IN THE SUPREME COURT OF FLORIDA

CASE NO. 70,361

ALBERTO FARINAS,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

WILLIAM A. CAIN, ESQUIRE
Special Assistant Public Defender
Suite 401
11755 Biscayne Boulevard
North Miami, Florida 33181
Telephone: (305) 893-2246

Counsel for Appellant

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INITIAL BRIEF OF APPELLANT

INTRODUCTION

The Defendant, ALBERTO FARINAS, the Appellant herein, was prosecuted by the State of Florida, the Appellee herein, in the Circuit Court of the Eleventh Judicial Circuit of Florida, in and for Dade County. For continuity, we shall refer to the Appellant and Appellee in this Brief, as "Defendant" and "State" respectively.

The symbol "R" as used herein designates the Record on Appeal which includes the transcript of trial proceedings.

STATEMENT OF THE CASE

Defendant was charged by Indictment filed January 7, 1986, with First Degree Murder (Count I), Kidnapping with a firearm, a pistol (Count II), and Armed Burglary (Count III). (R. 1899-1900). Standing mute at arraignment, the trial Court directed entry of a not guilty plea. (R. 3).

Defendant filed Notice of Intent to Rely upon Defense of Insanity on August 29, 1986. (R. 2370). The Court ordered a competency hearing and appointed Doctors Mutter, Miller and Marina to evaluate Defendant. (R. 1930). The psychiatric evaluations are part of the Record on Appeal. (R. 1937-1951). After a competency hearing the Court found Defendant competent to stand trial. (R. 134 and R. 1920).

The following defense Motions were made: 1) Motion to Suppress Defendant's Confessions, Admissions and Statements (R. 2376-2377) and 2) Motion to Suppress Evidence Obtained Through an Unreasonable Search and Seizure. (R. 2378-2379). Both Motions were denied. (R. 340).

Trial commenced February 4, 1987. (R. 1903). On February 13, 1987, the jury rendered guilty verdicts on all three Counts. (R. 2555-2557), and the penalty phase was continued to February 24, 1987. (R. 1916). The jury on a 9 to 3 vote recommended the death penalty. (R. 1918). The trial Court imposed the death penalty on the murder conviction, a consecutive life sentence on the kidnapping, and a life sentence on the armed burglary consecutive to the kidnapping sentence. It also imposed a 3-year minimum mandatory to

run concurrently with the kidnapping conviction. (R. 1922).

A formal Order adjudicating Defendant guilty and imposing sentence was entered on March 30, 1987. (R. 2602-2608). Notice of Appeal was filed on April 1, 1987. (R. 2614).

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[1] The jurisdiction of this Court is involved pursuant to Article V, Section 3(b)(1) of the Constitution of the State of Florida, Section 921.141(4) Florida Statutes (1983), and Florida Rules of Appellate Procedure 9.140 (b)(4) and 9.030 (a)(i). This Court also has jurisdiction to review the convictions for kidnapping while armed and armed burglary which arose from the same transaction and trial as did the murder conviction. 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 One of the Indictment charges first degree murder from "a premeditated design" to effect death or while engaged in or attempting a kidnapping and/or burglary while armed with a pistol. Count Two charged armed kidnapping "with intent" to facilitate the commission of a felony, and Count Three charged armed burglary of an automobile "having an intent to commit an offense therein," among which offenses was murder and/or kidnapping. (R. 1899-1900).

From opening statements and throughout the trial, the defense admitted the facts, but relied solely on the defense of insanity at the time of the commission of the acts. (R. 832).

In an attempt to present all the pertinent facts to this Court, we have abstracted the testimony of all witnesses and proceedings as follows:

MAGALY DIAZ, called as a witness by the State:

21, living with parents, nephews, niece and sister and brother-in-law at 320 W. 56th Street. (R. 836). Niece is 2 and nephew is 7, the children of her sister, ELSIDIA LANDIN. Defendant lived with her sister 2 years or less. (R. 837). They had been separated about 2 months as of November 25, 1985. Elsidia was living with us. At 6 A. M. my sister and I were taking Dad, Fernando Diaz, to work. I don't drive. (R. 838).

Dropped Dad at work around 6:20 and headed back home on Okeechobee Road. We were in the right land and suddenly a car on the left lane tried to push us off the road. It was Defen-

dant. (R. 839). He tried it about 4 or 5 times. He made a motion for my sister to stop. When she didn't he stopped his car in front of us at an angle. My sister stopped or we would have crashed. He got out of his car, told my sister to stay there, went and moved his car to park behind us, came back to the driver's side where my sister was and told her, "You see, I could find you anywhere." She asked, "What do you want Alberto?" (R. 840).

He said, "Why did you call the police?" She said she did it so he would leave her and the family alone. He repeated, why did you call the police? I told him she did it to get him in trouble so he'd leave her and the family alone. He repeated twice more, "Why did you call the police?" She asked twice, "Why are you doing this?" (R. 841).

He then said, "You know, I saw Gustavo the other day and he told me that he was going to kill you." "You know, 1 told him that I would help him, you know, kill her." Gustavo was her husband before she met Defendant. Elsidia asked him why he was saying this. I gotscaredand told him to please let us go. I said your daughter is at home and my mom had to go to work. He ignored me so I repeated it. Staring at Elsidia, he said, "Elsie, you know something, you are not going to live to be an old lady." (R. 842).

He got his hand inside the car on the driver's side, with part of his body inside and took the key from the ignition. Elsidia asked him to please return the key. His body was inside our big station wagon about chest level. Elsidia repeatedly asked

for the key and I told him to give it to her. I screamed at him to give her the key and he told her to get out of the car. She asked, "Why, (R. 843), why, why?" I said, no, Alberto, and he opened the door on the driver's side. He grabbed her upper arm and told her to get out, at the same time he was guiding her out of the car. At this time I had walked to the back of car near his car. (R. 844).

Elsidia stopped for a second and asked, "What are you going to do? Please, no, what are you going to do?" He didn't force her but ordered her and they went to his car. He opened the passenger side of his car and told Elsidia to get inside and she asked why. I told him to leave her alone, then he went over to the driver's side. (R. 845).

He had the key to my father's car in his hand. I asked him to give Elsidia the key and when he gave it to her it was bent and curved. He gave her the key and she gave it to me. Elsidia was standing and he told her to get in. She asked why, what are you going to do? I told him please not to take her and asked what are you going to do to her? She also asked him the same thing. He closed the door and drove off. (R. 847).

The key was bent so I ran back to where Dad works, a few blocks away. I told him Alberto had taken my sister and he told his boss we had to leave so he drove us to the car. Dad straightened the key and drove toward home down Okeechobee Road. Two or three blocks later we saw a lot of traffic. I saw police cars and a body laying on the street with a yellow plastic blanket over

it and a hand with a bracelet and I told Dad it was my sister and he said, no, no. (R. 848). We stopped and I told the police I recognized the bracelet and described how she was dressed. They drove me to the station. It was my sister. (R. 849).

CROSS EXAMINATION:

His eyes looked real red. In the statement I gsve police I said his face looked kind of crazy, but I was nervous and confused. He was not crazy. (R. 850). I did say to police something about he looked crazy, but I also said I know that he is not. (R. 851).

RICHARD NUNEZ, called as a witness by the State:

A surveyor for Ashard Western Construction Company but was working for Volca Stephens Construction Company on 11/25/85. I had to take Okeechobee to work at that time. (R. 852).

At about 6:45 A. M. that morning I was stopped at a light on Okeechobee right before the Palmetto overpass going northwest. I saw a girl running very fast against traffic on the shoulder. I was in the inside lane of the two lane road so there was no other lane between me and the shoulder. It was overcast but the sun was out. (R. 853). She was behind me. My window was down and 3 or 4 cars were ahead of me. When first seen she was right to the right of me. (R. 854). Then I saw a man running in the same direction carrying a gun, pointing it ahead of him. I lost sight of him and the girl. (R. 855).

I heard some shots, two or three. One was fired, then a pause and the other shots. Moments later the man ran back to his car, a gray LeMans. (R. 856). It was on the outside lane ahead of me in traffic. He closed the passenger door and then came around

and qot in and went northwestbound, the light turned green and he headed south on the Palmetto ramp. (R. 857). I just saw the back of his car but couldn't get the tag number. This was in Dade County. (R. 858).

Defense agreed man running was Defendant. (R. 860).

Stipulated that the witness has in fact picked Defendant from a live lineup. (R. 862).

OFFICER JENNINGS, called as a witness by the State:

In the Patrol Division of the Hialeah Police Department. (R. 872). I was radio dispatched to the scene with lights and signs. (R. 873). It took three minutes for me to get to the scene. Officers Miyares and Milnes were present, attempting to secure the scene or gather witnesses. (R. 875).

A white female was lying in the road facedown near the entrance ramp to the Palmetto. I directed traffic at the scene. (R. 875). There were some projectiles on the ground near the body, casings from bullets which had already been shot. (R. 876). It was quite apparent she was dead. (R. 877).

TERRY ANDREWS, called as a witness by the State:

Technician with Hialeah Police Department, Mobile Crime Laboratory. (R. 878). Dispatched at 7:03 A. M. with Technician Bill Waters, later joined by Technician Israel Urra. (R. 880). My job at scene was to make a sketch. Waters picked up projectiles and casings, measured same and preserved them for trial. (R. 881).

Exhibit 1, sketch of scene, admitted without objection. (R. 883). Victim's face was in upward motion. (R. 884). Lying on

her back. (R. 885).

Continuing objection to any reference to gun or pouch in which it was seized. (R. 889). Witness then identified gun, pouch, ammunition. (R. 890-893).

BILL WATERS, called as a witness by the State:

Crime scene technician, Hialeah Police Department. Job is collection, preservation and identification of evidence. (R. 894). Took photographs of scene. (R. 895). State's Exhibits 2 and 3 (photographs) admitted in evidence without objection. (R. 896). State's Exhibits 4, 5, 6, and 7 admitted in evidence over objection. 4, 5 and 6 depict the victim's back. Gunshot wound to lower back depicted in number 6. (R. 899). These photographs show #4, projectile through the skirt, #5 through the underwear, and #6 in the body. Exhibit #7 is a picture of victim's head prior to time she was moved and shows a laceration of victim's forehead. (R. 900). Witness collected 3 spent casings, 3 live rounds and a spent projectile at the scene. (R. 902).

No objection to chain of custody. (R. 904).

State's Exhibit 8 composite of casings, live rounds and projectile found at scene. (R. 906).

KEVIN DURKIN, called as a witness by the State:

Tampa Police Officer, Detective Division. December 1, 1985, came in contact with Defendant. (R. 914). At time aware of outstanding Dade County warrant for Defendant for first degree murder. (R. 915). About noon set up surveillance at 4617 N. Lois Avenue, Tampa, a single story detached house. Had spotted silver

Pontiac LeMans (R. 9161, with front end damage which was the Defendant's vehicle, parked in front of the house.

Surveillance set up in alley across street about 200 yards away, west of residence. Fifteen to 30 minutes later Defendant came out of the house (R. 917), walked over to his car, looked around and went back in. Defendant's car parked in driveway on west side of residence, about 5 to 7 feet from house itself and 15 to 20 feet from nearest doorway. No other police on surveillance with witness. Prior to setting it up spoke to Officers Cory and Lastra (R. 9181, of Tampa. He came out again, walked over to his car, looked around and went back in house.

Then I moved my police car, a 1983 light blue Dodge Diplomat, which is a very obvious police car, to the nearest intersection to the north away from the alley which was across from the house. (R. 919).

Both times I knew he was person arrest warrant was for. First time wasn't close enough to effect a safe arrest. Witness parked car on side of a bar. (R. 920). Went inside and positioned self in men's restroom which had a little window from which house could be seen. He came out a third time and approached his car. Witness ran to police car, placed radio call for assistance and drove across street as fast as he could, identified self as police officer and ordered him to stop. Defendant was standing on other side (R. 921) of his car, about 15 to 20 feet from front door of house. Defendant turned toward doorway, looked back at witness and ducked down behind hood. I had a .12 gauge shotgun pointed at Defendant. (R. 922).

Before arrival of back-up units, witness stood out behind police car and Defendant stood up and raised his hands which had nothing in them. Witness ran up to Defendant and ordered him to kneel and face the house, at that time back-up units arrived and assisted in handcuffing Defendant. (R. 923).

Then Officers Carey and Lastra arrived and witness told them to check the house out and cover him. They immediately ran into the house, and came back out (R. 924), in a minute or so. Officer Ullum, and maybe 5 or 6 officers also went in house. I was holding Defendant. Carey came out with a leather gun case (R. 925), which contained a 9 MM semi-automatic pistol which he turned over to witness.

Defendant's counsel agreed weapon that Officer Carey gave witness (R. 926), when Defendant was arrested by preserved previous objection. (Motion To Suppress). (R. 927).

State's Exhibit 9 admitted without objection except for previous objections. When Carey and Lastra returned from house Defendant and witness were standing by the Pontiac LeMans. (R.928).

Defendant put in Carey's car and taken to Tampa Police Department. Passage of time from arrest at gunpoint to his transportation to Police Department about 5 or 10 minutes. We came in contact with Defendant again at Police Department about 2:55 P. M., or 20 minutes or so after Carey and Lastra left the scene with Defendant. (R. 929).

Defendant placed in Homicide squad room, a large office with about 20 desks for detectives. It was a Sunday so witness

was the only detective present. (R. 930). Handcuffs removed from behind his back to the front for comfort. Witness speaks English, but not Spanish. (R. 931).

Officer Lastra spoke Spanish so witness, Lastra and Defendant had a conversation for about 10 minutes which was recorded on cassette tape. (R. 932).

Lastra translated questions of witness. Prior thereto, witness asked Lastra to explain Miranda rights to Defendant, and Lastra spoke to Defendant in Spanish. (R. 933).

Lastra had also given those rights to Defendant at the scene. (R. 934). Witness has come into contact with individuals who appeared to be under influence of alcohol or narcotics hundreds of times. (R. 935). Defendant wasn't, he was sober. Witness has come into contact numerous times with people who have appeared to have some sort of mental disease or mental infirmity. (R. 936).

Defendant appeared to comprehend on 12/1/85, was responsive and when witness spoke, looked directly at witness even when witness spoke to Lastra, Defendant looked at Lastra. Defendant paid attention and responded verbally to Lastra. (R. 937). No unusual or bizarre behavior. He was polite, alert and witness observed he understood what was going on. Had no difficulties moving about office. (R. 938).

CROSS EXAMINATION:

Witness doesn't know what state of aggravation Defendant might've been in at time of shooting, nor did witness have any conversation with him after the shooting. Even though unmarked wit-

ness'es car was obviously an unmarked police car. (R. 939).

When witness drove it toward Defendant, he didn't run in opposite direction. Defendant made no attempt to flee. He ducked when witness pulled a gun on him. Defendant was not attempting to conceal the Pontiac. (R. 940). Defendant was obedient to witness'es command. He put his hands up almost immediately after ducking down briefly which appeared to be in response to the raising of a shotgun on him. (R. 941).

Witness didn't have to throw Defendant to the ground but when he placed his hand with pressure on his shoulder, Defendant understood because he knelt. When that close to him no other officers were present. He didn't attempt to resist nor grab the shotgun. He never resisted witness in any way. Never said anything disrespectful to witness. (R. 942). Witness is familiar with curse words in Spanish, Defendant never used them. When on the ground, Defendant sat still and made no attempt to flee. It wasn't necessary to use any force to get him into the squad car. (R. 943). He was cooperative with witness the whole time at the scene of arrest. (R. 945).

ROBERT CAREY, called as witness for the State:

Tampa Police Officer. (R. 946). On December 1, 1985, came in contact with Defendant at arrest scene about 2:00 P. M. (R. 947). Responded to Detective Durkin's radio request for assistance. Upon arriva) Officer Ullum (R. 949), and Corporal Dawson were already at the scene, having arrived just prior to us. Durkin and Ullum were effecting the arrest in front of the house.

Defendant was on his knees towards the front of a Pontiac LeMans. I followed several other officers into the residence to check it for possible people inside the residence that could be of possible threat to the safety of officers present at the scene. (R. 950).

I believe there was a kitchen area and two bedrooms plus a bathroom. Witness checked the northwest bedroom and was also inside the kitchen area. In the northwest bedroom a bed was located against the north wall (R. 951), and lying on top of it was a black zippered case which contained a firearm. I believed there was a firearm in it. There was a bulging inside the case. Upon touching it I thought there was a firearm inside. I picked it up . . . "unzipped the pouch to examine the interior contents of the case and I discovered the firearm inside." (R. 952, lines 19-21).

I gave the pouch to Detective Durkin. Exhibit #9 is the case with firearm. (R. 953). Witness and Lastra transported Defendant to Police Station in marked police unit. Lastra read the Defendant his Miranda rights prior to transporting Defendant. (R. 954). This took place in the police car. Trip from scene to the station took about 10 minutes or a little less. (R. 955).

On numerous occasions observed people under influence of alcohol or narcotics. Defendant didn't appear that way at all. Have also had contact with individuals who appear suffering from some type of mental disease, or defect, or mental problems, numerous times. (R. 956).

Defendant didn't appear to suffer with that. No bizarre behavior. In homicide bureau of detective division, Durkin, Lastra and witness were present and Lastra interviewed Defendant on

tape in Spanish. (R. 957)

Interview lasted about 10 minutes and they were together several minutes prior to and after the tape itself. Couldn't understand because in Spanish, but witness saw no bizarre behavior. Defendant was looking at Lastra. (R. 958).

CROSS EXAMINATION:

Defendant was cooperative with the police. (R. 961).

CARLOS LASTRA, called as a witness for the State:

Officer, Tampa Police Department. A graduate of Jefferson High School. (R. 963). About 2:00 P. M. assisted Durkin in arrest, together with Officer Carey. Witness still in training, Carey was his field training officer. (R. 964). At arrival we went inside the house with a couple of other officers. We wanted to make sure nobody was in there that would endanger us while he stood outside. Carey came in contact with the weapon in a bedroom. (R. 965). We were in the house 3 minutes or less. When witness came out, put Defendant in back seat of police vehicle because he spoke Spanish and was only one who could communicate. Witness born in Cuba. (R. 966). Has been here close to 4 years. Learned to speak English in school here. Learned to speak Spanish with parents. (R. 967).

Parents speak only Spanish. Had 2 years of Spanish in high school. At home Spanish is normal conversation. (R. 968). Used a Miranda rights card to assist in reading Defendant his rights. Exhibit 1-P for identification is such a card. (R. 970). Witness read rights from exhibit in Spanish and translater trans-

lated in English in Court for jury. (R. 971). Defendant said he understood. Maybe 5 minutes from rights reading until transportation to police station. (R. 972). Took 10 or 15 minutes to arrive at station. He acted normal, calm and collected. Defendant didn't appear under influence of alcohol or narcotics, (R. 973), nor did he appear to have any mental problem. (R. 974). No threats or promises to Defendant. (R. 975).

Set up tape recorder and gave him his rights again and interviewed him on tape. He was still calm and collected. Durkin told witness questions, witness related same and Defendant replied. (R. 976). On tape gave Defendant his rights off top of head, did not use a card. Just last week witness listened to tape. (R. 977). Tape admitted in evidence as State's Exhibit 10. (R. 978). English transcription of Exhibit 10 admitted as Exhibit 11 subject to previous objections, (R. 980); the Motion to Suppress and the Lawson issue. (R. 982).

English transcript, Exhibit 11, read to jury commencing on R. 983.

The rights section read as follows:

OFFICER LASTRA: I will try to tell you your rights again in Spanish, okay?

DEFENDANT: Uh huh.

OFFICER LASTRA: Okay you are under being in jail for the murder of the first degree, okay?

You have the right to remain silent if you don't want to speak nor want to say anything, you don't have to say it.

You have the right to have an attorney

present while we, we give you the interview and speak to you, okay?

If you can't have the money to pay an attorney, you can, one, the Court will, you know, will give you an attorney free.

DEFENDANT: In Miami here?

OFFICER LASTRA: No, here, the Court, you know, will look for an attorney for you free.

DEFENDANT: Here already. I'll be sent over there, no? (R. 984).

OFFICER LASTRA: Yes.

You are willing to speak to us now?

DEFENDANT: No.

After an unintelligible portion of the tape, Defendant says:

DEFENDANT: But I am willing, but it, I, I know that I am guilty.

OFFICER LASTRA: Okay. Well, we just want to speak to you. Are you willing to talk or not?

DEFENDANT: Yes, yes, yes. (R. 985).

Unintelligible portions of the tape abound as follows: R. 983, lines, 8, 9, 10 and 15; R. 985, line 9; R. 986, lines 3, 4, 14, 15 and 16; R. 987, lines 14, 20 and 21; R. 988, lines 7, 8, 9; R. 990, lines 11 and 12; R. 991, line 14; R. 993, lines 10 and 18; R. 997, line 2; R. 998, lines 18 and 25.

In the balance of the tape Defendant said he had a daughter with her. (R. 986).

When she left the old man at work I followed and told her, "Look, you see, you see that when I want to catch people, I catch them, I watch and I catch them." (R. 988). She said I do love

you but they gave me bad advice. I told her to get in. I wasn't going to do anything to her. Next to the Palmetto she throws herself and started to say, help, help, help. If she didn't throw herself I wouldn't have killed her. I hadn't thought about killing her. I told her you ought to be killed but I simply won't kill you. I already had the pistol on me. (R. 989).

I thought maybe there's police around here going to catch me. I hit her with the first shot. I think I shot at her three times. She died on the road. (R. 990). The first shot was to knock her down, the other ones by the head must've killed her. He was jealous of her. (R. 991).

The sister didn't see it because he left her in the car. (R. 992). His car was the LeMans. (R. 994). I told her before seeing her in arms of another man he'd kill her. (R. 995).

DR. CHARLES WETLI, called as a witness by the State:

Deputy Chief Medical Examiner for Dade County. (R. 1001). Stipulation Doctor is qualified to testify as an expert. (R. 1002).

November 25, 1985, visited scene. (R. 1005). Deceased lying on her back, legs crossed and large accumulation of blood next to her head. She was laying face down prior to his arrival. (R. 1006). Found gunshot wound entered middle lumbar area, (R. 1008), depicted in Exhibit 6. Found two gunshot wounds entered on left side of back of head with exit wound on right side of forehead. (R. 1009). Exhibit 7 is exit wound. Performed autopsy. (R. 1010). Found external abrasions consistent with falling forward

on asphalt. (R. 1012). The wound in the area of the belt or slightly below exited just to the right of the midline and just above the hip. (R. 1013). When it entered the spinal canal the effect was the complete loss of the lower extremities, instantaneous paraplegia. (R. 1014). It would have caused her to drop immediately to the ground. It was fatal if untreated; treatment rapidly had, (R. 1015), within a matter of minutes, might have saved life.

Another wound on back of head several inches to left of midline. It entered and exited right through the head. (R. 1016). It caused a complete massive injury to the brain. Another wound in back of head slightly left of the middle. Found projectile in the temporal lobe of the brain. (R. 1017). Exhibit 12 admitted without objection (projectile retrieved from temporal lobe). Photographs taken of deceased. (R. 1019). Admitted as State's Exhibits 13 and 14. Exhibit 14 is back of head showing two gunshot wounds. Exhibit 13 is front view of deceased's head. (R. 1021).

Died of gunshot wounds of the head. (R. 1023).

CROSS EXAMINATION:

The three gunshot wounds would have had to be in rapid succession, within a matter of seconds probably.

REDIRECT:

Can't give exact time period between the three shots but we are not talking about a full and great time span. (R. 1028). Maybe a minute or so. (R. 1029).

ROBERT HART, called as a witness by the State:

Criminalist specializing in firearms identification with Metro Dade Police Department. (R. 1030). Exhibit 12 contents, one spent projectile from scene; Exhibits 8 and 7, three fired casings from scene, 3 unfired cartridges from the scene and 1 spent projectile. (R. 1037). All found at scene were fired from same weapon, already in evidence. (R. 1042).

MICHAEL ORSINI, called as a witness by the State. (R. 1046).

November 25, 1985, about 6:45 A. M., driving to work on Okeechobee Road, with girl friend. (R. 1047). Going northwest in far right lane. Sitting at red light at the Palmetto about ten cars back and saw man shoot girl. (R. 1048). Girl running towards witness'es car yelling help several times. About 50 feet behind her a man was running with a pistol in same direction she was running. (R. 1049). A black revolver. (R. 1050). Gun in Court looks like the gun. He caught up and shot her in the back of the head, (R. 1051), on road shoulder parallel to witness'es car. She fell face down. Witness panicked and tried to get out of line of fire while his girl friend dove to the floorboard. (R. 1052).

Witness jumped the median and started driving in opposite lane, looked back and man was bending over shooting her more. Thinks four shots heard. (R. 1053).

Then man got into faded gray or silver Pontiac LeMans and got onto southbound ramp on 826. (R. 1054).

Woman running was about 5 foot, black hair, little heavy. (R. 1056). Pulled into Fina station and told them to call police or ambulance. (R. 1057).

Later that night police came to his house to show a six-picture lineup. Witness identified two people who he thought was the man. Wasn't sure at time which one it was. (R. 1058).

Four months after incident viewed six people in lineup. Exhibit 1-A is a photo of that lineup, (R. 1059), admitted without objection as Exhibit #15. Witness identified person #2 as murderer. Defense agreed Defendant was man identified. (R. 1061).

CROSS EXAMINATION:

Defendant casually drove away.

ALBERT NABUT, called as a witness for the State:

Homicide investigator, Hialeah Police Department. (R. 1063).

He was to gather witnesses who had left scene prior to his arrival. Spoke to witness Nunez, (R. 1066), also to Magaly Diaz and Fernando Diaz. Advised Defendant apprehended in Tampa. (R. 1067). He drove there with Detective Ubeda, leaving about 8:09 P. M. on December 1st and arrived at 11:00 P. M. (R. 1068). Impounded gun from Tampa property room. Just after midnight on 12/2/85 saw Defendant at Hillsborough County Jail. (R. 1069). Detectives Blazo from Tampa and Joe Ubeda were with him. (R. 1070).

Defendant wanted to talk to them, (R. 1072), and was coherent and responsive. Witness born in Cuba and left when about six, spoke to Defendant in Spanish. (R. 1073). Feels he's fully conversant in Spanish usage, grammar and speech. (R. 1075).

Used rights waiver form to advise Defendant of his rights. (R. 1077). Exhibit #16 is that form. It took 10 minutes

to read them and Defendant agreed he understood them. (R. 1083, 1084). After pre-interview took a tape recorded statement. (R. 1085). No objection as to tape's instroduction as Exhibit 17 except as before noted. (R. 1088).

On English translations witness placed additions or corrections based upon his memory of portions of tape that were inaudible. (R. 1090). Received in evidence as Exhibits 18 and 19. (R. 1091). Agreed witness can identify Defendant. (R. 1092). English translation read to jury and had the following unintelligible portions at: R. 1099, 1101, 1102, (3 on 1103), 1104, 1108, 1109, (3 on 1110), (2 on 1111), 1113, (2 on 1114), (3 on 1115), (2 on 1117), 1118, (2 on 1119), (3 on 1123), 1126, 1127, 1128, (2 on 1129), 1130, 1132, 1134, (2 on 1136), 1137, 1138, 1139, 1140, (2 on 1141), (3 on 1142), 1143, (2 on 1144), 1145 (3 on 1146) and (2 on 1147).

Defendant didn't appear impaired in any manner. (R. 1151).

JESUS HERNANDEZ, called as a witness by the State:

Has known Elsidia Landin between 7-1/2 and 8 years. State's Exhibit 13 is a photograph of her, and the State rested. (R. 1154).

DR. DAVID ROTHENBERG, called as a witness by the defense:

A clinical psychologist, 38 years. (R. 1166). Independent practitioner since 1949. (R. 1167). Accepted as Court expert. (R. 1174).

Initial impression of Defendant was he was mentally ill, suffering from a major mental illness of paranoia schizophrenia.

Saw him at jail 5 times. (R. 1176). He has a split personality; part of him lives in reality and part lives in a fantasy world, very clearly a paranoid schizophrenic. (R. 1177).

His is a case in which psychological testing just doesn't work. (R. 1180). There are no such tests that are standard or standardized for people from the Cuban culture, no research population has been given these tests so that we would know what they meant. He was absolutely not malingering. (R. 1181).

He cut his hair because of fantasies about bugs and snakes crawling all over him. (R. 1182). He would be able to give a detailed statement to police. He is psychotic and lives mostly in a fantasy world. (R. 1183). He is in the twilight zone, still psychotic even though he can still recount when crisis situations are real. (R. 1184).

At the time of the crime he was incapable of premeditating or planning ahead, he had no intent to kill. He kept repeating, "I don't want to kill you." His chasing her out of the car, running after her were moments of his absolute loss of control, his psychosis taking over. (R. 1185). He only wanted to keep her from leaving him. His mental defect would diminish his mental capacity to specific intent to commit murder. Review of other medical reports strengthened his belief his diagnosis was correct. (R. 1186).

Jail medical records showed he was on pills both for depression and anxiety. He was on Thorazine used for management of manifestations or indications (R. 1187), of psychotic disorders,

schizophrenia. It's my opinion Defendant was insane at the time of the offense in this case. (R. 1188).

After cross examination, redirect was had for the purpose of admission of the witness'es curriculum vitae as Defense Exhibit A, the prosecutor was allowed to resume cross examination and engaged in the following:

Question: Doctor, did you ever work for the City of Miami Beach?

Answer: Yes, sir.

Question: In what capacity? (R. 1240).

Answer: In psychology.

Question: When did you work for them?

Answer: It was a 7-year period from the early 50's to the late 60's.

Question: And did there come a time when you terminated or you ceased your employment relationship with the City of Miami Beach?

Answer: Yes, sir. The city closed the office because they felt that there was other services that should be provided at a county level rather than a municipal level so they did not include it in the next budget.

Question: Do you know whether or not the City of Miami Beach terminated you because the City of Miami Beach felt that you were ethically and purposely referring private patients to yourself after you had made contact with those patients as an employee of the City of Miami Beach?

Answer: No. That's absolutely not true and it couldn't have happened because the City of Miami Beach was servicing people who were not able to afford private fees and they had to be screened as being eligible for public service because they only provided service for those and there was no way for me to refer those (R. 1241) indigent people to anyone.

Question: So as far as you are concerned, you did nothing unethical in that instance?

Answer: I have never been unethical, sir.

Question: I am not asking you that, did you act unethically in that situation?

Answer: No, sir. (R. 1242).

RECROSS EXAMINATION:

Question: . . . Doctor, would you be surprised if he talked to individuals over in the jail already about possible defenses in this case?

Answer: No, I wouldn't be surprised.

Question: You wouldn't be surprised that he had talked about possible defenses?(Objection, request for prosecutorial reprimand and for mistrial.) (R. 1246).

MS. GEORGI, proceeding outside presence of the jury:

Ms. Georgi: Judge, if I may make it clear to your Honor, the grounds for my motion for mistrial and my request for reprimanding the prosecutor, while a great latitude may be allowed in cross examination, we are dealing with the life of a criminal defendant and I submit to the Court that for Mr. Ridge to infer something that has no basis and fact whatsoever, specifically that Mr. Farinas had consulted with other (R. 1249) individuals in the Dade County Jail. There is no basis whatsoever, Judge. . . . it denies my client a right to confront evidence to that effect, it denies him a fair trial and it denies him due process of law. . . . Secondly, he raised an issue about the innuendo concerning Dr. Rothenberg and Miami Beach and they have no factual basis whatsoever. . . .

Mr. Ridge: First of all, your Honor, Ms. Georgi (R. 1250) is right. There is no basis for me asking those questions as to whether or not the Defendant conferred with anyone in the Dade County Jail but for the basis of the grounds upon common sense, and I think this jury can take their own common sense and base it and infer an opinion. . . .

. . . Secondly, there may very well be some evidence concerning the reputation of this particular doctor and I choke on the words when I say them, this particular doctor, this psychologist who perpetrates a fraud on the jury and this Court. Concerning the doctor and the reasons why he left his employment with the City of Miami Beach, and I can bring in people in the form of reputational evidence and I will be happy to put (R. 1251) that on for Ms. Georgi and she can listen to the reputation of that particular doctor and we can address the issue at that time.

The Court: If you want the mistrial, okay. I am going to let him make good on his offer. If you can make good I will deny it.

Mr. Gonzalez: That's on one ground, judge, on the two grounds - - -

The Court: The first ground I am going to deny. The second one she wants a mistrial because of something that he brought up about the doctor's reputation. (R. 1252). If you want I will strike that evidence and if you want your mistrial then I think it's totally ---

Mr. Ridge: Judge, in the first place that would be irrelevant, something that happened long ago. Twenty years ago, Judge.

Mr. Gonzalez: *30* years ago.

Ms. Georgi: . . . I would take the mistrial. (R. 1253).

ANASTIO CASTIELLO, called as a witness by the defense:

A medical doctor specializing in psychiatry, in private practice and part of forensic service at Jackson Memorial Hospital in the University of Miami office. (R. 1258). It's a unit providing services to criminal court by evaluating defendants in cases ordered by Judges. (R. 1259). Accepted by Court as an expert in

forensic psychiatry.

Saw Defendant 1/15/86 and 2/2/86. Opinion is he suffers from a chronic mental major illness, a paranoid schizophrenic. Formed that opinion in initial evaluation in January, 1986; found him to be quite a disturbed person. (R. 1264).

He would respond to questions by answers were not comprehesnive, not conclusive. Shows anger and agitation quite clearly. Kept accusing different people of doing things to him or preventing them from doing what he wanted. Quite upset when talking about his wife and daughter, kept talking about how he could hear them, how he was prevented (R. 1265) talking to them. How correction officers were mean to him and always doing things to him. He became angry when people called him crazy. He discussed Elsidia in present tense and didn't accept fact that she was dead. He insisted she was prevented from talking to him and that she was outside and had (R. 1266), been begging correction officers to let her in. (R. 1267).

Psychotic means that the ability of an individual to recognize reality is lost. Basically he is living in a fantasy world. (R. 1268).

The more simple and direct questions may be the better able to be answered by a psychotic person.

Malingering means a person is acting or behaving in such a way that others may feel he is mentally ill. In my opinion Defendant was not malingering. (R. 1269). My interview of February 2, 1986 confirmed my first opinion. There was some degree of im-

provement, he was more rational but severe elements of his thinking disorder were there all the time and his reality testing capacity doesn't go beyond his every day life. He was medicated in jail. (R. 1270). He was given Thorazine which has anti-psychotic properties and Tofanil, an anti-depressant. I would say they affected his improvement from January to February of 1986. (R. 1271).

An inmate is first seen medically and is prescribed what the doctor thinks they should receive. The inmate can not request medication. (R. 1272).

I have been unable to reach an opinion to a reasonable degree of psychiatric certainty as to whether or not Defendant was insane at the time of the crime. Witness received police reports and witness statements. (R. 1272).

Facts in evidence provided witness in a hypothetical question seem to make witness think that there was an accumulation of stress and an accumulation of factors that eventually led to what happened. Witness can see how anyone suffering from an illness of this type that Defendant has would have increasing difficulties in coping with the stress related by that accumulation of factors. (R. 1275).

Someone as sick as I believe him to be is likely to respond very appropriately to a stress of that nature.

CROSS EXAMINATION:

He was coherent but answers were incomplete. Did have an intellectual capacity. (R. 1276). I may have been deceived in the past and not necessarily have known it. (R. 1278). Defendant

may have perpetrated a fraud on me but that's not my opinion. His Thorazine dosage is mild to moderate for someone who is psychotic. (R. 1279). His Tofanil dosage was a small one. (R. 1280). Vistaril is an antihistemenic and 15 mgms two to three thimes a moderate dose. It has some qualities to relieve anxiety. (R. 1281). Defendant gave no inexact answers to questions such as those present in Gancer syndrome. (R. 1284).

I have seen development of psychotic symptoms after incarceration. (R. 1285). It was and is my opinion that this was not an individual who was psychotic then and had not been psychotic before. I formed the impression corroborated by my second interview that I was dealing with someone who had been chronically ill for many years. (R. 1287).

I do not know if Defendant was thinking about killing Elsidia Landin when he shot her. (R. 1290). Can't tell what Defendant's mental condition was at the time he pulled the trigger. (R. 1291). Based upon review of statements to police in looking at facts only he was in full control of his mental faculties.

REDIRECT EXAMINATION:

Interview conducted in Spanish. (R. 1294).

In my clinical interviews with Defendant, my observations of his conduct coupled with the way he answered, how he answered, coupled with the way he said that gives me a doubt about his mental state at the time. (R. 1295).

DEFENSE RESTED.

DR. DORITA MARINA, called as a witness by the State:

Clinical psychologist with subspecial in forensic psychology. (R. 1297). Saw Defendant 1/14/86. (R. 1304). The fact that an individual is Spanish speaking and comes from a different culture affects the validity of tests. (R. 1310). We account for the cultural basis particularly in the intelligence tests. (R. 1311). Accepted by the Court as an expert in the field of clinical psychology. (R. 1313). Interview conducted in Spanish. (R. 1315). I cannot deny that he had no brain damage and I cannot deny that he is not antisocial. (R. 1317).

I was aware his wife was dead and was very amazed to have him speak of her in the present tense. (R. 1322). Said he had been to a psychiatrist or psychologist in Cuba. He had been taken not to a hospital but to a place. (R. 1324). Said he was dressed in white and was given pills which he refused to take and was given injections. He gave the location as "the provencia," this was a "provencia" of Santa Clara. Witness didn't do any brain damage tests but would have recommended a neurological or a neuropsychological evaluation to be done. (R. 1325).

A true psychotic hears voices inside his head and Defendant told me he heard voices right outside the window. (R. 1330). He did not maintain eye contact when relating these auditory experiences. (R. 1331).

He was bored and psychotics live in a fantasy, never bored. (R. 1333). The Rorschach test did not indicate any psychosis. (R. 1346). Cards pointed to a borderline personality disorder,

(R. 1348), a lack of identification, confusion about "who am I." (R. 1350). We don't know whether Defendant is a high or low borderline. It is possible he could be a low borderline which means closer to the psychotic than normal. This is a mental infirmity disease or effect. (R. 1351).

At time he shot Elsidia my opinion is that he was not in a psychotic and that he knew the nature and consequences of his acts and that he knew right from wrong. (R. 1352).

CROSS EXAMINATION:

Premeditation doesn't fit with borderline impulsive acting out type of personality that I diagnosed him to be. He did not in my opinion premeditate the shooting. (R. 1357). He would from his history have reason not to trust me. He has some insensitive relations with females and either disregards or doesn't trust them. (R. 1359(. When I say I'm here to ask you questions and the Court sent me that could somewhat confuse and put Defendant on his guard. (R. 1360).

REDIRECT EXAMINATION:

I don't think at the time Defendant shot Elsidia he formed a conscious intent and desire to kill her. I think at that moment it was as if he were killing himself. He was killing his lover and killing in a way (R. 1364), symbolically killing himself at the same time. The fact he waited at the house of his target, followed her off the road, forced her to come with him, does not indicate a plan or premeditation. I think he was desperate to be without her and he really needed to feel that she was there

for him, available. The statement I love you and before seeing you in the arms of another man, I will kill, doesn't indicate a conscious decision on his part not to allow her to be with another (R. 1365), individual doesn't sound like a threat. "I think he could not face the fact that she could leave him. I think that was very intolerable for him." I don't think he was capable of reflection. (R. 1366).

It's antisocial when he said: "You see, you see that when I want to catch people, I catch them. I watch and I catch them." I cannot see the likelihood of him planning. When he said you ought to be killed, I simply won't kill you, he is saying he won't. I don't think he really was thinking of doing it when he was saying those words. (R. 1367).

At the point where he shot her in the back followed by two shots in her brain he wanted her dead. (R. 1368). At that point he formed a conscious intent at that instant to kill her.

RECROSS EXAMINATION:

The actions of Mr. Farinas were the actions of a depraved mind and at that exact moment were the actions of a sick mind. (R. 1369). Certainly regardless of human life.

REDIRECT EXAMINATION:

The term "sick" in this case means borderline personality disorder. (R. 1370).

DR. CHARLES MUTTER, called as a witness by the State:

Physician, specializing in psychiatry since 1960. (R. 1373). Court accepted witness as an expert in forensic psychiatry.

January 15, 1986, examined Defendant. (R. 1380).

Evaluation took place in Spanish with interpreter. (R. 1381), for about one hour. (R. 1382). If he was truly hallucinating that the dead were still alive this would be a product of mental illness and coupled with a psychotic symptom of mental disorder this would certainly cause me to question his sanity. (R. 1383). I didn't believe he believed he was hearing voices. (R. 1384). I thought he was malingering when I saw him. He didn't keep his story straight. (R. 1395). Opinion he was sane, did understand right from wrong and nature of consequences of his acts at time of offense. (R. 1399).

CROSS EXAMINATION:

After a hypothetical question of all facts in evidence the witness stated: ". . . if he felt . . . that she was trying to flee or leave him, that would be more consistent in my medical opinion as an act of impulse. Passion of rage, but he would still know that killing somebody is wrong and it's against the law." (R. 1404). ". . . his mental capacity could have been somewhat diminished to the degree that he was not reasoning like most logical people would, but I don't think he was insane." (R. 1405).

REDIRECT EXAMINATION:

After a hypothetical by the prosecutor, he asked the witness: " . . . is that not also consistent with a conscious decision to kill her?" Answer: ". . . that is truly an issue and decision for a jury to answer and not me." (R. 1414). ". . . I don't think this is a man that had initially had the intent to kill her. (R.

1415). When she left he knowingly and wilfully was going to punish her. "Whether or not he intended to kill her or not by this punishment, I think is up to the jury to decide and I defer to that. (R. 1416).

OFFICER ROBERT CAREY, recalled as a witness for the Stat :

Last time saw Defendant was in the Detective Division at Hillsborough County Jail. (R. 1418). No objection to booking photographs. (R. 1422). Admitted as Exhibits 22 and 23. (R. 1427).

CHARLES F. BLAZO, called as a witness by the State:

Detective, Tampa Police, and a latent investigator, homicide bureau. (R. 1428). Has seen individuals suffering from paranoid schizophrenia. On December 2, 1985 Defendant didn't appear to be suffering from any mental illness. (R. 1438). He was calm, alert and attentive when spoken to. (R. 1439, 1440).

CROSS EXAMINATION:

Not a doctor and doesn't speak Spanish. One doesn't have to appear phrenetic or panicky to be mentally ill. (R. 1441).

DR. LLOYD RICHARD MILLER, called as a witness by the State:

Psychiatrist for 13 years. (R. 1442).

VOIR DIRE:

Lectures about testifying in Court. (R. 1447).

The Court accepted witness as an expert in forensic psychiatry. January 16, 1986 examined Defendant for 1-1/2 hours in Dade County Jail with an interpreter. (R. 1448). "There was some

appearance of mental illness." (R. 1449).

He was out of contact with reality to a degree, but witness thought Defendant was malingering, faking. (R. 1450). He didn't demonstrate bizarre behavior nor do anything physically unusual, however his verbal responses were unusual. (R. 1451).

I didn't believe he believed he heard his wife talking to him from outside his cell. (R. 1452). Everything was too fine plus his denial that he was in jail. A mentally abnormal person should have some idea as to why they're in jail even if they don't know that the event took place. (R. 1453).

He gave answers that would indicate he was not only crazy but stupid. There were evasions or non responses. (R. 1454). Even a psychotic or paranoid schizophrenic could answer as to brand of gasoline used or name a gas station. (R. 1455).

"If, indeed, he heard voices, his wife calling him, his date for trial, those would be hallucinations which might indicate the mental illness of schizophrenia."

". . . the ignorant responses would suggest either a state of brain damage or toxic brain damage or mental retardation or a combination of the two . . . it is possible . . . but not probable in this case because witness would expect some history. (R. 1458).

Defendant suffered from too many symptoms. (R. 1459). He had no mental illness or breakdown during the stress of confinement. "What he has is an abnormal mental state of a personality disorder nature, which would (R. 1460), require a little more accurate history." (R. 1461).

At the time of the offense he was sane, not suffering from mental informity, or defect; knew what he was doing, its consequences or that it was wrong. (R. 1462).

After a hypothetical of facts already in evidence, witness'es opinion was at the time Defendant stood over his wife he was capable of formulating the intent to kill her. (R. 1469).

CROSS EXAMINATION:

He finds most of his patients to be sane and made $64,000.00 on court appointed cases in 1986. (R. 1473, 1474).

DETECTIVE ALBERT NABUT, recalled as a witness for the State. (R. 1480).

Four hours to transport Defendant from Tampa to Hialeah. (R. 1481). Defendant asked him about equipment in squad. (R. 1483). Greeted witness at live lineup. Nothing unusual about his behavior. Coherent and responsive. (R. 1487). Then he acted silly, putting on an act. (R. 1488).

State rested in rebuttal. (R. 1489).

Defense Motions renewed and denied. (R. 1495, 1496.)

COMPETENCY HEARING

DR. LLOYD RICHARD MILLER, called as a witness by the State:

An expert in the field of forensic psychology, (R. 26), appointed by the Court to examine Defendant at the jail on January 16, 1986. Reviewed arrest report of December 2, 1985 and medical records at jail clinic. (R. 27).

Note of jail psychiatrist gave diagnosis as anxiety disorder, medicated with Vistaril 50 mgs, 3 times daily, and Trilifon, 25 mgs, 3 times daily. Vistoril is used for mild anxiety or alcohol withdrawal but is known as an antipsychotic medication not used for mental illnesses. (R. 28).

Conducted a 90-minute examination with a Court interpreter. Witness was asked whether or not Defendant was competent to stand trial and he stated his opinion that Defendant was competent to stand trial. (R. 29).

Malingering is the feigning of symptoms of a mental illness. Doctor found evidence of malingering. His responses were somewhat vague and evasive. The sum total might indicate he was ignorant or retarded, or paranoid or hallucinating or suffering from brain damage or perhaps other symptoms as well, when in fact, (R. 30), there are too many symptoms to come up with the formulation of a bona fide mental illness especially in an individual who is not taking any kind of medication and in a general population jail cell.

His responses to background were reasonably acceptable. When asked about his legal problems he stated he had not done anything. He claimed he didn't know what murder was. When asked about how he would plead, he just said, "I haven't done anything." (R. 31).

When asked what would happen if found guilty or not guilty, he didn't know. He said he knew nothing about legal system or what a judge is. Asked to identify the President of Cuba, after a long delay he finally said, "Fidel. No?" as if unsure of even that response. He never heard of Jose Marti, Julio Iglesias, Telly Savales or Ronald Reagan. When asked, 'Who is Jesus Christ'' . . . he said "that one I know. I believe in him. I have my bible. I read it every day. I am a son of his." (R. 32)

Buys regular gasoline but didn't remember station except it's in Hialeah, Southwest. He said Exxon was a Datsun. He didn't know what a Ford was nor what he drove except a station wagon, an old one. He claimed he was living with Elsidia and that correctional officers would not allow her to come and visit him, Not credible responses. If mentally retarded might not know some of these things but couldn't know as little as he claimed, even if mentally ill and schizophrenic. (R. 33).

He had the gammut, basically of claiming ignorance to things that anybody even of low intelligence would know. He had no idea as to what he was doing in jail. Even though lawyers visited him he claimed not to know what was going on. At this point the Court admonished Defendant to remain silent, (R. 34), with no response to the Court's question to him, "Do you understand that?"

In a questionnaire he denied mental illness except to say he had taken pills. He said he was like in a hospital that they didn't want him to leave. (R. 35).

"He was just not telling the truth or he was just so mentally disturbed that he was incapable of providing acceptable or consistent responses. That is my belief." It is not my opinion that he is mentally disturbed. No indication from correctional officer that he had a behavioral problem or manifested unusual behavior. (R. 36).

Statements given police appear relatively coherent and well organized. (R. 37).

CROSS EXAMINATION:

Never discussed penalties but believes he understands nature and range of possibilities and that is why he is malingering. (R. 40). He indicated he is waiting to get out of jail to live with deceased. (R. 41).

If found competent I think he will start to relate to counsel pretty well unless he continues to malinger hoping for a break. (R. 43).

He had apparent hallucination or delusion that somebody who is dead is still alive and coming to see him and that would be symptomatic if it were valid. He also exhibited mental retardation, nat knowing President of U.S.A., Capitol of Cuba and Jose Marti; ignorance would go to retardation. Also organic brain syndrome (R. 46), if given incorrect dates. He is forgetful and that would be an organic brain damage if it existed.

Mental illness is in itself separated. (R. 47). Defendant, though, had just too many diagnoses. Defendant told me he had a 5th grade education but able to read and write. (R. 48).

It's possible his condition could have decompensated between my visit and the present time. (R. 49).

DR. RICHARD MUTTER, called as a witness by the State:

An expert in forensic psychology. Interviewed Defendant on January 15, 1986 at Dade County Jail. (R. 52).

Had a Court interpreter for an hour interview in Spanish. (R. 53). Prior to interview received police reports, Miranda waiver forms, statements of witnesses and officers and Defendant's statement of December 2, 1985, and subsequent statement, today, in Court. (R. 54).

Opinion: Defendant able to assist counsel in the preparation of the defense to stand in trial. Opinion of malingering because of inconsistent responses to questions asked and changes in psychomotor activity and eye contact. (R. 55).

Claimed no memory in areas related to the crime. Said he was seeing and hearing voices of his child and wife who be believed was alive. If hallucinating he gave no sign or symptom such as blocking in his speech consistent with major mental disorder. (R. 56).

Attempted to go through criteria in the Rules of Criminal Procedure, however Defendant claimed to not know the role of attorney, prosecutor, judge or jury. (R. 57).

Changes in eye contact or body movement made me feel he knew more than he was telling me, (R. 58), in statements to describe circumstances with no contradictions. Nothing in them was disconnected or out of touch with reality. (R. 59). His inability to remember crim in my interview shows an inconsistency.

CROSS EXAMINATION:

When I evaluated Defendant I determined his judgment was impaired. (R. 60). I thought he was faking with me and that is impaired judgment. I meant in terms of his lifestyle, hoe he conducted himself, how he handled the situations of life and how he, in my opinion, handled his interview with me. (R. 61).

His awareness about his own emotional problems was nil. He has some awareness of the serious consequences and is trying to impress people he is sick and that may not be such bad judgment. (R. 63).

He said he had a lady lawyer but didn't know what a lawyer does: "I've had no experience with anybody in court. I don't know." (R. 66).

More anxious when asked about the crime or court. I asked him if I killed somebody what would happen. He said you would go to jail. (R. 67).

He said his wife could not be dead because she came to visit yesterday and he has heard her voice.

The Court asked the witness would this type of incident that Defendant is alleged to have committed, cause some possibility to cease to be competent if they were competent prior thereto? (R. 68).

Yes, I was looking for that when I saw the Defendant, but I didn't see that. (R. 69).

DR. DORITA MARINA, called as a witness by the State:

An expert in forensic psychology. Saw Defendant in Dade County jail on January 14, 1986. (R. 70). I found him to be competent to stand trial. (R. 71). Found several instances of malingering. Evaluation consisted of clinical interview, competency status instrument, Rorschach Test and the House-Tree-Person Test. No memory of anything before the age of 10. (R. 72). He told me he was the second of 5 offsprings, his father was killed when he was 7, his mother did not remarry, but he was reporting rather than saying, "Yes, I remember." Said he was often truant, bored, and repeated many grades in school. He dropped out and engaged in fights. (R. 73).

Said he was married three years ago to Elsidia; it didn't make sense because he had told me there hadn't been a legal marriage. Told me they met in a store, went together four months while making plans for their wedding. When asked what he had liked about her, he stated, "I like everything about her. She is clean and the mother of my daughter." At this point I realized he was speaking of her as if she was alive. He spoke as a man who is in love with his wife who is alive. If speaking of the deceased as presently alive, the indication would be that perhaps he has some sort of mental problem that would affect his competency to stand trial. That would be an appropriate affect. I don't know. I

found the affect being rather flat. (R. 74). By affect I am describing emotions. Talked about his daughter being born in Tampa but didn't know month, date or year and perhaps misspelled her name as "Maguili". Even though there was some education the level indicated is very borderline. " . . . That went along with the diagnosis that I finally made for him of a borderline personality disorder, which often includes, or may go along with a borderline intellectual function." (R. 75).

Questions were asked to which he'd answer, "Why?" I would wait and he would finally answer it. This considered evasive because he had heard the question. I didn't have to repeat it.

Avoiding eye contact and frequently looks through the glass windows as if to check he was not being overheard. This is malingering, evasiveness. (R. 76).

From his statements given to the police, obviously he had much better memory than when I interviewed him. (R. 77). I can't understand how memory of a person can disintegrate so rapidly in such a short period of time without there being drug abuse, brain damage, or some type of mental retardation.

The competency status instrument is a series of questions about Miranda rights, function of judge, public defender and jury. He was unable to answer. I didn't find that to be truthful. (R. 78). That's consistent with malingering.

The Rorschach Test, ten cards with blots, is very anxiety provoking to many individuals. If psychotic, a person will very often give psychotic like answers and will see things in the cards that are not there. (R. 79).

No psychosis was found in the test but he can be borderline. Borderline personality disorder is a lack of identification. The individual doesn't know who he really is. He may go over the border, the border between normal and psychotic. It is that gray area in between. There is a very high level of borderline that is very close to normal. A middle point and a very low level borderline. The very low would probably slip in and out of the psychotic state. (R. 80).

I would say Defendant is in the middle level. He malingered on this test where obvious forms are spiders. He saw a spider but not where everybody sees a spider but elsewhere nearby. (R. 81).

The House-Tree-Person test is where subject is asked to draw a house that has a tree and a person. An anti-social personality disorder is someone not concerned at all for rights of others and in fact takes out hostility and may even act it out. Saw this in Defendant's Rorschach and House-Tree-Person tests. (R. 82).

CROSS EXAMINATION:

He did remember some thing about his elementary school years, (R. 83), and about his father's death when Defendant was 7. (R. 84). At the time I saw him he had the appearance of someone who was psychologically very ill; he looked schizo. (R. 86).

If I had given him an intelligence test he would probably come out borderline intellectual function, that is in between (R 88), normal and abnormal as to retardation.

I know he is not mentally retarded. He didn't fit the picture of psychosis. (R. 90).

STIPULATION: Dr. Castiello would testify consistently with his report.

SHIRLEY FARINAS, called as a witness by the State:

Has known Defendant since boatlift of May, 1980. (R. 94). Her ex-brother-in-law. Families lived together for a while, ate together, did tasks together and socialized. Stopped seeing him around 1982. (R. 95). Defendant always well groomed. No unusual, bizarre or abnormal conduct at that time. (R. 96).

Saw him again since January, 1985. Met his wife early February, 1984. (R. 97). Same person at that time. He had a good memory. Understood what was being said and responded normally. (R. 98).

He never complained about mental problems nor diseases. Never any indication of same. Never saw him have any psychiatric or psychological treatments. (R. 99). Never told her of any treatments for same. He's average intelligence, able to read and write. When his wife started receiving FHA checks for her and her two children he didn't work much, saying he was going to climb coconut trees and get coconuts. (R. 100). Said he was going to act crazy so he could get those checks. (R. 101).

MAGALI DIAZ, called as a witness by the State:

Defendant used to live with her sister, Elsidia, like

husband and wife but they weren't married. First met him in Tampa 1-1/2 years ago. Stopped seeing him when he killed her sister November 25, 1986. (R. 104).

He was always well groomed and worked. (R. 105). He spoke like a normal person. Never saw him conduct himself in an abnormal, unusual or bizarre manner. Never complained about mental problems nor did witness ever see any evidence of mental problems. Never received psychiatric or psychological treatment. He's very intelligent. (R. 107).

ALBERT NEBUT, called as a witness by the State:

Detective, City of Hialeah. First in contact with Defendant, December 2, 1985 at Hillsborough County Jail, Tampa. (R. 109 . Clean shaven, calm, collected and responsive. Tape taken. Witness speaks Spanish and English. (R. 110). English transcript of taped statement admitted into evidence as State's Exhibit 1, only one side of two-sided tape. Side 2 is being translated from Spanish to English. (R. 112). His answers were responsive to questions. He carried on a coherent conversation. Nothing unusual, abnormal or bizarre about his conversation. (R. 113). Witness and his partner drove him back to Hialeah. Trip about 4-1/2 to 5 hours long. Defendant was in front seat next to witness who was driving, and partner was in back seat. No unusual behavior on that trip. 3/10/86, I again came in contact with Defendant at Dade County Jail, 6th floor. (R. 114). Checked to see if physical condition pretty much the same because of a live lineup to be held 3/11/86. (R. 115). He appeared coherent and responsive. He said, "Hi," and I said, "Hi, how are you?" He said, "Fine, thank you, and how is it going?

What are you here for?" I said, "I can't talk to you at this time. I will be seeing you maybe tomorrow." (R. 116).

He started acting silly, pointing at roof, making strange sounds, pointing at the floor and turning around in circles.

On 3/11/86 he said hi to me. I advised him a live lineup was to be conducted. (R. 117). Started to act crazy. Boxing by himself inside the lineup room right up to the concrete walls that were inside the glass. (R. 119).

CROSS EXAMINATION:

Started pointing at ceiling and floor after witness said, see you tomorrow. Did not tell him about live lineup to be held the next day. Witness did nothing to provoke that behavior. (R. 120).

Prior to lineup on 3/11/87, Defendant said two correctional officers outside of the lobby were communists and were going to kill him. Defendant mentioned a machine gun. Said he'd only do what correctional officer Manning who was there would tell him to do. (R. 121). He asked me to dance when I told him to turn from side to side while he was being observed by witnesses. (R.122).

EDITH GEORGI, called as a Court witness:

Assistant Public Defender. First time met Defendant was arraignment where he started throwing up his hands and said, "What am I here for," or, "I didn't do anything." Witness took him to jury room to explain arraignment to him but could make no headway. (R. 131).

When interviewed in jail he didn't know what the charges were. (R.132).

He complained various guards trying to kill him. He'd be looking out the windows in the interview cell. He was very jumpy, rubbing and picking at his skin. Talked about non-existant bugs he saw crawling on the walls.

Witness has been back at least four or five times but no semblance of an attorney/client relationship could be established. (R. 133). It's utterly ridiculous for witness to even attempt to discuss the charges or the process we are going through with him.

Court's opinion, Defendant has been malingering and is competent. (R. 134).

MOTION TO SUPPRESS

Agreed there was no search warrant for 4617 N. Lowest Avenue, Tampa, Florida, on 12/1/85. (R. 149).

MICHAEL MALEKA, called as a witness by the State:

Owner of an alarm contract firm in Dade County. (R. 150). Was a sergeant with Hialeah Police Department for 10 years. On 11/25/85 was part of homicide investigation of Elsidia Landin. (R. 151). Served arrest warrant for Defendant 11/26/85. (R. 153).

KEVIN DURKIN, called as a witness by the State:

Tampa Police Officer. Received teletype with Defendant's physical description, name, date of birth and charge of first degree murder. (R. 164). He was driving an early 1970 Pontiac LeMans with front end damage, silver in color. He was supposedly in Drew Park, a predominantly Latin community in Tampa. (R. 165).

That neighborhood has a very high crime rate. Defendant supposedly had an automatic hand gun. I went there around noon on 12/1/85. (R. 166).

Shortly after noon on that day I located the car at 4617 N. Lowest Avenue in Tampa; a single story green detached house, a private residence. (R. 167).

I was alone in a 1983 Dodge Diplomat about 1/2 block, maybe 200 yards from the house. A person exited the residence, walked to the Pontiac, looked around and went back in the house. (R. 168).

He was the Defendant. He was maybe 15 or 20 feet from the car. I saw no other individuals in the yard or in the house at this time. He came out a second time, went to the car without going into it and looked around again. (R. 169).

There were two jalousie windows in the front of the house facing the street. I was across the street so it was impossible for me to see into the house. I moved a little bit further up north of Lowest Avenue to Cayuga Street and hid in my police car. (R. 170).

Mine was a very obvious unmarked police car and I was afraid Defendant was able to see. There's a bar on the corner of that intersection and I could look through the bathroom window at the residence. I moved my car to the bar after the second time Defendant exited the house. (R. 171).

The third time he exited he started to open the door of the vehicle. I ran out of the bar, jumped into my car and drove across the street to the residence, meanwhile radioing for assistance. Within a minute backup police arrived. (R. 172).

While Defendant was standing on the other side of his vehicle I jumped out of my car with a 12 gauge shotgun, pointed it at him and shouted police several times.

Defendant made a half turn and ducked behind his car. I ran to the rear of my squad car. Defendant peering up over the fender of his vehicle suddenly stood upright and submitted. He had nothing in his hands. I ran up to him and instructed him to turn around and kneel, which he did. (R. 173).

The backups arrived and officer Greg Ullum helped me secure him with handcuffs. I told the arriving officers to cover me and check the house. I was standing directly beneath the two windows and to my left was an open door. I had no idea if anybody was inside or if anybody was about to come outside. (R. 174).

The fact that he was in Tampa led me to believe he fled Dade County, armed and allegedly killed a person led me to have a great concern for my own safety. Whoever resided there evidently had befriended Defendant. (R. 175).

Defendant remained on the scene five or ten minutes and was then transported to the Tampa Police Department, Detective Division, in about 15 or 20 minutes. (R. 176).

On that day there was some type of window shade or curtain on the windows. (R. 181). I was 3 to 5 feet away but could not see in. Defendant arrived at Tampa Police Department about 2:45 P. M. (R. 182).

Officers Bob Carey, Carlos Lastra and myself spoke to the Defendant. I don't speak Spanish and Defendant didn't speak English. (R. 183). Officer Lastra who is bilingual spoke in Spanish to Defendant at about 2:55 P. M. We tape recorded the conversation.

I instructed Lastra to give Defendant his rights in Spanish. He spoke to him briefly and Defendant replied. (R. 184).

Defendant was sober, polite, alert and seemed able to communicate. (R. 185). The tape has the witness'es name and badge number on it. (R. 186).

CROSS EXAMINATION:

Had the house under surveillance for 2 hours prior to apprehending Defendant. (R. 188). During that time no other people entered nor exited the house; he heard no voices from the house. When apprehending Defendant no weapons were sticking out of windows. He heard no scuffling on the sides of the windows he was near. Teletype information he received contained nothing of any accomplices working with Defendant. (R. 189). Defendant offered no resistance to the arrest. (R. 190). When on the ground being handcuffed Defendant didn't call anybody that might be in the house. (R. 191).

He at no time made any effort to obtain a warrant for the residence. Several officers responded as backup and found nobody in the house. (R. 192).

No Miranda rights or warning session prior to taping by this officer. This officer not present when Lastra told this witness that he had given Defendant his rights while at the residence.

Prior to 2:55 statement Lastra advised him of his rights but not from any form. (R. 195). Those cards are available at the station. (R. 196). I didn't explain the charge to the Defendant. My impression was he didn't understand me at all.

Within the Court system in Tampa there are regular Court interpreters but the police only have available police officers who are bilingual. (R. 197).

ROBERT CAREY, called as a witness by the State:

Tampa Police Officer. (R. 199). December 1, 1985 was a field training officer with Probationary Officer Carlos Lastra. (R. 201). That day first came in contact with Defendant at 2:00 P. M. Less than two minutes after Durkin's radio request for backup we arrived. Officers Greg Ullum and Michael Dawson were already there. (R. 203). At that point several officers with Lastra and I checked the inside of the residence to check for other possible people that could be a possible threat to us. (R. 204).

Other officers went in before me. I was right behind them. I could look out the windows (R. 205), but couldn't see through them because of window coverings. (R. 206). I checked the northwest bedroom . . . "lying on top of the bed in plain view was a black leather zippered pouch." (R. 207). It was about 7 by 10 inches. By its shape and looks it appeared to be some kind of gun pouch to me. There was an outline of something in there that appeared to be a firearm. I picked the pouch up. (R. 208).

I felt a gun, zipped it partially open and found a 9 millimeter semi-automatic handgun. The witness and Lastra transported Defendant to the Tampa police station. (R. 209). No bizarre behavior on part of Defendant. (R. 211).

At the scene Lastra appeared to give Miranda warning to Defendant but had nothing in his hands to assist him. (R. 212).

CROSS EXAMINATION:

The pouch appeared rectangular, not the shape of a gun. The case was black, not transparent and was zippered up. (R. 213). Nobody else was in the residence. (R. 214).

2 P. M. that day not witness'es first involvement. "We had been notified by Durkin earlier that he was checking this area specifically for Defendant." (R. 215).

CARLOS LASTRA, called as a witness by the State:

Tampa patrolman. (R. 216). Testified in one felony trial before a jury (R. 217), and 10 or 15 traffic and misdemeanor cases. December 1, 1985 working with Officer Carey. (R. 218).

When I came in contact with Defendant was when Durkin was watching the house where he was supposed to be staying at. (R. 219). After cuffing Defendant we went inside the house. (R. 220). We were looking for other suspects involved maybe with this guy but didn't find anyone. (R. 221).

Saw Carey pick up a black leather case. ". . . you could see the outline of the gun." (R. 222).

Witness born in Cuba, lived there four years and moved to the United States. Read him his rights in Spanish. (R. 223). Spoke Spanish with folks and has a high school education. (R. 224). As for Spanish used in his daily affairs - "I speak it but not read it and write it, once in awhile." Uses Spanish daily, (R. 225), had two years of it in high school. (R. 224).

I used the rights card when transporting Defendant to give him his rights in Spanish. (R. 226).

No bizarre behavior. (R. 231). When Durkin arrived he set up a tape recorder, told witness to read him his rights again in Spanish. Witness did it again. . . "off the top of my head. . . ." (R. 233).

CROSS EXAMINATION:

Witness, when giving him the Miranda warnings and asking Defendant, "So you are willing to speak to us now? Is that correct?" "NO." The witness did not stop questioning Defendant when he said no. (R. 243).

REDIRECT:

After Defendant's "no" there is an unintelligible portion of the tape but witness said Defendant stated, "NO, well, yes, I am willing to talk to you, but I am guilty you know." (R. 244).

ALBERT NABUT, called as a witness by the State:

Homicide Detective, Hialeah Police Department. (R. 247). After Defendant's arrest, Nabut and Joe Ubeda went to Tampa. Got to Hillsborough County Jail about 12:25 A. M. on December 2, 1985. (R. 249). Witness born in Cuba. (R. 251). Learned Spanish in Cuba and through his parents, his mother is a Spanish teacher. (R. 252). Reads, writes and speaks Spanish. (R. 253).

Read rights before the pre-interview, (R. 256), from a rights waiver form used by the police department. (R. 257). Signed by Defendant, Detective Ubeda as witness and Nabut. (R. 258).

ALBERTO FARINAS ZAMORA, called as a witness for the Defense:

Top photograph on State's Composite Exhibit 3 was the house he had stayed at for four days and where he was arrested. He had his belongings in there. (R. 299).

He remembered Officers Lastra and Durkin who told him they were going to give him a lot of years and the electric chair. (R. 300). He told them he had nothing to talk about and they said if he didn't talk they would give him the electric chair.

Detective Nabut was a good one who gave him coffee. (R. 301). The other officer would slam on top of a table and told him if no cooperation he would get the chair. (R. 302).

CROSS EXAMINATION:

His friend, Oscar Saiz, owned the house in Tampa but didn't live there. Saiz's friend Luis lived there. He wasn't aware of any warrant for Luis for attempted first degree murder. (R. 305).

Remembers talking to police officers in Tampa. (R. 306). Remembers saying yes, yes, yes, to the question are you willing to talk or not? Remembers speaking to Officer Nabut and Detective Ubeda. (R. 307).

He signed State's Exhibit No. 6 but doesn't remember if it was read to him or not. (R. 309). Defendant read from the exhibit which was as to his rights in open court as follows:

> "Before we ask you any questions you must be aware of your rights. You have a right to remain silent. Anything you say can be used against you in a Court of law. You have the right to consult with your attorney to be advised by him before we ask you any questions and you also have the right of the presence of your attorney during the questioning." (R. 310).

No one hit me or beat me. (R. 311).

JOSEPH UBEDA, called as a witness by the State:

A Hialeah detective. December 1, 1985 interviewed

Defendant. (R. 312). Miranda waiver form Exhibit 6 filled out by Defendant. (R. 313).

Nabut read the rights and Defendant was to initial it if he understood, and he did. Neither Ubeda nor Nabut were bad guys. Categorically denied promises, threats, or intimidation testified to by Defendant. (R. 314). Nor did any other officers so act in his presence.

CROSS EXAMINATION:

Discussed life imprisonment with Defendant. (R. 315). Witness has used good and bad guy technique in the past but not in this case. (R. 316).

PENALTY PHASE

DR. CHARLES WETLI, called as a witness by the State:

Gunshot wound A entered mid portion of lower back, severing the spinal cord, and exited the front of the abdomen. (R. 1715). Physiologically, it would have completely eliminated any feeling or ability to move from the waist down. It would have felt like a kick or punch. Not a lot of pain is associated with it, but she would have been aware she was shot. (R. 1716). She could see, hear ans speak. (R. 1718). An execution murder has two facets: 1, shot from a moving car, or, 2, where person is immobilized and then shot. (R. 1719). She was immobilized by the first gunshot wound. The subsequent gunshot wound to the head is consistent with an execution style murder. Objection to question overruled. (R. 1720).

CROSS EXAMINATION:

Domestic murders involve rage reactions, and sometimes it is evident of intent but not in the sense I have described where the person usually gets first immobilized and then shot or strangled or whatever. "Usually it is a continuation of events; one continuous event." Usually in domestic cases either one bullet is fired or the whole gun is emptied. (R. 1721).

One is simply to hurt and the other where the firing continues until there is no more ammunition manifests rage. In this case the gun was emptied, which is consistent with a rage reaction. She felt nothing from the head wounds. (R. 1722).

REDIRECT EXAMINATION:

If bullets are left in gun it would imply more of an intentional timing thing, where the job is over, time to go home.

State rested, relying on previous testimony. (R. 1723).

DR. ANASTIO CASTIELLO, called as a witness by the defense:

Found Defendant a non-malingering paranoid schizophrenic. (R. 1725). When Defendant shot Elsidia, his frame of mind was not cold, calculated and premeditated without any pretense of moral or legal justification. He suffered from a severe mental illness. (R. 1726).

At that time it appears he was under the influence of extreme mental or emotional disturbance to a reasonable degree of psychiatric certainty. (R. 1727).

His ability at that time to appreciate the criminality of his conduct, or to conform his conduct to the law, was substantially impaired such as he always has been impaired because of his illness. (R. 1728).

CROSS EXAMINATION:

Schizophrenia is a chronic illness; something you are born with. No question he was suffering from that when he shot her. Can't render an opinion as to whether he knew right from wrong. A schizophrenic may not necessarily be insane under the law. (R. 1729). Over objection, witness allowed to testify that he can not tell "us" whether the Defendant was insane under the law. (R. 1730).

Defendant more likely was not in full control of his

mental faculties. (R. 1731).

DR. DORITA MARINA, called as a witness by the defense.

Clinical psychologist, specializing in forensic psychology.

Can not imagine Defendant acting cold or calculated at all. He doesn't have the emotional ability to premeditate. He is an impulsive person who tends to act out his impulses. He has a borderline personality disorder. (R. 1734).

When he shot Elsidia he was under the influence of extreme mental or emotional disturbance. He was merging emotionally with the victim so that he saw no difference between himself (R. 1735) and the person he was killing. To him they were one. This type of person can't cope with concept of being abandoned. (R. 1736).

Though legally sane at the time but his ability to conform his conduct to requir ments of the law was substantially impaired. (R. 1737).

CROSS EXAMINATION:

Didn't diagnose im as paranoid schizophrenic. (R. 1738).

He would have a disregard for the consequences of his actions. (R. 1740).

OFFICER LOUIS DONATE, called as a witness by the defense:

Counselor in Dade County Jail in charge of taking care of basic needs of inmates. (R. 1744). Defendant, a model prisoner, addresses everyone with respect. (R. 1745).

CROSS EXAMINATION:

Has come across people suffering from mental illness. (R. 1750). They sometimes act differently from other inmates. (R. 1751). They cry a lot or are happier. Defendant is the smooth type. (R. 1752). Very polite, below average intelligence. Defendant was crying yesterday when he came from Court and about one month ago. (R. 1753). Defendant never told him his wife came to visit or called him through the window. On one day Defendant saw her all over the place. That was about five or six weeks ago. (R. 1756).

OFFICER EDISSON LOZADA, called as a witness by the defense:

Works at Dade County Jail. (R. 1758). Defendant, a model prisoner. (R. 1759).

CROSS EXAMINATION:

Has come in contact with about one out of 20 people suffering from mental problems. (R. 1762). Their behavior was bizarre. (R. 1763). We look for talking to self or to wall, bizarre behavior with feet, out of control, looking for fights with other inmates. (R. 1764). On one or two occasions they heard voices. (R. 1765).

Defendant was rational, coherent, clear, understandable and looked me in the eye. (R. 1767). Nothing about Defendant abnormal or equatable with mental illness. (R. 1768). Never saw him talk to himself. Never was told Defendant heard voices or his wife come to see him but was not allowed in. (R. 1769).

Defense rested.

SUMMARY OF THE ARGUMENT

MAY IT PLEASE THE COURT:

At the outset of the trial, defense counsel then, as appellate counsel now, admitted the facts surrounding the homicide, but reiterate a basic criminal law handbook principle, indeed a fundamental principal of our democracy, that we do not have two different types of trials; one for the guilty, that differs from that trial afforded the innocent defendant. We submit, that because of the defense theory of the case of not guilty by reason of insanity, the prosecution assumed almost a cavalier attitude towards principles assuring a fair trial and the trial Court erred in its rulings concerning those manifestations as well as those concerning substantive law.

A competency hearing was held after which the trial Court found Defendant competent, a result with which we disagree. However, even if this Court affirms the trial Court in that regard, we submit the record is so replete with Defendant's medical infirmities that the impartial observer must give pause; lest history record that Defendant was a victim of cruel and unusual punishment in that he was too mentally infirm to be responsible for two findings of the trial Court in aggravation, to wit: 1) Heinous, atrocious and cruel, and 2) cold, calculated and premeditated.

A Motion to Suppress the introduction of a 9 millimeter gun and case seized in a warrantless search of a single dwelling residence which was the object of a 2-hour police surveillance, the officer having called in by radio at the beginning of same and

again €or backup immediately prior to his arrest of Defendant some 2 hours later; was denied. This was true even though Defendant did not resist arrest, was the only person seen by the officer during the two hours, and backup arrived almost immediately. No request of the officer on the scene to others was made to obtain a search warrant. He recognized Defendant as the wanted man when he first saw him. The sole exigency proposed by the State for the lack of warrant was the safety of the officers, but a fruitless sweep allegedly for officer security does not warrant a warrantless search.

A particularly offensive photograph of the back of the deceased's head was admitted into evidence over objection. This was not only a posed photo, but one prepared by a prosecution witness, the medical examiner, under the pretext of showing the two head wounds. He had shaved that portion of the head so that the scalp appeared stark white and the wounds looked like two hideous eyes. It was gruesome, shocking, inflammatory and prejudicial and totally unnecessary. The defense admitted the shooting and all surrounding circumstances. The introduction of the shaved head photograph made it totally impossible to plead for the life of this Defendant.

Just prior to the start of the penalty phase, juror Colson did not appear. The Court told the jury that and that he had just issued a warrant for juror Colson's arrest. We submit this had no place in this trial. It had an intimidating, chilling effect on the jury that was to decide whether or not Defendant was to live or die, at the very time the jury should have been free of

any pressure by the trial Court.

In its case in chief the defense called Dr. David Rothenberg, a clinical psychologist who was accepted by the Court as an expert. He testified that Defendant suffered from paranoia schizophrenia and was of the opinion Defendant was insane at the time of the offense. On cross examination, the prosecutor was able to question him at length about his unethical conduct, unsupported by anything in the record. He further asked the doctor about defendant's talking over possible defenses in jail. Upon defense objection and motion for a mistrial, the prosecutor admitted there was no basis for those questions about defendant's discussing possible defenses. As to the attack on the doctor, the prosecutor said he could being in people in the form of reputational evidence. This lack of understanding by the prosecutor of the manner in which to impeach a witness, if possible, by reputation witnesses resulted in improper discrediting of a chief witness for the defense on the issue of not guilty by reason of insanity. It totally prejudiced the Defendant's case and was compounded by the Court's denial of a mistrial. For the rectitude of our contention, an examination of the record thereafter shows no attempt by the prosecution to bring in such "reputation witnesses."

The jury was instructed on Counts II and III, armed kidnapping and armed burglary, and returned a verdict finding Defendant guilty of both crimes as charged, yet there was no independent proof that Defendant was armed at the time of the commission

of both of those charges. Only through the confessions of Defendant, admitted into evidence over objection, were there any references to a gun during the commission of those two charges. The confessions themselves were the only evidence. They were used in this case to establish the corpus delecti rather than corroborate it.

The Court's findings in support of the extreme penalty were contradictor, contra to existing case law, and totally cruel and unusual in light of medical testimony in this cause upon which the trial Court through its findings was cognizant of, yet chose to ignore in total abuse of, or lack of, discretion.

The death penalty itself with the disparities in its application, constitutes cruel and unusual punishment in violation of Federal and State Constitutions.

ARGUMENT

I.

THE TRIAL COURT ERRED WHEN IT DENIED DEFENDANT'S MOTION TO SUPPRESS THE FIREARM (PISTOL) WHICH WAS OBTAINED AS THE RESULT OF AN ILLEGAL SEARCH AND SEIZURE.

A Motion to Suppress a case and 9 MM semi-automatic pistol which was introduced at trial as State's Exhibit 9 without objection except as to objections previously made on the Motion to Suppress was admitted in evidence. (R. 927). On the Motion to Suppress the prosecutor agred that there was no search warrant for the case and pistol when same were seized. (R. 149).

KEVIN DURKIN, a Tampa Police Officer, testified that on December 1, 1985 he received a teletype from Dade County with Defendant's physical description, name, date of birth and charge of first degree murder. (R. 164). Defendant was said to have been driving an early 1970 silver Pontiac LeMans with front end damage. He was supposedly in Drew Park, a predominantly Latin community. (R. 165). Defendant was said to be armed with an automatic hand-gun. Durkin shortly after noon located the car at 4617 N. Lowest Avenue, Tampa. It was a single story green private residence. (R. 167). He surveyed the house for about two hours and saw only Defendant go in and out of the house three times. On the third time he arrested Defendant. (R. 168, 171, 172).

Defendant when arrested did what Durkin instructed him to do. (R. 173, 190). Immediately before the arrest Durkin radioed for backup. (R. 172).

ROBERT CAREY, another Tampa police officer, testified: "We had been notified by Durkin earlier that he was checking this area specifically for Defendant." (R. 215).

Durkin further testified that the fact Defendant was in Tampa led him to believe he fled Dade County, was armed, and allegedly killed someone, so Durkin was concerned for his own safety as whoever resided in the house evidently befriended the Defendant. (R. 175). But the facts were, Defendant who turned around and kneeled at Durkin's instructions (R. 173), and was so situated when Officer Greg Ullum arrived as part of backup and helped Durkin cuff Defendant (R. 174), and though Durkin had house under surveillance for two hours prior to arrest (R. 188), no other people entered or exited the house, and he heard no voices from the house, no weapons were sticking out of windows, nothing in teletype indicated Defendant had an accomplice (R. 189), Defendant offered no resistance and did not call out to anyone in the house. (R. 191).

Though those were the facts, Durkin told arriving officers to cover him and check the house. (R. 174). Durkin at no time made any effort to obtain a search warrant for the house and as a matter of fact officers who searched the house as so-called "back-ups" found nobody in the house. (R. 192).

ROBERT CAREY, another Tampa officer, checked the residence for other possible people that could be a possible threat to police. (R. 204). In the northwest bedroom, ". . . lying on top of the bed in plain view was a black leather zippered pouch." (R. 207). It appeared to be some kind of gun pouch to him. An out-

line of something in it appeared to be a gun. (R. 208). He felt a gun, zipped it open partially, and found a 9 MM semiautomatic handgun. (R. 209).

On cross examination Carey testified the pouch appeared rectangular, not the shape of a gun. The case was black, not transparent, and was zippered closed. (R. 213). Nobody else was in the residence. (R. 214).

CARLOS LASTRA:

Worked with Officer Carey on that day. (R. 218). Entered house as they were looking for other suspects maybe involved with Defendant but didn't find anyone. (R. 221). Saw Carey pick up a black leather case with outline of a gun. (R. 222).

It is unequivocal from the foregoing that Officer Durkin had the house under surveillance for two hours. Before he arrived at scene, Officer Carey testified Durkin was checking the area specifically for Defendant. No request was made by Durkin by radio for a search warrant when he identified Defendant at the house. During his surveillance Durkin only saw Defendant ingress and egress the house, heard no voices in house, no visible weapons, no accomplice indicated in teletype. Upon arrest Defendant offered no resistance nor called out to anyone in the house. No attempt whatsoever by police to obtain a search warrant in two hours.

Durkin attempted to justify the warrantless search and seizure as a "protective sweep," however such a sweep is by law to check for persons who may be a danger to police, not evidence. The police also attempted to justify their unconstitutional conduct

by testimony that the evidence was in "plain view," but that presupposes the police had a legitimate right to search.

In Klosieski v. Florida, 482 So. 2d 448 (5th DCA, 1986) rev. denied 491 So. 2d 281, the Court stated at page 450:

> Generally, unless a search warrant is issued, police officers may not enter a home and search absent exigent circumstances. Coolidge v. New Hampshire, 403 U. S. 443, 91 S. Ct. 2022, 29 L. Ed. 564 (1971); Chimel v. California, 395 U. S. 752, 89 S. Ct. 2034, 29 L. Ed. 685 (1969). Exigent circumstances would include a situation where, after an arrest, the officers have a reasonable basis to suspect that there may be other individuals on the premises who would be dangerous to the police officers or destroy evidence. See State v. Skaff, 450 So. 2d 896 (Fla. 1st DCA 1984); Dedmon v. State, 400 So. 2d 1042 (Fla. 1st DCA 1981); Newton v. State, 378 So. 2d 297 (Fla. 4th DCA 1979) review denied, 389 So. 2d 1115 (Fla. 1980); Grant v. State, 374 So. 2d 630 (Fla. 3d DCA 1979); McNair v. State, 354 So. 2d 473 (Fla. 3d DCA 1978). Absent extraordinary circumstances, government agents have no right to search a dwelling when an arrest is effectuated outside it. Vale v. Louisiana, 399 U. S. 30, 90 S. Ct. 1969, 26 L. Ed. 2d 409 (1970). In Payton v. New York, 445 U. S. 573, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980), the United States Supreme Court reaffirmed the latter principle:
>
> > In terms that apply equally to seizure of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshhold may not reasonably be crossed without a warrant.
>
> 399 U. S. at 591, 100 S. Ct. at 1382, 63 L. Ed. 2d at 653.
>
> In the instant case, the police had no reason to believe that other individuals, dangerous to their safety, were inside the house. None had been observed during any surveillance. The Klosieskis were in custody outside. Obviously, the safety of the officers was placed in greater jeopardy by their entry into the house than it would have been had they simply left the premises with the Klosieskies, the purpose of the arrest warrants having been fulfilled. The fact that the police did not

> know, as an absolute certainty, whether more people were in the house, as found by the trial court, cannot justify entry into the house. There was no exigency, and it was error to deny the motion to suppress. Hence, we reverse the convictions of the appellants.
>
> REVERSED.

In Alvarado v. State, 466 So. 2d 335 (2nd DCA 1985), rev. denied 476 So. 2d 672, the Court stated at page 337:

> Florida's courts have found exigent circumstances to exist in cases where an officer is in peril, escape is likely, or the officer reasonably fears that evidence might be destroyed. Generally, however, exigent circumstances arise only when there is a very short time between the incident giving rise to probable cause and the warrantless entry into the defendant's premises. See Graham v. State, 406 So. 2d 503 (Fla. 3d DCA 1981); Williams v. State, 403 So. 2d 430 (Fla. 3d DCA 1981); State v. Moyer, 394 So. 2d 433 (Fla. 2d DCA 1980). In this case, sufficient time elapsed between the officer's conversation with the victim and the arrest of Alvarado for the police to have made at least a minimal attempt to obtain a warrant. The officers did not know when the appellant was supposed to leave town; they had four men covering three exits to the apartment; and the appellant could easily have eradicated bloodstain evidence between the time of the afternoon assault and the arrest early the next morning. The conditions were indeed, less than exigent. Furthermore, law enforcement officers cannot be permitted to convert self-imposed delay into a circumstance of exigency when the elapsed time is sufficient to seek a warrant. Hornblower v. State, 351 So. 2d 716 (Fla. 1977); State v. Moyer, 394 So. 2d 433 (Fla. 2d DCA 1980); Wilson v. State, 363 So. 2d 1146 (Fla. 2d DCA 1978).

The Court went on to say that notwithstanding the illegality of the initial entry consent was given and Defendant failed to contest the voluntariness of the consent at the suppression hearing. No consent was given nor sought by police in the case at bar.

Defendant certainly had a reasonable expectation of privacy for property in the house he occupied. ". . . One's dwelling has long been regarded as constituting a zone of privacy." State v. Parker, 399 So. 2d 24 (3d DCA 1981).

The Court in its opinion stated at pages 28 and 29:

> Having determined that the defendant may claim the protection of the fourth amendment, we must next decide whether the state has justified the intrusion by demonstrating an exception to the warrant requirement. Warrantless searches are "per se unreasonable under the Fourth Amendment - subject only to a few specifically established and well-delineated exceptions." Katz v. United States, 389 U. S. 347, 357, 88 S. Ct. 507, 514, 19 L. Ed 26 576 (1967). The exceptions are "jealously and carefully drawn," Jones v. United States, 357 U. S. 493, 499, 78 S. Ct. 1253, 1257, 2 L. Ed. 2d 1514 (1958), and the burden is on the state to demonstrate that the procurement of a warrant was not feasible because "the exigencies of the situation made that course imperative." Chimel v. California, 395 U. S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969); Norman v. State, supra: Hornblower v. State, 351 So. 2d 716 (Fla. 1977).
>
> The state attempts to justify the search and seizure by reliance on several well established exceptions to the warrant requirement.
>
> First, the state argues that the police action here was reasonable based on the existence of probable cause and exigent circumstances. Specifically, the state claims that a gun is a dangerous instrumentality and, knowing that a weapon was involved in the incident, the police were justified in locating it and removing it from the scene so no one would get hurt. This argument is specious. Officers were posted all over the property. . . The police had complete control of the property from the moment they arrived on the scene, and once the suspect was taken into custody, had ample time to secure a warrant while officers guarded the area.
>
> The State also appears to rely on the "protective sweep" exception. However, the purpose of such a search when an arrest takes place is to check for possible accomplices, not evidence, and is justified only if necessary to allow officers to carry out the

> arrest without fear of violence. United States v. Bowdach, 561 F. 2d 1160 (5th Cir. 1977); Newton v. State, 378 So. 2d 297 (Fla. 4th DCA 1979), cert. denied, 389 So. 2d 1115 (Fla. 1980); Grant v. State, 374 So. 2d 630 (Fla. 3d DCA 1979). In the present case, the police had no reason to believe that there might be anyone else present at the house. . . Nor can this seizure be justified as incident to arrest. This exception is rationalized as necessary to seize weapons. . . to prevent an assault on arresting officers and to prevent the destruction of evidence. Chimel v. California, 395 U. S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685(1969). Chimel restricts the scope of the search, however, to the person of the accused and the area within his immediate control. . . .

While Dedmon v. State, 400 So. 2d 1042 (1st DCA 1981), appears contra, the factual situation is completely different than in the case at bar. In Dedmon, officers were told only of presence of the Defendant. Having spent fifteen minutes in talking Defendant into surrendering when he came outside, an officer saw two shadowy figures inside. The officers were surprised and acted reasonably to insure their safety.

This right of protection from illegal search and seizure has even been extended to a motel room. In Engle v. State, 391 So. 2d 245, (5th DCA 1980), the Court stated at page 246.

> All searches conducted without a warrant are per se unreasonable unless conducted within the framework of a few specifically established and well delineated exceptions. Katz v. United States, 389 U. S. 347, 88 S. Ct. 507, 19 L. Ed. 576 (1967). The burden is upon the state to show that a warrantless search comes within one of the recognized exceptions. Coolidge v. New Hampshire, 403 U. S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971). The five basic exceptions to the requirement for a search warrant are: (1) consent, (2) incident to a lawful arrest, (3) with probable cause to search but with exigent circumstances, (4) in hot pursuit, and (5) stop and frisk. Raffield v. State, 333 So. 2d 534 (Fla. 1st DCA 1976).

None of the exceptions apply to the factual pattern of the instant case. No matter what argument the State may propose as to overwhelming evidence of proof of guilt. The admission of the pouch and weapon contained therein is one more unconscionable building block in the scaffold to be considered by the jury when fixing penalty.

II.

THE COURT COMMITTED FUNDAMENTAL ERROR IN ITS ABANDONMENT OF ITS DUTY TO SCRUPULOUSLY GUARD THE CONSTITUTIONAL RIGHTS OF THE DEFENDANT IN THAT:

A. IT ADMITTED INTO EVIDENCE STATE'S EXHIBIT 14, A PHOTOGRAPH OF THE BACK OF DECEASED'S HEAD, THE APPEARANCE OF WHICH HAD BEEN ALTERED BY THE STATE'S WITNESS WITH A RESULTANT GHOULISH EFFECT WHICH RENDERED IT SO SHOCKING, INFLAMMATORY AND PREJUDICIAL THAT THE VALUE, IF ANY, OF ITS RELEVANCY WAS DEFEATED.

B. ITS PRONOUNCEMENT TO THE JURY IMMEDIATELY PRIOR TO THE PENALTY PHASE OF THE TRIAL, THAT THE COURT HAD ISSUED AN ARREST WARRANT FOR ONE OF ITS MEMBERS, WHO HAD DELIBERATED WITH THEM IN THE GUILT OR INNOCENCE PHASE OF THE TRIAL, CREATED A COERCIVE ATMOSPHERE PERMEATED WITH THE TACIT THREAT OF REPRISAL, THEREBY INVADING THE SANCTITY OF THE JURY ROOM ITSELF.

A.

In her opening statement, the public defender set the tone of the whole defense when in speaking of the prosecutor's opening statement she said:

"The State doesn't have to call Magaly Diaz and they don't have to call Mr. Orsini or Mr. Nunez or any of the other police officers in this case. We admit to the facts that Ms. Jiminez has just described to you." The only defense was that of not guilty by reason of insanity. (R. **832**).

In line with her opening statement, the record is replete with defense admissions and stipulations as to the identity of the deceased, her death and how it occurred, her relationship with the Defendant, his identity as the perpetrator of the homicide, the manner in which the pistol was used, the number of projectiles entering her body such as one in the back and two in the back of the head, and which stayed in the body and which exited. There is little need to burden the Court with citations to pages as the State can not in good conscience deny that such admissions permeated the trial.

In addition to other photographs, the following were admitted into evidence of deceased's body:

State's Exhibit 2, the covered body. (R. 2398).

State's Exhibit 3, the body uncovered. (R. 2399).

State's Exhibit 4, the back of the body showing bullet entry. (R. 2400).

State's Exhibit 5, another view of entry wound in back. (R. 2401).

State's Exhibit 6, another view of entry wound in back with clothing held back. (R. 2402).

State's Exhibit 7, exit wound of one shot to the head depicting right side of her forehead. (R. 1009, 1010, 2403).

State's Exhibit 13, another photograph of exit wound in the head. (R. 2414).

State's Exhibit 14, the photograph which should not have been admitted, a copy of which next appears herein.

alberto Farinas

STATE'S DEFENDANT'S

☑ ☐

FILED: 1-9

☑ FOR IDENTIFICATION

☑ AS EXHIBIT 13

DATE FEB 9 1987

RICHARD P. BRINKER, CLERK

BY Celeste F D.C.

IN THE
CIRCUIT/COUNTY COURT
IN AND FOR
DADE COUNTY FLORIDA

CASE NO. 85-30405

DEFENDANT

alberto Farinas

STATE'S DEFENDANT'S

☑ ☐

FILED: 1-8

☑ FOR IDENTIFICATION

☑ AS EXHIBIT 14

DATE FEB 9 1987

RICHARD P. BRINKER, CLERK

BY Celeste F D.C.

2414

> "This is not I . . . Retouched and smoothed
> and prettified to please; Put back the
> wrinkles and the lines I know . . .
> Burton Braley, Poet.

Dr. Charles Wetli, medical examiner for the State, shaved her head to inspect the wound. (R. 2484). The result was a devil-like apparition with demoniac eyes peering at the observer. This would not be the case if we could "put back" the hair.

We are not Unaware of the line of cases concerning gruesome, bloody and unpleasant photographs which despite same were allowed in evidence because of relevancy and which were, in fact, the product of Defendant's criminal act. Exhibit 14 in this case was made more gruesome by the State medical examiner's razor and it was totally unnecessary. As a matter of fact, there is no defense objection in the record to its introduction.

We are cognizant of the necessity to object to save the record.but submit that the trial Court in a criminal case has the duty to see that the Defendant obtains a fair and impartial trial and particularly where the jury is qualified for the death penalty. To do otherwise is a denial of the Defendant's rights as secured by the Fifth and Fourteenth Amendments to the Constitution of the United States of America as well as Article I, Section 9, of the Florida Constitution. It was fundamental error, in view of the unequivocal admissions by defense counsel throughout the trial, except for the defense of insanity at the time of the crime, for Exhibit 14 to have been admitted in evidence. Unlike a fleeting prosecutorial comment about Defendant's failure to take the stand, this photograph could not be forgotten by the jury. It was with

them throughout the trial, going to the very foundation of the case and goes to the merits of the imposition of the death penalty. Its only effect is to outrage, prejudice, inflame and close the mind to any thought of mitigation of sentence.

We submit, ". . . the gruesomeness of the portrayal is so inflammatory as to create an undue prejudice in the minds of the jury and detract them from a fair and unimpassioned consideration of the evidence. . . ." Young v. State, 234 So. 2d 348 (Fla. 1970).

In Bush v. State, 461 So. 2d 936 at page 940, this Court opined: "We require only that the photograph not be so shocking in nature that it defeats the value of its relevancy," citing this Court's decision in Williams v. State, 228 So. 2d 377 at page 379. (Fla. 1969).

We respectfully submit that with such an inflammatory and prejudicial photograph in evidence, wherein a gruesome subject was made more horrendous by the State's own witness, a jury penalty of death can not be allowed unreversed. When the State invokes the death penalty, we firmly believe they elect to play on the Creator's turf and because one of the referees failed to call a foul (by no objection), the player in this hapless tragedy can not in good conscience be put to death by default.

In Clark v. State, 363 So. 2d 331 (Fla. 1978), the majority opinion of this Court at page 333 cited the decision of the Supreme Court of the United States in Chapman v. California, 368 U. S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967), which in declin-

ing to adopt a rule that the constitutional error of comment on silence should automatically require a reversal of conviction, announced that the test to be applied in determining whether a federal constitutional error can be held harmless is whether the Court finds error to be harmless beyond a reasonable doubt.

We submit this photograph to this Honorable Court with the rhetorical question; that, in view of all the various photographs in evidence, can such an exhibit, made more heinous by an alteration to that portion of the body it depicts by the State's own witness, can the error of its admission be considered beyond a reasonable doubt to be "harmless?"

In a capital case, we think not.

We respectfully reiterate the dissenting opinion of Justice Adkins in Clark v. State, supra, at page 335, as certainly applicable to this horrible Exhibit 14:

> Technicalities in the law should be avoided, not fostered. Our fundamental responsibility is to protect the constitutional rights of individuals, so that justice is rendered without regard to the ability of attorneys to recognize reversible error when it springs forth in the heat of a trial. . .
>
> Fundamental error is committed when improperly admitted evidence is of such character that neither rebuke nor retraction may entirely destroy its sinister influence . . . .

Unlike the possibly fleeting improper remark of a prosecutor, this photograph ". . . worth a thousand words. . ." was neither rebuked nor retracted, but remained a lethal weapon launched by the State, when the defenses were down.

B.

At the moment when the enormity of the power of the sovereign was prevalent in the Courtroom; when the very air breathed by the participants was sparked with electricity; when the life of the Defendant hung by a precarious thread of legal maneuvers; indeed, at the very time that the jury should have been free of any sense of coercion, restraint, fear or reprisal, the following occurred with respect to Mr. Colson, a juror who had sat in this cause when guilt was decided:

> The Court: Welcome back. Please be seated.
>
> Mr. Colson has not shown. I have issued a warrant for his arrest. Mr. Walden, he will take his place as a member of the jury. (R. 1712, lines 18-23 .

In its Motion for a New Sentencing Hearing, the defense brought this error to the trial Court's attention when, in paragraph 4, it complained of:

> "The Court's replacing juror Colson by alternate juror Waddle without consulting Defendant, defense counsel, or obtaining a waiver from Defendant of Colson's presence, and announcing to the jury that a warrant had been issued for the arrest of Colson." (R. 2611).

We submit that the Court could have just announced that juror Colson was not present and therefore had to be replaced by an alternate juror so that the proceedings could conclude. No one could find fault with an innocuous explanation.

In the pursuit of remaining a "a nation of laws and not of men," to preserve and protect our constitutional safeguards, the

trial Court's pronouncement of its issuance of an arrest warrant for a fellow juror when that jury was to enter the penalty phase of the trial must give us pause.

From this record, none of us, even those who possess keen hindsight, can determine whether or not in the guilt/innocence phase of the trial, juror Colson was a hold out for a not guilty by reason of insanity. If he had been, the chilling effect on the jury when deciding penalty now made cognizant by the Court of their susceptibility to immediate and swift retribution, is not the calm, inviolate surrounding which constitutional framers envisioned for juries. If he had not been, they were still in a position to be coerced by demands of the State; for the Judge who until then could be considered their benign partner in this trial, as to the law, flexed his muscles against one of their own. Could they be free in mind and spirit to follow their own conscience?

There are no cases which we found directly on point factually, but this Court in its opinion in Williams v. Florida, 143 So. 2d 484 (Fla. 1962), at page 488, spoke of a judicial atmosphere which this Defendant was denied:

> . . . We canonize the courthouse as the temple of justice. There is no more appropriate justification for this than the fact that it is the only place we know where the rich and poor, the good and the vicious, the rake and the rascal - in fact every category of social rectitude and social delinquent - may enter its portal with the assurance that they may controvert their differences in calm and dispassionate environment before an impartial judge and have their rights adjudicated in a fair and just manner. Such a pattern

> for administering justice inspires confidence. The legend on the seal of this court - "sat cito si recte" (soon enough if right or just) - embossed on the floor in the rotunda of this building, encourages devotion to such a pattern. Litigation guided by it makes the courthouse the temple of justice. When judges permit their emotions or the misapplication of legal principles to shunt them away from it, they must be reversed. The judge must above all be neutral and his neutrality should be of the tough variety that will not bend or break under stress.

And again,

> The judge's neutrality should be such that even the defendant will feel that his trial was fair. <u>In the trial of a capital case the judge's attitude or demeanor may speak louder than his words; in fact it may speak so loud that the jury cannot hear what he says</u>. This is particularly true when his emotions instead of his judgment get in the driver's seat. (Underlining ours).

We submit, that to advise a juror one of their number is to be arrested, no matter what the reason, is to invade the jury room with fear and doubt about their individual safety and freedom.

> . . . The attitude of the judge and the atmosphere of the courtroom should be such that no matter what charge is lodged against a litigant or what cause is before the court, the party can approach the bar with every assurance that he is in a forum which is everything a court represents: impartiality and justice. The due process guarantee of a fair trial can mean nothing less than this. <u>State ex rel. Davis. v. Parks</u>, 141 Fla. 516, 194 So. 613 (1939).

III.

WHEN, AS IN THE CASE AT BAR, THE DEFENSE HAS ADMITTED ALL MATERIAL FACTS, BUT RELIES SOLELY ON THE DEFENSE OF INSANITY AT THE TIME OF COMMISSION OF THE CRIME, THE COURT COMMITTED FUNDAMENTAL ERROR AND ABUSED ITS DISCRETION IN ITS DENIAL OF DEFENDANT'S MOTION FOR A MISTRIAL WHEN THE PROSECUTION'S INTERROGATION OF THE KEY DEFENSE WITNESS, A PSYCHOLOGIST, ON CROSS EXAMINATION, UNFAIRLY AND IMPROPERLY DISCREDITED THE WITNESS AND THE DEFENDANT, AND MAY HAVE PREJUDICED THE JURY TO DEFENSE PLEAS FOR LIFE.

It is very apparent from the entire record, opening statement to closing argument of the defense, that the theory of the defense was insanity at the time of commission of the crime, and if and when all was lost, a plea for life, that we feel it unduly burdensome to cite pages of the record herein.

Dr. David Rothenberg, a clinical psychologist for 38 years (R. 1166), was accepted as a Court expert. (R. 1174). He was of the opinion that Defendant was clearly a paranoid schizophrenic. (R. 1177). He gave as his opinion that Defendant was insane at the time of the offense in this case. (R. 1188). We submit he was the only witness to be that certain of Defendant's mental condition at the time of the offense, thus his credibility was of utmost importance to the defense theory of this case as echoed by defense counsel from the inception to the termination of the trial.

After cross examination, redirect was had for the sole purpose of admission of the witness'es curriculum vitae as Defense Exhibit A. (R. 1242).

RECROSS EXAMINATION:

Q. . . . Doctor, would you be surprised if he talked to individuals over in the jail already about possible defenses in this case:

A. No, I wouldn't be surprised.

Q. You wouldn't be surprised that he had talked about possible defenses?(Objection, request for prosecutorial reprimand and for mistrial). (R. 1246).

MS. GEORGI, proceeding outside presence of the jury:

Ms. Georgi: Judge, if I may make it clear for your Honor, the grounds for my motion for mistrial and my request for reprimanding the prosecutor, while a great latitude may be alowed in cross examination, we are dealing with the life of a criminal defendant and I submit to the Court that for Mr. Ridge to infer something that has no basis and fact whasoever, specifically that Mr. Farinas had consulted with other (R. 1249) individuals in the Dade County Jail. There is no basis whatsoever, Judge. . . . it denies my client a right to confront evidence to that effect, it denies him a fair trial and it denies him due process of law. . . . Secondly, he raised issues about the innuendo concerning Dr. Rothenberg and Miami Beach and they have no factual basis whatsoever. . . .

Mr. Ridge: First of all, your Honor, Ms. Georgi (R. 1250) is right. There is no basis for me asking those questions as to whether or not the Defendant conferred with anyone in the Dade County Jail but for the basis of the grounds upon common sense, and I think this jury can take their own common sense and base it and infer an opinion. . . .

. . . Secondly, there may very well be some evidence concerning the reputation of this particular doctor and I choke on the words when I say them, this psychologist who perpetrates a fraud on the jury and this Court. Concerning the doctor and the reasons why he left his employment with the City of Miami Beach, and I can bring in people in the form of reputational evidence and I will be happy to put (R. 1251) that on for Ms. Georgi and she can listen to the reputation of that particular doctor and we can address the issue at that time.

The prosecutor was then allowed to resume cross examination and engaged in conduct which is of such importance to a death row defendant, that we include same here as follows:

> Q. Doctor, did you ever work for the City of Miami Beach?
>
> A. Yes sir.
>
> Q. In what capacity? (R. 1240).
>
> A. In psychology.
>
> Q. When did you work for them?
>
> A. It was a 7 year period from the early 50's to late 60's.
>
> Q. And did there come a time when you terminated or you ceased your employment relationship with the City of Miami Beach?
>
> A. Yes sir. The city closed the office because they felt that there was other services that should be provided at a county level rather than a municipal level so they did not include it in the next budget.
>
> Q. Do you know whether or not the City of Miami Beach terminated you because the City of Miami Beach felt that you were ethically and purposely referring private patients to yourself after you had made contact with those patients as an employee of the City of Miami Beach?
>
> A. No. That's absolutely not true and it couldn't have happened because the City of Miami Beach was servicing people who were not able to afford private fees and they had to be screened as being eligible for public service because they only provided service for those and there was no way for me to refer those (R. 1241) indigent people to anyone.
>
> Q. So as far as you are concerned, you did nothing unethical in that instance?
>
> A. I have never been unethical, sir.
>
> Q. I am not asking you that, did you act unethically in that situation?
>
> A. No sir. (R. 1242).

The Court: If you want the mistrial, okay. I am going to let him make good on his offer. If you can make good I will deny it.

Mr. Gonzalez: That's on one ground judge, on the two grounds ---

The Court: The first ground I am going to deny. The second one she wants a mistrial because of something that he brought up about the doctor's reputation. (R. 1252). If you want I will strike that evidence and if you want your mistrial then I think it's totally ---

Mr. Ridge: Judge, in the first place that would be irrelevant, something that happened long ago. Twenty years, Judge.

Mr. Gonzalez: 30 years ago.

Ms. Georgi: . . . I would take the mistrial. (R. 1253).

It is evident that the prosecutor in his cross examination of the doctor's employment with the City of Miami Beach in the 50's or 60's was attempting, what if done fairly and within the rules, could have been impeachment.

However, the prosecutor, in an attempt to rebut the defense motion, stated: "Judge, in the first place that would be irrelevant, something that happened that long ago. Twenty years ago. (R. 1253).

If, in fact any such impeachment was proper, our evidence code sets forth the appropriate manner in which to proceed. Section 90.404(1) of the Florida Statutes provides in part:

> Evidence of a person's character or a trait of his character is inadmissible to prove that he acted in conformity with it on a particular occasion, except:
>
> (c) Evidence of the character of a witness as provided in Sections 90.608 - 90.610.

Section 90.608 provides in part:

> Any party, except the party calling the witness, may attack the credibility of a witness by:
>
> (a) Introducing statements of the witness which are inconsistent with his present testimony.
>
> (b) Showing that the witness is biased.
>
> (c) Attacking the character of the witness in accordance with the provisions of Sections 90.609 or 90.610.

Clearly, sub-paragraphs (a) and (b) are not involved in the type of of questions propounded by the prosecution.

Section 90.609 provides in part:

> A party may attack or support the credibility of a witness, including an accused, by evidence in the form of reputation, except that:
>
> (1) The evidence may refer only to character relating to truthfulness.

Section 90.610 pertains only to conviction of certain crimes as impeachment and is totally uninvolved in this matter.

While it is true that Section 90.405 of the Florida Statutes allows opinion evidence which departs from the usual contemporary practice followed in Florida, which limits testimony to reputation, Section 90.405, this section is applicable when character is one of the facts necessary to establish a liability or defense or is a factor in the measure of damages. When character is used circumstantially and hence occupies a lesser status in the case, proof may be only by reputation and opinion.

> . . . Evidence of specific instances of conduct is the most convincing. At the same time it possesses the greatest capacity to arouse <u>prejudice</u>, <u>confuse</u>, surprise, or consume time. Section 90.405, Florida Statutes, Law Revision

Council Note - 1976 (Underlining ours).

In the case at bar, no attempt, even after the defense motion for mistrial was denied, was made by the prosecution to bring in witnesses which would support, if available, his scurrilous attack on the defense witness. We submit, the trial Court abused its discretion in allowing to stand this totally improper, and as the Law Revision Council Note defines, arousal of "prejudice" and confusion, particularly where the Defendant's life was at stake.

> The clear weight of authority allows only the general reputation of the witness in the community to be admissible. Antone v. State, 382 So. 2d 1205 at pp. 1213, 1214 (Fla. 1980), citing C. McCormick, Evidence, Section 44 (2d Ed. 1972).

In Fulton v. State, 335 So. 2d 280, 284 (Fla. 1976), this Court held that allowing the state, over objection, to cross examine a defense witness as to a pending charge of second degree murder against the witness was improper and, as the witness' testimony went to the heart of the defendant's claim of self defense, the error could not be held harmless.

The Fulton case was cited with approval in Chavers v. State, 380 So. 2d 1180 (5th DCA 1980), where the Court stated at page 1181:

> If the witness had been sufficiently discredited . . . in the minds of the jurors, the ultimate result of the case could have been entirely different. We do not say that it would have or should have been different; we merely hold that if the correct rule of evidence had been applied, it could have been. Citing Fulton v. State, supra.

The Chavers opinion went on to say:

> The defense witness' testimony in the present case went to the heart of appellant's defense; therefore, the error in allowing the improper evidence was not harmless.

In the Chavers case, the prosecution was allowed to cross examine defendant's key witness to the effect that for $100.00 he went to bed with a male defendant in another trial. In the case at bar, the prosecution's cross examination, which incidentally was totally outside the redirect examination, asked the key defense witness whether he was terminated as a psychologist by the City of Miami Beach because the City felt he was unethical in referring private patients to himself. When the witness explained, the prosecutor followed with:

> Q. So far as you were concerned you did nothing unethical in that instance?

When the witness answered, "I have never been unethical, sir," the prosecutor countered with:

> Q. I am not asking you that, did you act unethically in that situation? (R. 1242).

We know that prosecutors are sometimes prone to overkill, but certainly justice requires that this Defendant, who might have had a different result, at least in the penalty phase of the trial, not be entombed because of improper discrediting of his key defense witness.

The prosecution, after its devastatingly improper attack on this doctor's integrity asked this doctor, and only him:

> Q. Doctor, would you be surprised if he talked to individuals over in the jail already about possible defenses in this case?

> A. No, I wouldn't be surprised.
>
> Q. You wouldn't be surprised that he had talked about possible defenses?

Defense objection, request for prosecutorial reprimand and for mistrial. (R. 1246).

This line of questioning, if proper, but we submit it was not, as not one scintilla of evidence had been introduced by the State in its case in chief, could have been asked of various other doctors and indeed correctional and police officers. However, it was not. The prosecutor, feeling he had destroyed this witnes, again overkilled and went for the Defendant's jugular. Lest our characterization of the prosecutor be considered intemperate, let us examine a portion of his response to the objection:

> First of all, your Honor (R. 1250), Ms. Georgi is right. There is no basis for me asking those questions as to whether or not the Defendant conferred with anyone else in the Dade County Jail, but for the basis of the grounds upon common sense, and I think this jury can take their own common sense and base it and infer an opinion. . . . (R. 1251).

Obviously, this game of life and death played by the prosecutor had no rules. The constitutional provisions at the federal and state level guarantee a fair and impartial trial. Certainly a Defendant in a first degree murder case, actually "in the valley of the shadow of death," should fear no evil dereliction from basic tenets of our democracy. His counsel, unfettered by prejudicial error, should be able to stand before a jury and ask for his life. To impede that basic humane right provided by our law is fundamentally repugnant to its safeguards.

IV.

IT WAS FUNDAMENTAL ERROR FOR THE TRIAL COURT TO ENTER JUDGMENT ON THE VERDICTS ON COUNTS II AND III OF THE INDICTMENT AND TO SENTENCE DEFENDANT THEREON.

Count II of the Indictment charged the Defendant with kidnapping during the commission of which the Defendant . . . carried, displayed, used, threatened, or attempted to use a weapon or firearm, to wit: a pistol, in violation of 787.01 and 775.087 Florida Statutes . . . (R. 1900).

Section 787.01 is the kidnapping statute and Section 775.087 is that portion of the Florida Statutes that makes possession or use of a weapon a felony reclassification and calls for a mandatory minimum of three years.

Count III of the Indictment charges the commission of burglary of a conveyance and that in the course of committing same ". . . the defendant was armed or did arm himself with a dangerous weapon, to wit, a pistol. . ." (R. 1900).

The Defense made a Motion to Suppress Defendant's Confessions, Admissions and Statements (R. 2376-2377), which was denied.

The jury returned, in addition to Count I of the Indictment, the following verdicts:

A. As to Count II of the Indictment, guilty of kidnapping with a firearm. (R. 2556).

B. As to Count III of the Indictment, guilty of burglary with a firearm. (R. 2557).

The Court sentenced Defendant on Count II of the Indictment to life and to the mandatory minimum of 3 years ". . . as the Defendant possessed a firearm." (R. 2599).

The Court further sentenced Defendant on Count III to life and to the mandatory minimum of 3 years, ". . . as the Defendant possessed a firearm." (R. 2600). The 3-year mandatory minimum in Count III was to run concurrent with same in Count II.

We think it readily apparent from Counts II and III of the Indictment that a firearm was an integral element of the corpus delecti of each Count.

Count 11, kidnapping, is ordinarily a first degree felony, but Defendant was charged with occasioning same by the use of a weapon, which reclassified it under Section 775.087 (a) to a life felony for which he was sentenced.

Count III, burglary, is also ordinarily a first degree felony, but Defendant was charged with being armed at the time of the commission of the crime which also reclassified it as a life felony under Section 775.087 for which he was sentenced.

The only eye witness to the burglary and kidnapping was Magaly Diaz, the sister of the deceased, Elsidia Landin. Ms. Diaz was in the automobile that Elsidia was driving and from which she went with Defendant. Nowhere in her testimony did she ever testify that when Defendant approached the vehicle he had displayed, or in any manner exhibited or used a firearm. (R. 836-851). There was no other witness to any part of the occurrence thereafter until the deceased was seen running away from Defendant and his car, some distance from where Elsidia left the car in which she had been stopped with her sister. No one testified as to a weapon in Defendant's car while he was driving with Elsidia, the deceased.

The armed burglary, if any, could only have occurred where the armed kidnapping would have occurred, that is, the spot where Defendant stopped Elsidia and her sister Magaly, in their father's car.

The two confessions admitted in evidence over objection (R. 982, 1091), were the only evidence in the record that at the time of the commission of the burglary and kidnapping the Defendant had a weapon concealed in his waistband. The defense Motion to suppress the confessions said they were not supported by proof of the corpus delecti. (R. 2377). The admission of the two confessions over objection, when the only eye witness to the commission of the kidnapping and burglary never connected a weapon at that time and place with the Defendant is a flagrant violation of the corpus delecti rule which states that ". . . before a Defendant's confession can be admitted into evidence at a criminal trial, there must be proof by substantial evidence of the corpus delecti of the crime independent of the statement. . . ." Fla. Dept. of Law Enforcement v. Dukes, 484 So. 2d 645 (4th DCA 1986), citing Stone v. State, 378 So. 2d 765 (Fla. 1980).

A conviction solely based on appellant's confession is prohibited by the well established corpus delecti doctrine. Ruiz v. State, 388 So. 2d 610 (3rd DCA 1980), rev. denied 392 So. 2d 1380 (Fla. 1981).

In Harrison v. State, 483 So. 2d 757, (2nd DCA 1986), the Defendant appealed his conviction of possession of a firearm by a convicted felon. The Court opined at page 758:

> Before a defendant's confession can be admitted into evidence, the state must prove by substantial evidence the corpus delecti of the crime independent of the statement. . . None of the state witnesses observed appellant in possession of a gun.

In the case at bar, they did as to the murder, but not as to armed kidnapping and armed burglary.

Florida v. Hepburn, 460 So. 2d 422 (5th DCA 1984) was to the same effect, and cited State v. Allen, 335 So. 2d 823 (Fla. 1976), Nelson v. State, 372 So. 2d 949 (2nd DCA 1979) cert. denied 396 So. 2d 1130 (Fla. 1981), McQueen v. State, 304 So. 2d 501 (4th DCA 1974), cert. denied 315 So. 2d 193 (Fla. 1975).

We are not responsible for the Counts as constructed. The State could have charged simple kidnapping and burglary, but they chose to charge those crimes when committed were accomplished with a weapon. They could have proved the simpler charges without a confession but they chose the more difficult and under the testimony in this case, the impossible corpus delecti, sans confessions of armed crimes.

The Court instructed the jury as to a firearm carried in the course of a kidnapping (R. 2526), also the lesser offense of false imprisonment, and if a weapon is used (R. 2528), and burglary while armed. (R. 2531).

He was convicted of armed kidnapping and armed burglary which convictions were considered as factors in aggravation and entered the following Finding:

> The capital felony (murder) was committed while the defendant was engaged in the commission of a kidnapping. The jury found the defendant guilty of armed burglary and armed kidnapping. (R. 2603). (Underlining ours).

Thus, without independent proof of an armed defendant in the commission of kidnapping and burglary, a confession was admitted, a jury was instructed about firearms, their verdict affirmed the use of a firearm, the Court found the armed convictions as a factor in aggravation and the penalties were enhanced. We respectfully submit, this is hardly harmless error.

V.

THE COURT ERRED IN ITS DENIAL OF DEFENSE MOTIONS TO:

A. BAR EVIDENCE, ARGUMENT AND INSTRUCTION THAT A CIRCUMSTANCE OF AGGRAVATION IN THIS CASE WAS THAT THE MURDER WAS HEINOUS, ATROCIOUS AND CRUEL, AND,

B. THAT THE MURDER WAS COLD, CALCULATED, AND PREMEDITATED WITHOUT JUSTIFICATION.

The facts on which the prosecution relied in seeking applicability of these factors, identified herein as A and B, stem from Defendant confronting his estranged common law wife on a well traveled roadway during morning traffic, arguing, ordering her out of her car and into his, possibly grabbing her by the arm, continuing their argument as they drove. Within moments, after the victim promised to return to Farinas to start over, she ran from the car. Farinas followed, carrying a gun and shot her three times, first in the back and then twice in the head. According to the medical examiner, the pain associated with the first shot was minimal -- like a kick, and death was instantaneous with the subsequent shots. The entire transaction occurred in seconds.

A.

This Court has vacated the death penalty in several cases in which the aggravating factor of heinous, atrocious and cruel had been erroneously found applicable by the trial court in situations analagous to the case at bar in that they involve argument among

friends or spouses, sudden violent acts, and relatively quick death.

In Kampff v. State, 371 So. 2d 1007 (Fla. 1979), the penalty was vacated for a murder by the rejected spouse who, like Farinas, was obsessed by the goal of reuniting. The victim was shot three times in front of witnesses in a retail bakery.

In Ross v. State, 474 So. 2d 1170 (Fla. 1985), where death of the wife occurred as a result of bludgeoning, even though the murder was found to be heinous, the penalty was vacated in view of the fact that the killing was the result of an angry domestic dispute in which the victim realized that the Defendant, like Farinas, was having difficulty controlling his emotions.

The recent opinion of this Court in Irizarry v. State, (11 FLW 568 Nov. 7, 1986, Case No. 66,947), demonstrates how carefully the trial court should scrutinize the aggravating factor of heinous, atrocious and cruel in a situation which results from a passionately obsessed rejected lover killing the one who spurned him. Mr. Irizarry fatally stabbed his ex-wife and injured her lover, was sentenced to death after a finding of four aggravating factors (including heinous, atrocious and cruel), but this Court vacated the death sentence stating, "furthermore, from the evidence presented, the jury could have reasonably believed that appellant's crimes resulted from passionate obsession." (11 FLW, 570).

Likewise, defendant Sam Wilson's death penalty was overturned despite the finding that the murder in question was heinous, atrocious and cruel where the killing resulted from a heated domestic confrontation. Wilson v. State, 493 So, 2d 1019 (Fla. 1986).

In Lewis v. State, 377 So. 2d 642 (Fla. 1979), after an argument, Defendant shot his friend of twenty years first in the chest and then in back during an attempt to flee, in front of victim's children. Despite the obvious tragic scene of the killing, this Court found it not to fall within the purview of heinous, atrocious and cruel.

In Blair v. State, 406 So. 2d 1108 (Fla. 1981), the husband-defendant's death penalty was vacated after this Court found factor of heinous, atrocious and cruel inapplicable to a situation in which the wife was killed "instantaneously" by three gunshots to the head and then buried in the backyard.

The following cases are offered as additional authority to demonstrate that the case at bar does not fall within the parameters of the heinous, atrocious and cruel factor:

1. State v. Dixon, 283 So. 2d 1 (Fla. 1973)

> It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies - the conscienceless or pitiless crime which is unnecessarily torturous to the victim. Dixon, at 9.

2. Mills v. State, 426 So. 2d 172 (Fla. 1985)

> The criminal act that ultimately caused death was a single shot from a shotgun. The fact that the victim lived for a couple of hours in undoubted pain and knew that he was facing imminent death, horrible as this prospect may have been, does not set this senseless murder apart from the norm of capital felonies. Mills, at 178.

3. Blanco v. State, 452 So. 2d 520 (Fla. 1984)

Victim shot six times during home invasion, dying on top of his fourteen year old niece - factor improperly found.

4. Daaton v. State, 480 So. 2d 1279 (Fla. 1985)

H. The capital felony was especially heinous, atrocious, or cruel.

CONCLUSION:

The aggravating circumstances does apply. The evidence is that an electric cord was put around the victim's neck while he was driving the car. Then he was transported to another section of Fort Lauderdale where he was strangled to death. Witnesses testified that the episode of killing Santi P. Campanella took 15 minutes and that the victim begged and pleaded for his life and that he said he would give them anything they wanted if they would let him live. Witnesses also testified that afterwards the Defendant James Thomas Deaton, said that while the victim begged for his life, he tightened the cord until the victim started spitting up blood. The evidence shows that the Defendant laughed and joked about how long it took the victime to die. The Defendant enjoyed unmercifully the pain and suffering the victim was forced to endure. Therefore, this crime was especially conscienceless, pitiless and unnecessarily torturous. Deaton, at 1282.

5. Breedlove v. State, 413 So. 2d 1 (Fla. 1982)

The trial court properly found the murder to be heinous, atrocious and cruel. Although death resulted from a single stab wound, there was testimony that the victim suffered considerable pain and did not die immediately.

6. Steinhorst v. State, 412 So. 2d 332 (Fla. 1982)

Factor properly found where victims were bound, gagged, and confined in small van before being shot in skull, execution style.

7. Hooper v. State, 476 So. 2d 1253 (Fla. 1985)

Factor properly found where death accomplished by torturous strangulation after numerous wounds.

8. Clark v. State, 443 So. 2d 973 (Fla. 1983)

Factor improperly found where disabled, elderly woman shot during robbery and died in the presence of her husband.

9. Bottoson v. State, 443 So. 2d 962 (Fla. 1983)

Factor properly found where victim was abducted, stabbed fourteen times in back and once in abdomen, and death was caused by being run over with automobile.

10. Barclay v. State, 343 So. 2d 1266 (Fla. 1977)

Factor properly found where victim was stabbed while begging for mercy and then shot to death by shots to head.

11. Johnson v. State, 465 So. 2d 499 (Fla. 1985)

Factor properly found where death caused by repeated strangulation.

12. Johnson v. State, 497 So. 2d 863 (Fla. 1986)

Factor properly found where elderly victim was stabbed deeply five times after strangulation and died slowly.

13. Scott v. State, 494 So. 2d 1134 (Fla. 1986)

Factor properly found where victim brutally beaten, transported to deserted area, regained consciousness, and beaten again.

14. Kokal v. State, 492 So. 2d 1317 (Fla. 1986)

Factor properly found. Robbery victims made to march to murder site at gunpoint then beaten viciously while pleading for life.

B.

From the facts it is readily apparent that this was not an execution-type nor a contract murder to sustain the charge that this was a cold, calculated, and premeditated murder, without justification.

An examination of cases decided by this Court as applied to the factual pattern in the case at bar affirms our position as in the following cases:

1. Card v. State, 453 So. 2d 17 (Fla. 1984)

   Factor properly found where victim taken from her office after being mutilated, driven to secluded area, killed by cutting of throat.

2. Jent v. State, 408 So. 2d 1024 (Fla. 1981)

   Factor properly found where victim beaten, transported, raped and then burned to death.

3. Middleton v. State, 426 So. 2d 548 (Fla. 1982)

   Factor properly found where defendant sat for hours holding gun and thinking about killing victim.

4. Phillips v. State, 476 So. 2d 194 (Fla. 1985)

   Factor properly found where victim shot while fleeing after having been shot twice in initial confrontation.

5. McCray v. State, 416 SO. 2d 804 (Fla. 1982)

   "Finally, we conclude that this was not a murder committed in a 'cold, calculated, and premeditated manner without pretense of moral or legal justification.' Section 921.141(5)(i), Fla. Stat. (1979). That aggravating circumstance ordinarily applies in those murders which are characterized as executions or contract murders, although that description is not intended to be all-inclusive." McCray, at 807.

6. Cannady v. State, 427 So. 2d 723 (Fla. 1983)

   "During his confession appellant explained that he shot Carrier because Carrier jumped at him. These statements establish that appellant had at least a pretense of a moral or legal justification, protecting his own life.

   The trial judge expressed disbelief in appellant's statements because the victim was a quiet, unassuming minister and because appellant shot him not once but five times. Though these factors may cause one to disbelieve appellant's version of what happened, they are not sufficient by themselves to prove beyond

a reasonable doubt that the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification." Cannady, at 730.

7. Herzog v. State, 439 So. 2d 1372 (Fla. 1983)

"The trial court found that the facts supporting this factor are as follows: '(T)he killing was the consummation of prior threats and arguments based on defendant's belief that the victim had previously taken some of his money or drugs.' This finding speaks to the issue of premeditation, however it is not sufficient to establish the requirement that the murder be "cold, calculated . . . and without any pretense of moral or legal justification." Herzog, at 1380.

8. Maxwell v. State, 443 So. 2d 967 (Fla. 1983)

"Proof of this aggravating circumstances requires a showing of a state of mind beyond that of the ordinary premeditation required for a first degree murder conviction. Here the evidence showed that appellant killed Donald Klein intentionally and deliberately but there was no showing of any additional factor to establish that the murder was committed in a 'cold, calculated, and premeditated manner without any pretense of moral or legal justification.'" Maxwell, at 971.

9. Hardwick v. State, 461 So. 2d 79 (Fla. 1984)

Factor improperly found despite evidence that defendant planned other crime against victim; premeditation cannot be transferred from other felony to murder.

10. Herring v. State, 446 So. 2d 1049 (Fla. 1984)

Factor improperly found where defendant first shot in purported self defense but then shot a second time to kill during course of convenience store robbery.

11. Peavy v. State, 442 So. 2d 200 (Fla. 1983)

"While some may view this homicide as cold, calculated, and premeditated, it does not meet the standard for finding this aggravating circumstance. (citations omitted). This murder occurred during the commission of a burglary and robbery and is susceptible to other conclusions than finding it

committed in a cold, calculated, and premeditated manner. The trial court improperly found the existence of this aggravating circumstance because the evidence does not establish it beyond a reasonable doubt." Peavy, at 202.

12. Gorham v. State, 454 So. 2d 556 (Fla. 1984)

Prohibits transferring of premeditation for felony to murder which occurs in the course thereof.

13. Johnson v. State, 465 So. 2d 499 (Fla. 1985).

Factor properly found where victim was killed by repeated strangulation after escaping from first attempt to kill her.

The killing in the case at bar was no more, no less, than a domestic relationship which went awry. On the facts, neither the heinous nor cold, calculating circumstances of aggravation were applicable.

Appropriate Defense Motions in this regard were made to the trial Court. (R. 2578-2582 and R. 2588-2590).

VI.

THE COURT ERRED IN ITS IMPOSITION OF THE EXTREME PENALTY IN LIGHT OF TESTIMONY OF MEDICAL EXPERTS AND ITS FINDINGS IN MITIGATION.

AGGRAVATING CIRCUMSTANCES

I. Finding

The capital felony (murder) was committed while the defendant was engaged in the commission of a kidnapping. The jury found the defendant guilty of armed burglary and armed kidnapping.

II. Finding

Evidence was introduced of the execution style murder by firing two bullets into the head of the victim following the defendant's having paralyzed the victim from the waist down with a gunshot through her spine and while the victim was fully conscious and aware of her impending demise from the defendant; and after the defendant traversed thirty feet upon paralyzing the victim and then unjammed his pistol three times prior to executing the victim, all of which shown an especially heinous, atrocious, and cruel crime.

III. Finding

The evidence establishes that this homicide was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. The defendant stalked Elsidia Landin, waited outside her home; followed her until her father was dropped off at work; followed her until an opportune moment to force her off the road; kidnapped her while armed and later, chased

her when she tried to escape, and shot her and paralyzed her prior to executing her.

MITIGATING CIRCUMSTANCES

IV. Finding

This Court, at a pre-trial competency hearing, was presented with psychiatric and psychological testimony concerning the defendant's competency to stand trial. This Court listened to the testimony at this hearing and found the defendant to be a malingerer and not suffering from mental disease, defect or infirmity that would render him incompetent to stand trial. Furthermore, and more importantly, this Court listened to the psychiatric, psychological and lay testimony presented during the trial and at the sentencing hearing, particularly the testimony that dealt with the issue of malingering, and the Court finds that while the defendant was under the influence of a mental or emotional disturbance, * it was not of such a nature or degree as to be considered extreme; and the Court finds that this mitigating factor alone, or in conjunction with other mitigating factors, is entitled to little weight and is outweighed by the aggravating factors previously stated in this order. (*Underlining ours).

V. Finding

This Court was presented with psychiatric and psychological testimony prior to trial. This Court listened to the testimony at that hearing and found the defendant to be a malingerer and not suffering from a mental disease, defect or infirmity

that would render him incompetent to stand trial. Furthermore, and more importantly, this Court listened to the psychiatric, psychological and lay testimony presented during the trial and at the sentencing hearing, particularly the testimony that dealt with the issue of malingering, and the Court finds that while the defendant was somewhat impaired in his ability to appreciate the criminality of his conduct, and his ability to conform his conduct to the requirements of the law was impaired, the defendant's lack of appreciation of the criminality of his conduct and his inability to conform his conduct to the requirements of the law * was not of such a nature or degree as to be considered total or substantial. This Court finds that this mitigating factor, considered alone or in conjunction with other mitigating factors is entitled to little weight and is outweighed by the aggravating factors previously stated in this order. (*Underlining ours).

To better understand just how ". . . the defendant was somewhat impaired in his ability to appreciate the criminality of his conduct, and his ability to conform his conduct to the requirements of the law. . . ," it is necessary to revisit the testimony of the experts in this regard.

COMPETENCY HEARING

DR. LLOYD RICHARD MILLER testified he was an expert in forensic psychology (R. 26), appointed by the Court, (R. 27), after a 90 minute interview of Defendant found him competent to stand trial. (R. 29). Noted that jail psychiatrist diagnosed Defendant as

suffering from an anxiety disorder. (R. 28). Felt Defendant was feigning symptoms of mental illness or malingering. (R. 30). "He was just not telling the truth or he was just so mentally disturbed that he was incapable of providing acceptable or consistent responses. That is my belief," not that he is mentally disturbed. (R. 36).

He indicated he is waiting to get out of jail to live with deceased. (R. 41). He had apparent hallucination or delusion that somebody who is dead is still alive and coming to see him and that would be symptomatic if it were valid. He also exhibited some mental retardation, not knowing political figures. Ignorance would go to retardation. (R. 46).

He is forgetful and that would be organic brain damage if it existed. (R. 47). He had just too many diagnoses. (R. 48). It' possible his condition could have decompensated between my visit and the present time. (R. 49).

COMMENT: Most respectfully, we think this testimony indicates that if one has too many symptoms, this witness believes the patient is feigning. Interestingly enough, Dr. Miller believes this mentally healthy defendant could decompensate in jail from the time he interviewed him to the time of trial.

DR. CHARLES MUTTER testified as an expert in forensic psychology, found defendant competent to stand trial because malingering, opinion of which based upon inconsistent responses and changes in psychomotor activity and eye contact. (R. 55).

Thought defendant's judgment was impaired because he was

faking with Doctor. (R. 61). His awarencess about his own emotional problems was nil. (R. 63).

In his written report to the Court, Dr. Mutter ended same with: "I feel he is dangerous and should not be released under any circumstances whatsoever. (R. 1938).

COMMENT: Here is an evaluation that discounted all that was related to the doctor because the latter thought he was faking and in the doctor's opinion that was impaired judgment. His awareness about his own emotional problems was nil. Though mentally sound, this doctor believes him dangerous and he should not be released under any circumstances whatsoever. Without being irreverant, we believe this diagnosis is anything but normal. Rhetorically, it sounds crazy, does it not?

DR. DORITA MARINA testified as an expert in forensic psychology. Found defendant competent to stand trial, (R. 70), and malingering. (R. 72).

He spoke as a man who is in love with his wife who is alive. If speaking of the deceased as presently alive the indication would be that perhaps he has some sort of mental problem that would affect competency to stand trial. (R. 74). Education is borderline. Diagnosis: Borderline personality disorder which often includes, or may go along with a borderline intellectual function. (R. 75).

Borderline is lack of identification. Doesn't know who he really is. He may go over the border between normal and psychotic. (R. 80).

At time Doctor Marina saw him he had appearance of someone psychologically very ill; he looked schizo. (R. 86). If given an intelligence test he'd probably come out borderline intellectual function, between normal and abnormal as to retardation. (R. 88).

COMMENT: If this doctor had believed defendant her decision as to competency to stand trial might have been different. Even though she disbelieved him she diagnosed him as borderline personality disorder and intellectual function where he might cross between normal and psychotic. In fact his appearance was that of a schizo.

DR. A. M. CASTIELLO: It was stipulated would have testified as to matters contained in his report. (R. 91). He is a psychiatrist with the Forensic Service, The Institute, Jackson Memorial Hospital. (R. 1947). His opinion follows:

"It is considered that at the present time, the defendant may possess a factual, but not a rational, understanding of the proceedings against him, is not capable of properly assisting counsel in his defense, or of standing trial. . . this defendant is psychotic. He should be considered dangerous by reason of his mental condition, and committed to a maximum security (R. 1949), psychiatric facilty for further observation and treatment as needed."

COMMENT: He agreed with Dr. Mutter that defendant was dangerous and should be committed to a maximum security facility. The only difference between the two doctors' opinions in this regard was that Dr. Mutter's opinion seems to relate to a mentally healthy defendant while Dr. Castiello furnishes the only normal interpreta-

tion of the recommendation for incarceration and that is that this defendant is psychotic and should be confined for further observation and treatment as needed.

MEDICAL TESTIMONY AT PENALTY PHASE

DR. DAVID ROTHENERG, called by the Defense and accepted as a Court expert. (R. 1174).

Initial impression of defendant was he was suffering from major mental illness of paranoia schizophrenia. Saw him at jail 5 times. (R. 1176). Defendant has split personality, very clearly a paranoid schizophrenic. (R. 1177). He was absolutely not malingering. (R. 1181). He's in the twilight zone, still psychotic even though he can still recount when crisis situations are real. (R. 1184). Jail medical records showed he was on pills used for management of manifestations or indications of psychotic disorders, schizophrenica. It was his opinion defendant was insane at the time of the offense. (R. 1188).

COMMENT: Dr. Rothenberg, it is apparent, was the key witness for the defense on the sole defense offered, that of insanity at the time of the commission of the offense. The brutal, unconscionable attack to which he was subjected by the prosecutor which the trial Court countenanced by its denial of defense motions, was discussed elsewhere herein. Suffice it to say that of all the medical experts, Dr. Rothenberg interviewed him 5 times and like Dr. Castiello, found defendant psychotic.

DR. A. M. CASTIELLO, called by the Defense.

Saw defendant twice. Defendant suffers from a chronic mental major illness, a paranoid schizophrenic. (R. 1264). Psychotic means the ability to recognize reality is lost. Defendant basically lives in a fantasy world. (R. 1268). Defendant was not malingering. (R. 1269). His second interview of defendant confirmed his first diagnosis. Ther was some degree of improvement, (R. 1270), probably due to medication given him in jail. (R. 1271).

Could not reach an opinion as to insanity at time of offense (R. 1272), but anyone suffering from this illness would have increasing difficulty in coping with the stress related by accumulation of factors in this case. (R. 1275).

It was doctor's belief that defendant had been psychotic, chronically ill, for many years. (R. 1287). Interview conducted in Spanish. (R. 1294). Doctor had a doubt about defendant's mental state at time of offense. (R. 1295).

COMMENT: While Dr. Castiello had doubts as to the state of defendant's mind at the time of the offense, like Dr. Rothenberg he found defendant was a chronically ill paranoid schizophrenic.

DR. DORITA MARINA, called as a witness by the State, testified defendant told her he had been to a psychiatrist or psychologist in Cuba and had been taken to a place. (R. 1324). He was dressed in white and was given pills which he refused so was given injections. Dr. Marina didn't do any brain damage tests, but would have recommended a neurological or neuropsychological evaluation be done. (R. 132).

It is possible he could be a low borderline which means closer to psychotic than normal. This is a mental infirmity, disease, or effect. (R. 1351). In opinion of witness at time of shooting he knew nature and consequences and right from wrong. (R. 1352).

Premeditation doesn't fit with borderline impulsive acting out type of personality that I diagnosed him to be. He did not premeditate shooting. (R. 1357).

At time defendant shot Elsidia I don't believe he formed a conscious intent to kill her. At that moment it was as if he were killing himself. (R. 1364).

Facts of waiting at her house, followed her off the road, forced her to come with him, does not indicate a plan or premeditation. His statememt, I love you and before seeing you in the arms of another man I will kill, does not indicate a conscious decision on his part not to allow her to be with another (R. 1365), individual. Doesn't sound like a threat. I do not think he was capable of reflection. (R. 1366). I can not see the likelihood of him planning. When he said you ought to be killed, I simply wont' kill you, he is saying he won't. I don't think he really was thinking of doing it when he was saying the words. (R. 1367).

At the point where he shot her in the back, followed by two shots in her brain, he wanted her dead. (R. 1368). At that point he formed a conscious intent at that instant to kill her. His actions were that of a depraved mind and at that exact moment were the actions of a sick mind, (R. 1369), certainly regardless of human life. The term "sick" in this case means borderline person-

ality disorder. (R. 1370.

COMMENT: The testimony of Dr. Marina and Drs. Rothenberg and Castiello are conclusive evidence of defendant's mental illness throughout this occurrence.

DR. CHARLES MUTTER called as a witness by the State.

If he was truly hallucinating this would be a product of mental illness and coupled with a psychotic symptom of a mental disorder, would certainly cause me to question his sanity, (R. 1383). I thought he was malingering. (R. 1395). Witness'es opinion, defendant was sane, understood right from wrong and nature of consequences of his acts at time of offense. (R. 1399).

If he felt that she was trying to flee or leave him that would be an act of impulse, passion, of rage, but he'd still know it was wrong and against the law. (R. 1404). Mental capacity could've been diminished to degree, he was not reasoning to degree most logical people would, but I don't think he was insane. (R. 1405). Witness did not think defendant had initially had the intent to kill her. (R. 1415).

DR. LLOYD RICHARD MILLER, called as a witness by the State, testified there was some appearance of mental illness. (R. 1449). He was out of contact with reality to a degree but in witness'es opinion was malingering. (R. 1450). Defendant gave answers that would indicate he was not only crazy, but stupid. (R. 1454). The rest of this witness'es testimony was similar to same at the competency hearing. He finds most of his patients sane. (R. 1473).

There were lay persons who testified, but in the matter of life and death the greatest weight should be given to experts in the field of mental illness. In that regard, there were five expert opinions.

Three of the experts, Drs. Miller, Mutter and Marina, felt defendant was malingering. Of those three experts, Drs. Mutter and Miller were of the opinion that if they believed symptoms indicated in defendant's responses, he would be psychotic. However, Dr. Miller felt that there were too many symptoms to believe even though there was some appearance of mental illness and being out of contact with reality. Dr. Mutter said defendant's awareness of own emotional problems was nil. If defendant was truly hallucinating and this was coupled with defendant's psychotic symptoms of mental disorder, this would cause Dr. Mutter to question defendant's sanity. Defendant's killing could have been an act of impulse, passion, of rage. Nevertheless, Dr. Mutter considered (the malingering) defendant dangerous and that he should not be released under any circumstances whatsoever.

Dr. Marino, who shared the malingering opinions of Drs. Miller and Mutter, nevertheless felt defendant doesn't really know who he is, that he may go over border between normal and psychotic. His appearance was that of a person psychologically very ill; schizo. She diagnosed him as having a borderline personality disorder which often includes a borderline intellectual function. Premeditation doesn't fit with borderline impulsive acting out type of personality she diagnosed him to be. He did not premeditate the shooting, nor did he form a conscious intent to kill her. At that moment it was as if he were killing himself. He was not capable of

reflection. His actions were that of a depraved, "sick" mind at that exact moment of the killing.

Dr. A. M. Castiello's diagn sis was that defendant was and is psychotic. Like Dr. Mutter, Dr. Castiello considered defendant as dangerous, but unlike Dr. Mutter, gave the reason for that opinion and that was by reason of defendant's mental condition, for which he should be committed to a maximum security psychiatric facility for further observation and treatment as needed. While he could not form an opinion as to insanity at the time of the commission of the offense, a person suffering as was defendant of a major mental illness, that is, a paranoid schizophrenic, would have increasing difficulty in coping with the stress in this case. Defendant's ability to recognize reality is lost. He lives in a fantasy world. Dr. Castiello's opinion was that defendant was chronically ill for many years.

Dr. David Rothenberg's diagnosis agreed with that of Dr. Castiello, that defendant was a paranoia schizophrenia, a split personality, not a malingerer. Defendant was insane at the time of offense.

The trial Court in its findings relating to Mitigating Circumstances made the following observations, which we have for convenience identified by roman numerals:

> IV. " . . . and the Court finds that while the defendant was under the influence of a mental or emotional disturbance, it was not of such a nature or degree as to be considered extreme . . ."

And, again at our number V. herein:

V. ". . . and the Court finds that while the defendant was somewhat impaired in his ability to appreciate the criminality of his conduct, and his ability to conform his conduct to the requirements of the law was impaired, the defendant's lack of appreciation of the criminality of his conduct and his inability to conform his conduct to the requirements of the law was not of such a nature or degree as to be considered total or substantial. . . ."

In other words, the Court found three circumstances in mitigation which were:

1. Defendant was under the influence of a mental or emotional disturbance.

2. Defendant was somewhat impaired in his ability to appreciate the criminality of his conduct.

3. Defendant's ability to conform his conduct to the requirements of the law was impaired.

If, as in IV. hereof the trial Court expressed defendant was under the "influence" of a mental or emotional disturbance, then defendant was under the "weight, pressure, pull, prevalance, sway, predominance, upper hand, dominance, reign, control, domination, hold or spell of a mental or emotional disturbance. Roget's Pocket Thesauras, 58th Printing, 1963.

If he was "somewhat impaired" in his ability to appreciate the criminality of his conduct and his ability to conform his conduct to the requirements of the law, then his abilities were diminished in quantity, strength or value; his abilities were somewhat debased, decreased, deteriorated, diminished, enfeebled, lessened, reduced and weakened. Funk & Wagnall's New Practical Standard Dictionary, Volume I, p. 666.

It's apparent then that the trial Court found that because of his mental condition, which had the upper hand or dominance, his abilities were somewhat diminished, lessened or weakened.

This may not be sufficient to legally excuse the commission of the crime, but may we in all due reverence invoke the Creator's name and say: My God, does this, in all good conscience, not stop the sovereign State from the destruction of your creation?

Under the circumstances in the case at bar, if the execution of a human being is countenanced, even though the trial Court found him at the time under the pressure or upper hand of an emotional or mental disturbance which reigned over his ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law, is not the execution of the sentence more cold, calculated and heinous than the act of the depraved, sick mind of the defendant?

Such an execution would merit the exclamation of Marc Antony at the funeral of Julius Caesar: "O judgment, thou art fled to brutish beasts, and men have lost their reason." Julius Caesar, William Shakespeare.

As stated by this Honorable Court in State v. Dixon, 283 So. 2d 1 (Fla. 1973) at page 10:

> Mental disturbance which interferes with but does not obviate the defendant's knowledge of right and wrong may also be considered as a mitigating circumstance. Fla. Stat. Section 921.141(7)(f), F. S. A. Like subsection (b), this circumstance is provided to protect that person who, while legally answerable for his actions, may be deserving of some mitigation of sentence because of his mental state.

If this were a mere counting process, three of the five medical experts, to wit, Drs. Rothenberg, Marina and Castiello testified as to the absence of what at common law would be called a cold, cruel, abandoned heart. This defendant was mentally **ill.** Even Dr. Mutter, who insisted defendant was malingering, recommended defendant be committed as a dangerous person. We submit, no doctor would recommend incarceration of a mentally healthy person as a result of psychiatric evaluation.

We need not remind this Court of disparity in sentences. In State v. Dixon (supra), this Court stated at page 10 of the Reporter:

> Review by this Court guarantees that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case. No longer will one man die and another live on the basis of race, or a woman live and a man die on the basis of sex. If a defendant is sentenced to die, this Court can review that case in light of the other decisions and determine whether or not the punishment is too great. Thus, the discretion charged in Furman v. Georgia, supra, can be controlled and channeled until the sentencing process becomes a matter of reasoned judgment rather than an exercise in discretion at all.

Without waiving any points on appeal which go to the propriety of the convictions, we pray this Court to consider the excessiveness of the punishment in this cause of a man, who, in the opinion of three medical experts, was incapable of the state of mind which would merit the imposition of a sentence that is without recall.

In addition, the Counts wherein the corpus delecti was not established independently of the confessions, if held erroneous, as hereinbefore argued, would leave the three mitigating circumstances found by the Court as opposed to only one aggravating circumstance for consideration in imposing penalty, and would entitle defendant to a reconsideration of his sentence as discussed in Randolph v. State, 463 So. 2d 186 (Fla. 1984) at page 193. In Randolph, there were only two mitigating circumstances, the defendant's age and his impaired capacity due to the use of heroin. As this Court said therein:

> We cannot know whether this 'reasoned judgment' would have been different if the trial judge had considered only one instead of three aggravating circumstances before imposing the death penalty.

VII.

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. 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 the majority 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 truest sense. The sentence should be vacated as the death penalty in Florida as applicable to this case constitutes cruel and unusual punishment.

CONCLUSION

MAY IT PLEASE THE COURT:

Based upon the admission into evidence of a weapon illegally seized in an illegal search and a shocking photograph made more gruesome by State alteration of that which it portrayed, the judgment and sentence as to all three Counts should be reversed and remanded for a trial de novo.

When the sole defense was not guilty by reason of insanity, the unconscionable attack on the only key witness for the defense, which the prosecutor admitted to the Court was not based upon any evidence in the record, was of such magnitude that a mistrial was the only effective cure for this transgression. The prejudice to the defense carried through the guilt/innocence phase to the final penalty, and dictates reversal.

When two Counts charged Defendant with armed offenses, it was necessary for the prosecution to establish that part of the corpus delecti independently of the confessions. This they failed to do. In addition, at the start of the penalty phase, the trial Court's pronouncement that it issued a warrant for a fellow juror removed that mental veil enjoyed by American jurors and could have caused them to fear reprisal.

The Court erred in its denial of Defendant's Motions to bar evidence, argument and instructions that the murder was heinous, atrocious and cruel and further, cold, calculated and pre-

meditated. It also erred in its findings with regard thereto.

The final solution, death, was an erroneous sentence in view of the medical opinions and the Court's own findings in mitigation. The evidence does not support that this ill man should suffer a terminal cure.

Finally, we shall always argue that the death penalty is cruel and unusual punishment, as archaic as the appendix in the human body or witch hangings. It is particularly cruel to execute a man for acts committed while his judgment was impaired by mental illness. We respectfully submit that if this Court disagrees with any of our contentions, please consider the cumulative effect that these matters had, or could reasonably have had, upon the jurors and their advisory opinion of execution.

We submit, justice requires that the entire judgment and sentence be reversed and remanded for a new trial on all Counts, or at least on Count I, the murder charge.

Further, we urge this Court, if it disagrees with the foregoing, that at the very least the judgment and sentence should be reversed and remanded for the trial Court to reconsider its sentence without the aggravating circumstances of a heinous or a cold homicide.

Respectfully submitted,

WILLIAM A. CAIN
Special Assistant Public Defender
Suite 401
11755 Biscayne Boulevard
North Miami, Florida 33181
Telephone: (305) 893-2246

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief of Appellant was mailed to: MARK DUNN, ESQUIRE, Office of the Attorney General, Suite 820, 401 N. W. 2nd Avenue, Miami, Florida 33128, this 14 day of OCTOBER, 1987.

'WILLIAM A. CAIN