IN THE SUPREME COURT OF FLORIDA

SUPREME COURT NO.: 71,026
CIRCUIT COURT CASE NO.: 86-33032-A

SAMUEL RIVERA,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

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INTRODUCTION

Appellant, SAMUEL RIVERA, was the Defendant in the court below. The Appellee, the State of Florida, was the prosecution. In this Brief, the parties will be referred to as they stood in the Court below.

Defendant, SAMUEL RIVERA, appeals from the conviction and sentence entered by the Court below, to wit: the Circuit Court of the Eleventh Circuit of Florida, in and for Dade County imposing a sentence of death.

The Record on Appeal will be referred to by the letter "R." The trial transcripts will be referred to by the letter "T."

STATEMENT OF THE CASE

On November 6, 1986, the Defendant was arrested and charged with first degree murder with a firearm, two counts of armed robbery with a firearm, possession of a firearm during the commission of a felony, conspiracy to commit armed robbery, carrying a concealed firearm, and possession of a firearm during a felony, burglary and grand theft. (R. 27-30).

An Indictment was returned by the Grand Jury charging the Defendant with first degree murder in violation of Section 782.04 (1), Florida Statutes (Count I); armed robbery of a firearm in violation of Section 812.13, Florida Statutes (Count II); armed robbery of a motor vehicle in violation of Section 812.13, Florida Statutes (Count III); attempted armed robbery of the Dollar General Corporation in violation of Section 812.13 and Section 777.04, Florida Statutes (Count IV); armed burglary of the Dollar General Corporation in violation of Section 810.02, Florida Statutes (Count V); carrying a concealed firearm in violation of Section 790.01, Florida Statutes (Count VIII); and possession of a firearm while engaged in a criminal offense in violation of Section 790.07, Florida Statutes (Count IX). (R. 1-5A).

This cause proceeded to trial before the Honorable Martin Greenbaum (T.). The jury returned a verdict of guilty as charged on July 7, 1987 (R. 272-278). On that date the Defendant was also

adjudicated to be guilty by the Court. (R. 279-281).

On July 9, 1987, the advisory portion of the trial was conducted and the jury recommended the Defendant be sentenced to death by electrocution (T. 1700)

On July 14, 1987, the Defendant was sentenced to death for Count I; fifteen (15) years on Count II; One hundred Thirty Three (133) years with a minimum mandatory sentence of three (3) years with regards to Count III; fifteen (15) years with a minimum mandatory of three (3) years with regards to Count IV; One Hundred Thirty Three years (133) with a minimum mandatory sentence of three years with regard to Count V; five (5) years with regard to Count VIII; sentence was suspended with regards to Count IX. (T. 315-321). All sentences were ordered to run consecutive to each other.

A Notice of Appeal was timely filed on August 12, 1987. (R. 340).

STATEMENT OF THE FACTS

The Defendant, SAMUEL RIVERA, is a citizen of Puerto Rico (T. 1157). Prior to November 6, 1986, the Defendant had been in Dade County approximately six days and had been residing with his brother. (T. 1158-59).

On November 6, 1987, the Defendant, and his brother went shopping at the Palm Springs Mall. (T. 1159). They traveled to the shopping mall by bus. (T. 1160-61). While en route to Hialeah, the Defendant's brother purchased a firearm which was contained in a blue bag against the Defendant's advise. (T. 1163).

The Defendant asked his brother not to enter the store as he feared his brother would be arrested for carrying a gun The Defendant's brother ignored this advise and entered the store (T. 1167).

While within the Dollar General Store, the Defendant went to the back of the store, however, after he saw it was a storage area and there were no articles for sale, he exited. (T. 1167). While within the store, the Defendant didn't speak to any employee (T. 1169). He did not steal anything from the store. (T. 1169). And, he was not in possession of the bag containing the weapon (T. 1169).

After the Defendant left the Dollar General Store, while walking through the parking lot, he observed that the police had stopped his brother. (T. 1169). The Defendant became concerned

about the blue bag, took it from his brother and ran. (T. 1170).

The Defendant reentered the mall area followed by Officer Emilio Miyares. The Defendant ran down a hall and was confronted with a locked exit. (T. 1172). At this point, he threw the blue bag on the floor, and told Officer Miyares "if this is what you want, you can have it." (T. 1172). By the time the Defendant released the gun, he believed he had surrendered. (T. 1172). Officer Miyares, then instructed the Defendant to turn towards the wall, and the Defendant complied. (T.1172-73). Upon pivoting, the Defendant felt something strike him in the head. (T. 1172-73). The Defendant turned around and observed that Officer Miyares was holding a revolver. (T. 1174). Officer Miyares was angry (T. 1174), and fearing the policeman would kill him, the Defendant jumped toward the hand with which Officer Miyares held the revolver (T. 1174-75, 1214). They both fell to the ground, wrestling for the revolver. (T. 1175). Four shots were fired, while Officer Miyares and the Defendant were on the ground (T. 1175-77). The Defendant then stood and ran. (T. 1179). A high speed chase ensued and the Defendant was finally apprehended with the aid of a dog. (T. 1183). The Defendant never injured his head while running from the police (T. 1180, 1186).

SUMMARY OF THE ARGUMENTS

POINT I

The trial court erred in failing to advise the jury they could consider circumstances tending to mitigate the death penalty not enumerated under Section 921.141, Florida Statute, in his instructions. The jury was left with the impression the only mitigating factor that could be considered were those addressed under Section 921.141, and the trial court's instructions served only to reinforce this improper theory.

POINT II

The fact that the Defendant was convicted of shooting a police officer does not, per se, make the aggravating factor of "especially heinous, atrocious and cruel " applicable, and the State failed to establish that this factor applied beyond a reasonable doubt.

POINT III

The evidence did not support a finding that the murder was committed in a cold, calculated and premeditated fashion as Officer Miyares sustained three gunshot wounds, fired

consecutively, in the midst of a confrontation with the Defendant. There was no evidence that Officer Miyares underwent a particularly lengthy, methodic or involved series of atrocious events, or that the Defendant had a substantial period of reflection and thought.

POINT IV

Trial counsel was deficient at sentencing by failing to introduce evidence of mitigation outside the realm of the items enumerated under Section 921.141, Florida Statutes.

POINT V

The prosecutor continuously made improper remarks prejudicing the Defendant by playing on the emotions and passion of the jury so as to keep them from their duty of evaluating the evidence in a logical fashion in light of the applicable law.

POINT VI

The trial court improperly denied the Defendant his right to due process of law when he failed to answer the question dealing with the penalties the Defendant was facing during the penalty phase of the Defendant's sentence.

POINTS ON APPEAL

POINT I

WHETHER THE TRIAL COURT ERRED IN LIMITING THE CONSIDERATION OF MITIGATING CIRCUMSTANCES TO FACTORS ENUMERATED UNDER SECTION 921.141 SOLELY AND NOT ADVISING THE JURY THAT IT COULD CONSIDER NON-STATUTORY MITIGATING CIRCUMSTANCES IN FAVOR OF THE SENTENCE OF LIFE IMPRISONMENT AS OPPOSED TO DEATH.

POINT II

WHETHER THE TRIAL COURT ERRED IN FINDING THAT THE MURDER OF WHICH THE DEFENDANT HAS BEEN CONVICTED WAS ESPECIALLY HEINOUS, ATROCIOUS AND CRUEL.

POINT III

WHETHER THE TRIAL COURT ERRED IN FINDING THAT THE KILLING WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED FASHION.

POINT IV

WHETHER COUNSEL FOR DEFENDANT WAS DEFICIENT AT SENTENCING BY FAILING TO INTRODUCE EVIDENCE OUTSIDE SECTION 921.141 THEREBY PREJUDICING THE OUTCOME OF THE HEARING.

POINT V

WHETHER THE TRIAL COURT ERRED IN NOT GRANTING A MISTRIAL BASED ON THE PROSECUTION'S REPEATED IMPROPER ARGUMENTS, WHICH SINGULARLY, AND IN THE CUMULATIVE WERE IMPROPER AND PREJUDICED THE DEFENDANT.

POINT VI

WHETHER THE TRIAL COURT ERRED IN FAILING TO ADVISE THE JURY, DURING THE PENALTY DELIBERATIONS, ONCE ASKED BY THE JURY, THE PRISON TIME CALLED FOR BY THE CHARGES OF WHICH THEY HAD CONVICTED THE DEFENDANT.

POINT I

WHETHER THE TRIAL COURT ERRED IN LIMITING THE CONSIDERATION OF MITIGATING CIRCUMSTANCES TO FACTORS ENUMERATED UNDER SECTION 921.141 SOLELY AND NOT ADVISING THE JURY THAT IT COULD CONSIDER NON-STATUTORY MITIGATING CIRCUMSTANCES IN FAVOR OF THE SENTENCE OF LIFE IMPRISONMENT AS OPPOSED TO DEATH.

Individualized sentencing in criminal cases has long been the accepted concept in this country. See, *Williams v. New York*, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949). Consistent with this concept, sentencing judges traditionally have taken a wide range of factors into account. *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). The definition of crimes generally has not been thought automatically to dictate what should be the proper penalty. See *Ibid.*; *Williams v. New York*, *supra* at 247-248, 69 S.Ct. at 1083; *Williams v. Oklahoma*, 358 U.S. 576, 585, 79 S.Ct. 421, 426, 13 L.Ed.2d 516 (1959). Moreover, where sentencing is discretionary, the sentencing judge's "possession of the fullest information possible concerning the Defendant's life and characteristics" is "highly relevant --if not essential--[to the] selection of an appropriate sentence..." *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978); *Williams v. New York*, 337 U.S. at 247, 69 S.Ct. at 1083. (Emphasis supplied)

The death sentence cannot be automatic and commonplace in capital cases. See, *Williams v. New York*, *supra*, at 247-248, 69 S.Ct., at 1083. In *Williams v. Oklahoma*, *supra*, 358 U.S. at 585, 79 S.Ct., at 426, the Court stated:

> "[i]n discharging his duty of imposing a proper sentence, the sentencing judge is authorized, if not required, to consider all of the mitigating and aggravating circumstances involved in the crime. (Emphasis added.)

See also *Furman v. Georgia*, 408 U.S. 238, 245-46, 92 S.Ct. 2726, 2729-2730 (Douglas J., concurring); *Id.*, at 297-298, 92 S.Ct., at 2756 (Brennan, J. concurring); *Id.*, at 339, 92 S.Ct., at 2777 (Marshall, J., concurring); *Id.* at 402- 403, 92 S.Ct., at 2810 (Burger, C.J., dissenting); *Id.*, at 413, 92 S.Ct. at 2815 (Blackmum, J., dissenting); *McGautha v. California*, 402 U.S. 183, 197-203, 91 S.Ct. 1454, 1462-1465, 28 L.Ed.2d 711 (1971).

In *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), Chief Justice Burger, writing for the plurality stated

> "[W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer not be precluded from considering, as a mitigating factor, any aspect of the Defendant's character or record and any of the circumstances of the offense that the Defendant proffers as a basis for a sentence less than death."

98 S.Ct. at 2964 (emphasis in original). See also, *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 874 (1982).

It is unequivocal that the rule announced in *Lockett* followed earlier decisions stressing individualized sentencing and the Supreme Court's insistence that capital punishment be imposed fairly, and with a reasonable consistency, or not at all. *Eddings v. Oklahoma*, 102 S.Ct. at 875. *Lockett* recognizes that

"justice...requires...that there be taken into account the circumstances of the offense together with the character and propensities of the offender." *Eddings v. Oklahoma*, 102 S.Ct. 869, 875 (1982)(citing from *Pennsylvania v. Ashe*, 302 U.S. 51, 55, 58 S.Ct. 59, 60, 82 L.Ed.2d 43 (1937).

Furthermore, it well established that a sentencing body must not be limited in its consideration of mitigating circumstances. *Hitchcock v. Dugger*, ____ U.S.____ , 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987). This principle applies both to the Florida sentencing jury and the sentencing judge. *Riley v. Wainwright*, ___ So.2d ___ (No. 69, 563, Fla. September 3, 1987); *Magul v. Dugger*, 824 F.2d 879 (11th Cir. 1987).

In Hitchcock v. Dugger, ____ U.S. ____, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987), the Court concluded that evidence of nonstatutory mitigating circumstances was not considered by either the advisory jury or the sentencing judge and hence reversed the judgement and remanded the case to the Court of Appeals. There, the defense attorney introduced some nonstatutory mitigating evidence, and although he stressed the statutory mitigating circumstances, he told the jury to "look at the overall picture...consider everything together...consider the whole picture, the whole ball of wax." *Id.* 107 S.Ct. at 1824. On the other hand, the prosecutor's closing argument told the jury to consider the mitigating circumstances by number, and then went down the statutory list. *Id.* 107 S.Ct. at 1824. See, also *Messer v. State of Florida*, 834 F.2d 890, 893 (11th Cir. 1987).

Additionally, the trial court told the jury that he would instruct them "on the factors in aggravation and mitigation that you may consider under our law." 107 S.Ct. 1824. Imposing the death sentence, the judge found "there [were] insufficient mitigating circumstances *as enumerated in Florida Statute 921.141 (6)* to outweigh the aggravating circumstances." *Id.* (emphasis in Supreme Court text.) On these facts, the Supreme Court concluded that

> "...the advisory jury was instructed not to consider, and the sentencing judge refused to consider evidence of nonstatutory mitigating circumstances."

107 S.Ct. at 1824.

Similarly, in *Messer v. State of Florida*, 834 F.2d 890 (11th Cir. 1987), a writ of habeas corpus was granted and a new sentencing hearing ordered on the ground that the state trial court judge had violated *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) by refusing to consider nonstatutory mitigating evidence when imposing the death sentence. After some appellate proceedings, at Mr. Messer's resentencing, the prosecutor made no mention that mitigating circumstances, other than those enumerated in the statute, could be considered by the jury. The prosecutor stated:

> In reaching that decision, His Honor will instruct you on the law and will instruct you on mitigating and aggravating circumstances. There are eight aggravating circumstances. There are seven mitigating circumstances--under the law. I suggest to you in this case there will be four--at least four aggravating circumstances. There will be no mitigating circumstances.

834 F.2d at 893. The Court concluded that "[l]ike the prosecutor in *Hitchcock*, the state attorney discussed one by one, the statutory list of mitigating circumstances, *clearly implying to the jury that the statutory list was exclusive. Id.* at 894.

Further, the sentencing judge in *Messer* made the following findings:

> The Court has reviewed those mitigating circumstances contained in Section 921.141(6)(a) through (g), and finds that none of those mitigating circumstances are present. In making this finding, the Court has considered the testimony of two clinical psychologists and a psychiatrist who testified, none of whom diagnosed the Defendant to have been suffering any extreme mental or emotional disturbance at the time of the commission of the offense.
>
> Based on the above findings, the Court concludes that sufficient aggravating circumstances exist to require the sentence of death in the electric chair, and that no mitigating circumstances exist which would allow this Court to reduce that sentence to life imprisonment.

In the instant case, the trial court limited the consideration of mitigating circumstances evidence. The prosecutor in the penalty phase told the jury:

> There is only one issue in this case at this point. The issue is, what punishment does that man deserve for the crime--the crimes that he committed.
> Now, it would be very simple to just say: "Okay. Everybody go back and let us know how you feel." But, it really wouldn't be fair. Every jury would be different, then, and it would be pretty arbitrary on how the death penalty was decided.
> So, the Legislature has set aside guidelines that you follow so that in every case, where somebody has been convicted of First Degree Murder, *every Defendant is judged by the same set of standards, and what these are, as you have heard, are the aggravating factors and the mitigating factors.* The aggravating factors, to begin, are those things which weigh in favor of the imposition of the death penalty. The mitigating factors are those

> things that weigh in favor of life imprisonment with 25 years before parole. (T. 1652.)
>
> . . .
>
> What you do is, you weigh these and as we talked about before, it is not so many against so many. *You can attach any weight to any one of these factors you want.* You could find that one aggravating outweighs five mitigating, or one mitigating outweighs five aggravating. You can attach whatever weight you feel is appropriate.
> What I would like to do is, I would like to go through these with you. *This is the standard that you have to apply when you make your recommendation to the Judge on what sentence should be applied.*
> (T. 1653)

The prosecutor then proceeded to itemize *one by one*, all of the aggravating and mitigating factors. In conclusion, the state attorney told the jury this case "screamed out in justice for the death penalty" (T. 1670) and explained:

> You are sworn to uphold the law. You just don't come to an opinion. You have to follow the law.
> *We have gone through the aggravating and we have gone through the mitigating, and it is seven to nothing.* There is not a mitigating factor.
> When you go back into that jury room, if you are going to follow the law, if you are going to do what is just and if you are going to do what is right in this case, there is only one recommendation you can make.
> Now, we don't have juries to do the easy thing. We have juries to do the right thing, and it may not be comfortable and it may not be something that everybody enjoys doing, but you have to do the lawful and the right thing in this case, and when you think about it, there is no choice.
> (T. 1671)

The trial court's instructions to the jury likewise mentioned only the mitigating circumstances outlined in Section 921.141, Florida Statutes. After reading one of the aggravating and mitigating circumstances, the Court stated:

> You should weigh the aggravating circumstances against

> the mitigating circumstances, and your advisory sentence must be based on these considerations. (T. 1690)

As in *Hitchcock* and *Messer*, the prosecutor in this case clearly implied to the jury that the statutory list was exclusive. See, *Messer v. State of Florida*, 834 F.2d at 894. The sentencing judge similarly failed to make clear, that circumstances relating to the Defendant's character, background, personality, upbringing and lifestyle, should be considered. The trial court made it unequivocal that the jury's duty was to weigh the aggravating circumstances against the mitigating circumstances and arrive at their advisory sentence. (T. 1690)

Furthermore, the trial court made it unmistakably clear that only those factors outlined in Section 921.141 (5) and (6), Florida Statutes, were considered by the Court when it stated:

> Pursuant to Florida Statute 921.141, Subsection 5, this Court is required to and does consider each of the aggravating circumstances involved herein, and pursuant to Florida Statute 921.161, Subsection 6, this Court is required to and does consider each of the mitigating circumstances involved herein and makes the following findings and judgments. (T. 1726)

The Court then proceeds to go through each one of the aggravating and mitigating circumstances (T. 1726-1737). The Court concludes its findings by announcing:

> The Court does not count the aggravating and the mitigating circumstances, but it is actually a reasoned judgement as to what the factual situation was in this trial, and judges *those factors* in determining whether the factual situation requires the imposition of death as contrasted with that of life imprisonment with a twenty-five year minimum mandatory. (T. 1738)

Thus, it is obvious that the jury was instructed, both by

the prosecutor, as well as by the trial court, that their sole purpose was to weigh the factors listed in Section 921.141 (5) against Section 921.141 (6). They were not told of their duty to consider the other mitigating factors produced at trial.[1] Hence, the sentence of death should be reversed and this matter remanded for a full resentencing hearing.

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[1]The only testimony adduced at trial from the Defendant was in rebuttal to enumerated aggravating factors. Defense counsel mentioned in argument that the Defendant was "a street kid" from "a poor family." (T. 1676) This was the only evidence presented as to mitigating factors outside the Statute. As part of this Brief, the Defendant argues ineffective assistance of counsel in failing to adduce evidence of other mitigating circumstances. (See Point IV) Even without further evidence of mitigation, this case merits reversal and remand for resentencing as the Court neither instructed the jury, nor considered the two mitigating factors outside the sentencing statute.

POINT II

WHETHER THE TRIAL COURT ERRED IN FINDING THAT THE MURDER OF WHICH THE DEFENDANT HAS BEEN CONVICTED WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL.

Section 941.121 (2), Florida Statutes, mandates that following a verdict of guilty to First Degree Murder a hearing be conducted in order for the jury to render an advisory sentence based on:

> (a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);
>
> (b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and
>
> (c) Based on these considerations, whether the Defendant should be sentenced to life imprisonment or death.

Section 921.141 (2), Florida Statutes.

Section 921.141 (5) enumerates those factors which are to be considered "aggravating circumstances." Aggravating circumstances must be proven beyond a reasonable doubt to be proper considerations in the sentencing decisions. *Williams v. State*, 386 So.2d 538 (Fla. 1980); *Alford v. State*, 307 So.2d 433 (Fla. 1975), cert. denied 428 U.S. 912, 96 S.Ct. 3227, 49 L.Ed.2d 1221 (1976). *Card v. State*, 453 So.2d 17 (Fla. 1984). A capital felony found to have been committed in an "especially heinous, atrocious, or

cruel" manner is one of several circumstances the legislature believes merits aggravation. Section 921.141 (5)(h).

The Florida Supreme Court has interpreted heinous to mean "extremely wicked or shockingly evil"; atrocious as "outrageously wicked and vile"; and, cruel to mean "designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others." *State v. Dixon*, 283 So.2d 1, 9 (Fla. 1973); *Fleming v. State*, 394 So.2d 954, 959 (Fla. 1979); *Lewis v. State*, 377 So.2d 640, 646 (Fla. 1979). The Court has categorized as "especially heinous, atrocious or cruel" to be

> "...those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies--the conscienceless or pitiless crime which is *unnecessarily torturous to the victim.* (Emphasis supplied.)

Id. at 9; *Fleming v. State*, 374 So.2d at 959; *Teffeteiller v. State*, 439 So.2d 840, 846 (Fla. 1983).

The instant case, although regrettably a murder, does not amount to a killing committed in an especially heinous, atrocious or cruel fashion. It has been recognized "that all killings are heinous -- the members of our society have deemed the intentional and unjustifiable taking of a human life to be nothing less." *Lewis v. State*, 377 So.2d 640, 646 (Fla. 1979). However, the Legislature intended to authorize the death penalty for the crime

which is "*especially heinous*" -- "the conscienceless or pitiless crime which is unnecessarily torturous to the victim." *Id.* (Emphasis supplied)

The trial court in the case at bar found this crime to be especially heinous, atrocious or cruel for several reasons:

> The eyewitness's testimony in the case, buttressed by the forensic evidence, shows that this Defendant reacted as a trapped predatory animal, reverting to an atavistic, amoral posture; that with cold, calculating premeditation, in a time sequence of sixteen seconds, fired three shots into the body of the victim. (Transcript, p. 1732)

In making this finding, the trial court chose to *disregard* the testimony of numerous witnesses whom, unlike the forensic officer, eyewitnessed the shooting. Additionally, the trial court intermixes the factors of "especially heinous, atrocious or cruel" with "cold, calculating and premeditated"[2] and makes a finding not in evidence.[3]

The sentencing judge then proceeds to note the Defendant knew the victim was a police officer. (T. 1732) And, poses a theory it admits is based on conjecture and speculation as a basis for the death sentence imposed.[4]

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[2]As a separate issue in this appeal, the Defendant addresses how this crime was not one properly categorized as "cold, calculating and premeditated."

[3]There was no testimony the shooting took place over a period of sixteen seconds.

[4]The Court finds:
It is the Court's conclusion, although speculative, that if the Defendant had managed to extract the automatic weapon from its

The trial court erred in allowing the fact that the victim was a police officer to affect his deliberation. This fact was taken into account when the judge aggravated the sentence by finding the Defendant to have committed the crime to disrupt or hinder the exercise of a lawful government function or the enforcement of laws. (T. 1731) Thus, the trial Court erred in substantiating two aggravating circumstances with the identical basis. The fact the victim was a police officer was not a proper foundation for a finding that the crime was committed in an especially heinous, atrocious or cruel manner. The judge clearly allowed this fact to affect his decision and immediately after imposing sentence addressed the Defendant as follows:

> You have killed a police officer. Police officers are a singular group that stand in a different category under different circumstances than anyone else. Everyday those on the police forces must protect all of society, and but for them society would sink into an amoral mass of chaos.
>
> You recognize their responsibilities and their duties. We recognize that anyone that kills a police officer in the line of duty must be and will be prosecuted to the fullest extent of the law.
>
> It is a duty and obligation of this Court to protect those police officers who put their life on the line each and every day, to the best of this Court's ability.
>
> I have no compunction and I have no equivocation in maintaining this obligation,

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carrying case, which in the confusion, he either lost sight of or felt that he could not really extract that weapon -- the carnage that would have been committed thereafter would have staggered the imagination. (T. 1773)

> this Court, as well as all of society, to the police throughout, not only this County, but throughout the entire United States --
>
> You must know, without qualification, that if you are going to kill a police officer in the line of duty, you are going to pay the fullest penalty that the law provides.
>
> The law looks for justice. Forgiveness is forgotten.
>
> When you meet your maker on your judgement day, when he peers into your heart and also when he renders your final eternal sentence, only then will he determine whether you are truly repentant and worthy of some type of forgiveness.
>
> I am confident that he will recognize that on this day this Court has entered the proper verdict and sentence for the proper reasons. (Transcript, p. 1744-45)

In *Teffeteiler v. State*, 439 So.2d 840 (Fla. 1983), the appellant challenged the trial Court's finding that the murder had been committed in an especially heinous, atrocious or cruel fashion. This Court agreed. The victim was stopped in traffic for the purpose of a robbery. When he refused to turn over his money, a shotgun was produced and the victim fired upon. The victim sustained massive abdominal damage and remained conscious and coherent for approximately three hours before his death. The Court reasoned that the criminal act was a sudden shot from a shotgun and after reiterating the requirement that in order to be especially heinous, atrocious or cruel as envisioned by the Legislature, the capital felony must be unnecessarily torturous to the victim, the Court announced:

> [t]he fact that the victim lived for a couple of hours in undoubted pain and knew that he

> was facing (sic) imminent death, horrible as this prospect may have been, does not set this senseless murder apart from the norm of capital felonies.

439 So.2d at 846.

The Court, in *Wilson v. State*, 436 So.2d 908 (Fla. 1983) was presented with a murder wherein one of the victims received a single stab wound to the chest. The Court reasoned that "...clearly the single stab wound to the chest was not such as to make the manner of death unnecessarily torturous or conscienceless and set apart from the norm of capital felonies." *Id.* at 912. On the other hand, the killing wherein numerous abrasions were found on the victim, including injuries consistent with hammer blows to the head region, did amount to an especially heinous, atrocious and cruel murder.

Fleming v. State, 374 So.2d 954 (Fla. 1979) dealt with the killing of a police officer. Mr. Fleming and a companion entered a building for the purpose of a robbery. During the crime, the police arrived and a hostage was taken. A gun battle resulted in one of the Defendants and the hostage being hit. Attempting to escape, the appellant fired a pistol and wounded one police officer and killed another. The trial court found the capital felony was especially heinous, atrocious or cruel and this Court reversed. The Court recognized that "[a]s human beings, we are appalled by such senseless killings," however, a judge "must unemotionally apply the law to the facts" and concluded the killing was not "especially heinous, atrocious or cruel."

In *Cooper v. State*, 336 So.2d 1133 (Fla. 1976), a policeman

received two shots to the head area following a robbery of a grocery store. The Court stated:

> [w]hile we agree with the state that this execution-type murder may have been unnecessary, we agree with Cooper that the standard of an aggravating circumstance is whether the horror of murder is 'accompanied by such additional acts as to set the crime apart from the norm...the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

336 So.2d at 1141.

In *Tedder, II v. State*, 322 So.2d 908 (Fla. 1975), appellant fired a shot in the direction of where his wife, mother-in-law, and his infant son were standing. Appellant's wife ran with the baby to a back bedroom and while loading a shotgun heard shots and her mother scream. Appellant broke through the bedroom door and took his wife and child. The record was clear that the Defendant pursued the deceased inside her trailer, fired additional shots, and killed her. He abandoned the victim, and would not allow his wife to provide her with aid. 322 So.2d at 910. The trial court found that the aggravating circumstance of "especially heinous, atrocious and cruel" applied; this Court disagreed. The Court reasoning:

> It is apparent that all killings are atrocious, and that appellant exhibited cruelty, by any standard of decency, in allowing his injured victim to languish without assistance or the ability to obtain assistance. Still, we believe that the Legislature intended something 'especially' heinous, atrocious or cruel when it authorized the death penalty for first degree murder.

Id. The order of the trial court sentencing appellant to death by electrocution was quashed and the trial court was directed to

enter a sentence of life imprisonment.

The killing in the case at bar simply does not fall within that category of crimes for which the legislature intended to authorize the death penalty. It was not a killing consistent with the published decisions of this Court warranting a finding of "*especially* heinous, atrocious and cruel."

In the instant case, the fact the victim was a police officer was the foundation for finding the crime was "especially heinous, atrocious and cruel." As in *Fleming v. State*, it is impossible to determine what significance this factor was given in the weighing process required under Section 921.141. Thus, the judgment should be reversed and the case remanded for a full resentencing.

POINT III

WHETHER THE TRIAL COURT ERRED IN FINDING THAT THE KILLING WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED FASHION.

Section 921.141 (5)(i) lists an aggravating circumstance to be a murder committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

As with all aggravating circumstances, the state must establish the requirements of this aggravating factor beyond a reasonable doubt. *Harris v. State*, 438 So.2d 787, 797 (Fla. 1983); *Jent v. State*, 408 So.2d 1024 (Fla. 1981).

The level of premeditation required under Section 921.141 (5)(i) is higher than the level of premeditation needed to convict in the guilt phase of a first degree murder trial. *Preston v. State*, 444 So.2d 939, 946 (Fla. 1984). Particularly lengthy, methodic, or involved series of atrocious events or a substantial period of reflection and thought by the perpetrator characterizes this aggravating circumstance. *Id.* Execution or contract murders, or similar killings are also considered committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. *Scott v. State*, 494 So.2d 1134, 1138 (Fla. 1986); *McCray v. State*, 416 So.2d 804, 807 (Fla. 1982).

If there exists a pretense of moral or legal justification,

it is error to apply this aggravating factor. *Cannady v. State*, 427 So.2d 723 (Fla. 1983); *Mann v. State*, 420 So.2d 578 (Fla. 1982); *McCray v. State*, 416 So.2d 804 (Fla. 1982).

In *Cannady v. State*, 427 So.2d 723 (Fla. 1983), the appellant stole money from a night clerk, kidnapped him, and thereafter transported him to a wooded area and shot him. The trial judge found the crime to have been committed in a cold, calculated and premeditated manner without pretense of moral or legal justification. Cannady repeatedly denied that he intended to kill the victim, explaining that he shot him because the victim jumped at him. This Court reversed the trial court's decision finding that the state had failed to prove beyond a reasonable doubt that this aggravating factor applied because the Defendant's statements "establish[ed] that appellant had at least a pretense of a moral or legal justification, protecting his own life." 427 So.2d 730. Even the trial court's expressed disbelief in appellant's statements based on the evidence that the victim was a quiet, unassuming minister and the fact that he was shot five times, did not, alone, prove the aggravating factor beyond a reasonable doubt. See also, *Scott v. State*, 494 So.2d 1134, 1138 (Fla. 1986).

In *Harris v. State*, 438 So.2d 787 (Fla. 1983), this Court likewise held that the state had failed to establish beyond a reasonable doubt that the murder was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. After reiterating the well-established

principle that it did not believe that the legislature intended this aggravating circumstance to apply to all premeditated murder cases, the Court noted that the state had failed to show that the murder was planned and, in fact, all of the instruments of the death came from the victim's premises. 438 So.2d at 798.

In *Preston v. State*, 444 So.2d 939, (Fla. 1984) the fact that the Defendant cut the victim's throat from one side to the other was held not to support the heightened form of premeditation required under Section 921.141 (5)(i). Likewise, in *Peavy v. State*, 442 So.2d 200 (Fla. 1983) the Supreme Court reversed the trial court's finding that the case involved a murder committed in a cold, calculated and premeditated manner. In *Peavy*, the murder occurred during the commission of a burglary and robbery. The victim had died from stab wounds. This Court reasoned that the evidence was susceptible to other conclusions than finding it was committed in a cold, calculated and premeditated manner and thus the aggravating circumstance was not proven beyond a reasonable doubt. 442 So.2d at 202.

This Court in *Wilson v. State*, 436 So.2d 908 (Fla. 1983) was presented with a fact scenario wherein a family dispute escalated into the stabbing of a five year old and the appellant shooting his father. The defendant challenged the trial court's finding that the murders were cold, calculated and premeditated. The State, along with this Court, concurred.

In the instant case, the Defendant, as well as all eyewitnesses, testified that Officer Miyares and the Defendant

struggled on the floor. The Defendant plead self-defense and the use of justifiable force. State witness, Ray Freeman, firearms examiner for Crime Laboratory Bureau of Metro-dade Police Department, testified that the hypothesis that when the shots were fired, one of the parties was lying on the ground was just *one* hypothesis and *other* hypotheses were possible. (T. 1048) Ms. Librada Torres testified that she witnesses the altercation; that she heard four shots fired; (T. 1146-47) and all four shots were fired while Mr. Rivera and the officer were struggling on the ground (T. 1147) Additionally, the medical testimony substantiated the Defendant's theory of defense. Doctor Robert Quencer, as well as Dr. Seckinger, agreed that the head injury sustained by the Defendant, Rivera, was occasioned by a blow of such magnitude that it fractured the skull, requiring the Defendant to undergo a craniotomy. This injury was consistent with a focal force blow caused by the tip of a pistol. (T. 1120, 1126, 1127). Thus, it is unequivocal that the evidence was susceptible to other conclusions than the killing was committed in a cold, calculated and premeditated fashion. The Defendant presented evidence which, at a minimum, "establis[ed] that appellant (Mr. Rivera) had at least a pretense of a moral or legal justification" for the actions he took. Mr. Rivera believed he was protecting his own life. In *Cannady v. State*, 427 So.2d 723 (Fla. 1983) the fact the trial court disbelieved the appellant's claim that the victim jumped him, did not, alone, substantiate the finding that the murder was committed in a cold, calculated and premeditated

manner without any pretense of moral or legal justification. 494 So.2d at 1138.

Similarly, here, the fact the trial court chose to give greater weight to the forensic officer rather than to the eyewitnesses does not substantiate the heightened burden of proof that this crime was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. Thus it was improper for the sentencing judge to conclude this factor was an aggravating circumstance.

POINT IV

WHETHER TRIAL COUNSEL FOR DEFENDANT WAS DEFICIENT AT SENTENCING BY FAILING TO INTRODUCE EVIDENCE OUTSIDE SECTION 921.141 THEREBY PREJUDICING THE OUTCOME OF THE HEARING.

Pursuant to the dictates of *Combs v. State*, 403 So.2d 418 (Fla. 1981), the Defendant raises the issue of effective assistance of counsel at the sentencing phase so that this issue may be resolved in an expeditious manner by suggesting remand to the trial court for the purposes of a full sentencing hearing so as to avoid unnecessary and duplicitous proceedings. 403 So.2d at 422 (citing *State v. Meneses*, 392 So.2d 905 (Fla. 1981)). In *Combs v. State*, this Court made it clear that it construed Section 921.141 (4) to require a full record review for trial error and a determination of the sufficiency of the evidence, as well as the appropriateness of the imposition of the death sentence.[5]

The Defendant in the instant case challenges the appropriateness of counsel's performance during the sentencing phase for the following reasons:

(1) There was no evidence presented with reference to the Defendant's childhood, upbringing and family background;

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[5]In *Combs v. State*, the Court relied on *Francis v. State* (No. 50,127) dated June 20, 1978 (unreported order) wherein the Court relinquished jurisdiction to permit appellant to file a motion pursuant to Fla. R. Crim. P. 3.850 raising a claim of ineffective assistance of counsel. The Defendant, Rivera seeks similar relief.

(2) There was no character evidence presented to show the Defendant's potential for rehabilitation and productivity within the prison system;

(3) There was no evidence presented with regards to the Defendant's emotional stability in general; (appellant's counsel finds no request for assistance of experts during the sentencing phase and if remanded, such aid would be utilized by the Defendant.)

(4) There was no evidence presented with regards to the Defendant's emotional stability at time of the crime;

(5) There was no evidence with reference to the Defendant's mental and emotional development;

(6) There was no evidence of psychological or psychiatric assistance;

(7) There was no evidence as to use and/or drug or alcohol addiction;

(8) There was no evidence of employment.

In order to establish a claim that counsel rendered constitutionally ineffective assistance, it must be shown that counsel's conduct so undermined the proper functioning of the adversary process that the trial cannot be relied upon as having produced a just result. *Strickland v. Washington*, ____U.S.___, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). This test is delineated into a two-part inquiry:

(1) Did counsel in fact render a deficient performance?

(2) If counsel's performance was deficient, was this prejudicial to the defense in any particular way?

Tyler v. Kemp, 755 F.2d 741, 744 (11th Cir. 1985).

Counsel's conduct is deficient when it falls "below an objective standard of reasonableness." *Strickland v. Washington*,

104 S.Ct. 2065. Someone challenging assistance of counsel must demonstrate that the particular acts of counsel were outside the "wide range of competent assistance." *Id.* at 2066.

Actual prejudice is shown where there is a "reasonable probability that but for counsel's unprofessional errors the result of the proceeding would have been different." 104 S.Ct. at 2068.

There was no evidence, although counsel honestly believes such evidence was available, of mitigating circumstances outside Section 921.141 (6).[6]

In *Thomas v. Kemp*, 796 F.2d 1322 (11th Cir. 1986), the appellate court upheld the district court's finding that omitting several witnesses from the sentencing phase was prejudicial. The Court reasoned that "Thomas' lawyer had made little effort to investigate possible sources of mitigating evidence." *Id.* The Court noted that the state record was insufficient to permit a determination of whether counsel's decision not to present mitigating evidence was strategic or negligent; thus, it was proper to hold an evidentiary hearing. 796 F.2d at 1324.

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[6]Undersigned counsel lives and works in Miami, Florida. The Defendant is incarcerated in Starke, Florida. The only communications between the Defendant and undersigned counsel have been via correspondence and it is impossible to question Mr. Rivera through telephonic means or by way of correspondence, since he has refused believing that all such communications are intercepted and monitored by law enforcement authorities. Undersigned counsel has not been appointed to represent Mr. Rivera on the collateral issue of ineffective assistance of counsel, but cost money will be requested to travel to Starke, Florida. (The Defendant, Rivera, was declared indigent for costs and appointed trial and appellate counsel.)

Similarly, in *Tyler v. Kemp*, 755 F.2d 741 (1985), the defendant was held to have been denied effective assistance of counsel during sentencing in that defense counsel presented no evidence of mitigating circumstances. 755 F.2d at 744. There, although family members had expressed their desire not to testify, the Court held that the attorney failed to inform them their testimony was needed on a subject other than guilt or innocence, the attorney did not explain the sentencing phase of the trial or that evidence of a mitigating nature was needed. [7] 755 F.2d 744-45. The Court reasoned that the defendant had been prejudiced by the non-introduction of this evidence, and, that there was a reasonable probability that the jury would have recommended a sentence of life as opposed to death. *Id.* at 746.

In *King v. Strickland*, 749 F.2d 1462 (11th Cir. 1984), the Court again held that counsel was deficient and prejudiced in his performance at the sentencing hearing when he failed to present available character witnesses in mitigation.

In this case, a combination of trial counsel's errors during the penalty phase in not producing mitigating circumstances outside of Section 921.141, Florida Statutes, the prosecutor's comments, and the trial court's instructions[8] undermine the confidence in the reliability of Mr. Rivera's sentencing proceeding. Mitigating evidence from the family, as well as other

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[7]Please refer to footnote 6.

[8]See Point I.

witnesses is possibly available.[9] See, *Tyler v. Kemp*, 755 F.2d 741, 745 (11th Cir. 1985) (Court found that "mitigating evidence from outside the family was possibly available" and found counsel ineffective at sentencing phase).

Thus, the Defendant requests this Court remand for a full sentencing hearing.

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[9]Please refer to footnote 6.

POINT V

WHETHER THE TRIAL COURT ERRED IN NOT GRANTING A MISTRIAL BASED ON THE PROSECUTION'S REPEATED IMPROPER ARGUMENTS, WHICH SINGULARLY, AND IN THE CUMULATIVE WERE IMPROPER AND PREJUDICED THE DEFENDANT.

During closing arguments, the prosecutor made the following comments:

> Emilio Miyares was 27. He will always be 27. He will always be 27 because of the actions of this man. (T. 1523).

During closing at the penalty phase, the prosecutor then states:

> And, the fact that you are about to be arrested by the police is not extreme emotional or mental disturbance. If it was, we would have a lot of dead police officers in this community. (T. 1659).

The trial court denied the Defendant's motion for mistrial, however, the court advised the jury they were not to consider this statement.

Immediately, thereafter, the prosecutor states:

> He comes up here -- you are going to be deciding now, making a recommendation of what should happen to him. He

comes up here before you.
Does he say he is sorry?
Does he say, "I'm sorry
that Officer --"
MR. GURALNICK: Objection.
MR. PUROW: "--Officer Miyares
is dead." (T. 1666)

The Defendant moves for a mistrial, or alternatively a curative instruction. Thereupon, the prosecutor interrupted and said:

"There is nothing improper--"

The Court then noted he "considers it (the prosecutor's statements), under the circumstances inflammatory." However, denied a mistrial and requested the jury disregard the statement.

Immediately thereafter, the prosecutor tells the jury:

Did you hear one person,
any witness, any defense
witness come up here and
say anything nice about
him? (T. 1667)

The State then argues to the jury that because this case deals with the death of a policeman:

"...it is extra, extra
terrible when a police
officer dies, and that is
why we have--" (T. 1669)

The Defendant interrupted, and requested a mistrial, which was denied.

The prosecutor clearly overstepped the bounds of proper argument. He deliberately and continuously made improper and extremely prejudicial statements. His conduct was so outrageous, it violated the prosecutor's duty to seek justice, not merely to "win" a death recommendation. See ABA Standards for Criminal Justice 3-5.8 (1980). The prosecutor was repeatedly admonished by

the Court, and through curative instructions, the jury was told to disregard the inflammatory comments of the prosecutor.

The prosecutor went outside the permissive scope of argument. As explained in *Bertolotti v. State*, 476 So.2d 130 (Fla. 1985):

> The proper exercise of closing argument is to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence. Conversely, it must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant rather than the logical analysis of the evidence in light of the applicable law.

476 So.2d at 134.

The prosecutor improperly urged the jury to convict the Defendant on the basis of emotional consideration. He asked the jury to deprive the Defendant of his life because Officer Miyares would "always be 27...because of the actions of this man (referring to the Defendant). (T. 1523)

Similarly, advising the jury that there would be "a lot of dead police officers in this community" if being arrested by the police amounted to extreme emotional or mental disturbances was improper. The trial court acknowledged the impropriety of the statement. There was no evidence about other police officers being threatened or hurt. In fact, the evidence was contradictive of this fact. The Defendant had access to Officer Miyares' gun upon being apprehended. Never, following the incident at the mall, did he attempt to point or shoot another policeman. The prosecutor's statement was meant to inflame the jurors and attain an emotional

response, rather than a logical analysis of the evidence.

The prosecutor's next improper comment goes to show the Defendant's lack of remorse. It is well settled that evidence of remorse may be used in favor of mitigating a sentence. However, absence of remorse is not a proper consideration. *Patterson v. State*, 513 So.2d 1263 (Fla. 1987); *Pope v. State*, 441 So.2d 7073 (Fla. 1983).

The prosecutor then makes reference to the Defendant not calling witnesses who "say anything nice about him." This statement clearly infringes on the Defendant's right to remain silent, by not calling any witnesses and violates his right to due process of law under the Fifth and Fourteenth Amendments to the United States Constitution. The Defendant took the stand in his own behalf, however, this did not per se require him to produce character evidence to rebut the type of argument made by the prosecutor.

The prosector reinforced the fact that the victim was a police officer and improperly played on the juror's emotions. The State argued that this crime was "extra, extra terrible" because it dealt with a policeman. This statement unequivocally had an effect on the jurors, as well as the trial court.[10]

The prosecutor's misconduct in playing on the juror's passions was so outrageous that it tainted the validity of their deliberations. During closing at the penalty phase, the prosecutor

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[10]See trial court's statements directed at Defendant cited on page 21.

also told the jurors:

> What is going through this man's mind as he is looking down the barrel of this gun.
> I am not going to do any of you the disservice by pointing this in your face, but you can just imagine this gun is pointing down to him while he is on his knees with his hand raised up in the air and he sees this man fire the gun and the bullet rips into his body, and the man fires the gun again and another bullet rips into his body, and then, the man fires again and another bullet blows apart Emilio Miyares' heart and he starts to bleed internally.

This statement was clearly improper.[11] In *Teffeteiller v. State*, 439 So.2d 840 (Fla. 1983) this Court rejected the contention that the victim lived for a couple of hours in pain and knew that he was facing imminent death, to substantiate an aggravation. 439 So.2d at 849. Furthermore, violation of the "Golden Rule" is unmistakably prejudicial error. The prosecutor improperly urged the jury to imagine what it would be like to have the gun introduced into evidence pointed at them when he asked them to imagine the scenario as he believed Officer Miyares experienced it.

The prosecutor continually made improper comments which had only one effect, to inflame the jurors with passion. Their deliberations were tainted and the verdict reflected an emotional response to the crime and appropriate penalty.

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[11]This statement was made during the penalty phase and the Defendant prays it be considered within the context of his ineffective assistance of counsel argument.

POINT VI

WHETHER THE TRIAL COURT ERRED IN FAILING TO ADVISE THE JURY, DURING THE PENALTY DELIBERATIONS, ONCE ASKED BY THE JURY, THE PRISON TIME CALLED FOR BY THE CHARGES OF WHICH THEY HAD CONVICTED THE DEFENDANT.

It is a well established principle of law in this state that this Honorable Court has the power to review on appeal errors that are so "fundamental as to justify such action or when the ...court in its discretion deems the interest of justice so require." *Anderson v. State*, 276 So.2d 17 (Fla. 1973); *State v. Smith*, 240 So.2d 807 (Fla. 1970). Fundamental error is "error which goes to foundation of case or goes to merits of cause of action." *Kinner v. State*, 382 So.2d 756 (2d DCA 1980).

At the sentencing phase of the case, that is the subject of this appeal, the Jury sent a specific question to the trial judge, the Honorable Martin Greenbaum, where they requested to know:

> Is there a minimum of time to be served on the other charges.

The trial court's response was:

> You are to concern your deliberations solely on the advisory opinion whether or not this Court should impose the death penalty or life with 25 year minimum as set forth in my instructions. (T. 1698)

It is clear from the question presented to the trial court that there was great concern among the jurors that the Defendant receive a proper punishment for his crimes. The question posed by the jury went directly to the merits of their duty, i.e., to determine the appropriate penalty. It is also abundantly clear that this jury was weighing the considerations of the proper punishment and wanted to know the total amount of the time the Defendant was subject to incarceration.

The Court should have informed the jury that while if they recommended life, and the Defendant was in fact sentenced to life that this Court could have then sentenced him to additional time for his additional convictions.

Ordinarily, a jury considering and weighing the evidence presented at trial, should not be, and in fact is not allowed to be informed as to the period of incarceration or form of punishment a particular Defendant might receive if convicted. However, at the stage of the proceedings where this fundamental error occurred, the jury had already determined guilt and was deliberating as to penalty only.

The facts of the case show the jurors were split 7-5 in favor of the death penalty. (T. 1700) If one person had voted for life imprisonment, the jury would have been split 6-6 and perhaps the trial court would not have sentenced the Defendant to die.

This jury's purpose was to advise the trial court on the proper punishment. To make them aware that this Defendant, if sentenced to life, would spend a considerable amount of time in

jail, goes to the very "foundation" of what this jury was concerned with, to wit: punishment. Thus, it was error for the trial court to refuse to answer the precise question posed by the jurors.

CONCLUSION

Based on the foregoing facts, arguments, and authorities, the Defendant, SAMUEL RIVERA, submits that his conviction and sentence should be reversed with direction that he be discharged; alternatively, if this Court opines that the Defendant is immediately entitled to a resentencing, the Defendant requests the lower court be instructed to hold a full evidentiary hearing and resentence the Defendant.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing corrected Initial Brief of Appellant was furnished by mail to the Office of the Attorney General, 401 N.W. 2nd Avenue, Suite 820, Miami, Florida; Attention: Mr. Michael Neimand, Assistant Attorney General, this 13th day of April, 1988.

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