: You can't. (Negative nod.). (R 414-416).

How could any cross-examination worthy of the name be undertaken of a witness who exhibited such inconsistency and indefiniteness in her responses, the intelligibility of which degenerated completely when a question developed the slightest

bit of complexity or delved into somewhat less concrete areas of inquiry? The State itself recognized that Ms. Runyons' ability to relate accurate information was severely restricted. When defense counsel asked the witness how many times she had been convicted of a crime, certainly a basic question in a criminal prosecution, the prosecutor objected:

> "Mr. Gaeta knows good and well that she can say any number." (R 401)

Defense counsel was required to ask the question in leading form: "Miss Runyons, you have one felony conviction; correct?" (R 401).

A witness who could answer "any" number when asked about her prior convictions even after extensive coaching by the State is a witness who has demonstrated her inability to either comprehend a question or formulate a "true" answer to it. It is also a witness of whom meaningful cross-examination is completely impossible. These defects become especially serious in light of the undeniable focus of sympathy Ms. Runyons must have presented to the jury as an elderly ("I believe Miss Runyons is 48. She looks about 68," said the trial judge (R 722)), destitute, pathetic black victim of a disabling stroke trying to testify about an occurrence which the State claimed was a brutal sexual assault. Faced with the impossibility of discerning by study of her own "testimony" what Ms. Runyons really knew about the incident, it must have been all too easy for the jury to simply accept the State's version of what she was trying to say, and there was absolutely no way Mr. Daniels could effectively test her account as presented via the State's repetitive examination technique and her own contradictory responses. In view of the

demonstrated incompetence of Ms. Runyons to testify, then, the instant case requires the same holding as Davis v. State, 348 So.2d 1228 (Fla. 3d DCA 1977), where it was held an abuse of discretion to permit a five-year-old child to testify where the witness continually affirmed that he had been told by his mother what to say in court and the mother did not hide the fact that she and her husband had refreshed the child's memory of the alleged incident several times. Sub judice, the witness was subjected to the same kind of influences with respect to the content of her testimony, and had even less ability or motive than the child in Davis to withstand that influence. Consequently, it was reversible error to permit her to testify over Mr. Daniels' pretrial objections (R 261-269, 742-743) or to refuse to strike her testimony at trial (R 339-340, 379-380, 631-632, 687-689).

POINT IV

THE TRIAL COURT ERRED IN DENYING PETITIONER'S MOTION FOR DISCHARGE AND GRANTING EXTENSIONS OF SPEEDY TRIAL TIME WHERE IT WAS NEVER SHOWN THAT THE INCOMPETENT WITNESS, LILLIE MAE RUNYONS, WOULD EVER DEVELOP SUFFICIENT ABILITY TO TESTIFY INTELLIGENTLY AND ACCURATELY.

Mr. Daniels was arrested on the day of the alleged assault against Ms. Runyons, July 10, 1983 (R 521). He remained in custody during the pendency of the charges against him. On January 6, 1984, the State obtained, over Mr. Daniels' objection (R 9), a 60-day extension of speedy trial time because Ms. Runyons had suffered a stroke rendering her incapable of communicating (R 3-4). Although Ms. Runyons had been in this condition for the preceding four (4) or five (5) months, she had received no special treatment which would lead to improvement. Nor was the State able to suggest any grounds for believing that her ability to communicate would, in fact, return. See, R 14. Rather, at a hearing held January 27, Ms. Runyons' treating physicians opined that she had a "very, very poor prognosis" (R 58). Although there might be "something that could be done for her fairly profound episode" (R 126), her outlook was less than favorable in view of the length of time she had already been incapacitated (R 129). In any event, any measurable improvement would take at least six (6) months to a year to show itself (R 127).

Despite the frankly speculative nature of the medical opinion presented, the trial judge ratified the earlier order extending speedy trial time and granted a further extension until

April 1 (R 145). In response to Mr. Daniels' objection (R 147), the judge ordered the State to set up a speech therapy program for Ms. Runyons (R 145).

On March 29, 1984, upon expiration of the original 60-day extension of speedy trial time, the State admitted that speech therapy had not begun until the beginning of March and then only on a once-a-week basis (R 152, 153). Significant therapy did not actually begin until March 14 (R 167). Again over Mr. Daniels' objection (R 154, 156), the State was granted another extension of speedy trial, until May 2, 1984 (R 155). On that day, the speech therapist, Bonnie Beck, reported that Ms. Runyons had reached her maximum improvement (R 169) after about six weeks of therapy (R 167). She could, in Ms. Beck's opinion, answer 90% of simple questions put to her accurately, although it was easy to confuse her (R 168). Nevertheless, an additional two-week extension of speedy trial time was granted at the State's request to allow Ms. Runyons to be examined by her neurologist, Dr. Stoll (R 173). Mr. Daniels' objections were again overruled (R 177), and his motions for discharge on speedy trial grounds were denied (R 23, 279-283, 733, 745), even though he had at all times announced ready for trial and had even filed a demand for speedy trial (R 157). This was error.

Fla.R.Cr.P. 3.191(d)(2)[4] provides, in pertinent part, that

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[4] Since the instant case was tried well before January 1, 1985, the most recently amended rules of criminal procedure effective that date have no application to this appeal.

"The periods of time established by this Rule may at any time be waived or extended by order of the court...(ii) on the court's own motion or motion by either party in exceptional circumstances as hereafter defined..."

"Exceptional circumstances" are defined in R.Cr.P. 3.191(f):

> As permitted by this Rule, the court may order an extension of time or continuance where exceptional circumstances are shown to exist; exceptional circumstances shall not include general congestion of the court's docket, lack of diligent preparation or failure to obtain available witnesses, or other avoidable or foreseeable delays.
>
> Exceptional circumstances are those which as a matter of substantial justice to the accused or the State or both require an order by the court. Such circumstances include (i) unexpected illness or unexpected incapacity or unforeseeable and unavoidable absence of a person whose presence or testimony is uniquely necessary for a full and adequate trial; (ii) a showing by the State that the case is so unusual and so complex, due to the number of defendants or the nature of the prosecution or otherwise, that it is unreasonable to expect adequate investigation or preparation within the periods of time established by this rule; (iii) a showing by the State that specific evidence or testimony is not available despite diligent efforts to secure it, but will become available at a later time; provided, not more than two continuances shall be granted on this ground; (iv) a showing by the accused or the State of necessity for delay grounded on developments which could not have been anticipated and which will materially affect the trial; (v) a showing that a delay is necessary to accommodate a co-defendant, where there is reason not to sever the cases in order to proceed promptly with trial of the defendant; (vi) a showing by the State that the accused has caused major delay or disruption or preparation of proceedings; as by preventing the attendance of witnesses or otherwise.
>
> Under the foregoing circumstances the Court may set a new trial date within a reasonable time.

In order for the State to meets its burden to show that exceptional circumstances exist, see, D.A.L. v. State, 456 So.2d 1333 (Fla. 5th DCA 1984), then, it must demonstrate both that a witness's evidence became unexpectedly unavailable, and that there is some reasonable likelihood that the evidence will become available at some foreseeable future date. Thus, in State v. Brunson, 422 So.2d 956 (Fla. 1st DCA 1982), the State's attempt to demonstrate exceptional circumstances to justify an extension of speedy trial time was held inadequate, where a witness was out of town on vacation at the time the case was called for trial. Although the State knew of this witness's vacation plans, it made no effort to obtain an earlier trial date or to encourage the witness to alter his plans.

> "In our view, the state was not diligent in its preparation and prosecution of this case, and we accordingly reversed the judgment of guilt and order that the Petitioner be discharged." Id. at 957.

The instant case presents a like situation. Ms. Runyons suffered her stroke within a couple of weeks of Mr. Daniels's arrest. The State had ample time to seek treatment for its key witness in the months before the 180-day time period for speedy trial expired. It did not do so. Instead, it waited until the 180th day before asking for an extension of time, and then again waited until the final days before expiration of that extension before obtaining the services of a speech therapist. Even more importantly, the State never made any showing, when either the original or the second extension of time was applied for, that it had any realistic expectation that Ms. Runyons would or could

ever be restored to competency to testify, so that her evidence would be "available." And see, Argument, Point II, supra. Indeed, the testimony of the medical witnesses offered at the extension hearings was, at best, extremely pessimistic as to Ms. Runyons' prognosis, with very good reason. Consequently, the trial court erred in finding that exceptional circumstances existed to extend the speedy trial time, and Mr. Daniels' motion for discharge should have been granted.

POINT V

THE TRIAL COURT ERRED IN REFUSING TO GRANT A MISTRIAL WHERE A POLICE WITNESS STATED ON DIRECT EXAMINATION THAT AFTER BEING ARRESTED, MR. DANIELS SAID HE DIDN'T WISH TO MAKE A STATEMENT.

During the direct examination of the police officer who arrested Mr. Daniels, the following occurred:

> Q: Did you ask Mr. Daniels if he understood? At the end of the Miranda rights form there's a statement to the effect knowing your rights as I have given them to you, do you wish to speak to me. Did you ask Mr. Daniels that?
>
> A: I did.
>
> Q: Did he indicate he wanted to speak to you?
>
> A: He stated he didn't want to make a statement. I wasn't prepared to take a full statement.
>
> MR. GAETA [defense attorney]: Judge, can we approach the bench?
>
> THE COURT: Take the jury out, please.
>
> (Thereupon, the jury exited the courtroom.)
>
> MR. GAETA: Judge, at this time the defense would move for a mistrial in that this deputy has made a direct comment upon my client's right to remain silent; totally prejudicial.
>
> MR. DUPREE [prosecutor]: He said he wanted to make a statement.
>
> THE COURT: He did?
>
> MR. DUPREE: He said he did want to make a statement.
>
> MR. GAETA: That's not what I heard.
>
> THE COURT: That's not what I heard.
>
> THE COURT REPORTER: That's not what I heard.

THE COURT: That's not what Rose [court reporter] heard it.

MR. GAETA: May we have the record read back?

(Thereupon, the court reporter read the requested portion of the record as above recorded.)

THE COURT: You say he did want to make a statement?

THE WITNESS: Yes, Your Honor.

THE COURT: The officer indicates that what he said was that he did want to make a statement. Not that he didn't. Otherwise, I probably would have granted the motion.

MR. GAETA: May the record also reflect I heard didn't, the Court heard didn't, as well as the court reporter.

THE COURT: It doesn't make any difference. (R 501-502

The trial judge thereafter denied Mr. Daniels' motion for mistrial:

> "I was ready to grant it but the officer says that's not what he said so I guess some of us didn't understand him. We'll correct that." (R 504).

It is a violation of the Defendant's due process rights under the federal constitution for the State to refer in any way to his exercise of his Fifth Amendment right to silence. Doyle v. Ohio, 426 U.S. 610 (1976). While the "Miranda"[5] warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the

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5 Miranda v. Arizona, 384 U.S. 436 (1966).

warnings. Doyle v. Ohio, supra. Any such comment has long been regarded in this State as reversible error, without regard to the harmless error rule. Shannon v. State, 335 So.2d 5 (Fla. 1976).

In the present case, the officer clearly testified that Mr. Daniels didn't want to make a statement to police. Defense counsel, the court, and the court reporter heard him so state, and the jury may also be presumed not to have had its ears stopped to what was said. Once this remark was made, mistrial was mandated. Turner v. State, 414 So.2d 1161 (Fla. 3d DCA 1982). That the officer subsequently testified briefly that Mr. Daniels made an inculpatory statement[6] does not cure the error which was created when the officer testified that Mr. Daniels remained silent. In Roban v. State, 384 So.2d 383 (Fla. 4th DCA 1980), this court held that reversal was required despite the fact that after an officer testified that the defendant refused to give a statement subsequent to being advised of his rights, the state introduced the defendant's oral inculpatory statement. See also, Peterson v. State, 405 So.2d 997 (Fla. 3d DCA 1981) [reversible error where defendant said he would answer some questions but would stop when he didn't want to answer any more; subsequent testimony that defendant answered some questions but 'would not explain...the time of day' held independently erroneous.] Fundamental fairness particularly requires this result in the instant case where, at the State's behest, the trial court

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6 "He just stated that he met the black female at another location. A friend of his had dropped them off at the house. He had entered the house and under the pretense of having some sort of relationship....He did indicate that it was not his [house]." (R 504-505).

excluded evidence of the exculpatory portion of Mr. Daniels' statement (R 516-526), see, Argument Point V, infra). Therefore, Mr. Daniels' conviction below must be reversed and this cause remanded for new trial.

POINT VI

THE TRIAL COURT ERRED IN EXCLUDING THE EXCULPATORY PORTION OF MR. DANIELS' STATEMENT TO POLICE AFTER THE STATE HAD INTRODUCED THE INCULPATORY PORTION OF THAT STATEMENT.

It is an ancient and venerable rule of evidence that where part of a conversation is introduced into evidence, the opposing party has the right to introduce the rest on cross-examination. Savage v. State, 18 Fla. 909 (1882). This rule is equally viable to this day. E.g., Salter v. State, 582 So.2d 892 (Fla. 4th DCA 1980); Jones v. State, 399 So.2d 67 (Fla. 5th DCA 1981). Moreover, the rule specifically applies to allow defendant to introduce, through cross-examination, exculpatory statements made to a witness from whom the State has elicited testimony that, in the same conversation, the defendant made inculpatory statements too. Thalheim v. State, 38 Fla. 169, 20 So. 938 (1896).

Ignoring this well-established principle, the trial court in the present case allowed the State to introduce Mr. Daniels' admission made at his arrest, that he entered a building which he did not own (R 504), but thereafter precluded defense counsel from cross-examining the arresting officer that at the same time Mr. Daniels explained that Ms. Runyons had voluntarily accompanied him in order to engage in consensual acts of sexual intercourse (R 516).

The purported basis for excluding the complete conversation, a portion of which had been testified to by the officer, was that the exculpatory statements were self-serving hearsay. Fagan v. State, 425 So.2d 214 (Fla. 4th DCA 1983). But Fagan has no

application to the instant case at all. In Fagan, unlike in the present case, the defendant did not testify. More importantly, by its introduction of only a portion of Mr. Daniels' statement, the State effectively misled the jury as to the true nature of the conversation. It is to preclude reliance on this kind of inaccuracy that the rule allowing completion of a partial account of a conversation was formulated. In Fagan, the State had not previously introduced any portion of the defendant's statement.

The error in precluding Mr. Daniels from introducing his exculpatory account cannot be considered harmless. By precluding admission of the true fact that, from the very moment of his first encounter with the police, Mr. Daniels asserted that he and Ms. Runyons were engaged in a consensual sexual encounter, the trial court allowed the jury to erroneously believe that Mr. Daniels' "consent" defense was only concocted some time after his prosecution began. The officer's evidence that Mr. Daniels told him right from the start that Ms. Runyons consented supplied crucial evidence which would have corroborated Mr. Daniels' trial testimony. See, Dukes v. State, 442 So.2d 316 (Fla. 3d DCA 1983) [excluded testimony of defendant's cellmates would have corroborated defendant's testimony and should have been admitted]. It was thus reversible error to sustain the State's objection to Mr. Daniels' proper cross-examination of the arresting officer.

CONCLUSION

Based upon the foregoing Arguments and the authorities cited herein, Petitioner respectfully requests this Honorable Court to reverse the Judgment and Sentence of the Trial Court and remand this cause for new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to ROBERT S. JAEGERS, Assistant Attorney General, 111 Georgia Avenue, West Palm Beach, Florida, by courier, this 19th day of December, 1985.

Of Counsel