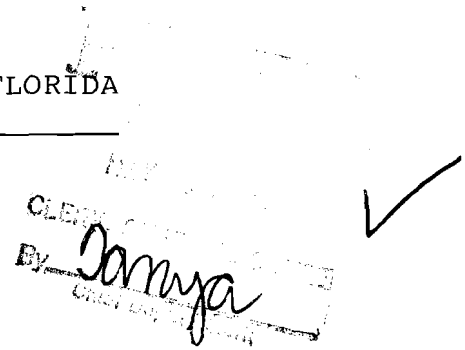
IN THE SUPREME COURT OF FLORIDA



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| MICHAEL SCOTT KEEN, Appellant, | ) | |
| vs. | ) | CASE NO: 67,384 |
| STATE OF FLORIDA, Appellee. | ) | |

**BRIEF OF THE APPELLANT**

Appeal from the Circuit Court, 17th Judicial Circuit, in and for Broward County, Florida
Judge Patti Henning
Case No: 84-9474 CF 10

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## PRELIMINARY STATEMENT

The Appellant MICHAEL SCOTT KEEN was the Defendant in the trial court of the Circuit Court of the Seventeenth Judicial Circuit, the Honorable Patti Henning presiding; Appellee, the State of Florida, was the Plaintiff in the trial court. They will be referred to in this as Appellant or KEEN, and Appellee or State.

## STATEMENT OF THE CASE

The Appellant MICHAEL SCOTT KEEN was arrested on August 23, 1984 and was indicted in Broward County, Florida for the first degree premeditated murder of his wife Anita Lucia Lopez on or about November 15, 1981 (Tr. vol. X, pg. 1635). Various pre-trial motions (Motion to Dismiss for Lack of Jurisdiction, Motion to Suppress Statements, etc.) were litigated before the trial by both Judge Patricia Cocalis (Tr. vol. X, pg. 1676), and by the eventual trial Judge Patti Henning. The trial of the matter commenced on June 3, 1985 in front of Judge Henning, with the jury returning a verdict of Guilty as charged (Tr. vol. VIII, pg. 1381). On June 10, 1985, the jury recommended the sentence of death by a unanimous vote (Tr. vol. IX, pg. 1558), and sentencing was deferred until July 17, 1985. On July 17, 1985, the court denied the Appellant's Motion for New Trial, particularly dealing with juror misconduct (Tr. vol. IX, pg. 1607) and finding three aggravating circumstances, sentenced the Appellant to death (Tr. vol. IX, pgs. 1622-1625).

This timely appeal followed.

## STATEMENT OF THE FACTS

On November 15, 1981, Anita Lucia Lopex Keen, the wife of the Appellant, died when she drowned in the Atlantic Ocean, many miles off the coast of Florida after falling from the Appellant's boat. The State witness, Ken Shapiro, present on the boat at the time, along with the Appellant and the victim, told a story of his planning with the Appellant to kill the victim for insurance money (Tr. vol. V, pg. 778), with such plans culminating with the Appellant, Shapiro and the victim traveling many miles into the ocean, with the Appellant putting the boat into neutral near sunset and pushing his then-pregnant wife over the side of the boat, circling the victim until dark. (Tr. vol. V, pg. 794-797). Upon returning to the backyard dock, Shapiro called the Coast Guard, and, along with Aappellant, filed a Missing Person Report, claiming that the victim was last seen in the cabin of the boat and was no longer present (Tr. vol. V, pg. 896, 899). The Appellant, who testified in his own behalf, told a story of being on the boat with his wife and Shapiro when he was accidently bumped or pushed by Shapiro, sending both the Appellant and his wife into the ocean (Tr. vol. VII, pg. 1202). The Appellant then told of spending many hours looking for his wife until dark, to no avail (Tr. vol. VII, pg. 1204, 1206 and 1207). Where Shapiro claimed the story of the victim's disappearance was concocted

out of his fear for the Appellant (Tr. vol. V, pg. 801), the Appellant claimed to have gone along with Shapiro's story out of a loyalty to Shapiro (Tr. vol. VII, pg. 1211). After efforts by the Appellant to collect life insurance proceeds from two separate policies (Tr. vol. VI, pg. 941, 989), including giving a tape recorded statement, exhibit #7 of the State, (Tr. vol. VI, pg. 924-948), and filing a Petition for Order of Presumption of Death (Tr. vol. VI, pgs. 978, 940, 984), the case lay dormant for almost three years until the Broward Sheriff's Office received a tip from the insurance companies, and, based on that tip, approached Ken Shapiro who then gave his complete story without immunity, as he was overcome by conscience (Tr. vol. V, pg. 805, 807). The statement of Shapiro led to an arrest warrant for the Appellant, and the story was strengthened when prison inmate Mike Waddle told of inculpatory statements supposedly made by the Appellant (Tr. vol. VI, pgs. 1005-1006).

Other facts will be cited through the body of the brief as appropriate.

## POINT I

THE STATE OF FLORIDA HAS NO JURISDICTION IN THE INSTANT CASE, AS THE INCIDENT OCCURRED ON THE HIGH SEAS.

The Appellant was charged with First Degree Murder By Premeditation, with the allegations in the Indictment that the victim was taken a considerable distance into the Atlantic Ocean and drowned. (Tr. vol. X. pg. 1642). The Appellant filed a Motion to Dismiss the Indictment for lack of jurisdiction (Tr. vol. X, pg. 1659), and a hearing on such Motion was held on November 4, 1984, with the prosecutor conceding that the State of Florida's jurisdiction ended at the three mile limit and that the instant case was, in fact, outside of that area. (Tr. vol. I, pgs. 100, 109). See also United States v. Romero-Galue, 757 F.2d. 1147 (U.S.C.A. 11th Circ. 1985), a Florida case where it was again reiterated that the high seas lie seaward of a nation's territorial sea, such territorial sea being the band of water that extends up to three miles out from the coast. In the light most favorable to the State in this case, witness Ken Shapiro testified that although the incident in question happened well into the area known as the high seas, the planning and premeditation, if you will, occurred in Broward County, State of Florida. (Tr. vol. V, pg. 788). Under this court's decision in Lane v. State, 388 So.2d. 1022 (Fla. 1980), this court specifically found

that premeditation in a murder case was an essential element for purposes of jurisdiction being proved in the State of Florida. Page 1028.

However, the instant case presents a situation which is entirely different from that in Lane and its progeny, as the instant case deals with a supposed murder on the high seas giving the United States courts jurisdiction to the exclusion of the state courts.

In finding a jurisdiction in the State of Florida by virtue of premeditation occurring within the State, this court in Lane, supra, interpreted §910.005 of the Florida Statutes:

> 1. A person subject to prosecution in this state for an offense that he commits while either in or outside the state, by his own conduct or that of another for which he is legally accountable if:
> (a) the offense is wholly or partly within the state;
>
> (b) the offense is committed partly within the state if either the conduct that is an element of the offense or the result that is an element occurs within the state.

The court went on to find that the premeditation in

Florida gave this state jurisdiction over the murder which probably occurred in Alabama, where the body was found after Lane's confession. In this broad holding, this court recognized that the decision granted the state of Florida broader jurisdiction than many of the other sister states. Page 1028.

The problem in this case arises, however, due to the fact that the United States courts have exclusive jurisdiction over the incident involved by virtue of 18 U.S.C., Section 7, entitled Special Maritime and Territorial Jurisdiction of the United States Defined, which states in pertinent part:

> The term special maritime and territorial jurisdiction of the United States as used in this title includes:
> (1) The high seas, any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular state and any vessel belonging in whole or in part to the United States or any citizen thereof ..... when such vessel is within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular state.

18 U.S.C. Section 7 then goes on to also include within this special maritime jurisdiction lands reserved or required for the use of the United States under the exclusive or concurrent jurisdiction thereof for the erection of forts, magazines, arsenals, dockyards and other needful buildings. This Section has been interpreted as including murders committed on the high seas or on lands within the jurisdiction. Jones v. United States, 137 U.S. 202, 11th S.Ct. 80.

While the State of Florida certainly has the right to control the conduct of its citizens upon the high seas, it must be with respect to matters in which the state has a legitimate interest and where there is no conflict with acts of Congress. Skiriotes v. Florida, 313 U.S. 69, 61 S.Ct. 924 (1941), pg. 929. An example of this exercise of authority, seen in Southeast Fisheries Association v. Department of Natural Resources, 453 So.2d. 1351 (Fla. 1984), where the State of Florida exercised its authority with legislation dealing with the regulation of fishing activities. In interpreting such legislation and upholding its constitutionality, this court held that "We recognize that the State can regulate and control the operation of vessels and the acts of its citizens in waters outside Florida's territorial limits, provided however, that the federal court has not preempted state regulation." Page 1354.

The State of Florida had an interest and legislated toward that interest and such legislation was upheld. However, dealing with the instant case and the murder provisions, the federal court clearly preempts the state in matters on the high seas and on U.S. registered vessels and, more specifically, there is no Florida statute or legislation attempting to usurp this extraordinary teritorial jurisdiction.

This conflict between state and federal jurisdictions was discussed briefly in Ross v. State, 411 So.2d. 247 (Fla. 3rd DCA 1982), where Ross was caught with contraband at the Miami Airport and was eventually stopped in the customs area, an area arguably within exclusive federal jurisdiction. Ross's theory hit complications because there was no showing that the State of Florida gave up jurisdiction on that particular area of property obviously within the state, and, more practically, Ross carried the dope from the airplane to the customs area with such runway and hallway being Florida property. However, the court did notice that Ross's argument would have merit if it had been indisputedly established that the customs area within the airport was property acquired by the United States from the State of Florida, and the United States had, by separate act, accepted exclusive jurisdiction over the property. Page 248.

Obviously Appellant KEEN's Motion has merit because it is indisputable that the incident in question happened out-

side any arguable Florida jurisdiction and was comfortably within the definition, and thus jurisdiction, of 18 U.S.C. Section 7.

This court's attention is also directed to Wynne v. United States, 217 U.S. 234, 30 S.Ct. 447 (1909), where the Supreme Court reviewed a first degree murder and death sentence case for a murder committed on a ship while it was in the harbor of Hawaii in the territory of Hawaii. The jurisdiction of the United States court was upheld despite the contention that the harbor of Honolulu, although admittedly within the admiralty and maritime jurisdiction of the United States, was a locality not out of the jurisdiction of any particular state because it was within the jurisdiction of the territory of Hawaii. Page 447.

Similarly, in Murray v. Hildreth, 61 F.2d. 483 (U.S.C.A. 5th Circ. 1932), Murray filed a habeas corpus petition challenging the United States jurisdiction on a warrant which charged him with Murder on the High Seas within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of the State of Florida on board a vessel belonging in whole or part to a citizen of the United States. Page 44. The crime was committed on board the boat or in the water just alongside, within two hundred feet of the Florida coast near Dania beach. Murray contended that the

crime alleged against him because the place where it was committed was not punishable in the courts of the United States but within the exclusive jurisdiction of the courts of the State of Florida. In Affirming the conviction and the jurisdiction of the United States District Court, the court noted that as between nations there is concurrent jurisdiction in foreign waters, and as between the United States and the several states, there is no reason why the jurisdiction over crimes within the three-mile limit could not be made concurrent as has usually been done in the punishment of offenses committed in violation of both federal and state laws. Page 485.

Certainly, the instant matter before this court clearly occurred outside of any arguable Florida jurisdiction, as it was well outside of the three mile limit in the jurisdiction of the federal courts. See also Nixon v. United States, 352 F.2d. 601 (U.S.C.A. 5th Circ. 1965), where the court Affirmed a murder conviction done on a boat on the high seas, stating that "We conclude that the record supports the finding that the actions leading to Nixon's indictment took place on the high seas. The case is therefore within the special maritime and territorial jurisdiction of the United States. Page 602. See also Hockenberry v. United States, 422 F.2d. 1171 (U.S.C.A. 9th Circ. 1970), holding that a special territorial jurisdiction was in effect over an assault

with a deadly weapon at a federal prison and that California statutes were not applicable; and United States v. Blunt, 558 F.2d. 1245 (U.S.C.A. 6th Circ. 1977), assault in a federal prison under the territorial jurisdiction of the United States.

As this case does not deal with a question of situs between two states, but deals unquestionably with an act carried out on the high seas on a United States registered vessel, the State of Florida is and remains without jurisdiction over the incident, as the United States court has exclusive jurisdiction under 18 U.S.C., Section 7.

The case must then be remanded and the Indictment dismissed in favor of federal prosecution.

## POINT II

THE APPELLANT'S RIGHT TO A FAIR TRIAL WAS DESTROYED WHEN THE PROSECUTOR QUESTIONED THE APPELLANT ABOUT AN ELEVEN YEAR OLD,TOTALLY UNRELATED ATTEMPTED MURDER INCIDENT, AND THE TRIAL COURT DENIED A MOTION FOR MISTRIAL.

As early as February 20, 1985, the prosecutor in the instant case filed a Notice of Intent to Rely on Evidence of Another Crime, specifically, an incident of August 8, 1973 in which the Appellant and his brother Patrick Keen supposedly attempted to murder Susan Page by hitting her in the head with a rock while in North Carolina (Tr. vol. X, pg. 1683). After hearing testimony by Susan Page and Kenneth Shapiro along these grounds on June 3, 1985, the trial court reserved ruling on the Appellant's Motion in Limine and the State's proffer with a specific instruction that there would be no mention of such incident until there was a ruling (Tr. vol. II, pg. 354). At the trial, after the direct testimony of Ken Shapiro, the State Attorney renewed his proffer to the court regarding the 1973 incident, with the added ground that Shapiro's knowledge of the 1973 incident would lend credence to Shapiro's claim of fear of the Appellant which caused Shapiro to help the Appellant (Tr. vol. V, pg. 877). Rejecting the State's argument that the defense had opened the door to such inquiry during the cross examination of Shapiro, the trial court

denied the proffer, clearly ruling that "I am not going to permit it in this trial, so the proffered testimony will be refused by the court." (Tr. vol. V, pg. 885). The State again broached the subject with the trial court, arguing admissibility based upon the similarities of the 1973 incident with the present charge, as well as again arguing the basis of fear of Ken Shapiro (Tr. vol. VII, pgs. 1105-1106). Having heard the pre-trial proffer, the mid-trial proffer and the State's argument on both theories of admissibility (similarity and basis for fear), the court again specifically denied the admissibility of the 1973 incident, as there was not sufficient similarity between the incidents, and recognizing that the 1973 action could become a major influence upon the jury that would prejudice them to such an extent that it might not be the only time that this case was tried (Tr. vol. VII, pg. 1107).

The trial court went further to clarify that she did not feel that the door was open on cross examination of Shapiro and would stand by her ruling, excluding the evidence on that ground (Tr. vol. VII, pg. 1108).

After the State rested its case, the Appellant testified on his own behalf and admitted to one felony conviction (Tr. vol. VII, pg. 1173). On cross examination of the Appellant regarding previous acts of violence (Tr. vol. VII, pg. 125), the prosecutor then stated before the jury, "Didn't

you describe to Ken Shapiro how you and Patrick Keen had tried to beat Patrick Keen's wife to death with a rock in North Carolina in 1973?" (Tr. vol. VII, pg. 1259), leading to an immediate objection and Motion for Mistrial, which was denied (Tr. vol. VII, pg. 1260-1273).

It was the purposeful eliciting of this improper and prejudicial evidence and the resultant denial of the Motion for Mistrial which requires a new trial in the instant appeal.

The law in the State of Florida regarding the admissibility of similar act evidence or collateral crimes evidence is well settled, with §90.404(2)(a) of the Florida Statutes being a recent codification of Williams v. State, 110 So.2d. 654 (Fla.), cert. denied 361 U.S. 847 (1959):

> Similar act evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but is inadmissible when the evidence is relevant solely to prove bad character or propensity.

Certainly, similarity between the two incidents is the crucial and threshold question. This court has recently reviewed the Williams Rule law in the state of Florida in Peek v. State, __So.2d.__; 11 F.L.W. 175 (4/18/86), where the court was faced with the review of a first degree murder sexual battery and death sentence case wherein an elderly woman was raped and murdered in her Winter Haven home, dying of strangulation by a robe and a bedspread tied around her neck, after being severely beaten and strapped to a bedpost. In the trial of Peek, a collateral crime was presented to the jury, with evidence that Peek admitted to a rape of a young woman after the incident in question, again in the Winter Park area, and within two months of the initial incident. While this court noted that both incidents involved white females and rapes, were both in Winter Park and within two months of each other, many more dissimilarities were noted, such as one victim being killed, one victim being tied to a bedpost, one victim being old, one crime being done during the daylight hours. etc. Page 176.

This court went on to review and reaffirm the original Williams v. State, supra, wherein Williams was charged and convicted of rape after hiding in the back seat of the victim's car in the Webb City parking lot. The similar act evidence, which was found to be appropriate, was of another incident, six weeks before the main incident, in the

same parking lot at approximately the same hour of the day, with Williams again hiding in the back seat of the car and grabbing the purported victim (who was rescued by police after screaming).

While approving the facts in Williams, supra, by citation, the Peek court reiterated that collateral crime evidence is not relevant and admissible merely because it involves the same type of offense. Pg. 176. To illustrate the point, the Peek court cited to the second Williams case, Williams v. State, 117 So.2d. 473 (Fla. 1960), where a conviction was reversed and collateral evidence rejected by this court, finding that the admission of a collateral offense of a robbery in a robbery and murder trial was "so disproportionate to the issues of sameness of perpetrator and weapon of design that it may well have influenced the jury to find a verdict resulting in the death penalty." Page 176. This court then reviewed Drake v. State, 400 So.2d. 1217 (Fla. 1981), wherein the collateral crime evidence in a murder and rape trial was found to be improper when it was simply shown that Drake had raped two separate women and, as with the victim of the murder, had tied their hands behind their backs.

> A mere general similarity will not render the similar facts legally relevant to show identity. There must be identifiable points of similarity which pervade the compared factual situations. Given sufficient similarity, in order for the similar facts to be relevant, the points of similarlty must have some special character or be so unusual as to point to the defendant. Page 176.

The Peek court eventually reversed the conviction and sentence because of the improper admission of supposed similar act testimony, specifically finding that the crimes' common points are not so unusual as to establish a sufficiently unique pattern of criminal activity to justify admission of the collateral crime evidence. Page 177. Further, the court said that, "If we held the testimony concerning Peek's collateral crime admissible under these circumstances, any collateral crime evidence would be admissible as long as the crimes were of the same type and were committed within the same vicinity." In the case at bar, there were virtually no similarities, other than both victims being young girls and both being insured. The dissimilarities are overwhelming: one incident in Florida, one in North Carolina; eleven year hiatus; one involved a drowning, one involved a striking with a rock; one resulting in death, one resulting

in transporting the supposed victim to a hospital for stitches; one in which the appellant had potential financial gain, and one where there was no interest of such gain, etc. See Larkin v. State, 474 So.2d. 1282 (Fla. 4th DCA 1985), where sufficient similarities were found by the court in two drugstore robberies in which, both times, Larkin approached the pharmacist and asked for a minor medication and then showed a gun to the pharmacist. Larkin then produced a CLOSED FOR INVENTORY sign in both cases and made the pharmacist hang the sign on the door and then, in both cases, asked for specific drugs, including, both times, dilaudid, amytol, and similar drugs, placing the drugs in both instances in garbage bags and then taking the watches and wallets of the pharmacists, as well as Salem cigarettes and Timex watches from the display cases in both instances.

The case at bar is similar to Jackson v. State, 451 So.2d. 458 (Fla. 1984), where this court reversed a murder conviction and death sentence based upon the improper testimony before the jury regarding a boast of Jackson that he was a thoroughbred killer while pointing a gun at a witness. The court found this testimony to be impermissible and prejudicial, being unable to envision a circumstance in which the objected testimony would be relevant to a material fact in issue. While this testimony may have showed an assault on the witness (as

the hitting with the rock showed an assault on Page in the instant matter), it was not relevant to the case to be tried, and in fact, was precisely the kind of evidence forbidden by the Williams Rule.

This court must recall that identity was never an issue in the case at bar, and the only issue to be decided by the jury was the credibility of the Appellant in his explanation of the events versus witness Shapiro. The facts, for the most part, were not in dispute, with both witnesses agreeing that the Appellant, Shapiro and the victim were on the boat, that the boat was many miles into the ocean, and that the victim ended up in the ocean, off of the boat, and drowned. There is no conceivable element of the crime to be proved by such improper and inadmissible dissimilar act evidence, other than the extremely prejudicial element of criminal propensity and bad character.

As this court stated in Peek, supra:

> There is no doubt that this admission (to prior unrelated crimes) would go far to convince men of ordinary intelligence that the defendant was probably guilty of the crime charged. But, the criminal law departs from the standard of ordinary in that it requires proof of a particular crime. Where evidence has no relevancy except as to the character and propensity of the defendant to commit the crime charged, it must be excluded. Page 177.

Clearly, our criminal justice system requires that in every criminal case the elements of the offense must be established beyond a reasonable doubt without resorting to the character of the defendant or the fact that the defendant may have a propensity to commit the particular type of offense.

Therefore, the admission of improper collateral crime evidence is presumed harmful error because of the danger that a jury will take the bad character or propensity to crime thus demonstrated as evidence of guilt of the crime charged. Straight v. State, 397 So.2d. 903 (Fla. 1981), pg. 908; Peek, supra, page 177.

Not only was the evidence in question insufficiently similar to be inadmissible (a fact recognized by the trial court and specifically found in her ruling at vol. VI, pg. 1107), but the sheer damning nature of the proffered testimony, the alleged beating of a young girl with a rock to try to kill her, is so inflammatory and prejudicial as to require exclusion of its own accord, notwithstanding lack of similarity. It is beyond question that any arguable probative value of such eleven year old incident would be highly outweighed by the improper prejudicial effect of such evidence coming before the jury. See Washington v. State, 432 So.2d. 484 (Fla. 1983), also noting the trial court's specific finding that such evidence would be overly prejudicial if heard by the jury (Tr. vol. VI, pg. 1107).

Examining another aspect of this prejudicial material, the court is reminded that at the onset of his testimony, the Appellant admitted to one felony conviction (Tr. vol. VII, pg. 1173), which was, in fact, an accurate representation of his prior criminal activity. §90.610 of the Florida Statutes codifies the Florida law on impeachment by prior conviction and makes clear that impeachment can be attempted through evidence of a conviction of a felony. Although Appellant admitted to a felony conviction, the conviction was not for the North Carolina incident, but was for a totally unrelated act (Tr. vol. IX, pg. 1477), and the State was aware of this. It is well established that the prosecutor can only ask the Appellant, on cross examination, whether or not he had been convicted of a felony and how many times, with no further inquiry by the prosecution, particularly into the nature of the offense, being allowed when the convictions are admitted. Johnson v. State, 380 So.2d. 1024 (Fla. 1979), pg. 1025, 1026. Certainly, if a defendant chooses to bring out his prior convictions in an effort to soften the effect on the jury, the State is not authorized to inquire further than it would otherwise have been allowed to - the defendant does not open the door for the prosecutor to inquire into the nature of the convictions. Sneed v. State, 397 So.2d. 931 (Fla. 5th DCA 1981), pg. 933.

The narrative question on cross examination of the Appellant regarding the 1973 incident was improper impeachment, as the Appellant was never arrested nor convicted for that particular incident, therefore making that conduct inadmissible under §90.610 of Florida Statutes and the incident was simply too far removed in time to be relevant even had there been a conviction. See Braswell v. State, 306 So.2d. 609 (Fla. 1st DCA 1975), pg. 613. Further, this technique on cross examination was highly improper, as it gave the jury the false impression of the Appellant's record, with the inevitable conclusion by the jury being that the conviction that the Appellant admitted to was for the attempted murder with a rock in 1973, that the Appellant's attorney objected to so strongly. This tactic, aside from showing great finesse on the part of the prosecutor, prejudiced the Appellant, as it also showed great prosecutorial misconduct.

The misconduct on the part of the prosecutor in the cross examination of the Appellant by improperly impeaching the Appellant with an incident which was not a conviction, and an incident which was eleven years old, leading the jury to a mistaken impression of the Appellant's criminal record, is further aggravated by the fact that the prosecutor was painfully aware of the trial court's repeated orders denying the admissibility of that 1973 incident before

the jury at the trial phase. (Tr. vol. V, pg. 885, vol. VI, pg. 1107). It was also very clear that the court's Order of Exclusion dealt with the alternate theories held by the prosecutor: Williams Rule/similar evidence and grounds for fear of Ken Shapiro.

It must be noted that this evidence was not elicited mistakenly by the blurting of a witness or an unexpected answer to a proper question. The question, as noted earlier, was a blatant narrative including all of the prejudicial facts which had been ordered excluded by the trial court. Unlike an inadvertant statement by a witness, the question was simply an introduction of similar act evidence by the prosecutor in his question, as in Smith v. State, 340 So.2d. 117 (Fla. 3rd DCA 1976), where a conviction was reversed based upon the cross examination question by the prosecutor on a burglary case, "You would never break into anybody's house, would you?" Page 118. See also Vaczek v. State, 477 So.2d. 1034 (Fla. 5th DCA 1985), where, despite an Order granting a Motion in Limine, the prosecutor specifically asked the victim whether or not she was pregnant at the time of the attack by Vaczek. In reversing the conviction, the court found that the prosecutor's questioning was clearly erroneous and all the more reprehensible in light of the trial court's previous Order of Exclusion.

Certainly, the blatant and purposeful misconduct on the part of the prosecutor in his attempts to circumvent the court's specific and repeated Orders of exclusion of the prejudicial evidence requires reversal of the instant matter.

Finally, regarding the prosecutor's argument that the 1973 incident was brought out, not as similar act evidence, but to support the evidence and credibility of Ken Shapiro, the court is referred to Warren v. State, 371 So.2d. 219 (Fla. 2nd DCA 1979), where the court was faced with a situation where similar fact evidence was brought out during the cross examination of a witness. The State argued that it was not brought out as evidence of a collateral crime, but was brought out to rehabilitate the police officer, and to show the officer's good character and credibility. In reversing the conviction, the court simply stated the obvious and logical response, which is applicable in the case at bar, that being that the prosecutor should have brought forth evidence of the witness's good character rather than testimony showing Warren's propensity for committing armed robbery and escape. Page 220.

Fortunately for the Appellant KEEN, this court has dealt with virtually the identical tactic in the recent case of Robinson v. Florida, __So.2d.__; 11 F.L.W. 167 (4/18/86) where this court reviewed a death sentence and, in fact, reversed the sentence because of a similar tactic used by the prosecutor before the jury. When cross examining several

defense witnesses during the sentencing portion of the trial, the State brought up two crimes that occurred after the murder in question and that Robinson had not even been charged with, let alone convicted of, the identical situation facing this court with the 1973 incident. As in the case before this court, the prosecutor brought up the other non-convictions in Robinson through improper narrative questions as, "Are you aware .... that the defendant went back to the jail to commit yet another rape?" Page 168, note 3. Where the State in the instant case may argue that the 1973 North Carolina incident would give credence to the testimony of Shapiro regarding his fear of the Appellant, the State in Robinson argued that the incidents would undermine the credibility of Robinson's witnesses who testified that Robinson was a good-hearted person and a good worker. As in the case at bar, Robinson had not been convicted of the supposed crimes, and a timely objection was logged. The prosecutor in Robinson went on to argue that giving such information to the jury by attacking a witness's credibility is permissible, yet a very fine distinction - a distinction that this court found to be meaningless because

> It improperly lets the State do by one method something which it cannot do by another. Hearing about other alleged crimes could damn a defendant in the jury's eyes and be excessively prejudicial. We find the State went too far in this instance. Page 168.

Clearly, the case at bar is identical to the situation in Robinson, except that in this instance, the misconduct was more grievous due to the court's repeated exclusion of the incident and the prejudice was greater to Appellant KEEN due to the close credibility question presented to the jury and the shockingly prejudicial nature of the 1973 incident as chronicled in the prosecutor's question (and as seemingly admitted by the Appellant's testimony of one prior felony conviction).

THEREFORE, a new trial must be granted, and a new jury must be allowed to try the case without the prejudicial matter before it.

## POINT III

APPELLANT WAS DENIED A FAIR TRIAL BY THE CUMULATIVE AND REPEATED INCIDENCES OF PROSECUTORIAL MISCONDUCT.

Separate and apart from the misconduct of the prosecuting attorney in violating the court order in bringing in incidental criminal actions by the Appellant, the prosecutor went further and repeatedly prejudiced the Defendant in the jurors' eyes to the extent that a fair trial was not received by the Appellant.

Upon direct examination of State witness Ken Shapiro, the prosecutor purposely elicited the highly prejudicial and totally irrelevant fact that the victim was known to be pregnant at the time of her death (Tr. vol. V, pg. 784). This information was clearly elicited for the sole and improper purpose of appealing to the sympathy of the jury, to the prejudice of the Defendant. See Edwards v. State, 428 So.2d. 357 (Fla. 3rd DCA 1983). See also Vaczek v. State, 477 So.2d. 1034 (Fla. 5th DCA 1985), where a conviction was reversed because of the prosecutor's eliciting the fact that a victim was pregnant at the time of a first degree murder. The court found that the question was clearly erroneous and that the loss of the victim's unborn child was such an inflammatory fact that it could not be deemed harmless error. The emotional and prejudicial effect

of this testimony in the instant case is clearly exhibited by the fact that the victim's pregnancy and unborn child were referred to repeatedly by the trial court in her Sentencing Order. A new trial is required.

The prosecutor was further guilty of misconduct when he gave false credibility to State witness/inmate Mike Waddle by eliciting the fact that another inmate, George Porter, had been given a polygraph (at the prosecutor's request) and had been rejected since he had failed the polygraph. (Tr. vol. VI, pg. 1096). When Detective Amabile was cross examined regarding whether or not he had spoken to an inmate named George Porter, and whether or not the Detective tried to improperly influence inmate Porter to testify against the Appellant (Tr. vol. VI, pg. 1084-1085), the prosecutor then, on redirect, made it known to the jury that he had personally instructed the Detective to give Porter a polygraph examination regarding the truthfulness of his statements in a related murder, and that Porter did not pass the polygraph test. (Tr. vol. VI, pg. 1096). After a prompt objection, the prosecutor finalized this ploy by asking the Detective, "As a result of that (failing the polygraph), was he discarded as a witness?" Answer: "Yes, he was." (Tr. vol. VI, pg. 1097).

Clearly polygraph evidence is inadmissible, both the results and testimony regarding such tests, Codi v. State, 313 So.2d. 754 (Fla. 1975), yet this misconduct, standing alone, would probably not be reversible error without consideration of its placement in the trial and its unquestionable effect on the jury. The witness immediately before Detective Amabile was Mike Waddle, coincidentally enough, a Broward County Jail inmate, who testified regarding highly damaging statements by the Appellant. (Tr. vol. VI, pgs. 1004-1006). Where an inmate's testimony might be (justifiably) highly suspect in the eyes of the jury, and where vigorous cross examination as in the case of Waddle might further negate the effect of such testimony,any jury of lay persons would take an extremely different view of such witness and his testimony when they learn that the prosecutor standing before them personally screens such inmate information, personally orders polygraph examinations for such witnesses, and personally discards such witnesses, should they fail the polygraph examinations.

Clearly, such comments by a prosecuting attorney vouching for the credibility and honesty of a witness are improper, Richmond v. State, 387 So.2d. 493 (Fla. 5th DCA 1980), and this is all the more true in the instant case when the specter of the polygraph looms over Appellant's

shoulder. This situation was aggravated when, during the closing argument, the prosecutor stated that if Waddle lied, he could have violated his probation (Tr. vol. VIII, pg. 1349). Again, not only is the prosecutor improperly vouching for the credibility and truthfulness of the witness, and thereby invading the province of the jury, Barnes v. State, 93 So.2d. 863 (Fla. 1957), but also improperly implied that the State had more evidence or knowledge that the jury did not know that made the prosecutor so certain that Waddle was not lying. Glantz v. State, 343 So.2d. 88 (Fla. 3rd DCA 1977). It has been often said that a prosecutor's duty and obligation is to see that justice shall be done, not just to win a case. As was noted by the United States Supreme Court in Berger v. United States, 295 U.S. 788, 55 S.Ct. 629 (1935):

> It is fair to say that the average jury, in a greater or lesser degree, has confidence that these obligations which so plainly rest on the prosecuting attorney will be faithfully observed. Consequently, improper suggestions, insinuations and especially insertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none. Page 633.

More recently, in United States v. Young, __U.S.__; 105 S.Ct. 1038 (1985), the Supreme Court elaborated in a holding which requires reversal in the instant case:

> The prosecutor's vouching for the credibility of witnesses in expressing his personal opinion concerning the guilt of the accused poses two dangers: such comments can convey the impression that evidence not presented to the jury but known to the prosecutor supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury; and the prosecutor's opinion carries with it the imprimatur of the government and may induce the jury to trust the government's judgment rather than its own view of the evidence.
> Page 1048.

Consequently, the cumulative effect of the prosecutorial misconduct, Groebner v. State, 342 So.2d. 94 (Fla. 3rd DCA 1977), when considered with the major indiscretion regarding the 1973 North Carolina incident, requires reversal and a new trial in the instant matter.

## **POINT** IV

THE TRIAL COURT ERRED IN ADMITTING VARIOUS STATEMENTS OF THE APPELLANT TO BE BROUGHT BEFORE THE JURY.

The Appellant was arrested on August 23, 1984 in Seminole County, where he was kept overnight before being transported to Broward County by automobile, with resultant booking in Broward County occurring at approximately 9:00 PM on the 24th of August (Tr. vol. I, pg. 171). At the Motion to Suppress hearing on December 21, 1984, both Detective Amabile and Detective Scheff admitted that the Appellant was not taken before a magistrate in Seminole County, and, in fact, was not taken before a magistrate until almost forty-eight (48) hours after his arrest (Tr. vol. I, pgs. 168-169; vol. II, pg. 215). Rule 3.130(a) of the Florida Rules of Criminal Procedure provides that, except for those persons released on bail, ever arrested person shall be taken before a judicial officer, either in person or by electronic audio visual device, in the discretion of the court, within twenty-four (24) hours of his arrest. Rule 3.130(b) provides that at that initial appearance within twenty-four hours, the court shall not only inform the arrested person of the charges, but shall adequately advise the defendant that he is not required to say anything, that if he is unrepresented,

that he has the right to counsel if he is unable to afford counsel, counsel will be appointed forthwith, and that he has the right to communicate with his counsel and that reasonable means will be provided to enable him to do so. Subsection C(c) states that the magistrate, upon determining that the arrested person cannot obtain counsel, shall immediately appoint counsel for him, and that any waiver of counsel at that state shall be in writing, signed and dated by the defendant. In Anderson v. State, 420 So.2d. 574 (Fla. 1982), this court reviewed a murder conviction and a sentence of death in a murder spree across the country in which Anderson was eventually transported from Minnesota to Florida by automobile. During the four-day sutomobile trip, a statement was eventually obtained from Anderson.

As part of this court's finding of a violation of the Sixth Amendment right to counsel, this court held that:

> Florida Rule of Criminal Procedure 3.130(b) provides that every arrested person be taken before a judicial officer within 24 hours of his arrest. Anderson's four-day car ride obviously prevented that, and it is significant that the elicited statement came far after the time he normally would have appeared before a judicial officer with the attendant advice of rights and appointment of counsel. Page 576.

In an identical situation as that in Anderson, the Appellant in the instant case was advised of his rights on numerous occasions while in Seminole County, yet was not taken before the duty magistrate in Seminole County as is mandated by Rule 3.130. The initial statement by the Defendant was simply that he did not kill the victim and he couldn't understand why Shapiro would tell such a story (Tr. vol. I, pg. 130), with the eight-page handwritten statement in question (exhibit #12) not being obtained until late in the evening on the 24th in Fort Lauderdale - well after time that the Appellant would have appeared before a magistrate.

It is also important to note that Detective Amabile admitted that he knew that he was supposed to take the Defendant before a magistrate within a twenty-four period, yet did not do so (Tr. vol. VI,pg. 1090).

Pursuant to Anderson, supra and Rule 3.130, the statement in question, the eight-page handwritten statement, must be suppressed, and it was reversible error for the court to allow such statement before the jury.

Separate and apart from the violation of Rule 3.130 is the insufficiency of the record to show that the eight-page handwritten statement was freely and voluntarily given

and that it was not elicited in violation of the Appellant's Sixth Amendment right to counsel, although the violation of 3.130 and the twenty-four hour rule is certainly a strong factor to be considered under the counsel/voluntariness question. Upon his arrest in Seminole County at his place of business at approximately 10:00 AM, the Appellant, who was shocked and amazed at his arrest (Tr. vol. I, pg. 160), immediately told his employee, Sam Sparks, to get him an attorney (Tr. vol. I, pg. 162), and both detectives involved were well aware of this effort, although they weren't aware if an attorney had been contacted or not (Tr. vol. I, pg. 178). When the Appellant and the detectives arrived at the Seminole County Jail about fifteen minutes later, (Tr. vol. I, pg. 126-127), the Appellant again stated that he wanted an attorney for bail (Tr. vol. I, pgs. 163-164). The response of the detective was that there was no bail on this offense, and although the Appellant wanted an attorney for bail, he did not ask to call an attorney after the officer's response (Tr. vol. I, pg. 164). After the Appellant was moved from the jail to the headquarters of Seminole County, he again referred to his desire for an attorney, saying that his attorney would ask for discovery (Tr. vol. I, pgs. 165-166). It was also admitted at the Motion to Suppress that the Appellant requested to make a phone call and that

request was refused until he was moved to yet another location (Tr. vol. I, pg. 185), where the Appellant finally did make a phone call from Seminole County (Tr. vol. I, pg. 189). The Appellant then testified that he told the detectives before the car ride that he had talked to his friend Carol and that an attorney would be waiting for him (Tr. vol. II, pg. 232). Despite these many references to the Defendant's request for an attorney, interrogation continued, resulting in the eight-page statement.

Clearly, once an accused has expressed his desire for an attorney, he is not to be subjected to further interrogation until counsel is made available to him, unless he initiates further communications with the police. Edwards v. Arizona, __U.S.__; 101 S.Ct. 1880 (1980), pg. 1885. Similarly, a valid waiver of the right to counsel cannot be established by merely showing that a defendant responded to further police-initiated custodial interrogation, even if he has been advised of his rights. Edwards, supra, pg. 1884. Similarly, the police have an obligation not to act in a manner that circumvents and thereby dilutes protections afforded by the right to counsel. Maine v. Moulton, __U.S.__ 106 S.Ct. 477 (1985), pg. 485. Certainly the State has the burden of establishing a valid waiver of the right to counsel and all doubts must be resolved in favor of protecting a claim

of Sixth Amendment right to counsel. Michigan v. Jackson, __U.S.__; 106 S.Ct. 1404, pg. 1409. Even in the best light of the State, it is clear from the record that the state has failed its burden of showing a waiver of Appellant's right to counsel.

A further impediment for the proper admission of the statment involved was the failure of the State to show that the statements involved were made freely and voluntarily. DeConingh v. State, 433 So.2d. 501 (Fla. 1983). The State must necessarily fail in this aspect of the examination, as every indication by the Appellant seemed to show that he did not want to cooperate: not only did he ask for an attorney on several occasions, but he refused to allow any statements he made to be tape recorded (Tr. vol. I, pg. 140, 150; vol. II, pg. 219), and later refused to sign the handwritten statement which was written by the officers and not by the Appellant (Tr. vol. I, pg. 152; vol. II, pg. 227).

These clear indications of a desire to remain silent must be viewed in conjunction with the repeated promises and inducements if possible leniency if the Appellant cooperated against Shapiro. Amabile stated that if he got a statement from the Appellant it would make the State Attorney's office less likely to offer Shapiro immunity (Tr. vol. I, pg. 198), with these statements being repeated on several occasions throughout the course of the trip and the interview (Tr. vol. II, pgs. 209-211).

Finally, this court must consider the fact that Defendant's physical and emotional state prevented him from giving a free and voluntary statement. Not only was he shocked and amazed at the arrest, but the Appellant was confused, had the chills and was not coherent when he gave his statement (Tr. vol. II, pgs. 233, 270), and, in fact, gave his statement only so he could rest and think and call an attorney (Tr. vol. II, pg. 236) and because of the emotional state that he was in (Tr. vol. II, pg. 242). This court has held, in DeConingh, supra, that when dealing with an upset, crying, confused person, that mental and emotional distress prevented DeConingh from effectively waiving her rights, thereby making a statement inadmissible. Page 503. See also Breedlove v. State, 364 So.2d. 495 (Fla. 4th DCA 1978), wherein a conviction was reversed and a statement found to be involuntary because of Breedlove's emotional confusion raising serious doubts as to whether her statements were knowingly and intelligently made and whether or not such emotional state precluded a knowing and voluntary waiver of Fifth Amendment rights. Page 497.

Since the Appellant was not brought to a magistrate within twenty-four hours of his arrest, and since the various statements attributed to him occurred only after that period of time, and since in his invocation of his right to an attorney and his right to remain silent were not scrupulously honored, it is impossible for this court to find, on the face

of the record, that a knowing and voluntary waiver of Fifth and Sixth Amendment rights occurred. When this is further embellished by the extremely emotional and confused state of the Appellant at the time of the statements, as well as the inducements regarding Shapiro that were made, it is clear that the trial court erred in allowing such eight-page statement to come before the jury.

## POINT V

THE EVIDENCE WAS INSUFFICIENT TO SUPPORT A CONVICTION, AND A NEW TRIAL IS REQUIRED IN THE INTEREST OF JUSTICE.

The entire case against the Appellant was in the form of testimony from Ken Shapiro, the self professed co-defendant of the Appellant, whose job it was to provide an alibi for the Appellant (Tr. vol. V, pg. 785) and who also was to help push the victim into the sea (Tr. vol. V, pgs. 840, 846). In direct contrast, the Appellant testified in his own behalf, giving a reasonable explanation of the occurrence on the date in question, that being the Appellant and the victim were accidently pushed into the ocean (Tr. vol. VII, pg. 1202), and that despite efforts to look for the victim, darkness prevented her rescue (Tr. vol VII, pg. 1207). The Appellant's version was also accompanied by flat denials of planning (Tr. vol. VII, pgs. 1190-1191), denials of pushing the victim into the sea (Tr. vol. VII, pg. 1208), and denials killing or intending to kill the victim (Tr. vol VII, pg. 1229).

Other than Shapiro's testimony, only bits of inconsequential evidence were brought to contradict the Appellant's story, including jailhouse statements supposedly made by the Appellant, and contradictory statements made by the Appellant in a misplaced loyalty to his long-time friend Ken Shapiro (Tr. vol. VII, pg. 1211).

While it is this court's concern in review to determine whether there is substantial evidence to support the verdict and judgment, Tibbs. v. State, 397 So,2d, 1120 (Fla. 1981), Tibbs also made it clear that there is continued vitality in the state of Florida of a reversal in the interest of justice:

> By eliminating evidentiary weight as a ground for appellate reversal, we do not mean to imply that an appellate court cannot reverse a Judgment or conviction "in the interest of justice". The latter has long been, and still remains, a viable and independent ground for appellate reversal. Rule 9.140(f), Florida Rules of Appellate Procedure, provides the relevant standards:
>
> > In the interest of justice, the court may grant any relief to which any party is entitled.
>
> This Rule, or one of its predecessors, has often been used by appellate courts to correct fundamental injustices, unrelated to evidentiary shortcomings which occurred at the trial. Page 1126.

Initially, the testimony and version of the Appellant must be believed, as the circumstances presented at the

trial did not show that version to be false. Mayo v. State, 71 So.2d. 899 (Fla. 1954). In contrast to the Appellant's testimony, Shapiro's patently unbelievable testimony was further discredited by his testimony that he held the knowledge of this crime to himself for over three years, and then when questioned, gave a complete statement which he knew was a confession to first degree murder without having any deals, assurances or immunities to keep him from going to the electric chair (Tr. vol. V, pgs. 805-806). Despite the jeopardy to his life, Shapiro testified that he was now telling the truth, after lying on at least two separate occasions, because his conscience required it. (Tr. vol. V, pg. 807).

As this testimony by Kenneth Shapiro was not of such a nature to be convincing, and, in fact, bears the earmarks of falsehood and uncertainty which requires reversal. Council v. State, 140 So. 13 (Fla. 1933), pg. 14. It is clear that the verdict in this case was not in accord with the manifest justice of the case, and that the character and integrity of the witnesses should go into a formula for determining the interest of justice on review. Williams v. State, 130 So. 457 (Fla. 1930). As a human life is involved, it is only just and right that another jury should pass upon the issues in this matter. Platt v. State, 61 So. 502 (Fla. 1913).

## **POINT** VI

THE CUMULATIVE EFFECT OF VARIOUS ERRORS AT THE TRIAL LEVEL VIOLATED APPELLANT'S DUE PROCESS RIGHT TO A FAIR TRIAL.

Throughout the course of the litigation in the instant matter, various evidentiary and legal rulings were made by the trial court which were erroneous and which, taken together, have a cumulative effect of depriving the Appellant of a fair trial.

On March 4, 1985, the Defendant filed a Motion for a Change of Venue, properly supported by two affidavits and fourteen pages of photocopied press clippings and headlines (Tr. vol. X, pg. 1684). Even a perfunctory perusal of the clippings attached show that there was a tremendous amount of headline publicity regarding the incident in question, and such articles contained an extreme amount of extraneous and prejudicial material. The Motion was heard, and the ruling deferred on March 28, 1985 (Tr. vol. II, pg. 286), only to be renewed during the voir dire segment of the trial on June 4, 1985 when it became clear that nine jurors had heard or read some accounting of the incident involved (Tr. vol. IV, pg. 717). Despite the pervasive publicity involved and the prejudicial nature of such publicity, as exhibited by the articles and the nine jurors who had had knowledge of the

case, the Motion for Change of Venue was denied by the trial court (Tr. vol. IV, pg. 718). This denial constituted prejudicial error, as the Appellant was unable to receive a fair trial in Broward County because of the publicity involved.

In a similar matter, related to the change of venue, the trial court erred in denying a new trial for the Appellant, based upon juror misconduct, specifically that members of the jury panel who decided the case were overheard in the courthouse hallway speaking about a newspaper account of the trial which they had seen and read. (Tr. vol. X, pg. 1756). A copy of the news article which appeared during the course of the trial, June 4, 1985, was made a part of the Motion (Tr. vol. X, pg. 1759), and testimony was taken at a hearing for the Motion for New Trial on June 26, 1985 from Carol Martin, who identified the newspaper article and who testified that she overheard two of the jurors state that they saw and read the article in question (Tr. vol. IX, pg. 1591). The trial court deferred ruling on the Motion for New Trial regarding the juror question (Tr. vol. IX, pg. 1604), and later denied such Motion on July 17, 1985, stating that the jurors in question were individually questioned regarding their outside influence (Tr. vol. IX, pg. 1607).

It is certainly fundamental that every defendant is entitled to be tried by a fair and impartial jury, Kelly v. State, 371 So.2d. 162 (Fla. 1st DCA), and that any case

tried in our judicial system is to be decided only by evidence and argument in open court and not by any outside influence. Patterson v. Colorado, 205 U.S. 454, 27 S.Ct. 556 (1907).

THEREFORE, since a showing was made, by the testimony of Carol Martin, that there was outside influence which probably affected the deliberation of the jury, and since it is certainly clear that the verdict and sentence in the instant case do not square with right and justice, and that there is reasonable ground to conclude that the jury acted through prejudice or other unlawful cause, Florida Publishing Company v. Copeland, 89 So.2d. 18 (Fla. 1956), pg. 20, the trial court erred by failing to grant a new trial.

The trial court erred in denying the Defendant's Motion to Disclose the Grand Jury Testimony of Kenneth Shapiro (Tr. vol. X, pg. 1651). A hearing was held on the Appellant's Motion on October 19, 1984, and the Motion was denied (Tr. vol. I, pg. 8). §905.27(1)(a) of the Florida Statutes provides that the testimony of a witness before the grand jury shall not be disclosed except when required by a court for the purpose of ascertaining whether such testimony is consistent with the testimony given by a main witness before the court. The trial acknowledged the contradiction in the statements and the inconsistencies at the hearing, noting that if there was not an inconsistent statement, the defendant would not be in custody today (Tr. vol. I, pg. 5).

As there were admittedly inconsistent statements made by the only guilt witness, Ken Shapiro, the trial court erred in preventing the Appellant's trial counsel from obtaining the grand jury testimony for purposes of impeachment and cross examination, thereby depriving the defendant of the effective assistance of counsel under the Sixth Amendment.

The cumulative prejudicial effect of these errors by the trial court, considered together and in conjunction with the other errors previously mentioned, require a new trial.

## POINT VII

THE TRIAL COURT ERRED IN IMPOSING THE DEATH SENTENCE ON THE APPELLANT.

The review of a death sentence by this court has two discreet facets: to determine that the jury and judge acted within procedural rectitude and to insure relative proportionality among death sentences which have been approved statewide. Adams v. State, 412 So.2d. 815 (Fla. 1982). In the instant case, not only are the procedural errors fatal to the sentencing of death, but the sentence imposed is not proportional in a statewide comparison of death sentences approved, as the trial court improperly found the case at bar to be heinous, atrocious and cruel, and the sentencing based upon the facts of the case is disproportionate for death sentences statewide, particularly in light of the disparity between the treatment of the Appellant and unindicted co-defendant Kenneth Shapiro.

In imposing the death sentence upon the Appellant, the trial court found the existence of three aggravating circumstances: murder committed for pecuniary gain, murder committed in a cold, calculated manner, and murder being heinous, atrocious and cruel (Tr. vol. X, pgs. 1762-1764). The court went on to find a total lack of mitigating circumstances (Tr. vol. X, pg. 1765), and therein imposed the death penalty.

The court erred in finding the case to be heinous, atrocious and cruel as defined by the decisions of this court, and also erred by failing to consider the disparity of treatment between the Appellant and the co-defendant Shapiro as a mitigating factor to be considered.

While the trial court's written Sentencing Order certainly contained a literate and emotional account of how the victim Anita Lopez may have died, this court must review such findings with a cold and callous attitude and realize that the trial court's account is just that: speculation. Even the State's only witness, Ken Shapiro, had to admit that he heard no screams by the victim (Tr. vol. V, pg. 855), and, as a matter of fact, he last saw the victim swimming and floating on her back (Tr. vol. V, pg. 797, 854). While reprehensible, the instant case is not an example of a killing which is accompanied by such additional acts as to set the crime apart from the norm of capital felonies - the conscienceless or pitiless crime which is unnecessarily torturous to the victim. State v. Dixon, 283 So.2d. 1 (Fla. 1973), pg. 9. It should also be noted that the improper injection of the pregnancy of the victim, aside from being prejudicial in the eyes of the jury, had a grave effect on the trial court, as such pregnancy is mentioned repeatedly in her Sentencing Order.

When reviewing a finding of heinous, atrocious and cruel, the court inadvertantly finds itself reviewing the very nature of the killing for purposes of statewide proportionality. In regard to this general area, the court's attention is respectfully drawn to the following cases where the death sentence has been found to be appropriate, and where the sentence has been reversed; all of these cases (a very small sampling) exhibiting facts much more heinous and deserving of the death sentence than the instant matter. In Huddleston v. State, 475 So.2d. 204 (Fla. 1985), the death sentence was reversed by this court as being inappropriate although Huddleston, who worked at an Officers Club at an Air Force Base, returned after being fired and beat, strangled and stabbed his female boss during a robbery, returning two or three different times to finish the murder, as the victim was still alive on those occasions.

Drake v. State, 441 So.2d. 1079 (Fla. 1983) saw this court reverse a death sentence in a case although the victim was found with her hands tied together after suffering eight stab wounds. In Herzog v. State, 439 So.2d. 1372 (Fla. 1983), the death sentence was reversed although the victim was forced to take pills, was beaten, suffocated and eventually, when she refused to die, she was strangled with a phone wire, with each end of the wire being pulled by a separate perpetrator, with her body eventually being burned after being stuffed into a garbage can.

The death sentence was reversed in McKennon v. State, 403 So.2d. 389 (Fla. 1981), although McKennon returned to his jobsite and killed his boss by beating her head against the wall and floor, strangling her, slitting her throat and breaking ten ribs in the process, before eventually stabbing her to death. See also Neary v. State, 384 So.2d. 881 (Fla. 1980).

For further comparison, to show the instant case as being an inappropriate case for the imposition of the death sentence, the following cases have been found to be proper death sentence cases. In Hooper v. State, 440 So.2d. 525 (Fla. 1985), the court found the death sentence appropriate where Hooper, a six-foot eight-inch, three hundred twenty-five pound man, was living with his brother and the brother's family until he stabbed and mutilated his sister-in-law, strangled and cut the throat of his nine year old niece and beat his twelve year old nephew in the head, crushing his skull, but failing to kill him. Gore v. State, 475 So.2d. 1205, (Fla. 1985), was found by this court to be an appropriate death sentence case, since Gore was convicted of two counts of kidnapping, one count of first degree murder and three counts of rape, stemming from a fourteen year old and a seventeen year old girl being picked up while hitchhiking. Gore then tied up the two girls, the fourteen year old girl was raped three

times and then executed with two shots; the seventeen year old girl was able to escape, but only temporarily, as Gore chased her, caught her and shot her two times also.

In Roman v. State, 472 So.2d. 886 (Fla. 1985), this court found the death sentence to be appropriate, as Roman kidnapped a two year old baby girl from the back seat of a car during a party, raped and choked the baby girl before burying her alive. In Bassett v. State, 449 So.2d. 803 (Fla. 1984), this court upheld the death sentence where two eighteen year old boys were kidnapped, robbed and taken to a swamp, where unsuccessful attempts to beat them to death resulted in broken ribs and jaws. The two boys were then stuffed into a trunk where an exhaust pipe from the car was put into the trunk, causing the victims to struggle, with the struggle being ended with the victims being stabbed with a knife numerous times until the fumes from the car could cause their lingering deaths. Waterhouse v. State, 429 So.2d. 301 (Fla. 1983) was Affirmed where the victim was raped, strangled and drowned, the victim being found with a tampon in her mouth, a coke bottle in her rectum, and having suffered lacerations, bruises, defensive wounds and having been hit with a tire iron.

In Adams v. State, 341 So.2d. 765 (Fla. 1977), the victim was beaten with a metal fire poker during a robbery

of the victim's home past the point of submission and until her body was grossly mangled. The victim was found injured and incoherent and died the next day. Thompson v. State, 389 So.2d. 1197 (Fla. 1980) was found an appropriate death sentence case, as during the course of a sexual battery and murder of the victim, the victim was beaten with a chain and a billy club, struck with a chair leg and burned with a cigarette lighter in the area of her vagina. The chair leg was forced into the vagina of the victim, it was twisted inside and struck with a hand to force it up into the vaginal area. The billy club was forced up into the vagina of the victim so that it ripped the entire portion of the vagina, tearing the wall and causing such extreme pain that the shock contributed in great part to the death of the victim as stated by the medical examiner's testimony. The beating of the victim resulted in eighty percent of the victim's body being covered with deep bruises, cuts, perforations, in addition to some of her front teeth being broken by blows from the defendant.

Finally, the death sentence was approved in Gardiner v. State, 313 So.2d. 675 (Fla. 1975), where the victim had at least one hundred bruises upon her head, eyes, nose, both breasts and various parts of her body, large patches of healthy hair were pulled from her head, abrasions to the head as a result of the hair being grabbed and her head

pushed against the wall and floor, massive hemorrhages of scalp, small hemorrhages under the covering of the brain, and contusions to the nose, massive hemorrhages to the pubic area, including the inner surface of the thighs and labia of the vulva, large tears inside the vagina from the outside entrance all the way to the back as far as it could go caused by a broomstick, bat or bottle, large lacerations or tears of the entire right side of the liver and the peritoneal cavity or bone located in the pubic area, and the lower part of the body was broken up into small pieces by blunt injuries such as being stomped on.

Clearly, when a legitimate statewide comparison of death sentence cases is made, this court must agree that death sentence in the instant matter would be disproportionate, and should be lowered to life imprisonment.

Quite distinct from the proportionality question, although related, is the obvious and unconstitutional disparity in the treatment of the Appellant's case as opposed to the treatment of Kenneth Shapiro, the self-admitted co-defendant. By his own testimony, Shapiro claimed to have been part of elaborate and lengthy plans to kill an unsuspecing wife, along with the Appellant KEEN (Tr. vol. V, pgs. 776-777). Shapiro discussed earlier plans of pushing the victim off of a high building (Tr. vol. V, pg. 778) until

the idea of drowning was agreed upon. According to Shapiro's version, his role was not only to be a credible alibi witness for the Appellant (Tr. vol. V, pg. 785), but was also assigned the task of helping to push the victim overboard and into the sea (Tr. vol. V, pg. 840-846). According to Shapiro, when the victim was pushed over the railing, Shapiro was at the helm of the boat and, in fact, it was Shapiro who piloted the boat out of the victim's grasp, some several hundred yards away (Tr. vol. V, pg. 795-796). Then Shapiro and the Appellant, according to Shapiro, watched the victim flounder without helping her (Tr. vol. V, pg. 797), discussed the phony story that they would tell (Tr. vol. V, pg. 798), and, in fact, it was Shapiro who called the Coast Guard when the boat was docked and gave the false stories to cover up the deed (Tr. vol. V, pgs. 799, 801).

Finally, after lying at least two times about the various stories (Tr. vol. V, pg. 807), Shapiro continued to cover up the incident for three years, until he was approached by Detective Amabile (who was tipped by the insurance company), (Tr. vol. Vi, pgs. 1024-1025). Although Shapiro knew that he was confessing to first degree murder (Tr. vol. V, pg. 805), and was doing such without immunity and without negotiation or a deal (Tr. vol. V, pg. 806), Shapiro was not arrested at the time (Tr. vol. VI, pg. 1026) and, in fact, was never arrested,

never charged, never tried and never sentenced for his identical participation in the alleged incident - the same participation which resulted in the death sentence for the Appellant. The death penalty statute in Florida cannot be upheld under the requirements of Profitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960 (1976), if such disparities among equally culpable participants are ignored. See McCaskill v. State, 344 So.2d. 1276 (Fla. 1977), pg. 1280. It was held by this court in Meeks v. State, 339 So.2d. 186 (Fla. 1976) that when dealing with different sentences for equally guilty co-defendants:

> We are extremely sensitive to the demands of equality before the law in cases in which we must consider whether the sentence of death should be upheld. Our reading of Furman v. Georgia, 408 U.S. 283, 92 S.Ct. 2726 (1972) convinced us that identical crimes committed by people with similar criminal histories require identical sentences. It is this uniformity and predictability of the result which §921.141 of the Florida Statutes (1975) seeks to accomplish. Page 192.

In the leading case of Slater v. State, 316 So.2d. 539 (Fla. 1975), Slater was one of three co-defendants

involved in a motel robbery in which the manager was shot and killed. The "trigger man" was given a life sentence, the "wheel man" was given a five-year sentence, and Slater received the death penalty. In vacating the death sentence, this court looked to the sentences of the two co-defendants:

> We pride ourselves in a system of justice which requires equality before the law. Defendants should not be treated differently upon the same or similar facts. When the facts are the same, the law should be the same. The imposition of the death sentence in this case is clearly not equal justice under the law. Page 542.

This case is not similar to any of the disparity cases decided by this court in that the co-defendant, confessed, in the instant matter was not even arrested or charged, as opposed to the typical case where a plea bargain or some leniency was given in exchange for testimony. See Bassett v. State, supra, where a death sentence was upheld for Bassett, despite an equally culpable co-defendant getting a life sentence, because Bassett had the opportunity for the same plea bargain yet backed out at the last minute and chose to go to trial.

In Deaton v. State, 480 So.2d. 38 (Fla. 1985), the death sentence of Deaton was upheld in the face of the

co-defendant receiving a life term after a term because, although both Deaton and the co-defendant choked and beat the victim, this court found Deaton to be the dominant force, the person who instigated the murder and the person who dealt the death blow. In Woods v. State, __So.2d.__, 11 F.L.W. 191 (Fla. 5/2/86), a death sentence was Affirmed for Woods after a joint trial with a co-defendant wherein it was shown that Woods and his co-defendant, while inmates at the Union Correctional Institution, stabbed four guards, with one of the guards dying. This court specifically upheld the sentence of death for Woods, finding no disparity, with the justification being that Woods was the main attacker, Woods was the one who told the victim that he was going to die while the victim begged for his life, and that Woods was the one who prevented the rescue attempts. Also it was noted by this court that Woods stabbed four persons, while the co-defendant only stabbed two and received the life penalty. See also Brown v. State, 473 So.2d. 1260 (Fla. 1985), where the cooperating co-defendant received a life sentence on a second degree murder plea to avoid the disparity problem, and Griffin v. State, 474 So.2d. 777 (Fla. 1985), where the disparity problem was avoided where one co-defendant got a twenty-five year sentence, the other got a ten-year sentence and Griffin was found to be the trigger man in a convenience store robbery and shooting.

Finally to be considered by this court in the matter of disparity and sentencing and in the matter of general appropriateness of the death sentence is the case of Barclay v. State, 470 So.2d. 691 (Fla. 1985), wherein the death sentence was actually reversed despite the fact that Barclay, along with co-defendant Dougan, were self proclaimed members of the Black Liberation Army who drove around town looking for random victims, settling on a young white man who was then abducted, shot, stabbed and killed. Barclay then participated in the taunting of the victim's parents through sending them tape recordings and giving recordings to the press. Although aggravating circumstances were found and no mitigating circumstances, this court reversed the sentence, finding a disparity between Barclay and co-defendant Dougan, as Dougan was the professed leader of the group.

The difference between one co-defendant getting a life sentence and cooperating with the State, with a resultant death sentence for the co-defendant, is sometimes understandable and has been found appropriate by this court. However, in this most unusual situation, the ultimate diaparity: death for one defendant, total freedom and absolution for the other, cannot be tolerated in a juridical system that prides itself on equal dispensation of justice and treatment under the law.

WHEREFORE, for all the reasons mentioned, the death sentence in the instant matter must be reduced to life in prison.

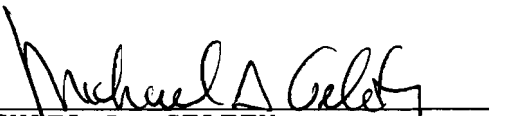
## CONCLUSION

Based on the foregoing points, the Appellant is entitled to a dismissal of the instant matter because of a lack of jurisdiction in the State of Florida.

He is also entitled to a new trial because of the extremely prejudicial and improper conduct by the prosecutor in eliciting evidence of a prior attempted murder which was specifically ruled inadmissible by the trial court, and for all of the other matters discussed in the Appellant's preceeding points, a new trial and new sentencing are required.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief of the Appellant, MICHAEL SCOTT KEEN, Case No: 67,384 has been furnished, by mail, to the Attorney General's Office, 11 Georgia Avenue, Room 204, West Palm Beach, Florida, 33401, this 16th day of May, 1986.



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