IN THE FLORIDA SUPREME COURT

JORGE ZERQUERA,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO: 70,751

ON APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA CRIMINAL DIVISION

BRIEF OF APPELLANT

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INTRODUCTION

This matter is a capital appeal taken from judgments and a sentence of death upon the Appellant, Jorge Zerquera. The Appellee is the State of Florida. Each party will be referred to in this brief as they stood before the trial court. We will use the symbol "R" to refer to pages of the record filed with this Court: the symbol "T" will be used to refer to the transcript of the court proceedings: the symbol "S.R." will refer to the Supplemental Record filed with this Court: and the symbol "A" will be used to refer to an Appendix we have attached to this brief. All emphasis, by means of underlined portions of the brief, are supplied, unless the contrary is indicated.

STATEMENT OF THE CASE

Mr. Zerquera was indicted along with a co-defendant, Scott Puttkamer, on January 9, 1985, in the Eleventh Judicial Circuit in and for Dade County, for the crimes of First Degree Murder, Armed Robbery, Grand Theft, Second Degree Arson and Tampering with Physical Evidence. (R. 1-3A). On the eve of the joint trial, the State of Florida waived death as a penalty. (T. 668). Trial began on February 10, 1986, and when the specter of antagonistic defenses rose in the opening statements, Mr. Zerquera's Motion for Severance was granted. (R. 84-95). On February 13, 1986, Mr. Puttkamer negotiated a deal with the State to testify against Mr. Zerquera, (S.R. 160-1741, and Mr. Zerquera's case was reset for trial.

The State of Florida later changed its position, and

announced it would seek the death penalty. Defense motions to preclude that penalty on constitutional grounds were filed, (R. 84-94, 98-99), and denied on April 22, 1986. However, the Honorable Amy Steele Donner, Circuit Judge, entered a written order on May 9, 1986, finding that on the facts of this case, a jury would "have to return a non-death penalty recommendation to the court," (T. 721), and "that a jury could not validly recommend the death penalty in this case." (R. 103). That order was appealed to this Court, which reversed on the authority of State v. Bloom, 497 So.2d 2 (Fla. 1986). State v. Donner, 500 So.2d 532 (Fla. 1987).

The second trial of Mr. Zerquera began before Judge Donner on February 25, 1987, a Wednesday. (R. 4; T. 754). The lawyers closed to the jury that Friday, February 27, and the unsequestered jury was sent home for the weekend. (R. 11; T. 1241). The jury returned on Monday morning, March 2, 1987, were instructed on the law, and retired to deliberate. Verdicts of guilty on all charges were returned that afternoon. (R. 24; T. 1292).

The penalty phase was scheduled by the trial judge for March 31st - twenty-nine days later, (T. 1299). At that hearing, after less than an hour of deliberation, the jury recommended the penalty of death by a vote of eight to four. (T. 1408).

The trial court set May 13, almost six weeks later, for sentencing, and on that date, heard an impassioned request from the family of the victim for a sentence of death. (T. 1413-1415). The State concurred, (T. 1423), and the trial judge found

that, notwithstanding her finding that an equal number of aggravating and mitigating circumstances had been proven, death was the appropriate sentence. (T. **1428, 1429).** A written order setting forth those findings and the court's sentence was filed a month later, on June 11, **1987.** (R. **294-297).** A Notice of Appeal was promptly filed, (R. **298),** and this appeal ensues.

STATEMENT OF THE FACTS

A. Introduction

A cab driver was killed and his taxi burned in the City of Hialeah on October **31, 1984.** The crime went unsolved, and the police had no leads, until Scott Puttkamer was arrested two weeks later for some car burglaries. (T. **517-519).** With the hope of obtaining leniency from the police, he made up a story, telling the detectives that he had heard his ex-roommate Jorge had killed the cab driver. (T. **519).** When it was made obvious to him that the police knew he was lying, (T. **534-542),** Puttkamer changed his story. He then told the police that he participated in a robbery of the cab driver, but it was Jorge who pulled the trigger. (T. **547).** Mr. Puttkamer was arrested for First Degree Murder.

The police soon located Jorge, and took him to the police station. (S.R. 15). Although he refused to discuss the homicide, he was nevertheless interrogated. (S.R. 30, **57).** After hours of questioning, and after being confronted with Scott Puttkamer's written accusation, (s.R. **58-60),** Mr. Zerquera gave a statement that was the mirror-image of Puttkamer's: Jorge participated in the robbery, but Scott pulled the trigger. (R. **133-136).** The

police investigation ended on that date, November 28, 1984, with the procurement of this statement, and the men were indicted for First Degree Murder, Robbery, Grand Theft [of the cab], Second Degree Arson [of the cab], and Tampering with Physical Evidence [arson of the cab]. (R. 1-38).

B. The Waiver of Death

The prosecution of the joint defendants proceeded slowly during 1985. The first critical event occurred on October 4, 1985, when the court conducted an evidentiary hearing on the Defendant's Motion to Suppress the statement he made to the police. (R. 33-38A). That hearing is the key event to our appeal regarding the guilt phase of this trial, as the trial court erred in denying the motion. See Point I, infra. The facts elicited at that proceeding will be set forth infra, within the Argument section of our brief, and will not be recounted here to avoid duplicity. It would suffice to say that the interrogation of Mr. Zerquera proceeded despite his repeated requests not to be questioned about the homicide.

Following the denial of Mr. Zerquera's Motion to Suppress on December 12, 1985, (T. 502), and the denial of Mr. Puttkamer's motion to suppress, (T. 601), the parties filed motions for severance and motions attacking the constitutionality of the death penalty. (R. 380-436; T. 606). The State of Florida announced on February 3, 1986, on the eve of trial, that it would waive the death penalty as to each defendant. (T. 668). A non-death qualified jury was selected for a joint trial on February

10-12, 1987, (R. 12-22), and following the presentation of opening statements, Mr. Zerquera's Motion for Severance was granted due to the antagonistic nature of each defense. (R. 21). During the recess, two events occurred. First, Mr. Puttkamer negotiated a plea to Second Degree Murder and agreed to testify against Mr. Zerquera. (S.R. 160-174). Second, the prosecutor represented to counsel for Mr. Zerquera that "it might be better for you to get another jury." (T. 719). The defense acquiesced to that suggestion, and the jury was released. (R. 22).

C. The Second Trial

The State about-faced, and announced that with the procurement of Mr. Puttkamer's testimony, it would now seek the death penalty. A flurry of defense motions were filed, attacking this maneuver as a violation of the double jeopardy clause, unconstitutional, and vindictive. (R. 84-98A). While those grounds were unsuccessful, the trial court orally ruled on April 22, 1986, and in a written order entered on May 9, 1986, that death would be precluded because (1) the State induced the Defendant to forego trial by a non-death qualified jury, and was now estopped from seeking that penalty; (2) the Defendant had received ineffective assistance of counsel for allowing this predicament to arise, and (3) that after considering the aggravating and mitigating circumstances presented by the facts, "a jury could not validly recommend the death penalty in this case." (R. 102-105; T. 716-720). That ruling was appealed to this Court, which reversed. State v. Donner, 500 So.2d 532 (Fla.

1987).

Trial commenced on February 25, 1987 following the mandate from this Court. The trial was relatively uncomplicated, burdened only by a dispute between the parties as to who pulled the trigger of the murder weapon. The State presented the taped statement by Mr. Zerquera, the testimony of Scott Puttkamer, and several civilian and police witnesses to establish several undisputed details.

In rapid succession, and without dispute, the State presented a scenario of the events which occurred on October 31, 1984. Officer Valerie Fiallo of the Miami Springs Police Department discovered an unoccupied cab in flames in the early morning hours, and learned by radio that the car was owned by Armando Hernandez. (T. 961-965). Fiallo learned that the cab had been dispatched to pick up a fare at a 7-11 across from the Parkway Inn, and that a body had been found nearby by a fellow on his way to work. (T. 979-981). Officer Fiallo picked up Mr. Hernandez, and he identified the burned cab as his vehicle. He also identified the body found in nearby Hialeah as Robert Shane, the driver of the cab. (T. 967, 968).

Officer Tim Murphy found the body Mr. Shane in front of a building occupied by the Craftsman Body Shop. Mr. Shane had his pockets turned out and had been shot one time in the back of the neck. (T. 981-989). An assistant medical examiner arrived at the scene, and told the jury that the single gunshot put Mr. Shane into an immediate coma, and caused his death. (T. 990-1015). The projectile removed from the body of Mr. Shane was identified by a

firearms technician as having been fired from a .22 caliber magnum derringer, which was never located. (T. 1019-1039).

The only piece of evidence available to the police when they began their investigation was a tape recording of a telephone call made to Super Yellow Cab on October 31, 1984 directing a cab be sent to pick up a fare. (T. 1073-1075, 1136-1139). But when Scott Puttkamer was arrested almost three weeks later for auto theft, the pieces fell into place.

Detective Gary Venema of the Hialeah Police Department was called by officers of the Miami Springs Police Department on November 19, 1984, and told that a person they had arrested for auto theft claimed to know about the death of the cab driver. Detective Venema interviewed the man, Scott Puttkamer, who told him that Jorge, his roommate, may have committed the homicide, but he himself was uninvolved. (T. 1141, 1142). Venema knew Scott was lying, as it was Puttkamer's voice on the tape kept by the cab company, and Puttkamer knew details he claimed to have read in the newspaper at a time when no publicity had occurred. Rather than confront Puttkamer, he merely asked him to be polygraphed.

When Mr. Puttkamer failed the polygraph miserably, (T. 1169, 1170), he changed his story. Puttkamer now claimed that he and his roommate at the Parkway Motel, Jorge Zerquera, committed the robbery of the cab driver as they had no money and had not eaten for days. Puttkamer claimed that Jorge Zerquera, not he, shot Mr. Shane. (T. 1144, 1145). Puttkamer was arrested following this statement, and charged with First Degree Murder.

The twenty-six page statement by Puttkamer led the police to Craftsman Body Shop, where Mr. Shane's body was found, and where Mr. Zerquera had been employed. Detective Venema told the jury he found the Defendant there on November 28th, 1984, and Mr. Zerquera consented to go to the police station for questioning. (T. 1198). Following almost four hours of interrogation, Mr. Zerquera gave a taped statement that was played for the jury over a defense objection. (T. 1150, 1160). That statement was essentially the same as Puttkamers with one critical difference: the killing was done by Puttkamer, to the surprise and without foreknowledge by the Defendant.

The prosecution offset the introduction of the Defendant's statement with the testimony of Scott Puttkamer. He told the jury that he knew Jorge for four to five months and was roommates with him at the Parkway Motel on October 31, 1984. (T. 1080, 1081). He had been out of work for two weeks, and Jorge only worked occassionally at Craftsman as a night watchman. According to Puttkamer, neither of them had any money, they were extremely hungry, and Jorge allegedly suggested that they rob a cab. (T. 1082, 1083). Puttkamer had the motel operator call a cab, and the company was directed to send a cab to the 7-11 across the street from the motel. (T. 1084). He claims that Jorge got in the back seat behind the driver, Puttkamer got in the back passenger side [Jorge claimed the opposite in his statement] and Jorge directed the driver to the address of Craftsman. (T. 1085, 1086). Puttkamer told the jury that when they arrived at the address, Jorge fired the gun once, while Puttkamer jumped from

the cab and ran back to the motel. (T. 1087). Puttkamer claimed that Jorge was already at the motel when he arrived there, with cigarettes and food, and Puttkamer claims he was told at gunpoint that if he told the police what had occurred, he was an accessory and a dead man. (T. **1090-92).** Notwithstanding this threat, Puttkamer lived with the Defendant for another two and one half weeks until his arrest on November 14 for auto theft. (T. **1092-94).**

Puttkamer said that he volunteered to the officers investigating the auto theft that he knew something of the cab drivers murder to help clear his conscience. (T. **1094).** However, he told them a lie - he claimed that he had no personal knowledge of the incident, but suspected his ex-roommate. (T. **1096).** This false statement, to "clear his conscience," was easily transparent to the police. After Puttkamer failed the lie detector test, he gave a second statement a week later because "I felt it would be better on me if I did." (T. 1097). In the second statement Puttkamer admitted his involvement in the robbery, attributed the entire idea and the killing to Mr. Zerquera, and portrayed himself as a meek and subservient follower.

The jury learned from Puttkamer that he pled guilty on February 13, **1986** to the reduced charges of Second Degree Murder and Robbery with a Weapon [not a firearm]. (T. 1101). He told the jury that the sentencing range he faced was ten years to life. (T. **1102).** That testimony was false, but went uncorrected by the prosecutor. In fact, the sentencing guidelines score

sheet for Mr. Puttkamer was twelve to seventeen years (R. 442). More significantly, Mr. Puttkamer gave a sworn statement on April 3, 1986 claiming "the State came to me and said that they would give me ten years on Second Degree Murder and Armed Robbery and drop the other charges in this case." (A. 5). Mr. Puttkamer went unimpeached.

This deception by the prosecution and its witness pales in comparison to the State's misleading the jury, and defense counsel for Mr. Zerquera, regarding the .22 caliber bullets similar to the projectile which killed Mr. Shane which were found by the police among the personal possessions of Mr. Puttkamer. Because the jury obviously recommended death believing Mr. Zerquera was the triggerman, the State's deception was critical, and requires a more detailed discussion.

On February 3rd, 1986 the eve of the first trial, before Mr. Puttkamer became a witness, and after a year of uneventful discovery which failed to uncover any physical evidence suggesting which of the two co-defendants pulled the trigger, the State revealed an important discovery. It claimed that it had found, among the possessions owned by Scott Puttkamer, a plastic pouch, his cooking utensils [he was a chef], his old paycheck stubs, and some .22 caliber bullets and a casing similar to the projectile which killed Mr. Shane. When the State learned of this new evidence, it promptly alerted counsel for Puttkamer - not Zerquera - who immediately received a continuance to depose the officers who had found the items. (R. 652-664). Trial was rescheduled for one week to allow Puttkamer's lawyers time to

investigate this new and grave evidence.

Puttkamers lawyers - again, not the Defendant's - deposed the two key officers the next day, February 4, 1986. They learned that the incriminating bullets and a casing were found in a plastic bag kept by Mr. Puttkamer, among his paycheck stubs, his cutlery utensils, and miscellaneous bike repair items. (A. 10). There was not the slightest hint that these bullets belonged to anyone but Puttkamer. His lawyers immediately filed a written motion to exclude, to dismiss, for sanctions, and demanded an evidentiary hearing. (R. 429-432).

An evidentiary hearing was conducted on February 10, 1986. Neither the Defendant nor his lawyer were even present, as the as the parties agreed that the bullets belonged to Puttkamer. (S.R. 126-152). In fact, the lawyer for Mr. Zerquera did not arrive for that hearing until after it was over. (S.R. 150-152). Puttkamer's lawyers argued that the police illegally searched his property, and that no chain of custody could be shown. They conceded that the bullets were found in their client's possession, but argued nevertheless for exclusion and sanctions. (S.R. 135-138). In fact, so damaging were the bullets to Puttkamer's claim that he was not the shooter, his lawyers argued that their discovery was favorable to Mr. Zerquera's defense and the failure of the State to notify Mr. Zerquera of the discovery was a Brady violation. (S.R. 143). Because the State was unable to justify its warrantless search of Mr. Puttkamer's possession, or a valid exception to the Fourth Amendment, the Court found the evidence inadmissible at the joint trial. (S.R. 147).

But when Puttkamer became a State witness, his bullets took on a chameleon-like quality. They became, at the second trial, in the rhetoric of the prosecutor and the testimony of Puttkamer, Jorge's bullets. (T. **1227, 1228).** The prosecutor continuously objected and limited the cross-examination of Puttkamer regarding the bullets, claiming they were found in Mr. Zerquera's suitcase. (T. 119). The prosecutor fought all questions by the defense regarding the bullets found in Puttkamer's belongings, because "it goes to the issue of whether or not this man [Zerquera] is the shooter, and that is the issue that [his lawyer] is trying to deal with in this case." (T. **1172).** This deception by the State of Florida, and the failure of the prosecutor to correct the false testimony of Puttkamer and Detective Venema concerning the bullets, made the jury's recommendation of death an unreliable result predicated upon false and misleading testimony improperly condoned by the prosecution.

The State of Florida rested with the introduction of Mr. Zerquera's taped statement. (T. **1185).** The Court rejected the factual hypothesis of an accidental discharge of the gun when the cab was placed into park, (T. 1185), and denied all motions for acquittal. (T. **1186-1194).** The Defendant rested without presenting a case. (T. 1191, **1194).** The trial, which began on Wednesday, February **25, 1987** closed to the jury on Friday of the same week, February **27.** That afternoon, the trial was recessed for the weekend, and the jurors were released with the simple admonition that they would return Monday morning to deliberate. **(R. 11;** T. **1241).** That Monday, March **2,** the jury was instructed,

and returned verdicts of guilt as to all charges over four hours later. (T. 1283, 1292). The foreman of the jury was Mr. Vitkovitch (R. 244-48); that information is superfluous, until it is pointed out that he is a former cab driver left on the jury by the defense. (T. 891). Sentencing was set by the court for March 31, 1987, over the mild protest from the defense that such a delay would improperly divorce the jurors from the case. (T. 1297-1299).

D. The Penalty Phase

The State had waived death as a penalty at one time, and the trial judge had ruled, orally and in writing, that death was not an appropriate penalty under the facts of this case. It was ironic, then, that the first indication that death was imminent came in a comment made by the trial judge when she was a spectator at the sentencing of Puttkamer on March 4, 1987, when defense counsel for Mr. Zerquera was not present. Judge Donner remarked from the gallery that Mr. Puttkamer should not serve his ten year sentence in "the same facility that Jorge Zerquera will be kept in, if he is not put on death row." (T. 1317). Had counsel been there, he would have known - perhaps for the first time - that the tide had changed.

The sentencing hearing consumed part of the afternoon of March 31, 1987. The State relied upon the evidence it had presented at the trial, and called Scott Puttkamer to testify to a piece of evidence that had never surfaced in either of his two statements to the police, his deposition, or his trial testimony. Puttkamer testified that Mr. Zerquera allegedly told

him two days after the incident that he shot the cab driver because he did not want any witnesses. (T. 1351). Cross-examination was limited to evoking the disparity in sentences between Puttkamer's ten years and Mr. Zerquera's death sentence. (T. 1349).[1]/ The trial court restricted cross-examination by the defense regarding drug usage by the two men on the date of this shooting, (T. 1351), and ruled that the defense had to call Puttkamer to elicit this mitigating evidence. (T. 1353).

The defense called three witnesses. Sahara Zerquera, the Defendant's mother, told the jury of the incredibly disturbing effect upon Jorge of his father's death in late 1982. He began hearing his father's voice thereafter, and had to leave the Navy because of this disturbance. The family sent Jorge to live in Florida with relatives, believing a change in environment would ameliorate the extent of the devastation. (T. 1356-1360). An aunt, Caridad Zerquera, testified that Jorge came to live with her in Florida, and stayed with her from June until September of 1984. He seemed noble and sweet to her: she recalled he was unable, when requested by a neighbor, to kill a cat that was infirm and needed to be put to sleep. Jorge lost his job as a security guard, and left her home to avoid having his car repossessed. (T. 1366-68). Finally, a neighbor from Jorge's home town told the jury that she travelled all the way from

[1]/ Puttkamer was not impeached by a prior inconsistent statement he made that he did not recall what he and Jorge discussed after the incident. This inconsistency will be discussed in Point V, infra.

Massachusetts to tell them that she had known Jorge since his birth, and he was a good, hard-working boy. She recalled the shock which befell the entire family on the death of their father and its strong impact upon Jorge. (T. 1370-72).

The only true issue litigated by the defense was reduced to a nutshell in the cross-examination of Detective Venema, who was called in rebuttal by the State. The defense asked two questions:

> Q: You have no physical evidence, no fingerprints?
> A: No, sir.
> * * *
> Q: You don't know for a fact whether Jorge was lying or Scott was lying about who had the gun?
> A: No, sir.

(T. 1376).

Following argument of counsel, the court instructed the jury. The Court limited the aggravating circumstances to (1) was the crime committed during the crime of robbery and **(2)** was the murder committed for the purpose of avoiding or preventing a lawful arrest or affecting an escape from custody. **(T. 1401-1403).** Although the only evidence regarding the second circumstance was the uncorroborated and suspiciously inconsistent contention offered by Mr. Puttkamer, the jury was not instructed to "use great caution in relying on the testimony of a witness who claimed to have helped the Defendant commit a crime . . . particularly . . . when there is no other evidence tending to agree with what the witness says about the Defendant." See Instruction **2.04(b),** Accomplices, Fla. Stnd. Jury Inst. After fifty-five minutes of deliberation, (T. 1407), Foreman Vitkovitch

returned a signed verdict recommending death by a vote of eight to four. (T. **1408).**

Sentencing was set for April **14, 1987** (T. **1409),** then reset for May 13. The court heard argument of counsel, and heard an impassioned plea from the victim's daughter, Sheila Smith. Ms. Smith asked that the death penalty be imposed, (T. **1414),** as did the State of Florida. (T. **1423).** The entreaty had a significant impact on the trial judge, who responded:

> THE COURT: Well, let me say something to you because I'm sure it was difficult for you to come and talk to me and talk in this courtroom.
> Whatever the Court rules after hearing all the testimony before today, I understand your pain and sufferins and I have great feelings of sympathy for you and your family. I have watched your mother and I believe it's your other sister, at least, I recognize--
>
> MS. SMITH: Both my sisters.
>
> THE COURT: And their children who have sat here, in effect, year after year because this started last year and perhaps even way before this; I'm not even sure. This is **1987** and this began in **1984** and I know that I've seen you all here for several years and I know your great interest in following this trial and I'm sure it's out of love for your father--
>
> MS. SMITH: Yes.
>
> THE COURT: --and concern that justice is served.

(T. **1414-15).**

The impact of this demand for justice from the daughter of Mr. Shane had an immediate effect - the court phrased its sentence in terms of the need of the family of Mr. Shane to feel that justice is served. The court imposed the death sentence by

stating:

> THE COURT: Mr. Zerquera, please come before me.
> Mr. Zerquera, perhaps you are right, perhaps that the sentence I do give you will be incorrect. If I sentence you to life imprisonment, the family of Robert Shayne [sic] feel that justice has not be served. If I sentence you to death by electricution, you feel that I have sentenced improperly and incorrectly because you feel that you are not the person who commited the crime.
> In any event, through your own statements you have admitted that you were on the scene at the crime when Mr. Shayne [sic] was murdered. This is one of the most difficult parts of being a judge. You're only **24** years of age and except for this case, it appears that you're not significantly involved with the law; however, balancing this, the family of Robert Shayne [sic] can never have the love, comfort and protection of husband, father and grandfather.
> In addition, I am sworn to uphold the law of the State of Florida and the death penalty is part of our Florida statutes and is recognized by our courts. The courts have long recognized the jury's recommendation as most persuasive because it is a statement from members of the community and how they feel concerning the crime that was tried and the person who was tried for the crime.
> I have struggled with this case because of your age, but the crime that was committed was cold and calculating and after spending many weeks and at this time months considering my verdict, the Court hereby sentences you to death by electricution for the murder of Robert Shayne [sic].

(T. 1428, 29). This appeal follows.

SUMMARY OF THE ARGUMENT

1. The lower court was obliged to suppress Mr. Zerquera's statement to the police when his interrogators conceded at the Motion to Suppress hearing and in their sworn testimony that the Defendant was questioned about a homicide after he had told both

detectives he refused to discuss the homicide. The request to remain silent was not scrupulously honored, and the State of Florida did not prove that the statement obtained after this invocation of silence was freely and voluntarily induced.

2. Prosecutorial misconduct occurred when the State of Florida elicited and condoned testimony it knew to be false. Pre-trial, the only physical evidence found in the investigation by the police - bullets - pointed to Mr. Puttkamer as the triggerman. When Puttkamer became a State witness, the bullets were attributed to the Defendant by false testimony of Puttkamer and the police. The prosecutor knew the testimony was false, yet condoned it. Worse, the State obstructed efforts made by the defense to bring out the truth - bullets similar to the one which killed Mr. Shane were found among the personal possessions of Scott Puttkamer.

3. A penalty of death is disproportionate in this case - a killing during a robbery - when an equal number of statutory aggravating and mitigating circumstances were proven and a considerable amount of evidence was elicited to establish other unenumerated mitigating circumstances. This Court's duty to guarantee proportionate capital sentencing requires a vacating of the death sentence imposed, when the facts of this case and the character of Mr. Zerquera are juxtaposed against other cases heard by this Court.

4. The trial judge erroneously imposed the death penalty by balancing the statutory mitigating factors proven by the Defendant against the need for the victim's family to feel that

justice was served, and to offset the family's loss of love, comfort and protection. This decision-making process was in violation of the Eighth and Fourteenth Amendments to the United States Constitution, which preclude the calculation of non-statutory aggravating factors.

5. Evidence adduced in support of the aggravating circumstance of avoiding a lawful arrest was insufficient. The only basis to that finding was the testimony of a co-defendant which was inconsistent with his prior sworn testimony, and which was provided to the jury without the benefit of an instruction telling them to weigh and receive such testimony "with great caution."

6. The State of Florida once waived the death penalty, and the Defendant went to trial with a non-death qualified jury. When a severance was granted, the jury was released because the prosecutor represented to the Defendant that a new jury would be better for him. Then the State asked for the death penalty. After the trial judge ruled that the death penalty was not legally possible under the facts of this case, Mr. Zerquera again went to trial. The death penalty was only imposed because the trial court placed undue weight upon the jury's recommendation of death. Also, the State of Florida was estopped from seeking that penalty.

7. The trial court erred in failing to find the existence of other enumerated and unenumerated mitigating circumstances shown by the evidence. The existence of these factors tipped the scales towards a life sentence, when the trial court acknowledged

the existence of only two aggravating circumstances and two statutory mitigating circumstances.

8. The trial court's spontaneous comments to the jury, in conjunction with the Florida Standard Jury Instructions, diminished the responsibility of the jury regarding their role in sentencing and denied the Defendant due process of law.

ARGUMENT

I.

WHEN THE POLICE ADMIT THAT THE DEFENDANT WAS INTERROGATED ABOUT A HOMICIDE AFTER HE INVOKED HIS RIGHT TO REMAIN SILENT, THE DEFENDANT'S FIFTH AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION WERE NOT SCRUPULOUSLY HONORED.

Two homicide detectives interrogated Jorge Zerquera for almost four hours before he gave them a statement. Four different versions of how that statement was coaxed were offered at the Motion to Suppress hearing conducted on October **4, 1985.** Each version had one factor in common: the detectives and Mr. Zerquera agree that the Defendant was interrogated concerning the homicide after he had invoked his right to remain silent. The failure of the police to scrupulously honor his right to remain silent required the suppression of the statement. Michigan v. Mosley, **423** U.S. **96 (1975).**

A temporal framework is necessary to understand where the versions overlapped at the Motion to Suppress hearing. Following the homicide on October 31, **1984,** Detectives Porth and Venema of the Hialeah Police Department were assigned the case. They were

the officers who obtained the two statements from Scott Puttkamer which implicated Jorge Zerquera. (S.R. **4-6).** The two officers went to the Craftsman Body Shop on November 28th looking for Mr. Zerquera, and found him there. (S.R. **10-12).** They claimed that Mr. Zerquera agreed to go to the station with them for questioning. The first accurate milestone of the time frame of the interrogation is **2:04** p.m., which was when the questioning began by the signing of a constitutional rights waiver form. (R. 167). The next document which establishes a guidepost in the progress of the interrogation is a consent to search form signed by Mr. Zerquera at **3:25** p.m., almost an hour and one half later. (R. **40).** Finally, the statement of the Defendant began at **5:46** p.m., almost four hours after the interrogation began. (R. **134).** Before the commencement of that statement, Mr. Zerquera did not incriminate himself or give a statement. (S.R. **33).**

The first version of how the interrogation proceeded was given by Detective Porth. He admitted that Mr. Zerquera was interrogated about the homicide after he had invoked his right to remain silent. Porth testified that they began the interrogation by asking the Defendant about a car theft ring, to ease their way into conversation, but Mr. Zerquera said "he did not want to talk about his friends.'' (S.R. **25).** Then, Mr. Zerquera invoked his right to remain silent:

> Q: Now, up until the time of **3:25** p.m., when Mr. Zerquera signed a consent to search form, did he ever say to you, 'Detective Porth, I don't want to talk to you?'
>
> **A: Yes.**
>
> Q: Did he ever say to you, 'Detective Porth, I want a lawyer?'

A: No.

Q: Was Detective Venema with you throughout these proceedings?
A: No.

(S.R. 30).

Notwithstanding this invocation by the Defendant, Porth admitted that Mr. Zerquera was questioned about the homicide from the commencement of the interrogation at 2:04 p.m. until the time the Defendant agreed to give a statement at 5:46 p.m. (S.R. 32, 75). Detective Porth said that he was not in the interview room, and Mr. Zerquera was alone with Detective Venema, when the Defendant agreed to make that statement. (S.R. 34, 35).

Detective Venema's version criss-crossed that of Porth's. The Defendant was given his constitutional rights at 2:04 p.m., and initially questioned about auto thefts to ease the way into the conversation. (S.R. 49-52). Mr. Zerquera refused to speak about the thefts. (S.R. 55). Venema testified that he and Porth were in and out of the interrogation room throughout the afternoon, (S.R. 50-55), and he was not aware that Mr. Zerquera had told Porth that he did not want to talk about the homicide. (S.R. 56). But he did admit he was aware that the Defendant refused to discuss the homicide.

Detective Venema testified at the Motion to Suppress hearing that late in the afternoon of the interrogation, when he was alone with Mr. Zerquera, he confronted the Defendant with Puttkamer's accusation, and the Defendant told him "I don't want to discuss the homicide." (S.R. 57). Venema claims that this invocation occurred after he told Mr. Zerquera that Puttkamer had

confessed, and had told the police that Jorge was the one who pulled the trigger. (S.R. 58). Venema said "I wasn't trying trickery. I had the statement right in front of me. And, I had read him a few excerpts from the statement. He said, 'I don't wish to discuss it.'" (S.R. 58).

Venema claimed in one version that he then left the room, but purposely left behind the statement of Puttkamer in case the Defendant thought he was bluffing. (S.R. 59). The detective got some coffee, and when he walked back into the interrogation room, the Defendant said "Scott puked?'' When Venema answered "Scott puked twenty-six pages worth," the Defendant allegedly said "go get your tape recorder." (S.R. 60).

As dramatic as that might have been, the detective got the time frame wrong. Detective Venema gave a different version six months earlier, in a sworn deposition. (A. 12-25). There, he testified to the identical speech to Mr. Zerquera which elicited the confession, but in a different and unconstitutional fashion. He testified in his deposition:

> Q: Well, what prompted Jorge to sign the consent to search? [at 3:25 p.m. see S.R. 401.
> A: I showed him the statement given by Scott. I said, 'here, read it. We didn't drag you down here, out of the blue. I never met you in my life. I didn't decide to pick on some unknown person and make life miserable, or whatever.'
>
> Q: So the conversation happened before 3:30?
> A: Before 5:30, or whatever.
>
> Q: 5:30, or whatever?
> A: I showed him the statement. Jorge looked at me. He never asked for a lawyer. He said, 'I don't want to discuss it. I

> don't want to talk about it.' Then I told him some things that Scott said. What I said exactly I don't really recall. I said Scott is saying you were both there and you pulled the trigger. He is putting the shooting on you, and I showed him the statement, and I said, 'here is the statement, which he had signed and corrected and it has been notarized, and all.' He read through a few pages. I said, 'I don't know, maybe this did not occur. I am not making this up. I am not trying to make a bluff. This person we caught described it in quite a bit of detail, this murder.' He finally looked at me and said, "Scott puked." I said, he puked twenty-six pages. He said aet yourself a tape recorder or turn on the tape recorder. I don't remember what his exact words were, but something to that effect, get yourself a tape, or turn on the recorder and he proceeded -- well, you got a copy of the tape. I could hardly shut him up.

(A. 16-17).

Thus, Detective Venema himself gave two versions of how he elicited a statement from Mr. Zerquera. In the earlier version, given in his April 22nd deposition, he expressly admits to interrogating the Defendant by confronting him with Puttkamer's statement and questioning him after Mr. Zerquera had said "I don't want to discuss it. I don't want to talk about it." (A. 16). In the latter version, Venema claimed that Mr. Zerquera first refused to discuss the homicide at 5:40 p.m., after three and one half hours of unrelated interrogations.[2]/ The detective

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[2]/ That version defies reason and logic. The detectives would not have skirted a homicide interrogation for three and one half hours. In any event, Detective Venema admitted later on that he did interrogate Mr. Zerquera about the homicide much earlier in the afternoon. (S.R. 73).

claims he left the room immediately, leaving the Defendant alone with the statement, and Mr. Zerquera agreed to make a statement when the detective returned. (S.R. 57-59). But the accuracy of the second version is undone by two other portions of Venema's testimony.

In his April 22nd statement, Detective Venema was asked if the Defendant was told to provide details about the homicide; he was asked:

> *Q:* Was Jorge told that if he gave more details or incriminated himself it is a more believable statement?
> A: No. Once he started going -- well, you read this thing. He goes on and on for pages at a time without my saying anything.
>
> Q: What about in the three hours and forty-five minutes before the tape started?
> A: He would not discuss it.
>
> Q: He refused to discuss it?
> A: Correct.

(A. 23).

Clearly, the Defendant was questioned about the homicide all through the three and three quarters hours, but refused to discuss it.

This scenario was confirmed when Venema testified at the Motion to Suppress hearing:

> Q: Did he talk about the homicide in the three hours and forty-five minutes prior to that statement?
> A: No.
>
> Q: Did you ask him about the homicide [in] the three hours and forty-five minutes before the statement?
> A: I'm sure we did.

(S.R. 73)

* * * *

Q: At what point did you start talking to Jorge about the homicide?
A: Right when I brought out the transcript by Scott; just before that.

Q: You waited three hours and forty-five minutes before --
A: Counselor, I'm not sure. I wasn't watching every minute, if it was two hours and sixty minutes or three hours and forty-three minutes. We read him his rights form on it. I didn't keep running notes, minute by minute, what we were doing.

Q: Shortly after the rights form. did you ask him about the homicide?
A: Yes.

(S.R. **75).**

Hence, Detective Venema's testimony can be distilled to the following: (1) the Defendant was read his rights at 2:04 p.m. **(R. 167);** (2) the Defendant was questioned about the homicide immediately thereafter (S.R. **73, 75); (3)** the Defendant refused to speak about the homicide during the three and one half hours of interrogation (R. **73; A.** 23); (4) Venema was not in the room when the Defendant told Detective Porth he would not discuss the homicide (S.R. 30); and (5) at **5:45** p.m. either (a) the Defendant refused to discuss the homicide any further but Venema responded with interrogation in the form of confronting him with Puttkamer's statement and asking him questions, (A. **16-17),** or (b) the Defendant refused to discuss the homicide any further and Venema left the room, purposely leaving behind a copy of Puttkamer's statement for the Defendant to read. (S.R. **57–59).**

If the versions offered by Porth and Venema were not a

catalyst towards suppression, Mr. Zerquera's testimony was. Jorge was at the Craftsman Body Shop on November 28th when he first met the two homicide detectives. He told them he did not have any problems with them, and "Detective Venema leaned in about two inches from my face and gritted his teeth and said, 'you got big problems with us.'" (S.R. 80).

He agreed to go to the police station and to cooperate. (S.R. 81). Once there, he was told he was not under arrest, read his Miranda rights, was told that Puttkamer had put him at the scene of a murder, and asked if he had anything he wanted to say. (S.R. 85). Mr. Zerquera told the officers that he was willing to cooperate, but he would not answer any questions. (S.R. 104) His invocation of his right to remain silent resulted in a Mutt and Jeff routine. Venema told him that Puttkamer was putting it all on him, and he would get the chair if Puttkamer's version was left unrefuted. (S.R. 87). Porth was telling him that the only one guilty of murder was the one who pulled the trigger, there is no such thing as "accessory," and told him ". . .make myself believable. 'We can probably make you a State's witness. You probably won't get arrested.' He kept going on and on how [Puttkamer] was going to be a witness against me. 'I believe you didn't do it. I really believe you'. . . all I had to do was put the gun in [Puttkamer's] hand." (S.R. 90).

Mr. Zerquera acquiesced to the entreaties of the police after being confronted with Puttkamer's statement, and after being given the implicit assurance that putting the gun in Puttkamer's hand would end his legal problems. (S.R. 104-108).

He gave a statement after being told he would be a State witness. (S.R. 109) 3/

At the conclusion of the Motion to Suppress hearing, the court thought that if Mr. Zerquera had been questioned about the homicide and refused to speak when he first arrived at the station, the motion would be granted. (S.R. 123). Although Porth, the Defendant, and - in one version - Venema did testify to that scenario, the court, over a month later on December 12, 1985, denied the Motion to Suppress with the simple finding that it was freely and voluntarily given. (T. 502).

The United States Supreme Court held in Miranda v. Arizona, 384 U.S. 436 (1966) "once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." This Court has not hesitated to reverse convictions, even capital convictions, where the police have failed to follow that procedure. Smith v. State, 492 So.2d 1063 (Fla. 1986); Long v. State, 517 So.2d 664 (Fla. 1988).

Detective Porth testified quite clearly that Mr. Zerquera invoked his right to remain silent, refused to discuss the homicide, and did so before 3:30 in the afternoon. It is completely and legally irrevelant that Detective Venema was not

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3/ Venema could not refute that testimony:
Q: Was he told he might be a witness against Scott?
A: Possibly. I don't know.
(A. 23).

in the room at the time, and may not have been privy to the invocation. An individual need only invoke his right to remain silent one time to assert the Fifth Amendment privilege. See Michigan v. Jackson, 475 U.S. _____, 106 S.Ct. _____, 89 L.Ed.2d 631 (1986); Williams v. State, 466 So.2d 1246, 1249 (Fla. 1st DCA 1985) (irrelevant if second officer conducting interrogation unaware of invocation); Anderson v. State, 487 So.2d 85 (Fla. 2nd DCA 1986); Silling v. State, 414 So.2d 1180 (Fla. 1st DCA 1982). Nor is there the slightest inkling from Porth's testimony that the request to remain silent was equivocal.

Even Venema's version was that, although the Defendant expressly refused to discuss the homicide from 2:04 p.m. until 5:45 p.m., he confronted the Defendant with Puttkamer's statement immediately after Mr. Zerquera refused to speak about the homicide. Such a confrontation was clearly a form of interrogation designed to elicit a response in furtherance of the interrogation. Rhode Island v. Innis, 446 U.S. 291 (1980); Brewer v. Williams, 430 U.S. 387 (1977). Venema's version only forked when talking about a time frame - in his deposition, Venema said that the invocation of silence came before 3:30 p.m.; at the Motion to Suppress hearing, he said it came after 5:30 p.m. In either event, because the invocation to Porth before 3:30 p.m. was not equivocal, no conversation following the refusal was admissible. See Long v. State, supra; Drake v. State, 441 So.2d 1079 (Fla. 1983). The United States Supreme Court held in Smith v. Illinois, 105 S.Ct. 490 (1984), and this Court in Long v. State, supra, that any questioning following an

invocation of the right to remain silent is limited to whether that request was equivocal or unequivocal. Nothing can be more clear than Mr. Zerquera's refusal to speak about the homicide. The fact that a defendant subsequently answers questions cannot be used to retroactively undo an unequivocal request to remain silent. Smith v. Illinois, supra.

The procedure which follows an unequivocal refusal to answer questions is clear. The police must thereafter scrupulously honor the right to remain silent. Michigan v. Mosley, 423 U.S. 96 (1975); Webber v. State, 305 So.2d 235 (Fla. 3rd DCA 1975). Scrupulously honoring an individual's invocation of his right to remain silent means not attempting to wear down his will, asking him to renege on his invocation, or other badgering or overreaching. When the interrogation progresses without a break in time, statements provoked thereafter are inadmissible. Spradley v. State, 442 So.2d 1039 (Fla. 2nd DCA 1983) (where no break in time, readvising individual of Miranda insufficient to demonstrate an honoring of rights); State v. Madruga-Jimenez, 485 So.2d 462 (Fla. 3rd DCA 1986) (accord); cf. Muehleman v. State, 503 So.2d 310 (Fla. 1987) (invocation honored where police did not seek to re-interrogate defendant for eight days).

The State bears the heavy burden of demonstrating that, following the Defendant's invocation of his right to remain silent, he knowingly and voluntarily made an intelligent waiver of that right. Smith v. Illinois, supra. The transcript fails to reflect the State having carried that burden. Had the Defendant's testimony been credited, the burden was not

established. Had Detective Porth's testimony been credited, the State failed to establish its burden. Detective Venema offered one version as to how he elicited the statement, but two versions as to the time frame. This inconsistent testimony was insufficient to establish the State's burden, especially when the trial court did not credit the testimony of one individual nor reject the testimony of others. A new trial is necessary without the introduction of the inadmissible statement.

II.

THE DEFENDANT WAS DENIED DUE PROCESS OF LAW WHEN THE PROSECUTOR ELICITED TESTIMONY HE KNEW TO BE FALSE, AND PARTICIPATED IN THE PRESENTATION OF FALSE AND MISLEADING TESTIMONY WHICH TAINTED THE FACT-FINDING FUNCTION OF THE JURY.

Mr. Zerquera received the death penalty because the jury believed that he, not Puttkamer, shot the cab driver. That belief was founded upon an obstruction in the truth-seeking process created by the prosecutor. The only physical evidence discovered by the police pointed to Puttkamer as the triggerman. But the prosecutor, knowing bullets similar to the murder projectile were found among Puttkamer's belongings, stood by as Puttkamer lied at trial about the bullets. To make matters worse, the prosecutor misled the jury into falsely believing that Mr. Zerquera put the bullets in Puttkamer's possession. These deceptions tainted the fact-finding process, and rendered the jury's recommendation of death unreliable.

A. The Chameleon-like Bullets

After a year of uneventful discovery, during which no physical evidence surfaced shedding light upon who killed Mr. Shane, the State announced on February 3, 1986 - the eve of trial - that it had found "from some of his belongings" evidence connecting Puttkamer to the murder weapon. (T. 652, 655). The prosecutor announced to the court that police went looking for some of Puttkamer's property, and "inside this brown suitcase was found [Mr. Puttkamer's] property." (T. 653). That property included a plastic pouch, which contained some check stubs with Puttkamer's name on them, some cooking utensils, and some .22 caliber derringer ammunition which was identified as similar to the murder projectile. (T. 657-659). Defense counsel for Puttkamer immediately requested a delay to investigate this evidence, and to file motions to exclude and/or suppress.

Those motions, (R. 429-432), prompted an evidentiary hearing. The defense contended that the search of the property "owned by my client" was non-consentual and warrantless, and no chain of custody could be proven. (S.R. 132-137). The prosecutor told the court, while waiting for its police officer/witnesses to arrive, regarding "lab work done last week on those bullets that were found in Mr. Puttkamer's suitcase," (S.R. 141), and that when the bullets were found he immediately notified Puttkamer's lawyers. (S.R. 142).

The State was unable to justify the warrantless search, and the court excluded the bullets. (S.R. 147). Two other noteworthy facts arose from the suppression hearing. First, Mr. Zerquera and his lawyer were not even present, as the bullets were

indisputably owned by and in the possession of Puttkamer. Second, the bullets were so obviously incriminating to Puttkamer, his lawyer deemed their discovery as Brady material for Mr. Zerquera. (S.R. 143).

The bullets took on different stripes once Puttkamer joined the State's ranks. They became Jorge's bullets, invidiously secreted among Puttkamer's possessions. At trial, the prosecutor elicited false testimony at trial, idly stood by while false testimony was presented, and continuously obstructed the truth-seeking function of the jury.

The misconduct began during the cross-examination of Puttkamer. After denying he was the one with the gun, Puttkamer was asked "were the bullets to the gun found in your belongings?" (T. 1118). The answer should have been "yes", but the State, hell-bent on deluding the jury, objected. The objection was overruled, and Puttkamer testified that (1) he never put the bullets with his belongings, (2) he did have a pouch that he kept his cooking utensils in, and (3) after Mr. Zerquera moved out, Zerquera no longer had access to that pouch. (T. 1121, 11220).

The prosecutor knew at this stage his witness was lying. The bullets were found in Puttkamer's pouch. Puttkamer admitted that Mr. Zerquera did not have access to that pouch. If (2) and (3) above were true, then (1) could not have been true. But the State forged on.

The issue arose again in the cross-examination of the lead detective, when Venema, after telling the jury that Puttkamer denied owning a gun, was asked "but bullets were found in Scott

Puttkamer's belongings; were they not?" (T. **1171).** Again, the State objected and attempted to prevent the expected answer of "yes." The State vehemently attempted to exclude this critical part of the examination, arguing "it goes to the issue of whether this man is the shooter, and that is the issue [defense counsel] is trying to deal with in this case." (T. **1172).** The objection was overruled, (T. **1174),** and Venema was examined:

> Q: About three days after Scott Puttkamer was arrested you came into possession of some of his belongings; did you not?
> A: Yes.
>
> Q: And among those belongings was a plastic bag with Scott Puttkamer's cooking utensils and paystubs and **.22** magnum bullets, and **.22** magnum casings; isn't that correct?
> A: No. There were no cooking utensils in there.

(T. 1174, 1175).

The last answer was both false and misleading. The answer should have been "yes." The property inventory report, (R. 49), and the proposed evidence as proffered by the prosecutor at the pre-trial motion indicates the answer should have been "yes." The detective's answer misled the jury into believing the **.22** caliber bullets identical to those used in the killing were not kept by Puttkamer. The only physical evidence in the case pointed to Puttkamer as the shooter, but the prosecutor allowed false testimony to stand in an attempt to convince the jury otherwise.

To add insult injury, the prosecutor elicited testimony from Venema to prove to the jury that the bullets were Mr. Zerquera's. The prosecutor allowed Venema to testify that he had

no idea whose personal items were within the suitcase and pouch, (T. 1178), that the property within that suitcase was all mixed up, that the items had passed through many hands, and that Puttkamer and Mr. Zerquera shared many items. (T. 1179).

The bullets, which clearly and unequivocally belonged to Puttkamer in the pre-trial proceedings, had now been metamorphisized into Jorge's bullets. Defense counsel for Mr. Zerquera was not adept at dealing with this evolution, not having been present at the pre-trial hearing when the prosecutor was speaking out of the other side of his mouth, Now the only physical evidence pointed at Mr. Zerquera, and the wool was completely pulled over the eyes of the jury.

One last stab at attributing the bullets to Mr. Zerquera occurred; Puttkamer was recalled as a witness. The obstruction achieved by the State of Florida can only be completely understood by a display of the examination:

> BY MR. DI GREGORY:
>
> Q: Mr. Puttkamer, very quickly, did Mr. Zerquera own a suitcase?
> A: Yes.
>
> Q: What color was it?
> A: Brown,
>
> MR. DI GREGORY: No further questions.
>
> CROSS-EXAMINATION
>
> BY MR. JACOB:
>
> Q: Did you ever use that suitcase to pack your items in?
> A: No. I had my own suitcase which was about three times larger than that one.
>
> Q: Were you the one that packed up your items?

A: What?

MR. DI GREGORY: Objection. I just asked him one question.

THE COURT: Go ahead.

BY MR. JACOB:

Q: You never used the brown suitcase?
A: No, I didn't.

Q: After you were arrested you left your belongings with somebody else?

MR. DI GREGORY: Objection. Beyond the scope of the direct examination.

MR. DI GREGORY: Sustained.

BY MR. JACOB:

Q: George left that bag behind when he left; didn't he?

MR. DI GREGORY: Objection.

THE COURT: Overruled.

THE WITNESS: Left behind where?

BY MR. JACOB:

Q: When he moved out?
A: No.

MR. DI GREGORY: Objection. Vague.

THE COURT: Overruled. He answered the question.

BY MR. JACOB:

Q: When George moved out, he took his brown suitcase with him?
A: When George moved out he took everything out he had with him, and a few of my clothes as well.

Q: And where was your plastic pouch?

MR. DI GREGORY: Objection. That's beyond the scope of the direct examination.

THE COURT: Sustained.

BY MR. JACOB:

Q: He didn't take that with him; did he?

MR. **DI** GREGORY: He has no idea, and **I** object. I will object because that's beyond the scope of the direct examination.

THE COURT: You will have to rephrase your question.

Beyond what the "it" is.

BY MR. JACOB:

Q: The plastic pouch that is used on your bicycle, the one that you kept the cooking utensils in and the pay stubs, that was not amongst the items that George took: was it?

MR. **DI** GREGORY: Objection.

THE COURT: Sustained.

MR. JACOB: **I** have no further questions.

MR. **DI** GREGORY: Nothing further.

(T. 1182-1185).

Now the bullets had become Mr. Zerquera's, and the State's fabrication was complete. Now, Jorge owned the brown suitcase in which the plastic bag with the bullets were found. The change in ownership occurred because the prosecutor knowingly allowed Puttkamer to falsely testify: (1) he never packed his items in that suitcase [but with the pouch and the suitcase were his pay stubs and cooking utensils]: and **(2)** Mr. Zerquera did not leave that suitcase behind when he left [but he must have, as the items found by police were all Puttkamer's]. Aside from the failure of the prosecutor to correct these falsehoods, his obstruction designed to mislead the jury was despicable. Ten questions asked

by defense counsel in this area provoked seven objections. Four were improperly sustained, so the jury was not provided with the answers to "where was your plastic pouch after Mr. Zerquera moved out and did Mr, Zerquera take "the plastic pouch that is used on your bicycle, the one that you kept the cooking utensils in and the pay stubs, . .?" That bag also had the bullets. The jury needed and was entitled to truthful answers to these questions.

The last nail in this false-bottomed coffin was driven home by the prosecutor in closing argument, when he had the gall to tell the jury that "those casings could not have been found in that pouch that [defense counsel] made such a big deal about. And there is nothing relating this to this crime and that pouch because the casings are on the ground." (T. 1220). Detective Venema had said that pouch contained pay stubs, .22 magnum bullets and .22 magnum casings. (T. 1174, 1175). This deception was shocking.

The task of the sovereign "in a criminal prosecution is not that it shall win a case, but that justice be done. . .while [a prosecutor] may strike hard blows, he is not at liberty to strike foul ones." Berger v. United States, 295 U.S. 78, 88 (1935). Foul blows were struck by the State of Florida. Bullets discovered in the possession of Puttkamer undoubtedly induced his plea of guilty. These bullets became the Defendants when the prosecutor elicited and condoned false testimony. That conduct tainted the sentencing function of the jury, and requires a new sentencing hearing.

A deliberate deception on the part of the prosecution by the

presentation of known false evidence is not compatible with the "rudimentary demands of justice." Mooney v. Holohan, 294 U.S. 103 (1935); Hernandez v. State, 368 So.2d 606 (Fla. 3rd DCA 1979); Rogers v. State, 467 So.2d 1819 (Fla. 5th DCA 1985). "The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected." Napue v. Illinois, 360 U.S. 264, 269 (1959); United States v. Antone, 603 F.2d 566 (5th Cir. 1979); Ho Yin Wong v. State, 359 So.2d 460 (Fla. 3rd DCA 1978); Porterfield v. State, 442 So.2d 1062 (Fla. 1st DCA 1983) (remand for evidentiary hearing on allegation of knowing use of false testimony), following remand, 472 So.2d 882 (Fla. 1st DCA 1985) (denial of motion by trial court reversed as error shown).

False testimony was elicited and went uncorrected. Pre-trial, the suitcase was Puttkamer's (S.R. 141); at trial, it became Mr. Zerquera's. (T. 1182). Pre-trial, the bullets and casings were found in a pouch along with Puttkamer's cooking utensils and pay stubs (T. 653-659); at trial, Puttkamer claimed there were no bullets in his pouch, and Venema said Puttkamer's cooking utensils were not among the belongings. (T. 1120-1122, 1174). Pre-trial, the pouch was in the brown suitcase (T. 659); at trial, Puttkamer claimed he never left anything in the suitcase. (T. 1183).

Had the truth come out - police had found among Puttkamer's personal items projectiles and casings similar to the instruments of murder - a different cast would have been laid on Puttkamer by the jury. The only physical evidence discovered by the police would have pointed at Puttkamer as the triggerman. A result

obtained by the use of false testimony "is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." United States v. Agurs, 427 U.S. 97 (1976); United States v. Kattan, 840 F.2d 1118, 1127 (1st Cir. 1988). A remand is in order, and a new sentencing hearing before an untainted jury.

III.

A SENTENCE OF DEATH IS UNCONSTITUTIONALLY DISPROPORTIONATE WHERE THERE ARE AN EQUAL NUMBER OF STATUTORY AGGRAVATING AND MITIGATING CIRCUMSTANCES AND A CONSIDERABLE NUMBER OF NON-STATUTORY MITIGATING CIRCUMSTANCES, AND AS APPLIED TO THE FACTS OF THIS CASE,

The imposition of the death penalty in this case is unconstitutional under the Eighth and Fourteenth Amendments to the United States Constitution, as the facts of the case and the character of the Defendant are not within the realm of aggravated or atrocious crimes for which that penalty is reserved. See, Fead v. State, 512 So.2d 176 (Fla. 1987); Proffit v. State, 510 So.2d 896 (Fla. 1987).

Three separate reasons justify the finding that the death penalty is unconstitutionally disproportionate. First, the character of the crime does not warrant that penalty. Second, the two aggravating circumstances were outweighed by two statutory mitigating circumstances and several non-statutory mitigating circumstances. And third, death sentences with far more aggravating factors and far fewer mitigating circumstances

have been vacated by this Court.

This Court has consistently reversed death sentences for the spontaneous murder of a victim in a robbery or burglary. Proffit v. State, supra; Caruthers v. State, 465 So.2d 496 (Fla. 1985). Even if Puttkamer's version is accepted, he never contended that Mr. Zerquera planned or discussed the shooting of the cab driver. There existed evidence from the statements of each man that the gun went off as the car was being put into the parking gear, which may have caused an accidental discharge of the weapon. The death of a robbery victim, in and of itself, is not such an egregious murder to warrant the death penalty. If so, all felony murders would be so classified. Absent a heightened degree of premeditation, death here is disproportionate. Caruthers v. State, supra, (shooting of store clerk during robbery and jury recommendation of death; death sentence vacated); Menendez v. State, 419 So.2d 312 (Fla. 1982) (store owner shot during robbery and jury recommendation of death; death sentence vacated); Rembert v. State, 445 So.2d 337 (Fla. 1984) (victim killed in robbery and jury recommendation of death: death sentence vacated).

A death sentence is also disproportionate here when the two aggravating circumstances were surpassed in quality by two statutory mitigating circumstances and an overwhelming number of non-statutory mitigating circumstances. Death sentences under far more aggravating circumstances have been vacated by this Court. In Nibert v. State, 508 So.2d 1 (Fla. 1987), the defendant planned to rob and then killed his victim, and the jury

recommended death. This Court, although finding one aggravating circumstance and no mitigating circumstance, found "although death may be the proper sentence in this situtation, it is not necessarily so," and remanded for resentencing. Id., 501 So.2d at 5. In Caruthers, supra, this Court found the existence of one aggravating circumstance, one statutory mitigating circumstance, and several non-statutory mitigating factors, and reversed the death sentence in a felony-murder robbery by finding death a disproportionate penalty. In Lloyd v. State, 524 So.2d 396 (Fla. 1988), evidence established the murder of a robbery victim, and a jury recommended death. This Court held, with the existence of one aggravating circumstance and one mitigating circumstance, "a review of our prior decisions requires us to conclude that the imposition of the death penalty on this record is proportionately incorrect. . ." Id., 524 at 403. See also, Thompson v. State, 456 So.2d 444 (Fla. 1984) (two aggravating and no mitigating circumstances in killing of victim in robbery without justification warrants life imprisonment).

Here, the weighing process required of this Court mandates a finding of disproportionality. The two aggravating factors were outweighed by the two mitigating circumstances and the several non-statutory mitigating factors. The coercion of hunger, the deluding effect of drug usage, the family qualities of the Defendant and the extremely disturbing effect of his father's demise make death an inappropriate penalty. Where more heinous crimes have resulted in vacated death sentences, proportionality should come into play. For example, in Wilson v. State, 493

So.2d 1019 (Fla. 1986), two aggravating circumstances, a jury recommendation of death, and no mitigating circumstances found by the trial court still resulted in a life sentence. In Ross v. State, 474 So.2d 1170 (Fla. 1985), one aggravating circumstance, no mitigating circumstances and a death recommendation still resulted in a life sentence from this Court. Three aggravating circumstances, including witness elimination, and no mitigating circumstances resulted in a life sentence in Welty v. State, 402 So.2d 1159 (Fla. 1981).

In conclusion, the crime in this case and the character of the Defendant do not warrant the death penalty. Several inchoate factors - the hunger, the drug usage, the doubt as to who was the triggerman, the Defendant's past good family character - all combine to make death inappropriate where an equal number of aggravating and mitigating circumstances were proven.

IV.

THE TRIAL COURT COMMITTED FUNDAMENTAL ERROR BY WEIGHING THE IMPACT OF THE CRIME ON THE VICTIMS FAMILY AS A NON-STATUTORY AGGRAVATING CIRCUMSTANCE IN ITS DECISION TO IMPOSE THE DEATH PENALTY.

The United States Supreme Court held in Booth v. Maryland, 482 U.S. ____, 96 L.Ed.2d 440, 107 S.Ct. 2529 (1987) that information regarding the character of the victim or the emotional impact of the crime on the family and relatives was irrelevant to the capital sentencing decision. This case presents an egregious violation of that rule, a violation of the Eighth Amendment to the United States Constitution, and requires

that a new sentencing hearing be conducted.

The trial judge in this case had ruled as early as April 22, 1986 that death was not an appropriate penalty under the facts of this case. (R. 102). Even the State of Florida had agreed not to seek the death penalty, and had once begun a trial of the Defendant after waiving the death penalty. (R. 11-22; T. 668). At the second trial, following the jury's recommendation of death on March 31, 1987, the trial judge reconsidered her earlier ruling, and reconsidered whether the April 22, 1986 decision that "no jury could validly recommend the death penalty in this case" should be reversed. The undisputed record in this case reflects that the trial court acceded to the jury's recommendation because of the impact of Mr. Shane's death upon his family.

The court was familiar with the family of Mr. Shane, who regularly attended the protracted court proceedings. To begin the sentencing hearing, the court asked the prosecutor "I see the family here as I have seen them previously. Are they going to make any statement to the Court?" (T. 1347). A victim impact statement was made prior to the imposition of sentence on May 13, 1987, when the daughter of Mr. Shane, Sheila Smith, told the court:

> I believe that before [Mr. Zerquera] got in that cab he was going to kill my father. I believe he killed my father -- and I'm sorry for his family, but our family has been through a terrible time with this and I know he said that he was under emotional stress because his father was killed, but how does it feel to have your father shot in the head and dumped in the street. None of my family has gone out and committed armed robbery or murder because of that and I feel that he should be given the death penalty and if you

> don't agree with that, I feel you should put him in prison for as long as possible with consecutive sentences for all his crimes to keep him off the street and to keep him from doing this to anyone else for as long as you can.

(T. 1413, 1414).

A preview of the great weight the court would later attach to the impact of the crime on the victim's family is shown by the court's response to Ms. Smith's plea for the death penalty; the judge responded:

> Well, let me say something to you because I'm sure it was difficult for you to come and talk to me and talk in this courtroom. Whatever the court rules after hearing all the testimony before today, I understand your pain and suffering and I have great feelings of sympathy for you and your family. I have watched your mother and I believe it's your other sister, at least, I recognize -- ... and their children who have sat here, in effect, year after year because this started last year and perhaps even way before this; I'm not even sure. This is 1987 and this began in 1984 and I know that I have seen you all here for several years and I know your great interest in following this trial and I'm sure it's out of love for your father -- ... and concern that justice is served.

(T. 1414, 1415).

Fundamental Booth v. Maryland error leaps from the page of the transcript which reflects the court's sentencing speech. It is abundantly clear that the court, having found two statutory aggravating factors and an equal number of statutory mitigating factors, allowed the family's need for justice to weigh as the deciding factor. The court sentenced in the following fashion:

> Mr. Zerquera, perhaps you are right, perhaps that the sentence I do give you will be incorrect. If I sentence you to life imprisonment, the family of Robert Shayne

> [sic] will feel that justice has not been served. If I sentence you to death by electricution, you feel that I have sentenced improperly and incorrectly because you feel that you are not the person who committed the crime.
> In any event, through your own statements you have admitted that you were on the scene at the crime when Mr. Shayne [sic] was murdered. This is one of the most difficult parts of being a judge. You're only 24 years of age and except for this case, it appears that you're not significantly involved with the law; however, balancing this, the family of Robert Shayne [sic] can never have the love, comfort and protection of the husband, father and grandfather.

(T. 1428, 1429).

It was fundamentally wrong for the court to balance the two mitigating factors of age and no significant criminal history against "the family of Robert Shayne [sic] can never have the love, comfort and protection of a husband, father and grandfather.'' (T, 1428). Nor was it proper for the court to find "if I sentence you to life imprisonment, the family of Robert Shayne [sic] will feel that justice has not been served." (T. 1428). Factors that are not within the list of aggravating circumstances in Section 921.141 shall not be considered in the imposition of a sentence. See, e.g. Pope v. State, 441 So.2d 1073 (Fla. 1983) (lack of remorse); Jackson v. State, 498 So.2d 906, 910 (Fla. 1986) (victim's character and standing in the community).

This Court's decision in Patterson v. State, 513 So.2d 1257 (Fla. 1987) is indistinguishable. There, this Court held:

> Further, the record reflects that the victims niece who had responsibility for the victims children after her death, testified at the sentencing hearing before the judge alone

> concerning the affect of the victims death on the children and expressed her opinion that the death penalty was appropriate. Allowing this type of evidence in aggravation appears to be reversible error in view of the United States Supreme Court decision in Booth v. Maryland, ____ U.S. _____, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987).

The error cannot be considered harmless under the facts of this case. First, the court had once ruled that death was an inappropriate penalty. Then, following the jury's recommendation, the court found as a matter of law an equal number of aggravating and mitigating circumstances. It is clear from the court's statement that the victim impact speech carried the day. (T. 1428). The fact that it was the judge that was exposed to the error, rather than a jury, does not make a difference. See, Patterson v. State, supra. A Booth v. Maryland error can occur in a bench trial if a court relies upon such testimony in arriving at its decision. See, e.g. State v. White, 239 N.E.2d 65 (Ohio 1968); State v. Post, 513 N.E.2d 754 (Ohio 1987) (presumption exists that judge considers only proper evidence unless it affirmitively appears to the contrary on the record).

Nor is the absence of an objection an impediment to our claim for relief. This Court did not adopt the holding in Booth v. Maryland until its decision in Grossman v. State, _____ So.2d _____ (Fla. 1988) (Case No. 68,096, Op. Filed Feb. 18, 1988) (13 F.L.W. 127), over nine months following the sentencing in this case. Grossman held that an objection was required to preserve for appeal a prejudicial introduction into evidence of a victim's impact statement. But that holding is

distinguishable from this case, where no evidence was introduced which could have prompted a defense objection. Here, the penalty phase had occurred on March 31st, with the presentation of evidence and argument to the jury. No victim related evidence was submitted to the jury. The case was reset for sentencing for May 13th, and that hearing began with the judge inviting the comments of the victims family. (T. 1413). Any objection would have been futile, as the court had clearly stated that such comments were welcome, and this Court had yet to rule that Section 921.143(2), Fla. Stat. (1985) (victim impact statements) was an invalid factor in a capital case. See, State v. Grossman, supra.

The strong reliance by the court on the impact of Mr. Shane's death on his family, as evidenced by the court's remarks, (T. 1428), requires a new sentencing hearing. Where two aggravating circumstances were offset by two statutory mitigating circumstances, and numerous other non-statutory mitigating circumstances,[4]/ the expressed weight given by the court to the need for justice by the family of Robert Shane and the court's balancing of the statutory mitigating factors with the loss of love and comfort which befell the family of Robert Shane, violated the Defendant's guarantees under the Eighth and Fourteenth Amendments to the United States Constitution.

4/ There was other evidence presented upon which the court could have found that drug usage and extreme hunger mitigated the Defendant's mental condition, as well as the disturbing effect of the death of his father and the disparity in sentences with his co-felon, which outweighed the imposition of death as a penalty.

V.

THE TRIAL COURT'S FINDING THAT THE MURDER WAS COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST WAS ERRONEOUS.

The State of Florida argued and sought to prove the existence of two aggravating circumstances: murder committed while engaged in a robbery and a killing for the purpose of avoiding a lawful arrest. See Sections 921.141(5)(d) and (e), Fla. Stat. (1983). The trial court found both were proven. (R. 293-297). We do not contest the proof or finding of the first; however, the finding that the murder was committed to avoid a lawful arrest was not proven to the degree required by this Court's prior rulings, and the evidence upon which that finding was made is unreliable, untrustworthy, and was fabricated for the trial.

Scott Puttkamer took the stand in the penalty phase of the trial and said that two days after the shooting, he asked Jorge why he had shot the cab driver, and Jorge responded that he did not want any witnesses. (T. 1350, 1351). That claim was uncorroborated, had never before been uttered by Puttkamer in his two prior statements, and was directly inconsistent with his sworn deposition testimony. Mr. Puttkamer had testified on April 3, 1986 - one year earlier:

> Q: Did Jorge say anything about recognizing the cab driver?
> A: He said something to me a few days before that some cab driver had seen him stealing a car and thought he might be talking to somebody.

Q: This is a few days before the shooting?
A: Yes, I think he had mentioned it that night too -- I'm not sure, I can't remember all that completely.

Q: Did he ever mention it after the shooting?
A: What, the cab driver?

Q: About recognizing the cab driver?
A: No, he didn't, not recognizing that cab driver, no, he didn't mention anything about the cab driver. Afterwards, we had talked one time afterwards, but it was brief. It kind of turned my stomach thinking about it so I didn't really want to talk about it.

Q: So, you have no reason to believe this cab driver recognized Jorge?
A: No, I don't think he did. I don't think it was the same cab driver. You know, first thing, if it had been the same cab driver, I don't think he would have picked us up. He would have kept going.

(A. 30) This prior inconsistent statement was not used to impeach Mr. Puttkamer, nor to undermine the finding made by the court or in argument prior to the deliberations of the jury. In the context of this obvious inconsistency, there exists only the unreliably recent and obviously fabricated testimony of Puttkamer at the penalty phase to support the "avoid arrest" finding. Where the stakes are so high, the uncorroborated testimony by Puttkamer is insufficient.

Aside from this demonstration of unreliability by the prior inconsistent statement, the testimony of Mr. Puttkamer alone is not enough to meet the high standard imposed by this Court to prove a Section 921.141(5)(e) circumstance. The State must show beyond a reasonable doubt that the dominant or sole motive for the murder was the elimination of a witness. Bates v. State, 465

So.2d 490 (Fla. 1985); Riley v. State, 316 So.2d 19 (Fla. 1978). This Court held, in a similar felony-murder, that this circumstance was reserved primarily for executions, contract murderers or witness-elimination killings. Hansbrough v. State, 509 So.2d 1081, 1086 (Fla. 1987). See also, Rogers v. State, 511 So.2d 526, 533 (Fla. 1987) (shooting robbery victim for "trying to be a hero" insufficient); Jackson v. State, 502 So.2d 409 (Fla. 1987) (error to assume witness elimination where no other reason set forth).

Assuming Puttkamer's testimony is even worthy of belief, the testimony offered by Puttkamer is still insufficient. In Dufour v. State, 495 So.2d 154 (Fla. 1986), an associate testified that Dufour had told him about a killing during a robbery, explaining "anybody hears my voice or sees my face has got to die." Id., 495 So.2d at 156. This Court found that this evidence did not prove that witness elimination was the dominant or sole motive. Here, where counsel argued facts supported an accidental discharge of the firearm when Mr. Shane put the car into park, a similar result should occur.

This Court's decision in Amazon v. State, 487 So.2d 8, 13 (Fla. 1986), is indistinguishable, and requires that the finding of this circumstance be vacated. There, Amazon allegedly told a detective that he had killed to avoid arrest. This Court called that evidence an "unsupported assertion," and discounted it. The same result should occur here, where Puttkamer's statement was unsupported, inconsistent with his earlier testimony, and recently contrived, as the statement surfaced for the first time

at the penalty phase.

Finally, fundamental error occured when the trial court failed to instruct the jury that they "should use great caution in relying on the testimony of a witness who claims to have helped the Defendant commit a crime. . . particularly. . .when there is no other evidence tending to agree with what the witness says about the Defendant." Number 2.04(b), Accomplice, Fla. Stand. Jury Inst. This error undermines the reliability of the jury's verdict and the court's finding that a Section 921.141(5)(e) circumstance was proven.

VI.

THE DEATH PENALTY WAS UNCONSTITUTIONALLY IMPOSED WHEN THE SENTENCING JUDGE (1) IMPROPERLY WEIGHED THE JURY'S RECOMMENDATION OF DEATH, (2) IMPOSED DEATH AFTER HAVING RULED THAT DEATH WAS AN IMPROPER PENALTY UNDER THE FACTS OF THIS CASE, AND (3) IMPOSED DEATH KNOWING THAT THE DEFENDANT WAS ONLY IN JEOPARDY OF THAT PENALTY BECAUSE HE RELIED TO HIS DETRIMENT UPON A MISLEADING STATEMENT FROM THE PROSECUTION.

The record in this case presents various reasons which cumulate to require the vacating of the death penalty. These grounds are unique to this case, when the death penalty was once waived by the State of Florida and once declared inappropriate on the facts by the trial judge. Because the Defendant was misled into believing that he never realistically was in jeopardy of the death penalty, that ultimate penalty was improperly imposed.

When Mr. Zerquera was first brought to trial in February of 1986, the State had waived the death penalty. (T. 668). A jury

was selected that was not screened for their being prone towards or against that penalty. The case was to be tried with each defendant's confession implicating themselves in felony-murder and the other as the triggerman. But when a severance was granted following opening statements, and Puttkamer negotiated a plea with the State, the "Defendant was then told by the prosecutor that it would be in the Defendant's interest to have a new trial with a different jury. Relying upon the prosecutor's representation the Defendant did not object to a new jury." (R. **102).** (finding by trial court in original sentencing order).

When the State followed that misrepresentation with an announcement that it now sought the death penalty, the trial judge stepped in and found three separate reasons why she would not sanction the death penalty. (R. **102,** 103). Even though this Court ruled that the court's order was improper, State v. Donner, **500** So.2d **532** (Fla. **1987),** the Defendant still reasonably expected the trial judge to believe "the Court finds, after consideration of the potential aggravating and mitigating circumstances, that a jury could not validly recommend the death penalty in this case." (R. **103).** The Defendant went to trial **in 1987** with a reasonable reliance upon that finding by the trial court.

Mr. Zerquera only received the death penalty because he relied to his detriment upon a statement by the prosecutor and the finding by the judge that, even if the jury recommended death, that penalty would not be imposed. In fact, the trial judge once invoked the doctrine of estoppel, ruling that the

Defendant had relied to his detriment upon the State's contention that he would do better with another jury. Estoppel operated to prevent the State from seeking death, as estoppel ''may further operate to extinguish a right or privilege conferred specifically by statute." Yorke v. Noble, 466 So.2d 349 (Fla. 4th DCA 1985), aff'd, 490 So.2d 29 (Fla. 1986). While the State once had the right to seek the death penalty, it was estopped from doing so at a second trial when the Defendant only ended the first trial on the representation by the prosecutor that a new jury would be in his best interest.

Next, the court having once ruled that no jury could validly recommend death, it is evident that the trial judge placed undue weight on the jury's recommendation. This Court 'has held that undue weight should not be placed on a jury's recommendation of death, as opposed to a jury's life recommendation, as the court's independent perspective is necessary to validate the third prong of our State's trifurcated system. Ross v. State, 386 So.2d 1191, 1197 (Fla. 1980) is identical to this case. There, the defendant killed a woman during a robbery, allegedly to avoid arrest, and two mitigating circumstances were also found. The death sentence was vacated by this Court, where it appeared that the trial judge was unduly swayed by the jury's recommendation of death.

It is quite plain that the judge was unduly swayed by the jury recommendation, as her sentencing speech refers to that recommendation as ''most persuasive.'' (T. 1428). When the court excluded death in April of 1986, Puttkamer had already been named

as a State witness, had been deposed, and his testimony was fully available. The additional evidence - Puttkamer's fabricated claim regarding witness elimination - is untrustworthy and unreliable. This testimony, if true, would have been brought to the court's attention in April of 1986. It was not, because it was only fabricated by the co-defendant in March of 1987 at Mr. Zerquera's trial. This testimony did not establish beyond a reasonable doubt the aggravating circumstance and should not have altered the Court's earlier ruling. See, Amazon v. State, 487 So.2d 8, 13 (Fla. 1986) (unsupported assertion by detective that defendant said he killed to avoid arrest does not establish this aggravating circumstance). Finally, the State did not even ask for death as a penalty until after the jury recommendation. This factor alone shows the incredible change in complexion of the case following the jury's second verdict.

This Court has vacated death sentences before where a defendant placed himself in jeopardy believing that penalty would not be imposed. Thompson v. State, 351 So.2d 701 (Fla. 1977); Surace v. State, 351 So.2d 702 (Fla. 1977). That happened here. No other explanation is possible, as the defense was not guilt or innocence, but triggerman versus non-triggerman. Defense counsel must have believed that death was not a possible penalty, or no trial would have even occurred.

VII.

THE TRIAL COURT ERRED IN FAILING TO FIND THE EXISTENCE OF OTHER ENUMERATED AND UNENUMERATED MITIGATING CIRCUMSTANCES.

The Court found the existence of two mitigating factors in its sentencing order: no prior significant criminal history and the age of Mr. Zerquera. See Sections 921.141(6)(a) and (g). Other enumerated and unenumerated mitigating circumstances were proven which outweighed the aggravating circumstances, and which made Mr. Zerquera's sentencing unconstitutional under the Eighth and Fourteenth Amendments to the United States Constitution.

The two additional enumerated mitigating circumstances that were proven were under Sections 921.141(6)(b) and (d). The State introduced evidence, through Mr. Puttkamer, concerning the motive behind the robbery - hunger. Neither man had eaten in days, and they were desperate to get money to feed themselves. Mr. Zerquera claimed that Puttkamer unexpectedly shot Mr. Shane during the robbery: Puttkamer claimed the opposite. In any event, hunger and the use of drugs also referred to by Mr. Puttkamer [5] constituted an extreme physical and/or mental influence, and should have been recognized by the court as a mitigating circumstance.

Mr. Zerquera's statement also proved the mitigating circumstance that the homicide was committed by another, and that

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[5] The trial court erroneously limited the cross-examination of Puttkamer during the penalty phase regarding the use of drugs.

he was an accomplice to the spontaneous murder committed by Puttkamer. See Section 921.141(6)(d). Although the evidence would have been significantly developed had the prosecutor not misled the jury about the .22 caliber bullets found in the possessions of Puttkamer, Mr. Zerquera's statement was enough to meet the evidentiary standard for proof of a mitigating circumstance. The failure of the Defendant as an accomplice to participate or intend to participate in the homicide warrants the finding that this mitigating circumstance exists. See, Brumbley v. State, 453 So.2d 381 (Fla. 1984); Hawkins v. State, 436 So.2d 44 (Fla. 1987).

The trial court also failed to attribute significant weight to the non-statutory mitigating factors proven by the Defendant. The sentencing order entered by the Court merely recites that the death of his father and the ten year sentence of Puttkamer were insufficient mitigating circumstances. But those words do not do justice to the evidence presented.

Family members and close acquaintances testified to the extreme emotional impact the death of his father had on Mr. Zerquera. He had to leave the Navy; later, he had to leave his home in Massachusetts, to get away from the memories. These considerations must be weighed by the sentencing court, Eddings v, Oklahoma, 455 U.S. 104 (1982), and were not done so in a significant fashion. See, Jacobs V. State, 386 So.2d 713 (Fla. 1986) (family qualities of the defendant are a significant consideration). Additionally, evidence that a defendant was a hard worker and a good provider for his family have been

significant mitigating circumstances in past cases considered by this Court. Fead v. State, 512 So.2d 176, 179 (Fla. 1987); Thompson v. State, 456 So.2d 444, 448 (Fla. 1984).

Next, the disparate sentence received by Puttkamer - ten years - is shocking, and a significant reason why death is inappropriate. See, Malloy v. State, 382 So.2d 1191 (Fla. 1979); Slater v. State, 316 So.2d 539 (Fla. 1975). Mr. Zerquera refused to speak with the police on his initial interrogation, and only did so when he learned that Puttkamer had placed the gun in his hand. No physical evidence exists to corroborate Puttkamer's claim; alternatively, bullets similar to the fatal projectiles were found among Puttkamer's possessions. Even the lead detective in this case testified:

> Q: You don't know for a fact whether Jorge was lying or Scott was lying about who had the gun?
> A: No, sir.

(T. 1376).

The disparity between death and ten years is too great, especially when no physical evidence exists which made Mr. Zerquera the gunman. Edmund v. State, 399 So.2d 1362 (Fla. 1981); Gafford v. State, 387 So.2d 333 (Fla. 1980). See also Cailler v. State, 523 So.2d 158 (Fla. 1988) (death sentence vacated where triggerman in murder for hire received life sentence, as disparity a significant factor): Harmon v. State, ___ So.2d ___ (Fla. 1988) (Case No. 69,824, Op. filed May 19, 1988) (disparity in treatment of accomplice a proper factor in sentencing consideration).

Additionally, the trial judge should have considered: (1)

the Defendant's service in the Navy, Pope v. State, 441 So.2d 1073 (Fla. 1983), (2) his good behavior in custody between November 1984 and February 1987, Delap v. State, 440 So.2d 1242 (Fla. 1983) and (3) that he confessed to the police, Agam v. State, 445 So.2d 326 (Fla. 1985). These considerations, valid non-statutory factors traditionally relied upon in sentencing hearings, also tipped the scales towards life.

The Court found two aggravating and two statutory mitigating circumstances. Even if the substantial evidence regarding hunger as a motive for the crime, drug usage, lingering doubt over the relative culpability of the Defendant, and Mr. Zerquera's emotional problems over his fathers death did not rise to the level of a mitigating circumstance, these factors certainly were a calculation in the weighing process. The court erred in rejecting this plethora of mitigation, and the Defendant's death sentence was unconstitutional and in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

VIII.

THE TRIAL, COURT ERRED IN IT'S COMMENTS TO THE JURY AND IN GIVING THE STANDARD PENALTY PHASE JURY INSTRUCTION WHICH DIMINISHED THE RESPONSIBILITY OF THE JURY'S ROLE IN THE SENTENCING PROCESS, AND DENIED THE DEFENDANT DUE PROCESS OF LAW.

The United States Supreme Court held that any suggestion to a capital sentencing jury that the ultimate responsibility for sentencing rests elsewhere violates the Eighth and Fourteenth Amendments to the United States Constitution. Caldwell v.

Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). While the sentencing jury must be made fully aware of the magnitude of its responsibility, the misguided suggestion that the ultimate determination of the penalty rests with others presents "an intolerable danger that the jury will in fact choose to minimize the importance of its role." Id., 472 U.S. at 133. The spontaneous comments made by the trial court in voir dire, in conjunction with the standard instructions at the close of the case, amount to a violation of Caldwell.

The prosecutor began the dimunition of the jury's role in voir dire when he told them "though you are the finders of fact, whatever you decide in the second part of the trial is a recommendation to her Honor, who is finally and ultimately responsible for the imposition of sentence." (T. 788). The court followed by telling the jurors "if you should come out with [a verdict of guilty] then they go into the second part of the trial, that part of the trial you will only make an advisory opinion, You do not determine whether or not I sentence the Defendant to death in the electric chair. You merely advise me of your opinion by a not necessarily unanimous decision, and that means each and every one of you, who are jurors in this case, can either have an opinion that it should be life imprisonment or death by electricution. You will so advise by that verdict. I will listen to that verdict and the ultimate decision will be the Court's." (T. 792). Then, at the conclusion of the case, the trial court told the jury that "the penalty is for the court to decide. You are not responsible for the penalty in any way

because of your verdict. The possible results of this case are to be disregarded as you discuss your verdict on the guilt or innocence." (T. 1275).

These spontaneous comments, in conjunction with the standard jury instruction provided to the jury telling them that their verdict as to punishment would be advisory only, (T. 1348), violated the Eighth and Fourteenth Amendment to the United States Constitution. The comments made by the prosecutor and the trial judge, together with the standard jury instruction, provided an ameliorative effect on the responsibility which fell on the juror's shoulders as they retired to deliberate. The fact that their deliberation lasted less than an hour, in and of itself, suggests that their role was not unduly burdensome. While this Court has not been receptive to these claims, see Aldridge v. State, 503 So.2d 1257 (Fla. 1987), this issue is now pending before the United States Supreme Court. See Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986), modified 816 F.2d 1493 (11th Cir. 1987), ~~cert. grtd.~~ ~~—~~U.S. ___, 108 S.Ct. 1106, (1988). We respectfully ask that this Court reconsider its earlier rulings on this matter, under the facts of this case, and reverse the death sentence. In the alternative, we ask that this issue be deferred to the ruling of the United States Supreme Court in Adams v. Wainwright, supra.

CONCLUSION

Based upon the authorities cited herein, and the arguments of fact and of law contained within our brief, it is respectfully submitted that this Honorable Court must grant Mr. Zerquera a new trial. Short of that remedy, a determination must be made by this Court that the death penalty is inappropriate under the facts of this case, or that a remand is in order for a new sentencing hearing.

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that a true and correct copy of the foregoing was mailed to: Michelle Crawford, Assistant Attorney General, 401 N.W. 2nd Avenue, Room 820, Miami, Florida this 11th day of JULY, 1988.

Respectfully submitted,

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