IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

MARTIN GROSSMAN	*	
APPELLANT,	*	
VS.	*	CASE NO.: 68,096
STATE OF FLORIDA,	*	
APPELLEE.	*	

INITIAL BRIEF

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PRELIMINARY STATEMENT

Throughout this brief Defendant/Appellant, MARTIN GROSSMAN, will be referred to as Mr. Grossman. The State or Prosecution will be referred to as The State. All references to the record will be shown as (R).

STATEMENT OF THE CASE

On December 25, 1984, Detective John Holliday of the Pinellas County Sheriff's Office filed a complaint/arrest affidavit, alleging that Mr. Grossman was guilty of first degree murder in the homicide of Margaret Park, a Florida Game and Fresh Water Fish Commission Officer, on December 13, 1984. (R1). The affidavit was based on information provided by Brian Hancock. (R1-3).

On December 26, 1984, an advisory and solvency hearing was held, the Court found probable cause, and a Public Defender was appointed to represent Mr. Grossman. (R2,5). On January 2, 1985, the court appointed private counsel due to the Public Defender's conflict. (R7,8). On January 18, 1985, a grand jury indicted Mr. Grossman for murder in the first degree, to which Mr. Grossman entered a written plea of not guilty. (R9).

On March 20, 1985, Mr. Grossman's attorney filed a Motion for Continuance of Pre-Trial Conference because of a conflict with another trial. (R71-76). On March 26, 1985, Mr. Grossman filed a motion to appoint co-counsel because of

the same conflict. (R77). On March 29, 1985, an order was entered granting both motions and waiving speedy trial. (R78).

On April 24, 1985, Mr. Grossman filed seven motions to dismiss addressed to the constitutionality of the Florida death penalty statute, both on its face and as applied, and attacking the indictment. (R80-98).

On August 7, 1985, Mr. Grossman's attorney moved for a continuance of the trial set for August 20, 1985, which was granted. (R123-126,130,132).

On October 1, 1985, Mr. Grossman filed a motion for a subpoena duces tecum to produce a copy of the personnel file of officer Margaret Parks which was denied. (R142 & 149). On October 11, 1985, Mr. Grossman filed a motion to sever his trial from that of Co-Defendant Taylor, which was denied. (R156-158).

On October 17, 1985, Mr. Grossman's attorney filed a motion for an order continuing the trial from October 22, 1985, until November 4, 1985, which was denied. (R165-166,180).

On October 21, 1985, Mr. Grossman filed a motion to suppress evidence seized from Defendant's residence and car on grounds that the evidence was seized by an illegal search. (R168-169). The motion was denied. (R182).

On October 21, 1985, Mr. Grossman also filed three

motions in limine. The motion to prohibit the State from mentioning or eliciting testimony regarding an alleged burglary committed by Mr. Grossman and Mr. Taylor on or about December 7, 1984, (R175), was denied. (R1316).

Mr. Grossman's trial was held on October 22 through October 29, 1985. At the close of the State's case and at the close of all the evidence, both defendants moved for judgment of acquittal which was denied. (R2321-2347). Mr. Grossman's Motion to Include Special Jury Instructions for the Penalty Phase was denied. (R234-235). The jury returned a verdict of guilty of first degree murder against Mr. Grossman, (R222), and recommended the death penalty. (R250). On October 31, 1985, a judgment was entered finding Mr. Grossman guilty of murder in the first degree. (R251-252). Mr. Grossman's motion for new trial, filed November 8, 1985, was denied. (R253-257, 291).

On December 13, 1985, sentence of death was entered against Mr. Grossman. (R283-286). On December 23, 1985, Mr. Grossman filed notice of appeal. (R294). The Court entered written findings as to aggravating and mitigating circumstances in support of the death penalty on March 19, 1986. (R289-290).

STATEMENT OF THE FACTS

On December 13, 1984, Wildlife Officer Margaret Park of The Florida Fresh Water Fish and Game Commission was

patrolling an unpopulated wooded area in Pinellas County, called Covered Bridge Estates. Between 7:45 and 8:Ø5p.m. Officer Park issued a citation to David Allor. (R183Ø-1833,1838). A few minutes after she drove away, Mr. Allor heard voices yelling, a gunshot, and about 5 to 2Ø seconds later, a second shot. (R1833-1839). At about 8:18p.m., Officer Park radioed in a message to the Pinellas County Sheriff's Office to the effect that "I'm hit". (R1849,1865). When Pinellas County Sheriff's Deputy Chatham arrived at the scene, Officer Park had died from a gunshot wound to the head. (R1849). The Gunshot was from her own weapon. (R185Ø-1851).

A substantial reward was offered for information leading to the arrest of the person who killed Officer Park. (R1271-1272). On December 25, 1984, Pasco County Sheriff's Office arrested Martin Grossman on the basis of information supplied by an informant, Brian Hancock. (R1-3).

At the time of his arrest, Mr. Grossman was residing in a room in the home which he shared with his mother, Myra Grossman. (R1271-1272). After Mr. Grossman's arrest, the Pasco County Sheriff's Office conducted a search of Mr. Grossman's car and residence, and seized Mr. Grossman's wallet, driver's license and clothing from his bedroom and some tires from the trunk of his car. (R1272-1273). Mr. Grossman never consented to the search, but his mother signed a consent form to search the house. (R1269,1274).

A Pre-Trial hearing was held on Mr. Grossman's Motion to Suppress this evidence. (R1269-129Ø). Mr. Grossman testified that he resided in a bedroom in a house owned by his mother, that he occupied this bedroom alone that he did not share it with anyone, that no one else went into it, and that he frequently kept it locked. (R1271-1272). He testified that all items of every description which were in his room belonged exclusively to him and not to anyone else (R1272-1273); that he never gave permission to anyone to search either his residence or his vehicle and he never gave his mother permission to permit such a search, (R1274); that he did not want anyone to search his room or his vehicle; and that he had expected that any property in either place would remain his private property. (R1282).

Mr. Grossman also testified that he owned the 1972 Dodge Charger which belonged to him exclusively. (R1272). The consent to search signed by Mrs. Grossman did not contain any consent to search Mr. Grossman's vehicle. The tires seized were in the closed trunk of the car and the car keys were in the dresser in his bedroom. (R1281-1282). (R1285-1286). The State presented no evidence other than the consent form. The Trial Court denied the Motion to Supress, (R182), on the grounds that Mr. Grossman had no standing to object to the search of his room or the search of his vehicle. (R1289).

During discovery, Mr. Grossman filed a Motion requesting a Subpoena Duces Tecum for a copy of the personnel file of Margaret Parks. (R141), which was denied. (R1216,1211-1220). At trial, over defense objections (R1833-1835, 1903), the State elicited testimony from David Allor regarding Officer Park's demeanor (R1833-1836) and from her supervisor, Lieutenant Gainer, regarding her professional conduct record (R1904).

On October 14, 1985, a hearing was held on Mr. Grossman's motion to sever his trial from that of Co-Defendant Taylor. (R2817). Mr. Grossman argued that he was entitled to severance because Co-Defendant, Taylor, in his own defense, would attempt to lay the sole responsibility for the homicide on Mr. Grossman, and because Mr. Taylor had made self incriminating statements and confessions to police officers and others in which he implicated not only himself but Mr. Grossman. (R2817-2818). Co-Defendant Taylor would be in effect acting as a second prosecutor. (R2818-2819). The Trial Court denied Mr. Grossman's motion for severance. (R2839).

On October 17, 1985, a hearing was held on Mr. Grossman's Motion to Continue the Trial until November 4, 1985. (R1222-1237). Mr. Grossman requested the Continuance in order to file a motion to suppress the testimony of an informant, who, along with the officer to whom he had made

his statement, had not previously been listed as a witness and therefore had not been deposed. (R1225). Also, informant Charles Brewer, a trustee at the jail, to whom Mr. Grossman had allegedly made incriminating statements, had only been deposed the previous day at which time it was discovered that another prisoner, Don Smith, was allegedly present when Mr. Grossman made these statements. Mr. Smith had been released from custody, was now out of state and had never been listed as a witness by the State. (R1225-1226). On October 22, 1985, Mr. Grossman's attorney renewed the Motion to Continue. (R1262-1263). He had contacted Mr. Smith the day before and Mr. Smith denied that Mr. Grossman ever made any confession or admissions of any kind to Mr. Brewer. (R1263).

Mr. Grossman also based his request for a continuance on problems encountered in preparing for the penalty phase of the trial. (R1227). Mr. Grossman's mother, a witness in the penalty phase, had just had a hysterectomy and was not supposed to engage in any activities until after her post operative check up on October 28. (R1227-1228). Mr. Grossman's attorney had not had the opportunity to depose and talk to approximately 25 witnesses because of his involvement as defense counsel in a Federal Trial which began March 25, 1985 and lasted through mid August, 1985, in addition to 9 other trials scheduled for September and

October, 1985. (R123-125). Co-counsel had done nothing at all on the case for several months because of his own scheduling conflicts. (R1237). Defendant's motion to continue was denied. (R180,1237).

A Pre-Trial hearing was also held on Mr. Grossman's Motion in Limine for an order that the State not be permitted to discuss or elicit evidence regarding an alleged burglary to the home of Mr. and Mrs. Hancock in which a gun which Mr. Grossman and Mr. Taylor had with them at the time of the encounter with Officer Park, was taken. (R1292). Mr. Grossman argued that the manner in which he acquired that fire arm was irrelevant and highly prejudicial; therefore, the evidence of the alleged burglary should be excluded. (R1392-1294,1301-1302). The Motion was denied. (R2811). This testimony was later admitted at trial over Mr. Grossman's objection. (R1958-1960,1999).

Both Defendants also objected to the presence of cameras in the courtroom because of the unusually small size of the courtroom, the location of the camera directly in front of the jury and the obtrusiveness of the camera. (R1314-1317). The Court overruled the objection and denied Defendants' requests. (R1317).

At trial, held October 22 through October 28, 1986, Mr. Grossman renewed his pre-trial motions which were again denied. (R1258-1260), (R1260-1261), (R1263-1264).

During voir dire, the State repeatedly commented to the jurors that they were not the one's who imposed the death sentence - the Judge was. (R1346,1442,1449,1513). The Trial Court denied Mr. Grossman's request for a curative instruction at the penalty phase to the effect that the jury's recommendation was entitled to great weight. (R2573-2575).

Throughout voir dire, Co-Defendant Taylor's attorney emphasized to the jurors that the case against Mr. Taylor was separate from that against Mr. Grossman. (R1397,1476-1478,1535,1538,1591-1592,1594,1638,16471,1703-1704,1722-1723,1771,1783-1784). During opening statement he stated "the evidence will show the minimal momentary involvement of my young client before the shooting where he was dominated by Martin Grossman, he was threatened by Martin Grossman, he was scared of Martin Grossman", and made it clear that Co-Defendant Taylor's defense would be based on an effort to show that he was minimally involved in the homicide and that Martin Grossman was actually the one responsible. (R1820-1822). At this point, Mr. Grossman's attorney again moved for severance of the Defendants' trials and for a mistrial. (R1823). The Court denied both Motions. (R1823).

The first witness in the trial was David Allor, to whom Officer Park issued a citation, shortly before her

death. (R1830-1833). Mr. Grossman objected to the State's attempt to elicit testimony from Mr. Allor regarding Officer Park's demeanor or attitude. (R1833-1836). In front of the jury, the State responded that the testimony was relevant regarding any attempt the Defense might make to raise the Defense of self defense in the case because of Officer Park's attitude. (R1833). Both Defendants objected to this comment regarding self defense on the grounds that was a violation of Mr. Grossman's ~~sixth~~ fifth amendment rights. (R1833-1834). Appellant moved for a mis-trial, which was denied. (R1834). The Court also ruled that Mr. Allor's testimony regarding Officer Park's demeanor would be admissible. (R1835). The Court, at Mr. Grossman's request, then instructed the jury "Ladies and Gentlemen, you are to disregard the response to the attorneys objection". (R1836).

The State entered in evidence as Exhibit 4 pictures of Officer Park at the scene which were objected to by Defendant Grossman on the grounds that the photographs were prejudicially gory and were not probative of anything which would not be covered in a video tape which the State planned to introduce, (R1853-1856), and was later played for the jury. (R1881-1886,1889,2772-2773). Over the objections of both defendants' counsel, on the grounds that the unsequestered jurors might see television coverage of the

videotape which could unduly emphasize portions of the tape and which might include commentary which would taint the juror's objectivity the Court granted a press motion to obtain the video tape. (R1890-1894).

The Assistant Pinellas County Medical Examiner, Edward Corcoran, testified to the manner and cause of Officer Park's death which was instantaneous. (R1914,1919). Over objection on grounds that the photographs were merely cumulative and unnecessarily prejudicial, the State entered in evidence State's composite Exhibit 11 consisting of three photographs which showed the entrance wound on the back of the head and a laceration on the left side of the head which resulted from blow out pressure from inside the brain caused by the bullet. (R1922,1923-1925). The Court also admitted a picture of Officer Park lying in a pool of blood at the scene, allegedly to show her holster. (R2143-2145). The Defendants objected that the picture was irrelevant because the hlster itself could be admitted. (R2143-2145).

Over Mr. Grossman's continuing objection to any testimony regarding prior crimes, his Probation and Parole Officer, David Rice was allowed to testify that Mr. Grossman had previously been convicted of a felony, for which he was placed on community control, that possession of a fire arm by Mr. Grossman would have been a violation of his

probation, that burglary would have been an additional violation, and that he would have had Mr. Grossman arrested and brought to Court for violation of probation which could have resulted in his having to return to prison. (R1947-1952). Mr. Rice further testified that Mr. Grossman had been doing very well on probation and had not committed any violations. (R1952).

Virtually the only evidence linking Mr. Grossman to the murder of Officer Park was hearsay testimony regarding statements made by Mr. Grossman and/or Co-Defendant Taylor to Brian Hancock, Brial Allen, Officer Desmearis and Charles Brewer. Brian Hancock testified that on the evening of December 31, Mr. Grossman and Mr. Taylor left the house at about 7:30p.m. driving Mr. Grossman's mother's van to practice shooting a nine-millimeter luger which had been taken from his parent's house. (R1960-1961). According to Brian Hancock, Mr. Grossman and Co-Defendant Taylor were approached by Officer Park who conducted a search of their vehicle and found a gun underneath Mr. Grossman's seat. (R1966). She then went to her radio to call in the incident and a confrontation ensued. (R1966-1967,2020). During the scuffle, Mr. Taylor grabbed Officer Parks legs, at which time she kicked him in the groin, and her 357 Magnum went off, grazing Mr. Taylor. (R1967). At this point, Mr. Grossman grabbed the gun away

from her and she was shot. (R1967). Mr. Taylor then grabbed Mr. Grossman's license and the nine millimeter luger that were lying on the seat of Officer Park's vehicle, and they left in the van. (R1968). Mr. Taylor lost his black Motley Crew hat at the scene. (R1975).

When Mr. Taylor and Mr. Grossman returned home; (R1962), they allegedly told Mr. Hancock that Mr. Grossman had shot a police officer. (R1963). Mr. Hancock and Mr. Taylor took two guns out to a location on Olsteen Road and buried them. (R1963). Later in the evening, they attempted to burn the clothes that Mr. Grossman had been wearing that evening. (R1964). They changed their minds, however, put the fire out, put the clothes in a garbage bag, and Mr. Taylor took them out to a lake and sunk them with a rock. (R1965).

Mr. Taylor and Mr. Grossman later cleaned up the van and the next day, at Mr. Taylor's suggestion, they changed the tires which were later seized by the deputies in their warrantless search from the trunk of Mr. Grossman's car. These tires were sitting in the Courtroom within sight of the jury during the trial and were State's Exhibit 27A-D. (R184). (R1969). Mr. Hancock testified that he turned Mr. Grossman in to the authorities, that he was aware of the reward offered, and that he had not been charged with anything for his own actions in helping the defendants

dispose of evidence. (R1969-1970,2022). Mr. Hancock also admitted that during this period of time he was smoking pot heavily. (R2021). Mr. Hancock was unable to indicate during his testimony which statements were made by which Defendant as "they were both talking at the same time". (R1961).

During cross examination by co-defendant Taylor's attorney, Mr. Grossman's attorney repeatedly objected, moved for mistrial and renewed his request for severance because of numerous instances of testimony elicited to attempt to show that Mr. Grossman was really the guilty party and that Mr. Taylor was only minimally involved in the crime. (R1977-1990). All of this testimony was relevant only to Mr. Taylor's defense and would not have come out had the defendants been tried separately. (R1990). The Court again denied the Motion for Severance and for Mis-Trial. (R1990).

On redirect the State elicited testimony from Mr. Hancock that there were other guns besides the nine millimeter taken from Mr. Hancock's parent's home. Both Appellants objected to the other crimes testimony on the ground of relevancy. (R2025). The objection was sustained, but Appellant's request that the question as well as the answer be stricken from the record was denied. (R2025-2029).

Brian Allen also testified that Mr. Grossman and Mr. Taylor told him that they killed Officer Park. (R2044). Mr. Allen testified that both Mr. Taylor and Mr. Grossman were present during conversation about how the crime ocurred and he could not remember who told him what portions of the story. (R2048). After the shooting Mr. Taylor grabbed the nine millimeter gun and Mr. Grossman's license from the seat of Officer Park's vehicle. (R2050-2051). On cross examination Mr. Taylor's attorney elicited testimony from Brian Allen to the effect that Mr. Grossman was solely responsible for the shooting and had threatened Mr. Taylor who was afraid of Mr. Grossman and wanted to turn himself in. (R2055-2058,2062). Mr. Grossman's attorney objected and renewed his Motions for Mis-trial and Motion for Severance which were denied. (R2063).

Mr. Allen further testified that Mr. Grossman had never indicated any desire to kill anyone, including the game officer, that Mr. Grossman's reason for going out into the woods was just for target practice, not to kill anyone, that he had tried to talk Officer Park out of reporting him for possession of the gun, that his intention in hitting Officer Park was just to knock her unconscious; not to kill her, that he tried to prevent her from drawing her gun, and that he asked Mr. Taylor only for help in preventing her from getting her gun out of her holster. (R2065-2066).

Seven time felon, Charles Robert Brewer, a trustee at the Pinellas County Jail during the time when Mr. Grossman was incarcerated there, who was awaiting sentencing on two additional felonies at the time of this trial, also testified that Mr. Grossman told him about killing Officer Park in the presence of another prisoner and trustee, Don Smith. (R2085-2090,2093-2094). On cross examination by Co-Defendant Taylor's attorney, Mr. Brewer testified that Mr. Grossman did not mention Mr. Taylor in the conversation. (R2090-2092). Defendant Grossman again moved for mis-trial.

Pasco County Sheriff's Deputy Thomas Hendrickson testified that, at the direction of Brian Hancock, he and other divers recovered some sneakers from a lake in Pasco County. The State attempted to introduce those sneakers into evidence, but Defendant Grossman objected to introducing the sneakers in evidence on the grounds that they had not been identified as belonging to Mr. Grossman and there was nothing to tie the sneakers to him. (R2125). The Court admitted the sneakers into evidence after Deputy Hendrickson testified, over objections on grounds of hearsay that Mr. Hancock had identified the sneakers as belonging to Mr. Grossman. (R2127-2128).

Mr. Grossman's objections to the State's attempts to qualify witness Larry Bedore as an expert in blood spatters, (R2261), was overruled by the Court.

(R2261,2264). Mr. Grossman further objected to Mr. Bedore's testimony on the grounds that Mr. Bedore had stated in his deposition that he had performed no analysis of the blood spatters at the crime scene and any observations he made or conclusions he had drawn were simply based on common sense and were those anyone could make. (R2261-2264,1158-1159,1164-1166,2272-2275). The Court permitted Mr. Bedore to testify to his opinion that Officer Park had her head inside her vehicle at the time she was shot. (R2266-2270).

Defendant Grossman objected to the testimony of Detective Desmarais, regarding the confession of Co-Defendant Taylor made at the time he was arrested. (R2278). Mr. Taylor's confession contained numerous opinions and self serving statements tending to place the blame on Mr. Grossman and to suggest that Mr. Taylor acted only out of fear and was extremely remorseful. (R2279,2289-2299). Mr. Grossman renewed his Motion for Severance on the grounds that there was no way Mr. Grossman could get a fair trial if Detective Desmarais's testimony regarding Mr. Taylor's statement was admitted; and also moved that if the Court denied the Motion for Severance Mr. Grossman's name be deleted throughout the statement, with an instruction that this testimony could be considered only against Mr. Taylor. (R2279). The Court agreed to instruct the jury that the statement of Mr. Taylor should be considered as evidence

only against Mr. Taylor, but denied Mr. Grossman's Motion for Mistrial and Severance and that Mr. Grossman's name be deleted throughout the confession. (R2279-2282). Defendant Grossman requested a continuing objection to the testimony of Detective Desmarais. (R2284).

On cross examination by Mr. Taylor's attorney, testimony was elicited from Officer Desmarais to the effect that Mr. Taylor appeared to be relieved upon discovering that Mr. Grossman had been arrested, Mr. Taylor told Officer Desmarais that at the time Officer Park took Mr. Grossman into custody, Mr. Taylor was not charged with anything or under arrest, and had Officer Desmarais repeat direct testimony damaging to Mr. Grossman. (R2299-2303). At the close of this cross examination. Defendant Grossman again moved for a mis-trial. (R2305). The motion was denied. (R2306).

At the jury instruction conference, both Defendants objected and requested a continuing objection to any reference to escape, robbery, or burglary as part of the felony murder instructions on the grounds of lack of any evidence of such crimes.. (R2360,2377,1951-1987). Defendant Grossman also specifically objected to paragraph 2.b. of the instruction on felony murder; (R193,2364), and to the second paragraph of the Court's instruction on escape. (R196,2360-2376). The objections were denied.

(R2366,2357). During deliberation, the jury asked the Court to clarify paragraph 2.b. of the felony murder instruction. (R2561). Defendant Grossman requested that the Court give standard instruction 2.Ø4-b, regarding testimony of accomplices. (R2394-2397). The Court denied the request. (R2397).

During his closing argument, the attorney for Co-Defendant Taylor repeatedly distinguished the case against Mr. Taylor from that against Mr. Grossman requested the jury to consider the evidence against each Defendant separately, and agrued that Mr. Grossman was the one who took all the actions resulting in the shooting of Officer Park, that Mr. Taylor was in a sense only a bystander who became involved only after Mr. Grossman began struggling with Officer Park, that Mr. Taylor was afraid of Mr. Grossman and was dominated by him, that even if they found Martin Grossman guilty of felony murder the case against Mr. Taylor regarding felony murder required a totally different analysis from that against Mr. Grossman, that Mr. Grossman pointed the gun at Mr. Taylor and threatened him after shooting Officer Park. (R2484-2492,2499-25ØØ).

Following the jury instructions, (R2529-2553), both Co-Defendants renewed their objections to the instructions. (R2553). The jury entered a verdict as to Defendant Grossman of guilty of first degree murder.

(R2564), and as to Co-Defendant Taylor, guilty of third degree murder. (R2565).

Defendant Grossman's attorney filed a Motion for Certain special Penalty Phase instructions. (R234-243). Defendant Grossman objected to including in the instructions on mitigating and aggravating factors an explanation of felony murder in the course of a robbery and burglary and to include as aggravating factors five and seven, avoiding lawful arrest and interfering with governmental functions or law enforcement. (R2581). The Court decided to give both with a stacking instruction to the effect that if both were found to be present it would only constitute one aggravating circumstance. (R2548). Defendant also objected to instructions on aggravating factors 8 on the grounds that there was no evidence to support the finding that the manner of killing Officer Parks was wicked, evil, atrocious or heinous in that her death was virtually instantaneous. (R2584-2592). Mr. Grossman later renewed his objection to giving instructions on both factors 5 and 7 with the stacking instruction. (R2593-2600). Mr. Grossman's attorney requested instructions on mitigating factors number 7 and 8. (R2601). And requested a special instruction be included in number 8.

During the penalty phase of the trial, Mr. Grossman's mother, Myra Grossman, testified that Mr.

Grossman's father had died when he was fifteen and for several years prior to that had suffered from muscular dystrophy which confined him to a wheelchair, (R2608-2611); that Martin had a very difficult time when his father died, dropped out of junior high school, began working at menial jobs, and helped to support the family, (R2611-2612), that Martin was very non-violent and had never attacked or hurt anyone or anything previously. (R2614). Mrs. Grossman testified that Martin had been in jail in a youthful offender for theft and burglary. (R2614). She testified that she still loved her son, that Martin had never had bad relationships with girls, and indeed had been known to come to the defense of girls who were being harassed or bothered. (R2617).

Mrs. Grossman further testified that she felt that the shooting incident with Officer Park was totally out of character for Mr. Grossman and was extremely shocking to her. (R2617). Over the Defendants objections, the Court permitted the State to cross examine Mrs. Grossman regarding prior crimes. (R2620-2621). Mrs. Grossman testified that Mr. Grossman had been in juvenile detention for a short period in addition to the time he spent in the youthful offender program for burglary and theft. (R2621). Mrs. Grossman also testified that she had heard Brian Hancock, the chief witness against Mr. Grossman and the individual

who turned him into the police, discuss splitting the reward money with Mrs. Grossman's mother-in-law, Paul Miltin. (R2623).

Correctional Officer Campbell of the Pinellas County Jail testified that Mr. Grossman was never any problem, and treated all of the correctional officers with politeness and respect. (R2627). Witness Stephen Martakas, a school boy friend of Mr. Grossman's testified that he knew Mr. Grossman well, since he was fifteen, that Mr. Grossman had always been respectful to his mother, was protective of his family and friends, that Mr. Grossman was very helpful and understanding with his friends and their problems, that Mr. Grossman had no bad habits and did not smoke or do drugs, and that Mr. Grossman had once talked him out of committing suicide because he had been arrested on a drug charge and helped him face the problem, tell his parents and go through the legal system. (R2631-2637). Witness Carolyn Middleton, a correction social worker for the Pinellas County Sheriffs Department, testified that she saw Mr. Grossman almost daily during his incarceration, that he took his coming trial extremely seriously, that he was able to socialize and interact with her in conversations, that he was always courteous to everyone in the jail, that he was very nervous about the possibility of receiving the death penalty, that Mr. Grossman had expressed an interest in trying to do something to help juveniles avoid getting into criminal activities, (R2639-2646).

During the State's closing argument in the penalty phase, the State emphasized the paucity of witnesses testifying on behalf of Mr. Grossman. (R2673). Over Mr. Grossman's renewed objections, (R2652), the Court charged the jury that there must be sufficient aggravating circumstances to justify imposition of the death penalty and that the aggravating circumstances must not be outweighed by mitigating circumstances. The aggravating circumstances to be considered were as follows:

1. Crime was committed while the Defendant was fleeing or attempting to flee or committing or attempting to commit the crime of robbery or burglary.

2. The crime was committed for the purpose of avoiding or preventing an lawful arrest or affecting an escape from custody.

3. The crime was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of law.

4. The crime was especially wicked, evil, atrocious or cruel. (R2708-2709). The Court advised the jury that the mitigating circumstances to be considered are:

1. The age of the Defendant.

2. Any other aspect of the Defendants character or record and any other circumstances of the offense. (R2710). At the close of the jury instructions Defendant

renewed his objections and requests made at the jury instruction conference. (R2712). The jury returned a verdict and a recommendation of death. (R2713).

At the sentencing hearing held December 13, 1985, the Court imposed the death penalty. (R2764). The Court did not specify the aggravating and mitigating factors found and did not enter written findings in support of the sentence until March 19, 1986. (R289-290).

ISSUES

I. Did the Trial Court err in refusing to sever the trial of Mr. Grossman from that of Co-Defendant Taylor where (a) Mr. Grossman was denied his Constitutional right of confrontation when Co-Defendant Taylor's confession and out of Court statements to third parties, implicating Mr. Grossman, were admitted at trial, but Mr. Taylor did not testify: and (b) Mr. Taylor's defense consisted solely of attempting to place the blame for the homicide on Mr. Grossman, which resulted in Mr. Taylor's acting as a second prosecutor against Mr. Grossman?

II. Did the Trial Court err in refusing to suppress the items found in the warrantless search of Mr. Grossman's residence and automobile where consent to the search had been given by Mr. Grossman's mother but Mr. Grossman had not consented to the search and had a reasonable expectation of privacy in the vehicle and in the portion of the premises where the items were found?

III. Was the death penalty imposed on Mr. Grossman invalid as a violation of the Eighth Amendment where the State repeatedly made statements to the jury to the effect that the jury was not the one who imposed sentence and that the ultimate responsibility for deciding whether or not to impose the death penalty was that of the judge, thereby minimizing the importance of the jury in making its

recommendation of death or life; and where the Trial Court refused to give an instruction requested by Mr. Grossman to the effect that the jury's recommendation of life or death would be given great weight in the Court's ultimate decision?

IV. Did the Trial Court err in denying Mr. Grossman's Motion for Continuance when his attorney was unable to adequately prepare, particularly for the penalty phase of the trial because he was involved in a trial which lasted six months, instead of the expected six weeks and terminated only shortly before Mr. Grossman's trial?

V. Did the Trial Court err in (1) refusing to exclude videotaping cameras from the court room where the court room was extremely small, the video camera was placed directly in front of the jury in their line of vision, and the cameras were extremely intrusive; and (2) releasing a videotape which was a trial exhibit, to the press during Trial?

VI. Did the Trial Court err in (a) refusing to issue a Subpoena Duces Tecum for Officer Park's Personnel file and (b) in allowing the State to introduce evidence at trial regarding Officer Park's non-aggressive demeanor and prior conduct?

VII. Did the Trial Court err in denying Mr. Grossman's Motion to Exclude Testimony regarding an alleged

prior burglary of the home of Brian Hancock's parents, regarding other crimes for which Mr. Grossman had previously been in prison and for which he was on parole at the time of the homicide, regarding Mr. Grossman's alleged threats to kill Brian Hancock, and regarding Mr. Grossman's alleged orders to Brian Hancock to bury the guns involved in the crime?

VIII. Did the Trial Court err in exhibiting State's exhibits 4 and 11 where exhibit 4 was a close up of the victim at the scene which did not show anything which was not included in the State's videotape exhibit and where exhibit 11 showed autopsy photos after the victim's head was shaved and both exhibits were totally gratuitous and unnecessarily grotesque and gory?

IX. Did the Trial Court err in admitting into evidence the sneakers and T-shirt found in the lake where Brian Hancock testified Mr. Grossman's clothes had been thrown in the absence of where there was proper identification of these items?

X. Did the Trial Court err in admitting the testimony of Larry Bedore regarding blood spatters where he was not adequately qualified as an expert and in permitting him to testify as to his opinion when he made no expert analysis of the blood spatters and where his only observations and conclusions were those which could be made by an ordinary person using common sence?

XI. Did the Trial Court err in giving jury instructions regarding burglary, robbery and escape as part of the felony murder instructions where there was no evidence that either Defendant had committed burglary, robbery or escape?

XII. Did the Trial Court err in refusing to give a jury instruction that the testimony of an accomplice should be received with great caution?

XIII. Was there sufficient evidence to support a finding of first degree murder?

XIV. Did the Trial Court err in finding that there were sufficient aggravating circumstances to support the death penalty?

XV. Did the Trial Court err in denying Mr. Grossman's Motion for Special Penalty Phase Jury Instructions?

XVI. Was there sufficient evidence in the instant case to support a finding that there were sufficient aggravating factors to support a sentence of death?

XVII. Should the death sentence in the instant case be set aside because the Trial Court failed to orally recite the aggravating factors found into the record at sentencing and did not enter written findings until after the Trial Court had lost jurisdiction because of filing of the appeal?

XVIII. Does the Florida death penalty statute violate the United States and Florida Constitutions, both on its face and as applied?

SUMMARY OF THE ARGUMENT

I. Mr. Grossman's conviction should be reversed because the trial court erred in refusing to sever his trial from that of Co-Defendant Taylor. The use of Co-Defendant Taylor's out of court confession and statements, which implicated Mr. Grossman was a violation of Mr. Grossman's constitutional right of confrontation because Mr. Taylor did not testify and was not subject to cross examination. His entire defense rested on placing the responsibility for the homicide on Mr. Grossman alone. Therefore, Co-Defendant Taylor in effect acted as a second prosecutor against Mr. Grossman.

II. The trial court should have suppressed items seized during the warrantless search of Mr. Grossman's residence and automobile. Mr. Grossman did have standing to object to the search because he had a reasonable expectation of privacy in his bedroom, to which no one else had access, and also in his automobile which belonged to him exclusively. Furthermore, even assuming that her consent was given voluntarily, Mr. Grossman's mother did not have authority to consent to the searches because she did not have access to or common authority over the bedroom or automobile. The items seized from the automobile were in the locked trunk which was opened with keys taken from the dresser in Mr. Grossman's bedroom. Mrs. Grossman clearly

did not have authority to consent to a search of the locked trunk and there was no other exception to the warrant requirement.

III. The Prosecutor's statements to the jury during voir dire to the effect that the jury was not the one who imposed sentence and the ultimate responsibility for deciding whether or not to impose the death penalty rested on the Judge was a violation of the Eighth Amendment. The comments, particularly where the trial court refused to give a curative instruction regarding the weight given to the jury's recommendation, clearly misled the jury as to the importance of their function in the sentencing process and undermined the jury's sense of their responsibility.

IV. The trial court should have granted Mr. Grossman's Motion for Continuance of the trial. Mr. Grossman's attorney was involved in a Federal Trial which was expected to last about a month and lasted six months, as well as numerous other trials during the month prior to Mr. Grossman's trial. As a result of the problems with Mr. Grossman's attorney's schedule, it was impossible for him to adequately prepare a competent and effective defense.

V. The trial court should have excluded television cameras from the court room in the instant case. The court room was unusually small, the camera was directly

in the juror's line of vision and close to them and was extremely obtrusive. Furthermore, the trial court should not have released a videotape which was entered into evidence during the trial to the press over Mr. Grossman's objections.

VI. The trial court should not have denied Mr. Grossman's Motion for a Subpoena Duces Tecum to obtain the personnel file of Officer Park. The denial of the Subpoena Duces Tecum prejudiced Mr. Grossman in his defense because he was prevented from obtaining information regarding prior incidents in which Officer Park might have used violence or used her gun. Furthermore, the trial court compounded the prejudice by permitting introduction of inadmissible evidence regarding Officer Park's character during the trial.

VII. The trial court denied Mr. Grossman's Motion to Exclude Testimony regarding alleged other crimes committed by Mr. Grossman. The evidence of these other crimes was inadmissible because its only relevance was to prove the bad character or criminal propensities of Mr. Grossman and was not relevant to prove any other facts at issue in the case. The numerous instances of this type of testimony was extremely prejudicial because it inevitably focused the jury's attention on Mr. Grossman's character and propensity for crime rather than on his guilt or innocence as to this particular crime.

VIII. The trial court erred in admitting several photographs which were extremely gruesome and gory and which were entirely gratuitous as they were relevant only to facts which had already been proved by other evidence. Furthermore, some of the photographs were of Officer Park's head after it had been shaved and prepared for autopsy. Because of their gruesome nature the photographs were extremely prejudicial and inflammatory and should have been excluded.

IX. The trial court admitted into evidence, over Mr. Grossman's objections, a T-Shirt and sneakers which were found in the lake where Mr. Grossman allegedly disposed of his clothing. However, the T-Shirt and sneakers were never properly identified and should not have been admitted into evidence.

X. The State elicited opinion testimony regarding blood spatters from a witness who was not adequately qualified as an expert and had made no expert analysis of the blood spatters at the scene of the crime. His only observations and conclusions were those which could be made by an ordinary person using common sense. Therefore, it was error to permit him to testify as to his opinion.

XI. The trial court should not have given jury instructions regarding burglary, robbery, and escape as part of the felony murder instruction because there was no

evidence that Mr. Grossman was under arrest or in custody at the time of his confrontation with Officer Park and there was no proof of intent to commit robbery or burglary. The State attempted to manipulate the felony murder statute to cover circumstances to which the statute was never intended to apply.

XII. As previously discussed, there was insufficient evidence to make out a prima facie case of felony murder. There was also insufficient evidence of premeditation in that all the evidence in the case indicated that the incident happened in a matter of a few seconds as a result of panic on the part of the Defendants and there was no evidence that Mr. Grossman ever intended to kill Officer Park. Therefore, there was insufficient evidence to support a conviction of first degree murder.

XIII. The trial court should have given Defendant's requested jury instruction that the testimony of an accomplice should be received by the jury with great caution. Because a vital portion of the State`s case for first degree murder was based on testimony at trial of accomplices to the crime.

XIV. The trial court should have granted Mr. Grossman's Motion for Special Penalty Phase Jury Instructions. The United States Supreme Court has held that in order for a State's application of capital punishment to

be constitutional there must be clear and objective standards to guide the discretion of the jury and permit rational review of the sentencing process in death cases. The jury instructions requested by Mr. Grossman were all supported by the law and were necessary to adequately instruct the jury as to their responsibility and the standards to be applied in determining whether or not the death penalty should be imposed.

XV. There was insufficient evidence in the instant case to support a finding that there were sufficient aggravating factors to support a sentence of death. Furthermore, the evidence clearly established that there were mitigating factors which should have been considered by the court.

XVI. Mr. Grossman's death sentence should be vacated because the trial court failed to enter specific written findings as to the aggravating factors he found until after the trial court had lost jurisdiction to the appellate court. The trial Judge also did not orally specify for the record the aggravating factors which he was considering at the time of sentencing.

XVII. The Florida death penalty statute violates the United States Constitution and the Florida Constitution both on their face and as applied. The Statute fails to provide adequate standards; it unconstitutionally sets out

rules of practice and procedure for the courts; it is applied arbitrarily and capriciously; it permits imposition of the death penalty without proper notice to the Defendant of the aggravating factors to be relied on; and it is applied in a indiscriminatory manner. Therefore, the death penalty imposed on Mr. Grossman is a violation of both the United States and Florida Constitutions and should be reversed and vacated.

ARGUMENT I

The Trial Court erred in denying Defendant's Motion to sever his trial from that of Co-Defendant Taylor's where (a) Mr. Grossman was denied his constitutional right of confrontation when Co-Defendant Taylor's confession and statements to third parties were admitted at their joint trial and Mr. Taylor did not testify; and (b) Co-Defendant Taylor's entire defense rested on placing the responsibility for the homicide on Mr. Grossman rather than on himself, which resulted in Co-Defendant Taylor's acting as a second prosecutor against Mr. Grossman.

Prior to Trial, Mr. Grossman filed a Motion to Sever his Trial from that of Co-Defendant Taylor on the grounds that the State would be admitting into evidence the confessions of Mr. Taylor made to third parties which would be unduly prejudicial to Mr. Grossman; and on the grounds that Mr. Taylor's defense rested on an attempt to place the entire responsibility and blame for the homicide on Mr. Grossman. Therefore Mr. Taylor would be virtually acting as a second prosecutor in the case against Mr. Grossman. Throughout the Trial, Mr. Grossman repeatedly renewed the Motion for Severance and moved for a Mis-Trial on numerous occasions because of the prejudicial affects of the hearsay testimony regarding Mr. Taylor's statements to Brian Hancock, Brian Allen, and Officer Desmearis. (R1977-1990,2063,2278-2282,2284). Mr. Grossman's Motions for

Severance and Mis-Trial were all denied. The Trial Court also refused to excise references to Mr. Grossman from Mr. Taylor's confessions, and agreed only to give a limiting instruction to the jury to the effect that Mr. Taylor's hearsay statements and admissions could be used only against him and not against Mr. Grossman. (R2279-2282).

The admission of a Co-Defendant's confession implicating the Defendant at a joint trial constitutes prejudicial error even when the Trial Court gives clear instructions that the confession can only be used against the Co-Defendant and must be disregarded as to the Defendant. Bruton v. United States, 88 S. Ct. 1620, 391 U.S. 123, _____ L. ED. 2d _____ (1968). In Bruton, the United States Supreme Court squarely confronted the issues raised in Mr. Grossman's Motion for Severance and held that, despite instructions to the jury to ignore a Co-Defendant's out of Court confessions in determining the Defendant's guilt, admission of the Co-Defendant's confession violated the Defendant's right of cross examination assured by the confrontation clause of the sixth amendment. Id.

The Court reasoned that the sixth amendment right to confrontation includes the right of cross examination. Where a Co-Defendant refuses to take the stand and therefore cannot be cross examined regarding his out of Court admissions, the prejudicial affect of the confession is unacceptable. Id.

The Court noted that all practicing attorneys know that any assumption that prejudicial effects can be overcome by limiting instructions to the jury is naive and "unmitigated fiction". Id. It is totally unreasonable to expect a jury in a joint trial where both Defendant's guilt is being considered and determined at the same time to expect the jury to be able to keep portions of a confession in mind and use it in determining the Co-Defendants guilt and totally and completely disregard those same statements and admissions in deciding the Defendants guilt. Id. This is much more difficult situation than those in which a jury is instructed to totally disregard for any purposes inadmissible testimony or evidence. Id.

Justifications of speed, economy, and convenience cannot justify the sacrifice of basic constitutional liberties; and the risk that the jury will be unable to or unwilling to follow limiting instructions is so great and the consequences to the Defendant so vital and prejudicial that the practical limitations of the jury system cannot be ignored. Id, 391U.S. at 135.

Clearly in the instant case, we are presented with exactly the situation in Bruton. The out of Court statements of Co-Defendant Taylor to third parties were admitted at the trial, subject only to a limiting instruction by the Court to disregard those admissions as to

Defendant Grossman. Mr. Taylor's out of Court confessions were a vital part of the State's case against Mr. Grossman and were extremely prejudicial to Mr. Grossman because those statements were virtually the only evidence regarding Mr. Grossman's motives and intent and the only evidence to support a finding of first degree murder against Mr. Grossman.

As the Bruton Court pointed out, the confessions of Co-Defendants are inherently unreliable in that the Co-Defendant has a vested interest in attempting to place primary blame and responsibility on the other Defendant. That is precisely what happened in the instant case where, not only were Mr. Taylor's admissions to third parties self serving, but his entire defense rested on minimizing his own responsibility and placing the blame fully on Mr. Grossman. Therefore, in the instant case, the limiting instructions given by the Court to the jury were insufficient to prevent substantial prejudice to Mr. Grossman and Mr. Grossman was denied his Sixth Amendment right to confrontation because Mr. Taylor did not testify.

Mr. Grossman's and Co-Defendant Taylor's confessions were not "interlocking" as definde in Parker v. Randolph, 99 S. CT. 2132, 442 U.S. 62, 60L. ED. 2d 713 (1979). In Randolph, the Defendants each had confessed individually to police officers, their confessions were

substantially identical in material detail, and each Defendant had "heaped blame onto himself". Id, 90S. CT. at 2139, 442 U.S. at 73, 60L. ED. 2d at _____.

Although it is true that, in the instant case, certain out of court admissions made by Mr. Grossman to third parties were also admitted at trial, those confessions were clearly not truly "interlocking" with Mr. Taylor's. The rational of Randolph was that, where Co-Defendants confessions are substantially identical in detail and the Defendants own confession would be sufficient to convict him of the crime charged, the effect of admitting his Co-Defendants confessions is not prejudicial and therefore does not violate his right to confrontation. First, in the instant case, however, although Mr. Grossman and Co-Defendant Taylor's statements to third parties were similar in some respects, the statements attributable to Mr. Taylor were to the effect that he was, almost an innocent bystander in the incident, that it was Mr. Grossman who initiated the confrontation with Officer Park, took her gun, and shot her and that Mr. Grossman threatened Mr. Taylor, that Mr. Taylor was afraid of Mr. Grossman, and that the full blame for the actual murder should be placed on Mr. Grossman.

The alleged statements by Mr. Taylor were an essential part of the State's case for first degree murder in that they were the only evidence of premeditation or

felony murder. Mr. Taylor's statements were clearly self serving in that they tended to minimize Mr. Taylor's own participation in the murder, and Mr. Grossman's lack of opportunity to confront and cross examine Mr. Taylor regarding those points on which his confession was not identical to that of Mr. Taylor's, was not harmless in that it was precisely those differing statements by Mr. Taylor which were the basis for a first degree murder conviction.

The self serving statements of Mr. Taylor were extraordinarily prejudicial to Mr. Grossman in terms of the penalty phase of the Trial. The evidence of aggravating factors on which the jury was instructed, came almost entirely from the alleged statements of Mr. Taylor indicating that Officer Park was attempting to arrest Mr. Grossman at the time the incident began, that Mr. Grossman had repeatedly and viciously beaten Officer Park, that Mr. Grossman very carefully and deliberately fired the shot at Officer Park, that Mr. Grossman had threatened Mr. Taylor with the gun after Officer Park was shot, and that Mr. Taylor was afraid of Mr. Grossman. It simply cannot be said, as in Randolph, that Defendant Grossman was incriminated as fully by his own alleged admissions as by those of his Co-Defendant.

The second respect in which the situation in the instant case is materially different from that in Randolph

is that in the instant case, neither Mr. Hancock nor Mr. Allen were able to specify which statements were made by which Defendant. Therefore, it is impossible to determine what facts Mr. Grossman actually did admit to. Under those circumstances the Court simply cannot make a determination as to whether or not Mr. Grossman's and Mr. Taylor's admissions were "interlocking".

Both Federal and State Courts have recognized the necessity for granting a Defendants Motion for Severance of Trials when the Co-Defendants defense is based upon minimizing his own involvement in the crime and placing primary responsibility on the Defendant. Lee v. Illinois, 106 S. CT. 2056, _____ U.S. _____, _____ L. ED. 2d _____ (1986); Crum v. State, 398 So. 2d., 810 (Fla. 1981); Rowe v. State, 404 So. 2d., 1176 (Fla. 1st DCA 1981). In Lee, where the operative facts were remarkably similar to those in the instant case, both Lee and her Co-Defendant Thomas had separately confessed to the police. Both confessions were generally identical. However, the confessions differed in certain details relating to the issue of premeditation. Id. Lee's confession indicated that there had been no previous discussion or plan to murder the victims and that Co-Defendant Thomas had "snapped" on the night of the murders and had stabbed one of the victims. Lee was then attacked

by the other victim whom she killed. Co-Defendant Thomas, however, stated in his confession that he and Defendant Lee had previously discussed killing one of the victims and had actually had a premeditated plan to do so. Id. The Illinois Appeals Court held that the two Defendants confessions were "interlocking" and affirmed Lee's conviction. The Supreme Court reversed holding that Co-Defendant Thomas' statement, as the confession of an accomplice, was presumptively unreliable and as it was not identical to Lee's regarding premeditation, was not interlocking and did not bear sufficient independent "indicia of reliability" to overcome that presumption. Lee.

Appellant believes that Lee is dispositive of the issue of whether or not admitting Co-Defendant Taylor's confession in a joint trial with Mr. Grossman where Mr. Taylor chose not to testify was a violation of Bruton.[1]

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[1] In Lee v. Illinois the Defendants were tried in a non-jury trial before the judge who indicated in his decision that he relied upon facts in Defendant Thomas's confession in finding that Lee was guilty of premeditated murder. Prior to trial, the Defendants had both agreed to joint trial preciselybecause the trial was to be before a judge whom the Defendants agreed would be able to distinguish the two confessions and use Thomas's confession only against him and Lee's confession only against her. Clearly if the judge was unable to distinguish between the confessions nad use them in this limited manner, juries cannot be expected to do so.

Lee makes it very clear that, although the confessions of Defendant and Co-Defendant may interlock on some points, where, as in the instant case, they are not identical as to certain facts material to the crime charged, those confessions are not sufficiently interlocking to meet the Parker v. Randolph exception to Bruton.

In the instant case, Co-Defendant Taylor's entire defense was based on attempting to show that Mr. Grossman was the one actually responsible for the murder of Officer Park. Not only did Co-Defendant Taylor's out of Court statements tend to minimize his role in the crime, but his attorney during the Trial, repeatedly elicited testimony on cross examination which tended to minimize Mr. Taylor's role in the crime, to suggest that Mr. Grossman was solely responsible and that Mr. Taylor acted only out of fear of Mr. Grossman, and that Mr. Grossman`s actions were premeditated and extremely violent. The Florida Supreme Court has held that where a Co-Defendant's defense is based upon a claim that the Defendant was solely responsible for the crime and where the Co-Defendant elicits evidence or testimony at the trial to that effect, a Motion for Severance should be granted. Crum v. State, 398 So. 2d., 810 (Fla 1981). See Rowe v. State, 404 So. 2d., 1176 (Fla 1st DCA 1981). That was precisely the situation in the instant case, and the Trial Court erred in refusing to grant

Mr. Grossman's Motion for Severance. Therefore, Mr. Grossman's conviction should be reversed.

ARGUMENT II

The Trial Court erred in refusing to suppress the items found in the warrantless search of Mr. Grossman's residence and automobile where Mr. Grossman had not consented to the search and had a reasonable expectation of privacy in the vehicle and in the portion of the premises where the items were found.

A search conducted without a warrant is per se unreasonable under the IV Amendment unless it falls within one of the few specifically established exceptions to the warrant requirement. Florida v. Royer, 1Ø3 S. CT. 1319, 46Ø U.S. 491, 75L. ED. 2d 229 (1983); Katz v. United States, 88 S. CT. 5Ø7, 389 U.S. 347, 19L. ED. 2d 576 (1967); Norman V. State, 379 So. 2d. 643. The burden of proof to establish the validity of a warrantless search is on the State. Mann v. State, 292 So. 2d 433. In the instant case, the Sheriff's Office conducted a search of Mr. Grossman's residence without a warrant. Therefore, unless the record establishes that the State met its burden of proving that either the Defendant had no standing to challenge the validity of the search or that the search fell within an established exception to the warrant requirement, the Trial Court should have granted the Defendant's Motion to Suppress the evidence seized in the course of that search. Walker v. State, 433 So. 2d. 644 (Fla. 2d DCA 1983).

Consent to a search is, of course, a recognized exception to the warrant requirement. Schneckloth v. Bustamonte, 93 S. CT. 2041, 412 U.S. to 18, 36L. ED. 2d 854 (1973). Again, however, the State has the burden of proving that the necessary consent was obtained freely and voluntarily. Florida v. Royer, 103 S. CT. 1319, 460 U.S. 491, 75L. ED. 2d 229 (1983). Norman Supra. Furthermore, that proof must be clear and convincing. Norman Supra.

Consent to search may be given by a third party if that third party is a co-occupant and possesses common authority of access and right of control to the premises. United States v. Matlock, 94 S. CT. 983, 415 U.S. 164, 39L. ED. 2d 242 (1974). A Defendant has standing to challenge the legality of a search of his residence even though consent to the search may have been given by a co-occupant of the premises. Bumper v. North Carolina, 88 S. CT. 1788, 391 U.S. 543 (1968). The Defendant has standing even if he has no ownership interest in the premises and the party giving consent is the owner. Id; United States v. Lyons, 706 F. 2d 321 (D.C. Cir. 1983); State v. Brown, 408 So. 2d. 846 (2d DCA 1982); Walker v. State, 433 So. 2d. 644 (2d DCA 1983).

In the instant case, the Trial Court held that Mr. Grossman did not have standing to challenge the warrantless search of his residence or his car because his mother had

consented to the search. It is clear, however, that the fact that a co-occupant of a Defendant's premises may have consented to a search does not deprive the Defendant of his standing to challenge the search. Lyons, Brown, Walker. In the instant case the evidence established that Mr. Grossman was living in his own separate bedroom and that this was his residence for all purposes. He was the sole owner of the car and the only person with access to it. Therefore, clearly Mr. Grossman had a reasonable expectation of privacy in the premises and in the car. State v. Brown, 408 So. 2d., 846 (2d DCA 1982). The Trial Court erred in finding that Mr. Grossman did not have standing to challenge the validity of the search in the instant case.

Furthermore, not only did Mr. Grossman have standing to challenge the searches, but the evidence established that the search was a violation of his Fourth Amendment rights. The authority of the co-occupant of the premises to consent to a search depends on whether or not the co-occupant has common authority over the premises and access or control of the premises for most purposes. Donovan v. A.A. Beiro Construction Company Incorporated, 746 F. 2d 894 (D.C. Cir. 1984), citing United States v. Matlock, 94 S. CT. 988, 415 U.S. 164, 39L. ED. 2d 242 (1974); United States v. Lyons, 706 F. 2d., 321 (D.C. Cir. 1983) even though the co-occupant may have authority to consent to a

general search of the common areas of the premises, that consent does not necessarily extend to every place on the premises. Donovan, Supra. United States v. Gilley, 608 F. SUPP. 1065 (D.C. Georgia 1985); United States v. Butler, 495 F. SUPP. 679 (Eastern District of Arkansas 1980); Walker v. State, 433 So. 2d., 644 (2d DCA 1983); State v. Brown, 408 So. 2d., 846 (Fla. 2d DCA 1982). Rather, the co-occupants authority to give consent to the search depends upon whether or not he has common access to or control over the areas to be searched such that the Defendant has no expectation of privacy in those areas. United States v. Gilley, United States v. Butler, Walker v. State, State v. Brown. A person's expectations of privacy in a particular area will be recognized as legitimate if that person has exhibited an actual subjective expectation of privacy and such expectation is one that society recognizes as reasonable. Norman v. State, 379 So. 2d., 643 (1980). United States v. Salvucci, 448 U.S. 83, 100 S. CT. 2547, 65L. ED. 2d 619 (1980).

In Walker, the Defendant was the sole occupant of a separate bedroom of a home which he occupied with another resident and was the only person authorized to use the room. Therefore, he had a reasonable expectation in the premises and the co-occupant of the house had no authority to consent to a search of the room. Id. In the instant

case, the evidence at the suppression hearing established that Mr. Grossman did indeed have a subjective expectation of privacy in his bedroom and that that expectation was one which would be generally accepted as reasonable by society in general. Therefore, the Trial Court erred in refusing to supress the items taken from his bedroom.

Even more certainly, Mr. Grossman had a reasonable expectation of privacy in his car which was his exclusive property. Under the cases cited above, Mrs. Grossman clearly did not have authority to consent to the search of Mr. Grossman`s car as it was not her property, and she did not have control of or access to the car. Therefore, the Trial Court also erred in denying Mr. Grossman's Motion to Suppress the evidence found in his car.

ARGUMENT III

The death penalty imposed on Mr. Grossman was invalid and a violation of the 8th amendment where the State repeatedly made statements to the jury to the effect that the jury was not the one who imposed sentence and that the ultimate responsibility for deciding whether or not to impose the death penalty was that of the judge, thereby minimizing the importance of the jury in making its recommendation of death or life, and where the Trial Court refused to give an instruction requested by Mr. Grossman to the effect that the jurys recommendation of life or death would be given great weight in the Court's ultimate decision as to whether or not to impose the death penalty.

The United States Supreme Court has unequivocally found that it is a violation of the 8th amendment of the Constitution to rest a death sentence on a determination made by a jury who has been led to believe that the responsibility for deciding whether or not the death penalty is appropriate rests elsewhere. Caldwell v. Mississippi, 37 Cr. L. 3089 (1985). The Court reasoned that the underlying premise of the Supreme Court's line of cases dealing with capital sentencing, was that "capital sentencers would view their task as the serious one of determining whether a specific human being should die at the hands of the state". Id, 37 Cr. L. at 3091. It is only the Court's belief in the assumption that a sentencing jury treats its power to determine the appropriateness of death as a "awesome responsibility" which has allowed the Court to hold that the sentencing jury's discretion in this matter is consistent with the 8th amendment's "need for reliability in the determination that death is the appropriate punishment in a specific case". Id, quoting Woodson v. North Carolina, 428 U.S., at 305.

In the context of capital sentencing proceedings, there is a high potential for substantial unreliability as well as bias in favor of the death sentence when the jury is induced by the State to believe that it may shift its responsibility. Id. The jury might be receptive to the

idea that the jury can more freely err because that error might be corrected by someone else. Id. Also, at least some of the jurors may assume that the Judge will only be reviewing the death penalty and not a recommendation of life imprisonment, and might impose a death sentence out of a desire to avoid responsibility for the decision. Id. Clearly, the sentence that would result from such a proceeding would not truly represent a finding by the jury that the State had demonstrated that the death penalty was appropriate. Id. Furthermore, because jurors in a capital case are placed in an extremely uncomfortable situation and must make a grave and difficult choice, the mere suggestion that responsibility for the ultimate decision as to death rests with others, creates an unacceptable danger that the jury will minimize the importance of its role. Id.

In the instant case, whenever a jury expressed any doubts regarding the death penalty, the State asserted that the jurors did not have the ultimate responsibility for passing sentence on the Defendants and that the final decision rests with the Judge. (R1346,1442,1449,1513). Although perhaps technically an accurate statement of the law in Florida, the context and manner in which the statements were made clearly tended to suggest to the jury that their recommendation of death or life was not really important and that the real responsibility rested with the

Judge. These statements were fundamentally inaccurate because they misled the jury as to their role. The statements also were not an expression of any arguably valid sentencing consideration. The fact that the judge may be the one who ultimately actually sentences the defendant, is no valid reason for a jury to return a death sentence if it might not otherwise. It is simply irrelevant to determining the appropriate sentence. The prejudice to Mr. Grossman which resulted from the statements by the Prosecutor was compounded by the Trial Court's refusal to give a jury instruction reminding the jury of the gravity of the decision and the weight to be given to their recommendation. Therefore, although the State's statements may have been technically correct when viewed by a judge or attorney who is familiar with the law, they were clearly misleading in the implication that the recommendation of the jury is simply not all that important.

As pointed out in Caldwell, capital punishment has been found to be constitutional only because of the underlying assumption that capital juries and judges would approach their task with the most profound seriousness and gravity. Anything which tends to undermine the jury's perception of the importance of its role in recommending the death penalty is unconstitutional and the death penalty returned by such a jury is a violation of the 8th

amendment. In the instant case, as the jury was led to believe that their role was less important than it actually is, their recommendation of death against Mr. Grossman was invalid. The death penalty imposed on Mr. Grossman should, therefore, be reversed.

ARGUMENT IV

> The Trial Court's denial of Mr. Grossman's Motion to Continue the Trial because his attorney was involved in a Federal Trial which was expected to last about a month and lasted six months, and because Mr. Grossman's attorney had discovered only days before the Trial that there was an additional witness previously unknown to him who was allegedly present during an alleged confession made by Mr. Grossman, prevented Mr. Grossman's attorney from preparing a competent and effective defense, particularly as to the penalty phase of the Trial.

A criminal defendant has the right to assistance of counsel whose performance meets at least a minimum level of effectiveness. Kimbrough v. State, 352 So. 2d., 925 (1st DCA 1977). An opportunity for adequate preparation is an absolute pre-requisite if a defendant's attorney is to fulfill his responsibility of insuring that all available defenses are raised on behalf of the Defendant. Id. For example, it was an abuse of discretion for a Trial Court to deny a Defendant's Motion for Continuance where the Defendant's Counsel did not find out until four days before trial about hypnotically induced recall testimony and did

not have the opportunity to depose the hypnotist until the day before trial. Brown v. State, 426 So. 2d 76 (1st DCA 1983). The Defense was also prevented by the denial of continuance from obtaining witnesses to testify in opposition to the hypnosis process used by the State. Id. Inherent in the right to counsel is an adequate opportunity to investigate and prepare any applicable defenses. Id. Likewise, Anderson v. State, 314 So. 2d., 803 (3rd DCA 1975) [where the defense was able to depose a key prosecution witness only the day before trial, it was an abuse of discretion for the Trial Court to deny the Defense request for continuance to secure rebuttal witnesses].

In the instant case, as in Brown and Anderson, Mr. Grossman's attorney was prevented from preparing an adequate defense because he was unable to depose Charles Brewer until right before the trial, and during that deposition he discovered that there was another witness present during Mr. Grossman's alleged confessions to Mr. Brewer, which witness had never been listed or made known to the Defense by the State. Because that witness, Don Smith, was now out of State, having been released from custody, it was impossible for the Defense to contact Mr. Smith, depose him, and bring him back to Florida in time for Trial. When contacted by Mr. Grossman's attorney the night before trial, Mr. Smith stated that the alleged conversations with Mr. Brewer never

took place. As Mr. Smith's testimony could have been crucial in impeaching the testimony of Mr. Brewer, it was impossible for Mr. Grossman's attorney to prepare a thorough and adequate defense in the absence of an opportunity to depose Mr. Smith and obtain his testimony.

Furthermore, Mr. Grossman was also denied the opportunity to prepare an adequate defense as to the penalty phase of his Trial. In his Motion for Continuance, Mr. Grossman's attorney asserted that, because the Federal Trial in which he had been involved prior to Mr. Grossman's trial lasted six months instead of the 1 month which he had been led to expect, he had been unable to adequately investigate and secure the presence of out of state witnesses who would testify on Mr. Grossman's behalf during the penalty phase of the Trial. As in Brown, supra, Kimbrough, supra, and Anderson, supra, it was an abusive of discretion in the instant case for the Trial Court to deny the Motion for Continuance and effectively deny Mr. Grossman an opportunity to obtain essential character witnesses and prepare his defense for the penalty phase of the case.

Both the failure to obtain Mr. Smith as a witness and to adequately prepare for the penalty phase of the Trial was extremely prejudicial to Mr. Grossman. The statements which Mr. Grossman made to Mr. Brewer were the only statements specifically attributable to Mr. Grossman alone

The other out of court statements entered into evidence were made either by Mr. Taylor alone or jointly by Mr. Grossman and Mr. Taylor and the witnesses testifying to those statements were unable to clearly distinguish who made which statements. That point is crucial in two respects:

1. The jury was instructed to disregard Mr. Taylor's hearsay statements in determining Mr. Grossman's guilt;

2. The State based its argument in opposition to Defendant's Motion for Severance on the grounds that Mr. Grossman's and Mr. Taylor's confessions were interlocking. Obviously, the jury should not have considered any out of court statements where they could not distinguish between the statements made by Mr. Grossman and Mr. Taylor in determining Mr. Grossman's guilt. Equally obviously, if the witnesses testifying to Mr. Taylor's and Mr. Grossman's out of court statements could not distinguish which statements were made by whom, the confessions could not be considered interlocking. Therefore, the failure to obtain Mr. Smith's testimony to impeach that of Mr. Brewer resulted in extreme prejudice to Mr. Grossman.

The failure to prepare an adequate defense for the penalty phase of this Trial was also extremely prejudicial to Mr. Grossman. Indeed, the prosecution made a very strong point in closing argument of pointing out the paucity of

witnesses of the defense. The State implied that, because the defense did not produce any credible and objective witnesses who had known Mr. Grossman over a long period of time to testify to his character and background, that such witnesses must not have existed. Undoubtedly, that is exactly the conclusion that was drawn by the jury in making their recommendation for the death penalty.

Therefore, Mr. Grossman's conviction should be reversed because the Trial Court abused its discretion in refusing to grant Defendant's Motion for a Continuance to adequately prepare his Defense.

ARGUMENT V

> The Trial Court erred in (1) denying Defendant's Motion to Exclude Cameras from the Court Room where the Court Room was unusually small, the camera was directly in the jurors line of vision and close to them, and the camera was extremely obtrusive; and (2) releasing to the press a videotape of the crime scene during the course of the trial when the jury was not sequestered.

Although the Florida Supreme Court has held that television cameras may be permitted in the Court room during the course of a trial, the Court has also cautioned that such cameras must be placed in locations which would not interfere with or disrupt the conduct of the trial. In re: Post Newsweeks Stations, Florida, Inc., 370 So. 2d., 764

(Fla 1979). Television cameras should not be situated in the courtroom so that they interfere with the proceedings or with any of the trial participants or their activities. State v. Green, 395 So. 2d., 532 (Fla. 1981). Small Court rooms particularly may not be suitable for camera coverage. Id.

In the instant case both defendants objected to the placement of the television cameras in the courtroom because of the unusually small size of the Court room and the obtrusiveness of the cameras, particularly in relationship to the jury. Because of the closeness of the cameras to the jury and its placement in their direct line of vision, the jurors were unduly aware of the presence of the television camera and subjected to undue pressure because of the constant reminder of public scrutiny. Particularly in the instant case where there was a great deal of publicity surrounding the matter and the press coverage tended to be sensational, the jury was certainly aware of and sensitive to the pressure of public opinion. Therefore, the Trial Court's refusal to exclude television cameras from the Court Room denied Mr. Grossman a fair trial and his conviction should be reversed.

Providing to the press in the middle of Trial, the videotape of the crime scene which was entered in evidence also denied Mr. Grossman a fair trial. See Sheppard v.Maxwell, 86 S. Ct. 1507, 384 U.S. 333, (1966). The jurors

were not sequestered and one or more jurors may have seen television coverage using the videotape. The accompanying commentary would certainly color the juror's view of this piece of evidence and tend to imbue it with greater weight and importance than it would otherwise have had. Although the press and public have a right to access to a public trial, there is nothing which justifies or authorizes handing over pieces of evidence or trial exhibits to the press during trial.

ARGUEMENT VI

The Trial Court erred in (A) refusing to issue a Subpoena Duces Tecum for Officer Park's Personnel File, and (B) in allowing the State to introduce evidence at Trial regarding Officer Park's demeanor and prior conduct record over Mr. Grossman's objections.

A criminal defendant is entitled to a Subpoena Duces Tecum for the production of material relevant to his defense. Fla. R. App. P. 3.220 (D); Green v. State, 377 So. 2d. 193 (3d DCA 1979). In the instant case, Mr. Grossman's Motion for a Subpoena Duces Tecum for the Florida Fresh Water Game and Fish Commission to produce the Personnel File of Officer Park was denied by the Trial Court. (R142,1213-1216). The denial of a Subpoena Duces Tecum was prejudicial to Mr. Grossman in that he was prevented from obtaining information regarding possible prior incidents in which

Office Park unnecessarily employed violence or used her fire arm, which could have been used to rebut testimony elicited by the State over Mr. Grossman's objections regarding Officer Park's mild demeanor on the evening of the incident and her general employment history. (R1833,1901-1904). Therefore, the trial court erred in refusing to issue a Subpoena Duces Tecum to produce Officer Park's Personnel File.

The trial court further erred in permitting the State to introduce evidence in testimony during the trial regarding Officer Park's general character over Mr. Grossman's objections. Evidence of the character or character trait of the victim of a crime is generally inadmissible. Section 90.404, Florida Statutes (1985). The only other exceptions are when a criminal defendant places the character of the victim in issue as part of his defense. Section 90.404 (1)(B)(1&2), Florida Statutes (1985). The testimony of David Allor and of Lieutenant Gainor regarding Officer Park's demeanor and employment history had no relevance to any fact in issue in the case. As neither Defendant ever attempted to present evidence regarding Officer Park's character or to suggest that Officer Park was the aggressor in the incident leading to the shooting, the Trial Court clearly erred in overruling Mr. Grossman's objections to the testimony of Mr. Allor and Mr. Gainor regarding Officer Park's character.

This testimony, which tended to suggest that Officer Park was a very mild mannered, non-aggressive individual, was highly prejudicial to Mr. Grossman, particularly at the penalty phase of the Trial. This testimony could not have helped but bolster the jury's perception that Officer Park was a non-aggressive, relatively weak woman at the mercy of the much larger and more aggressive Defendants. Therefore, the Trial Court erred in refusing to exclude testimony regarding Officer Park's character and that error denied Mr. Grossman a fair Trial.

ARGUMENT VII

> The Trial Court erred in denying Mr. Grossman's Motion to Exclude Testimony regarding the alleged prior burglary of the home of Brian Hancock's parents, regarding other crimes for which Mr. Grossman had been convicted and placed on probation, regarding Mr. Grossman's alleged threats to kill Brian Hancock, and regarding Mr. Grossman's alleged orders to Brian Hancock to bury the guns involved in the crime.

Evidence of other crimes is inadmissible when it is relevant solely to prove the bad character or criminal propensity of the Defendant. Section 90.404 (2), Florida Statutes (1985); Williams v. State, 110 So. 2d. 654 (Fla. 1959); Jackson v. State, 451 So. 2d. 458 (Fla. 1984) [witness's testimony regarding a prior occasion when

defendant pointed a gun at him and boasted that he was a thoroughbred killer was an inadmissible reference to a prior crime and was sufficiently prejudicial to require reversal]; State v. Vazquez, 419 So. 2d. 1088 (Fla. 1982) [evidence regarding defendant's prior conviction was inadmissible on charges of murder and unlawful display of a fire arm during commission of a felony and required reversal of those convictions]; Walker v. State, 403 So. 2d., 1109 (Fla. 2d DCA 1981) [testimony by witnesses regarding alleged other crimes by defendant were improperly admitted because they were relevant only to the accused's character and propensity for crime]; Fasenmyer v. State, 383 So. 2d., 706 (Fla. 1st DCA 1980) [the State was not entitled to question defendant's accomplice about other alleged crimes; questions regarding whether or not the defendant and the accompliss stole guns during other burglaries and regarding defendant's threat to kill him if he went to the police were irrelevant to any fact in issue.]

In the instant case, the trial court denied Mr. Grossman's Motion in Limine, and, over Mr. Grossman's objections, permitted the State to elicit testimony regarding Mr. Grossman's prior felony conviction for which he was placed on probation, regarding an alleged burglary of the home of Brian Hancock's parents in which several guns were taken, alleged threats made by Mr. Grossman against Brian Hancock, Mr. Taylor and Mr. Grossman's alleged orders

to Brian Hancock to dispose of the evidence after the shooting. None of these other crimes were relevant to any facts at issue in the case, and were intended only to show Mr. Grossman's bad character and propensity for crime.

The Trial Court's err in admitting testimony regarding other crimes by Mr. Grossman was clearly prejudicial. As pointed out by the Court in Walker, Supra, although one instance of testimony regarding another crime by a Defendant may in itself not be so prejudicial as to require reversal, where there are a number of instances of such testimony and the effect is to focus attention on the defendant's character or propensity for crime rather than on whether or not he committed the particular crime in question, the cumulative effect may be highly prejudicial and violate the defendant's right to a fair trial. That is exactly what happened in the instant case. The numerous instances in which the Trial Court permitted testimony regarding other crimes over Mr. Grossman's objection had the cumulative effect of focusing the jury's attention on Mr. Grossman's character and propensity for crime rather than on whether or not he was guilty of this particular crime.[2] Therefore, Mr. Grossman's conviction should be reversed.

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[2] It should be noted that the prejudicial effect of this testimony may have been particularly serious at the penalty phase of the Trial where the jury would be especially likely to be swayed by their perception that Mr. Grossman had a propensity for criminal behavior even though that is not an aggravating factor which the jury is permitted to consider under the statute.

ARGUMENT VIII

The Trial Court erred in admitting State's exhibits 4 and 11 over Defendant's objections where exhibit 4 was a gory and gruesome photograph showing a close up of the victim at the scene and where exhibit 11 contained autopsy photographs after the victims head was shaved and both exhibits were totally gratuitous and unnecessary to prove any relevant facts.

Photographs which have potential for unduly influencing a jury should be admitted only if they have some relevancy to the facts and issue. Reddish v. State, 167 So. 2d. 858 (Fla. 1964). Photographs which are gory or gruesome and which are not necessary to prove facts at issue in the case should not be admitted into evidence, particularly where such photographs are merely cumulative. Reddish; Beagles v. State, 273 So. 2d. 796 (Fla. 1st DCA 1973). In the instant case, the still photographs of Officer Park at the scene of the crime were extremely gory and gruesome and were merely repetitions of scenes contained in a video tape which was also played to the jury. The still photographs added absolutely nothing to what was shown in the video tape and the only possible effect was to emphasize to the jury the gruesome nature of the crime.

Particularly where gruesome and gory photographs are of the body after it has been removed from the scene of the crime, they should not be admitted into evidence.

Reddish, Rosa v. State, 412 So. 2d. 891 (Fla. 3rd DCA 1982); Beagles, Supra. For example, photographs of the victim's body taken after removal to the morgue, particularly if they were taken after an autopsy had been performed, are irrelevant and should be excluded from evidence unless there is a disputed issue regarding the cause of death. Reddish, supra; Beagles, supra. In the instant case, the cause of death had been clearly established by the testimony of the medical examiner and there was absolutely no reason to introduce into evidence the pictures of Officer Park after her head had been shaved in preparation for the autopsy. These photographs were extremely gruesome and distressing and were irrelevant to prove any facts in dispute. The effect of the trial court's error in admitting these photographs into evidence was highly inflammatory and prejudicial to the Defendant and denied him a fair and impartial Trial. Therefore, his conviction should be reversed.

ARGUMENT IX

The Trial Court erred in admitting into evidence, over Mr. Grossman's objections, the sneakers and T-Shirt found in the lake where Brian Hancock testified that Mr. Grossman's clothes had been thrown, in the absence of proper identification of the items.

Authentication or identification of evidence is required as a condition precedent to its admissibility.

Section 90.901, Florida Statutes (1985). In the instant case an Officer testified that a pair of sneakers and a T-Shirt, which were admitted into evidence by the State, were found in the lake where Brian Hancock testified that he had disposed of Mr. Grossman's clothing. The Officer attempted to identify the clothing as belonging to Mr. Grossman, but his identification was clearly insufficient as he had no first hand knowledge that the clothing did in fact belong to Mr. Grossman. He was not competent to identify the clothing as Mr. Grossman's and the Court erred in admitting the items on the basis of his identification. These exhibits were certainly prejudicial to Mr. Grossman in that they appeared to coroberate Brian Hancock's story. Therefore, the Trial Court erred in admitting the sneakers and T-Shirt into evidence and Mr. Grossman's conviction should be reversed.

ARGUMENT X

The trial court erred in admitting the testimony of Larry Bedore regarding blood spatters where he was not adequately qualified as an expert and in permitting him to testify as to his opinion when he had made no expert analysis of the blood spatters at the scene of the crime and where his only observation and conclusions were those which could be made by an ordinary person using common sense.

Opinion testimony of non-experts is inadmissible unless his observations cannot be accurately and adequately

communicated in any other way. Section 90.701, Florida Statutes (1985). Opinion testimony by an expert is admissible if that expert's scientific technical or specialized knowledge will help the jury in understanding the evidence. Section 90.702, Florida Statutes (1985). Opinion of an expert should be excluded where facts testified to do not require any special knowledge or experience in order to arrive at a conclusion or are of such a nature that they may be presumed to be within the common experience and knowledge of ordinary people. Mills v. Redwing Carriers, Inc, 127 So. 2d., 453 (Fla. 2d. DCA 1961). Where a witness's testimony clearly establishes that he performed no calculations and developed no factual predicate for his opinion, his testimony as an expert witness is inadmissible. Town of Orange Park v. Pope, 459 So. 2d. 418 (Fla. 1st DCA 1984).

In the instant case, Larry Bedore admitted both at his deposition and in his testimony at Trial that his observations and conclusions regarding the blood spatters at the scene of the crime required no special expertise and that the conclusions he drew were based strictly on common sense and could have been drawn by any ordinary person. He further testified that he performed no technical calculations or analysis of the blood spatters. Therefore,

the Trial Court clearly erred in permitting him to testify as an expert to his opinion that Officer Park's head was inside the car at the time she was shot. This evidence was certainly prejudicial to Mr. Grossman in that it was essential in establishing his entry into the vehicle. Mr. Grossman's entry into the vehicle was an essential fact in establishing a burglary for the purpose both of felony murder and also at the penalty phase as an aggravating factor.

ARGUMENT XI

The trial court erred in giving jury instructions regarding burglary, robbery, and escape as part of the felony murder instructions, over Defendant's objections, where there was no evidence that either Defendant had committed burglary, robbery, or escape.

Section 782.04, Florida Statutes (1985), provides that a homicide which is committed by any person engaged in robbery, burglary, or escape is first degree murder. A defendant may be charged with escape pursuant to Section 944.40, Florida Statutes (1985), if he has been placed under arrest and is in the lawful custody of a law enforcement officer and then consciously and intentionally leaves the "established area of such custody". State v. Ramsey, 475 So. 2d. 671 (Fla 1985). In the instant case, however, there was no evidence that Mr. Grossman had actually been arrested

or taken into custody at the time of his confrontation with Officer Park. Therefore, there was no evidence that the shooting occurred during an escape.

There also is no evidence that the shooting occurred during a burglary or robbery. Robbery is the taking of money or other property which may be the subject of larceny [theft] from the person or custody of another by force, violence, assault or putting in fear. Section 812.13, Florida Statutes (1985). Theft is knowingly obtaining or using or endeavoring to obtain or use with the intent to deprive another person of the property or appropriate the property to his own use. Section 812.014, Florida Statutes (1985). Specific intent to deprive the owner of a piece of property is an essential element of the crime of robbery. Bell v. State, 394 So. 2d 979 (Fla 1981). In the instant case, there was clearly no specific intent on the part of either Defendant to deprive Officer Park of any property. The gun was taken in the course of the struggle after Officer Park had shot at Mr. Taylor, in order to prevent her from using it again. It is simply ludicrous to characterize this act as robbery.

Burglary is defined as entering or remaining in a structure or conveyance with the intent to commit an offense therein. Section 810.02, Florida Statutes (1985). The State must prove that the Defendant entered the structure or

conveyance and that the Defendant had a specific intent to commit some offense. Krathy v. State, 406 So. 2d., 53 (1st DCA 1981); Rozier v. State, 402 So. 2d., 539 (Fla 5th DCA 1981). In the instant case, the State failed to prove that Mr. Grossman was actually inside Officer Park's vehicle. Secondly, the evidence indicated that, even if he were at some point inside the vehicle, he had no intent to commit an offense. Clearly, if any portion of Mr. Grossman's body entered Officer Park's vehicle during the struggle it was completely accidental and unintentional and cannot be considered burglary.

It is clear that the State in this case attempted to manipulate the felony murder statute to cover the situation, but that the felony murder statute was obviously never intended to apply to circumstances such as those in the instant case. As there was no evidence of essential elements of robbery, burglary or escape as defined by Statute, the Trial Court erred in giving the jury instruction on felony murder. The instruction was clearly prejudicial to Mr. Grossman as the jury returned a verdict of first degree murder. Therefore, Mr. Grossman's conviction should be reversed.

ARGUMENT XII

There was insufficient evidence in the instant case to support a conviction for first degree murder.

Appellant will not repeat the preceding discussion regarding the elements of felony murder. As was discussed in the preceding issue there was insufficient evidence in this case to make out a prima facie case of felony murder.

There was also insufficient evidence of premeditation. All the evidence established that the incident happened in a matter of a few seconds as a result of panic on the part of the Defendants. There was absolutely no evidence that Mr. Grossman intended to kill Officer Park. Rather, his only intention was to get away from her and, after she had pulled out her gun and shot at Mr. Taylor, to disarm her. Although, of course, it is unnecessary in order to find premeditated murder that the Defendant have actually plotted and planned over a period of time to commit the crime, never the less, it is necessary that the crime had been committed "from a premeditated design to effect the death of the person killed". Section 782.Ø4 (1) (A), Florida Statutes (1985). In the instant case, there was simply no evidence to support a finding that Mr. Grossman shot Officer Park with any such "premeditated design".

As there was no evidence to support a finding of either premeditation or any of the offenses which would support a finding of felony murder, the verdict was unsupported by the evidence and should be reversed.

ARGUMENT XIII

The Trial Court erred in refusing to give Defendant's requested jury instruction that the testimony of an accomplice should be received by the jury with great caution.

When a vital portion of the State's case rests on the testimony of an accomplice, it is reversible error for the Trial Court to refuse to give a Defendant's requested jury instruction that the testimony of the accomplice should be received by the jury with great caution. United States v. Beard, 761 F. 2d., 1477 (11th Cir. 1985); Padgett v. State, 53 So. 2d., 106 (Fla. 1951); Varnum v. State, 188 So. 346 (Fla. 1939). In the instant case, a vital portion of the State's case for first degree murder rested on the testimony at trial of Brian Hancock and on the testimony of Brian Hancock, Brian Allen, and Officer Desmaris regarding out of Court statements made to them by Co-Defendant Taylor. Brian Hancock was an accomplice to the crime because he assisted the Defendants in disposing of the evidence of the crime and in avoiding discovery.

Furthermore, although Mr. Taylor did not testify at Trial, it was his out of Court statements to third parties which provided the only evidence that Mr. Grossman was actually the person who pulled the trigger. The evidence regarding how the crime actually occurred and who

was responsible for what actions, on the basis of which the State attempted to prove first degree murder against Mr. Grossman, came from Mr. Taylor. Mr. Taylor was obviously an accomplice in the crime as he participated in and assisted Mr. Grossman at the time of the shooting.

The failure to give the requested jury instruction was clearly prejudicial given the fact that the testimony or evidence suggesting that Mr. Grossman was the one who actually pulled the trigger and the evidence on which the State based its claim of premeditated or felony murder derived from the testimony or statements of these two accomplices. Therefore, the Trial Court erred in refusing to give the cautionary jury instruction regarding accomplice testimony when requested by the Defendant, and Mr. Grossman's conviction should be reversed.

ARGUMENT XIV

The Trial Court erred in denying Mr. Grossman's Motion for Special Penalty Phase Jury Instructions.

The Florida Supreme Court has held that a jury instruction defining the mitigating circumstances listed in Section 921.141, Florida Statutes (1985) must be given. Cooper v. State, 336 So. 2d., 1133 (Fla. 1976). The United States Supreme Court has also held that in order for a State's application of capital punishment to be

Constitutional, the law must be applied in a manner that avoids arbitrary and capricious infliction of the death penalty, and, therefore, standardless sentencing discretion on the part of the jury must be avoided. Godfry v. Georgia, 100 S. CT. 1759, _____ U.S. _____, _____ L. ED. 2d. _____ (1980). The jury's discretion must be guided by clear and objective standards which make rationally reviewable the sentencing process in death cases. Id.

Mr. Grossman requested a jury instruction to the effect that the jury's advisory recommendation regarding the death penalty is entitled to great weight; the jury's recommendation of death or life imprisonment is entitled to great weight. Stone v. State, 378 So. 2d. 765 (Fla 1979); Tedder v. State, 322 So. 2d. 908 (Fla 1975). In fact, an essential premise in finding that the death penalty is Constitutional and not a violation of the Eighth Amendment, is that the jury recognize the importance of their responsibility in recommending life or death in a capital punishment case. Caldwell v. Mississippi, supra.

In the instant case, where the State had repeatedly suggested to the jury that the responsibility for the death sentence actually rested with the Judge, not the jury, the trial court's failure to give the instruction that the juries recommendation, although advisory, was entitled

to great weight, was a violation of the Eighth Amendment and requires reversal of the death sentence imposed on Mr. Grossman.

Mr. Grossman was also entitled to have included in the jury instructions his requested instruction number 2, which stated that the death penalty is intended for only the most aggravated and unmitigated of cases (R237), number 3, instruction regarding the procedure to be followed in weighing aggravating and mitigating circumstances (R238), number 4, that any aspect of the Defendant's character or background or any circumstances of the offense could be considered as a mitigating factor, and number 5, that the aggravating circumstances are limited to those in the Statute although the mitigating circumstances which can be considered are unlimited. The Florida Supreme Court has specifically held that, under Florida's Death Penalty Statute, the death penalty is intended for only the most aggravated of crimes, and that weighing the aggravating and mitigating circumstances is not "a mere counting process of x number of aggravating circumstances and y number of mitigating circumstances, but rather a reasoned judgment". State v. Dixon, 283 So. 2d., 1, 10 (Fla 1973). Requested instructions two and three should have been given by the Trial Court, particularly in light of the Court's instruction "you should weigh the aggravating circumstances

against the mitigating circumstances," which suggests that the process may indeed be merely comparing the number of aggravating circumstances to the number of mitigating circumstances. (R245).

A State's death penalty statute is only Constitutional to the extent that it provides for a procedure and is consistently applied in such a manner that all mitigating factors of any kind or nature may be considered as mitigating factors, while the aggravating factors are limited to those specifically listed in the Statute. Lockett v. Ohio, 98 S. CT. 2954, 438 U.S. 586, 52 L. ED. 2d., 973 (1978); Dixon, Supra; Songer v. State, 365 So. 2d., 696 (Fla. 1978); Elledge v. State, 346 So. 2d., 998 (Fla 1977). Therefore, Mr. Grossman's requested penalty phase instructions number 4 (R239) and number 5 (R240) should have been given by the Trial Court.

A Defendant may argue as a mitigating circumstance that he did not intend to kill his victim. White v. State, 403 So. 2d., 331 (Fla 1981). Therefore, the Trial Court should have included Defendant's requested penalty phase instruction number 6 to the effect that if found that the Defendant did not possess a deliberate intent to kill that factor should be considered a mitigating circumstance (R241).

The trial court should also have included Mr.

Grossman's requested instruction that a jury may decline to recommend the death penalty even if one or more aggravating circumstances are found and no mitigating circumstances are found. Gregg v. Georgia, 96 S. CT. 2909, 428 U.S. 153, 49 L. ED. 2d 859 (1976); Maggard v. State, 399 So. 2d., 973 (Fla 1981).

The Trial Court also erred in including in the jury instruction that if the crime was committed during the commission, an attempt to commit or flight after committing, the crime of robbery or burglary and an instruction to the effect that the crime for which the Defendant is to be sentenced was especially wicked, evil, atrocious or cruel, were aggravating factors to be considered by the jury where there was absolutely no evidence to support either aggravating factor. (R244). The State has the same burden of proof - proof beyond a reasonable doubt - in establishing aggravating factors at the penalty phase of the Trial as in establishing guilt. State v. Dixon, 283 So. 2d., 1 (Fla 1973). As discussed in previous issues, there was simply insufficient evidence to prove beyond a reasonable doubt that the shooting of Officer Park occurred during either a robber or a burglary.

There was also insufficient evidence that this crime was committed in a manner which was heinous, atrocious, or cruel. This aggravating factor is limited

only to those circumstances which are exceptionally horrible and cruel. (See Issue XV)

It was also misleading for the Trial Court to instruct the jury that an aggravating factor which could be considered was that the crime occurred in order to avoid lawful arrest or escaping from custody or to disrupt or hinder the lawful exercise of government function. There was no evidence that Mr. Grossman was actually under arrest at the time the incident occurred or that he was attempting in any way to disrupt law enforcement functions. Furthermore, as these two factors may be considered only as one aggravating factor even if both are found to exist, it was error for the Trial Court, over Mr. Grossman's objections, to include them as two separate factors. (R2593-2600).

There is no question that the Court's refusal to give the jury instructions requested by Mr. Grossman and the Court's errors in giving the jury instructions on aggravating factors was prejudicial to Mr. Grossman. Therefore, the death sentence imposed on Mr. Grossman should be reversed.

ARGUMENT XV

There was insufficient evidence in the instant case to support a finding that there were sufficient aggravating factors to support a sentence of death and no mitigating factors.

In the instant case, the Trial Court found the following aggravating circumstances:

1. The crime was committed while he was engaged in the commission of or an attempt to commit or flight after committing or attempting to commit the crime of robbery or burglary;

2. The crime was committed for the purpose of avoiding or preventing lawful arrest or effecting escape from custody; or, the crime was committed to disrupt or hinder the lawful exercise of governmental function or enforcement of laws. (These aggravating factors were treated as only one by the judge.);

3. The crime was especially wicked, evil, atrocious or cruel. The Court found no mitigating circumstances and specifically noted that Mr. Grossman's youth was not a mitigating factor.

The State in a capital punishment case must prove aggravating factors by proof beyond a reasonable doubt. Dixon, supra. As discussed in Issues XI and XII, there was simply insufficient evidence in the instant case to establish the aggravating factors that the crime was

committed during a burglary or robbery or attempts to commit a burglary or robbery.[3] Therefore, it was error for the Trial Court to find that aggravating factor.

There was also insufficient evidence to establish that the crime was committed in order to avoid or prevent lawful arrest or effecting escape from custody. The evidence indicated that Mr. Grossman had not actually been placed under arrest or taken into custody at the time the confrontation with Officer Park began. There was also no evidence that the crime was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws. Therefore, it was error for the trial court to find these aggravating factors.

There was also no evidence to show that the crime was especially wicked, evil, atrocious or cruel. The evidence indicated that the crime occurred because Mr. Grossman panicked that the crime occurred in the course of his struggle with Officer Park, and that she died instantaneously of the bullet wound to her head. The Florida Supreme Court has consistently held that heinous means extremely wicked or shockingly evil, that atrocious means outrageously wicked and vile, and that cruel means designed to inflict a high degree of pain with utter

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[3] And the State presented no additional evidence during the penalty phase of the Trial.

indifference to or even enjoyment of the suffering of others. Dixon, Supra; Clark v. State, 443 So. 2d., 973; Maggard v. State, Supra; Williams v. State, 386 So. 2d., 538 (Fla 1980). The circumstances to be considered in determining whether or not a first degree murder is especially heinous, atrocious, or cruel, is whether or not the always present horror of murder itself is accompanied by additional acts which set the crime apart from the norm, making it a conscienceless or pitiless crime which is unnecessarily torturous to the victim. Cooper, supra. This Court has repeatedly held that where a murder victim dies almost instantaneously or within a very short time after being shot, the aggravating factor that the crime is heinous, atrocious, or cruel simply does not apply. Maggard, supra, Williams, supra, Clark, supra. The evidence established that the entire sequence of events covered an extremely brief period of time. There was simply no evidence that the crime was committed in a manner which was completely conscienceless, pitiless, or intended to inflict pain and suffering on the victim. This is simply not the type of crime which was intended to be included in Section 921.141 (5) (H).

As there was insufficient evidence to support a finding of any of the aggravated circumstances found in the

instant case, Mr. Grossman's sentence of death should be vacated and reversed.[4]

In addition, there was substantial evidence of mitigating factors. Mr. Grossman had no prior history of violence, he had a deprived and difficult adolescense because of poverty and the disability and death of his father, he was only nineteen, and while in jail he had expressed remorse for the crime and had been a well-behaved and cooperative prisoner. Therefore, it was error for the court to find no mitigating circumstances.

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[4] Furthermore, even if only one of the aggravating factors submitted to the jury are found to be unsupported by the evidence, the death sentence should be vacated as the jury returned a general verdict recommending death, without specific findings. Stromberg v. California, 51 S. Ct. 532, 283 U. S. 359, 75 L. Ed. 1117, (1931).

ARGUMENT XVI

Mr. Grossman's death penalty sentence should be reversed because the Trial Court failed to enter written findings regarding the aggravating circumstances on which he was relying to impose the death sentence until after Notice of Appeal had been filed and the Trial Court had lost jurisdiction of the case, and the Trial Court did not orally recite the findings on which the death sentence was based into the record at the time of hearing.

Section 921.141 (3), Florida Statutes (1985), provides that whenever a Trial Court imposes the death sentence the Court's determination shall be supported by specific written findings of fact regarding aggravating and mitigating circumstances. This section further provides that "if the Court does not make the findings requiring the death sentence, the Court shall impose sentence of life imprisonment". Id. At the sentencing on December 13, 1985, where the Trial Court orally pronounced sentence of death, (R2763-2764), he did not specify what aggravating or mitigating factors he had determined. (R2719-2765). Notice of Appeal was filed on December 23, 1985. The Court's written findings as to aggravating and mitigating circumstances was not entered until March 19, 1986. (R289-290).

After filing Notice of Appeal, the Trial Court loses jurisdiction of a criminal case. Matheny v. State, 429 So. 2d., 1341 (Fla. 2d DCA 1983). In the instant case,

the Trial Court had clearly lost jurisdiction of the matter at the time the written findings were entered, three months after Notice of Appeal was filed.

Where a Trial Judge did not enter written findings of fact regarding aggravating and mitigating circumstances in the record until after the Court had lost jurisdiction because of filing Notice of Appeal, and the Trial Judge had not orally pronounced any specific findings as to aggravating or mitigating factors at the time of sentencing, a death sentence must be vacated. Royal v. State, #66,144 [11 FLW 490] (Fla Sept. 18, 1986). As the circumstances in Royal were virtually identical to those in the instant case, this Court's holding in Royal requires vacating Mr. Grossman's death sentence.

ARGUMENT XVII

The Trial Court erred in denying Mr. Grossman's Motions 1 through 7 to dismiss the indictment because Section 921.141, Florida Statutes (1985), is unconstitutional on its face and as applied.

The Florida Death Penalty Statute, Section 921.141, Florida Statutes (1985), is unconstitutional as applied in the State of Florida because there is no requirement that the Defendant in a capital murder case be informed in the indictment or be given other notice of the aggravating factors on which the State intends to rely in asking for the death penalty. Mines v. State, 390 So. 2d., 332 (Fla 1980); Cert. Den., 451 U.S. 916 (1981). A criminal indictment must adequately inform the Defendant of the precise charges against him. Russell v. United States, 82 S. CT. 1038, 369 U.S. 749 (1962). The State's failure to specify the aggravating circumstances upon which it would rely in seeking the death penalty for Mr. Grossman denied him due process, impaired the preparation of his defense, violated his right to adequate assistance of counsel, and rendered the indictment so vague, indistinct, and indefinite as to mislead the accused and embarrass him in the preparation of his defense in violation of Amendments V, VI and XIV, U.S. Constitution. Because the procedures in imposing a death sentence are entirely different from those of imposing any other type of sentence, in that an

evidentiary hearing before a jury is required and in that the State is limited to specific aggravating circumstances in seeking the death penalty, the sentencing in a capital murder case cannot be compared to sentencing in any other type of case.

As Mr. Grossman was not given notice of the aggravating circumstances on which the State would rely in seeking the death penalty, imposition of the death penalty violated his constitutional right to due process and should be vacated.

Section 921.141(4), Florida Statutes (1985), also violates the Constitution of the State of Florida, Article V, Section 2, which vests the constitutional authority for adopting rules of practice and procedure in all courts in the Florida Supreme Court, because it provides that the Florida Supreme Court must review death penalty cases within sixty days after certification of the record subject to an extension not to exceed thirty days. Therefore, Mr. Grossman's death penalty sentence should be vacated.

Moreover, criminal sanctions may not be so totally without penological justification that they result in the gratuitous infliction of suffering. Gregg v. Georgia, 96 S. CT. 2971, 428 U.S. 227, 49L. ED. 2d 904 (1976). The death penalty has not been proved to be a deterrent to homicide. H. Zeisel, "The Deterrent Effect of the Death Penalty: Facts

vs. faith; L. Klein, B. Forst, V. Filatov, "The Deterrent Effect of Capital Punishment: An Assessment of the Evidence, "The Death Penalty in America, (H. A. Bedau, Ed. 1982). The alternative life sentence with mandatory twenty-five years in prison is an equally effective method of preventing the Defendant from committing future crimes and deterring homicide. Therefore, the Florida Death Penalty Statute violates amendments Eight and Fourteen of the United States Constitution and is unconstitutional. Therefore, Mr. Grossman's death penalty should be reversed and vacated.

Section 921.141, Florida Statute (1985), is also unconstitutional on its face in that it violates the right to due process and equal protection guaranteed by Amendments Five and Fourteen, United States Constitution, and Article 1, Sections 2 and 9, Florida Constitution, in that it provides that in capital sentencing proceedings that any evidence may be introduced that the Court determines to have probative value, regardless of its admissibility under the rules of evidence. This provision creates a separate category of criminal defendants in capital sentencing hearings and denies such defendants equal protection. The Florida Death Penalty Statute is also unconstitutional both on its face and in the manner in which it is applied in that it permits arbitrary and capricious application of the death penalty because jurors are not required to make written findings of aggravating and mitigating

circumstances, the standards set out in the Statute are so vague, ambiguous, and indefinite that the Defendant is deprived of his right to know the nature of the charges against him, provides standards which are impermissibly vague and overbroad, and places upon the Defendant the burden of proving mitigating circumstances in violation of his Fifth and Fourteenth Amendment rights. The United States Supreme Court has consistently held that capital sentencing statutes which permit arbitrary and capricious imposition of the death penalty are unconstitutional. Furman v. Georgia, 409 92 S. CT. 2726, 408 U.S. 238, 33 L. ED. 2d 346 (1972). A capital punishment statute must provide clear and objective standards to guide the sentencer in distinguishing those few cases in which the death penalty should be imposed. Godfrey v. Georgia, 100 S. CT. 1759, 446 U.S. 420, 64 L. ED. 2d 398 (1980); Gregg v. Georgia, 96 S. CT. 2909, 428 U.S. 153, 49 L. ED. 2d 859 (1976).

The aggravating and mitigating circumstances set out in the Florida Death Penalty Statute are too vague and overbroad to adequately guide the discretion of the jury which recommends life or death. The first aggravating circumstance contained in Section 921.141(5)(a), is that the capital felony was committed by a person under sentence of imprisonment. This aggravating circumstance is overbroad because it makes no distinction between the types of crime

for which a person may have been imprisoned. Aggravating circumstance (b), that the Defendant was previously convicted of another capital felony or felony involving use or threat of violence is also overbroad because the circumstances surrounding the prior felony are not considered and there is no exclusion of uncounselled convictions prior to Gideon v. Wainwright or convictions which are not yet final.

Circumstance (c) which is the knowing creation of a great risk to many persons is simply vague on its face and has been applied so broadly and has been and can be applied so broadly as to encompass almost any murder. Aggravating circumstance (d), involves felony murder and is overbroad in that any felony murder has an automatic circumstance and carries with it the presumption of death regardless of the individual circumstances. Applying this aggravating factor could result in a sentence of death totally disproportionate to the Defendant's actual conduct, in violation of Coker v. Georgia, 97 S. CT. 2861 (1977).

Aggravating circumstances (e) and (g) are also vague and overbroad and have been applied inconsistently. See Meeks v. State, 336 So. 2d., 1142 (Fla 1976); Knight v. State, 338 So. 2d., 201 (Fla 1976); Gibson v. State, 351 So. 2d., 948 (Fla 1977). Aggravating circumstance (h) is that the capital felony was especially cruel, heinous, or

atrocious. This factor is overbroad because it could be applied to almost any capital felony and has been applied in an arbitrary and inconsistent manner in the State of Florida. This aggravating factor was found in the instant case although the manner in which this homicide was committed is clearly not in the same category as other cases in which prolonged torture of the victim prior to death was found to be cruel, heinous and atrocious. Finally, aggravating factor (i), that the homicide was committed in a cold calculated and premeditated manner, is clearly vague and overbroad because it can be applied to any premeditated murder and therefore would give every premeditated murder at least one aggravating circumstance, raising a presumption of death.

Florida Statute 921.141 (6), which provides for mitigating circumstances, is also unconstitutional pursuant to Lockett v. Ohio, 98 S. CT. 2981, 438 U.S. 586, 57 L. ED. 2d 973 (1978) because it does not provide that the Defendant be allowed to present any and all evidence relevant to the mitigation of his sentence. Therefore, the Statute, by limiting mitigating factors to those listed in the Statute violates Amendments VIII and XIV, United States Constitution and Article I, Section 17, Florida Constitution.

Furthermore, the sentencing patterns under Florida Death Penalty Statute have actually exhibited a pattern of

arbitrary and capricious sentencing such as that found unconstitutional in Furman v. Georgia. There is no consistency between cases in which the death penalty is imposed and the death penalty is imposed in a discriminatory manner. Numerous statistical studies have established that the death penalty is imposed on Defendants whose victim was white with far greater frequency than on Defendants whose victims were black. R Gross and R Mauro, Patterns of Death; An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization, 37 Stanford L. Rev. 27 (Nov. 1984); H Zeisel, Race Bias and the Administration of the Death Penalty; The Florida Experience, 95 Harv. L. Rev. 456 (Nov. 1981).

In Florida a Defendant whose victim was white is eight times more likely to receive the death penalty than a Defendant whose victim was black.[5] Gross and Mauro, 37 Stanford L. Rev. at 55. Mr. Grossman's case clearly falls within this category as both he and Officer Park are white.

The Trial Court erred in denying Mr. Grossman's motions 1 through 7 to dismiss the indictment because the Florida Death Penalty Statute violates both the United

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[5] Even controlling for such non-racial variables as commission of a felony killing of a stranger, killing of more than one victim, the sex of the victim, use of a gun, location of the homicide, and number of aggravating circumstances failed to reduce the disparity between white victim cases and black victim cases.

States Constitution and the Florida Constitution on its face and as applied. Therefore, Mr. Grossman's death sentence should be vacated.

CONCLUSION

Mr. Grossman's conviction of first degree murder and the death sentence imposed on him by the trial court should be reversed and vacated.

Respectfully submitted,

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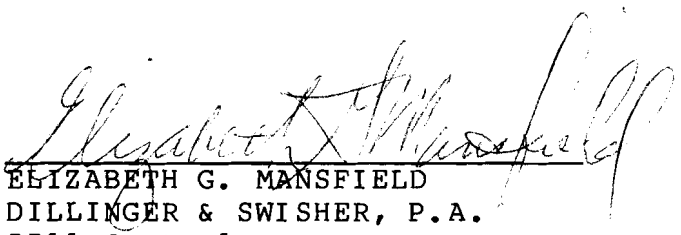
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished upon the Office of the Attorney General, 1313 Tampa Street, Suite 804, Tampa, Florida, 33602, by placing same in the United States Mail with sufficient postage affixed thereon, this 14th day of October, 1986.



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