IN THE SUPREME COURT OF THE STATE OF FLORIDA

HECTOR FUENTE

Appellant

vs.

STATE OF FLORIDA

Appellee

Appellate Case No. 69,196

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

By Indictment (1900-1901), filed on May 22, 1985, Appellant was charged with first degree murder.

On March 10, 1986, Appellant filed a Motion for Discharge (2012-2017) which was denied on March 10, 1986, with leave to refile after the taking on necessary deposition (1634). Said Motion for Discharge (2012-2017) was the subject of further proceedings conducted on April 29, 1986 (1757-1796) which concluded with the entry of an Order Denying Motion for Discharge (2042).

A trial was commenced in this cause on May 5, 1986, and continued through May 7, 1986 (1319-1512). Said trial resulted in a mistrial being granted on May 7, 1986 (1510).

On June 11, 1986, Appellant filed a Motion to Dismiss (2094-2095) which was denied on June 18, 1986 (2094).

On June 18, 1986, Appellant filed a Motion to Determine Whether Witness Can Assert Privilege Against Self Incrimination (2096-2097) which was denied on June 18, 1986 (2096).

A second trial commenced on June 23, 1986 (1898) and resulted in a jury verdict of guilty as charged on July 1, 1986 (1898). As a result of said verdict, a sentencing proceeding was conducted on July 1, 1986, which resulted in a jury recommendation of life imprisonment (2163). On July 1, 1986, a Judgment (2165) of guilt was entered and a Sentence (2167) of death by electrocution was imposed. The Court's written Sentence (2170-2176) was filed on July 29, 1986.

On July 3, 1986, Appellant filed a Motion for New Trial

(2169) which resulted in an Order upon Motion for New Trial, Etc. **(2178)** entered on August 11, **1986.**

Thereafter, Notice of Appeal **(2180)** was duly and timely filed.

FACTS **UPON ISSUE I**

On March **4, 1986,** Appellant filed a Motion for Discharge **(2012-2017)** claiming that his right to be brought to trial within **180** days pursuant to Chapter **941.45** et seq. Fla. Stat. had been violated. Proceedings occurred upon said Motion for Discharge on March **7, 1986,** which resulted in no ruling **(1571-1627).** Further proceedings were conducted upon the Motion for Discharge on April **29, 1986,** which culminated in a denial **(1757-1801, 2042).** On April **17, 1986,** between the aforesaid two proceedings, depositions of various employees of the Federal Penetentiary, Lompoc, California, were taken. These depositions were introduced into evidence at the proceeding upon said Motion for Discharge conducted on April **29, 1986 (1758).**

One of the depositions taken was that of Peggy Kinman, the records custodian at the Lompoc Penetentiary **(2445)** who testified, without objection, that:

(a) As early as June **15, 1985,** a detainer for first degree murder had been lodged against Appellant with federal prison authorities **(2456).**

(b) On July **25, 1985,** Appellant was ordered to be transferred from the federal correctional facility at Memphis, Tennessee, to the Lompoc Penetentiary **(2466-2472).**

(c) According to the Transfer Order **(2472),** Appellant

was medically cleared for transfer to the Lompoc Penetentiary and was healthy enough to travel (2466-2467, 2472).

(d) On August 1, 1985, Appellant left the facility in Memphis and arrived at a federal penal facility in Texarkana, Texas, on August 1, 1985, where he was held in a holdover status (2449).

(e) On August 5, 1985, Appellant was moved from Texarkana to a federal penal facility in El Reno, Oklahoma (2449-2450).

(f) Upon his arrival at El Reno, Appellant was medically screened, held in a holdover status and (medically) approved for temporary work assignments (2464, 2482).

(g) On August 20, 1985, Appellant traveled from El Reno to the Lompoc Penetentiary by air (2450).

(h) On August 20, 1985, upon his arrival at the Lompoc Penetentiary, Appellant was medically screened, was assigned to the general population and withheld from temporary work until medically evaluated (2465-2483).

(i) On October 1, 1985, Appellant left the Lompoc Penetentiary and arrived at a federal penal facility in Tuscon, Arizona (2459).

(j) On October 2, 1985, Appellant was transferred from Tuscon to a federal penal facility in Talladega, Alabama (2459).

(k) On October 18, 1985, Appellant was returned to the Memphis facility from Talladega (2459).

Another of the depositions taken at the Lompoc Penetentiary was that of Mark Edward Muellar, M.D., who testified that:

(a) He is a doctor working at the Lompoc facility (2490).

(b) The Lompoc Penetentiary lacks a hospital but does maintain an infirmary capable of providing care such as might be available at a university infirmary (2492), that is, a place to observe whether a patient is getting better or worse (2492).

(c) During the first couple of days of Appellant's residency in Lompoc, the only medical treatment he received was the continuation of medication he was already receiving (2494, 2495, 2500) for preexisting medical conditions (2499).

(d) Upon his arrival at Lompoc, Appellant was assigned to the general population and such does not occur when an inmate is sick so that his health and well being may be endangered (2501-2502).

(e) Upon his arrival at Lompoc, Appellant was (medically) stable without any findings supportive of acute medical problems (2503) and thus an appointment for an examination of Appellant was set for August 30, 1985.

(f) On August 26, 1985, Appellant was examined because of a fall and, as a result thereof, Appellant was continued on his preexisting program of medications and certain evaluations were commenced (2506).

(g) After the examination of August 26, 1985, Appellant was returned to the Penetentiary's general population because he was able to do activities including the daily activities of living (2507).

(h) Appellant was examined on August 29, 1985, and was

found to be in no acute distress and relatively stable (2524).

(i) Up until September 10, 1985, Appellant did very well medically at Lompoc (2525).

(j) From September 12, 1985, to September 30, 1985, was hospitalized at Lompoc with a diagnosis of Coumadin overdose (2525, 2516).

(k) With the exception of the Coumadin overdose diagnosed on September 12, 1985, every medical problem which Appellant had at Memphis he had when he arrived at Lompoc and throughout his travels from Memphis to Lompoc (2540).

(1) Appellant was discharged from his hospitalization at Lompoc on September 30, 1985, with the knowledge of Dr. Mueller that Appellant was to leave Lompoc on October 1, 1985, the next day, for a journey back to Memphis (2525-2531).

(m) On September 30, 1985, Appellant's medical condition was determined to be stable enough to permit a trip back to Memphis which takes as much as eighteen days (2525, 2532).

The last deposition taken at the Lompoc Penetentiary was of Terry Hammons, Appellant's caseworker at Lompoc (2558) who testified that:

(a) Appellant was the first inmate in all his seven years experience (2570) as a caseworker at the Lompoc Penetentiary who had been transferred to Lompoc for medical treatment (2562).

(b) On September 9 or 10, 1985, he observed Appellant and found him not to be bleeding or in any acute distress of any kind (2566).

(c) Following September 9 or 10, 1985, Appellant

complained of pain and bleeding from the gums **(2569).**

The proceeding upon the Motion for Discharge **(2012-2017)** which occurred on April **29, 1986,** consisted of discussion between the Court and the attorneys despite Appellant's multiple requests to present testimony, repeated complaints that he was not being afforded a hearing and continual objections to the receipt of documents without compliance with the Florida Evidence Code **(1757, 1764, 1772, 1773, 1784, 1785, 1788, 1789, 1790, 1792).** At the proceeding, the following occurred, to-wit:

(a) Because he was unable to present testimony and have what he considered to be a hearing upon his Motion for Discharge, Appellant submitted a Proffer Upon Motion for Discharge **(1789, 2414 - 2440).**

(b) Appellee submitted medical records secured from employees of the Lompoc Penetentiary after the conclusion of the aforementioned depositions and outside the context of the depositions **(1778, 1779).**

(c) Appellee's defense to the Motion for Discharge was that the **180** day period set forth in Chapter **941.45** Florida Statutes, though having elapsed, was nevertheless tolled by reason of Appellant's physical condition rendering him unable to stand trial in this case **(1759, 1761, 1763).**

FACTS UPON ISSUE II

One aspect of the trial testimony of Appellee's key witness, Ralph Salerno, dealt with Barbara Alfonso, about whom he said the following, to-wit:

a. Barbara Alfonso had said that she was willing to pay

$2,500.00 to **$5,000.00** to have the victim, her husband, killed (358).

b. Barbara Alfonso had said she wanted her husband out of the way by Christmas **(391).**

c. Barbara Alfonso had said she needed to do away with her husband because she was doing a big drug deal with some Miamians who would not deal with her because of her husband's big mouth **(392).**

d. Barbara Alfonso expressed a desire to see her husband's personal possessions as proof that he was dead **392).**

e. Shortly before her husband's death, Barbara Alfonso spoke to some Cubans about a large drug deal **(392).**

f. Barbara Alfonso said not to worry because she would have the money for the killing of her husband **(426).**

g. After the killing, Barbara Alfonso spoke jokingly about how her husband would never be seen again **(422).**

h. After the killing, Barbara Alfonso drove the automobile in which her husband was killed **(421).**

With regard to the foregoing, Barbara Alfonso, during her trial testimony, denied a. through g. immediately above **(708, 709, 716, 717, 745)** and acknowledged that, during her deposition taken in this case, she denied ever driving the automobile in which her husband was killed **(744).**

Both Ralph Salerno and Barbara Alfonso testified that Appellant was not involved in the drug trade **(392-393, 746)** and there is nothing in any other part of the record in this case indicating otherwise.

Another aspect of Ralph Salerno's testimony dealt with Federal Bureau of Investigation ("FBI") **302** interview forms prepared by FBI agent Robert Conrad from notes he took during interviews of Salerno by law enforcement **(335).** With regard to these FBI **302's,** Salerno acknowledged having reviewed them during the course of his deposition taken in this case on February **6, 1986 (436),** acknowledged having reviewed them in anticipation of the first trial in this case **(339-340)** and acknowledged not having reviewed them in anticipation of the second trial though copies of the FBI **302s** were received by him from Appellant's counsel on or after May **21, 1986,** and before the commencement of the second trial **(340).** During the second trial, direct and cross examination were completed on June **24, 1986 (427)** and redirect examination by Appellee commenced on that date but was interrupted by a recess **(432).** Said redirect continued on June **25, 1986 (436)** with the revelation that during the recess Salerno had reviewed the FBI **302s (464)** and with Salerno testifying, as follows, about discrepancies between the accounts reflected in the FBI **302s** and the account given during his trial testimony, to-wit:

a. The FBI **302s** reflect that Appellant was armed when, with the victim in the car, he picked up Salerno **(446)** [which, of course, contradicts Salerno's trial testimony that Appellant was not armed at this point in time **(279-280, 401)].**

b. The FBI **302s** reflect that Salerno was armed with a Smith & Wesson revolver but this was an error by the FBI agent **(467, 468).**

c. The FBI **302s** reflect that, after driving around for

two or two and one-half hours, Appellant asked Salerno to make sure his (Salerno's) gun was working **(469)** [which, of course, conflicts with Salerno's trial testimony that there was no signal from Appellant to Salerno as to when Salerno was to shoot **(408)**].

d. The FBI **302s** fail to state that, after Salerno's gun did not fire, the parties returned to Appellant's home to pick up another gun **(470)** [which, of course, conflicts with Salerno's testimony about such a return for such a purpose **(279-280)**] ostensibly because the FBI **302s** reflect that Appellant was armed at all times **(470)**.

e. The FBI **302s** reflect that ten to fifteen seconds elapsed between the firing by Appellant of the first and second shots at the victim **(471)** [which, of course, is inconsistent with Salerno's trial testimony that two to three seconds elapsed between the firings **(410-411)**].

f. The FBI **302s** reflect that Salerno wore gloves to drive the automobile in which the killing occurred to the Library Lounge for disposal **(478)** [which, of course, conflicts with Salerno's trial testimony that he drove with ungloved hands **(443)**].

g. The FBI **302s** reflect that, after he dug the grave, he went directly to the Imperial Lounge **(440)** [which, of course, conflicts with Salerno's trial testimony that he went to Appellant's home to pick up a **.38** caliber weapon and then proceeded to the Imperial Lounge **(275)**].

h. The FBI **302s** reflect that Salerno was armed as he was digging the grave **(44)** [which, of course, conflicts with his trial

testimony that he was armed by Appellant after the grave was dug **(275)].**

i. The FBI **302s** reflect that the murder weapon was a single shot gun **(44),** that is, one which holds one bullet at a time and must be reloaded between firings **(411)** [which, of course, conflicts with Salerno's trial testimony that the murder weapon was multi shot and was fired by fanning action **(281, 410)].**

Another key witness who testified as Appellee's witness at trial was Barbara Alfonso. One aspect of her testimony dealt with a visit made to her home shortly after the killing of her husband during which Appellant and Salerno supposedly spoke about and reenacted the murder **(694-695).** This testimony conflicted with that of Appellee's witness, Sally Resina, Appellant's wife at the time of the murder **(632)** whose trial testimony preceded that of Alfonso, who testified that at the same time as Alfonso claims Appellant and Salerno were at her home as aforesaid, Appellant and Salerno were at her (Sally Resina's) home speaking about and reenacting the murder in almost the same fashion as described by Alfonso **(642-646).** Additionally, during her trial testimony, Alfonso acknowledged that she was familiar with Resina's deposition taken in this case, that in the deposition Resina described the return of Appellant and Salerno to her home and their words and actions thereat, and that her (Alfonso's) testimony at trial conflicted with that of Resina on deposition in that each placed Appellant and Salerno at two different locations at the same time doing the same thing **(735-736).**

A second aspect of Alfonso's trial testimony concerned the

discrepancies, conflicts, and contradictions between it and the deposition testimony of Alfonso's close and trusted friend (730), Barbara Jean Wright, with whose deposition Alfonso was familiar (707). According to Alfonso, after the murder of her husband, she fled to Miami to hide because of fear resulting from threats made by Appellant and, while in Miami, had contact with Wright to whom she expressed fear, as aforesaid, as her reason for being in Miami (727). Of course, Alfonso acknowledges that Wright, in her deposition, testified that Alfonso never expressed fear as the reason for being in Miami (727-728). According to Alfonso, on the morning after the murder, she and Wright participated in cleaning out the automobile in which the murder occurred. Of course, Alfonso acknowledged that, during her deposition, Wright denied participating in the cleaning of the automobile (729). According to Alfonso, Appellant was present when she showed Wright two (bullet) holes in the right front passenger seat of the automobile (699). Of course, Alfonso acknowledges that, during her deposition, Wright testified that Appellant was not present as aforesaid (729). According to Alfonso, while she was in Miami hiding, she made no trips to Columbia to do drug deals (710). Of course, Alfonso acknowledges that, during her deposition, Wright testified that Alfonso told her that, during her Miami stay as aforesaid, she (Alfonso) had traveled to Columbia to do a drug deal (730). According to Alfonso, she never told anyone that her husband would never be seen again (716). Of course, Alfonso acknowledges that during her deposition Wright testified that this statement was made by Alfonso (732). And, finally, according to

Alfonso, Wright was present when, shortly after the murder, Appellant and Salerno spoke about and reenacted the event at her (Alfonso's) home **(694-695).** Of course, Alfonso acknowledges that, during her deposition, Wright testified that she only learned of the murder several years after its occurrence from law enforcement officers **(733, 772).**

The last aspect of Alfonso's trial testimony concerns an additional point of conflict between it and that of Sally Resina. According to Resina, at or about **8:00** a.m., after the killing, Alfonso placed her dead husband's clothing and personal effects in a plastic bag **(663).** This contradicted Alfonso's testimony to the effect that she was told to leave her place of abode by Appellant and that, upon her return, all of her husband's clothing and personal effects had been removed therefrom **(697-698).**

Salerno received (verbal) immunity from prosecution **(345).** Alfonso received immunity from Appellee via an Agreement **(2268-2269)** which represented that her continued provision of "truthful testimony" would result in her not being prosecuted for her "part in the homicide of Enrique Alfonso."

In its argument at the close of the penalty phase of Appellant's trial, Appellee, in support of the aggravating circumstance that the crime was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification claimed that..."this is a contract killing" **(1161).**

During trial, Appellant moved to dismiss the case against Appellant for prosecutorial misconduct, to-wit: the presentation of perjured testimony which was denied **(751).** The same issue was a

subject of Appellant's Motion for New Trial **(2169)** which was denied **(2178)**.

FACTS UPON ISSUE III

During trial upon the question of Appellant's guilt or innocence of the crime charged in the Indictment **(1900-1901)**, several witnesses essential to Appellee's case testified for Appellee.

One of those witnesses was Ralph Salerno who testified that:

a. He dug a hole into which he knew the victim's body would be placed upon his death **(273, 275, 439)**.

b. While on the automobile ride during which the victim was to be shot and killed, he was armed with a concealed firearm which he aimed and fired at the victim with the intent to kill the victim **(275, 279, 405)**.

c. Upon the victim's death, he pulled the victim from the car in which the killing had occurred, removed money and personal property from the victim and then buried the body **(282-283)**.

d. He believed he had received immunity from prosecution **(345-346)**.

e. He was told by Appellee's assistant that, if he cooperated in the prosecution of Appellant, he would not be prosecuted for any crime involving murder **(346)**.

f. No criminal charges had been filed against him and no price extracted by the law had been paid by him for any crimes in which he admitted involvement since he started cooperating with law enforcement against Appellant **(356)**.

g. Barbara Alfonso, the victim's wife, had offered **$2,500.00 - $5,000.00** to have her husband killed **(289, 358).**

A second essential witness for Appellee was Barbara Alfonso who testified that, though unsolicited by her, Appellee had granted her immunity **(702).** Admitted into evidence was an Agreement **(2268-2270)** which reflects that Alfonso received immunity from prosecution for her part in the murder of her husband in exchange for her cooperation with Appellee.

During its deliberations upon the question of Appellant's guilt or innocence, the jury sought and received the reread of certain jury instructions involving the one pertaining to principals/aiders and abettors **(1031-1032).**

During the penalty phase of Appellant's trial, it was established that:

a. Appellant was married **(1149).**

b. Appellant is the father of three children **(1149).**

c. Appellant participated in the raising of his children and was an excellent father (1150).

d. Shortly after a second open heart surgery, while riding on a boat, Appellant jumped into the water and saved the life of a drowning woman (1151).

e. The incident referred to in (d) immediately above was the subject of a newspaper article that was admitted into evidence **(2381-2383).**

f. Appellant and others were defendants in a federal court criminal case in which the government offered plea bargains to all defendants contingent upon all defendants entering guilty

pleas pursuant to the bargain offered **(1153).**

g. Appellant pled guilty to the federal charge in order to save his mother the trouble and pressure of going through a federal criminal trial (1153).

Appellant's jury recommended that he receive a sentence of life imprisonment **(1179, 2163).** The trial judge overrode the recommendation citing three aggravating circumstances and one mitigating circumstance **(2170 - 2176)** and sentenced Appellant to death by electrocution **(2164-2168, 1184).**

FACTS UPON ISSUE IV

During its opening statement at trial, Appellee stated that it would prove, among other things, that:

> "...defendant pulled out a pistol which he had right by the door and fired it two times into Enrique Alfonso (the victim)." **(188)**

During the trial, Ralph Salerno, a witness for Appellee testified about the murder of the victim referred to in the Indictment **(1900-1901)** as follows:

(a) He was present when Appellant shot the victim twice with a **.357 (272).**

(b) Appellant pointed a gun at the victim, hit the hammer and hit it again causing two shots to go off **(281).**

(c) Appellant, after the shooting, stated that he was glad that he (Appellant) had done the shooting **(288).**

Another witness presented during trial by Appellee was Sally Resina who testified that after the shooting of the victim, Appellant and Salerno appeared at her home where discussion about the incident occurred **(642-646).** According to Resina, during the

discussion, Appellant stated that he was glad that he (Appellant) did the killing **(646).**

A third witness who testified at trial for Appellee was Barbara Alfonso, who testified that:

(a) She received a phone call from Appellant during which Appellant said that he had just killed the victim **(694).**

(b) After the phone conversation, Appellant and Salerno came to her home and, while there, stated that he (Appellant) had shot the victim two times **(697).**

During its closing argument, Appellee stated that:

(a) **No** witness at trial had ever said that anyone other than Appellant had shot the victim **(955).**

(b) Appellant, after leaving the auto in which the victim was killed, returned thereto and fired two shots into the vehicle through the victim's body **(957).**

Included among its charges to the jury, the trial court gave the standard Florida (Criminal) Jury Instructions on principals/aiders and abettors (1024-1025). Prior to the giving of the charge to the jury, Appellant objected to giving said instruction on the theory that the instruction was not supported by the evidence **(923).** The objection was overruled **(923).**

During its deliberations upon Appellant's guilt or innocence, the jury sought a rereading of certain jury instructions including the one pertaining to principals/aiders and abettors **(1031)** which instructions were reread **(1031).**

FACTS **UPON ISSUE** V

A (first) trial commenced in this case on May **6, 1986,** which

ended in a mistrial (1510). During this (first) trial, Appellee presented the testimony of Ralph Salerno ("Salerno"), Appellant's half brother (1322-1483) who testified about the participation of himself and Barbara Alfonso (the victim's wife) in the murder with which Appellant was charged via the Indictment (1900-1901). Specifically, Salerno testified as follows:

(a) He dug a hole into which the victim was to be placed after he was killed (1335).

(b) On the night of the crime, he armed himself with a loaded pistol which he concealed in an ankle holster (1336).

(c) While seated directly behind the victim in a moving automobile, he pulled out his concealed pistol and fired two shots at the victim (1339-1340) but the pistol misfired.

(d) After the victim was shot and killed, he removed money and personal property from the victim, placed the victim in the hole and covered up the hole (1346-1348).

(e) Shortly before the victim's death, the victim's wife, Barbara Alfonso ("Alfonso") had said that:

(i) She was going to do a large drug deal with some Miamians, but they would not do business with her because her husband talked too much (1406).

(ii) She wanted her husband's personal property as proof that he was dead (1406).

(iii) She wanted her husband out of the way by Christmas (1407).

(iv) She discussed drug deals with some Cubans (1409).

(v) She discussed a large cocaine shipment **(1408).**

(vi) After the victim's death, Alfonso joked that her husband would never be seen again **(1474).**

(f) Alfonso had offered money to have her husband killed **(1386-1387).**

(g) He drove the automobile in which the victim was killed to the Library Lounge and set it on fire **(1352-1353).**

(h) He had been told by Appellee that if he cooperated with Appellee he would not be charged with the victim's murder **(1363).**

Alfonso was granted immunity by Appellee from prosecution for the murder of her husband via an (Immunity) Agreement **(2268-2270).**

Via its Notice of Discovery **(1967-1969),** Appellee listed as a witness one Barbara Jean Wright ("Wright") whose deposition **(2098-2157)** was taken in the case on February **20, 1986 (2098-2157).**

At the second trial which commenced on June **23, 1986,** and which resulted in Appellant's conviction **(1032)** and death sentence **(2170-2176),** Alfonso testified about certain matters as follows:

(a) That she offered no money for the killing of her husband **(745).**

(b) That shortly after her husband's murder, she was fearful of Appellant and thus departed Tampa for Miami **(714, 715).**

(c) That both before and after the departure, she expressed these fears to Wright **(727).**

(d) That Wright participated in the cleaning of the automobile in which the killing had occurred **(729).**

(e) That while in Miami, as aforesaid, she never traveled to Columbia to do a drug deal **(710)**.

(f) That, after her husband's murder, she never told Wright that her husband would never be seen again **(716)**.

(g) That Appellant and Salerno reenacted the crime in the presence of her and Wright **(694-697, 733)**.

Wright's deposition contradicted the testimony of Alfonso on (a) - (g) immediately above **(710, 727-729, 733)**.

Prior to the second trial, Appellant listed Wright as a witness **(1842)** and caused a subpoena for trial to be served upon her **(1842-1843)**. In response to such service, Wright, through her attorney, advised that, if called as a witness at trial, she would refuse to testify by asserting her privilege against self incrimination **(1843)**. Said response generated Appellant's Motion to Determine Whether Witness can Assert Privilege Against Self Incrimination **(2096-2157)**, which was the subject of a hearing conducted on June **18, 1986**, at which Wright asserted the privilege on the ground that her testimony might incriminate her in a charge of accessory after the fact **(1844)** and might, because of the conflicts between it and the testimony of Alfonso, result in her being prosecuted for perjury **(1844, 1858)**. The Motion to Determine Whether Witness Can Assert Privilege Against Self Incrimination **(2096-2157)** was denied **(1884)**.

FACTS UPON ISSUE VI

Appellant was convicted of first degree murder **(2165-2168)**. His jury recommended that he be sentenced to life in prison **(2163)**. The trial court sentenced Appellant to death **(2170-2176,**

2164-2168). The court's Findings **(2170-2176)** in support of the death sentence, the trial court concluded that Appellant's previous conviction for racketeering constituted a previous conviction of Appellant for a felony involving the use or threat of violence to the person.

FACTS UPON ISSUE VII

Carlos Cabrera testified as Appellee's witness at the trial upon the Indictment **(1900-1901).** On direct examination by Appellee, Cabrera testified that in May **1983** he and Appellant drove by Hillsborough and Howard Avenues in Tampa where they observed a mobile home marked "Crime Unit," unmarked automobiles and a bulldozer engaged in digging **(599-600).** Because that location was where law enforcement officers searched and dug for and ultimately found the remains of the victim in this case **(228),** Appellee further elicted from Cabrera that, after the drive-by, Appellant said "They are not going to find anything" **(603).**

On cross examination, Cabrera was confronted with portions of his deposition taken on April **25, 1986** (604). Specifically, Cabrera was confronted with the following from his deposition, to-wit:

> "Question: As you sit here today, you cannot remember whether or not you ever heard Mr. Fuente speak about his involvement in any homicides; is that correct?
>
> Answer: That's correct **(608-609)...**
>
> Question: Okay, just to tie it up as you sit here today - am I correct that you do not recall Mr. Fuente ever having spoken to you about any evidence in connection with any homicide; is that true?
>
> Answer: I cannot remember, sir **(609)...**
>
> Question: And correct me if I am wrong. As you sit

here today, you also did not remember Mr. Fuente even talking to you about the likelihood that law enforcement might be able to find some evidence in connection with some homicide; is that correct?

Answer: That's correct, sir. I can't remember **(609-610)...**

Question: And correct me if I am wrong. As you sit here today, you don't even recall any discussions, I'm sorry, any words spoken by Mr. Fuente pertaining to anybody that might be found in connection with any homicide; is that correct?

Answer: That's correct **(610)**"

Upon confrontation as aforesaid, Cabrera acknowledged all the quoted questions and all the answers **(609, 610).** Additionally, during cross examination, Cabrera acknowledged that during the deposition he was asked about and was unable to recall what he had told law enforcement before his deposition was taken **(608).**

On redirect examination, Appellee, over Appellant's objection **(618-621)** elicited from Cabrera that, before his aforesaid deposition, he had told a Robert Conrad that Appellant had said they (law enforcement) were not going to find anything **(623).**

FACTS UPON ISSUE VIII

A witness for Appellee at trial was Dr. Maria Prado, a dentist **(541)** who had had a patient named Enrique Alfonso **(542).** Through Dr. Prado, Appellee introduced her dental records pertaining to Enrique Alfonso **(542-544).** Among those records were full mouth x-rays **(548)** which became known at trial as Appellee's Exhibit 10B **(543, 548).**

Following Dr. Prado to the stand as Appellee's witness was another dentist, Dr. Vicki Lindauer **(550),** who testified to various similarities and dissimilarities between the teeth

depicted in Dr. Prado's records and the teeth of the victim with whose murder Appellant was charged **(1900-1901)**. Among the dissimilarities testified to by Dr. Lindauer was that the x-rays, Exhibit 10B, reflected the presence of a molar in the upper right side of the mouth which molar was not present in the mouth of the deceased **(578)**. Dr. Lindauer was then permitted to testify that on the x-ray an "x" was drawn through the molar and, over objection, that the "x" meant to her that the tooth was indicated for extraction or removal **(580)**. On cross examination, Dr. Lindauer acknowledged that Dr. Prado's records contained nothing reflecting that the molar through which an "x" was drawn had been extracted or removed **(591-593)**.

FACTS UPON ISSUE IX

A first trial commenced in this case on May **6, 1986 (1319)** which ended in a mistrial **(1510)**. The mistrial was declared as the result of a question and answer elicited thereto by Appellee during the redirect examination of its witness, Ralph Salerno.

On direct examination during said first trial, Appellee elicited from Ralph Salerno that he had been involved in criminal activity, to-wit: credit card fraud, insurance fraud, boat theft, auto theft, murder and arson **(1324-1325)** and that the victim had been involved in similar crimes **(1323-1324)**. On cross-examination, Salerno testified that Appellee had advised him that if he cooperated with Appellee, he would not be prosecuted for murder **(1363-1364)**, that he was actually and physically involved in the criminal activity to which he admitted involvement on direct examination **(1375)** and that, since he started to

cooperate with law enforcement against Appellant, he had not been charged with any crimes **(1377-1378).** On redirect examination, Appellee asked Salerno what led him to become involved in criminal activity to which Salerno, as Appellant was attempting to object, responded "Hector Fuente" **(1483).** It was this last question and answer which resulted in the mistrial.

As a result of the mistrial, the case was retried commencing on June **23, 1986** (1). Between the mistrial and June **23, 1986,** Appellant filed a Motion to Dismiss on double jeopardy grounds **(2094-2095)** which was denied on June **18, 1986 (2094-2095).**

During the second trial, Appellee elicited from Salerno testimony about a telephone conversation he had with Appellant in the presence of an FBI Agent, Robert Conrad, and which he permitted the police to record **(293).** A tape recording of the conversation was admitted into evidence **(887).** In the tape recording, Appellant is heard to say things implicating him in the murder with which he was charged.

During the first trial in this case, Appellee made no effort, through Salerno, to use the recording as evidence against Appellant. During earlier proceedings in this case, FBI Agent was removed by Appellee as a witness in the case **(1684-1685).**

FACTS UPON ISSUE X

Appellee's witness, Ralph Salerno, testified that he, the victim, Barbara Alfonso (the victim's wife and also Appellee's witness) and Sally Resina (Appellant's ex-wife and also Appellee's witness) were involved in criminal activity, to-wit: frauds, arson and thefts **(268-269, 353).** When asked by Appellee why the victim

was killed, Salerno responded that "...he talked too much and was flashy" (272).

In sentencing Appellant to death, the trial court found that the victim was killed to avoid or prevent a lawful arrest (2171-2172). Specifically, from the testimony of Salerno that the victim "talked too much," the trial court inferred that the victim was eliminated so that he would not be a witness to certain crimes of which Appellant was subsequently convicted (2171-2172).

During the penalty phase of Appellant's trial, there was evidence that Appellant pled guilty to Count IX of a federal Indictment **(1990-1998)** by which Appellant was charged with violating **18** U.S.C. by, among other things, engaging in various criminal acts including (mail) fraud and arsons.

SUMMARY OF ARGUMENT

ISSUE I

Appellee's failure to try Appellant within **180** days of his request for final disposition entitles him to discharge under Chapter 941.45 et seq. Florida Statutes.

Appellant did not receive a hearing upon his speaking Motion for Discharge and Appellee's speaking defense thereto.

ISSUE II

Appellee's repeated and knowing use of perjured testimony justified dismissal.

ISSUE 111

The trial court erred in overruling the jury's life sentence recommendation since reasonable people could have differed over

the appropriate penalty.

ISSUE IV

The jury instruction upon principals/aiders and abettors was unsupported by the evidence.

ISSUE V

It was error to conclude that a defense witness could assert her fifth amendment self incrimination privilege and to have not required Appellee to grant the witness immunity or suffer a judgment of acquittal.

ISSUE VI

A conviction for violating 18 U.S.C. Section 1962(c) does not constitute an aggravating circumstance under Chapter 921.141(5)(b) Florida Statutes.

ISSUE VII

It was error to permit rehabilitation of a witness by prior consistent statement without there first being an inference of improper influence, motive or recent fabrication.

ISSUE VIII

It was error to permit an unqualified witness to testify to the routine practice of an organization.

ISSUE IX

Appellee invited a mistrial which should have resultled in a dismissal on double jeopardy grounds because of the advantage which occurred to Appellee as a result thereof.

ISSUE X

The trial court's reliance upon the aggravating circumstance of avoiding or preventing a lawful arrest, Chapter 921.141(5)(e)

Florida Statutes was unsupported by the evidence.

ARGUMENT (FIRST) UPON ISSUE I

Via his Motion for Discharge (2012-2017), Appellant claimed entitlement to discharge pursuant to the Interstate Agreement on Detainers. Chapter 941.45 et seq. Florida Statutes. Specifically, the claim was that Appellant was not brought to trial within 180 days of his request for final disposition as required by Chapter 941.45(3)(a)&(b) Florida Statutes. Because Appellee did not contest, at either of the proceedings upon said Motion for Discharge, which occurred on March 7 and April 29, 1986, the facts alleged in said Motion for Discharge or Proffer Upon Motion for Discharge (2414 - 2440), Appellant, for the purposes hereof, will assume that said facts are established.

Assuming the establishment of said facts, Appellant contends that they demonstrate compliance by him with the requirements of Chapter 941.45(3)(a)&(b) Florida statutes. Accordingly, since Paragraph 11 of the Proffer Upon Motion for Discharge (2014-2440) shows that Appellant's last delivery of a request for final disposition occurred on July 19, 1985, and because the Motion for Discharge (2012-2017) was filed 227 days later on March 4, 1986, without Appellant having been brought to trial, Appellant contends that discharge from his murder charge was required because more than 180 days had elapsed between his (last) request for final disposition and the filing of his Motion for Discharge without the commencement of a trial upon the Indictment (1900-1901) filed against him.

As seems clear from the proceedings of April 29, 1986,

(1755-1801), Appellee's position is that the 180 day period referred to in Chapter 941.45(3)(a) Florida Statutes was tolled, pursuant to Chapter 941.45(6)(a) Florida Statutes, because Appellant was "unable to stand trial" due to his physical or medical condition. Since Chapter 941.45(6) Florida Statutes speaks in terms of a tolling and not in terms of a waiver, Appellant will, for the purposes hereof, concede that he was unable to stand trial upon the Indictment during his eighteen day hospitalization at the federal penetentiary at Lompoc, California (2516-2525). However, since the subtraction of 18 days from the aforementioned 227 days still leaves 209 days, the fact remains that Appellant was not brought to trial within the 180 day period contained in Chapter 941.45(3)(a) Florida Statutes.

The upshot of the preceding is that the real question is whether or not Appellant's physical or medical condition, except during said 18 day hospitalization, rendered Appellant unable to stand trial upon the Indictment (1900-1901). Appellant contends that the record dictates a negative answer and relies upon the following to support this contention.

When he made his requests for final disposition in July 1985, Appellant was an inmate at a federal prison facility in Memphis, Tennessee, where he was serving a sentence imposed by a federal court (2012-2013). On July 25, 1985, it was ordered that Appellant be transferred to the federal penetentiary, Lompoc, California, for medical treatment (2466-2472). Apparently, because no medical treatment was immediately required, six days elapsed until Appellant was removed from the Memphis facility on

August 1, 1985, to commence his journey to Lompoc (2449-2450). The journey to Lompoc consumed twenty days (2449-2450) with intermediate stops and holdovers at federal prison facilities in Texarkana, Texas, and El Reno, Oklahoma (2449-2450). Apparently, during the journey, Appellant required no immediate medical treatment and such is evident from the fact that the medical screening of Appellant at El Reno resulted in him being approved for temporary work assignments (2464-2482). On August 20, 1985, Appellant arrived at Lompoc where he was found to be medically stable without findings supportive of acute medical problems (2503) and was assigned to the Lompoc facility's general population (2501-2502). Until he was hospitalized at Lompoc on September 12, 1985 (2516-2525), the only treatment Appellant received was continuation of a preexisting program of medications (2494, 2495, 2500, 2506) and up to September 10, 1985, Appellant did very well medically at Lompoc (2525). From September 12 through September 30, 1985, Appellant was hospitalized at Lompoc (2516, 2525) and, except for the condition necessitating said hospitalization, every medical problem Appellant had at Memphis he had when he arrived at Lompoc (2540). The day after his release from the hospitalization, Appellant, with the knowledge of Lompoc's medical personnel, commenced his return journey to Memphis (2525) which said personnel knew might consume as much as eighteen days (2525, 2532). Indeed, said return journey consumed eighteen days with intermediate stops at federal prison facilities in Tuscon, Arizona, and Talladega, Alabama (2459).

The obvious conclusion from the foregoing is that, except for

eighteen days of hospitalization at Lompoc due to a condition that arose some three weeks after his arrival thereat, Appellant was at all other times from July 19, 1985, to March 4, 1986, available to stand trial upon the Indictment (1900-1901) filed against him. Surely, anyone who can travel for twenty days from one federal prison facility to another with intermediate stopovers at various other such facilities is able to sit in a courtroom while being tried upon a criminal charge. Surely, anyone able to do temporary work during a stopover is not physically or medically unable to be tried on a criminal charge. Certainly, an inmate who was medically stable during the first three weeks of his stay at a prison has the ability to be so tried. And, undoubtedly, a prisoner, who upon release from a hospitalization, is immediately permitted by medical personnel to embark upon an eighteen day journey back to the facility from whence he came with intermediate stopovers at other such facilities could participate in a courtroom proceeding directly involving him.

The United States of America and the State of Florida are parties to the Interstate Agreement on Detainers, Chapter 941.45(2)(a) Florida Statutes. According to State v. Roberts, 427 So.2d 787 (Fla. 3d DCA 1983), an accused who substantially complies with the Agreement is entitled to its benefits, to-wit: discharge, if not brought to trial within the mandated time period. And, if the accused substantially complies with the Agreement, then the prosecution is required to "chase" the accused unless he is unable to stand trial. In the case at hand, the record reveals Appellant's compliance with the Agreement, the

passage of 180 days between compliance and the filing of the Motion for Discharge (2012-2017) without trial and that, except for eighteen days from September 12 through September 30, 1985, Appellant's medical condition did not render him unable to stand trial upon the Indictment (1900-1901).

In conclusion, Appellant asserts that the denial of his Motion for Discharge (2012-2017) was error and that such denial should be reversed with directions to enter an order granting same.

ARGUMENT (SECOND) UPON ISSUE I

Appellant's Motion for Discharge (2012-2017) was the subject of a proceeding before the trial court on April 29, 1986. As is apparent from the transcript of the proceeding (1775-1802), the issue dealt with thereat was not whether or not Appellant had duly requested final disposition pursuant to Chapter 941.45 (3) Florida Statutes and was not whether or not 180 days had elapsed between compliance and the filing of the Motion for Discharge (2012-2017) without the commencement of a trial of Appellant upon the Indictment (1900-1901). Instead, the issue at the April 29, 1986, proceeding was whether or not Appellant, because of a physical or medical problem, was "unable to stand trial", Chapter 941.45(b) Fla. Stat., after his request for final disposition and thus, whether the 180 day requirement was tolled. Chapter 941.45(3)(a) and (b) and (6), Fla. Stat. Because this issue was anticipated as the result of earlier proceedings upon the Motion for Discharge occurring on March 7, 1986, (1570-1628), depositions were taken at the federal penetentiary in Lompoc, California,

which were attended by attorneys for both Appellant and Appellee.

Because Appellant's Motion for Discharge (2012-2017) alleged facts, during the proceeding of April 29, 1986, Appellant repeatedly and unsuccessfully requested the opportunity to present evidence in support of the Motion for Discharge (2012-2017). Because Appellee's defense to the Motion for Discharge (2012-2017) was based upon factual assertions which Appellee suggested would establish that Appellant's physical and medical condition rendered him unable to stand trial, Appellant repeatedly and unsuccessfully requested the trial court to require Appellee to comply with and conform to the Florida Evidence Code and The Florida Rules of Criminal Procedure (1764, 1774, 1779, 1785, 1789, 1790, and 1792) in proving up its defense. Despite these requests, the proceeding of April 29, 1986, occurred (a) without Appellant being permitted to present evidence in support of his Motion for Discharge (2012-2017) and (b) with Appellee being able to assert facts without presenting evidence in support thereof and being able to place documents before the trial court without proof of what they were, where they came from and/or whether or not they were originals and/or otherwise authentic, etc. and otherwise in total violation of the hearsay rule, Chapter 90.862 Florida Statutes.

An example of (b) above is as follows. During the proceeding of April 29, 1986, Appellee was permitted to place before the trial court medical reports which it claimed demonstrated that Appellant's physical or medical condition precluded him from standing trial (1778). According to Appellee, these records were secured from Dr. Mark Edward Mueller <u>after</u> the conclusion of his

deposition taken at the Lompoc Penetentiary **(1778).** Appellee's justification for being able to place the records before the trial court for its consideration in deciding Appellant's Motion for Discharge **(2012-2017)** was that Dr. Mueller was not questioned about the records during his deposition and accordingly, unlike the records about which Dr. Mueller was questioned, were not attached as exhibits to his deposition **(1779-1780).** Without even addressing the question of whether or not the procedures for using depositions in criminal cases is the same as that for civil cases under Rules **1.310** and **1.330** Fla. R. C. P., the fact remains that the placing by Appellee of said records before the trial court as aforesaid violated Chapter **90.802** Fla. Stat., the hearsay exclusion, since the records clearly were offered for the truth of their contents and represented statements of one not testifying before a court, Chapter **90.801**(1) Florida Statutes. Furthermore, if such records were admissible under some exception to the hearsay rule, Chapter **90.803** Florida Statutes, Appellee, on April **29, 1986,** was not required to lay a predicate therefore. While Appellant recognizes that such records might constitute statements for purposes of medical diagnosis or treatment, Chapter 90.803(4) Florida Statutes, or records of regularly conducted business activity, Chapter 90.803(b) Florida Statutes, Appellee neither made any effort nor was it required by the trial court to make any effort to establish the admissibility of the records under said exceptions on April **29, 1986.** Additionally, because the records were not of the self authenticating type described in Chapter **90.902** Florida Statutes, evidence of authentication or identification was required, Chapter 90.901 Florida Statutes,

which of course Appellee neither provided nor was required to provide on April 29, 1986.

Appellant's Motion for Discharge (2012-2017) was a "speaking motion,'' that is, one asserting facts as a basis for relief. Trawick's Florida Practice & Procedure, 9-4; City National Bank of Miami v. Simmons, 351 So.2d 1109 (Fla., 4th DCA 1977). Appellee's defense or response to the Motion for Discharge (2012-2017) was based on facts. Appellant sought to present evidence in accordance with the applicable rules of procedure and evidence to prove up the facts alleged in the Motion for Discharge (2012-2017), but this was thwarted by the trial court. Appellee, over repeated objection by Appellant, was permitted to support the facts asserted by it in defense of or in response to the Motion for Discharge (2012-2017) without complying with any rule of procedure or evidence. Accordingly, the proceeding of April 29, 1986, did not constitute a "hearing" upon the Motion for Discharge (2012-2017) as noted on multiple occasions by Appellant (1764, 1772, 1773, 1785, 1786, 1788, 1789, 1790) during the proceeding. Speaking motions must be supported by affidavits or proof where the facts are not apparent from the record or papers filed in the case or within the trial court's knowledge, Viking Superior Corp. v. W. T. Grant Co., 212 So.2d 331 (Fla. 1st DCA 1968). In this case, the facts asserted by Appellee for the tolling of the 180 day "speedy trial" period contained in Chapter 941.45(3) Florida Statutes were not apparent from any source and thus were required to be supported by proofs in order for the trial court to properly decide Appellant's Motion for Discharge (2012-2017).

The proceedings of April 29, 1986, concluded with a denial of Appellant's Motion for Discharge (2012-2017). Because he did not receive a "hearing" upon the Motion for Discharge (2012-2017), despite his repeated requests for same, the Motion for Discharge (2012-2017) was erroneously denied. Accordingly, if the Court does not decide that the facts, as argued in the immediately preceding section of this Brief, require discharge, then Appellant requests that this case be returned to the trial court for a hearing, in conformity with the applicable rules of procedure and evidence, upon the Motion for Discharge,

ARGUMENT UPON ISSUE II

The trial testimony of Appellee's witness, Ralph Salerno, preceded that of Appellee's witness, Sally Resina, which in turn preceded that of Appellee's witness, Barbara Alfonso. Toward the conclusion of Alfonso's testimony, Appellant moved to dismiss the case against him for prosecutorial misconduct, that is, the repeated presentation by Appellee of witnesses whose testimony was repeatedly diametrically opposed and contradictory (751). The motion was denied (751). Appellant raised the same issue in his Motion for New Trial (2169) which was also denied (2178). The reason the issue was raised arises from the concept that convictions obtained by the knowing use of perjured testimony are fundamentally unfair, Pyle v. Kansas, 317 U. S. 213, 63 S. Ct. 177, 87 L. Ed. 214 (1942) and U. S. v. Arguis, 427 U. S. 97, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976) and language such as the following:

> "The primary function of trial court proceedings is to find the truth, i.e. the true facts, in disputes between

> man and his neighbor and man and his government, in order that the applicable law may be applied thereto so as to reach a just conclusion. In our system the courts are almost wholly dependent on members of the bar to marshal and present the true facts of each cause in such manner as to enable the judge or jury to cook the adversary contentions in a crucible and draw off the material, decisive facts to which the law may be applied. When an attorney adds or allows false testimony to be cast into the crucible from which the truth is to be refined and taken to be weighed on the scales of justice, he makes impure the product and makes it impossible for the scales to balance. Dodd v. The Florida Bar, 118 So.2d 17 (Fla. 1960).

In the case at hand, Appellee obtained Appellant's conviction of first degree murder by presenting witnesses whose testimony contradicted the testimony (trial and deposition) of both other of Appellee's witnesses and others and statements which law enforcement would have attributed to a witness. Such is demonstrated by that portion of the Brief entitled "Facts Upon Issue II" which shows that the trial testimony of:

a. Salerno conflicted with the trial testimony of Alfonso on multiple points.

b. Salerno conflicted with what he had previously told an FBI agent on multiple points.

c. Alfonso conflicted with the trial testimony of Resina on several points.

d. Alfonso conflicted with the deposition testimony of Barbara Jean Wright on multiple points.

That Appellee knew of many, if not all, of the conflicts in advance is clear from the following:

a. The fact that Salerno received his FBI 302s from Appellant via a letter with which Appellee was copied (463).

b. The fact that Wright's deposition was taken in

advance of trial with Appellee's participation (2098-2157).

From the foregoing, which reveals a plethora of false statements at trial by at least two of Appellee's witnesses at trial and/or by nonwitnesses such as the FBI agent and/or Wright, and assuming that perjury occurs when a false statement is made under oath in an official proceeding (such as a trial or deposition) regarding a material matter, Chapter 837.02 Florida Statutes, it would defy reason and logic to conclude that neither Salerno and/or Resina and/or Alfonso committed perjury during Appellant's trial. And, if such is the case, Appellant's conviction is tainted especially in view of the fact that the record in this case fails to reveal any instance in which Appellee, through its trial attorney, attempted to correct a falsehood spoken by any of its witnesses as required. Giglio v. U. S., 405 U. S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972); Lee v. State, 324 So.2d 694 (Fla. 1st DCA 1976).

Lest Appellee claim that the preceding is too generalized, two specific actions taken by Appellee in this case crystallize the point. The first of these actions is the position taken by Appellee regarding Barbara Jean Wright. As discussed in another portion of this Brief, Appellant sought the testimony of Barbara Jean Wright on his behalf. This effort was opposed by Wright herself and, in her opposition, she was joined by Appellee which, among other things, refused to grant Wright immunity so as to nullify her opposition to testifying grounded in the privilege against self incrimination (1851, 1852, 1854, 1857, 1719, 1885). When it is recognized that no one was claiming that Wright was

directly involved in the murder in question, that her assertion of said privilege arose from fear of possibly being charged as an accessory after the fact or perjury because her trial testimony might conflict with that of Salerno and/or especially Alfonso **(1842, 1844, 1850, 1851, 1854)** and that Appellee granted immunity to Salerno and Alfonso despite their direct involvement in the murder though refusing to provide same to the obviously less involved Wright, it becomes clear that Appellee desired to foist upon Appellant's jury the testimony of, for example, Alfonso unencumbered by questions as to its veracity which would have been glaringly raised had Appellant been able to use Wright as a witness. Why did Appellee oppose permitting Appellant to use Wright as a witness? The simple answer is that Wright's testimony would have rendered Alfonso a liar and thus hurt Appellee's case.

The second action which places Appellee's misconduct in a bright and clear light arises from a statement made during Appellee's closing argument in the penalty phase of Appellant's trial. During the argument, Appellee argued that Appellant's crime was cold, calculated, and premeditated without pretense of moral or legal justification because "...this is a contract killing." The only evidence that the killing was a contract killing came from Salerno who testified that Alfonso offered $2,500.00 to $5,000.00 to have her husband killed. Alfonso denied offering anything to have her husband killed or otherwise soliciting his demise. Thus, by claiming that the killing was of a contractual nature, Appellee acknowledged that, on this point, its witness, Alfonso, lied when she denied what Salerno attributed

to her. Such constitutes misconduct because:

> "The State prosecutor has an affirmative duty to correct what he knows to be false and elicit the truth. Even though the State itself does not solicit the false evidence, it may not allow it to go uncorrected when it appears." Lee v. State, supra.

and the failure of Appellee, as reflected by the record in this case, to take any action regarding Alfonso's aforesaid denial at any time after it occurred. And, Appellee's failure is further compounded by the contents of the Agreement **(2268, 2270)** by which it granted Alfonso immunity from prosecution for the murder of her husband since such was premised on her truthfulness which, by its statement that the murder was a contract killing, even Appellee contested in its efforts to have Appellate sentenced to death.

The law is clear that it is improper for a prosecutor to knowingly present false or perjured testimony since same fundamentally subverts the role of the courts as a vehicle in search of truth. Giglio v. U. S., supra: Napue v. Illinois, **360** U. S. **264, 79 S.** Ct. **1173, 3** L. Ed. **2d 1217** (1959) and **U.** S. v. Pollock, **417** F. Supp. **1332** (U.S.D.C., D. Mass. **1976).** In Appellant's case, the presentation of such testimony by Appellee was a repeated and continual occurrence augmented by Appellee's joinder in a successful effort to preclude the testimony of a witness who would have exposed at least one witness for Appellee, to-wit: Barbara Alfonso, as a liar which witness Appellee ultimately claimed was in fact a liar.

ARGUMENT UPON ISSUE III

After rendering its verdict **(1032)** that Appellant was guilty as charged in the Indictment (1900-1901), Appellant's jury, after

hearing additional evidence, recommended that Appellant receive a life sentence (1179). This recommendation was overridden by the trial judge who found three aggravating circumstances, to-wit: that Appellant was previously convicted of a violent crime, that the crime for which Appellant was convicted was committed to avoid or prevent a lawful arrest and that Appellant's crime was committed in a cold, calculated and premeditated manner without pretense of moral or legal justification, who found one mitigating circumstance, to-wit: that Appellant had saved a life and who concluded that the aggravating circumstances outweighed the mitigating circumstance (2170-2176). Accordingly, a death sentence was imposed (2176).

The overriding of a jury's life sentence recommendation requires that the facts suggestive of a death sentence be so clear and convincing that reasonable people could not differ that death is the appropriate sentence. Francis v. State, 473 So.2d 672 (Fla. 1985); Tedder v. State, 322 So.2d 908 (Fla. 1975). For the following reasons, reasonable people could have so differed and thus the override was erroneous.

The first reason arises from the grant of immunity to Salerno in view of the law that the reasonableness of a jury's life sentence recommendation can be grounded upon the lenient treatment accorded to others, such as aiders and abettors, who are of equal culpability. Eutzy v. State, 458 So.2d 755 (Fla. 1984) and Herzog v. State, 439 So.2d 1372 (Fla. 1983). In the case at hand, Salerno, by his own admissions to preparing the grave with knowledge of its intended purpose to receive the victim's (dead)

body (273, 275, 439), traveling on the victim's last auto ride and firing a loaded pistol at victim during same with the intent to kill (275, 279, 405), being present at the killing (272), removing the body from the auto in which the victim was killed and burying same into the already prepared grave after removing money and personal property therefrom (282-283), clearly established himself as an aider and abettor under the following legal precepts, to-wit:

> (a) "Before an accused may be convicted as an aider and abettor, it must be shown not only that he assisted the actual perpetrator but that he intended to participate in the crime." Turner v. State, 442 So.2d 1064 (Fla. 1st DCA 1983).
>
> (b) "In a prosecution for first degree murder if the accused was present, aiding and abetting the commission or attempt of one of the violent felonies listed in the first degree murder statute, he is equally guilty, with the actual perpetration..." State v. Aquiar, 418 So.2d 245 (Fla. 1982).

Since aiders and abettors are equally as guilty as actual perpetrators, G. C. v. State, 407 So.2d 639 (Fla. 3d DCA 1981) and Chapter 777.011 Florida Statutes, it is clear that Appellee's grant of immunity to Salerno was tantamount to permitting Salerno to escape criminal liability for first degree murder.

The second reason aries from Appellee's grant of immunity to Alfonso "for her part in the murder" (2269) of her husband in view of the law cited in the immediately preceding paragraph hereof. The only evidence of Alfonso's involvement in the murder came from Salerno who testified that Alfonso offered $2,500.00 - $5,000.00 for the murder of her husband. Since those who counsel, procure and solicit the death of another are equally as guilty as the one who criminally causes the death, Coxwell v. State, 397 So.2d 335

(Fla. 1st DCA 1981), the grant of immunity to Alfonso, like the grant to Salerno, constituted an act by Appellee by which Alfonso was able to avoid criminal liability for the first degree murder of the same person of whose murder Appellant was convicted and sentenced. Perhaps to add insult to injury to Appellee's position regarding the death sentence it ought to have imposed upon Appellant, Appellee, after it was revealed that Alfonso was gratuitously granted immunity, nevertheless argued that a reason why Appellant should be put to death was because the murder was a contract killing (1161). Surely, Appellant's jury could have easily recognized the hypocrisy of Appellee's position inherent in the scenario by which it granted immunity to Alfonso, argued at the close the first phase one of Appellant's trial in favor of the credibility both Salerno and Alfonso though their testimony was diametrically opposed on the question of whether Alfonso offered compensation for the killing of her husband and then argued that contract killing was a factor justifying the imposition of the death penalty upon Appellant.

A third reason arises from obvious quetion of whether Salerno or Appellant was the actual killer of the victim. The law is that the reasonableness of a jury's life sentence recommendation can be grounded upon equivocal evidence of the whether the one to be sentenced is merely an accomplice on an actual perpetrator. Smith v. State, 403 So.2d 933 (Fla. 1981); Malloy v. State, 382 So.2d 1190 (Fla. 1979). In this case, Appellant claims the evidence was at least equivocal on this point and that such arises from the proof that Salerno fired a loaded pistol at the victim (275, 279,

405).

Appellant's claim on this point gains support from the actions of the jury itself when, during its deliberation upon the question of Appellant's guilt or innocence, it sought and received a reread of the certain instructions including that pertaining to principals/aiders and abettors. Obviously, by this action, the jury was contemplating the theory that Salerno was the shooter and Appellant merely an accomplice and it cannot be discounted that the jury carried this contemplation forward into its deliberations upon penalty.

Though he has attacked in other parts of this brief various of the aggravating circumstances relied upon by the trial court in sentencing Appellant to death, he has not done so in this part of the Brief because of his contention that, even assuming that the evidence established these three aggravating circumstances, the immunity accorded to those (Salerno and Alfonso) equally as guilty as Appellant pursuant to Chapter 777.011 Florida Statutes when combined with the one mitigating factor (the saving of a life by Appellant) noted by the trial court in its Sentence and other mitigating factors discounted in the Sentence (2170-2176), such as the Appellant being an excellent father to his children, Jacobs v. State, 396 So.2d 713 (Fla. 1981), demonstrates that the jury's recommendation of a life sentence was something upon which reasonable people could have agreed and thus, that the overriding thereof by the trial court was erroneous.

Of course, to the extent that the court hearing this appeal concludes that Appellant's position regarding one or more of those

aggravating circumstances is correct, then Appellant's claim expressed herein becomes overwhelming since the less number of aggravating circumstances available for weighing against the leniency and other factors alluded to herein, the more pronounced becomes the error of the trial court's view that the jury's recommendation of a life sentence was unreasonable.

ARGUMENT UPON ISSUE IV

Appellant recognizes that the Indictment **(1900-1901)** filed against him was sufficient to charge him with the commission of first degree murder either as an actual perpetrator or as an aider and abettor even though it did not express in which capacity he was being so charged. State v. Roby, **246** So.2d **566** (Fla. **1971).** However, Appellant also recognizes that if the proofs at trial failed to establish that he was an aider and abettor then it is error for the jury to be instructed on the subject of principals/aiders and abettors. This latter principal of law is found in Hair v. State, 428 So.2d **760** (Fla. 3d DCA 1983) in which Hair and Jackson were tried as codefendants for kidnapping and sexual battery. At the conclusion of the evidentiary phase of the trial, the trial court instructed the jury on principals/aiders and abettors. Hair objected to the application of the instruction to him but his objection was overruled. On appeal, the objection was found to be valid because of the lack of proof that Hair aided and abetted the actual perpetrator.

In Appellant's case, Appellee argued, both at the opening and closing of the evidentiary portion of the guilty or innocence phase of Appellant's trial, that Appellant was the actual

perpetrator, that is, that Appellant pulled the trigger of the gun from which the bullets which killed the victim emanated. During the presentation of testimony during said evidentiary portion, Appellee presented witnesses who testified that Appellant pulled the trigger as aforesaid and admitted to pulling the trigger as aforesaid. As noted by Appellee during its closing argument, no witness at trial ever testified that Appellant was ever anything but the shooter. Accordingly, no theory espoused by Appellee to the jury and no evidence presented to the jury suggested that Appellant was anything other than the actual perpetrator.

Trial courts are dutibound to:

> "...to give full instructions governing the entire law of the case as respects all the facts proved, or claimed by counsel to be proved, provided such claim is supported by competent evidence." Polk v. State, **179** So.2d 236 (Fla. 2d DCA **1965).**

Any, if a trial court erroneously instructs a jury:

> "...a defendant is entitled, if convicted, to a new trial." Parker v. State, **237** So.2d 251 (Fla. 3d DCA **1970).**

In this case, when the evidence preseted by Appellee and the positions asserted by it during its opening statement and closing arguments are viewed in light of Hair v. State, Polk v. State, and Parker v. State, supra, it is revealed that the instruction on principals/aiders and abettors was unsupported by the evidence and thus erroneously given.

Standing alone, Appellant realizes that the significance of the error may be difficult to assess. However, in this case, the significance of the error is obvious from the fact that during deliberations, the jury, considering Appellant's guilt or

innocence, requested a rereading of the certain instructions including that one pertaining to principals/aiders and abettors which instructions were reread to the jury (1031). From this event at trial, it is obvious that Appellant's jury, despite the fact that there was no evidence presented that Appellant was anything but an actual perpetrator and despite the fact that, during its statements and arguments to the jury, Appellee never suggested that Appellant was anything other than the actual perpetrator, was considering Appellant as if he were, not the actual perpetrator, but an aider and abettor to the actual perpetrator. While the world will never know whether the jury convicted Appellant as an actual perpetrator or as an aider and abettor, if Appellant was convicted in the latter capacity, the evidence would not support the theory. And, of course, the world would not have been left to wonder had the trial court not erroneously opened the door by instructing the jury on the concept of principals/aiders and abettors which was ungrounded in the Appellee's evidence or comments to the jury.

ARGUMENT UPON ISSUE V

One basis asserted by Wright for invoking her privilege against self incrimination if called as a witness at Appellant's trial is that her testimony, because it would conflict with the testimony of other witnesses, primarily Alfonso, could be used against her in a perjury trial. The trial court obviously gave credence to this theory when, in denying Appellant's Motion to Determine Whether Witness Can Assert Privilege Against Self Incrimination (2096-2157), the trial court said, "I determine the

witness can assert the privilege" (1884). The determination, under the facts of Wright's position, is erroneous.

In The Florida Bar v. Doe, 384 So.2d 30 (Fla. 1980), two attorneys had given statements to a state attorney who had immunized the two attorneys. Later, the attorneys were subpoenaed to testify at a disciplinary proceeding and asserted their privileges against self incrimination on the theory that if their testimony was inconsistent with the statements earlier given to the state attorney, they risked being charged with perjury. In denying the claim of privilege, it was noted that:

> "The law is clear that Doe and Roe may not invoke the fifth amendment privilege against self incrimination for untruthful statements they may now make in the pending disciplinary proceeding." The Florida Bar v. Doe, supra.

In U.S. v. Prior, 381 F. Supp. 870 (U.S.D.C., M.D., Fla. 1974), a witness, pursuant to a subpoena, appeared and testified before a federal grand jury. As a result of his testimony, the witness was indicted for perjury. Because he was not given his "Miranda" warnings before testifying, the witness sought to suppress his grand jury testimony. In denying the suppression, the following principle of law was enunciated:

> "It has always been the law that a witness is not entitled to assert the privilege against self incrimination on the ground that if he testifies he will perjure himself. The Fifth Amendment right to remain silent relates to past events and does not endow the witness with a license to commit perjury in answering questions not yet asked. He may refuse to answer, of course, if a truthful response might incriminate with respect to other offenses already committed or then in progress, but he will not be heard to say that he intends to be, and that he may therefor claim the privilege on the theory that once he has perjured himself he would then be subject to prosecution for that offense."

What Wright was asserting with regard to perjury flies in the face of the aforecited decisions. By claiming the privilege against self incrimination, Wright avoided answering questions not yet asked on the theory that to answer them, as she already had during her deposition at which she invoked no privileges, would subject her to a possible perjury charge.

A second basis for asserting her privilege against self incrimination was Wright's claim that her testimony might incriminate her in the crime of accessory after the fact. On this point, Appellant sought to invoke the procedures set forth in State v. Montgomery, **467** So.2d **387** (Fla. 3d DCA **1985)** by requesting the trial court to require Appellee to grant immunity to Wright or grant Appellant a judgment of acquittal **(1849)8-1849).** In State v. Montgomery, supra, the defendant sought the testimony of a witness who refused to testify unless he was granted immunity. After finding that the sixth amendment and the due process clause of the U. S. Constitution guarantee to a defendant in a criminal case the right to subpoena a witness and have the witness testify, the court in State v. Montgomery, supra, went on and concluded that if the prosecution's refusal to grant use immunity to a witness so he may testify for the defendant is done with a deliberate intent to distort the judicial fact finding process, then a court:

> "...has remedial power to require that the distortion be redressed by requiring a grant of use immunity to the witness as an alternative to a judgment of acquittal."

In State v. Montgomery, supra, it was concluded that because the defendant failed to make the required "substantial evidence

showing" that the fact finding process was being distorted, the trial court was not required to exercise the foregoing remedial power. However, such is not the case here.

In this case, Appellee granted immunity to Salerno, an aider and abetter by his own admission in the victim's murder, and to Alfonso who, according to Salerno, was also an aider and abetter (to-wit: the offeror of a contract to kill her husband) in the victim's murder. Yet the Appellee who originally listed Wright as its witness refused to grant her immunity to testify for Appellant though she, by no other witness nor by her own admissions during her depostion, was clearly uninvolved in the murder of the victim except perhaps, as she claimed, as a possible accessory after the fact. When the foregoing is juxtaposed with the clear contradictions between the trial testimony of Alfonso and the deposition testimony of Wright, which contradictions, if testified to at trial by Wright, reflect favorably upon Appellant's position, the distortion to the fact finding process due to the Appellee's refusal to grant immunity to Wright begin to appear. The distortion becomes clearer when it is realized that the thrust of Appellant's effort at trial was create reasonable doubt by eliciting information showing that Salerno was the killer at the behest of Alfonso to protect Alfonso's ability to engage in the illegal drug trade, a trade, incidentally, in which Appellant was not involved (392-393). Appellant needed Wright to contradict Alfonso's denials of involvement in the drug trade and involvement in and solicitation of the murder of her husband. Such need was gutted by Appellee, the controller of who receives and does not

receive immunity, which refused immunity to Wright, whose involvement, if any, in the murder was minimal and after the fact but granted same to Salerno and Alfonso who Appellee concedes were directly involved as aiders and abetters in the murder.

The upshot of the preceding is that the trial court erred in concluding that Wright could assert her fifth amendment privilege because of potential perjury arising from testimony not yet given and in failing to exercise the remedial power which was found to exist in State v. Montgomery, supra.

ARGUMENT UPON ISSUE VI

After Appellant was convicted of first degree murder **(2165-2168),** and after his jury recommended that he receive a sentence of life imprisonment **(2163),** the trial court overrode the jury's recommendation and sentenced Appellant to death by electrocution **(2170-2176, 2164-2168).** In arriving at said sentence, the trial court, as per its Findings **(2170-2176)** entered pursuant to Chapter **921.141(3)** Florida Statutes, found as an aggravating circumstance that Appellant had previously been convicted of a felony involving the use or threat of violence to the person. In so concluding, the trial court relied upon Appellant's previous guilty plea to a federal racketeering charge which had, as two of its predicate acts, the crimes of extortion and kidnapping.

With regard to the foregoing, the following occurred during the penalty phase of Appellant's trial. First, there was introduced into evidence a copy of a (federal) Indictment **(2271-2280)** against Appellant and a plea agreement **(2281-2288)**

pertaining thereto to which Appellant was a party. Secondly, the lawyer who prosecuted Appellant upon said Indictment (2271-2280) was permitted to testify only that:

a. Appellant pled guilty to a count of racketeering **(1108).**

b. Two of the predicate acts were extortion and kidnapping (1109).

As per said Indictment (2271-2280), Appellant was charged with, among other things, a violation of 18 U.S.C., Section 1962(c), commonly known as and herein referred to as "racketeering". According to 18 U.S.C., Section 1962(c), it is a crime, while an employee or associate of an enterprise, to conduct its affairs through a pattern of racketeering activity. According to 18 U.S.C., Section 1961(1), racketeering activity means the various crimes referred to therein. According to 18 U.S.C., Section 1961(5), a pattern of racketeering activity requires the occurrence of at least two of the acts of racketeering within a ten year period. As reflected in Count Nine of said Indictment (2271-2280), the Count charging Appellant with racketeering, the Government alleged thirteen acts of racketeering activity (predicate acts), to-wit: the extortion of Manuel Capaz, the kidnapping of Manuel Capaz, the arson of Chris' Place, the four mail frauds alleged in Counts One through Four of the Indictment (2271-2280), the burglary of the Institute DeBeaute, the two mail frauds alleged in Count Seven and Eight of the Indictment (2171-2280), the murder of Enrique Alfonso, the arson of a Pontiac automobile, and the arson of a structure at 4117 North Armenia

Avenue, Tampa, Florida.

With the foregoing as background, the issue is now whether such justified a finding that Appellant was previously convicted of a felony, (to-wit: extortion and kidnapping) involving the use or threat of violence to the person. Chapter 921.141(5)(b) Florida Statutes. For two reasons, Appellant contends the finding was not justified.

The first reason is that there was no proof that Appellant was ever convicted of any crime alleged in said federal Indictment (2271-2280). All that the record shows is that Appellant pled guilty to Count Nine of said Indictment (2271-2280). The record is devoid of any evidence that Appellant was ever convicted.

The second reason is that, even assuming that Appellant was convicted of racketeering, a conviction being a requirement of Chapter 921.141(5)(b) Florida Statutes, the reality of the situation is that such conviction would not have been for extortion or kidnapping. Appellant was convicted of violating 18 U.S.C., Section 1962(c). And, a conviction for racketeering does not constitute a conviction of the predicate acts or any of them. That this is so is obvious from certain cases which have discussed the crime of racketeering. According to U. S. v. Marcello, 537 F.Supp. 1364 (U.S.D.C., E.D. La.):

> "The heart of a RICO offense is the conduct of the affairs of an enterprise through a pattern of racketeering activity...RICO does not criminalize either associating as an enterprise or engaging in a pattern of racketeering activity standing alone; both elements are essential to the commission and conviction of a RICO substantive or conspiracy offense." (emphasis added)

According to U.S. v. Qaoud, 777 F.2d. 1105 (U.S.C.A., 6th Cir.,

1985):

> "The RICO statute, it must be remembered, had the broad purpose of providing new means of combatting organized and/or continuing patterns of criminal activity...The government must establish, in a RICO prosecution, 'a pattern of racketeering activity' which as defined in 18 U.S.C., Section 1961(5) consists of 'at least two acts of racketeering activity...the last of which occurred within ten years...after the commission or a prior act of racketeering activity'. Under 18 U.S.C., Section 1961(1) (Supp. IV, 1980), 'Racketeering activity' includes a wide array of federal and state crimes,...Although 'enterprise' and 'pattern of racketeering activity' are separate elements, they may be proved by the same evidence." (emphasis added).

Finally is the case of U. S. v. Licavoli, 723 F.2d 1940 (U.S.C.A., 6th Cir. 1984) in which in state court the defendants were acquitted of state crimes which were later used as predicate acts in a racketeering prosecution. In denying the defendants contention that the acquittals barred the use of the state crimes as predicate acts, the court stated that:

> "'[RICO] forbids racketeering, not state offenses per se. The state offenses referred to in the federal act are definitional only: racketeering, the federal crime, is defined as a matter of legislative draftsmanship by reference to state crimes. This is not to say...that the federal statute punishes the same conduct as that reached by state law. The gravamen of Section 1962 is a violation of federal law and 'reference to state law is necessary only to identify the type of unlawful activity in which the defendant intended to engage.'" (emphasis added).

The upshot of the preceding is that racketeering is its own crime separate and distinct from the predicate acts which constitute merely one of the elements needed to be proved in order for there to be a conviction of racketeering. Accordingly, a conviction for racketeering is not a conviction of the predicate acts. And, where one is convicted of racketeering in which more than two predicate acts are alleged, the conviction merely

indicates that the trier of fact concluded that two of the alleged predicate acts were sufficiently proven along with the other elements necessary to establish the crime. In Appellant's case, the Indictment (2271-2280) charged thirteen predicate acts plus the other elements of the crime of racketeering as set forth in 18 U.S.C., Section 1962(c). By pleading guilty to racketeering, all Appellant was doing was admitting that the government could prove the elements of the offense including that he had committed at least two of the thirteen predicate acts alleged in Count Nine of the Indictment (2271-2280). That this is indeed the situation regarding Appellant's plea to Count Nine of the Indictment (2271-2280), is evident from the plea colloquy which occurred between the Appellant and the federal judge who took his guilty plea to Count Nine of the Indictment (2271-2280), to-wit:

> "Do each of you understand, more particularly, that if this case did proceed to trial, it would be the burden or responsibility of the United States to prove beyond a reasonable doubt and to the unanimous satisfaction of the jury which has been selected to hear the case, first that during the times stated in the Indictment, the two of you were associated with what is called an enterprise consisting of a group of individuals engaged in activities affecting interstate commerce, interstate commerce meaning commerce or business relationships or transactions which involve or take place between two or more states: that during the conduct of the affairs of the enterprise, each of you knowingly and willfully participated in at least two of the criminal offenses alleged to have constituted the pattern of racketeering activity, one of which must have occurred after October 1970 and that at all times you acted knowingly and willingly, which means that you acted voluntarily and intentionally and not because of innocent mistake or accident, and willfully which means with specific intent to do something the law forbids. Those are what are called the essential elements of the offense which the Government would have to prove before you could be convicted by the jury, the point being that racketeering is an overlay crime."

The foregoing clearly demonstrates that Appellant's plea of guilty to Count Nine of the Indictment **(2271-2280)** did not constitute a conviction of him for the crimes of extortion and kidnapping. Therefore, to have used the plea as a basis for finding the existence of the aggravating circumstance contained in Chapter **921.141(5)(b)** Florida Statutes constituted error by the trial court.

ARGUMENT UPON ISSUE VII

On direct examination, Carlos Cabrera attributed to Appellant a statement from which (guilty) knowledge of the crime with which he was charged could be inferred against Appellant. On cross examination, Cabrera acknowledged that at his deposition shortly before trial he was unable to recall statements by Appellant such as the one to which he testified on direct examination. On redirect, Appellee was able to elicit from Cabrera, over objection, that he had, previous to his deposition, advised another of the statement he attributed to Appellant on direct examination. For the following reasons, said redirect examination was improper and the objection thereto should have been sustained.

Prior consistent statements by a witness are only admissible to rebut an inference of improper influence, motive or recent fabrication. Chapter **90.801(2)(b)** Florida Statutes. In this case, no such inference was available for rebuttal by a prior consistent statement since all that was established on cross examination was that Cabrera, during his deposition, was unable to recall statements by Appellant such as he ultimately attributed to Appellant at trial. Surely, no inference of improper influence,

motive or recent fabrication can arise from such an inability. Appellant asserts that the use of prior consistent statements in accordance with Chapter 90.801(2)(b) Florida Statutes is permitted to rehabilitate a witness who has been impeached by a prior inconsistent statement pursuant to Chapter 90.608(1) Florida Statutes because the inference, especially of recent fabrication, could only arise from an inconsistency between prior statements and present testimony. However, in this case, Cabrera was not impeached by a prior inconsistent statement. He was only confronted with his failure, at an earlier time, to recall that to which he testified at trial. Accordingly, it was error to have permitted Cabrera to testify, on redirect examination, as to a prior statement consistent with what he testified to on direct examination.

ARGUMENT UPON ISSUE VIII

By Indictment (1900-1901), Apellant was charged with killing a person named Enrique Alfonso. Appellee claimed that the victim was the person whose skeleton was removed from a grave at Hillsborough and Howard Avenues in Tampa. In an effort to prove that the skeleton was that of Enrique Alfonso, Appellee presented Drs. Prado and Lindauer to show the similarities between the teeth of the skeleton and those of Dr. Prado's patient, one Enrique Alfonso. One dissimilarity between the teeth of the skeleton and those of Dr. Prado's patient was that a molar was missing from the skeleton which appeared in Dr. Prado's records, to-wit: her full mouth and x-rays. On the x-rays, the molar was depicted with an "x" drawn through it. At no point in her testimony did Dr. Prado

ever state the meaning or purpose of the "x" drawn through the molar depicted on her x-rays. However, Dr. Lindauer was able to testify, over objection, that to her the **"x"** indicated a tooth "indicated for extraction or removal" (580).

For several reasons, the overruling of the objection was error. The first was that Dr. Lindauer was testifying about the meaning of the "x" from common practice, not personal knowledge as required by Chapter **90.604** Florida Statutes. The only person with personal knowledge of the meaning and purpose of the "x" was Dr. Prado (who did not testify to same), because the x-rays with the **"x"** were hers.

The second reason is that Dr. Lindauer was unqualified to testify to the routine practices of Dr. Prado's dental practice. Pursuant to Chapter **90.406** Florida Statutes, evidence of an organization's routine practice is admissible to prove that the organization's conduct on a particular occasion was in conformity with its routine practice. However, the record is devoid of any indication that Dr. Lindauer was either a member of Dr. Prado's organization, to-wit: her dental practice, or had knowledge, personal or otherwise, of its routine practices or its purpose for drawing "x"s through teeth depicted on x-rays. After all, one dentist's **"x"** may reflect a cavity, whereas another dentist's "x" may designate a tooth for future extraction or one dentist's **"x"** may designate a tooth to be reexamined at a future time, whereas another dentist's "x" may designate a tooth requiring a cap. Why Appellee chose Dr. Lindauer, as opposed to Dr. Prado, as the interpreter of the latter's x-rays is unknown to Appellant.

However, as the foregoing establishes, Dr. Lindauer lacked the knowledge and qualifications to prove the meaning of the "x" through the molar depicted on the x-ray. And, of course, the significance of the point is that without Dr. Lindauer's testimony regarding the "x", a second dissimilarity (591) between the teeth depicted in the x-rays and those of the skeleton would have been established thereby complicating Appellee's efforts to prove that the skeleton was that of the person named in the Indictment as the victim of the crime charged therein.

ARGUMENT UPON ISSUE IX

By asking its witness about who led him into criminal activity, Appellee clearly sought evidence bearing on Appellant's bad character or propensities. Such evidence is inadmissible. Chapter 90.404(2)(a) Florida Statutes. As a result of the asking of the question and the response given, Appellant moved for and was granted a mistrial.

In determining whether the actions of Appellee, which led Appellant to request (and ultimately receive) a mistrial, preclude a retrial of Appellant by Appellee on double jeopardy grounds, the issue is whether or not the mistrial was the result of prosecutorial overreaching. Bell v. State, 413 So.2d 1292 (Fla. 3d DCA 1982); U. S. v. Dinitz, 424 U. S. 600, 96 S. Ct. 1075, 47 L. Ed. 2d 267 (1975). For one very significant reason, Appellee's aforementioned conduct constitutes such overreaching.

Such overreaching exists when the prosecutor's actions, which invite the accused's request for mistrial, are for the purpose of affording the prosecution a more favorable opportunity or

advantage for conviction. U. S. v. Dinitz, supra; U. S. v. Ziele, 734 F.2d 1447 (11th Cir. 1984); U. S. v. Beasley, 479 F.2d 1124 (5th Cir. 1973). In this case, the mistrial afforded the opportunity and advantage.

As previously noted, on direct examination of Ralph Salerno during the first trial, Appellee sought no testimony concerning a tape recorded telephone call which Salerno had with Appellant. On cross examination of Salerno during said first trial, no testimony was given by Salerno concerning such a telephone call. Accordingly, since said telephone conversation was not the subject of either the direct or cross examination of Salerno, it presumably could not have been the subject of any redirect examination of Salerno by Appellee. Thus, when, during Appellant's retrial, Appellee elicited on its direct examination of Salerno testimony about the telephone conversation which led to the introduction into evidence of a recording thereof, the mistrial invited by Appellee's action at the first trial accorded Appellee the opportunity and advantage to do something in the retrial which it did not do in the first trial, to-wit: introduce a recording of conversation which incriminated Appellant in the crime for which he was being tried in both trials. On this point, it must be remembered that there were only two witnesses to the telephone conversation, to-wit: Salerno and FBI Agent Conrad. Since Conrad had been previously stricken by Appellee as a witness in the case, only the testimony of Salerno concerning the telephone conversation and recording thereof, was available to Appellee for use at any trial of Appellant.

As the foregoing demonstrates, Appellee was able to enhance its evidence during retrial by adding thereto the recorded telephone conversation. Such was the sole result of the mistrial generated by Appellee's actions at the first trial. Consequently, via the mistrial, Appellee gained a more favorable opportunity and an advantage in the second trial to secure Appellant's conviction. Such constitutes a violation of the constitutional prohibition against double jeopardy. Arizona v. Washington, 434 U. S. 497, 98 S. Ct. 824, 54 L. Ed. 2d 717 (1978).

ARGUMENT UPON ISSUE X

The aggravating circumstance of avoiding or preventing a lawful arrest, Chapter 921.141(5)(e) Florida Statutes concerns primarily the killing of a law enforcement officer though, where the dominant motive is witness elimination, it can be applied to the killing of a civilian. White v. State, 403 So.2d 331 (Fla. 1981); Riley v. State, 366 So.2d 19 (Fla. 1978). Since the victim was a civilian, the issue is whether the dominant motive in killing him in 1979 was as the trial court contends, to eliminate him as a witness to crimes of which Appellant was convicted via a 1983 federal court Indictment (1990-1998). For several reasons, proof of this contention is insufficient.

The first reason is that the trial court's finding on this point belies its assumption that the criminal (predicate) acts described in Court IX of the federal Indictment (1990-1998) are the same as Salerno attributed to himself, the victim, Alfonso and Resina. Of this, there is absolutely no proof that the frauds and arson described in the federal Indictment (1990-1998) are the same

ones in which Salerno, the victim, Alfonso and/or Resina were involved. To buttress this position, it must be noted that several of the (mail) frauds and one of the arsons described in the federal Indictment (1990-1998) allegedly occurred after the victim's death in 1979 (272-273). Though the trial court spoke in terms of "logical inference," it seems illogical, for example, to infer that the victim was killed in 1979, so that he would not be a witness to frauds which occurred in 1980 and 1983 and/or to an arson which occurred in 1983.

The second reason is that the aggravating circumstance found in Chapter 921.141(5)(e) Florida Statutes, insofar as it involves non-law enforcement officers, has been applied when the accused eliminated an actual witness to a crime. Brown v. State, 473 So.2d 1260 (Fla. 1985); Rivers v. State, 458 So.2d 762 (Fla. 1984); Card v. State, 453 So.2d 17 (Fla. 1984); Herzog v. State, 439 So.2d 1372 (Fla. 1983). In the case at hand, there is no proof that the victim was an actual witness to any crime perpetuated by Appellant. Thus, there is no proof that the dominant motive for the alleged killing of the victim by Appellant was witness elimination.

Finally, despite the trial court's conclusion that the victim was killed to eliminate him as a witness to crimes of which Appellant was later convicted, the fact of the matter is that the only proof of motive is that the victim was too flashy and talked too much (272). The sole witness to this motive was Salerno from whom no further testimony was elicited as to what the victim supposedly talked about "too much." The trial court's assumption

is that the victim talked too much about criminal activity but of this there is not a scintilla of evidence. Thus, the "logical inference'' relied upon by the trial court lacks support in the evidence and thus is devoid of the purported logic.

For these reasons, the trial court erred in finding the aggravating circumstance which is the subject of Chapter 921.141(5)(e) Florida Statutes.

CONCLUSION

For all the reasons set forth herein upon Issue I, Appellant claims entitlement to discharge for Appellee's violation of Chapter 941.45 Florida Statutes and, barring same, a hearing upon his Motion for Discharge.

For all the reasons set forth herein upon Issue 11, Appellant claims entitlement to dismissal because of prosecutorial misconduct, to-wit: the presentation of perjured testimony.

For all the reasons set forth herein upon Issue 111, Appellant claims entitlement to have his death sentence vacated because of an erroneous override of a jury's life sentencing recommendation.

For all the reasons set forth herein upon Issue IV, Appellant claims entitlement to a new trial because of the giving, over objection, of a jury instruction unsupported by evidence.

For all the reasons set forth herein upon Issue V, Appellant claims entitlement to a judgment of acquittal due to distortion of the truth finding process arising from Appellee's failure to grant immunity to a defense witness.

For all the reaons set forth herein upon Issue VI, Appellant

claims entitlement to have his death sentence vacated because of the trial court's reliance upon an unfounded aggravating circumstance.

For all the reasons set forth herein upon Issue VII, Appellant claims entitlement to a new trial for improper rehabilitation of Appellee's witness.

For all the reasons set forth herein upon Issue VIII, Appellant claims entitlement to a new trial for the admission of inadmissible testimony.

For all the reasons set forth herein upon Issue IX, Appellant claims entitlement to dismissal on double jeopardy grounds.

For all the reasons set forth herein upon Issue X, Appellant claims entitlement to have his death sentence vacated, because of the trial court's reliance upon an improper aggravating circumstance.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Initial Brief of Appellant has been furnished, by mail, this 22 day of December, **1986**, to Robert **J**. Landry, Esquire, Assistant Attorney General, **1313** North Tampa Street, Tampa, Florida 33602.

SIMSON UNTERBERGER, ESQUIRE