IN THE SUPREME COURT OF FLORIDA

CASE NO. 69,101

HAROLD LEE HARVEY,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT IN AND FOR INDIAN RIVER COUNTY.

INITIAL BRIEF OF APPELLANT

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AUTHORITIES CITED

PRELIMINARY STATEMENT

Appellant was the Defendant and Appellee was the Prosecution in the Criminal Division of the Circuit Court of the Nineteenth Judicial Circuit in and for Indian River County, Florida. In this brief, the parties will be referred to as they appear before this Honorable Court.

The following symbols will designate the appropriate portions of the record:

"R" Record on Appeal

STATEMENT OF THE CASE

The appellant was arrested on February 27, 1985. An Indictment charging the appellant with two counts of First Degree Murder was filed on March 7, 1985. (R 3100 - 3101) Prior to trial, appellant filed a Motion to Suppress. (R 3341 - 3342) The appellant also filed two Motions in Limine. (R 3173 - 3174; 3485 - 3486) The appellant also filed a Motion to Disclose the Identity of the Confidential Informant. (R 3230 - 3231) The two Motions in Limine and the Motion to Disclose the Identity of the Confidential Informant were denied by the trial court, as well as the Motion to Suppress.

The trial commenced on June 9, 1986. During the process of voir dire, the appellee moved to challenge for cause prospective jurors Roach, Rogers and Meadors. Over the objection of the appellant, all three challenges for cause were granted. Also during voir dire, while in chambers and in the absence of the appellant, the trial judge, prosecutors and counsel for the appellant examined the father of prospective juror Keneven and ruled on and granted the appellee's challenge for cause of prospective juror Keneven. (R 1031) During the examination of the other prospective jurors, counsel for the appellant attempted to ask and examine the prospective jurors on specific hypotheticals in order to determine the attitudes of the prospective jurors on the imposition of the death penalty. (R 810 -811) The appellee objected to these hypothetical questions, and the trial judge sustained the objection.

Twelve jurors were sworn in to hear the cause. (R 1740) Two alternate jurors were selected and sworn in to sit in this cause. (R 1832)

The trial judge gave his preliminary instructions to the jury. (R 1832 - 1839) Counsel for the appellee and for the appellant gave their opening arguments. (R 1848 - 1868)

The appellee presented all of its evidence to the jury and rested. (R 2447B) The appellant made a Motion for a Judgment of Acquital which was denied by the trial court. (R 2450 - 2451) The appellant rested. (R 2451) Counsel for the appellant and the appellee gave their closing arguments. (R 2459 - 2529) The trial judge instructed the jury on the law governing its deliberations. (R 2532 - 2555) The jury commenced its deliberations at 4:30 P.M. on June 18, 1986. (R 2556) The jury returned a verdict wherein it found the defendant to be guilty on two counts of First Degree Murder. (R. 2570)

The trial court instructed the jury on the preliminary penalty phase Standard Jury Instructions. (R 2623 - 2624) Counsel for the appellee and the appellant gave their opening arguments on the penalty phase of the trial. (R 2626 - 2646) Both the appellant and the appellee presented testimony during the penalty phase of the trial. (R 2650 - 2948) The appellant submitted certain Special Requested Jury Instructions. (R 3587 - 3594) The Special Requested Jury Instructions were denied by the trial judge. (R 2575) Counsel for the appellee and for the appellant gave their closing arguments on the penalty phase of the trial. (R 2981 - 3038) The trial judge instructed the jury on the penalty phase Standard Jury Instructions. (R 3038 - 3043) The jury retired to consider the advisory sentence at 4:10 P.M. on June 20, 1986. (R 3043) At 4:37 P.M. the jury asked two questions of the trial court, (R 3044) and the court instructed the jury to rely on the instructions which were previously provided to them. (R 3044 - 3045) At 5:01 P.M. the jury indicated they had arrived at a verdict. (R 3046) At 5:05 P.M. the jury was returned to the court-room and returned advisory verdicts recommending to the trial court by a vote of eleven to one that it impose the death penalty upon the appellant (R 3046 - 3047) At 5:12 P.M. the court adjourned in order that the trial judge could consider the evidence presented and the recommendation of the jury in preparation for

imposition of sentence. (R 3050) At 6:58 P.M. the court reconvened and the trial judge adjudged the appellant to be guilty of two counts of First Degree Murder. (R 3051) The trial judge, having found four aggravating circumstances to exist as enumerated in Section 921.141 of the Florida Statutes, and having found only one mitigating circumstance to exist as enumerated in Section 921.1 of the Florida Statutes, and having found that the aggravating circumstances outweighed the mitigating circumstances, imposed the death penalty upon the appellant. (R 3465 - 3470; 3052)

The appellant timely filed a Notice of Appeal. (R 3495)

STATEMENT OF THE CASE

At approximately 6:30 P.M. on February 23, 1985, the appellant met with his codefendant, Scott Steitler, at his house and drove over to the home of the victims intending to rob them. (R 3608) They agreed that they should cut the power on the telephone lines and drove over to the bridge near the home and cut the power lines. They drove up to the victims' home and knocked on the front door. The appellant had a pistol in his possession at that time. Mrs. Boyd walked around from the side of the house. The codefendant grabbed his weapon from the vehicle and the appellant grabbed Mrs. Boyd and took her into the house where Mr. Boyd was located. (R 3609) At that point in time they told the victims that they needed money and Mr. Boyd went into the bedroom and got his wallet. The appellant traded weapons with his codefendant and took possession of the AR rifle. After Mr. Boyd gave the appellant money from his wallet, the appellant and his codefendant discussed what they were going to do with the victims. They decided that they would have to kill them. The victims started to get up as though to try to run and the appellant started to fire, striking both of the victims. The appellant left the home of the victims, but after hearing the hollering and moaning from Mrs. Boyd, re-entered the home finding Mrs. Boyd still alive and shot her in the head. (R 3610 - 3611) The appellant and his codefendant left the victims' home and threw the weapons away along the roadway.

At approximately 6:20 A.M. on February 27, 1986, the appellant was stopped while driving his motor vehicle along the roadway in Okeechobee County and placed under arrest for the murders of the Boyds. (R 2092 - 2094) The appellant was read his rights pursuant to constitutional law at that time. (R 2095)

The appellant was transported to the Okeechobee County Sheriff's Department and again read his Miranda warnings. (R 2097) The appellant was questioned and interrogated by Sgt. Charles E. Flynn, Jr. of the Okeechobee County Sheriff's Office which began at approximately 10:30 A.M. on the same date. (R 2120) The appellant was again read his rights under Miranda. The appellant was questioned as to his involvment or any knowledge as to the deaths of Mr. and Mrs. Boyd and he denied the same. (R 2123) The appellant requested to speak to his wife, and arrangements were made during that period of time for him to speak to his wife. (R 2128 - 2130) At approximately 2:22 P.M., the appellant gave a statement to the law enforcement authorities wherein he admitted his involvement in the murder of the Boyds. (R 3603 - 3646)

On May 11, 1986, the appellant escaped from the Okeechobee County Jail. (R 2306) During the early morning of May 11, 1986, the appellant was located sleeping in a truck by Hugh McDonald, a police officer with the North Miami Beach Police Department. (R 2326) The officer woke up the appellant and the appellant pointed a gun in the officer's face. (R 2330) After the officer fired his weapon at the appellant, the appellant jumped in the officer's vehicle and fled the scene. (R 2331) After a car chase through the city, the appellant was subdued. (R 2340) The appellant was transported back to the Okeechobee County Detention Center where he stayed pending trial in this cause.

ARGUMENT

POINT I

THE TRIAL COURT ERRED BY EXAMINING PROSPECTIVE JUROR KENEVEN'S FATHER AND IN HEARING, RULING ON AND GRANTING THE APPELLEE'S CHALLENGE FOR CAUSE OF PROSPECTIVE JUROR KENEVEN IN THE ABSENCE OF THE DEFENDANT.

Rule 3.180 (a) (4) of the Florida Rules of Criminal Procedure requires that the defendant be present in all prosecutions for crimes "at the beginning of the trial during the examination, challenging, impanelling, and swearing of the jury". Subparagraph (b) of Rule 3.180 states that if the defendant shall "voluntarily absent himself from the presence of the Court without leave of court...the trial of the cause or the return of the verdict of the jury in the case shall not thereby be postponed or delayed, but the trial, the submission of said case to the jury for verdict, and the return of the verdict thereon shall proceed in all respects as though the defendant were present in court at all times".

During the selection and examination of the prospective jurors at the trial of the case sub judice, it became apparent, although the Record on Appeal does not specifically state so, that the trial court became concerned as a result of the non-responsive answers which were given by prospective juror Keneven during the examination of said prospective juror. (R 1031) As a result of the non-responsive answers given by this prospective juror, the trial judge made inquiry as to whether or not any member of this prospective juror's family came with her to court and she responded that her father had been there with her and that he was present. The trial court then declared a recess and asked the lawyers to meet in his chambers. Thereafter, while in chambers and during the recess, in

the presence of counsel for the appellant, the trial judge and counsel for the appellee, and in the absence of the appellant, the trial court undertook to question the father of said prospective juror. (R 1037 - 1043) Thereafter, the trial judge had the said prospective juror's father sworn in and inquired as to whether all of the questions which he had previously given in response to the trial court's questions were true and correct. (R 1043) Counsel for the appellee inquired as to all of the persons present if they could agree that said prospective juror Keneven be challenged for cause by way of a joint challenge. Counsel for the appellant indicated that he did not oppose the appellee's Motion for Challenge for Cause. (R 1044 - 1045) The trial judge then realized that the appellant was not present during the examination of the father of said prospective juror and indicated that he would have excused the said prospective juror for cause on his own Motion if neither party had made such a challenge. Based upon that fact, the trial judge indicated that he did not think that it was necessary for the appellant to be present. (R 1045) The trial judge granted the State's Motion challenging prospective juror Keneven for cause and the said prospective juror was excused from serving on the jury. (R 1045 - 1046) There was no indication in the Record why the appellant was not present during the examination of the father of the prospective juror and at the time of the granting of the appellee's Motion to challenge said prospective juror for cause.

In Francis v. State, 413 So.2d 1175 (Fla. 1982), this Court held that the defendant had a constitutional right to be present at stages of his trial where fundamental fairness might be thwarted by his absence and reversed the conviction of the defendant for First Degree Murder, vacated the sentence of death and remanded the cause for a new trial. In Francis (supra), this Court recognized that jury selection was one of the essential stages of a criminal trial where a defendant's presence is mandated. In Francis (supra), this Court held that the defendant's

absence during the exercise of a peremptory challenge was a crucial state of the proceeding and also determined that the defendant's absence was not voluntary. The defendant, Francis, had been executed by the court momentarily to go to the restroom. After he had returned to the courtroom, his counsel, the prosecutor, the judge and the court reporter retired to the jury room to exercise Francis' and the State's peremptory challenges. Francis' counsel had told him he could not go with them into the jury room. His counsel had not obtained his express consent to challenge peremptorily the jury in his absence. The Record did not affirmatively demonstrate that Francis knowingly waived his right to be present or that he acquiesced in his counsel's actions after counsel and judge returned to the courtroom upon selecting a jury. The court held that his silence, when his counsel and the others retired to the jury room or when they returned after the selection process, did not constitute a waiver of his rights. This court held that the State had failed to show that Francis made a knowing and intelligent waiver of his right to be present, citing Schneckloth v. Bustamont, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed. 2d 854 (1973) and Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). This court then considered that having found error in proceeding with the jury selection process in his absence, whether the error was harmless. This court stated:

> "We are not satisfied beyond a reasonable doubt that this error in the particular factual context of this case is harmless." Francis (supra) at Pg. 1178.

> "The exercise of peremptory challenges has been held to be essential to the fairness of a trial by jury and has been described as one of the most important rights secured to a defendant...It is an arbitrary and capricious right which must be exercised freely to accomplish its purpose. It permits rejection for

> real or imagined partiality and is often exercised on the basis of sudden impressions and unaccountable prejudices based only on the bare looks and gestures of another or upon a juror's habits and associations. It is sometimes exercised on grounds normally thought irrelevant to legal proceedings or official action, such as the race, religion, nationality, occupation or affiliations of people summoned for jury duty".

Citing Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824; 13 L.Ed. 2d 759 (1965), this court held that "we are unable to assess the extent of prejudice, if any, Francis sustained by not being present to consult with his counsel during the time his peremptory challenges were exercised. Accordingly, we conclude that his involuntary absence without waiver by consent or subsequent ratification was reversible error and Francis is entitled to a new trial".

In the case sub judice, it is clear from the Record that the appellant was not present during the questioning of the prospective juror's father. The appellant would submit that the questioning of prospective juror Kenevin's father was the functional equivalent of the questioning of said prospective juror herself. The trial court itself apparently understood this when it felt compelled to place the said prospective juror's father under oath and inquire as to whether or not all of the questions which he had answered during prior examination were true and correct. The appellant would submit that this court should view the questioning of said prospective juror's father as though it were the equivalent of the examination of the said prospective juror herself. In addition, the Record clearly states that the appellant did not waive his right to be present during the selection of the jury and did not ratify his trial counsel's action after the attorneys and the trial judge returned to the courtroom. His silence on this issue does not

constitute a waiver of the appellant's right to be present during the selection of the jury. Because the extent of the resulting prejudice cannot be assessed, the error was reversible and the appellant is entitled to a new trial.

In Walker v. State, 438 So.2d 969 (Fla. 2d DCA 1983), it was held that the exercise of peremptory challenges of prospective jurors by criminal defendants was not necessarily a mere mechanical function and the trial court erred in not permitting the defendant's presence during the exercise of the peremptory challenges, notwithstanding that prior voir dire questioning of the prospective jurors was conducted in open court in the defendant's presence. In this case, the trial judge, assistant state attorney, and counsel retired to another room, out of the jury's presence, for the exercise of peremptory challenges. The defendant's counsel conveyed the defendant's request that the defendant be present at that time. The judge, however, after ascertaining from defendant's counsel that the defendant had been consulted concerning the subject of peremptory challenges, denied the request. The State argued that the defendant was not entitled to be present at the "mechanical function" of exercising challenges and that this function is not a "critical stage of the proceedings". In that case, the State also argued that Francis (supra) was distinguishable because in Francis (supra) the defendant was not present during the jury selection procedures conducted in the presence of the jury. The appellate court, however, specifically stated that the exercise of challenges by defendant is not necessarily a mere "mechanical function". The appellate court went on to say that "It may involve the formulation of on-the-spot stratagy decisions which may be influenced by the actions of the state at the time...on the other hand,

the exercise of peremptory challenges is 'essential to the fairness of a trial by jury', and we cannot approve the erroneous exclusion of defendant unless we are satisfied beyond a reasonable doubt that the error was harmless". The court therefore ruled that the involuntary absence of the defendant without waiver by consent or subsequent ratification was reversible error and that the defendant was entitled to a new trial.

The appellant would submit that if the exercise of peremptory challenges is not a "mere mechanical function" then the making of a challenge for cause and the ruling thereon is also not a "mere mechanical function", thereby necessitating the presence of the defendant. The appellant may have disagreed with his counsel and objected to the State's challenge to prospective juror Kenevin for cause. The appellant would submit that this court is incapable of assessing the extent of the prejudice, had that scenerio occurred. Furthermore, as distinguishable from Walker (supra), the appellant in the case sub judice was not even present during the questioning and examination of the father of said prospective juror. The appellant would further submit that it is impossible for this court to assess what may have occurred and the resulting prejudice had the appellant requested his trial counsel to ask further questions in examining the father of the prospective juror and in making a request that the trial court continue the questioning of the prospective juror herself. There is no way that this court can determine what may have been revealed had there been further and subsequent examination of the prospective juror. It may have become apparent that she was not, in fact, an appropriate subject for a challenge for cause.

Although this court left open the question in Francis (supra) as to whether the defendant's voluntary absence during a critical stage of a trial for a capital offence constitutes error, that is not the issue before this tribunal. The appellant's absence was clearly not voluntary because he was not invited into

chambers along with counsel by the trial judge.

It is too well established and settled that the challenging of jurors is one of the essential stages of a criminal trial where defendant's presence is required. Herzog v. State, 439 So.2d 1372 (Fla.1983). In Salcedo v. State, 11 FLW 2390 (1986) the appellate court reversed the defendant's conviction based upon the trial court's denial of his Motion for a New Trial wherein he averred that he was not present at the beginning of the trial during the challenging of the jury in violation of Rule 3.180 (a) (4) of the Florida Rules of Criminal Procedure. And, in Godwin v. State, 12 FLW 314 (1/30/87) the appellate court held that the actions of the trial court in requiring the defense attorney to select a jury in the absence of the defendant constituted reversible error. Although with that case the issue arose as to whether or not the defendant's absence during jury selection was voluntary or not, the appellate court found the selection of the jury in his absence to be error. The case sub judice is exactly the same in that the trial court not only heard, ruled on and granted a challenge for cause of a prospective juror in the defendant's absence but also allowed the examination of said prospective juror's father in the absence of the defendant.

Wherefore, the appellant would respectfully submit that this Honorable Court should, for the reasons set forth hereinabove, reverse the conviction, vacate the sentence of death and remand for a new trial. The fact that the appellant's trial counsel joined in and did not otherwise object to the challenge for cause made by the prosecution as to that prospective juror was not dispositive. At no point in time did the appellant knowingly, intelligently and voluntarily waive his right to be present by either ratifying the act of his attorney or by acquiescence

to the waiver with actual or constructive knowledge of the waiver. State v. Melendez, 244 So.2d 137 (Fla. 1971).

POINT II

THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION TO DISCLOSE THE IDENTITY OF THE CONFIDENTAL INFORMANT OR IN THE ALTERNATIVE IN FAILING TO HOLD AN IN CAMERA HEARING.

Prior to trial, the appellant filed a Motion to Disclose the Identity of the Confidential Informant. (R 3230 - 3231) In the said Motion, the appellant alleged that his counsel had learned through discovery that a so-called confidential informant had provided law enforcement with certain information which led to the arrest of the co-defendant and thereafter, to the appellant. The said Motion alleged that the prosecution selected not to disclose the identity of the so-called confidential informant. During the argument on the said Motion, counsel for the appellant requested by way of an oral Motion that the court, in the alternative, hold an in camera hearing at which time the trial judge could question the so-called confidential informant, determine what information that said person had concerning the case, and thereafter, determine whether to grant the appellant's Motion requiring the prosecution to disclose the identity of the confidential informant. The trial court denied the Motion. (R 3260)

Rule 3.220 (a) (1) (i) of the Florida Rules of Criminal Procedure requires the prosecutor, within 15 days after written demand by the defendant, to disclose to the defense counsel the "names and addresses of all persons known to the prosecutor to have information which may be relevant to the offense charged, and to any defense with respect thereto". Subparagraph (c) of Rule 3.220 of the Florida Rules of Criminal Procedure states: "Disclosure of a confidential informant shall not be required unless the confidential informant is to be produced at a hearing or trial, or a failure to disclose his identity will

infringe the constitutional rights of the accused." The prosecution argued that it did not intend to call the so-called confidential informant as a witness in the trial, that the so-called confidential informant was not present during the murder and that he or she never personally spoke to either of the accused. The prosecution argued that the only involvement of the so-called confidential informant was to direct law enforcement to an individual whose name was made known to the defense lawyers. (R 176 - 177)

Initially, the appellant would submit that the trial court erred in denying the Motion and in further not holding an in camera hearing, because the prosecution initially bears the burden of showing that the anonymous witness is, in fact, a "confidential informant" who should be given confidential informant protection and whose identity therefor should not be disclosed. Although the Record does not reveal the basis for the prosecutions refusal to disclose the identity of the anonymous witness, counsel for the appellant herein would submit that the said anonymous witness was a person who had disclosed whatever information he or she knew to law enforcement only upon a promise by law enforcement that his or her identity would not be disclosed. In Featherstone v. State, 440 So. 2d 457 (Fla. App. 4 Dist. 1983), the appellate court held that because the State did not establish that the anonymous witness should be given confidential informant protection, but refused to disclose his identity only because of alleged requests by witnesses to remain anonymous, that the trial court abused its discretion in failing to hold an in camera hearing to determine whether or not the State's right to protect witnesses' identities outweighed the defendant's right to know their names. Although the appellate court in Featherstone (supra) acknowledged that the general rule is that the State has the privilege of non-disclosure of the identity of the confidential informant and the burden is on the

defendant to show why disclosure should be compelled, citing Treverow v. State, 194 So. 2d 250 (Fla. 1967) and State v. Anderson, 239 So. 2d 424 (Fla. 3d DCA 1978), the appellate court reversed and remanded the cause to the trial court with directions to conduct an in camera hearing of the anonymous witnesses to determine whether or not they are entitled to confidential informant status and to enter such further Orders as may be consistent therewith. The appellate court determined that the State's basis for refusal to disclose the identities of the anonymous witnesses was "wholly insufficient to deny appellant's request for the names of witnesses whose testimony might exculpate him..." "The trial court abused its discretion in failing to grant appellant's request for an in camera hearing based upon the State's bare assertion that these witnesses constituted confidential informants" at Pg. 459. The court went on to say that "Just as Florida Rule of Criminal Procedure 3.220 (c) (2) protects confidential informants, Rule 3.220 (i) provides a method by which the court may satisfy itself that a witness is entitled to the protection accorded a 'confidential informant'". Subparagraph (i) of Rule 3.220 of the Florida Rules of Criminal Procedure states that "Upon request of any person, the court may permit any showing of cause for denial or regulation of disclosures, or any portion of such showing to be made in camera. A record shall be made of such proceedings. If the court enters an order granting the relief following a showing in camera, the entire record of such showing shall be sealed and preserved in the records of the court, to be made available to the appellate court in the event of an appeal". In the case sub judice, however, the trial court failed to follow the dictates of subparagraph (i) of Rule 3.220 of the Florida Rules of Criminal Procedure, thereby mandating reversal and remand.

The appellant is not unaware of the decision of the Third District Court of Appeals in State v. Acosta, 439 So. 2d 1024 (Fla. 3d DCA 1983), wherein the court held that a defendant who seeks disclosure of an informant's identity bears the burden to establish that it is necessary. The court concluded that the bare assertion that disclosure of an informant's identity is needed to insure an adequate defense is insufficient to overcome the privilege of non-disclosure. In order to warrant disclosure of an informant's identity, the defendant must demonstrate that the testimony of the informant is essential to establish a defense. The mere possibility that disclosure of an informant's identity might aid in the defense is insufficient to support an order to reveal the identity. If the testimony of the informant would not be relevant and material to the establishment of a defense, the disclosure of the informant's identity is not required. The disclosure is helpful to the defense only if the testimony of the informant would exculpate the defendant. They went on to hold, however, that the appropriate procedure for determining whether the confidential informant is an essential witness for the defense is an in camera hearing, citing United State v. Fisher, 521 F. 2d 783 (5th Cir. 1976) and Coby v. State, 397 So.2d 974 (Fla. 3d DCA). In Acosta (supra), the State appealed an Order dismissing an Information for the State's failure to disclose the name of the confidential informant when ordered to do so by the trial court. The defendant had filed a pretrial Motion to Compel Disclosure of the Identity of the Confidential Informant. The trial court held that the informant's identity had to be disclosed. From the State's refusal to comply with the Order requiring disclosure of the name of the confidential informant and the subsequent Order of the court dismissing the Information, the State appealed. The appellate court heald that "Before suffering the ultimate sanction of dismissal for refusing to disclose an informant's

identity, the State is entitled to an in camera hearing to consider the necessity for the informant's testimony and the State's interest in non-disclosure". The appellant would submit that the matter sub judice no less requires and entitles the appellant to an in camera hearing before the trial court could rule on the Motion. In Antone v. State, 382 So. 2d 1205 (Fla. 1980), this court refused to reverse the conviction based upon the alleged error alleged by the trial court's denial of a Motion to Compel Disclosure of a Confidential Informant. This court held that every case does not mandate disclosure of every confidential informant. This court went on to hold that because the record reflects that this confidential informant was not present at any material point in the incident and did not testify, the defendant, Antone, had not sustained his burden of showing prejudice by the non-disclosure. This court did hold, however, citing Roviaro v. United States, 353 U.S. 53, 77 S.Ct. 623, 1 L. Ed. 2d 639 (1957) that a "careful balancing of interests is necessary" at Page 1214. It is not clear from that opinion, however, whether or not an in camera hearing was ever held wherein the careful balancing of the competing interest was determined. In the case of sub judice, however, had the trial court simply granted that part of the motion requesting an in camera hearing, it could have provided the appellant an opportunity to lay his record wherein the balancing of those interests could have been established. Appellant would submit that the trial court erred in simply relying upon the State's bare assertion that the anonymous witness was, in fact, a "confidential informant". The appellant would submit that if this Honorable Court determines that the trial court did not err in holding an in camera hearing, it effectively will be stripping away Rule 3.220 of the Florida Rules of Criminal Procedure and the requirement that the prosecution provide the names and addresses of all persons known to the

prosecution to have information which may be relevant to the offense charged and to any offense thereto. What is there to prevent the prosecution from avoiding its obligation under Rule 3.220 of the Florida Rules of Criminal Procedure by simply asserting that each, and every witness, including the victim in a particular circumstance, is a "confidential informant". The appellant would submit that the anonymous witness in this case was no more a "confidential informant" than was any other witness listed by the State in its Answer to Demand for Discovery. To hold that the trial court did not err in refusing to hold an in camera hearing, is an invitation to prosecutorial misconduct and very dangerous. The obvious ramification is that the prosecution will inevitably rely upon this court's decision on this issue and thereafter, intentionally or otherwise, simply fail to disclose the existence of any such persons it desires not to disclose. The appellant would submit that this would open the proverbial pandora's box.

Lastly, in State v. Hassberger, 350 So.2d 1 (Fla.1977), this court held that even where the informer never testifies at trial or hearing, but simply provides the police with information which is helpful in an investigation of the crime, there are due process limitations on the extent of the informer's privilege. The personal safety exception to the defendant's right of access to the State's witnesses on cross-examination is an exceedingly narrow one. In analyzing the need for a balancing of the conflicting interests involved, this court held that the trial court erred in not requiring the confidential informant to appear before him, in camera, and testify to the specific threats which were made against his safety, thereby requiring non-disclosure of his name.

Wherefore, the appellant would submit that the trial court erred in failing to hold an in camera hearing in violation of the appellant's Sixth Amendment rights of compulsory process, thereby requiring that this court reverse the conviction and remand the matter to the trial court for a new trial.

POINT III

THE TRIAL COURT ERRED IN GRANTING THE STATE'S MOTION AND CHALLENGE FOR CAUSE OF PROSPECTIVE JURORS ROACH, ROGERS AND MEADORS.

The standard for juror exclusion has been set forth by the United States Supreme Court in Wainwright v. Witt, 105 S. Ct. 1415 (1985) wherein the court adopted a test from Adams v. Texas, 448 U.S. 38, 45 (1980) to-wit:

> "The line of cases establishes the general proposition that a juror may not be challenged for cause based upon his views about capital punishment unless those views prevent or substantially impair the perform-and of his duties as a juror in accordance with his instructions and his oath. The State may insist, however, that jurors will consider and decide the facts impartially and conscientiously apply the law as charged by the Court. This standard relaxed the previously enforced standard pursuant to which a venireman was excludable only after the prosecution had established that he or she was irrevocably committed, before the trial had begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings." Witherspoon v. Illinois, 391 U. S. 510 88 S. Ct. 1770, 20 L. Ed. 2d 776 (1968).

In the recent case of Lockhard v. McCree, _____U.S.____106 S. Ct. 1758, 90 L. Ed. 2d 137 (1986), the United States Supreme Court held that the United States Constitution does not prohibit removal for cause, prior to the guilt phase of a bifurcated capital trial, of prospective jurors whose conscientious objection to the death penalty is so strong that it would prevent or substantially impair the performance of their duty as jurors at the sentencing phase. The court held that "death qualification" of a jury does not violate the Sixth Amendment requirement that the jury be a fair cross-section of the community nor

does "death qualification" of the jury violate the right to an impartial jury. The court held that "There is a legitimate State interest in obtaining a single jury that can properly and impartially apply the law to the facts of the case at both phases of a bifurcated capital trial, and that 'death qualification' serves a legitimate State interest."

Additionally, it is clear that where a prospective juror is excluded and challenged for cause improperly and in violation of the appropriate standard as set forth hereinabove, notwithstanding the fact that such venireman would have been excused peremptorily, that the death sentences must be vacated and the matter remanded for resentencing of the cause including an advisory verdict to be rendered by a jury appropriately chosen in compliance with the appropriate standard. Chandler v. State, 442 So.2d 171 (Fla. 1983) In the case sub judice, each of three prospective jurors was excluded improperly in violation of the standards as set forth hereinabove, thereby mandating that the sentence of death be vacated and that the matter be remanded to the trial court for a new penalty phase hearing.

A. Prospective Juror Roach - The following colloquy took place during the selection of the jury:

> MR. MORGAN: There may be situations where after applying that law that you may feel that the law dictates an advisory recommendation of life without possibility of parole for 25 years?
>
> MR. MURPHY: Yes, right.
>
> MR. MORGAN: Would you be able to make that recommendation if you felt that was the case?
>
> MR. MURPHY: Yes.

MR. MORGAN: In other words, do you understand, in a murder case death, of course, is not the automatic type of sentencing?

MR. MURPHY: I agree.

MR. MORGAN: Would you have any problem doing that, that's another question?

MR. MURPHY: None.

MR. MORGAN: Thank you, Mr. Murphy.

Mrs. Roach, the same question to you.

MRS. ROACH: I don't believe in capital punishment.

MR. MORGAN: Under any circumstances?

MRS. ROACH: Right.

MR. MORGAN: All right. Now, of course, since there will be two different parts to this trial, the first part of this trial wouldn't even deal at all with the question of capital punishment; it will be solely guilt and innocense, do you think your feelings about capital punishment, knowing it's a possible consequence of your verdict should it be guilty, do you think it would affect the first part of the trial a little bit?

MRS. ROACH: No.

MR. MORGAN: So you think that you would be able to sit as a fair and impartial juror on the guilt and innocense phase?

MRS. ROACH: Yes, I would be.

MR. MORGAN: Now as to the penalty phase, are there no circumstances whereby you could recommend the sentence of death?

MRS. ROACH: I don't think so.

MR. MORGAN: Are your feelings and convictions such that that would not be the case at all?

MRS. ROACH: I don't think I could.

MR. MORGAN: Okay. That's fine. I appreciate that. Now, I want you to think about it just for a moment though. As far as the first phase, I am sure you have had a chance to think about it last night, are you really able to separate those two things out, guilt or innocense on the one hand and penalty on the other?

MRS. ROACH: Yes.

(R 976 - 978)

Although it would first appear from the colloquy above, that prospective juror Roach was excludable as a prospective juror in this case, the following colloquy occurred:

MR. WATSON: You indicated that you don't believe in the death penalty under any circumstances?

MRS. ROACH: Right.

MR. WATSON: Or essentially that's what you are feeling?

MRS. ROACH: Right.

MR. WATSON: Is that something that etched in concrete or is that something subject to change depending upon your experience in this case?

MRS. ROACH: It's possible that I could change.

MR. WATSON: If the Judge instructed you that there were certain laws to follow that gave a fairness to the process and you were, after hearing those instructions from the Judge, you were convinced of the fairness

of the process, would you then be able to consider the death penalty as a possible punishment in this case?

MRS. ROACH: I might be able to consider it but I doubt it.

(R 1008 - 1009, emphasis supplied)

Thereafter, the following colloquy took place:

MR. MORGAN: Mrs. Roach, let me just make sure that we're clear on your feelings. As I understood it, when we talked earlier, you said that there would be no circumstances in which you could return an advisory's sentence recommendation of death?

MRS. ROACH: I don't think so. It would have to be pretty extreme for me, you know, to advise a death penalty.

MR. MORGAN: You are saying that you can't conceive of some circumstances where you would recommend the death penalty even though you feel like its wrong?

MRS. ROACH: It's possible that I could, but I highly doubt that I could.

MR. MORGAN: I seem to pick up your feelings or I seemed to pick them up earlier that your convictions were so strong against the death penalty that under no circumstances could you recommend it. I'm just trying to find out if now there would be some circumstances where you would go against that, your conscience, as it were, and recommend death?

MRS. ROACH: It would have to be a very extreme case.

MR. MORGAN: Do you have any idea what kind of a case that would be?

MRS. FOSTER: Mass murder, mass child murders or something like that.

MR. MORGAN: Do you see a difference between killing in that kind of case as opposed to what I guess we could call just an ordinary type of killing as opposed to a mass killing?

MRS. ROACH: Yeah, I think there is a difference.

MR. MORGAN: In both cases somebody is dead?

MRS. ROACH: Right.

MR. MORGAN: Do you see any other difference?

MRS. ROACH: Well, someone has killed several people; it's different than just having killed one.

MR. MORGAN: You mean several like at one time?

MRS. ROACH: Right. Repeatedly doing it, has done it for a long time and has gotten very violent.

MR. MORGAN: Okay. All right. The Judge instructs you at the end of this trial or at the end of the second phase that there are aggravating and mitigating circumstances and Mr. Watson has asked each of you is you would consider that Mr. Harvey had a crime-free past and what have you and I forget all of the things. But there are aggravating circumstances as well. If the Judge were to tell you that you could consider whether or not this murder was especially crueal or heinous or atrocious, would you be able to consider that aggravating circumstance in weighing it against the mitigating circumstances?

MRS. ROACH: I could consider it.

MR. MORGAN: See, the real problem here, Mrs. Roach, no one has any problem I think with your personal convictions, I certainly do not. But the only question is, Do you think your personal convictions are going to override in your mind the law as the Judge reads it to you?

In other words, the law tells you that there are aggravating circumstances and these are the mitigating circumstances, you are to weigh them. And let's say you weigh them and you tell yourself, I think death is a possibility, I mean death is what I recommend but I'm not going to do that because my convictions tell me, my conscience tells me I cannot go death.

MRS. ROACH: I think my first convictions would deter me.

(R 1010 - 1012, emphasis supplied)

Thereafter, the appellee challenged prospective juror Roach for cause and over the objection of counsel for the appellant, the court granted the Motion to challenge prospective juror Roach for cause. (R 1027)

Although the appellant would submit that the issue as to whether or not prospective juror Roach was excludable under the standards set forth hereinabove was a close one, the appellant would submit that prospective juror Roach proved to be one of those prospective jurors who answers the question on their feelings on the death penalty in a fashion appropriate to which side is asking the question. When asked by the prosecutor, she gave the answers that the prosecutor was looking for. When asked by counsel for the appellant, she gave the answers which counsel for the appellant was searching for. The mere fact that counsel for the prosecution asked the last question should not be determinative of whether or not she was excludable as a juror. Unlike the Witherspoon (supra) standard, the standard set forth in Witt (supra), to determine whether a prospective juror may be excluded for cause because of his or her views on capital punishment does not require that a juror's biases be proved with

unmistakeable clarity. The appellant would distinguish this case from Lambrix v. State, _So.2d__, 11 FLW 503 (Fla. 1986). Therein, the prospective juror, Mrs. Hill, told the prosecutor that she could not consider the death penalty under any circumstances and told the defense counsel that she could follow the instructions of the Judge and consider the death penalty. Both attorneys, being capable advocates, led Mrs. Hill down the path of their choosing. This Court held therefore: "Thus, the most pertinent portion of Mrs. Hill's Voir dire testimony is her response to questions asked by the trial judge, the ultimate symbol of neutrality. The fact that Mrs. Hill told the trial judge that should could not vote for the death penalty under any circumstances is controlling", at Page 504. In that case, the following colloquy took place:

> THE COURT: Mrs. Hill, having to do with the death penalty, under any circumstances, could you vote for the death penalty?
>
> MRS. HILL: No.
>
> THE COURT: Ma'me, you may step down for cause.
>
> (Emphasis supplied)

This court held that the above quoted testimony indicated that Mrs. Hill's feelings concerning capital punishment would substantially impair her ability to act as an impartial juror. Therefore, paying great defference to a trial judge's findings in this regard, this court held that the trial judge did not err in excluding Mrs. Hill for cause. In the case sub judice, however, it is clear from the colloquy cited above, that perspective juror Roach could, under the appropriate circumstances, recommend the imposition of the death penalty. She stated that "it would have to be a very extreme case " thereby indicating that she could impose the death penalty in an appropriate circumstance. Although she stated that

"it would have to be a pretty extreme case for me, you know, to advise the death penalty ", she never went as far as perspective juror Hill did in the Lambrix (supra) case, wherein prospective juror Hill answered "no." in response to a question from the court as to whether or not she could impose a dealth penalty under any circumstances.

The appellant would submit that insofar as the trial court was ruling on the appellee's Motion, wherein it sought to exclude prospective juror Roach for cause, that the State had the burden of proof in establishing that the said prospective juror's feeling on the death penalty was such as to "substantially impair her ability to exercise her function as a juror". Having failed to meet that burden, the Motion by the State to challenge prospective juror Roach for cause should have been denied and the trial court erred in not doing so. Each and every prospective venireman comes before the court with a presumption that he or she can serve as a impartial juror and is otherwise fit for that purpose. Until such time as the appellee met its burden of proof in establishing otherwise, the presumption remains. As such, the appellant would submit that the trial court erred in granting the State's Motion wherein it challenged prospective juror Roach for cause, and as such this Honorable Court should vacate the sentence of death and remand the matter to the trial court for a new penalty phase hearing before a jury in conformity herewith.

B. Prospective Juror Rogers - Prospective juror Rogers was questioned preliminarily by counsel for the appellant and counsel for the appellee. (R 759 - 760, 768 - 769) Thereafter, the following colloquy took place:

MR. COLTON: Now, are there any of you who are opposed to capital punishment? Capital punishment means where a person can receive the death sentence. Are any of you justly opposed to capital punishment? If you raise your hand?

MRS. ROGERS: I am more or less.

MR. COLTON: Anyone else? Do you feel, Mrs. Rogers, you say you are more or less; is that what you said?

MRS. ROGERS: Yes.

MR. COLTON: Do you feel that there could be any set of circumstances under which you could vote for the death penalty?

MRS. ROGERS: I doubt it.

MR. COLTON: Okay. Do you feel that no matter what evidence the State produced in this case, and no matter what the judge advised you regarding the law, that you cannot vote for the death penalty under any circumstances?

MRS. ROGERS: I don't think I could, really.

(R 787 - 788)

At this point in the questioning of prospective juror Rogers, the appellant would submit that she was an appropriate candidate for a challenge for cause by counsel for the appellee. Thereafter, however, the following colloquy took place:

MR. WATSON: Hi, Mrs. Rogers; how are you? Let me get out of the court reporter's way so he can see. Mrs. Rogers, you had indicated that your personal feelings are that you oppose the death penalty. Would it be fair to say that you would be willing to listen to the positions and the arguments of your other jurors that you might serve on the jury during the deliberations of the case?

MRS. ROGERS: Well, I guess I would have to.

MR. WATSON: Would you consider what they have to say?

MRS. ROGERS: I imagine so.

MR. WATSON: And might that change your opinion?

MRS. ROGERS: Possibly.

(R 846 - 847, emphasis supplied)

Thereafter, the following colloquy took place:

MR. COLTON: Now, does anybody feel that they cannot do that? I'll state it a little differently. Do you feel that you could do that?

MRS. ROGERS: I guess so.

(R 900)

MR. COLTON: Mrs. Rogers, you said you had a particular problem in the beginning and I am not sure if you changed your mind, you answered a little differently when Mr. Watson was talking to you. You told me in the beginning that you have opposition to the death penalty?

MRS. ROGERS: Yes, I do.

MR. COLTON: Do you feel that you could not, if the defendant was found guilty in this case of first degree murder, do you feel that you could or could not vote for the death penalty?

MRS. ROGERS: I don't think I could vote for the death penalty.

MR. COLTON: Do you feel you could not vote for the death penalty under any circumstances?

MRS. ROGERS: I doubt it very, very much.

MR. COLTON: Do you feel that your opposition to the death penalty or your attitude toward the death penalty would either prevent or substantially impair you from making an impartial decision as to guilt?

MRS. ROGERS: No.

MR. COLTON: On the first phase?

MRS. ROGERS: No.

MR. COLTON: That part you would be all right with-- Mrs. Rogers?

MRS. ROGERS: Yes.

MR. COLTON: But you don't feel you could vote for the death penalty under any circumstances?

MRS. ROGERS: No. I wouldn't want that on my conscience.

(R 905 - 906) (Emphasis supplied)

Thereafter, the appellee made its Motion challenging Mrs. Rogers for cause and, over the objection of counsel for the appellant, the Court granted the Motion and excused prospective juror Rogers. (R 933A)

The appellant would submit that the decision by the trial court granting the State's challenge for cause as to Mrs. Rogers has greater support in the Record than as to its decision granting the State's challenge to cause as to prospective juror Roach. The appellant would submit, however, that again the State

has failed to meet its burden in establishing that the prospective jurors feelings on the death penalty would "substantially impair" her ability to exercise her function as a juror. The appellant would submit that under the case law as it presently stands, just as though a defendant is not entitled to a juor who is absolutely opposed to the death penalty, the prosecution is not entitled to a juror who is absolutely committed to the imposition of the death penalty. The totality of Mrs. Rogers' answers would show only that she would be a tough nut to crack for the State, but that she was not otherwise an improper potential juror.

Wherefore, the appellant would submit that the trial court erred in granting the State's Motion challenging prospective juror Rogers for cause.

C. Prospective Juror Meadors - The Court, counsel for the appellant, and counsel for the appellee examined prospective juror Meadors. (R 1746 - 1770) During the examination of prospective juror Meadors, it became apparent that he knew two of the persons that were listed by the State on it's Answer to Demand for Discovery as potential witnesses to testify on behalf of the State of Florida at the trial. (R 1749) Thereafter, the following colloquy took place:

THE COURT: Can you evaluate the testimony of these two witnesses as you would the testimony of any other witness?

MR. MEADORS: Not knowing the content of the testimony I can't say that I would be unbiased.

THE COURT: Are you saying you might be biased?

MR. MEADORS: Yes.

THE COURT: Is that because you have known these witnesses a head of time?

MR. MEADORS: Yes.

THE COURT: Do you have some idea at this time whether you would believe of disbelieve them more than another witness because you have known them ahead of time?

MR. MEADORS: Again, not knowing the content of the possible testimony, I have known these people in a business relationship for about two years.

THE COURT: Okay.

MR. MEADORS: And if I may add, I've had contact with other members of the family within the past month.

THE COURT: Can you evaluate the testimony of these two witnesses as you would the testimony of every other witness?

MR. MEADORS: Yes.

THE COURT: Do you think the fact that you've known them ahead of time would keep you from being able to do that?

MR. MEADORS: I believe I could.

THE COURT: That you can be fair and impartial, follow the law, evaluate every witness by the same rules?

MR. MEADORS: Yes.

(R 1750 -1751) (Emphasis supplied)

The following colloquy took place in Chambers:

THE COURT: Okay. Now, this is kind of, if you will, the same question being asked twice. One is can you lay aside anything that you recall from the news accounts? And the second is can you follow all of the law?

MR. MEATORS: Yes.

(R 1761)

MR. COLTON: You said that you knew the Stokes?

MR. MEADORS: Yes.

(R 1762)

MR. COLTON: If Mr. Stokes were to testify -- and I'm not sure that he will in this particular case -- but if he was to testify, do you think that based upon your relationship with him that you might tend to give his testimony less weight than someone elses? Just because of your relationship with him and because of what you might know or think about him?

MR. MEADORS: Possibly. Not hearing -- well, not knowing the content of the testimony that he might make, you know, it's hard to judge.

MR. COLTON: But in your mind would you say that if he were to take the stand he would not be viewed by you, he would not start off at least being viewed by you in the same light as the other witnesses?

MR. MEADORS: Possibly.

MR. COLTON: And you really don't know what effect it would have until you heard him testify?

MR. MEADORS: Correct.

MR. COLTON: So at this time would you say it would be, you know, speaking very frankly, impossible for you to say that you would give, that you would not -- Would it be impossible for you to say at this point that you would view him as you would any other witness?

MR. MEADORS: Can you phrase that?

MR. COLTON: I'm going to try to.

MR. WATSON: He asks these rambling questions, that's the problem.

MR. COLTON: At this point, based on what you know about him, would it be impossible for you right now to say that if you took the stand that you would in fact view him as you would any other witness?

MR. MEADORS: It would be impossible for me to view him as any other witness.

(R 1764 - 1766) (Emphasis added)

Thereafter, counsel for appellee moved to excuse prospective juror Meadors for cause and, over the objection of counsel for appellant, the Motion was granted and prospective juror Meadors was excused. (R 1768 - 1770)

This Honorable Court recently stated: "The test for determining juror competency is whether the juror can lay aside any bias or prejudice and render his verdict solely upon the evidence presented and the instructions on the law given to him by the Court." Lusk v. State, 446 So. 2d 1038, 1049 (Fla.) Cert. denied, 105 S. Ct. 229 (1984). In applying this test, the trial courts must utilize the following rule, set forth in Singer v. State, 109 So. 2d 7 (Fla. 1959): "If there is a basis for any reasonable doubt as to any juror's possessing that state of mind which will enable him to render an impartial verdict based solely on the evidence submitted and the law announced at the trial, he should be excused on motion of a party, or by the Court on its own Motion". The issue before the trial court, however, was whether or not prospective juror Meadors' relationship or knowledge of the two potential State's witnesses would make him "not only impartial, but beyond even the suspicion of partiality". O'Conner v. State, 9 Fla. 215-226, (1860). Again, the appellant would submit that the Record before the trial court is insufficient for the State to meet its burden as the moving party in challenging prospective juror Meadors for cause. At no point in time did Mr. Meadors ever indicate that his bias or prejudice was such that it would prevent him from laying

aside those considerations and rendering his verdict solely upon the evidence and the instructions. Leon v. State, 396 So. 2d 203 (Fla. App. 1981). In fact, prospective juror Meadors never stated whether or not his knowledge of the two potential witnesses would make those witnesses more believable or less believable in his eyes. As such, the appelle, as the moving party, failed to meet its burden and the motion challenging prospective juor Meadors should have been denied.

Wherefore, the appellant would submit that he is not only entitled to a new penalty phase hearing but that this Honorable Court should reverse the conviction, set aside the death sentence and remand the case for a new trial.

POINT IV

THE TRIAL COURT ERRED IN LIMITING AND PRECLUDING COUNSEL FOR THE APPELLANT FROM EXAMINING THE PROSPECTIVE VENIRE AS TO THE PROPRIETY OF THE DEATH PENALTY IN SPECIFIC FACTUAL SITUATIONS.

Rule 3.300 (b) of the Florida Rules of Criminal Procedure states as follows: "The court may then examine each prospective juror individually or may examine the prospective jurors collectively. Counsel for both State and defendant shall have the right to examine jurors orally on their voir dire." Meaningful voir dire examination of prospective jurors, by the Court and by counsel, is assured by the Florida Rules of Criminal Procedure, subject to the trial court's control of unreasonably repetitious and argumentative voir dire questioning. Counsel must have an opportunity to ascertain latent or concealed prejudgments by prospective jurors which will not yield to the law as charged by the court, or to the evidence. Jones v. State, 378 So.2d 797 (1 DCA 1979)

During the examination of the prospective venire, counsel for the appellant attempted to ask of the venire a series of factual situations and then ask them if they think the death penalty was appropriate in those particular factual situations. Counsel for the appellant first attempted to place before the venire the hypothetical wherein a person killed someone else while defending himself. After asking that question, counsel for the appellee objected and the objection was sustained. The court held that it would be improper to get a juror to commit to a certain type of fact situation during voir dire and that it was irrelevant to ask a question concerning another set of facts other than those which might be presented to the jury. Counsel for the appellant

argued that he was not at all suggesting that the hypotheticals which he would question the jurors on were going to be facts which would be presented in the case but that it was imperative for him to ask these questions in order for him to determine the attitudes of the prospective jurors on the imposition of the death penalty. (R 810 - 811, 966 - 969)

In Saulsberry v. State, 398 So.2d 1017 (5 DCA 1981), the appellate court held that the prosecutor had committed reversible error when during voir dire of the jury he set forth hypothetical questions which essentially embodied the facts of the case against the accused, thus attempting to, and probably succeeding in obtaining at least a tacit commitment from jurors to convict. See Dicks v.State, 83 Fla. 717, 93 So. 137 (1922). In Pope v. State, 84 Fla. 428, 94 So. 865 (1922), the appellate court held that in the prosecution for a capital offense, a hypothetical question, designed to ascertain if veniremen had conscientious scrupples against enforcing the law stated in the question which rule of law had been announced by the trial judge, as being applicable to the case under the indictment, was proper. Hypothetical questions having correct reference to the law of the case that aid in determining whether challenges for cause or peremptory are proper may, in the sound and reasonable discretion of the trial court, be propounded to veniremen on voir dire examination.

The appellant would submit that in a capital case where the imposition of the death penalty is being sought by the prosecution, that counsel for the appellant must be allowed to ask the prospective jurors as to whether or not it initially felt that imposition of the death penalty was appropriate under specific factual circumstances. The law seemingly does not allow counsel to ask a juror to commit as to its decision on a specific hypothetical situation, where the evident purpose is to secure an indication in advance as to that juror's decision under certain

evidence or upon certain facts, possibly committing the juror to certain ideas or views when the case shall be finally submitted. Dicks v. State (supra).

The appellant would submit that the issue before the Court is analogous to the situation in O'Connell v. State, 10 FLW 620 (Fla. 1985). In that case, two jurors, when examined by the prosecutor, and after stating that they were opposed to the death penalty, were excluded for cause by the trial judge, over defense counsel's objection that he had no opportunity to examine these jurors or try to rehabilitate them. The trial judge noted counsel's objections but took the position that he didn't believe that the defense attorney could rehabilitate these two witnesses "under any stretch of the imagination" and therefore precluded further examination by counsel for the defendant. This court held that the trial court's refusal to allow the defense an opportunity to examine the two "death-scrupled" jurors cannot be justified as an exercise of "control of unreasonably repetitious and argumentative voir dire questioning" Jones v. State (supra). Although the two cases are obviously factually distinquishable, the appellant would submit that precluding his trial attorney from questioning and examining the jurors as to those hypothetical situations in which they would find the imposition of the death penalty to be appropriate or inappropriate was the functional equivalent of precluding meaningful examination of prospective jurors in a capital case. The purpose of voir dire is to obtain a fair and impartial jury to try the issues in the cause, and it is clear that time restrictions or limits on numbers of questions can result in a loss of such a fundamental right. Williams v. State, 424 So.2d 148 (1st DCA 1982). Experience establishes that jurors will give whatever answer is apparently sought by the questioner, whether he be counsel for the State, for the defendant or the Court. Only upon further

examination, as by suggesting hypothetical situations, can one effectively and truly determine the biases, prejudices and feelings of a prospective juror on the imposition of the death penalty.

Wherefore, the appellant would submit that the trial court violated the appellant's rights of due process and therefore this Honorable Court should reverse the conviction, vacate the death penalty and remand the matter to the Circuit Court for a new trial.

POINT V

THE TRIAL COURT'S DENIAL OF THE APPELLANT'S MOTION IN LIMINE VIOLATED THE APPELLANT'S RIGHT TO A FAIR AND IMPARTIAL TRIAL BY JURY AS GUARANTEED BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND IN VIOLATION OF THE EIGHTH AMENDMENT'S NEED FOR RELIABILITY AND DETERMINATION THAT DEATH IS AN APPROPRIATE SENTENCE IN THIS SPECIFIC CASE.

Prior to trial the appellant filed a Motion in Limine wherein it requested the trial court to enter an Order prohibiting the state attorney, his agents, and witnesses from making any statement or argument to the jury that the appellant would become eligible for parole after 25 years if the death sentence were not imposed upon him (R 3173 - 3174). Section 775.082 of the Florida Statutes provides that:

> A person who has been convicted of a captital felony shall be punished by life imprisonment and shall be required to serve no less than twenty-five years before becoming eligible for parole unless the proceeding held to determine sentence according to the procedure set forth in Section 921.141 results in findings by the Court that such person shall be punished by death, and in the latter event such person shall be punished by death.

Based upon this section of the Florida Statutes, the jury was instructed, during voir dire, opening and closing arguments, during the guilt and innocence phase of the trial and during closing arguments made during the penalty phase of the trial that the jury had two alternative sentencing recommendations which it could make to the court being either life imprisonment without the possibility of parole for 25 years or death. The Motion was denied by the trial Court. (R 183) Additionally,

and in further violation of the appellant's rights under the Eighth Amendment to the United States Constitution, counsel for the appellant moved for a mistrial during voir dire when counsel for the appellee informed the jury that the appellant would be eligible for parole in 25 years, if the death penalty were not imposed upon him. (R 911 - 914) Thereafter, counsel for the appellant asked for, and the court granted, a continuing objection on behalf of the appellant as to any representation by the prosecution that the appellant would be eligible for parole in 25 years if the death sentence were not imposed upon him (R 964). Over the objection of the appellant, the jury was instructed during the penalty phase of the proceedings that the alternative recommended sentences available to them were life imprisonment without the possibility of parole for 25 years or the death penalty (R 2574, 3040). After the jury had deliberated for approximately 26 minutes they asked the Court two questions. One of the questions was "When is his absolute first possibility of parole?" and the other was "If we recommend life will Lee Harvey be serving two 25-years sentences or 50 years or just 25 years?". (R 3044 - 3045) The court responded by answering to the jury that it should rely upon the instructions which the court had previously given to them in that regard. (R 3045) Twenty-four minutes later, the jury indicated that they had arrived at a verdict and recommended to the court that it impose the death penalty by a vote of eleven to one upon the appellant on each of the two counts. (R 3046 - 3047)

The basis for the appellant's original Motion in Limine was that the statutory scheme pursuant to which the parole commission was created under Section 947.03 of the Florida Statutes had been effectively terminated. As such, the present term of all parole commissioners shall expire and the entire commission would expire by 1987. Therefore, under the present statutory framework, if the appellant

were sentenced to life imprisonment he would not be eligible for parole in 25 years because no provision existed for the exercise or granting of parole. Therefore , the appellant argued the prosecution should be precluded from arguing that the appellant could be paroled after 25 years.

Initially, this Honorable Court has held that a prosecutor's comment during closing argument in the sentencing hearing that, unless the jury recommended the death sentence, that the defendant would be released from prison in 25 years, should not have been made because it was not a fair comment either in rebuttal or upon any aggravating or mitigating factor. Paris v. State, 438 So. 2d 787 (Fla. 1983). Additionally, the courts have always held and have condemned misleading or inaccurate statements as to the facts in evidence or the law, and have set aside numerous death penalties as a result thereof. Tucker v. Kemp, 762 F. 2d 1496, 1507 (11th Car.en banc, 2985); Drake v. Kemp, 762 F. 2d 1449, 1458-1459 (11th Car., en banc, 1985); Zant v. Stephens, 462 U.S. 862, 887, n.24 (1983). Belief in the truth of the assumption that sentencers treat their power to determine the appropriateness of death as an "awesome responsibility" has allowed the courts to view sentencer discretion as consistent with - and indeed as indispensable to - the Eighth's Amendment's 'need for reliability in the determination that death is the appropriate punishment in a specific case'". Woodson v. North Carolina, 428 U.S. 280, 305, 96 S. Ct. 2978, 2991, 49 L.Ed. 2d 944. In other words, there should be no doubt upon affirming a death sentence that the sentencing jury in making its recommendation has proceeded in accordance with the law and based upon no misunderstandings. As stated by Justice O'Connor in his concurring opinion in Caldwell v. Mississippi, 105 S. Ct. 2633 (1985), the giving of misleading and inaccurate information regarding the jury's role in the

sentencing scheme is not irrelevant to the sentencing decision. In other words, the jury which makes a recommendation to the trial judge pursuant to which the death penalty is imposed upon the accused shall not be mislead or provided with inaccurate information upon which its recommendation is based. The appellant would submit, therefore, that the trial court erred in denying the appellant's Motion in Limine and in further instructing the jury that the alternative to a death sentence was that the appellant be sentenced to life imprisonment without the possibility of parole for 25 years. Clearly, that is no longer the law as the appellant, had he been sentenced to life imprisonment, would have served a life sentence because there is no longer a mechanism for granting him parole after 25 years - or ever. In view of the two questions which the jury asked of the court during its deliberations, it is quite clear that they were concerned with whether or not the appellant would ever be eligible for parole. Additionally, they were not only concerned with if he was eligible for parole, but when he would become eligible for parole. As such, the imposition of the death penalty upon the appellant violated his Eighth Amendment rights because the working misassumption by the jury diminished the reliability of that jury's determination that death was the appropriate punishment in this specific case and created a bias in favor of imposition of the death penalty.

Wherefore, this Honorable Court should vacate the sentence and remand the matter to the trial court for a new penalty phase hearing.

POINT VI

THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION TO STRIKE AND FURTHER REQUEST FOR A CURATIVE INSTRUCTION BASED UPON AN IMPROPER COMMENT MADE BY THE PROSECUTOR DURING VOIR DIRE.

During voir dire, the following statement was made by the chief prosecutor:

> The judge is not bound by your recommendation, okay. And he will explain that in greater detail later on but at this point suffice it to say that it is not a binding recommendation. It's just a recommendation.
>
> (R 916) (Emphasis supplied)

Thereafter, counsel for the appellant made a Motion requesting the Court to strike the afore-quoted statement made by the prosecutor and requested a further curative instruction be given to the jury in order to cure the error, analogizing the situation to the case of Caldwell v. Mississippi, 105 S. Ct. 2633 (1985). The appellant argued that the jury should not be informed that the trial judge was not bound by its recommendation as to the appropriate sentence and that the recommendation was not a binding recommendation in that it tended to undermine the assumption that sentencers treat their powers to determine the appropriateness of death as an "truly awesome responsibility" consistent with and indispensible to the Eighth Amendment's "need for reliability in the determination that death is appropriate punishment in a specific case". Woodson v. North Carolina, 428 U. S. 280, 305 96 S. Ct. 2978. (R 964) The trial court denied the request for a curative instruction because it "wished that Caldwell (supra) wouldn't have happened and because it didn't think that that case applied to this situation." (R 965)

Thereafter, to further compound the error, the following colloquy took place also during voir dire:

> MR. WATSON: So let me ask you this: If you were placed in the position where you had to make that decision as to whether or not a person lived or died in a case, do you think that you might later be haunted with whether or not you sat on a jury that you didn't feel that you were fair and impartial a hundred percent?
>
> MR. MORGAN: Your Honor, I object to that question? Because that will never be the situation in the State of Florida, that's just not the law. That the juror would be in a position to make the ultimate decision.
>
> THE COURT: The objection is sustained.
>
> (R 1360, emphasis supplied)

Subsequently, and also during voir dire, in an apparent attempt to cure the error which he had created, the appellee compounded the problem by making reference to the fact that the jury would be making an "advisory recommendation" and that the judge will "make the final decision". (R 2376)

In Adams v. Wainwright, 804 F. 2d 804, (11th Cir. 1986), the court reversed the District Court's denial of Adams' habeas petition after he was convicted of first degree murder and sentenced to death. The Court of Appeals held that the trial judge's statement to the jurors, indicating that the judge and not the jurors had the ultimate responsibility for sentence, rendered the defendant's death sentence unreliable and in violation of the Eighth Amendment. The court held that the judge's statements to Adams' jury clearly violated the principles

enunciated in Caldwell (supra), thereby rendering the jury's recommended sentence unreliable. In this case the judge's comments were misleading because they left the jury with a false impression as to the significance of their role in the sentencing process. The court held that the judge's instructions regarding mitigating and aggravating circumstances did not cure the misleading statements, because there was no withdrawal or correction of these statements. In fact, the judge reinforced his prior improper comments by stating that "the final decision as to what punishment will be imposed rests solely upon the Judge of this Court". The appellate court held that the fact that the jury heard these statements during voir dire did not mean that the statements did not influence the jury. The Court found that the statements were not isolated or insignificant comments. They were made by the judge at a time when he purportedly was informing the prospective jurors as to their role in the trial.

The appellant would submit that the error made by the prosecuting attorney in his comment during voir dire rendered the appellant's death sentence no less unreliable in violation of the Eighth Amendment. In Adams (supra), the court held as follows: "The judge's statements to Adams' jury indicating he was free to ignore the jury's recommendation thus were misleading as to the nature of his task in much the same way that the statements in Caldwell (supra) were misleading as to the role of appellate review." In Caldwell (supra), the court noted that the danger of bias in favor of the death penalty is created by the possibility that a jury unconvinced that death is the appropriate punishment might nevertheless impose the death penalty as a message of extreme disapproval of the defendant's acts if it believed that its error in doing so would be corrected on appeal. In Adams (supra), the court held: "The danger that Adams' jury,

relieved of responsibility for determining his fate, would feel free to express its outrage at the senseless killing of an eight-year-old girl clearly was present." Although the case sub judice is distinguishable from Adams (supra), in that the improper comment was made by the prosecuting attorney, the appellant would submit that the trial court compounded the error and brought this case within the four corners of the ruling in Adams (supra) when, in front of the jury, it sustained the state's objection to the question asked of the juror by appellant's counsel as referred to hereinabove. Therein, the prosecuting attorney specifically stated that it will never be the situation in Florida that the juror will be in a position to make the ultimate decision. In response to that statement, the court sustained the prosecuting attorney's objection to the question asked by the appellant's trial counsel. The only rational meaning which the jury could glean from all of this is that the court was agreeing with the prosecuting attorney that the jury will never be in a position to make the ultimate decision. The words might as well have been uttered by the court itself. The appellant would submit that when taking this into consideration, in addition to the prosecuting attorney's comments that the judge was not bound by the jury's recommendation and that it was "just" a recommendation, that the appellant's Eighth Amendment rights were violated. As in Adams (supra), the real danger exists that the judge's statements caused the jury to abdicate its "awesome responsibility" for determining whether death was the appropriate punishment in the first instance. The appellant might therefore be executed although no sentencer had ever made a considered determination that death was the appropriate sentence if the death sentence were allowed to stand.

Wherefore, the appellant submits that the prosecuting attorney's and trial judge's seriously misleading statements regarding the importance and effect of the jury's recommended sentence created an impermissible danger that the recommended sentence was unreliable and, consequently, that the appellant's death sentence was unreliable, and requests this Honorable Court to vacate the sentence and remand the matter to the trial court for a new penalty phase hearing.

POINT VII

THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION IN LIMINE THEREBY ALLOWING THE APPELLEE TO OFFER INTO EVIDENCE TESTIMONY OF THE APPELLANT'S ESCAPE AND SUBSEQUENT CRIMINAL ACTIVITY INVOLVED THEREIN AND IN FURTHER INSTRUCTING THE JURY ON EVIDENCE OF FLIGHT OVER THE OBJECTION OF THE APPELLANT.

Prior to trial, the appellant filed a Motion in Limine pursuant to which it requested that the Court enter an Order restricting the appellee from offering into evidence any testimony relating to the appellant's absence and escape from the Okeechobee County Detention Center subsequent to his arrest and prior to trial and any of the criminal acts committed by the appellant during the escape. (R 3485 - 3486) The court denied the Motion. (R 2301) During the appellee's opening argument, counsel for the appellee referred to the appellant's escape from the Okeechobee County Detention Center and counsel for the appellant made an oral Motion for a Mistrial based upon the same grounds as alleged in the Motion in Limine. The Motion for a Mistrial was denied. (R 1857 - 1858) After both the appellee and the appellant rested during the guilt and innocence phase of the trial, the appellee requested the standard "flight" instruction and, over the objection of the appellant, the court instructed the jury as follows: "If you find from the evidence that the defendant in any manner attempted to escape or evade threatened prosecution by flight, concelment, resistence to lawful arrest or other indications after the fact of a desire to evade prosecution, you may consider such facts along with all other evidence in this case as evidence of a consciousness of guilt on the part of the defendant". (R 2362, 2548 - 2549)

Based upon the trial court's denial of the Motion in Limine, the appellee called as a witness to testify on its' behalf O. L. Raulerson, a Deputy with the Okeechobee County Sheriff's Department, who testified that the appellant was arrested on February 27, 1985, and incarcerated in the Okeechobee County Jail. (R 2305) He also testified that on May 11, 1986, it was first learned that the appellant had escaped from the Jail and the method by which he effectuated his escape. (R 2307 - 2312) Thereafter, Charles Harvey Thompson testified on behalf of the appellee that on or about May 11, 1986, his truck was missing, apparently stolen. (R 2322 - 2325) Hugh McDonald, a police officer with the North Miami Beach Police Department, testified that on May 12, 1986, while on patrol, he saw the Thompson truck parked at the rear of a business, that he exited his vehicle and walked around to the passenger side. At that time he observed the appellant sleeping inside the truck. After awakening the appellant, the appellant propped himself up and pointed a gun in the witnesses face. After the witness fired at the appellant, he ran and fled the scene in the police officer's vehicle. A subsequent chase of the appellant took place. (R 2325 - 2335) Steven Morris, another patrolman with the North Miami Beach Police Department, testified that after hearing an emergency radio transmission from Officer McDonald indicating therein that the said officer's patrol car had been stolen, located and chased the said vehicle at a high rate of speed to a residential area at which time he stopped his vehicle behind the stolen patrolman's vehicle which had stopped at a concrete wall at a dead end. The appellant came out of the vehicle with his hands up at which time he was subdued and secured by the officer. During the attempt to subdue the appellant, he struggled violently and resisted their attempts and otherwise fought with the

officers. Another backup unit responded to the scene and a police dog was let loose on the appellant at which time the appellant formally surrendered and allowed the officers to put the handcuffs on him. (R 2335 - 2345)

Steven Steinberg, another police officer with the City of North Miami Beach, also testified to the same facts and circumstances as testified to by the other North Miami Beach police officers. (R 2349 - 2358)

Initially, the appellant is not unaware of the decisions of this Court in Bundy v. State, 471 So.2d 9 (Fla. 1985), Proffitt v. State, 315 So.2d 461 (Fla. 1975), Spinkelink v. State, 313 So.2d 666 (Fla. 1975) and Daniels v. State, 108 So.2d 755 (Fla. 1959). The appellant would submit, however, that each of these cases is distinguishable from the case sub judice in that the escape of the appellant from the Okeechobee County Jail and the appellant's subsequent flight, occurred over fifteen months after the appellant's arrest and incarceration. In Daniels (supra), the evidence of the flight showed that it occurred within hours of the offense. In Spinkelink (supra), the testimony about flight established that the accused had created a cover-up which enabled him to "flee the scene of the crime", at Page 670. In Proffitt (supra), the allegedly erroneous testimony established that the defendant had fled the scene within a short period of time after the crime. In Bundy (supra), the two incidences of flight occurred when the defendant was apprehended after fleeing the officer who had stopped him only six days after the victim had disappeared and since the disappearance had attracted much publicity, this Court held that it was reasonable to infer that the defendant fled from the officer as a result of a consciousness of guilt on his part. In that case, this Court discussed the probative value of flight evidence as circumstancial evidence of guilt by analyzing various opinions of the Fifth Circuit Court of Appeals. More specifically,

this Court referred therein to United States v. Borders, 693 F.2d 1318, 1325 (11th Cir. 1982), United State v. Howze, 668 F.2d 322, 324 - 25 (7th Cir. 1982) and United States v. White, 488 F.2d 660, 663 (8th Cir. 1970), wherein the probative value of flight evidence was considered to be weakened because there was a significant time delay from the commission of the crime to the time of the flight. Contrasting those cases from Bundy (supra), this Court specifically made reference to the fact that the two acts of flight occurred only two days and six days, respectively, after the victim had disappeared and that the disappearance had attracted so much publicity that the Court felt it could reasonably infer that Bundy had fled from the officers as a result of a consciousness of guilt on his part for those crimes.

In United States v. Myers, 550 F.2d 1036 (1977), the United States Court of Appeals for the Fifth Circuit analyzed the issue of admissibility of flight. Citing McCormick on Evidence, Section 271, it stated that analytically, flight is an admission by conduct. Its probative value as circumstances evidence of guilt depends upon the degree of confidence in which four inferences can be drawn: (1) from the defendant's behavior to flight; (2) from flight to consciousness of guilt; (3) from consciousness of guilt to consciousness of guilt concerning the crime charged; and (4) from consciousness of guilt concerning the crime charged to actual guilt of the crime charged. The Court stated that "Because of the inherent unreliability of evidence of flight, and the danger of prejudice its use may entail...a flight instruction is improper unless the evidence is sufficient to furnish reasonable support for all four of the necessary inferences". The Court went on to state: "The more remote in time the alleged flight is from the commission or accusation of an offense, the greater the likelihood that it resulted from something other than feelings of guilt concerning that offense."

Citing Myers (supra), the United States Court of Appeals for the Eleventh Circuit said in Borders (supra) that when the flight is not immediate, the inference of a conciousness of guilt weakens. "The immediacy requirment is important. It is the instinctive or impulsive character of the defendant's behavior, like flinching, that indicates fear of apprehension and gives evidence of flight such trustworthiness as it possesses...The more remote in time the alleged flight is from the commission or accuation of an offense, the greater the likelihood that it resulted from something other than feelings of guilt concerning that offense" at Page 1326. The appellant is not unaware of the fact that part of the analysis involves whether or not the defendant knows that he is accused of and sought for the commission of the crime charged, and obviously in this case the appellant was aware of the accusation as he was in custody for the crime charged at the time of the escape. Notwithstanding this fact, however, the appellant would submit that the trial court erred in admitting the testimony of the escape and the subsequent criminal activity into evidence because it was highly prejudicial and outweighed its probative value. Its probative value lies only in the fact that it establishes a "consciousness of guilt". Counsel for the appellant, however, had admitted to the jury during voir dire, opening argument and through his cross-examination of the State's witnesses, that the appellant had committed the robbery and the killing of the Boyds. The issue, and the only defense asserted by the appellant, was whether or not he was guilty of First Degree Murder or Second Degree Murder. As such, whatever probative value the evidence of the escape and subsequent criminal activity had to establish a "consciousness of guilt" was outweighed by its prejudicial value. The prejudicial value lies in the fact that this testimony was admitted into evidence merely to show the bad character of the appellant, and thereby prejudiced the jury against him.

Lastly, the appellant would submit that the admission into evidence of the subsequent criminal activity was also improper. The court allowed into evidence the testimony of the officers which established that the appellant had committed various other crimes including an escape, the theft of the motor vehicle, the assault upon a police officer when the appellant pointed the weapon at him, the theft of the police officer's motor vehicle, the assault and battery committed by the appellant upon the two officers and the appellant's acts in resisting arrest with violence. All of the testimony as to these incidences were submitted into evidence merely to prejudice the defendant in showing his bad character. This evidence was transformed from a mere "side show" to a "feature" of the trial, thereby requiring and warranting reversal. Denson v. State, 264 So.2d 442 (1st DCA 1972)

In view of the aforesaid, the appellant would submit that the trial court erred in denying the appellant's Motion in Limine, and allowing the suspect testimony into evidence, and further instructing the jury that if it found from the evidence that the appellant in any manner attempted to escape or evade a threatened prosecution by flight, concealment, resistence to lawful arrest, or other indications of a desire to evade prosecution, that they could consider that along with the other evidence as evidence of a consciousness of guilt on the part of the appellant, thereby requiring that the judgment be set aside, the sentence be vacated, and the matter be remanded to the trial court for a new trial.

POINT VIII

THE TRIAL COURT ERRED IN ITS FINDINGS OF FACT IN SUPPORT OF THE DEATH PENALTY AND ITS IMPOSITION OF THE DEATH PENALTY UPON THE APPELLANT.

The trial court found four aggravating circumstances to exist as enumerated in Section 921.141 (5) of the Florida Statutes. The trial court also found that one mitigating circumstance existed as enumerated in Section 921.141 (6) of the Florida Statutes. Admittedly, the trial court was correct in finding that the capital felony was committed while the appellant was engaged in the commission of or an attempt to commit robbery and burglary. The appellant would submit, however, that the trial court erred in finding that the capital felony was especially heinous, atrocious, and cruel as set forth in Subparagraph 5 (h) of Section 921.141 of the Florida Statutes. As the court's own findings state, when the victims made an attempt to run from the room, the appellant, armed with the AR-15, shot both repeatedly. This does not rise, however, to that which is required for this specific finding. As this Court has said, all murders are by their nature repugnant to our society. This aggravating factor is to be utilized, however, only in those cases "where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies -- the conscienceless or pitiless crime which is unnecessarily torturous to the victim". State v. Dixon, 283 So.2d 1, 9 (Fla. 1973). Also see Jackson v. State, ___So.2d _____ (Sup. 66, 671, 1986). In Dixon (supra) as in Jackson (supra), where a single fatal shot is fired and the victim dies shortly thereafter, this aggravating factor simply cannot be supported. The fact that the victim lived for some time in undoubted pain and knew that she was facing eminent death, horrible as this prospect may

have been, does not set such a senseless murder apart from the norm of capital felonies. Teffeteller v. State, 439 So.2d 840, 846 (Fla. 1983).

Dr. Leonard Walker testified that he performed autopsies on the two vicitms. The autopsies established that the cause of death as to Mr. Boyd were two bullet wounds, one to the back and one to the head, either of which could have been fatal. (R 2015 -2017) Mrs. Boyd also died from a number of bullet wounds. It was his testimony, however, that she was alive at the time of the bullet wound to the head which was instantaneously fatal. (R 2033 - 2037) The bullet wound to the head was the last wound to be inflicted upon her. As such, it is clear that the trial court erred in finding that the capital felony was especially heinous, atrocious and cruel.

The appellant would also submit that the trial court erred in finding that the capital felony was committed for the purpose of avoiding or preventing a lawful arrest as enumerated in Subparagraph 5 (e) of Section 921.141 of the Florida Statutes. The trial court found that the appellant knew that Mr. Boyd had recognized him and therefore after discussing this fact with his co-defendant that they decided that it was necessary to kill Mr. Boyd so that he could not identify him. The mere fact that a death occurs is not enough to invoke this aggravating factor when the victim is not a law enforcement official. Proof of the requisite intent to avoid arrest and detection must be very strong Riley v. State, 366 So.2d 19 (Fla. 1978). The fact that the victims knew their attacker is insufficient evidence to prove beyond a reasonable doubt the aggravating factor that the dominant motive for the murder was elimination of a witness. Doyle v. State, 460 So.2d 350 (Fla. 1984)

The appellant would also submit that the trial court erred in finding that the capital felony was a homicide and was committed in a cold, calculated and premeditated manner without any pretense or moral or legal justification as enumerated in Subparagraph 5 (i) of Section 921.141 of the Florida Statutes. A reasonable intrepretation of the evidence was that the appellant entered the dwelling with the intent to steal. There was no showing of heightened premeditation beyond a reasonable doubt as is necessary for a proper application of this aggravating factor. Blanco v. State, 452 So.2d 520 (Fla. 1984). This aggravating factor is intended to apply in those murders which are characterized as executions or contract murders. Cannady v. State, 427 So.2d 723 (Fla.1983).

Lastly, the appellant would submit the trial court erred in imposing the death penalty upon the appellant. After exclusion of the improperly found aggravating circumstances as stated hereinabove, the appellant would submit that there existed only one valid aggravating factor and at least one valid mitigating factor as found by the Court. As such, there were sufficient mitigating circumstances that outweighed the aggravating circumstances, thereby requiring that this Honorable Court vacate the death penalty and remand the matter to the trial court for imposition of a life sentence upon the appellant.

POINT IX

THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION TO SUPPRESS.

Prior to trial, the appellant filed a Motion to Suppress. (R 3341 - 3342) The Motion alleged that the statements made by the appellant to the law enforcement officers wherein he allegedly confessed to the crime, should be suppressed because the statements were made as part and parcel of an agreement between the appellant and the said law enforcement officers pursuant to which he had agreed to make incriminating statements in exchange for a contact visit with his wife. The trial court denied the Motion to Suppress. (R 727)

The appellant would submit that the trial court erred in denying the appellant's Motion to Suppress his statements in violation of the appellant's right to Due Process of the Law as guaranteed by the Fourth and Fourteenth Amendments to the United States Constitution and Section 9, Article I of the Florida Constitution.

The sum total of the testimony on the Motion to Suppress showed that the appellant was arrested by the Okeechobee County Sheriff's Department at approximately 6:15 A.M. on February 27, 1985. He was informed of his constitutional rights under Miranda v. Arizona, 384 U.S. 436 (1966). He was then transported to the Okeechobee County Sheriff's Department Jail and again advised of his rights under Miranda (supra). For approximately the next two hours he was interrogated and interviewed by certain law enforcement officers. The appellant was again informed of his constitutional rights at approximately 10:30 A.M. The appellant then began to cry. At this point in time the testimony of the appellant and the law enforcement officers are not in agreement. The appellant testified that the law enforcement officer asked him

if he would like to see his wife and that after he indicated that he would, the law enforcement officer said "I'll let you see her if you'll give me a confession". The appellant said nothing to the law enforcement officer for about five minutes and then indicated to him that "yeah, I'd like to see her". At that point in time he gave a statement to the law enforcement officers which is the statement which was sought to be suppressed. Detective Charles E. Flynn, Jr., testified that he initially met with the appellant at approximately 10:25 A.M. He was there for the purpose of administering a polygraph examination. (R 628) He administered the polygraph examination to the appellant and during the examination had concluded that the appellant was lying when he denied his involvement in the murder of the Boyds. (R 635) He informed the appellant that it was his opinion that he way lying and that he, the appellant, had committed the murders. At that point in time, the appellant started to cry and "stated that he would like to see his wife if she would agree to see him". (R 635 - 637) The officer testified that the appellant said to him that there was no point in going on with the polygraph interview and that he started to remove the attachments from himself. He, the appellant, then said "I'm sorry. I lied." (R 638) In response to that, the officer made no comment and the appellant then said "just tell my wife to sell out." (R 638) The appellant then again started talking about his desire to meet with his wife and the officer said "I'll try my best to get her here". (R 639) After fifteen minutes, the law enforcement officer asked the appellant if he wanted to talk any further and he gave no acknowledgment. He let the appellant know that someone was calling his wife. He advised the appellant of the desire of the Boyd family to know what had happened. The appellant started crying and made the statement "I just can't talk about it". (R 640 -641) The appellant then

indicated that he was willing to continue talking and said "I'll tell you what you want to know after I see my wife". (R 642) The law enforcement officer denied that he ever told the appellant that if he gave a statement or a confession that he would allow the appellant to see his wife or that he ever indicated in any manner to the appellant that he could see his wife upon the condition that he gave a statement or confession. (R 642 - 643) The officer then left the room and returned with some items of personalty that the appellant had requested. At that point in time the appellant said "Scott put all the blame on me. He was there, too". (R 645) The officer informed the appellant that attempts were being made to bring his wife to the office to meet with him." (R 647) The appellant was informed that law enforcement had received information to the effect that the rifle was stolen and the appellant stated "I didn't steal it. I found it on the road." He also stated, in reference to the rifle that the "AR was mine". The officer left the room to see if the appellant's wife had been contacted and if she had arrived yet. (R 649) He contacted another law enforcement officer for the purpose of starting the secret recording of the appellant's statements. At 2:22 P.M. the tape started recording in the polygraph room and shortly thereafter the appellant's wife arrived. (R 650) Thereafter, the conversation between the appellant and the law enforcement officer took place as more specifically appears in the record at Page 3603 to 3647.

In ruling on the Motion to Suppress, the court entered certain findings of fact wherein it found that the statement by the appellant that he wants to see his wife was of his own volition and that it was not prompted by a suggestion by the law enforcement officer. (R 718) The court also found that the appellant stated that he would tell Officer Flynn what he wanted to know

after he saw his wife. (R 719) The court found, however, that "no promise" was made by the law enforcement officers that they would bring the appellant's wife and allow a contact visit with him if he would give a further statement. The court also found that the officer told the appellant that by bringing his wife to the Jail this would be an exception to Jail policy but that they were doing it because they felt sorry for the appellant. (R 721) In its findings of fact, the court specifically stated that there were no offers or promises of any collateral benefits of any type which were made to the appellant which influenced the appellant to confess. That the decision for the appellant to make the confession was unconnected with any offer of any benefit. "The sequencing of seeing Mr. Harvey's wife first before he confessed was only that and was not a benefit that influenced him to make the confession. The facts clearly indicate that the decision to make the confession was not caused by Mr. Harvey seeing his wife or offer to see his wife. (R 726)

Simply stated, the appellant would submit that the trial court erred in its findings of fact and of law in its ruling on the Motion to Suppress. The appellant would draw this Court's attention to Page 1 of the Transcript of the colloquy between the appellant and Officer Flynn which appears on Page 3603 of the Record on Appeal. Therein, the following colloquy appears:

> SGT. FLYNN: Okay? Harvey do you still wanta talk to her? You, you still want to see her don't you? After I went through all that, I hope you do. Well, I'm living up to my end of the bargain. How about you? Do you feel any better that you got some of it off your chest? You're not

feeling any better until you get all of it off your chest now I'm telling you. I've been here too many times. And you do understand that the meeting between you and your wife has to be controlled. We can't allow you to swap any secrets or anything like that. Not that you would tell her hey go hide the gun or something like that but it just you know, its still a policy that due to the fact that you are now a prisoner under arrest we just can't allow free visitation if you will. Do you understand that?

LEE HARVEY: Whose going to be there?

SGT. FLYNN: Who do you want?

HARVEY: you.

SGT. FLYNN: Okay. What we'll do is we'll just keep it right here in this room. That way it's private among ourselves right here. Okay? Do you want a cup of coffee or anything?

LEE HARVEY: I would like a cup of, a cup of water though (inaudible - both talk)

SGT. FLYNN: A cup of water? Let me get you a cup of water.

LEE HARVEY: Everything is falling apart.

SGT. FLYNN: Well let me ask you are you going to keep your end of the bargain? I'm getting your wife down here. You said you'd tell me what happened after you talked to your wife and why it happened. Are you still going to keep your end of the bargain? I'm going to turn that air-conditioner down. It's getting cold in here, Lee, I'm cold with my coat on. Do you want my coat?

LEE HARVEY: No, sir.

(emphasis supplied)

The appellant would submit that Sgt. Flynn's own words established that there was, in fact, a "bargain" between him and the appellant. The appellant agreed to make a statement and otherwise confess to the crimes for which he was arrested if law enforcement allowed him to meet and speak with his wife. For the trial court to find that the words "bargain" mean anything other than an agreement, belies the truth.

When the question arises as to the voluntariness of a confession, the inquiry is whether the confession was free and voluntary. It is clear that any confession must not be extracted by any sort of threats or promise, nor obtained by any direct or implied promises, however slight. Nor may they be extracted by any improper influence. Brewer v. State, 386 So.2d 232 (Fla. 1980) In Brewer (supra), this court held that the defendant's initial statement made to the officers who had raised the spector of the electric chair and who suggested that they had the power to affect leniency further suggested to the defendant that he would not be given a fair trial, was coerced and was properly excluded at the defendant's trial for murder. Once it is established that there were coercive influences attendant upon initial confession, the coercion is presumed to continue unless clearly shown to have been removed prior to subsequent confession. Brewer v. State (supra), at Pg. 236. An accused may not be improperly urged by direct or implied promises to make a statement in violation of the basic tenet of law that a confessiong defendant shall be entirely free from the influence of hope or fear. Although a confession is not rendered inadmissible merely because the defendant is told that it will be easier on him if he tells the truth, where the defendant's unrebutted testimony, in essence, is that his interrogator stated that he could get him a "deal" which would result in a lighter sentence from the judge, the defendant's confession should be suppressed.

Bradly v. State, 356 So.2d 849 (4th DCA 1978) In the case sub judice, it is clear that the appellant's confession was the bargained-for exchange or quid pro quo for the right to speak with and have a contact visit with his wife. As such, the trial court erred in finding otherwise and denying the appellant's Motion to Suppress.

Wherefore, the appellant would submit that this Honorable Court should find the Motion to Suppress was improperly denied, reverse the conviction, set aside the sentence and remand the matter to the trial court for a new trial in conformity herewith.

POINT X

THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S SPECIAL REQUESTED JURY INSTRUCTIONS.

During the penalty phase of the trial, the appellant requested the court to instruct the jury on its Special Requested Jury Instructions as more specifically appear at page 3587 - 3594 of the Record on Appeal. Additionally, the appellant requested that the Standard Jury Instructions be amended in order that that portion thereof which informs the jury that its alternative sentencing recommendation to the death penalty that the appellant be sentenced to life imprisonment "without the possibility of parole for twenty-five years" be deleted in view of the statutory change under Section 947.03 of the Florida Statutes as is more specifically argued in Point V hereinabove so that the Jury Instruction would state that the alternative was life imprisonment and make no reference to the appellant's right to parole. Additionally, the appellant requested that the Standard Jury Instruction be amended in order to delete therefrom the final phrase that "the final decision as to what punishment be imposed rests solely with the judge of this court" in view of the decision in Caldwell (supra). The court denied all of the appellant's Special Requested Jury Instructions. (R 2575)

As to the last two requested amendments to the Standard Jury Instructions, the appellant would rely upon the Points and Authorities in the argument previously made hereinabove in Point V and Point VI.

With reference to the Special Requested Jury Instructions as more specifically appear in the Record on Appeal at Page 3587 through 3594, the appellant would rely upon the Points and Authorities referred to in the Special

Requested Jury Instructions themselves. Additionally, however, the appellant would specifically refer to that portion of the Special Requested Jury Instructions which appears on Page 3588 of the Record on Appeal. Therein, in the second Paragraph thereof, the appellant specifically requested that the jury be instructed as follows:

> In this part of the trial, the law does not forbid you from being influenced by pity, sympathy or compassion for the defendant. In fact, evidence engendering such feelings may be considered by you as mitigating factors justifying the exercise of mercy. Such mitigating factors are sufficient by themselves to support a verdict for life imprisonment (without the possibility of parole) if such mitigating factors outweigh any aggravating factors you may find.

Compounding the court's error in refusing and failing to give this portion of the Special Requested Jury Instruction, the appellant would refer to that portion of the voir dire and the appellee's second penalty phase closing argument. During voir dire, counsel for the appellant suggested to the jury that the court would instruct it that "sympathy" and "mercy" are mitigating factors which the jury could consider in determining its recommended advisory sentence. (R 1554) Thereafter, counsel for the appellee asked the jurors during voir dire if they would agree not to consider sympathy and mercy as factors in the penalty phase of the trial if the judge did not instruct them that these were factors to be considered. (R 1554A, 1642) And, as part and parcel of the appellee's closing argument during the penalty phase of the trial, counsel for the appellee argued that the Jury Instructions did not require the jury to consider sympathy or mercy in mitigation. (R 3014 - 3016)

Contrary to Jury Instructions as read to the jury, the law is clear that mercy and sympathy for the appellant are factors which the jury may consider

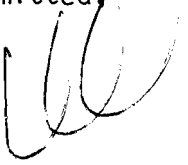
in mitigation and in determining the appropriate recommended or advisory sentence. Rollins v. State, 148 So.2d 274 (Fla. 1963); Piccott v. State, 116 So.2d 626 (Fla. 1960) The United States Court of Appeals for the Eleventh Circuit specifically held in Drake v. Kemp, 762 F.2d 1449 (1985) that just as retribution is an appropriate justification for imposing a capital sentence, a jury may opt for mercy and impose life imprisonment at will. It is stated therein at Page 1460, that "the suggestion that mercy is inappropriate was not only a misrepresentation of the law, but it withdrew from the jury one of the most central sentencing considerations, the one most likely to tilt the decision in favor of life". Therein, the court concluded that the petitioner had shown a "reasonable probability" that the prosecution's remark that "mercy is sickly sentimentality" caused the death verdict thereby rendering the sentencing proceeding fundamentally unfair and entitling the petitioner to relief.

Wherefore, the appellant would submit that the trial court erred in denying the appellant's Special Requested Jury Instructions, thereby requiring that this Honorable Court vacate the sentence and remand the matter to the trial court for a new penalty phase hearing.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Honorable Court shall enter an Order either vacating the sentence, reversing the Judgment and remanding the matter to the trial court for a new trial, or vacating the sentence and remanding the matter to the trial court for a new penalty phase hearing, or vacating the sentence and remanding the matter to the trial court for imposition of a life sentence upon the appellant.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to the Office of the Attorney General, 111 Georgia Avenue, Room 204, West Palm Beach, Florida, by mail on this 26 day of February, 1987.

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