IN THE SUPREME COURT OF FLORIDA

CASE NO. 69,496

ALTON MOORE,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR DADE COUNTY

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

	PAGES
TABLE OF CITATIONS	iv - x
INTRODUCTION	1
STATEMENT OF THE CASE	2 - 3
STATEMENT OF THE FACTS	4 - 18
SUMMARY OF THE ARGUMENT	19 - 21
ARGUMENT	
I. THE TRIAL COURT ERRED BY ITS REFUSAL TO EXCUSE CERTAIN JURORS FOR CAUSE AND TO GRANT THE DEFENDANT ADDITIONAL PEREMPTORY CHALLENGES, THEREBY ABRIDGING THE DEFENDANT'S RIGHT TO PEREMPTORY CHALLENGES.	22 - 30
II. THE MISLEADING JURY INSTRUCTION ON EXCUSABLE HOMICIDE DEPRIVED DEFENDANT OF DUE PROCESS AND A FAIR TRIAL, AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES, AND ARTICLE I, SECTION 9, OF THE CONSTITUTION OF THE STATE OF FLORIDA.	31 - 35
III. THE TRIAL COURT ERRED BY THE ADMISSION OF RANK HEARSAY IN THE FORM OF AN ALLEGED "DYING DECLARATION" AND A "911 POLICE TAPE RECORDING" THEREBY DEPRIVING THE DEFENDANT OF A FAIR AND IMPARTIAL TRIAL, AND HIS RIGHT OF CONFRONTATION AS GUARANTEED UNDER THE UNITED STATES CONSTITUTION AND THE FLORIDA CONSTITUTION.	36 - 43
IV. THE TRIAL COURT ABANDONED ITS DUTY TO SCRUPULOUSLY GUARD THE RIGHTS OF THE DEFENDANT WHEN IT DENIED DEFENDANT'S MOTION FOR MISTRIAL AFTER THE PROSECUTOR REFERRED TO DEFENSE COUNSEL AS "UNPROFESSIONAL" AND "UNETHICAL" IN FRONT OF THE JURY.	44 - 46

TABLE OF CONTENTS

		PAGES
V.	THE ADMISSION INTO EVIDENCE OF SHOCKINGLY GRUESOME POSED PHOTOS OF THE DECEASED ON A TABLE IN THE MEDICAL EXAMINER'S OFFICE, DEPICTING A GAPING, BLOODY KNIFE WOUND TO THE THROAT AND A PORTION OF A SURGEON'S INCISION BENEATH HER BREASTS MADE FOR MEDICAL THERAPY WAS IRRELEVANT, INFLAMMATORY, PREJUDICIAL AND DEPRIVED THE DEFENDANT OF A FAIR AND IMPARTIAL TRIAL.	47 - 50
VI.	THE DEFENDANT WAS DENIED HIS SIXTH AMENDMENT AND ARTICLE I, SECTION 16 RIGHT TO A TRIAL BY AN IMPARTIAL JURY AND HIS FOURTEENTH AMENDMENT RIGHT TO EQUAL PROTECTION OF THE LAWS WHERE THE PROSECUTOR USED PEREMPTORY CHALLENGES TO EXCLUDE JURORS SOLELY ON THE BASIS OF RACE.	51 - 53
VII.	THE TRIAL COURT ERRED IN SENTENCING THE DEFENDANT TO DEATH AFTER A JURY TRIAL WHEN PRIOR TO TRIAL THE DEFENDANT WAS OFFERED A PLEA TO LIFE WHICH HE REJECTED.	54 - 56
VIII.	THE POLICE MISCONDUCT IN OBTAINING DEFENDANT'S CONFESSION WAS A DELIBERATE ATTEMPT TO DEPRIVE DEFENDANT OF HIS SIXTH AMENDMENT RIGHT TO COUNSEL, RENDERING DEFENDANT'S CONFESSION INVOLUNTARY AND INADMISSIBLE AT TRIAL.	57 - 59
IX.	THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN DEFENDANT'S CONVICTION FOR ARMED BURGLARY WITH AN ASSAULT.	60
X.	THE TRIAL COURT ERRED BY FINDING THREE AGGRAVATING FACTORS, ONLY ONE STATUTORY MITIGATING FACTOR, NO NON-STATUTORY MITIGATING FACTORS, AND IMPOSING THE DEATH SENTENCE.	61 - 67

TABLE OF CONTENTS

		PAGES
XI.	THE DEATH PENALTY IS CRUEL AND UNUSUAL PUNISHMENT UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.	68
XII.	THE DEFENDANT DID NOT RECEIVE A FAIR AND IMPARTIAL TRIAL DUE TO THE CUMULATIVE PREJUDICIAL EFFECT OF THE TOTALITY OF ERRORS COMPLAINED OF HEREIN.	69
CONCLUSION		70
CERTIFICATE OF SERVICE		70

TABLE OF CITATIONS

CASES:	PAGE
ATKINS v. STATE 11 F. L. W. 567 (Fla. Oct. 30, 1986)	64
BAGLEY v. STATE 119 So. 2d 400 (Fla. 1960)	33
BATSON v. KENTUCKY ———U. S.———, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986)	53
BEAGLES v. STATE 273 So. 2d 796 (Fla. 1st DCA, 1973)	50
BEATTY v. STATE 486 So. 2d 59 (Fla. 4th DCA, 1986) reh den 1986	40
BETNER v. STATE 23 Fla. 806, 167 So. 685 (Fla. 1936)	46
BLACKBURN v. ALABAMA 361 U. S. 199, 80 S. Ct. 274, 4 L. Ed 2d 242 (1960)	59
BLITCH v. STATE 427 So. 2d 785, 787 (Fla. 2d DCA, 1983)	33
BOOKER v. STATE 397 So. 2d 910 (Fla. 1981) reh den 1981	50
BRADY v. U. S. 397 U. S. 742, 748, 90 S. Ct. 1463, 1468, 25 L. Ed. 747 (1970)	58
BREWER v. STATE 386 So. 2d 232, 235, (Fla. 1980) reh den 1980	57
BURCH v. STATE 343 So. 2d 831 (Fla. 1977)	66
CARTER v. STATE 250 So. 2d 230 (Fla. 1st DCA, 1971) cert den 257 So. 2d 260 (Fla. 1971)	40
CARUTHERS v. STATE 465 So. 2d 496, 499 (Fla. 1985), reh den 1985	66
CROFT v. STATE 117 Fla. 832, 158 So. 454, 455, (Fla.)	33
CROSBY v. STATE 97 So. 2d 181 (Fla. 1957)	69

CASES - Continued: PAGE

DeCASTRO v. STATE
359 So. 2d 551 (Fla. 3d DCA, 1978) 59

DeCONINGH v. STATE
443 So. 2d 501, 503 (Fla. 1983), reh den 1983, cert den 104 S. Ct. 995 57, 58

DEMPS v. STATE
395 So. 2d 501 (Fla. 1981) cert den 454 U. S. 933, (1981) 64

DRIESSEN v. STATE
431 So. 2d 692 (Fla. 3d DCA, 1983) 69

DYKEN v. STATE
89 So. 2d 866 (Fla. 1956) en Banc 49, 50

ERLER v. STATE
241 So. 2d 202, 203 (Fla. 4th DCA, 1970) 46

FRAIZER v. STATE
467 So. 2d 447 (Fla. 3d DCA, 1985) 55

FRALEY v. STATE
426 So. 2d 983 (Fla. 3d DCA, 1983) reh den 1983 55

FRANKLIN v. STATE
403 So. 2d 975, 976 (Fla. 1981) reh den 1981 33

GARMISE v. STATE
311 So. 2d 747 (Fla. 3d DCA, 1975) reh den 1975 app. dism. 328 So. 2d 841 (Fla. 1976), cert den 429 U. S. 998 48

GASPARD v. STATE
387 So. 2d 1016, 1021 (Fla. 1st DCA, 1980) 59

GOLDEN v. PORTERFIELD
429 So. 2d 45 (Fla. 1st DCA, 1983) 41, 42

GOMIEN v. STATE
172 So. 2d 511 (Fla. 3d DCA, 1965) reh den 1965 40

GREGG v. GEORGIA
96 S. Ct. 2971, 428 U. S. 153, 49 L. Ed. 2d 859 (1976) 68

GRIMES v. STATE
64 So. 2d 920 (Fla. 1953) 37

CASES - Continued: PAGE

HAWTHORNE v. STATE
377 So. 2d 780, (Fla. 1st DCA, 1979) 59

HIGGENBOTHAM v. STATE
19 So. 2d 829 (Fla. 1944) reh den 1944 38

HILL v. STATE
477 So. 2d 553 (Fla. 1985) reh den 1985 27, 28, 30

HOLMES v. STATE
429 So. 2d 297 (Fla. 1983) 66

HUCKABY v. STATE
343 So. 2d 29, 30, n. 1 (Fla. 1977) 3, 66

JOHNSON v. REYNOLDS
97 Fla. 591, 598, 121 So. 793, 796 (Fla. 1929) 28

JONES v. STATE
332 So. 2d 615, 619 (Fla. 1976) 66

KING v. STATE
390 So. 2d 315 (Fla. 1980) cert den 450 U. S. 989, (1981) 64

LEACH v. STATE
132 So. 2d 329 (Fla. 1961) 50

LEON v. STATE
396 So. 2d 203 (Fla. 3d DCA, 1981) 30

MATHEWS v. STATE
44 So. 2d 664, 670, (Fla. 1950) 46

MILLS v. STATE
264 So. 2d 71, (Fla. 1st DCA, 1972) 39

MINES v. STATE
390 So. 2d 332 (Fla. 1980), cert den 101 S. Ct. 1994, 451 U. S. 916, 68 L. Ed. 2d 308 66

MITCHELL v. STATE
407 So. 2d 343, (Fla. 4th DCA, 1981) reh den 1982 60

MOTLEY v. STATE
155 Fla. 545, 20 So. 2d, 798, 800 (Fla. 1945) 33, 34

NO. CAROLINA v. PEARCE
395 U. S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656, (1969) 55

CASES - Continued: PAGE

OLIVE v. STATE
34 Fla. 203, 206, 15 So. 925, 926 (Fla. 1894) 27

PALMES v. STATE
397 So. 2d 648, 652 (Fla. 1981) reh den 1981 33

PARKER v. STATE
495 So. 2d 1203 (Fla. 3d DCA, 1986) cert den in Fla. S. Ct. Cs. No. 69,664 (Feb. 13, 1987) 32, 33

PEOPLE v. JOHNSON
461 N. E. 2d 585 (Ill. App. 1 Dist., 1984) reh den 1984 42

PEOPLE v. SLATON
354 N. W. 2d 326 (Mich. App. 1984) 43

PROFITT v. FLORIDA
428 U. S. 242 (1976) 68

REDDISH v. STATE
167 So. 2d 858 (Fla. 1964) on pet for mod. 1964. 48

REMBERT v. STATE
445 So. 2d 337 (Fla. 1984) 64

RILEY v. STATE
366 So. 2d 19, 20, n.1, (Fla. 1978) app. after remand 413 So. 2d 1173, cert den 103 S. Ct. 317, 459 U. S. 981, 74 L. Ed. 2d 294, reh den 103 S. Ct. 773, 459 U. S. 1138, 74 L. Ed. 2d 985 31

RODRIQUEZ v. STATE
396 So. 2d 798 (Fla. 3d DCA, 1981) 33

ROSA v. STATE
412 So. 2d 891 (Fla. 3d DCA, 1982) reh den 1982 49

RUTLEDGE v. STATE
374 So. 2d 975 (Fla. 1979) cert den 435 U. S. 1004, (1978) 64

SCOTT v. STATE
11 F. L. W. 505 (Fla. Sept. 25, 1986) 64

SINGER v. STATE
109 So. 2d 7 (Fla. 1959) 28, 29, 30

STATE v. CABALLERO
396 So. 2d 1210 (Fla. 3d DCA, 1981) 59

CASES - Continued: PAGE

STATE v. DIXON
283 So. 2d 1 (Fla. 1973) cert den 416 U. S. 943, 94 S. Ct. 1950, 40 L. Ed. 2d 295 (1974) 66

STATE v. MURRAY
443 So. 2d 955 (Fla. 1983) 46

STATE v. NEIL
457 So. 2d 481 (Fla. 1984) 52

STATE v. PINDER
375 So. 2d 836 (Fla. 1979) 60

STATE v. ROSS
714 P. 2d 703, 707 (Wash. App. 1986) 42, 43

STATE v. STEELE
348 So. 2d 398 (Fla. 3d DCA, 1977) 46, 69

STATE OF WASHINGTON v. RUPE
683 P. 2d 571 (Wash. 1984 en Banc) 40, 41

STRAIGHT v. STATE
397 So. 2d 903 (Fla. 1981) reh den 1981 50

SWAIN v. ALABAMA
380 U. S. 202, 85 S. Ct. 824, 13 L. Ed. 2d 759 (1965) 53

TEFFETELLER v. STATE
439 So. 2d 840, 843 (Fla. 1983) reh den 1983 37, 38
cert den 465 U. S. 1074 (1984) 64

THOMAS v. STATE
59 So. 2d 517 (Fla. 1952) 50

TILLMAN v. STATE
44 So. 2d 644 (Fla. en Banc 1950) reh den 1950 39

TOWNSEND v. BAIN
372 U. S. 293, 308, 83 S. Ct. 745, 754, 9 L. Ed. 2d 770 (1963) 58

TYNDALL v. STATE
234 So. 2d 154, 155 (Fla. 4th DCA, 1970) 46

PAGE

CONSTITUTION OF THE UNITED STATES

Fifth Amendment 35, 43, 45, 69
Sixth Amendment 27, 35, 42, 43
Fourteenth Amendment 35, 43, 45, 69

CONSTITUTION OF THE STATE OF FLORIDA

Article I, Section 9 35, 45, 69
Article I, Section 22 27, 35, 43
Article V, Section 3(b)(1) 3

FLORIDA STATUTES

Section 90.801(1)(c) (1981) 36
Section 90.803(6) (1981) 37, 39
Section 90.804(2)(b) (1981) 37
Section 210.6 (3)(a) 63
Section 782.03 (1983) 31, 32
Section 784.011 (1979) 60
Section 810.02 (1983) 60
Section 913.03 (10) 27
Section 920.05 (1941) 34
Section 921.141(4) (1983) 3
Section 921.141(6)(b) 64
Model Penal Code 63

PAGE

FLORIDA RULES:

Fla. R. App. P.	9.030(a)(i)	3
Fla. R. App. P.	9.140(b)(4)	3
Fla. R. Crim. P.	3.350(a)	27
Fla. R. Crim. P.	3.600(7)	34

OTHER AUTHORITIES:

Stetson Law Review, Spring 1986, Vol. XV, No. 2
"Review of Capital Cases," Neil Skene 63

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INITIAL BRIEF OF APPELLANT

INTRODUCTION

The Appellant, ALTON MOORE, was the Defendant in the trial court, the Circuit Court of the Eleventh Judicial Circuit of Florida, In and For Dade County. The Appellee, the State of Florida, was the prosecution. In this Brief, the Appellant will be referred to as the Defendant and the Appellee will be referred to as the State.

The symbol "R" will be utilized in this Brief to designate the Record on Appeal which includes the transcript of trial proceedings.

STATEMENT OF THE CASE

Defendant was charged by Indictment filed October 29, 1985 with first degree murder (Count I), armed burglary (Count II), and possession of a weapon (knife) while engaged in a criminal offense (Count III). (R. 1622-1623a). He was arraigned on October 31, 1985, stood mute, and requested trial by jury. The trial court directed the entry of a plea of not guilty. (R. 18).

On November 27, 1985 upon defense motion, the Court entered an Order appointing a defense expert psychologist. (R. 1659-1660). Thereafter, upon defense motion, the Court appointed experts to examine the defendant's competency. (R. 1661-1664). The psychiatric evaluations are part of the Record on Appeal. (R. 1706-1707). A competence hearing was held on May 16, 1986 and the defendant was found to be competent. (R. 53, 114).

Trial commenced on July 22, 1986. (R. 254). On August 1, 1986, the jury returned verdicts on Counts I, II and III. (R. 1844-1846). Advisory sentence proceedings commenced on August 1, 1986 and the jury by majority subsequently recommended the imposition of the death penalty. (R. 1524). The trial court imposed the death penalty on the murder conviction, imposed a consecutive life sentence on Count II (armed burglary with an assault) and a consecutive 5-year sentence to Counts I and II on Count III (possession of a weapon while engaged in the commission of a felony. (R. 1899-1911).

A formal order adjudicating defendant guilty and imposing

sentence was entered on September 11, 1986. (R. 1899-1911).[1]

Notice of Appeal was filed on October 10, 1986. (R. 1914).

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[1] The jurisdiction of this Court is invoked pursuant to Article V, Section 3(b)(1) of the Constitution of the State of Florida, Section 921.141(4), Florida Statutes (1983), and Fla. R. App. P. 9.140(b)(4) and 9.030(a)(i). This Court also has jurisdiction to review the convictions for burglary and possession of a weapon while engaged in a criminal offense, which arose from the same trial as did the murder conviction. See Riley v. State, 366 So. 2d 19, 20 n.1 (Fla. 1978) appeal after remand 413 So. 2d 1173, cert. den. 103 S. Ct. 317, 459 U.S. 981, 74 L. Ed. 2d 294, reh den 103 S. Ct. 773, 459 U.S. 1138, 74 L. Ed. 2d 985; Huckaby v. State, 343 So. 2d 29, 30 n.1 (Fla. 1977).

STATEMENT OF THE FACTS

Count I of the Indictment alleges that the homicide in this case was committed "from a premeditated design . . . or while (defendant was) engaged in the perpetration of, or in an attempt to perpetrate an involuntary sexual battery and/or robbery and/or burglary. (R. 1624). The issues at trial were identity and sanity. (R. 1657, 1658, 1659, 1665-1686, 44, 1178, 1207, 1211). The only direct evidence which inculpated the defendant was a "pre-arrest" statement which was questionable due to denfendant's mental condition (paranoid schizophrenia); and an alleged dying declaration from the deceased. (R. 1738-1739, 1766-1794, 679, 828-856). Circumstantially, a hat alleged to belong to the defendant was found in the house where the deceased lived, and where the defendant was employed at times to do yard work and painting. (R. 967, 968, 973-976).

The incident which gave rise to the charges in this case occurred during the early morning hours of August 29, 1985 at a house located at 1611 N. W. 32nd Street in Miami, where the deceased resided with her brother and sister. (R. 892-894). There were no eyewitnesses to the events inside of the house that morning. Spencer Jenkins, brother of the deceased, testified that he left for work between 6:30 and 7:00 A. M. that morning. (R. 892). Thelma Holmes, sister of the deceased, testified that Spencer Jenkins left at 5:30 A. M., she left thereafter. (R. 963-966). As she left, she walked past 31st Street and 17th Avenue where she saw the defendant on his bicycle, according to her testimony.

(R. 966). She further stated that the defendant was wearing a red knit hat and army jacket, as he waved the bus down for her. (T. 968). She knew the defendant as he did yard work and painting for them a year or two ago. (R. 967).

Spencer Jenkins testified that he, too, saw the defendant at a bus stop at 33rd Street and 17th Avenue. (R. 897). The defendant was sitting on a bench where he usually sat with a lady, according to Jenkins, wearing a wool hat (like sailors wear that fold up), which was red or green. (R. 898-899).

Officer Croughwell, Custodian of Records for the City of Miami Police Department, testified over defense objection that at 6:34 A. M. and three seconds, on August 29, 1985, a call was made to 911. (R. 778-783).

Pursuant to that call, City of Miami Fire Rescue personnel responded to the scene where according to paramedic Regina Berger, they thought they were responding to a call for someone who was having difficulty breathing. (R. 917). Fire Rescue was dispatched at 6:39 A. M. and arrived at 6:44 A. M., according to Berger. (R. 917).

Berger testified that no one answered when she went to the door, so she went in as the door was unlocked. (R. 918). Thereafter, she stated, she observed a person crawling upstairs, naked from the waist down. (R. 919). She saw blood and feces on the wall. (R. 920). She asked the woman, "Did you call us? Are you hurt?" then observed a laceration from ear to ear. (R. 920). Berger testified further that she sealed the woman's throat with her hands to try to stop the bleeding. (R. 921).

Thereafter, over defense objection, Berger testified that she asked the woman if she knew who did this to her and the woman shook her head affirmatively. (R. 922). Berger testified she then asked, "Who?", and the woman responded, "Al." Berger asked her, "Al who?" (R. 922). The woman began losing consciousness, according to Berger, then said "Gardner." (R. 922). Berger stated the woman had no pulse, no blood pressure, was cold, sweaty, and had lost quite a bit of blood. (R. 923). Berger admitted that in a deposition she had given, she told attorneys that the woman said, "Al the gardner" did it, explaining that she read it in the newspaper and with the publicity, made a mistake. (R. 932, 936, 836-838). Berger thought the woman would live but felt the woman thought she would not. (R. 840). She expired at approximately 10:30 A. M. (R. 999).

Over further defense objection, Berger testified that this was probably the most traumatic case she had in her life. (R. 941).

Later, Berger was called to listen to the 911 tape wherein a raspy voice said, "Help me, help me. He cut my throat." (R. 956). Berger testified that the voice on the 911 tape sounded like the woman's voice but she was not sure if the voice was definitely the woman's. (R. 955). The woman was transported to the hospital where she arrived at 6:57 A. M. (R. 925).

Dr. Todd Cameron Gray, Assistant Chief Medical Examiner for Utah, was employed as Associate Medical Examiner for Dade County in August, 1985. (R. 784). He was tendered and accepted

as a witness in forensic pathology. (R. 784, 788). He performed an autopsy on the deceased on August 29, 1985. (R. 789) He noted that medical therapy had been performed on the deceased. (R. 793). He identified photos of the deceased which were admitted over defense objection. (R. 799).

When Dr. Gray examined the deceased, he testified he found a large, gaping, irregular incised wound with trailing cuts. (R. 804). He testified there were a minimum of seven separate cuts on the neck, and bruising. (R. 810). Cause of death was multiple incised wounds of the neck. (R. 819). Dr. Gray checked for the presence of semen. (R. 824).

Pat White, secretary at the Veteran's Administration, was called by the State to identify the deceased whom she knew since 1978, as Birdie Jenkins. (R. 890).

City of Miami I. D. Technician Carol Vincent responded to the scene (the house) at 7:30 A. M. (R. 706). She testified that she collected evidence including a wooden handled blood-stained knife, wooden sharpening steel, and photos. (R. 710-716).

City of Miami Police Investigator Charles Wellons arrived approximately 10 minutes after Vincent. (R. 990). He contacted Thelma Holmes, sister of the deceased, then viewed the scene. (R. 993-994). Wellons noted a red cap under an end table in the living room. (R. 994). There was not much indication of a struggle. (R. 999).

Thereafter, Wellons testified, he canvassed the area, stopping at 3314 N. W. 15th Avenue where a woman named Margaret told him she had a brother whom people referred to as Al the

gardner. (R. 1000). He stated he left his card with this woman and her mother and told them to tell the defendant he wanted to speak to him. (R. 1001).

On August 31, 1985, at 7:00 A. M., Wellons testified he received a phone call from the defendant who told him he wanted to speak to him about Birdie and that he would be at his house. (R. 1001). Wellons went to the defendant's house with officer Earl Washington. (R. 1007). The defendant was not placed under arrest. (R. 1008).

According to Wellons, the defendant accompanied them to the homicide office, made several phone calls, drank coffee and used the restroom. (R. 1009). He was advised of his Miranda rights, Wellons testified, and signed a waiver form. (R. 1011-1012).[2]

Wellons testified the defendant told him he knew the deceased because he did yard work for her and that he was her lover at one time. (R. 1018). He also allegedly told Wellons he was last at the residence two weeks before. (R. 1018). The defendant denied any involvement in her death. (R. 1019). Wellons did not push the defendant nor confront him with alleged evidence because that would have been unethical and improper.(R. 1025).

Detective John Buhrmaster, City of Miami Police Detective, did, however. (R. 1026, 1140). He arrived at the homicide office at 9:25 A. M. and saw the defendant. (R. 1041). He spoke to Wellons about his interview with the defendant. (R. 1040. He had

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[2] Prior to trial, defendant moved to suppress the statements the officers subsequently obtained from him. (R. 1738-1739).

previously interviewed Regina Berger who gave him the names Al Gardner or Al Gordon as the culprit. (R. 1034). Prior to speaking to the defendant, Buhrmaster knew he did not have sufficient evidence against the defendant to arrest him. (R. 1128).

Initially, the defendant denied any involvement in the incident. (R. 1047). In order to obtain a confession, Buhrmaster testified, he would lie to the defendant and try to trick him. (R. 1140-1141). Buhrmaster begain to confront the defendant. (R. 1049). He told the defendant he knew the defendant was responsible for the decedent's demise. (R. 1050). Wellons told Buhrmaster the defendant had trouble sleeping the night before and was denying everything. (R. 1130). The defendant got goosebumps and cried when Buhrmaster begin confronting him. (R. 1058). Originally, the defendant told Buhrmaster the deceased was his friend and he would not do anything like that. (R. 1136). The defendant was not told he could leave. (R. 1137). Buhrmaster kept asking questions after the defendant denied involvement. (R. 1137).

Buhrmaster told the defendant that the paramedics had gotten the name from the victim of who did it. (R. 1140). He did not tell the defendant the name was Al Gardner or Al Gordon. (R. 1140). In order to obtain a confession, Buhrmaster would lie and trick someone. (R. 1141). He told the defendant he would send evidence up to Tallahassee to get it fingerprinted. (R. 1141). No prints belonging to the defendant were found. (R. 1232).

Prior to the alleged statement, the defendant signed a consent to search form. (R. 1151). They retrieved the clothing the defendant had been wearing. (R. 1152). The clothing did not

have any blood on it. (R. 1153). The defendant denied taking the decedent's purse. (R. 1154).

The State rested. (R. 1154). When the defense renewed its Motions and moved for a judgment of acquittal on the burglary count, the Court noted that Count was weak, but denied the Motions. (R. 1154-1155, 1157).

The defense offered the testimony of Dr. Norman Reichenberg, Ph. D., a clinical psychologist who was accepted by the Court as an expert witness. (R. 1162). Dr. Reichenberg examined the defendant on December 13, 1985 and after examination, including various psychological tests, diagnosed the defendant as a chronologically sick paranoid schizophrenic, with a severe stuttering problem and who has heard voices in the past. (R. 1168-1169). He testified the defendant is bright but very disturbed. (R. 1171). The defendant has seen things that were not there. (R. 1176). According to Dr. Reichenberg, reality for the defendant is distorted and the defendant's illness interferes with his ability to know right from wrong. (R. 1178).

Dr. Anastasio Castiello, M. D., was called as an expert forensic psychiatrist, and agreed with Dr. Reichenberg's diagnosis of the defendant as a paranoid schizophrenic. (R. 1202). The defendant told Dr. Castiello he was innocent, but that he was called earlier in that day by someone he had done work for. (R. 1206). He told Castiello that he had been sexually involved with the deceased for 4-5 years. (R. 1206). When the defendant arrived at the house, he thought the deceased was sick but then did not know what exactly had happened to her. (R. 1207). He

entered the house, looked around and left, he stated. (R. 1207). That night, a lady the defendant did not know told him that he should take the blame for the incident because if he did not, his girlfriend and daughter would be hurt. (R. 1207). He was very much afraid of this woman and contacted the police. (R. 1207-1208).

According to Dr. Castiello, a paranoid schizophrenic develops ideas over which he has no control. (R. 1209). He may believe these ideas to be true and relate those ideas to others as though they were facts which were absolutely true when they may not be true at all. (R. 1209). Therefore, Dr. Castiello would have difficulty accepting anything the defendant says at face value. (R. 1209). Dr. Castiello would have reservations in stating the defendant was sane at the time of the offense. (R. 1211).

Through the testimony of City of Miami Police Crime Scene Technician Ralph Garcia and City of Miami Police Latent Print Examiner Ivan Almeida, the defense established that latent fingerprints were lifted from the scene but none belonged to the defendant. (R. 1219-1232).

Metro Dade Police Criminalist George Borghi, recognized by the Court as an expert, analyzed the rape kit and found no evidence of sperm. (R. 1240). He also found no evidence of blood on the green jacket and blue jeans taken from defendant. (R. 1242). The defense rested. (R. 1246).

In rebuttal, the State called Dr. Albert Jaslow, M. D. as an expert in forensic psychiatry. (R. 1248). He examined the defendant and found that the defendant is a paranoid schizophrenic.

(R. 1265, 1251). He testified the defendant was not psychotic. (R. 1251). Dr. Jaslow did not know the deceased was a lesbian, but stated it was expected that she was a homosexual. (R. 1257). When the defendant stated in his statement that the deceased paid him for sex, he may have been fabricating. (R. 1258). When the defendant made his statement about the woman who threatened him he was either lying, explaining what he had done or it could be a delusion. (R. 1258). Some people can be sick but still know right from wrong. (R. 1264).

The defendant told Jaslow that he is God. (R. 1266). That perception is not fully rational but not irrational and not "reflected with the grandioses you expect in an active paranoid schizophrenic," Jaslow testified. (R. 1267). Jaslow does not believe anybody knows whether the defendant was actually psychotic the day the deceased was killed. (R. 1268).

The State also called Leroy Jackson, a longshoreman who manages prizefighters and who testified he has known the defendant since 1975. (R. 1274). He and the defendant would talk when they saw each other. (R. 1276). On August 29, 1985 Jackson saw the defendant at 7:30 - 7:45 A. M. (R. 1278). The defendant was on a bicycle. (R. 1279). He does not think the defendant is strange or crazy. (R. 1280). Jackson came down as a character witness for the defendant because he does not believe the defendant committed the crime. (R. 1281). The defendant was not wearing a hat when Jackson saw him. (R. 1281). The State rested again. (R. 1281). Defense motions were renewed and denied. (R. 1282-1283).

A conference on jury instructions was held. (R. 1283-1292). Closing arguments were given. (R. 1315-1363). Objections to the prosecutor's closing argument were made. (R. 1363). The jury was instructed. (R. 1366-1393). The jury returned verdicts of guilty of first degree murder, armed burglary with an assault, and possession of a firearm while engaged in a criminal offense. (R. 1408-1409).

Prior to the penalty phase commencing, the defense moved to exclude the testimony of a witness, which was denied. (R. 1432-1433). The jury was brought in for the penalty phase. (R. 1434). During the penalty phase the State called the witness the defense had moved to exclude, Tonya Lynn Albury. (R. 1435).

Albury testified that on July 13, 1985 she planned to go out to American City Lounge in Miami. (R. 1436). She walked to the disco with a friend at approximately 10:00 P. M. (R. 1437). She had five or six drinks at the disco and was there until 4 A. M. when it closed. (R. 1489). When she got close to her house, a man came out from behind a van and choked her. (R. 1442). The man was wearing a green army jacket. (R. 1442). The defense renewed its motion to exclude the witness' testimony, which was denied. (R. 1444). The man told her if she screamed he would kill her. (R. 1445). She identified the defendant as the culprit. (R. 1446). The defendant then dragged her to the back of a van, tore her stockings and panties, then inserted his penis into her. (R. 1448). The State had no further witnesses. (R. 1452). The defense moved to take the penalty phase away from the jury, which was denied. (R. 1453).

The defense called the defendant's mother, Margaret Whitehead, as its first witness. (R. 1456). The defendant had a serious injury as a child and has spells and when he gets upset he grabs his head. (R. 1460). He also stutters. (R. 1461). Since his injury, the defendant was not like the witness' other 11 children. (R. 1455, 1461). The defendant has a girlfriend and a child. (R. 1462).

The defense next called attorney Frost Walker of the firm of Blackwell, Walker, Fascell & Hoehl in Miami. (R. 1463). Walker knows Alton Moore and has known him since the early 70's. (R. 1464). The defendant has always been different than other people. (R. 1465). The defendant's mother worked for Walker's wife. (R. 1465). They used to clean and paint duplexes together. (R. 1466). Walker testified that the defendant rode a bike, did not drive, and had perceptions which were unique, different and insane. (R. 1466).

The defense next called Dr. Anastasio Castiello, M. D., who testified again that the defendant has a mental condition called schizoid paranoid type. (R. 1471). Schizophrenia is a major mental disorder, which is severe, has no cure, and manifests itself by undue suspiciousness, acting a fantasy life, and the inability of the individual to properly recognize reality when he is psychotic. (R. 1471).

The defendant has been ill all of his life including the period of time surrounding the events he was accused of. (R. 1472). The defendant's illness could impair the defendant's ability to appreciate the wrongfulness of his conduct or conform

his conduct to the requirements of law. (R. 1472). Dr. Castiello can only answer with probability, because the defendant, due to his illness, is now fabricating a whole story as to what happened in the past. (R. 1473). The defendant's version, due to his illness, could be very far from reality. (R. 1473). He would recommend hospitalization for someone like the defendant. (R. 1473). There is no question the defendant needs treatment. (R. 1474).

The defense called Dr. Norman Reichenberg, Ph.D., again. (R. 1475). The defendant, according to Dr. Reichenberg, suffers from extreme mental or emotional disturbance, which has been a lifelong condition. (R. 1476). Paranoid schizophrenia is the most serious of all mental illnesses. (R. 1476). It causes people to see the world the way they want it to be rather than as it is. (R. 1476). The defendant's mental condition absolutely had an effect upon the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. (R. 1476). The defense rested. (R. 1477).

The defense moved to strike the juror, Mr. Yi, from considering penalty due to defense counsel's observation that he was unwilling to accept any testimony in mitigation due to facial expressions. (R. 1478). The Court denied the motion. (R. 1479). A conference on the penalty phase instructions was held and objections made by the defense. (R. 1478, 1484). Arguments by counsel were made. (R. 1491).

After instruction by the Court, the jury deliberated, then advised the Court by a vote of 9 to 3 that the jury recommended the imposition of the death penalty upon the Defendant. (R. 1524).

The jury was polled three times due to confusion, to determine if it was their verdict. (R. 1524-1530).

The defense moved to strike the advisory verdict since a juror stated she abstained. (R. 1532). The Motion was denied. (R. 1532).

Sentencing was scheduled for September 11, 1986. (R. 1535). The defense requested a determination of competence prior to proceeding further. (R. 1537). The Court found the Defendant competent to be sentenced. (R. 1539). A Motion for Judgment of Acquittal was made and denied. (R. 1539-1541).

The Stated called no witnesses. (R. 1541). The defense called Dr. Dorita Marina, clinical psychologist specializing in forensic psychology (stipulated by the State to be an expert) as its first witness. (R. 1542-1543). She found upon examining the Defendant that he suffers from a schizoid personality disorder and a paranoid personality disorder, conditions that exist every day of his life. (R. 1543). The Defendant is suffering from mental illness and has for a long period of time. (R. 1541).

Dr. Anastasio Castiello, M. D., was once again called by the defense as an expert and so accepted. (R. 1544). Dr. Castiello testified he has examined the Defendant three times and concluded he suffers from schizophrenia paranoid type. (R. 1543). The Defendant suffers from a major mental disorder, the cause of which is unknown. (R. 1545). The Defendant requires treatment for this ill-

ness. (R. 1546). He has most likely had this condition all of his life. (R. 1546).

Dr. Norman Reichenberg, Ph. D., was called by the defense. (R. 1547). He examined the Defendant twice, performed a full series of psychological tests and diagnosed the Defendant as a chronic paranoid schizophrenic. (R. 1547). Paranoid schizophrenia results in interpreting the environment according to personal, autistic needs rather than reality. (R. 1548). The Defendant is a seriously disturbed person who has been ill for a long period of time, and who is in need of treatment. (R. 1548-1549).

Dr. Barry Morris, Ph. D., accepted as an expert, was called by the defense. (R. 1549). His opinion is that the Defendant suffers from schizoid personality and paranoid personality with an indication of underlying schizophrenia. (R. 1550). It is longstanding. (R. 1550).

The defense called a number of other witnesses and the Defendant himself. (R. 1552-1587).

The Court found the following aggravating factors:

1. The Defendant was previously convicted of a felony involving the use or threat of violence to the person. (R. 1610).

2. The Defendant committed a capital felony while engaged in the commission of or an attempt to commit a robbery, rape, etc. (R. 1611).

3. That the capital felony was especially heinous, atrocious and cruel. (R. 1612).

The Court found one mitigating circumstance. (R. 1615).

The Court sentenced the Defendant to death. (R. 1619). Counsel was appointed for purpose of appeal. A timely Notice of Appeal was filed. This Appeal follows.

SUMMARY OF THE ARGUMENT

The Appellant has raised numerous issues on appeal, but wishes to stress those issues covered in this Summary of the Argument without waiving the other points on appeal.

The voir dire was fatally tainted. Five jurors were properly challenged for cause by the defense, but the trial court refused to excuse those jurors for cause, forcing the Defendant to use his peremptory challenges. The Defendant used all of his allotted peremptory challenges and requested more, which was denied. Of those five prospective jurors challenged by the defense, one indicated by raising his hand that the only penalty for first degree murder should be death, and that "we" should not have to "pay" for others' mistakes. Another prospective juror advised the court that he would probably not follow the court's instructions on insanity due to his concern over whether the Defendant would be released in the future if found to be insane. A third prospective juror indicated that he too has trouble with the defense of insanity. Two other prospective jurors told the court they would not be attentive due to their businesses. One stated that jury duty would cause him to go broke. The other was singled out, badgered at length by the trial judge (out of the presence of the other jurors), and told by the judge that the trial could not possibly last more than a week (which it did), the juror finally tacitly agreeing to remain, only to become the foreman of the jury, when the defense had exhausted its peremptory challenges and were denied more. These jurors had opinions of such a fixed

and settled nature that they would not readily yield to the evidence, and three of them would certainly have not even considered an insanity defense even when instructed by the Court.

The Defendant is entitled not only to have a jury comprised of persons who will follow the Court's instructions on legal defenses, but is also entitled to have the jury instructed on his defenses in a manner which is not misleading. In the case at bar, the jury was instructed on excusable homicide as a defense. However, the manner in which the instruction was read by the Court indicated to the jury that in order to find the defense of excusable homicide, the jury would have to have found three things, when in actuality any one of the three alone would be sufficient to establish the defense. The instruction should have been read with the word, "or" between each element. Instead, the Court was silent between each element which was confusing and misleading.

Also raised in Appellant's Initial Brief is an issue of first impression in Florida; the admissibility of police "911" tape recordings. This Court has not determined whether such recordings are admissible in Florida, and if admissible, what predicate must be laid prior to the admission of such evidence.

Throughout the trial there were instances of prosecutorial misconduct, the most prejudicial conduct being that of the prosecutor calling the defense attorney "unethical" and "unprofessional" in front of the jury, after the defense attorney objected to the prosecutor only reading a portion of a witnesses' conclusions on a subject, rather than the entire conclusion. The Defendant's

Motion for Mistrial should have been granted at that point in time. Additionally, the State by misrepresenting its reasons, caused a sexual battery case to go to trial prior to the case at bar, resulting in a "prior" conviction and an aggravating circumstance for this case. The prosecutor, according to the defense attorney who testified under oath, discussed a plea to second degree murder prior to trial and engaged in vindictiveness in seeking the death penalty thereafter. The prosecutor denied this. However, the prosecutor also denied that a plea to first degree murder and life had been offered, and this offer appears in black and white in this Record.

The cumulative, shocking, gruesome posed photos of the deceased on a table in the medical examiner's office in such a position as to exaggerate the wound, together with the results of medical therapy (an incision between her breasts) visible were irrelevant and immaterial and any probative value was outweighed by their prejudicial effect.

The remaining issues should also be carefully considered by this Honorable Court, as they all contributed to the Defendant's conviction and sentence of death and resulted in the Defendant's deprivation of a fair and impartial trial.

I.

THE TRIAL COURT ERRED BY ITS REFUSAL TO EXCUSE CERTAIN JURORS FOR CAUSE AND TO GRANT THE DEFENDANT ADDITIONAL PEREMPTORY CHALLANGES, THEREBY ABRIDGING THE DEFENDANT'S RIGHT TO PEREMPTORY CHALLENGES.

Section 913.03(10) Florida Statutes (1970) provides:

> A challenge for cause to an individual juror may be made only on the following grounds:
>
> (10) The juror has a state of mind regarding the defendant, the case, the person alleged to have been injured by the offense charged, or the person on whose complaint the prosecution was instituted that will prevent him from acting with impartiality, but the formation of an opinion or impression regarding the guilt or innocence of the defendant shall not be a sufficient ground for challenge to a juror if he declares and the court determines that he can render an impartial verdict according to the evidence.

The defense challenged five jurors for cause which the Court denied, and requested additional peremptory challenges as a result of having to use peremptory challenges on those jurors. (R. 641). Those jurors were Mr. Mor (R. 438), Mr. Lopez (R. 441), Mr. Dolan (R. 440), Mr. Woodruff (R. 638), and Mr. Yi, who became the foreman. (R. 656).

A major portion of the Defendant's defense was insanity, based upon the testimony of psychologists and psychiatrists offered both by the defense, and then the State (a psychiatrist) in rebuttal. (Please see Notices of Intent to Rely on Insanity Defense filed with Motion to Supplement Record on Appeal).

Summaries of the jurors' voir dire testimony and beliefs follow:

Mr. Mor: Mr. Mor stated "I just trust psychiatrists," when asked if he has any particular feeling about a psychologist as opposed to a psychiatrist. (R. 371). He stated he believes psychology is more a person's feeling than what the medical record shows. (R. 371). Mor stated he has a distrust for psychologists because they only deal with human behavior, rather than physical factors as do psychiatrists. (R. 401-402). He believes a psychiatrist would give a more final judgment on insanity and would have difficulty accepting a psychologist's opinion about insanity. (R. 402). Mor further stated he believes a person has to be responsible for his actions. (R. 403). He did state he believes someone can be legally insane. (R. 403). When the defense asked who believes that when a person is guilty of first degree murder, the only penalty should be the death penalty, Mr. Mor raised his hand. (R. 429). Mor stated he would also be able to consider a life sentence, but believes that society "doesn't have to pay for other people's mistakes. If they're not allowed to live with us, we don't have to pay for it." (R. 431). He also stated that if there are no other considerations, he's completely guilty and the State proved everything, death would be the sentence. (R. 431). Of course, Mr. Mor stated, he would consider a life sentence and the factors. (R. 431-432).

Defense challenge: The defense moved to challenge Mr. Mor for cause for the following reasons: (1) His comments that people who commit crimes should be held responsible; (2) His immediate

belief that first degree murder always requires the death penalty; (3) His prejudice towards psychologists and psychiatrists, all would prohibit him from being a fair and impartial juror. (R. 438). Cause was denied. (R. 438). Peremptory used. (R. 438).

Mr. Lopez: Does not think psychology is an exact science. (R. 374). Thinks the insanity defense is overused. (R. 377). Was concerned that evaluation would be after the offense took place. (R. 406). Believes anyone who takes another's life is a bit insane and premeditated. (R. 406). Lopez does not see "how you could let somebody off because of that factor." (R. 407). Even though Lopez believes somebody can be legally insane, he does not believe somebody should be set free because of it. (R. 407). When told that whether a legally insane person goes to jail or to a hospital is not Lopez's concern, Lopez initially said that this concern would not interfere with his decision-making. (R. 408). He then admitted he would be thinking about whether the person would be getting out in the future and that concern would probably prevent him from following the Court's instructions on insanity. (R. 408).

Challenge by defense: Lopez does not believe in the insanity defense. (R. 441). Lopez said they should not be allowed to live because of the insanity defense. (R. 441). He was not satisfied with the insanity defense. (R. 441). Challenge for cause was denied. (R. 441). Peremptory used. (R. 441).

Mr. Dolan: Has an extremely low regard for the abilities of psychiatrists and psychologists. (R. 367). The profession is in its infancy. (R. 368). Has little respect for the profession. (R. 369). Agrees with Lopez that insanity is an overused defense.

(R. 377). Does not think psychologists and psychiatrists are very good at what they are trying to do. (R. 399). He would not prejudge the witnesses because of his views "anymore than humanly possible." (R. 400). He does not believe his mind is closed. (R. 400).

Challenge by defense: Dolan has a low regard for psychologists, does not respect them and the Court should look behind the substantive responses to see that Dolan does not believe psychologists and psychiatrists when they take the stand and the defense is insanity. (R. 440). Challenge for cause denied. (R. 440). Peremptory used. (R. 440).

Mr. Woodruff: Testified that his business would prevent him from giving full attention to the case, and he would "be broke." (R. 421-422, 576).

Challenge by defense: Challenged on basis that if the trial went through the following week, he would go broke. (R. 442). The defense later had to use a peremptory challenge on Mr. Woodruff. (R. 638).

Mr. Yi: (foreman of the jury). Stated he is the sole agent of a company and the business cannot run without him. (R. 576). Further, he explained in great detail to the Court, that he is a certified general contractor who is legally required to physically supervise his projects (for permits). (R. 655). As a result of being in Court the day before, he had to stop two projects, costing him a tremendous sum of money. (R. 655). Yi was late coming back to Court the day before as a result of work. (R. 660).

The Court then examined Mr. Yi alone, explaining the

schedule. (R. 660). The Court and Yi had an extensive dialogue wherein the Court told Mr. Yi his presence on the jury was really important, and that there would not be any damage to him by "just three straight days. We will be through by Wednesday." (R. 662.) The Judge assured Mr. Yi there was "no way" the trial could carry on more than a week. (R. 662). Yi said that would then not be a problem. (R. 662). This dialogue occurred during the voir dire on Thursday, July 24, 1986. (R. 662). In fact, the trial commenced on Monday, July 28, 1986 and was not concluded until Thursday, July 31, 1986, at which time the jury retired to consider their verdict on the guilt phase. (R. 1634-1646). The jury was sequestered overnight until Friday, August 1, 1986 at 8:00 A. M. (R. 1646). The jury returned its verdict of guilt on August 1, 1986 and recommended the death penalty on that date. (R. 1647, 1649). The trial lasted both beyond "Wednesday" and longer than a week.

Challenge by defense: Mr. Yi's reluctance to serve due to business concerns. (R. 638). Challenge for cause denied. (R. 638). Defense requests additional peremptory challenges which the Court denied. (R. 642, 656, 657, 658). The defense had used all ten peremptory challenges and Mr. Yi was still on the panel. (R. 641). The Court was concerned about Mr. Yi and at one point stated, "I can excuse him for cause." (R. 656). The defense then argued to the Court that Mr. Woodruff should also have been stricken for cause for business reasons, or that the defense should be granted an additional peremptory challenge. (R. 656). The Court then decided to excuse Mr. Yi for cause, and to change the defense

peremptory challenge on Mr. Woodruff to a cause challenge also. (R. 657). The Judge then changed his mind again after the coercive dialogue with Mr. Yi. (R. 659-662).

On July 31, 1986, the trial Court explained to the jury they would be sequestered overnight. (R. 1294). At that time, the trial Judge told the jury not to reach a verdict for the sake of going back to work "like Mr. Yi is a busy man at work and would like that, I don't want you to do that." (R. 1295). The Court thought it would be unfair to excuse Woodruff and not Yi for the same reasons. (R. 658). The State even expressed concern that "with this man (Yi) you could see he was really beginning to choke to tremendous loss of money" creating a state of mind not conducive to either side. (R. 658).

The Sixth Amendment to the Constitution of the United States and Article I, Section 22 of the Constitution of the State of Florida guarantee the right to a jury trial to one accused of crime. Fla. R. Cr. P. 3.350(a) gives one accused of a capital offense the right to exercise ten peremptory challanges. By refusing to grant Defendant's motions to challenge the five jurors named herein for cause, pursuant to Section 913.03(10), the trial Judge abridged Defendant's right to peremptory challenges by reducing the number available to him. Hill v. State, 477 So. 2d 553 (Fla. 1985), reh den 1985.

All five jurors exhibited real doubt as to their sense of fairness and mental integrity. They exhibited symptoms of having formed opinions of such a fixed and settled nature "as not readily to yield to the evidence." Hill, at page 556; Olive v. State, 34 Fla. 203, 206, 15 So. 925, 926 (Fla. 1894).

This Court has held that the question of a challenged juror's competency is a mixed question of law and fact which should not be disturbed unless the error is manifest. (Hill, at page 556.) In the case at bar, the error was overwhelmingly manifest.

The Hill case was reversed due to a juror's preconceived notion that the death penalty should be imposed in all cases where anyone shoots anyone. Hill, at 555. This Court reversed the death sentence notwithstanding the juror's statement upon prodding, that he's "not saying in all cases." id, 555.

In reversing Hill, this Court noted its prior decision in Singer v. State, 109 So. 2d 7 (Fla. 1959) that the:

> . . . statement of a juror that he can readily render a verdict according to the evidence, notwithstanding an opinion entertained, will not render him competent if it otherwise appears that his formed opinion is of such a fixed and settled nature as not readily to yield to the evidence. id, at 22.

Juror Mor, eventually excused by the use of a defense peremptory challenge, raised his hand in agreement with the assertion that all first degree murders deserve the death penalty. (R. 429). He indicated very strongly that society should not have to pay for the mistakes of others and that if put to death, "we don't have to pay for it." (R. 431). These strong statements prior to Mor's assertion that he would consider a life sentence as well, cast severe doubt on his ability to be impartial. See Johnson v. Reynolds, 97 Fla. 591, 598, 121 So. 793, 796 (Fla. 1929). If his steadfast views on the death penalty somehow did not cast doubt on his competence to serve, then certainly his views on psychology

would. He indicated he distrusts psychologists, which is important since the defense called same. Further, he stated he would believe a psychiatrist over a psychologist, which is also important since the State called Dr. Jaslow (M. D.) in rebuttal to the defense psychologists and psychiatrist. This venireman had a "fixed opinion" as defined in Singer by this Court.

Venireman Lopez was equally, if not more so, not possessed of a state of mind which would enable him to return a verdict according to the evidence and law. Lopez made it clear that he could not follow the law as it relates to an insanity defense. He admitted that his fear of the person being set free on that defense would interfere with his ability to follow the Court's instructions on insanity. (R. 408). Again, the defense was forced to use a peremptory challenge on Lopez. (R. 440).

Although juror Dolan did not believe his mind was closed, his comments, much along the same lines as those of Lopez, give him away. He stated he would not prejudge the witnesses any more than is humanly possible. (R. 400). A peremptory challenge was used by the defense on Dolan as well.

As to Woodruff and Yi, the defense was placed in an untenable position. At one point, the trial Judge was going to excuse both of them for cause due to their concern over work. (R. 656). Yi was later coerced by the Court into submission, promised a trial not longer than one week, and only "three straight days" for him to be present. (R. 662). He demonstrated through his answers that his business would create such a state of mind and concern for time that he could not be a fair and impartial juror.

Mr. Yi was forced to serve longer than promised, and for a longer period of time than he told the Court he could serve.

The defense each time requested challenges for cause and was forced to use peremptory challenges until they ran out, with Mr. Yi becoming the foreman, as a result.

Such error can not be harmless because it abridged the Defendant's right to peremptory challenges (cutting them in half). This Court held in Hill at page 556 that it is reversible error for a court to force a party to use peremptory challenges on persons who should have been excused for cause, provided the party thereafter exhausts all of his peremptory challenges and an additional challenge is sought and denied. See Singer; Leon v. State, 396 So. 2d 203 (Fla. 3d DCA, 1981).

The judgment and sentence should be reversed and the cause remanded for a new trial.

II.

THE MISLEADING JURY INSTRUCTION ON EXCUSABLE HOMICIDE DEPRIVED DEFENDANT OF DUE PROCESS AND A FAIR TRIAL, AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES, AND ARTICLE I, SECTION 9, OF THE CONSTITUTION OF THE STATE OF FLORIDA.

The trial Court erred by giving a confusing and misleading excusable homicide instrution to the jury.

The instruction which was read by the Court stated, in pertinent part, as follows:

> "An issue in this case is whether the killing of Birdie Jenkins was excusable.
>
> The killing of a human being is excusable if committed by accident or misfortune.
>
> In order to find the killing was committed by accident and misfortune, you must find the defendant was:
>
> One, doing a lawful act by lawful means and with usual care, and acting without any unlawful intent.
>
> Two, in the heat of passion brought on by a sudden provocation sufficient to produce in the mind of an ordinary person the highest degree of anger, rage or resentment that is so intense as to overcome the use of ordinary judgment, thereby rendering a normal person incapable of reflection.
>
> Three, engaged in sudden combat. . . ." (R. 1817, 1382).

The instruction as read by the trial Court to the jury was read in a conjunctive manner, rather than the disjunctive form as provided in the standard jury instruction, and Section 782.03 [3]

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[3] 782.03 Excusable Homicide. - Homicide is excusable when committed by accident and misfortune in doing any lawful act by lawful means with usual ordinary caution, and without any unlawful intent, or by accident and misfortune in the heat of passion upon any sudden and sufficient provocation, or upon a sudden combat, without any dangerous weapon being used and not done in a cruel or unusual manner.

Fla. Stat. (1983). The trial Judge did not use the disjunctive "or" between each separate defense as required by the standard jury instructions and Section 782.03.

The Third District Court of Appeal recently determined this very issue in Parker v. State, 495 So. 2d 1203 (Fla. 3d DCA, 1986) cert den in Florida Supreme Court Case No. 69,664 (February 13, 1987). In Parker, as here, the trial Court read the excusable homicide instruction without the word "or" between the separate defenses, "one, two, or three." The Third District Court of Appeal held at page 1205, that such an error may not be considered harmless where the instruction given by the Court led the jury to believe that three elements were required for Defendant's legal defense rather than only one.

The Court, in Parker held:

> The trial transcript reflects that the instruction containing the three elements pertaining to excusable homicide, as read by the court to the jury, omitted the word "or" between the three elements. The standard jury instruction on excusable homicide states: Give 1, 2, or 3, as applicable. (Emphasis supplied). This instruction should have clearly stated that Section 782.03, Florida Statutes (1983)[3], permits a defendant to rely upon proof of only one of the three criteria of the Statute. Colon v. State, 430 So. 2d 965, 966 (Fla. 2d DCA, 1983). id at 1205-1206.

There was no objection to the instruction in the case at bar, however this error cannot be considered harmless where the instruction which was given led the jury to believe that three elements were required for the Defendant's legal defense, rather than only one. In Parker it was noted that the Court's final instruction to the jury was apt to be decisive and the instruction

on the issue was equivocal, confusing, and may have misled the jury. See also Blitch v. State, 427 So. 2d 785, 787 (Fla. 2d DCA, 1983).

In Parker, the Court refused to apply the harmless error rule, stating at page 1206:

> The erroneous instruction placed appellant in a disadvantageous position and cannot be considered harmless error. Colon v. State, 430 So. 2d at 966.

Likewise, the First District Court of Appeal has refused to apply the harmless error standard to the giving of:

> . . . confusing and misleading instructions where the evidence is conflicting, confusing, and susceptible to interpretations favorable as well as adverse to the accused, depending entirely on the jury's evaluation and determination of its legal effect. Brown v. State, 462 So. 2d 840, 843 (Fla. 1st DCA, 1985).

This Court has held the failure to completely instruct the jury on all essential elements of the crime charged to be fundamental error, not requiring an objection at trial. Franklin v. State, 403 So. 2d 975, 976 (Fla. 1981) reh den 1981. It is the duty of the Court to instruct on each and every essential element of the crime charged. Croft v. State, 117 Fla. 832, 158 So. 454, 455 (Fla.)

This Court also recognized the duty of the trial Court to instruct the jury on the law applicable to the theory of defense where there is evidence introduced in support thereof, in Motley v. State, 155 Fla. 545, 20 So. 2d 798, 800 (Fla. 1945); Palmes v. State, 397 So. 2d 648, 652 (Fla. 1981) reh den 1981. See also Rodriguez v. State, 396 So. 2d 798 (Fla. 3d DCA, 1981); Bagley v. State, 119 So.

2d 400 (Fla. 1960).

In the Motley case, the trial Court instructed the jury on self-defense, then upon request of defense counsel added a further charge which this Court held to be misleading and harmful. Id. at page 800.

This Court held, at page 800:

> We will not dispose of this case under the harmless error statute. There is much at stake and the right of a trial by jury contemplated trial by due course of law. See Section 12, Declaration of Rights, Florida Constitution.

This Court noted the Crime Procedure Act, Sec. 920.05 F. S. '41 F.S.A. which directed the granting of a new trial where the jury was misdirected on the law. Fla. R. Cr. P. 3.600(7) now in effect is to the same effect, providing for a new trial where the jury is erroneously instructed on a matter of law.

In Motley, as in the case at bar, the Court did not fail or neglect to charge on some phase of the evidence which would place the burden on the defendant to request a more complete charge; rather, the charge goes to the essence and entirety of the defense. Id. at page 800.

The trial Court obviously believed there was evidence to support an instruction on excusable homicide or the Court would not have instructed the jury on same. (R. 1817, 1382). The Defendant's statement, introduced into evidence at trial over defense objection, describes his fear that the deceased was going to grab a knife; the deceased having sex with the Defendant and telling him to "be rough;" and a struggle ensuing. (R. 1777, 1781-1782). The Defen-

dant further allegedly told police that he did not mean to harm the deceased, merely scare her. (R. 1785).

Under these facts, if taken as true, the instruction on excusable homicide as a defense, as read to the jury, provided the Defendant with no legal defense, as the jury might find (if they believed all three elements were necessary as instructed, that even though the Defendant was suddenly provoked or engaged in sudden combat, that he was not engaged in a lawful act by lawful means, etc.

The instruction as given in the case at bar was so fatally defective as to deprive the Defendant of a jury instruction on his defense. Said fatally flawed instruction deprived the Defendant of proper consideration by a jury (in effect a denial of the right to a jury trial in violation of the Sixth Amendment to the Constitution of the United States and Article I, Section 22, of the Constitution of the State of Florida Declaration of Rights). The Defendant was further deprived of due process and a fair and impartial trial as guaranteed to him by the Fifth and Fourteenth Amendments to the Constitution of the United States and Article 1, Section 9, of the Constitution of the State of Florida.

Finally, it would be a highly unjust result if Mr. Parker received a new trial due to the Third District Court of Appeal's reversal on the identical jury instruction with objection by his attorney, when Mr. Moore has been sentenced to death with the same faulty instruction.

This case should be reversed and remanded for a new trial.

III.

THE TRIAL COURT ERRED BY THE ADMISSION OF RANK HEARSAY IN THE FORM OF AN ALLEGED "DYING DECLARATION" AND A "911 POLICE TAPE RECORDING" THEREBY DEPRIVING THE DEFENDANT OF A FAIR AND IMPARTIAL TRIAL, AND HIS RIGHT OF CONFRONTATION AS GUARANTEED UNDER THE UNITED STATES CONSTITUTION AND THE FLORIDA CONSTITUTION.

At trial, the paramedic, Regina Berger, who responded to the home of the deceased, was permitted to testify over defense objection that the deceased responded to questions Berger asked and told Berger that "Al Gardner" "did this" to her. (R. 922). Berger testified that due to newspaper publicity, she had mistakenly told lawyers in a prior deposition that "Al the gardner" was what the deceased said. (R. 932, 936 836-838). The deceased's throat was cut. (R. 920). Berger thought the woman would live but did not believe the woman thought she would live. (R. 840). Berger told Det. Buhrmaster that the name given to her by the deceased was either Al Gardner or Al Gordon. (R. 1034). She expired over three and one-half hours later. (R. 999).

Also admitted at trial over defense objection, was a 911 tape, wherein the deceased allegedly called for help and stated "He cut my throat" which was difficult to hear clearly. (R. 956). Berger stated that the raspy voice on the tape sounded like the deceased's but she was not sure it was definitely the woman's voice. (R. 955).

Both the testimony by Berger and the 911 tape recording are hearsay as defined by Section 90.801(1)(c) Florida Statutes, (1981), as they constitute statements other than one made by the

declarant while testifying at trial, offered to prove the truth of the matter asserted.

The State offered the testimony of Berger as a dying declaration, an exception to the hearsay rule pursuant to Section 90.804(2)(b) Florida Statutes, (1981). The 911 recording was offered as a "business record" exception to the hearsay rule pursuant to Section 90.803 (6), Florida Statutes,(1981).

Whether a dying declaration should be admitted into evidence is a mixed question of law and fact, which will not be disturbed unless clearly erroneous. Teffeteller v. State, 439 So. 2d 840, 843 (Fla. 1983) reh. den. 1983. In the case at bar, the admission was clearly erroneous.

First, Regina Berger's two different names show the inherent unreliability of the hearsay. Gardner and Gordon are two very different names. Berger admitted she was confused by newspaper accounts. (R. 1034). This Court has refused to admit a dying declaration where there is contradictory evidence as there is in the case at bar. See Grimes v. State, 64 So. 2d 920 (Fla. 1953).

Secondly, a proper predicate for the introduction of the dying declaration was not made. Unlike the deceased in Teffeteller v. State, who commented, "Oh God, I'm going," the deceased in the case at bar was calling for help. There was insufficient evidence in the case at bar to establish that Birdie Jenkins was aware of her dying condition and actually believed she was dying. Additionally, unlike Teffeteller, there was no testimony from attending physicians that terminal patients are aware of their impending death.

The testimony by Dr. Gray, the assistant medical examiner, that he believed that the injuries would lead the victim to believe she should die, was objected to and should not have been admitted as a predicate. (R. 817). The following occurred:

> Q. (By the State): Doctor, is there anything about these injuries which would lead the victim to believe that she should die or survive?
>
> Mr. Smith: Objection to the speculative nature of the question.
>
> Mr. Sakin: Judge, he is rendering an opinion.
>
> The Court: That is a little bit out of his expertise. Let me think about it for a moment.
>
> Can I hear the question? Read back the question.
>
> (Thereupon, the question referred to was read back by the reporter as above recorded).
>
> The Court: Are you qualified to answer that question, doctor? Yes or no.
>
> The Witness: I believe so, yes.
>
> The Court: Overrule the objection.
>
> Mr. Smith: I'm going to object. It's calling for him to be a mind reader.
>
> The Court: I understand your objection. (R. 817-818).

The doctor then testified further that due to the amount of blood, pain and noises made when trying to speak, the deceased would have reason to believe that the injury is very serious if not lethal. (R. 818).

As in Teffeteller, in the case of Higginbotham v. State, 19 So. 2d 829 (Fla. 1944), reh. den. 1944, the deceased also expressed no hope of recovery.

The absence of all hope of recovery and the appreciation by the declarant of his/her imminent and inevitable death, is a preliminary foundation which must always be laid to make the declaration admissible. Tillman V. State, 44 So. 2d 644 (Fla. en Banc 1950) reh. den. 1950; Mills v. State, 264 So. 2d 71 (Fla. 1st DCA, 1972).

In the case at bar, the predicate was insufficient for the admission of the accusation by the deceased of the Defendant as the culprit, highly prejudicial testimony.

The 911 tape recording and its admissibility into evidence is a case of first impression in Florida. The State sought to introduce the 911 police tape under the business record exception to the hearsay rule contained in Section 90.803(6), Florida Statutes (1981) which provides:

> (6) Records of regularly conducted business activity. -
>
> (a) A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinion, or diagnosis, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity and if it was the regular practice of that business activity to make such memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the sources of information or other circumstances show lack of trustworthiness. The term "business" as used in this paragraph includes a business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

At the time the State sought to introduce the tape, the defense objected, stating the tape was irrelevant as it does not prove a material fact; that it was not a proper business record;

one of the providers of the information is somebody not involved in the regular course of the business, and it is not a business record. (R. 943). The defense further noted that the voice on the tape is unidentified to the Court, police department and the custodian of the records. (R. 944).

The voice on the tape was later "sort of" identified by paramedic Regina Berger who testified that the voice sounded like the deceased, but Berger was not sure the voice was definitely hers. (R. 955). The defense renewed the objections. (R. 954). The tape was admitted over objection as Exhibit 24. (R. 958).

A case which discusses a phone call to the police by an unidentified caller and which holds testimony about the call by the police officer to be inadmissible hearsay is Beatty v. State, 486 So. 2d 59 (4th DCA, 1986), reh den 1986.

There was no mechanical testimony about how the recording device operates. Gomien v. State, 172 So. 2d 511 (Fla. 3d DCA, 1965) reh den 1965. Additionally, where portions of a recording are unintelligible, it should not be admitted. Carter v. State, 254 ~~250~~ So. 2d 230 (Fla. 1st DCA, 1971), cert den 257 So 2d 260 (Fla. 1971).

While Florida courts have not yet had the opporunity to rule on the admissibility of 911 police tape recordings, some other states have.[4] The trial judge found that Florida had not ruled and relied upon State of Washington v. Rupe, 683 P. 2d 571 (Wash. 1984 en Banc). (R. 956). In that case, the 911 call was

[4] In the case at bar, the defense moved to exclude the testimony of Ed Croughwell, custodian of records for City of Miami Communications Center. (R. 778-783). Croughwell testified that he is primarily responsible for the keeping of tapes. (R. 743). He brought a tape

that of a distraught hushand who had just found his wife lying in a pool of her own blood and called the police. The tape was admitted during the trial because defense counsel during opening statement suggested that the husband was the person responsible for his wife's death. The tape was offered by the State to rebut this. Rupe, at p. 586. As a result, the Supreme Court of Washington found the tape to be relevant. However, the Court noted that the emotional impact of the tape might have a prejudicial impact on the penalty phase and therefore at the new sentencing hearing, the tape should not be played. Rupe, at p. 586. It should be noted that in Rupe there was no question of the identity of the voice on the tape. Due to the foregoing, that case is factually very distinguishable from the case at bar.

In the case at bar, any identification of the voice on the tape was unduly suggestive and prejudicial where the witness identifying the voice was unsure of the identification. The tape was not being offered to rebut anything raised by the defense, nor was it relevant to any issue at trial. Its sole purpose was to inflame the jury.

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recording into Court. (R. 743-744). Each tape contains 25 hours of recording. (R. 744). He took the master tape and reduced it to a smaller tape. (R. 745). The tape was maintained during the Miami Police Department's regular course of business. (R. 746). Croughwell is not aware of any deletions or additions to the tape. (R. 783). The call came in at 6:34 and 3 seconds in the morning. (R. 783). He did not testify, however, as to the accuracy of the original recording as in the other out of state cases. See also Golden v. Porterfield, 429 So. 2d 45 (Fla. 1st DCA, 1983). When the tape was played for the paramedic Berger, she testified that the voice on the tape sounded like Birdie Jenkins' voice but that she does not know if it was definitely hers. (R. 955). The defense objected, stating that playing the tape was like conducting a line-up with only one person, highly suggestive and improper. (R. 945-955).

Other states have required proper foundations prior to the introduction of a 911 tape which include a "party" to the conversation testifying to the accuracy of the recording. In People v. Johnson, 461 N. E. 2d 585 (Ill. App. 1 Dist., 1984) reh den 1984, an appellate court in Illinois permitted the introduction of 911 tapes where the dispatchers who answered the calls and were "parties" to the conversation testified to the accuracy of the recordings. It was held that the dispatchers' testimony served to identify the voices. This was not done in the case at bar. The operator answering the telephone never testified at trial as to the accuracy of the call. All Croughwell could testify to was that he made an allegedly accurate reproduction of a larger tape whose accuracy was not authenticated by testimony in any manner. See Golden v. Porterfield, 429 So. 2d 45 (Fla. 1st DCA, 1983). One of the operators in the Johnson case identified the defendant's voice as that of the caller. This is very relevant. In the case at bar, the defendant was not involved in the call in any manner.

An appellate court in Washington refused to permit the admission of a 911 tape, finding that its admission violated the defendant's right under the Sixth Amendment to the United States Constitution to confront witnesses. State v. Ross, 714 P. 2d 703, 707 (Wash. App. 1986).[5]

[5] In that case, a shooting occurred at the Ellis household when Ellis told the defendant she did not know her sister's whereabouts. Ellis called 911 and identified the defendant as the man who fired the shots. Ellis did not testify at trial, though subpoenaed. The Court in Ross noted that the 911 tape was being offered to prove the truth of Ellis' statements. In Washington, apparently, in

Finally, in Michigan, a 911 tape was admitted at trial and approved in the appellate court. However, in People v. Slaton, 354 N. W. 2d 326 (Mich. App. 1984), the facts were stronger than in the case at bar, and therefore the case is distinguishable.[6]

The tape in the case at bar should not have been admitted as the operator did not testify; the voice was not sufficiently identified; the content was irrelevant, inflammatory and prejudicial; and its admission violated the Defendant's right of confrontation as guaranteed by the Sixth Amendment right of due process as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and violated the Declaration of Rights of the Florida Constitution. The case should be remanded for a new trial.

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order for hearsay in an alleged business record to be admissible, the hearsay contained in the business record must fall within another exception to the hearsay rule, as well. Ross, at p. 705-706.

[6] In Slaton, the operator testified she received a call from one Mr. Trombley that someone broke into his home. The operator requested police assistance, the phone eventually dropped and she heard two voices ordering the caller to "freeze." The portions of the tape where the operator spoke to her supervisor were deleted. The tape was admitted as an excited utterance. In Slaton, the tape was held to be relevant to show that Trombley's fatal injuries were perpetrated by the perpetrators of the breaking and entering. Also, the tape was found to be probative of the credibility of the defendant's version of his limited involvement in the incident. The defendant had an alibi which raised an issue of whether he had an opportunity to enter the residence unobserved after a co-defendant and another had killed Trombley. In Slaton, the time factor was important to defendant's defense.
The case at bar is distinguishable in that no operator (party to the conversation) testified at trial as in Slaton. Also, the defendant's credibility was not at issue as he did not testify at trial nor provide alibi witnesses. The voices of the perpetrators actually were heard on the tape in Slaton. This is not true of the case at bar. The caller in the case at bar did not identify herself and made no reference to a break-in.

IV.

THE TRIAL COURT ABANDONED ITS DUTY TO SCRUPULOUSLY GUARD THE RIGHTS OF THE DEFENDANT WHEN IT DENIED DEFENDANT'S MOTION FOR MISTRIAL AFTER THE PROSECUTOR REFERRED TO DEFENSE COUNSEL AS "UNPROFESSIONAL AND UNETHICAL" IN FRONT OF THE JURY.

During the re-cross examination of Dr. Castiello by the State, the prosecutor read only a portion of the doctor's opinion and asked a question about it. (R. 1212). The following then occurred in front of the jury:

Mr. Smith: Could we have the prosecutor read the entire conclusion instead of cutting it off in the middle?

Mr. Band: I object, your Honor.

Mr. Smith: He is not handling this witness.

The Court: Do not interrupt.

Mr. Smith: I have made objections for our side for the entire trial.

Mr. Band: I am making a legal objection. That is it.

His comment is unprofessional and unethical and that is my objection.

The Court: All right. I believe though his position is understandable. If that statement is incomplete either you read it or I will allow the defense to read it.

Mr. Sakin: All right.

Mr. Smith: Did the witness listen to what the Court said?

Mr. Sakin: The doctor is capable of answering the question himself. I don't think he needs help from Mr. Smith.

The Court: Read the rest of the conclusion.

Mr. Sakin: "However, unless those considerations could be in some way corroborated by other means, it certainly cannot be accepted at face value,"

but nevertheless your report indicates that he was insane?

The Witness: That is correct.

The Court: Ladies and gentlemen, we are going to recess for the evening . . . . (R. 1213).

* * * * *

Thereafter, the jury left and defense counsel made the following motion:

Mr. Smith: I want to move for a mistrial. This unethical person has the nerve to say in front of a jury - -

The Court: Who are you pointing to?

Mr. Smith: This person, to say that another lawyer is unprofessional in front of a jury.

Judge, this is a death case. This is a first degree murder case. He has the nerve to make those comments when his partner leaves out a portion of a report and tries to mislead the jury.

I am moving for a mistrial. I think you should cite him and hold him in contempt and put him in jail because that is where he belongs.

The Court: The statement has not elevated to the status of a contempt action.

Mr. Smith: It is consistent with his conduct through the entire trial. (R. 1214-15).

The trial Court denied the Motion for Mistrial. (R. 1215).

The Due Process Clause of the Fifth Amendment to the Constitution of the United States as applied to the States through the Fourteenth Amendment thereof, as well as Article I, Section 9, of the Florida Constitution, guarantee a fair and impartial trial to one

accused of crime.

Due process requires a fair trial. State v. Steele, 348 So. 2d 398 (Fla. 3d DCA, 1977).

Comments which intimate that a defense attorney is guilty of misconduct have been held by this Court to be harmful and prohibitive of the defendant receiving a fair and impartial trial. Mathews v. State, 44 So. 2d 664, 670 (Fla. 1950); Erler v. State, 241 So. 2d 202, 203 (Fla. 4th DCA, 1970); Betner v. State, 123 Fla. 806, 167 So. 685 (Fla. 1936); Tyndall v. State, 234 So. 2d 154, 155 (Fla. 4th DCA, 1970).

In the case at bar, the comments made by the prosecutor in front of the jury deprived the Defendant of a fair trial.

While the appellant is not unmindful of State v. Murray, 443 So. 2d 955 (Fla. 1983), the transcript in the case at bar had so many errors that reviewing the entire record, one cannot say that the prosecutor's remarks did not contribute to the Defendant's conviction. Looking at the record as a whole, evidence cannot be overwhelming when there are due process violations as appear in the case at bar, as argued in the other points on appeal contained herein. The case should be remanded for a new trial.

V.

THE ADMISSION INTO EVIDENCE OF SHOCKINGLY GRUESOME POSED PHOTOS OF THE DECEASED ON A TABLE IN THE MEDICAL EXAMINER'S OFFICE, DEPICTING A GAPING, BLOODY KNIFE WOUND TO THE THROAT AND A PORTION OF A SURGEON'S INCISION BENEATH HER BREASTS MADE FOR MEDICAL THERAPY WAS IRRELEVANT, INFLAMMATORY, PREJUDICIAL AND DEPRIVED THE DEFENDANT OF A FAIR AND IMPARTIAL TRIAL.

States' Exhibits 21, 22 and 23 are all photos of the deceased taken at the medical examiner's office after the autopsy was performed. (R. 1760-1763).

Dr. Todd Cameron Gray, M. D., called as a witness on behalf of the State, testified that in August, 1985 he was an assistant medical examiner for Dade County. (R. 784-785). He conducted autopsies. (R. 785). He first became involved on August 29, 1985. The deceased arrived in the medical examiner's office at 2:00 P. M. on August 29, 1985. (R. 790). He found an indication of medical therapy which are the residual of attempts made to resuscitate a person, including intravenous catheters or surgical incisions on the body. (R. 792). In this case, Dr. Gray found evidence that open heart surgery had been performed, since an incision had been made beneath the breast so the surgeon could massage the heart. (R. 792-793). There was evidence of intravenous lines inserted into various parts of the body and a test tube on the right side so a lung can be re-expanded or foods drawn out. (R. 793).

The defense objected to the State's offer of State's Exhibits 1-JJ, 1-II, 1-KK for identification (which later became Exhibits 21, 22 and 23), on the basis that the deceased was first

treated at home by Fire Rescue, taken to Jackson Memorial Hospital, then sent to the medical examiner after she expired. (R. 794). The defense objected to the surgical intervention depicted in the photos, plus the cumulative prejudicial effect of four photos of the same thing. (R. 795-796). The defense also objected to the photos as not actually showing the cut itself, rather the doctor removing the skin to show the underlying area. (R. 797).

The doctor testified that 1-II shows a close-up of the deceased with the neck flexed back. (R. 800). The fact that the deceased's head was tilted back would tend to exaggerate the severity of the wounds. (R. 800). The witness had no photos where the neck was not extended backwards. (R. 802). Also viewing Exhibits 21 and 23, one can see the surgeon's incision from the medical therapy which is extremely prejudicial in a stabbing case. The objections were overruled. (R. 800).

While photographs taken at the scene of a crime are admissible if they tend to illustrate or explain the testimony of a witness, such photographs must be relevant to be admissible. Garmise v. State, 311 So. 2d 747 (Fla. 3d DCA, 1975) reh den 1975, app. dism. 328 So. 2d 841 (Fla. 1976) cert den 429 U. S. 998, but see Reddish v. State, 167 So. 2d 858 (Fla. 1964), on pet for mod. 1964.

In Reddish, at page 863, this Court held that photos of dead bodies,even though not unusually gruesome, taken after the bodies were removed to a morgue many miles from the homicide scene were not relevant where the cause of death was clearly established.

The Third District Court of Appeal citing this Court's decisions, reversed a second degree murder conviction where a photograph of the deceased's blood spattered body, depicting the results of emergency procedures performed after the stabbing, including surgical tubes and sutures, was irrelevant. Rosa v. State, 412 So. 2d 891 (Fla. 3d DCA, 1982) reh. den. 1982.

The Rosa case followed this Court's mandate in Dyken v. State, 89 So. 2d 866 (Fla. 1956) en Banc wherein the propriety of the admission of a "horrible" photograph of the deceased on a mortuary slab after being shot in the head with a shotgun was questioned. In Dyken, this Court held that the photograph must be "independently relevant." Dyken, at page 866. The location of the wound was conceded and proved by other evidence, and was too far in time and space from the crime to have independent probative value.

Likewise, in the case at bar, there was no question of how the deceased met her death physiologically. Dr. Gray's testimony hardly required the addition of the incredibly gory photographs.

The First District Court of Appeal has noted that numerous gruesome photographs have a cumulative prejudicial effect where numerous black and white photographs showing a deceased's nude body on its back in a shallow grave, and the deceased's feet protruding through the sand were admitted. The First District Court of Appeal followed this Court's rulings when it held that ordinarily gruesome photos should not be admitted if made after the body was removed, and gruesome photos if admissible should be limited in

number. Beagles v. State, 273 So. 2d 796 (Fla. 1st DCA, 1973) citing Thomas v. State, 59 So. 2d 517 (Fla. 1952); Dyken v. State, supra; Leach v. State, 132 So. 2d 329 (Fla. 1961). See also Booker v. State, 397 So. 2d 910 (Fla. 1981) reh den 1981; Straight v. State, 397 So. 2d 903 (Fla. 1981) reh den 1981.

In Dyken, at page 867, this Court noted that:

> We cannot say, in a first degree murder case without recommendation of mercy, that an error of this character and magnitude was not prejudicial.

In the case at bar, the photographs were too remote in time and space to the alleged crime. They were horribly bloody and gruesome, which was exaggerated by the deceased's head posed and tilted back making the wound appear even worse. Additionally, they were taken at the office of the medical examiner on a surgical table. They show an incision which was sutured beneath the deceased's breast, an act not done at the time of the crime. Finally, three of the same were too many. The cumulative prejudicial effect in this first degree murder case, without recommendation for mercy, was of such character and magnitude that it cannot be said that the admission of the photos was not prejudicial. The judgment and sentence should be vacated and the case remanded for a new trial.

VI.

THE DEFENDANT WAS DENIED HIS SIXTH AMENDMENT AND ARTICLE I, SECTION 16 RIGHT TO A TRIAL BY AN IMPARTIAL JURY AND HIS FOURTEENTH AMENDMENT RIGHT TO EQUAL PROTECTION OF THE LAWS WHERE THE PROSECUTOR USED PEREMPTORY CHALLENGES TO EXCLUDE JURORS SOLELY ON THE BASIS OF RACE.

In the case at bar, eight of the venire were black. (Please see Appellant's Third Motion to Supplement Record on Appeal). The prospective black jurors were: Patricia McCartney, (excused by the State by peremptory challenge, R. 1629); Sandra Whitis (who became a juror and served, R. 1631); Roy Bentley, (excused by the Defendant by peremptory challenge, R. 1631); Ethel Farrio (excused for cause, R. 1631); Eucola Fredrick, (excused by the State by peremptory challenge, R. 1632); Cleona Douglas, (excused by the State by peremptory challenge, R. 1632); Betty Rogers (excused by the State by peremptory challenge, R. 1632); and Clifford Murray, (excused by the State by peremptory challenge, R. 1632).

The defense made a motion to strike the panel immediately after the State exercised its peremptory challenges to strike four prospective black jurors in a row. (R. 643-644).

The State explained it struck Mrs. Rogers because she was arrested previously. (R. 645). The prosecutor stated he struck Mr. Murray because he too had been arrested and found not guilty, and that he indicated problems with the death penalty. (R. 645-646). Mrs. Douglas was stricken by the State allegedly because she and

her relative in the NAACP were against capital punishment. (R. 646). The Court noted with regard to Ms. Douglas that she specifically stated she did not care what they said about the capital punishment issue. (R. 646-647). Ms. Douglas had in fact served as a juror before in a death case. (R. 623).

The Court found no systematic exclusion of blacks (R. 647). In State v. Neil, 457 So. 2d 481 (Fla. 1984), this Court held that initially it is to be presumed that peremptory challenges are exercised in a non-discriminatory manner. When an objection is made, the trial court must then decide whether a substantial likelihood exists that the peremptory challenges were being exercised solely on the basis of race. Neil, p. 486. If the Court finds such a likelihood, then the party exercising the challenges must show that the challenges were not made on the basis of race alone. Neil, p. 486.

In the case at bar, the State did not show that the challenges were not made on the basis of race alone and in fact the Court applied the wrong test. (R. 647). The Court found "no systematic exclusion." (R. 647).

In the case at bar, the burden shifted to the State to show that the questioned challenges were not exercised solely on the basis of race. Neil, p. 486, 487. While the reasons for the exclusion need not be equivalent to those for cause, the party exercising the challenges does have to demonstrate that the challenges were based on the particular case on trial, the parties or witnesses or characteristics of the challenged witnesses other than race. Neil, p. 487. The trial court should have made a

determination of whether it was likely that the challenges were being made solely on the basis of race and not whether there was a systematic exclusion as required pre-Neil by Swain v. Alabama, 380 U.S. 202, 85 S. Ct. 824, 13 L. Ed. 2d 759 (1965). The Supreme Court of the United States has held that peremptory challenges cannot be based on the race of jurors alone. Batson v. Kentucky, ____ U. S. ____, 106 S. Ct. 1712, 90 L. Ed 2d 69 (1986).

The reasons given by the State for exlusion are weak at best and do not meet the burden imposed on the State to demonstrate that it was not making challenges solely on the basis of race. Finally, the trial judge might have so found, if he was not applying the "systematic exclusion" test.

The judgment and sentence should be vacated and the case remanded for a new trial.

VII.

THE TRIAL COURT ERRED IN SENTENCING THE DEFENDANT TO DEATH AFTER A JURY TRIAL WHEN PRIOR TO TRIAL THE DEFENDANT WAS OFFERED A PLEA TO LIFE WHICH HE REJECTED.

Prior to trial on the case at bar and the sexual battery case with which the Defendant was charged, the State offered the Defendant the opportunity to plead guilty to first degree murder and receive a sentence of 25 years to life. (R. 127). During Court discussions the following occurred:

> Mr. Sakin: Judge, the only thing we can offer them would be a plea which would involve the defendant entering a plea to first degree murder.
>
> The Court: Why? I thought you were talking yesterday like second degree murder.
>
> Mr. Sakin: It was just talk. Second degree was a possibility we cannot offer at this time . . . . (R. 125)

The defense brought it to the Court's attention that a plea of first degree murder and life had been offered to the Defendant, and rejected. (R. 209).

At a pre-trial hearing, in order to show the State's vindictiveness, Henry Rauch, an Assistant Public Defender representing the Defendant, was sworn and testified that he, Michael Band and Scott Sakin, the prosecutors, were in Court before Judge Orr and Judge Orr suggested they discuss pleas. (R. 220). Thereafter, Mr. Sakin, Mr. Smith, (the Assistant Public Defender), and the witness discussed a plea to second degree murder within the guidelines of 17-22 years. (R. 221). Mr. Sakin, the prosecutor, proposed

same. (R. 221). Rauch told Sakin that he would discuss it with the Defendant and report back. (R. 222). Rauch told Sakin that the Defendant would take the plea. (R. 223-224). It was Rauch's understanding that if the Defendant would consider such a plea, then Sakin would go to his office and see whether he could formally offer it. (R. 224). The State denied this. (R. 233). Sakin did state, however, that they only discussed second degree murder as a possible plea. (R. 233).

Prosecutor Band went so far as to misrepresent to the Court that there was never a discussion as to first degree mandatory minimum to life and that it was never discussed. (R. 240). This is not true as the offer appears in the Record at page 209.

The trial judge, using his outside experience of many years as a chief prosecutor, knowing what prosecutors go through, decided to "accept the straight representation" and held there was no vindictiveness on the part of the State in seeking the death penalty. (R. 244). The Court denied the Motion to find same. (R. 247).

The trial court based its decision on whom to believe on his own bias as he had been a prosecutor. This was improper.

The Third District Court of Appeal held that when a trial judge imposes a more severe sentence on a Defendant after trial than that which was offered prior to trial, the reasons for the more severe sentence must affirmatively appear in the Record to assure the absence of vindictiveness.[7]

In the case at bar, the Defendant was offered the opportunity

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[7] See Fraley v. State, 426 So. 2d 983 (Fla. 3d DCA, 1983) reh den 1983; But see Fraizer v. State, 467 So. 2d 447 (Fla. 3d DCA, 1985); See also North Carolina v. Pearce, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969).

to plead guilty and save his life prior to trial. Where life would have been a fair sentence as far as the State and Court are concerned, how then in good conscience can the trial court then impose the death sentence after trial? Certainly, this practice pressures the accused into pleading guilty in order to save his own life.

In the case at bar, the prosecutorial misconduct and vindictiveness should prohibit a death sentence, and in the very least this case should be remanded for a resentencing and the imposition of a life sentence.

VIII.

THE POLICE MISCONDUCT IN OBTAINING DEFENDANT'S CONFESSION WAS A DELIBERATE ATTEMPT TO DEPRIVE DEFENDANT OF HIS SIXTH AMENDMENT RIGHT TO COUNSEL, RENDERING DEFENDANT'S CONFESSION INVOLUNTARY AND INADMISSIBLE AT TRIAL.

The trial court erred when it denied Defendant's Motion to Suppress Confession under the facts in the case at bar.[8] The detective who took the statement played upon the Defendant's personality, tricking him and lying to him.

To be admissible, the State must show a confession to be voluntary. DeConingh v. State, 443 So. 2d 501, 503 (Fla. 1983) reh den 1983, cert den 104 S. Ct. 995; Brewer v. State, 386 So. 2d 232, 235 (Fla. 1980), reh den 1980. This Court held that:

> If for any reason a suspect is physically or mentally incapacitated to exercise a free will or to fully appreciate the significance of his admissions, his self-condemning statements should not be employed against him. DeConingh at p. 503.

In DeConingh this Court found that the circumstances added up to more than a "mere admission to a disinterested party." id. at p. 503. The Court noted that a deputy took impermissible advantage of a situation where DeConingh was hospitalized and on

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[8] Charles Wellons, City of Miami investigator, canvassed the crime scene area and met Defendant's mother and sister who told them that Alton Moore was known as Al the gardner. (R. 1000). He left his card with them and instructed them to tell the Defendant he wanted to speak to him. (R. 1001). On August 31, 1985, Wellons received a call from the Defendant who told him he wanted to speak to Wellons about Birdie Jenkins, and he'd be at his house. (R. 1003-4). Wellons and Det. Earl Washington went to the Defendant's house and took the

medication.

> Any questioning by police officers which in fact produces a confession which is not the product of a free intellect renders that confession inadmissible. Townsend v. Bain, 372 U. S. 293, 308, 83 S. Ct. 745, 754, 9 L. Ed 2d 770 (1963).

Additionally, the Supreme Court of the United States said:

> Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences. Brady v. U. S., 397 U. S. 742, 748, 90 S. Ct. 1463, 1468, 25 L. Ed. 747 (1970).

This Court in DeConingh likened the knowing and voluntary requirements for a confession to those for taking a guilty plea. id at p. 503, n. 4. Certainly, lying to someone to get him to plead guilty would render such a plea involuntary.

The First District Court of Appeal has noted that coercion

Defendant to the homicide office. (R. 1007). The Defendant was not placed under arrest as police did not have enough evidence to arrest him, nor was he advised he was a suspect. (R. 1128, 1008, 1024). The Defendant signed a Miranda rights waiver form. (R. 1012). Wellons did not push the Defendant nor confront him with the evidence police had as that would be unethical and improper. (R. 1025). Det. John Buhrmaster responded to the homicide office and saw the Defendant. Initially, the Defendant denied any involvement in the incident. (R. 1042). Then Buhrmaster began to confront the Defendant, and told the Defendant he knew the Defendant was responsible for Birdie's death. (R. 1049-50). The Defendant got goosebumps and cried. (R. 1058). Wellons told Buhrmaster the Defendant had trouble sleeping the night before. (R. 1130). Buhrmaster was with the Defendant for one hour and 45 minutes prior to having a court reporter come in. (R. 1143). Buhrmaster would lie to the Defendant and trick him if he could to obtain a confession. (R. 1140-41). Buhrmaster in fact did lie. He told the Defendant the paramedics got a statement and that they got his name from the victim. (R. 1140).

sufficient to render a confession involuntary can be mental as well as physical. Gaspard v. State, 387 So. 2d 1016, 1021 (Fla. 1st DCA, 1980); Blackburn v. Alabama, 361 U. S. 199, 80 S. Ct. 274, 4 L. Ed 2d 242 (1960); Hawthorne v. State, 377 So. 2d 780 (Fla. 1st DCA, 1979).

The confession in the case at bar was the product of improper influences. DeCastro v. State, 359 So. 2d 551 (Fla. 3d DCA, 1978); State v. Caballero, 396 So. 2d 1210 (Fla. 3d DCA, 1981). The case should be remanded for a new trial.

IX.

THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN DEFENDANT'S CONVICTION FOR ARMED BURGLARY WITH AN ASSAULT.

The trial court denied the Defendant's Motions for Judgment of acquittal and noted that Count II (the burglary count) "is weak, on the issue of consent, remaining." (R. 1157).

Burglary is defined in Section 810.02, Florida Statutes (1983).[9] In the case at bar, the burglary was charged as burglary with an assault. To sustain the first degree burglary charge there must be proof of an assault as defined in Section 784.011, Florida Statutes (1979). There is no evidence in the case at bar to show the victim had a well founded fear of imminent violence, an essential element. State v. Pinder, 375 So. 2d 836 (Fla. 1979); Mitchell v. State, 407 So. 2d 343 (Fla. 4th DCA, 1981) reh den 1982.

There was no evidence that the Defendant entered or remained in the Jenkins' house with the intent to commit an offense therein. The judgment and sentence for Count II should be vacated.

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[9] 810.021(1) "Burglary" means entering or remaining in a structure or conveyance with the intent to commit an offense therein ....

X.

THE TRIAL COURT ERRED BY FINDING THREE AGGRAVATING FACTORS, ONLY ONE STATUTORY MITIGATING FACTOR, NO NON-STATUTORY MITIGATING FACTORS, AND IMPOSING THE DEATH SENTENCE.

During the penalty phase, the jury recommended imposition of the death penalty by a 9-3 vote. (Please see Order Granting Motion to Supplement Record on Appeal dated February 27, 1987 containing the jury's advisory sentence). The trial court followed the jury's recommendation and found the following aggravating factors: (A) Defendant previously convicted of a felony involving use or threat of violence to the person (R. 1610); (B) Defendant committed capital felony while engaged in commission or attempt to commit a robbery, rape, etc. (R. 1611); (C) The capital felony was especially heinous, atrocious and cruel (R. 1612).

Notwithstanding testimony by psychiatric and psychological experts, the Court found only one statutory mitigating factor. The trial court found no non-statutory mitigating factors. The trial court erred by the findings as outlined below:

A. Finding that the Defendant was previously convicted of a felony involving use or threat of violence to the person.

On June 6, 1986, in Case No. 85-22092, the Defendant was convicted of sexual battery with force not likely to cause serious injury. (R. 133). On May 22, 1986, the defense objected to the State proceeding to trial on the sexual battery case, No. 85-22092, prior to the case at bar. (R. 120-121). The defense noted that

the only reason the State was seeking a trial first on the sexual battery case was to obtain a prior conviction which would become an aggravating factor in the sentencing in the case at bar. (R. 122). The State represented to the Court that the victim of the sexual battery case wants to "get this over with," and therefore the Court should try that case first. (R. 122). The Court denied the Defendant's Motion to try the case at bar first. (R. 122).

On June 6, 1986, at the time the Defendant was adjudicated guilty over defense objection in Case No. 85-22092, the prosecutor admitted the following:

> Mr. Band: Judge, I will tell this Court, the reason we wanted to try this case first, prior to proceeding against Mr. Moore on the first-degree murder case, we plan and we hope during the course of that trial to present to the jury certain facts that the jury should hear in determining a sentence.
>
> One of the facts would be he's been convicted of this crime. We want to tell the jury that, and the only reason we will be able to do that is if the Court enters an adjudication . . . . (R. 141).

On July 21, 1986, the defense filed a Motion calling to the Court's attention the vindictive and improper conduct of the prosecutor in misleading the Court and maneuvering the trial calendar in such a manner to create an aggravating factor for the case at bar. Due to this prosecutorial misconduct, the State should be estopped from using this factor.

The trial court's calendar, being the controlling factor over whether an aggravating factor exists or not, amounts to a

denial of due process under the Constitutions of the United States and of the State of Florida.

B. The finding that Defendant committed a capital felony while engaged in the commission or attempt to commit a robbery,burglary, etc.

The Defendant was convicted of armed burglary with an assault and possession of a weapon while engaged in a criminal offense, to wit, a knife. (R. 1866). This aggravating circumstance should be vacated, as there was insufficient evidence for these convictions, as raised in other points on appeal contained herein.

C. The finding that the capital felony was especially heinous, atrocious and cruel.

The Model Penal Code describes "heinousness" as "the special case of a style of killing so indicative of utter depravity that imposition of the ultimate sanction should be considered." Model Penal Code comment to Section 210.6(3)(a) at 137. This aggravating factor is vague.

As noted in the Stetson Law Review, Spring 1986, Vol. XV, No. 2, "Review of Capital Cases," by Neil Skene:

> Despite the Supreme Court's protestations that "an ordinary man would not have to guess" at what heinousness means, it would be extraordinarily difficult to determine from the last twelve years' opinions what murders are or are not heinous . . . .

This factor is vague and has been applied unevenly, amounting to a denial of equal protection and due process under the Constitutions of the United States and of the State of Florida.

The trial court found in the case at bar that the deceased had at least seven cuts across the throat, swallowed her own blood, suffered pain, survived at least an hour before becoming unconscious, and died a horrifying, slow and painful death.

This aggravating factor has been held to be improperly applied where the victim suffered before dying. Teffeteller v. State, 439 So. 2d 840 (Fla. 1983) cert. den. 465 U. S. 1074 (1984). The infliction of several stab wounds on a victim who lives and is taken to three hospitals before he dies was also held not to fall within the "heinous" category. Demps v. State, 395 So. 2d 501 (Fla. 1981) cert. den. 454 U. S. 933 (1981). A death accompanied by a beating has been held not to fall under this category. Rembert v. State, 445 So. 2d 337 (Fla. 1984).

The case at bar does not rise to the level of other cases where this Court has found the "heinousness" aggravating factor.[10]

D. The Court erred by failing to find the mitigating circumstances outlined in Section 921.141 (6)(b) Florida Statutes:

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[10] See for example, Rutledge v. State, 374 So. 2d 975 (Fla. 1979), cert. den. 435 U. S. 1004 (1978), mother and three children tortured and butchered while husband returned home to find them; King v. State, 390 So. 2d 315 (Fla. 1980), cert. den. 450 U. S. 989 (1981), where defendant tore victim's vagina with knitting needles and caused burns, bruises, brain hemorrhage, stab wounds and broken neck during rape murder; Atkins v. State, 11 F. L. W. 567 (Fla. Oct. 30, 1986), where 6 year old child taken to wooded area, knocked unconscious and beaten again and left on seldom traveled dirt road to die, with broken jaw and teeth, 30 blows on head and neck, blood in his stomach: Scott v. State, 11 F. L. W. 505 (Fla. Sept. 25, 1986), where random victim picked up and beaten, brought him to isolated place, beaten again and ran over victim with car.

That the capital felony was committed while Defendant was under the influence of extreme mental or emotional disturbance.

During the penalty phase, Dr. Anastasio Castiello, M. D., testified that the Defendant is a schizoid paranoid type. (R. 1471). That illness is a major mental disorder for which there is no cure and which manifests itself by undue suspiciousness, acting a fantasy life and the inability of the individual to properly recognize reality. (R. 1471). There is no question the Defendant suffers from this illness and has all his life including during the time the crimes were committed. (R. 1472). Dr. Castiello would recommend hospitalization for an individual such as the Defendant. (R. 1473). His illness could impair the Defendant's ability to appreciate the wrongfulness of his conduct or conform his conduct to the requirements of law. (R. 1472).

Dr. Norman Reichenberg, Ph. D., also testified that the Defendant suffers from an extreme mental or emotional disturbance and has for his entire life. (R. 1476). The Defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law are substantially impaired due to his mental condition. (R. 1476). The Defendant's major mental illness, paranoid schizophrenia, is the most serious of all mental illnesses and the Defendant's thinking has nothing to do with right or wrong, but rather with the way he perceives things at the moment. (R. 1477).

The psychological evaluations ordered by the Court which are part of the Record on Appeal reveal that the Defendant has heard voices, experienced hallucinations, and the voices have told him

that he is a god. (R. 1668). The sanity of the Defendant is an issue Dr. Castiello viewed as "obscured." (R. 1672).

There was sufficient unrefuted medical testimony for the Court to determine that the capital felony was committed while the Defendant was under the influence of extreme mental or emotional disturbance. Huckaby v. State, 343 So. 2d 29, 33-34, (Fla. 1977); Jones v. State, 332 So. 2d 615, 619 (Fla. 1976); Mines v. State, 390 So. 2d 332 (Fla. 1980), cert. den. 101 S. Ct. 1994, 451 U. S. 916, 68 L. Ed. 2d 308; Holmes v. State, 429 So. 2d 297 (Fla. 1983); Burch v. State, 343 So. 2d 831 (Fla. 1977); State v. Dixon, 283 So. 2d 1 (Fla. 1973), cert. den. 416 U. S. 943, 94 S. Ct. 1950, 40 L. Ed. 2d 295 (1974).

E. The trial court erred by failing to find any non-statutory mitigating circumstances. (R. 1900).

This Court has noted that a confession by the defendant and mutual love and affection of family and friends are non-statutory mitigating circumstances which have been considered. Caruthers v. State, 465 So. 2d 496, 499 (Fla. 1985), reh den 1985.

The trial court failed to consider the testimony of witnesses with regard to the non-statutory mitigating factors.[11] There was a confession and much testimony by family and friends.

[11]The witnesses were as follows: Felicita Brown, has known defendant 8-9 years. (R. 1551-52). Defendant was employed by her husband and she believes the judge should let him live. (R. 1552-53). Rudolph Rogers, who used to play basketball with the defendant and who has known the defendant to be a "good guy" wishes the judge not to sentence him to death. (R. 1554-55). Batsaida Torres, who was welcomed by the defendant into the neighborhood 5 years before, was always friendly to her children, believes the defendant should not be held responsible if sick. (R. 1555-58). J. Frost Walker, attorney, has

Finally, the case should, in the very least, be remanded for a new sentencing due to the failure of the Court to find the proper mitigating circumstances and to weigh all circumstances properly.

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known the defendant 10 years. (R. 1559). The defendant is compassionate, honest, intelligent, desires to help people, help Walker's family and to help the defendant's family. (R. 1559). The defendant has always lived with his mother at home, he has worked, supported himself. (R. 1560). The defendant will contribute to society, not deter others when he is being punished for being mentally ill. (R. 1561). Walker would plead for the defendant's life being spared. (R. 1562). Mrs. Walker testified in the same manner. (R. 1563-64). Deborah Dixon testified she is the defendant's niece and would ask the judge not to impose the death sentence. (R. 1566). Other relatives testified to the same effect. (R. 1568-1571). Leroy Jackson testified he's a very good friend of the defendant and that the defendant used to help his (Jackson's) mother when she had cancer. (R. 1572). The pre-sentence investigation recommended that the defendant be committed to the State hospital due to his mental condition. (R. 1576).

XI.

THE DEATH PENALTY IS CRUEL AND UNUSUAL PUNISHMENT UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

The Supreme Court of the United States in Gregg v. Georgia, 96 S. Ct. 2971, 428 U. S. 153, 49 L. Ed 2d. 859 (1976), held that mandatory infliction of the death penalty constitutes cruel and unusual punishment. While Appellant is not unmindful of Profitt v. Florida, 428 U. S. 242 (1976), and all of this Court's opinions on the issue, he would respectfully raise this issue once again as there would seem to be no basis for death being considered cruel and unusual punishment where it is mandatory, yet permissible where discretionary. The punishment itself - death - is the same. Additionally, in the case at bar, the testimony of all of the psychologists and psychiatrists agree that the Defendant suffers from a chronic major mental illness - schizophrenia, paranoid type. To impose the death penalty on one in need of treatment for such a disorder is truly cruel and unusual punishment in the real sense of the words. The sentence should be vacated as the death penalty in Florida constitutes cruel and unusual punishment.

XII.

THE DEFENDANT DID NOT RECEIVE A FAIR AND IMPARTIAL TRIAL DUE TO THE CUMULATIVE PREJUDICIAL EFFECT OF THE TOTALITY OF ERRORS COMPLAINED OF HEREIN.

Due process requires a fair hearing. Art. I, Sec. 9, Declaration of Rights, Florida Constitution; Fifth and Fourteenth Amendments to the U. S. Constitution. Driessen v. State, 431 So. 2d 692 (Fla. 3d DCA, 1983); State v. Steele, 348 So. 2d 398 (Fla. 3d DCA, 1977); Crosby v. State, 97 So. 2d 181 (Fla. 1957).

In the case at bar, The Defendant was deprived of his right to use peremptory challenges when his motions to strike jurors for cause were denied; the jury was not properly instructed on the Defendant's defense of excusable homicide as the instruction given was misleading; the misconduct throughout the trial and even pre-trial of the prosecutors and their referring to defense counsel as "unethical" and "unprofessional" before the jury; the admission into evidence of not one but three shockingly gruesome posed photographs exaggerating the deceased's wounds and showing the results (an incision between her breasts) of medical therapy; the plea offer of life followed by the sentence of death; all of these errors, any of which alone constitutes a valid reason for reversal, certainly taken together deprived the Defendant of a fair and impartial trial. The judgment and sentence should be vacated and the cause remanded for a new trial.

CONCLUSION

Based upon the foregoing reasons and authorities, the judgment and sentence should be vacated and the cause remanded for a new trial. In the very least, the sentence of death should be vacated and the cause remanded for a resentencing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief of Appeallant was mailed to Ralph Barreira, Esquire, Office of the Attorney General, 401 N. W. 2nd Avenue, Suite 820, Miami, Florida 33128, and to Alton Moore, #104659, Florida State Prison 11, P. O. Box 747, Starke, Florida 32091, P-1-S-10, this 9th day of April, 1987.

MAY L. CAIN