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IN THE SUPREME COURT OF FLORIDA

EDDIE EUGENE ALVIN,

Defendant/Appellant,

v.

THE STATE OF FLORIDA,

Appellee.

APPEAL DOCKET NO: **71,637**

ON APPEAL FROM THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA

~~BRIEF OF~~ APPELLANT

NATHAN G. DINITZ, ESQUIRE
600 Silver Beach Avenue
Daytona Beach, Florida **32018**
(904) 257-1158
ATTORNEY FOR EDDIE EUGENE ALVIN, APPELLANT.

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STATEMENT OF FACTS

This is an appeal from the Judgment and Sentence entered by the Honorable R. Michael Hutcheson, Circuit Court Judge, Volusia County, Florida, on October 28, 1987 (R. 2155-2161); rehearing denied December 1, 1987 (R. 2164). The Judgment and Sentence adjudicated the Defendant guilty of premeditated murder in the first degree, attempted murder in the first degree, attempted armed robbery with a firearm, and attempted kidnapping with a firearm; and sentenced the Defendant to death, together with concurrent sentences of seventeen years, fifteen years, and fifteen years respectively.

The parties will be referred to as they stood in the lower court: The Appellant, Eddie Eugene Alvin, will be referred to either by name or as the Defendant. The Appellee is the State. Reference to the Record on appeal will be designated by the simbol "R.___" followed by the applicable Record page number.

The testimony presented at trial showed the following:

On January 22, 1987, Volusia County Sheriff Michael Davis was on routine patrol on I-95 (R. 681-682). At about 9:30 p.m., he stopped a white 4-door Volvo for speeding, and issued the driver a traffic citation (R. 680-684). The driver was to Marvin Eugene Brown. The officer did not recognize anybody else who was in the Volvo, but believes there were three other passengers in the car. Officer Davis ran the temporary tag through the computer and neither the tag nor the driver was wanted; and he did not see any criminal violations or civil infractions regarding the temporary license tag (R. 689-692).

Willie Lamar Powell's nickname is "Omar", and he is twenty two years old

(R. 694).

Willie Powell and Letha Mae Paynes were at a grocery store at Bellevue and Campbell Streets, Daytona Beach, in the early morning hours of January 23, 1987. He saw a white Volvo pass by, and later return. Powell identified Marvin Brown as the driver of the Volvo (R. 703).

As Powell walked back to his car from the phone booth in front of the grocery store, he heard somebody ask "Where is Omar". In court, Powell identified the person who spoke as Eddie Alvin. Powell asked Alvin who was looking for "Omar", because that was Powell's name. At that time Powell noticed something shaped like a gun in Alvin's pants (R. 723-724).

Eddie Alvin asked Powell if he knew where Omar was. Powell said that he did not, but could probable locate him; Powell decided not to tell Alvin that he was Omar, because he did not know Alvin, and saw a gun in his pants (R. 726-728). Powell then saw Willie Grimes approaching, and told Grimes to wait a minute. Powell walked to the pay phone where Willie Grimes was waiting, and made believe he was using the phone to call "Omar". Actually, he asked Grimes if he knew the people in the Volvo (R. 729). Alvin then got in to the front passenger seat of the Volvo (R. 729).

When Powell got off the telephone, the Volvo had backed up to the phone booth, and Alvin told him to get in the car, and he could take them to Omar's house (R. 730-732). Powell refused to get in the car. Both passenger doors then flew open, the two passengers on the right side got out of the Volvo with guns, Powell started running, heard shooting, and felt a bullet hit him in the back (R. 732-742).

After the Volvo left, Powell returned to the parking lot where he saw Willie Grimes on the ground breathing hard (R. 743, 750-751). Powell then saw

Melody Fay Benjamin drive by, asked her to drive him to the hospital, which she did (R. 751-753).

When the two passengers jumped out of the Volvo, Willie Simmons stated "Its a jack", which Powell understood to mean that it was a robbery (R. 740).

Doctor Schwartz, testified that Willie Grimes died as a result of being shot (R. 837-860).

Codefendant, Wesner Remy, was the next witness. He recalled the incident beginning on January 22, 1987, when he took a trip from Jacksonville to West Palm Beach. He was in Marvin Brown's car, a white Volvo with tinted windows. With him were Marvin Brown, Willie Simmons, and "Applejack", who Remy identified as Eddie Alvin (R. 874-877). While they were heading to West Palm Beach, they stopped in Daytona Beach because Marvin Brown had a friend he wanted to see there (R. 877).

When they arrived in Daytona Beach, Marvin Brown asked a women to get in the car with them to help them locate his friend. They drove around looking for Brown's friend, they couldn't find him, so they dropped the women off at the bar where they had picked her up (R. 880-883). At that time Brown saw a red car and indicated that was his friend's car. They then parked next to the car, and Brown saw his friend standing by the pay telephones (R. 883-885). Applejack got out of the car with Willie Simmons, they were both armed, told Brown's friend to get in the car, and the next thing Remy knew was he heard shots (R. 885-887). After the shooting they then continued on to West Palm Beach (R. 887-888). Remy did not hear anyone refer to a "jack" (R. 922).

Remy then identified the guns found in the Volvo in West Palm Beach, as the guns used in the shooting (R. 889). Remy further testified as to his being

stopped in West Palm Beach, and his giving a statement to the police (R. 889-890). Additionally, Remy testified on direct examination that in exchange for his testimony in Court the State had agreed to give him immunity on the charge of accessory after the fact to this murder, and had further agreed to inform the prosecutors in Palm Beach of Remy's cooperation (R. 891).

On cross-examination, Remy testified that he had not met either Brown or Eddie Alvin prior to starting the trip to West Palm Beach (R. 895); he did not know why Brown wished to stop in Daytona Beach to visit a friend (R. 898); and that there had been no prior talk about robbing anybody or kidnapping anybody, and he had no idea why the shooting occurred (R. 902-903).

After some additional cross-examination of Remy, the State called Detective Greg Smith for the purpose of introducing and playing Wesner Remy's prior, unsworn, tape recorded statement given by him in West Palm Beach (R. 929). Over the Defendant's objections, the unedited tape recorded statement was then played for the jury (R. 930-950). The Defendant's motions for mistrial based on the playing of that tape recording were thereafter denied (R. 955-978).

The State's next witness was Melody Fay Benjamin. On January 23, 1987, she was parked at a nightclub in Daytona Beach. She entered a white Volvo when the driver started talking with her. Ms. Benjamin identified Marvin Brown as the driver of that Volvo (R. 982-985).

There were three other people in the Volvo, and in Court Ms. Benjamin identified Eddie Alvin as one of the passengers (R. 986, 989). Marvin Brown asked her if she knew somebody named "Doc", they drove around until Ms. Benjamin saw "Omar" standing by a pay phone on Campbell Street. "Omar" is "DOC'S" brother (R. 988-990). Ms. Benjamin spent about five minutes in the Volvo, did not see any shooting (R. 991). After the shooting, she saw a croud of people,

went to the parking lot, and gave Powell a ride to the hospital (R. **991-992).**

On cross-examination, Ms. Benjamin admitted that when she was shown six photographs one week after the shooting, she was not able to immediately identify Eddie Alvin as a passenger, and at that time she thought there was a fifty/fifty chance that the picture of Eddie Alvin was that of the front passenger (R. 996-999).

The next two witnesses were Francisco Gonzalez, and John Addazio, both of whom are Daytona Beach Police Officers who arrived shortly after the shooting, and who identified at trial, photographs and bullets from the scene of the incident (R. **1009-1156).**

Office Matthew McMillian from the West Palm Beach Police Department had previously testified at a suppression hearing. At trial Officer McMillian testified that he stopped a white Volvo in West Palm Beach on the evening of January **23, 1987,** because he observed a temporary license tag without the required information written on it (R. **1081-1083).** The four people in the car were Wesner Remy, Marvin Brown, Eddie Alvin, and Willie Simmons. After his arrest of Eddie Alvin, he located weapons in the car which later were determined to be involved in the homicide (R. 1128-1131). The weapons and ammunition located by Office McMillian in the Volvo are then admitted into evidence (R. 1134-1140).

Officer Jefferson Lilley and crime analyst Leroy Parker both testied as to atomic absorption tests performed on Grimes and Powell, and that the results were inconclusive as to whether Powell or Grimes discharged a weapon. Carroll Kingery testified (R. 1176-1189), that he examined the weapons and ammunition

boxes found in the Volvo, that he located a fingerprint of Marvin Brown on the side of the ammunition container, but no fingerprints of Eddie Alvin.

The final witness presented by the State was Daytona Beach Police Officer Clem Malek. Officer Malek investigated the homicide and assisted Detective Greg Smith in that investigation (R. **1241).** As part of his investigation he went to West Palm Beach with Detective Smith, and talked with both Brown and Alvin. During that conversation Eddie Alvin advised that he had traveled with Brown from Jacksonville to West Palm Beach, that Mr. Remy and Willie Simmons were in the car, that Alvin slept after leaving Jacksonville and they did not stop in Daytona Beach (R. 1243-1244).

The Defendant called Detective Greg Smith, who testifed that Letha Paynes had indicated after the shooting that she was a eyewitness and believed she could identify the front passenger. When shown a photo lineup including Mr. Alvin, Letha Paynes picked somebody other than Alvin from the lineup (R. **1387,** 1391-1392). Detective Smith also testified that on the night of the shooting Willie Powell and Letha Paynes gave one version of the shooting which coincided, but that later they both gave a different, but still similar version of the shooting incident (R. **1389-1390).**

STATEMENT OF THE CASE

The Defendant, Eddie Eugene Alvin, was indicted, together with Marvin Brown and Willie Simmons, in Volusia County, Florida, and charged with first degree murder; attempted first degree murder; attempted armed robbery; and attempted kidnapping. Wesner Remy was charged in the same indictment with accessory after the fact (R. 2115-2116). The undersigned was appointed to represent Eddie Alvin at trial (R. 2065, 2118).

The Defendant filed his pre-trial motion to suppress photographs, photographic lineup and statements (R. 2098-2102). The motion was heard on September 4, 1987 (R. 2174-2467). At the conclusion of the hearing the trial court entered its Order Denying Motions To Suppress (R. 2095-2097).

Trial of Alvin and Brown began on October 19, 1987, and concluded on October 24, 1987. Alvin was found guilty of premeditated murder in the first degree; attempted first degree murder; attempted armed robbery; and attempted kidnapping. The jury was reconvened for a penalty recommendation on Sunday, October 25, 1987 (R. 1876-2015), and thereafter recommended, by a vote of seven-to-five, that Eddie Alvin be sentenced to be executed. The same jury recommended life imprisonment for Brown. Simmons was tried separately, convicted of first degree murder and other lesser crimes, and sentenced to life imprisonment.

On October 28, 1987, the trial court entered its Findings Of Fact (R. 2151-2153), and sentenced Eddie Alvin to execution. The trial court also sentenced him to concurrent sentence of seventeen years, fifteen years, and fifteen years for the other charges.

The Defendant's motion for a new trial was filed on November 5, 1987 (R. 2162-2163), and denied on December 1, 1987 (R. 2164). On December 15, 1987, the Defendant timely filed his Notice of appeal to this Honorable Court (R. 2166).

SUMMARY ~~OF~~ ~~THE~~ ARGUMENT

1. The Defendant is black. The trial court erred in jury selection, by allowing the State to exclude every black potential juror. Additionally, the trial court erred in not allowing the Defendant to question the potential jurors about their feelings on imposing the death penalty.

2. The trial court erred by allowing the State to introduce as evidence, an unsworn prior tape recorded statement of a co-defendant, to impeach that State's witness, and to supplement that witness' in-court testimony. If the tape recorded statement were admissible at all, the trial court nevertheless erred in refusing to excise the irrelevant and prejudicial portions of that statement prior to allowing it to be played before the jury.

3. The trial court erred in refusing to allow the Defendant a fair opportunity to cross-examine the State's chief investigating officer, Detective Smith. The inadequate opportunity to cross-examine Smith resulted in the Defendant having a reduced opportunity to challenge his identification as the perpetrator of the murder.

4. The Defendant was charged with attempted armed robbery of U.S. currency from Willie Powell. The State failed to present any evidence that Willie Powell had any U.S. currency, or that the Defendant intended or attempted to take currency from him. Accordingly, the trial court erred in denying the Defendant's directed verdict on that count of the indictment

5. The Defendant was detained in West Palm Beach, handcuffed, and transported to the police station, because he was a passenger in a motor vehicle

a police officer thought might be stolen. A subsequent search of the motor vehicle where the Defendant had been sitting located two assault pistols which had earlier been used in the homicide in Daytona Beach. Continued investigation allowed the police to obtain a statement from the Defendant, and to obtain photographs of him which were later used for identification purposes. The court erred in denying the Defendant's motion to suppress the guns, statement, and photographs and identification, which resulted from his illegal detention.

6. The trial court erred in instructing the jury during the guilt phase of trial, by declining to instruct the jury on the defense of "alibi", when the Defendant's pre-trial styatement and his cross- examination of the State's witnesses at trial challenged his presence in Daytona Beach at the time of the homicide. Additionally, the trial court committed fundamental error in not fully instructing the jury properly on justifiable and excusable homicide.

7. The trial court erred in sentencing the Defendant to death. The procedures applied herein deny the Defendant due process and equal protection of the laws, and constitute cruel and unsual punishment. Additionally, the trial court erred in instructing the jury on an aggravating circumstance that was not proven, that the Defendant knowingly created a great risk of death to many persons. The trial court erred in imposing the death penalty on Eddie Alvin, while sentencing two co-defendants with substantially equal culpability, to life imprisonment; the sentence of Eddie Alvin was disproportionate to the crime and not rationally justifiable. Finally, the trial court erred in instructing the jury that it must reach its decision on the penalty phase by a majority vote; this is particulary prejudicial since the ultimate jury recommendation of death was by a seven-to-five vote.

Argument

I. THE TRIAL COURT ERRED DURING JURY SELECTION.

A defendant in a criminal trial has the constitutional right to be tried before a fair and impartial jury of his peers. It is respectfully submitted that the trial court prejudicially erred during jury selection, and thereby denied the Defendant, EDDIE ALVIN, that right, which directly resulted in his conviction and sentence of death herein.

A. THE TRIAL COURT ERRED IN EXCUSING, AND IN ALLOWING THE STATE TO EXCUSE, EVERY BLACK POTENTIAL JUROR SEATED IN THIS ACTION.

Both the Defendant, EDDIE ALVIN, and his co-defendant, Marvin Brown, were black men (R. 17). It is submitted that the trial court erred in excusing, and in allowing the State to excuse, every black potential juror called from the jury venire.

The intial jury venire contained two black women.[1] The initial panel tentatively selected contained one black juror, Ms. Gray. The State exercised a peremptory challenge to strike Ms. Gray (R. 438-439). Defense counsel objected and asked for a hearing pursuant to State v. Neil 457 So.2d 481 (Fla. 1984). The grounds offered by the State for excusing Ms. Gray, was that she indicated she knew one of the State's witnesses (R. 439). In fact, Ms. Gray had previously

1. The trial court excused a black man from the panel prior to jury selection, because he was on medication (R. 18-19).

indicated as follows:

> THE COURT: You heard probably the prosecutor read off a list of witnesses and I think one of the Defense attorneys read off some other names, too. Did any of you recognize any of those names whatsoever? If so, raise you hand and let me know.
>
> (Juror Ten raised hand)
>
> THE COURT: Just juror in Seat No. 10. Ms. Gray, do you recall what name or names you recogonized?
>
> JUROR TEN: Yes. It was Letha Mae Payne.
>
> THE COURT: How do you know Ms. Payne?
>
> JUROR TEN: I know her when I see her, that's all.
>
> THE COURT: A neighbor or just someone you see?
>
> JUROR TEN: No. It's just, you know, being around you just -- I know her when I see her. We're not friends or, you know, acquaintances. I just know who she is.
>
> THE COURT: The fact that -- you would not describe her as either a friend or acquaintance, just someone you happen to know ?
>
> JUROR TEN: Yes.
>
> THE COURT: The fact that you knew Ms. Payne, do you think that might influence you one way or the other? Let me back up on that. Do you feel that you have a state of mind in reference to any knowledge you might have of Ms. Payne in the event that she does, in fact, testify which would prevent you from acting with impartiality?
>
> JUROR TEN: No.
>
> THE COURT: Would your relationship or knowledge of Ms. Payne cause you to give greater or lesser weight to her testimony by reason of such knowledge?
>
> JUROR TEN: No.
>
> (R. 174-175)

Further, Ms. Gray indicated that she had only met the witness, Letha Paynes once, approximately seven or eight years before (R. 209). The juror was nevetheless excused.

Jury selection continued, and the panel of prospective jurors was supplemented and included additional black potential jurors. The next black

potential juror selected was Mr. Gatie (R. 544-545). Mr. Gatie indicated that he knew some of the State's witnesses, but that it would not affect his deliberations as a juror (R. 552-555). Notwithstanding the representation made on behalf of Mr. Alvin that "My client wants a black juror any way he can get him. He is the only black male and I believe we should -- " (R. 546), and based upon being uncomfortable sitting as a juror, Mr. Gatie was excused, without objection, for cause (R. 568).

The next black selected as a potential juror was Ms. Tompkins, tentatively seated as an alternate juror (R. 570). After she was qualified by the Court, the State announced that they anticipated challenging Ms. Tompkins (R. 572), because she indicated hesitation about returning a recommendation of death. This ground to support a peremptory challenge was advanced by the State, notwithstanding that a white woman, Mr. Monnen, indicated the same reservations about imposing a death penalty (R. 389), but was nevertheless allowed to remain on the jury and to serve as a juror by the State. Again the Defendant objected and requested a hearing under State v. Neil (R. 574). The record shows the following transcribed after the State announced it intended to excuse Ms. Tompkins peremptorily:

> State have anyone they wish to excuse for cause?
>
> MR. LEVIN: We'd like to excuse Ms. Tompkins for cause.
>
> THE COURT: Anyone wish to be heard on it?
>
> MR. DINITZ: Yes, Your Honor.
>
> She indicated very clearly that if the evidence proved first-degree murder she could return a first-degree murder verdict. I believe that's all she's required to do, is be able to return a fair and impartial verdict.
>
> I point out that Ms. Monnen who was accepted in the case but is white indicted the same problem. She was opposed to the death penalty but she could

return a first-degree murder verdict.

Ms. Tompkins, who is also a woman but black, indictated she could return a first-degree murder verdict but could ot impose the death penalty.

The only difference between the answers of Ms. Monnen and Ms. Tompkins was Ms. Tompkins is the only black on the possible jury.

I point out also at this point that there are three jurors selected after two days who are black. The first juror was excused by the State preemptorily. Also a black woman.

A second juror that was black was excused by the State for cause without objection from me.

The third juror has been excused again by the State for the same responses that a white female juror was not excused for.

Based on that I would have to ask for a State versus Neil hearing.

(R. 592 - 593)

The Court excused Ms. Tompkins for cause, over the Defendant's objection (R. 600), and denied a formal Neil hearing.

The trial court's excusing of black jurors, under the facts presented herein, violated the provisions of Article I s.16 FLA. CONST., the Sixth and Fourteenth Amendments to the U. S. CONST., and this Honorable Court's decision in State v. Neil 457 So.2d 481 (Fla. 1984).

The record shows that the Defendant, EDDIE ALVIN, is black, and that the State systematically exercised its challenges to exclude all black potential jurors from sitting in this action. The Defendant properly and repeatedly objected to the exclusion of blacks from the jury. The reasons given by the State for challenging black potential jurors do not rise to the level to support the trial court's denial of the Defendant's objections thereto or to its denial of a Neil hearing. This most obvious difference in treatment appears in comparing the treatment afforded Ms. Monnen, a white woman with religious objections to the death penalty who was allowed to sit as a juror by the State,

with that afforded Ms. Tompkins, a black woman with religious objections to imposing the death penalty who was successfully challenged for cause.

Upon the record presented, it is respectfully urged that the trial court erred in denying the Defendant's objections to the exclusion of blacks from the jury; and in not thereafter dismissing the jury pool and starting over with a new pool. Accordingly, it is respectfully urged that this action be remanded for a new trial, before a fair and impartial jury.

B. THE TRIAL COURT ERRED IN RESTRICTING THE DEFENDANT'S VOIR DIRE OF POTENTIAL JURORS REGARDING THEIR FEELINGS ABOUT IMPOSING THE DEATH PENALTY.

During jury selection in this first degree murder case, the Defendant attempted to explore with the potential jurors, their general feelings concerning appropriate application of the death penalty. The trial court restricted this area of examination, even though the State had not expressed any objection. Specifically, the Defendant asked the following questions:

> MR. **DINITZ:** What do you feel society's right is with regard to taking somebody's life?
>
> THE COURT: I am not going to require jurors to answer questions like that. I am not going to require jurors to explain their philosophical thoughts about the death penalty, just that they have them and if they'll apply them based on the evidence and the jury instructions.
>
> (R. 235).

Thereafter, the Defendant placed his objection in the record to the Courts having restricted his jury voir dire, placed his explanation for

questioning the jurors regarding their feelings on the death penalty, and moved for a mistrial (R. 258-259). The motion was acknowledged by the Court (R. 271), and denied (R. 277).

Fla.R.Cr.P. 3.300(b) provides that counsel for the Defendant shall be permitted to propound pertinent questions to the prospective jurors after such examination by the court. It is suggested that the trial court abused its discretion by interjecting itself into defense counsel's appropriate jury voir dire. It is further submitted that the Defendant was prejudiced thereby.

The Court's admonition of defense counsel prevented the Defendant from discovering information relevant to the potential juror's inclination towards mercy. As noted in Thomas v. State 403 So.2d 371, 376 (Fla. 1981), "We have previously held that it was error for a trial judge to refuse to allow defense counsel to propound any voir dire inquiry as to the issue of mercy, since such inquiry ... could conceivably be determinative of whether the defense should challenge a juror -- either for cause or peremptorily (citation omitted)". That was the very area that defense counsel herein was attempting to explore with the prospective jurors, when he was stopped by the trial judge.

By refusing to allow the Defendant to explore the juror's beliefs in any depth, the Defendant was effectively precluded from exercising his right under the applicable criminal rules, and was precluded from assuring a fair and impartial jury as guaranteed by Article I, s.16 FLA. CONST. and the Sixth and Fourteenth Amendment to the U. S. CONST. Accordingly, the Defendant moves this Honorable Court to remand this matter for a new trial.

11. THE TRIAL COURT ERRED BY ALLOWING THE STATE TO INTRODUCE PREJUDICIAL EVIDENCE AND TO IMPEACH ITS OWN WITNESS BY USING A PREVIOUSLY RECORDED UNSWORN STATEMENT OF THAT WITNESS, AND BY DENYING THE DEFENDANT'S SUBSEQUENT MOTION FOR A MISTRIAL.

Wesner Remy was arrested in West Palm Beach while driving the white Volvo belonging to Marvin Brown's girlfriend. He was stopped because the Volvo's temporary license plate did not show an expiration date, and a subsequent driver's license check resulted in his being arrested and charged with driving with a suspended license. Eddie Alvin, Marvin Brown, and Willie Simmons were riding as passengers.

After Remy's arrest, on January 24, **1987** Remy gave a tape recorded statement concerning the homicide herein to Daytona Beach detective Greg Smith; and later, on September **5, 1987,** he gave a sworn, transcribed statement to the Assistant State Attorney. Remy was granted immunity from the criminal charge of being an accessory after the fact to Willie Grimes' homicide in Daytona Beach in exchange for his trial testimony.

At Eddie Alvin's trial, Remy identified Alvin as a passenger in the Volvo, and as one of the two persons who shot at Willie Grimes and Willie Powell (R. 875). Remy testified that he drove in the Volvo with Marvin Brown, Eddie Alvin and Willie Simmons from Jacksonville to West Palm Beach, and that it was Marvin Brown's idea to stop in Daytona Beach to look for a friend (R. 880-883). Remy did not know whom they were looking for, nor why they were looking for him. He testifed that Alvin and Simmons confronted and shot Grimes and Powell, but that he did not know why Alvin and Simmons shot them, and that there had been no talk prior to going to Daytona Beach about robbery, shooting or kidnapping. (R. 844, 901-902).

When the State began questioning Remy about the unsworn tape recorded statement he gave to Detective Greg Smith while in custody in West Palm Beach, the Defendants objected to the use of that prior statement (R. 890). The prosecution then abandoned that line of questioning, and elicited from Wesner Remy that he had been granted immunity from prosecution in exchange for his trial testimony (R. 891).

After direct examination, the Defendants cross-examinined Wesner Remy from the transcript of his sworn statement given to the prosecuting attorneys on September 5, 1987, (R. 908-909, 913-915), as wel as the effects of the grant of immunity (R. 910-911).

On redirect examination the State then again questioned Mr. Remy concerning the prior, unsworn tape recorded statement given by him to Detective Gregory Smith on January 24, 1987 (R. 918-919). The Defendants' renewed objection to this testimony this time was overruled. The State successfully argued that the tape recording was admissible to rebut implications of improper motive or recent fabrication, and cited to Wilson v. State 434 So.2d 59 (Fla. 1st DCA 1983), and DuFour v. State 495 So.2d 154 (Fla. 1986). However, it should be noted that in the present case it was the State which first introduced Remy's testimony on the grant of immunity and raised the issue of improper motive, not the Defendants.

After Mr. Remy concluded testifying, the State called Detective Greg Smith for "rebuttal", i.e., the playing of Wesner Remy's unsworn tape recorded statement (R. 929). The Defendants again objected to the introduction of a prior consistent statement made by Wesner Remy while he was in custody after his arrest, but the objection was again overruled (R. 929-940). The Court indicated

concern about playing the tape recorded statement, "if the statement went into many other areas, completely unconnected." The prosecuting attorneys assured the Judge that the tape did not go into other areas, the Court then again overruled the objections, denied Defendants' motions for a mistrial, and stated "If the State wants to play the whole tape they can do that." (R. 940).

After the Court ruled that the tape would be admitted into evidence and played for the jury, the Defendants objected to playing the tape without first having an in camera hearing, to excise any parts not relevant (R. 946-950). That motion, together with the Defendants' motion *to* have the tape transcribed as played, were both denied.

The tape recording was played for the jury. The unsworn tape recorded statement of Wesner Remy (attached to the record herein as R. 2132), contained numerous, substantial allegations prejudicial to the Defendant, Eddie Alvin, which Mr. Remy did not testify to while under oath; and it contained statements contrary to, or inconsistent with, his sworn trial testimony. The Defendants again objected and renewed their earlier motions for a mistrial based upon the playing of that tape recorded statement (R. 955-959). The State argued that the tape was not prejudicial.

The highly prejudicial nature of the unsworn tape recorded statement of Mr. Remy is clearly illustrated by the trial court's subsequent observations:

> THE COURT: How about the allegation that the statements the Defendant made on the tape he did not repeat in the courtroom?
>
> Because I think it is pretty clear in the courtroom when Mr. Remy testified he more or less said he didn't know why Mr. Brown was looking for Omar or why any of the shooting took place.
>
> On the tape he did seem to indicate, paraphrasing his words, they were either looking

for them to buy drugs from them or to take drugs from them.

I think also he might have used the term jack or robbery on the tape which he didn't say in the court.

(R. 959-960)

* * *

THE COURT: In any event, gentlemen, the only thing I'm concerned about is the statement it seems to me greatly helps the State's case, particularly against Mr. Brown in that now all of a sudden Mr. Remy's taped statement gives some motivation for what was happening here.

Up to this point it seemed to be kind of unclear what the motivation of looking for this man, what the shooting, why all the shooting took place. I am concerned about that aspect.

All the other aspects argued I'm not particularly concerned about.

* * *

THE COURT: I'm assuming the State has listened to that tape and was fully aware that those comments were to come out which is, to me is a very material difference from the witness's testimony here at trial, and yet you all were objecting to its prescreening the thing.

(R. 966-968)

* * *

THE COURT: We would have had the same problem, would we not?

Don't say they [the defendants] wanted the tape. They didn't want either one and they at least wanted me to edit it and I went along with your objections to editing which is my own stupid fault, I guess, for not sitting down and looking at the transcript and realizing that he had a lot of stuff in that tape that he didn't say in trial which, at least in my way of thinking, was very damaging, probably more so to Mr. Brown than Mr. Alvin.

(R. 975-976)

The trial court recessed to consider the pending motions for mistrial. Ultimately it denied the mistrial (R. 977-978), which it should have granted.

Playing the unsworn taped statement of Wesner Remy served the State's purposes of impeaching its own witness, and in furnishing a possible motive or premeditation for the shootings in Daytona Beach, which it had previously failed to do. This method of presenting evidence however, is contrary to Fla.Stat. 90.608(1) ("Any party, except the party calling the witness, may attack the credibility of a witness by introducing statements of the witness which are inconsistent with his present testimony"); see, Williams v. State 472 So.2d 1350 (Fla. 2d DCA 1985). It also violates the Defendant's right to confront at trial adverse witnesses, as guaranteed by Article 1 s.16 FLA. CONST., and the Sixth and Fourteenth Amendments to the U.S. CONST.

At trial the State argued that Mr. Remy's prior unsworn statement was being introduced as a "prior consistent statement", to rebut implications of improper motive or recent fabrication. However, its effect was to allow the State to furnish in its case in chief substantive evidence through a co-defendant's prior, unsworn, inconsistent statement.

This method of proof was most recently disapproved of, and found to be reversible error, in Gillis v. State 518 So.2d 962 (Fla. 3d DCA January 19, 1988). In Gillis, a co-defendant's post-arrest statement was admitted as substantive evidence to establish that a homicide Gillis was charged with occurred during a marijuana transaction, alleged in the Information as the felony underlying the charge of third-degree felony murder. The Court stated:

> Kirland, a co-defendant called as a state witness, gave testimony at trial which was consistent with the defendant's trial testimony. The prosecutor then questioned Kirkland regarding inconsistent statements made in a post-arrest interrogation which implicated the defendant. Kirkland admitted giving the statements to the police but claimed

> that the statements were untrue. Over the defendant's objection, the statements made in the post-arrest interrogation were admitted as substantive evidence.
>
> We agree with the defendant that our opinion in Delgado-Santos v. State, 471 So.2d 74 (Fla. 3d DCA 1985), approved 497 So.2d 1199 (Fla. 1986), is controlling, and we reverse. The rule is generally that a statement made by a co-defendant during police custodial interrogation, inconsistent with his testimony at trial, cannot be introduced a substantive evidence at a trial of the defendant. The basic rule is codified in the Florida Evidence Code, section 90.804(2)(C), Fla.Stat. (1985).
>
> The exception to the general rule is that a statement of a co-defendant given pre-trial, which is inconsistent with his trial testimony, may be admitted as substantive evidence where the statement was given under oath in a formal proceeding, subject to the penalty of perjury s.90.801(2)(a), Fla.Stat. (1985). A police questioning, however, is not a formal proceeding. Delgado-Santos, 497 So.2d 1199 (Fla. 1986).
>
> Kirkland's post-arrest statement was crucial in that it established that the homicide occurred during a marijuana transaction which transaction was the sole underpinning of the third-degree felony murder charge.
>
> * * *
>
> Reversed and remanded for a new trial.

It is submitted that Gillis is factually indistinguishable from the instant case.

Even were the tape recorded statement otherwise admissible to rehabilitate Remy's trial testimony, the trial court was nevertheless required, upon defense motion, to excise the portions that were prejudicial or unrelated to rehabilitative purposes. Denny v. State 404 So.2d 824 (Fla. 1st DCA 1981). It was reversable error herein to refuse to do so.

Additionally, it should be noted that Mr. Remy's tape recorded statement was not presented by the prosecution until after Mr. Remy had been excused as a

witness. This trial tactic had the unfair effect of denying the Defendants any opportunity to cross-examine Remy concerning that statement -- even if Remy were later called as a defense witness, the Defendants could not then cross-examine him, or impeach his credibility, Fla.Stat. 90.608(1), supra. And again, the right to cross-examine adverse witnesses at trial is a fundamental, constitutional right. See, State v. Dolen 390 So.2d 407 (Fla. 5th DCA 1980). A further unfair result of the State attorney's tactic of excusing Remy from the witness stand prior to playing his taped statement, was to force the Defendant to choose between recalling the State's main witness for the purpose of examining him and thereby losing his valuable procedural right to rebut at closing arguments as provided for under Fla.R.Cr.P. 3.250 (see, e.g., Carter v. State 101 So.2d 911 (Fla. 1958), or alternatively, preserving his procedural right by waiving his constitutional right to confront his accusers.

It is respectfully suggested that the Defendant was unfairly prejudiced by the use of the unsworn statement of Wesner Remy as evidence of premeditation, a necessary element to support the murder conviction as well as for the other separately charged felonies herein, or as evidence of motive. Accordingly, it is respect fully urged that this matter be remanded for a fair trial.

III. THE TRIAL COURT ERRED IN DENYING THE DEFENDANT A FAIR OPPORTUNITY TO CROSS-EXAMINE THE STATE'S WITNESS, DETECTIVE GREG SMITH.

Detective Greg Smith was the primary investigator of this homicide (R. 1332-1333). It is respectfully submitted that the trial court erred in precluding the Defendant from cross-examining detective Smith thoroughly concerning his investigation of this crime.

Detective Smith was initially called by the State to introduce the tape recording of Wesner Remy's unsworn statement (see s. II of this brief, supra.). At that time the State announced that they were calling Detective Smith solely for the purpose of introducing the tape recording, and that they would recall him for his testimony concerning his whole involvement in the case (R. 929). After Wesner Remy's tape recording was played to the jury, the Court made the following announcement:

> THE COURT: I undertand this witness is likely to be called tomorrow.
>
> MR. LEVIN: That is true.
>
> THE COURT: Any cross-examination on the limited area the office was called for, tonight, Mr. Cass?
>
> (R. 951)

The next day the State recalled Detective Smith (R. 1327). Detective Smith then identified certain clothing worn by Defendant Marvin Brown, and the State concluded direct examination. Defendant Alvin then attempted to cross-examine Detective Smith concerning his involvement in the initial investigation of this case, but the Court precluded him from doing so. The Defendant

questioned detective Smith as follows:

Q. And you took statements from the eyewitnesses, Letha Payne and Willie Powell, it that correct?

MR. LEVIN: Objection, your Honor. It goes beyond the scope of direct examination.

MR. DINITZ: Your Honor, it goes to the facts leading up to the gathering of the clothing, the facts of his investigation, the facts of the shooting.

THE COURT: I'm going to sustain the objection. It seem totally beyond the scope of direct and could have been covered when the officer ws onthe stand earlier when he did get into those things.

Objection sustained.

BY MR. DINITZ:

Q. Other than the clothing, did you gather any other evidence in this case?

A. Yes, sir.

Q. And what was that other evidence?

MR. LEVIN: Objection, your Honor.

Same objection.

THE COURT: Sustained.

We are exceeding the scope of direct examination.

MR. DINITZ: Your Honor, I believe the Court has --

THE COURT: I have ruled, Mr. Dinitz.

BY MR. DINITZ:

Q. Did you talk to any witnesses about that clothing? Did any other witnesses prior to your gathering this clothing describe it to you?

MR. LEVIN: Your Honor, it's making me uncomfortable. I hate to keep objecting.

THE COURT: I'm going to sustain the objection. It is beyond the scope of direct examination.

MR. LEVIN: I hate to keep jumping up and down.

MR. DINITZ: Your Honor, it goes directly to the identification of the clothing.

THE COURT: Objection sustained.

MR. DINITZ: Thank you.

Q. Did you do any follow-up investigation subsequent to gathering that clothing?

A. Yes, sir.

Q. What did you do?

A. I talked to --

MR. LEVIN: Your Honor, same --

THE COURT: Same objection?

MR. LEVIN: Same objection, your Honor. And I really hate to keep jumping up and down but Mr. Dinitz continues to go with this and I'm forced to jump up and down.

THE COURT: Objection sustained. It is beyond the scope of direct examination.

(Pause)

To make myself perfectly clear, from my notes I believe the detective first, Detective Smith first testified late in the afternoon on Wednesday, the 21st of this month and my notes, betwen direct and cross he was on the stand approximately an hour and I think a lot of this could have been covered then.

This part of the reason why he was just put on the stand for a very limited purpose, today, to provide the last link in the chain of custody on that particular clothing and under our rules it would be just, any cross-examination would be limited to the extent of the direct examination.

MR. GARLOVSKY: Judge, may we take exception to that? His only part on the stand was to prove up a tape.

MR. LEVIN: Your Honor, I would object.

MR. GARLOVSKY: He didn't testify for a complete hour. The jury heard a tape for thirty minutes.

THE COURT: I stand corrected. You are correct on that.

Still, if you all want to call him as your witness in your case you have the right to do that but under the rules you are limited to cross-examination to what took place on direct examination and he testified in an extremely limited area here.

If you all want to call Detective Smith as your own witness, I'll require him to stay around.

(R. 1333-1336)

The Defendant ultimately did call Detective Smith as his witness to elicit testimony that the alleged eye-witness, Letha Mae Paynes, had initially picked someone other than Eddie Alvin out of a photo lineup (R. 1387-1392), and that both Letha Paynes and Willie Powell gave one story the night of the incident, but changed their story thereafter (R. 1392-1394).

The trial court's refusal to allow the Defendant to cross-examine

Detective Greg Smith forced the Defendant to call Detective Smith as his witness, thereby losing the right to impeach him (Fla.Stat. 90.608(1)); the right to rebut in closing argument (Fla.R.Cr.P. 3.250); and most importantly, the right to confront witnesses and to cross-examination, as guaranteed by Article 1 s.16 FLA. CONST., and the Sixth and Fourteenth to the U.S. CONST. This tactic helped the State convict by strengthening its weak evidence on identification.

It is error to limit the scope of cross-examinations in a manner that keeps from the jury relevant and important facts bearin on the trustworthiness of crucial testimony, especially where the cross-examination is directed to a key state witness. Williams v. State 472 So.2d 1350, 1352 (Fla. 2d DCA 1985) (and cases cited therein). And as stated in Rivera v. State 462 So.2d 540 (Fla. 1st DCA 1985);

> As in Salter [v. State 382 So.2d 892 (Fla. 4th DCA 1980)], however we find that reversible error occurred in that the trial court unduly restricted the defense's cross-examination of the victim and Offficer Garber. A full and fair cross-examination of a witness in a criminal trial is a right belonging to a defendant, not merely a privilege. Coco v. State, 62 So.2d 892 (Fla. 1953). As the Florida Supreme Court has explained:
>
> > The right of a criminal defendant to cross-examine adverse witnesses is derived from the Sixth Amendment and due process right to confront one's accusers. One accused of crime therefore had an absolute right to full and fair cross-examination .... A limitation on cross-examination that prevents the defendant from achieving the purposes for which it exists may be harmful error.
>
> Steinhorst v. State, 412 So.2d 332, 337 (Fla. 1982). Although Florida's Evidence Code provides that ther trial court "shall exercise reasonable

> control over the mode and order of the interrogation of witnesses," Section 90.612, Florida Statutes (1979), this court has recognized that such discretion "is constrained by a defendant's right to confront adverse witnesses." Smith v. State, 404 *So.* 2d 167, 169 (Fla. 1st DCA 1981). Accordingly, the "[c]urtailment of a defendant's right to cross-examination of State witnesses is a power to be used sparingly." Salter, 382 So.2d at 893.
>
> (Id. 543-544)

It is suggested that cross-examination of Detective Smith was crucial to the Defendants for a number of reasons. First, Wesner Remy testified that he never met Eddie Alvin or Marvin Brown prior to beginning his trip to West Palm Beach (R. 896); during his initial interview with Detective Smith on January 24, 1987, the transcript indicates that Remy was shown photographs only of the Defendants herein, and asked to identify them as Defendants -- constituting a possibly suggestive photo lineup (see, R. 2132); at trial Remy was able to positively identify Eddie Alvin. Cross examination of Detective Smith was therefore crucial to eliciting the testimony concerning the suggestive lineup. Second, Detective Smith was aware that the eyewitness, Letha Paynes, had initially picked someone other then Eddie Alvin out of the photo lineup (R. 1387-1392); that both Letha Paynes and Willie Powell had given one story the night of the incident, but changed there story thereafter (R. 1392-1394); and that Melony Fay Benjamin, another eyewitness who drove around with the perpetrators for some time during the night of the incident, one week later did not identify Eddie Alvin immediately from a photo lineup and thought there was only a fifty-fifty chance that the picture of Eddie Alvin was the picture of the passenger in the Volvo (R. 999). Ms. Benjamin did, however, identify Mr. Alvin in court.

In short, by limiting the scope of cross-examination of Detective Smith, the State was able to strengthen its identification of Eddie Alvin as the perpetrator of the crimes complained of herein. The trial court's refusal to allow the Defendant to thoroughly cross-examine Detective Smith thereby severely prejudiced him in his defense. Accordingly, it is respectfully urged that this matter be remanded for a fair trial.

IV. THE TRIAL COURT ERRED IN FAILING TO DIRECT A VERDICT IN FAVOR OF THE DEFENDANT ON THE CHARGE OF ATTEMPTED ARMED ROBBERY.

Count III of the Indictment filed in this action charges that "... EDDIE EUGENE ALVIN on or about the 23rd day of January, 1987, within Volusia County, Florida, did unlawfully by force, violence, assault or putting in fear, attempt to take certain property, to wit: U.S. currency, of a value more than one ($1.00) dollar, the property of Willie Powell as owner or custodian, from the person or custody of Willie Powell, ..." (R. 2115). During the course of the trial the State failed to produce any evidence that Willie Powell had any U.S. currency or anything else of value, or that the Defendants attempted to take currency, as alleged in the Indictment.

At the close of the State's presentation of evidence the Defendant moved for a directed verdict on the attempted robbery charge (R. 1350-1353). The Defendant's motion for directed verdict was denied (R. 1364, 1445).

Where a defendant is charged with robbery of U.S. currency, it is a materia element of the offense and incumbent upon the State to prove that the alleged victim had U.S. currency. Spanish v. State 67 Fla. 414, 65 So. 457 (1914). Where the State fails to produce such evidence, the Defendant is entitled to a directed verdict.

The present case is analogous to Eutzy v. State 458 So.2d 755 (Fla. 1984). In Eutzy,

> Appellant challenges the finding that the murder occurred during the commission of a robbery. We agree that this finding cannot be supported by the record. The State failed to present any evidence that the victim had anything of value with him for the murder or that no cash or valuables were on the

> victim's body when he was found. The prosecutor argued to the jury that cab fare was "due and owing" the victim and that a finding of robbery could be based on that circumstance alone. We do not find this to satisfy the elements of the robbery statute. s.812.13(1), Fla.Stat. provides: "robbery" means the taking of money or other property which may be the subject of larceny from the person or custody of another by force, violence, assault or putting in fear. The force, violence, assault or putting in fear must be contemporaneous or precedent to the taking.
>
> (Id. 758)

In the instant case, the State failed to present any evidence to prove a material element of the offense, that the victims had any U.S. currency as was charged. If anything, the tape recorded statement of Wesner Remy which was played to the jury (R. 2132), indicates that this was a drug "rip-off", or an attempt to take drugs from the victims, not currency. There was never an intent or attempt to take currency.

A Defendant is entitled to be informed of the nature and cause of the accusation against him. Article I s.16 FLA. CONST., and the Sixth and Fourteenth Amendments to the U.S. CONST. Since the state failed to present evidence that the Defendants attempted to take U.S. currency from the victims as specifically alleged, it is respectfully urged that the variance between the charge and the proof was fatal. The trial court erred in denying the Defendants' motion for directed verdict. It is therefore suggested that this matter be remanded to the trial court for the entry of a directed verdict on Count III of the Indictment.

V. THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS EVIDENCE AND IN ADMITTING ILLEGALLY SEIZED EVIDENCE AT TRIAL.

Prior to trial the Defendant filed a Motion To Suppress Photographs, Photographic Lineup And Statements Of The Defendant (R. 2098-2102). On September 4, 1987, a hearing was held on the Defendant's motion to suppress (R. 2174-2467).

At the suppression hearing the State called Officer Matthew McMillian. Mr. McMillian is employed by the West Palm Beach Police Department, and was on duty on January 23, 1987 (R. 2194-2195). At approximately 11:00 p.m. on January 23, Officer McMillian was on a routine patrol in West Palm Beach. He saw a white Volvo stopped at a stop light, observed that the vehicle had a temporary tag on the back which had no writing on it, no effective or expiration date, etc. (R. 2197). Based on that violation of the Statute, he effectuated a traffic stop (R. 2198).

The Volvo was pulled over. Wesner Remy was driving, Marvin Brown was in the front passenger seat, and Eddie Alvin and Willie Simmons were riding in the back passenger seats. Officer McMillian approached the vehicle, Wesner Remy exited the vehicle, and they began conversing. Officer McMillian asked Mr. Remy for his driver's license. After Remy tendered his license, McMillian asked the remaining three occupants of the Volvo to exit the vehicle (R. 2198). McMillian scanned the inside of the Volvo, saw nothing to cause him alarm, and thereafter allowed the three passengers to reenter the Volvo.

Officer McMillian determined that Wesner Remy was driving with a suspended license (R. 2200-2201), and decided to take him in custody for that

offense because he was not a Palm Beach County resident (R. 2258). Additionally, McMillian asked for the motor vehicle registration. Marvin Brown produced the motor vehicle loan papers in the name of his girlfriend, which led McMillian to suspect that the Volvo might have been stolen (R. 2201-2202).

Officer McMillian decided to impound the car, and asked the three remaining passengers, Brown, Alvin, and Simmons, to again exit the vehicle (R. 2203). He again searched it, and this time observed a revolver under the front seat where Marvin Brown had been sitting. McMillian arrested Marvin Brown for carrying a concealed firearm (R. 2205). He also arrested Eddie Alvin and Willie Simmons because he thought the Volvo might have been a stolen vehicle, handcuffed them, placed them in the squad car, and transported them to the Palm Beach Police Station (R. 2250-2253).

When they arrived at the police station, Officer McMillian had all four occupants of the Volvo taken upstairs to a secure holding facility, and then proceeded to conduct a search of the Volvo incident to their arrest. During that search Officer McMillian located a zippered bag that had been in the back seat between Alvin and Simmons, which, when he opened it, was found to contain two semi-automatic assault pistols (R. 2207-2208).

Up until that point Officer McMillian was not aware that the Volvo was suspected as the vehicle used in the homicide in Daytona Beach. However, at that time another officer advised him of the BOLO for a vehicle of that description (R. 2209-2210). McMillian then sealed the motor vehicle for use as evidence, went upstairs and advised Eddie Alvin that he was now under arrest for carrying concealed firearms (R. 2208-2210).

The West Palm Beach Police then contacted the Daytona Beach Police, and

the next day Detective Greg Smith drove to West Palm Beach to interview Eddie Alvin and the other defendants (R. 2324-2325).

When Detective Smith arrived in West Palm Beach, he photographed Eddie Alvin and obtained a statement from him. It is these photographs, the identification based on those photographs, the statement given by Eddie Alvin, and the contents of the zippered bag located on the seat of the Volvo next to where Eddie Alvin had been sitting, that were the subject of the motion to suppress.

At the conclusion of the hearing, the trial court entered its Order Denying Motions To Suppress (R. 2095-2097). The trial court's order found in pertinent part:

> . . . However prior to moving the vehicle the officer arrested Simmons and Alvin by handcuffing them and placing them in a lock-up of the station house. There was no probable cause for this arrest and detention.
>
> At the station the officer made an inventory search of the automobile before impounding it and in the process noticed what appeared to be two weapons in an unzippered bag on the rear seat which would have been between Simmons and Alvin. Upon opening the bag further the officer found two nine millimeter semi-automatic weapons. Thereupon he charged Simmons and Alvin with possession of a concealed firearm. Under the circumstance, to-wit: the arrest of the driver and one who claimed lawful possession and the unavailability of a driver for such car, together with the question as to who the car really belonged to the officer had a right to make his routine inventory search of the vehicle before impoundment.
>
> In any event the Defendants Simmons and Alvin have no standing to object to the search of the automobile in question as they were at most a passenger and as such did not possess the degree of expectancy of privacy in the content of said car and in particular to their open unzippered bag that would make a search of such bag an invasion of their right to privacy.
>
> After arrest the Defendants made nonincriminating statements to the police. This Court finds that said statements were made voluntarily and

after knowlingly waiving their right to be silent. It is therefore

ORDERED AND ADJUDGED that the Motion to Suppress any evidence seized from the persons of the Defendants Simmons and Alvin, including any fingerprings and photographs, before their arrest on the weapons charge is hereby suppressed. It is further

ORDERED AND ADJUDGED that the Motions to Suppress are denied in all other respects.

The motion to suppress was renewed at trial, and again denied (R. 1094-1121). Over the Defendant's objections at trial, Officer McMillian was allowed to identify Eddie Alvin (R. 1117-1121); the two semi-automatic assault pistols were admitted into evidence (R. 1129, 1134-1140); and the statement of Eddie Alvin was likewise presented to the jury (R. 1243-1244).

Fla.Stat. 901.151, the Florida Stop And Frisk Law, provides as follows:

* * *

2) Whenever any law enforcement officer of this state encounters any person under circumstances which reasonably indicate that such person has committed, is committing, or is about to commit a violation of the criminal laws of this state or the criminal ordinances of any municipality or county, he may temporarily detain such person for the purpose of ascertaining the identity of the person temporarily detained and the circumstances surrounding his presence abroad which led the officer to believe that he had committed, was committing, or was about to commit a criminal offense

3) No person shall be temporarily detained under the provisions of subsection (2) longer than is reasonably necessary to effect the purposes of that subsection. Such temporary detention shall not extend beyond the place where it was first effected or the immediate vicinity thereof.

4) If at any time after the onset of the temporary detention authorized by subsection (2), probable cause for arrest of person shall appear, the person shall be arrested. If, after an inquiry into the circumstances which prompted the temporary detention, no probable cause for the arrest of the

person shall appear, he shall be released.

5) Whenever any law enforcement officer authorized to detain temporarily any person under the provisions of subsection (2) has probable cause to believe that any person whom he has temporarily detained or is about to detain temporarily, is armed with a dangerous weapon and therefore offers a threat to the safety of the officer or any other person, he may search such person so temporarily detained only to the extent necessary to disclose, and for the purpose of disclosing, the presence of such weapon. If such a search discloses such a weapon or any evidence of a criminal offense it may be seized.

6) No evidence seized by a law enforcement officer in any search under this section shall be admissible against any person in any court of this state or political subdivision thereof unless the search which disclosed its existence was authorized by and conducted in compliance with the provisions of subsections (2)-(5).

It is submitted that the trial court erred in refusing to suppress the weapons, photographs and statements illegally obtained from Eddie Alvin herein, and that Eddie Alvin was substantially prejudiced thereby. The introduction at trial of the two semi-automatic assault pistols is obviously inflammatory, and the presence of the pistol used in the homicide near to the Defendant, Eddie Alvin in the Volvo, could be considered as evidence of guilt. Further, the photographs taken in Palm Beach were used for identification purposes by Willie Powell, Wesner Remy, and other persons who testified at trial and who identified Eddie Alvin.

In applying the Florida Stop And Frisk Law to facts similar to the ones here, the district court in Lewis v. State 382 So.2d 1249 (Fla. 5th DCA 1980), stated that "Because the initial stop was illegal *all* that flowed from it was essentially illegal and the fruits of the search, along with the confession, cannot be used in trial against the appellant (citations omitted)." Further,

> The custodial interrogation conducted at the police station without probable cause to arrest is

> also violative of Fourth Amendment guarantees. Florida v. Royer 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983); Dunaway v. New York 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979). Even if the initial stop could be construed as valid, we believe the police exceeded the bounds of any authorized temporary detention when they transported Rizo to the police station to conduct a custodial interrogation without probable cause. Royer. Thus, the photo obtained during the unlawful detention is inadmissible on that ground, Davis v. Mississippi 394 U.S. 721, 89 S.Ct. 1394, 22 L.Ed.2d 676 (1969); see, Terrell v. State 429 So.2d 778 (Fla. 3d DCA 1983); J.R.H. v. State 428 So.2d 786 (Fla. 2d DCA 1983); Pirri v. State 428 So.2d 285 (Fla. 4th DCA), review denied, 438 So.2d 834 (Fla. 1983) without consideration of the taint arising from the initial unlawful stip. Wong Sun [v. United States 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963)]; Lewis.

State v. Rizo 463 So.2d 1165, 1167 (Fla. 3d DCA 1984). See also, Vollmer v. State 337 So.2d 1024 (Fla. 2d DCA 1976).

All the evidence that was obtained from Alvin between the time of his illegal detention and his subsequent release from confinement, was obtained as the result of the violation of the Florida Stop And Frisk Law. The trial court acknowledged the illegality of the initial detention, yet allowed the subsequently discovered evidence to constitute probable cause to then arrest the Defendant and validate a further search for evidence. It is suggested that the trial court erred in allowing unlawfully obtained evidence to create probable cause to then obtain additional evidence, and then admit the additional evidence at trial. The trial court should have granted the motion to suppress, and it was reversible error not to do so.

It is therefore urged that this matter be remanded for a new trial, with instructions that the pistols, the statement of the Defendant, and the identification of the Defendant, resulting from his unlawful detention, be suppressed.

VI. THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY AS REQUESTED BY THE DEFENDANT, AND IN OTHERWISE OMITTING NECESSARY JURY INSTRUCTIONS DURING THE GUILT PHASE OF THE TRIAL.

At the close of the presentation of evidence, the trial court is required to instruct the jury as to the law applicable to the facts in dispute. Fla.R.Cr.P. 3.390. Failure to do so in this case constituted reversible error.

A. THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON THE DEFENSE OF ALIBI.

During the course of the trial, the Defendant, EDDIE ALVIN, challenged the evidence that he was present at the scene of the homicide by cross-examining each of the eyewitnesses concerning his identification. Additionally, the pre-trial statement of the Defendant was admitted into evidence, that he was not in Daytona Beach at the time of the homicide (R. 1243-1244).

At the conclusion of the trial and during the conference on jury instructions the Defendant specifically asked that the jury be instructed on the defense of alibi, and that the trial court give that standard jury instruction (R. 1660-1662). The trial court refused to give the instruction on alibi for two reasons. First, because the Defendant had not filed a declaration of intent to rely on the defense of alibi; and second, because the Defendant did not call any witnesses to substantiate the alibi, and was relying upon his pre-trial statement for substantiation. The Court did indicate, however, that the Defendant could certainly argue to the jury that he was not present (R. 1662). The trial court was wrong on both reasons.

There was sufficient evidence to raise the defense of alibi. Specifically, evidence of the Defendants not being present at the scene of the homicide was raised by the initial identification of two eyewitnesses of someone else as being the perpetrator of the homicide, coupled with the Defendant's statement which was admitted into evidence, indicating that he was not in Daytona Beach at the time of the homicide. Where there is any evidence to support a Defendant's theory of defense, he is entitled to have the jury properly instructed on that issue. Smith v. State 424 So.2d 726 (Fla. 1982); Hudson v. State 381 So.2d 344 (Fla. 3d DCA 1980).

Additionally, the trial court erred in refusing to give that instruction on the basis that the Defendant had failed to file a declaration of intent to rely on the defense of alibi. As noted in Hudson v. State, supra, "a notice of alibi is not required to be filed when a defendant intends to be the sole witness in regard to an alibi. (Citation omitted)" Id. 345.

Fla.Std.Jury Instr. (Crim) 3.04(a) provides as follows:

> An issue in this case is whether the defendant was present when the crime was allegedly committed.
>
> If you have a reasonable doubt that the defendant was present at the scene of the alleged crime, it is your duty to find the defendant not guilty.

The standard jury instruction requested by the Defendant was supported by evidence presented at trial. It should have been given as requested, and the Defendant was prejudiced by the trial court's refusal to do so. Accordingly, it is respectfully urged that this matter be remanded for a new trial.

B. THE TRIAL COURT ERRED BY FAILING TO ADEQUATELY INSTRUCT DEFENDANT'S JURY ON MANSLAUGHTER AND JUSTIFIABLE HOMICIDE.

The following issue was initially prepared by counsel for the co-defendant Marvin Brown, whose appeal is now proceeding in the Fifth District Court Of Appeal. The issue raised herein is not intended to be raised as intentional "invited error". Nevertheless, the error is fundamental error, which need not be raised at trial to be preserved for appeal.

The trial court read instructions to the jury at the guilt phase, including the following:

> THE COURT: Murder in the First Degree in Count I includes the lesser crimes of:
>
> Attempted murder in the first degree.
>
> Murder in the second degree with a firearm.
>
> Manslaughter, aggravated battery, aggravated assault, battery, assault, all of which are unlawful.
>
> A killing that is excusable or was committed by the use of justifiable deadly force is lawful.
>
> If you find Willie E. Grimes was killed by either one or both [of] the Defendants you will then consider the circumstances surrounding the killing in deciding if the killing was murder in the first degree or was murder in the second degree, manslaughter, or whether the killing was excusable or resulted from justifiable use of deadly force.
>
> The killing of a human being is justifiable homicide and lawful if necessarily done while resisting an attempt to murder or commit a felony upon the Defendant, or to commit a felony in any dwelling house in which the Defendant was at the time of the killing.
>
> The killing of a human being is excusable and therefore lawful when committed by accident and misfortune in doing any lawful act by lawful means with usual ordinary caution and without any unlawful intent, or by accident or misfortune in the heat of passion, upon any sudden combat,

without any dangerous weapon being used and not done in a cruel or unusual manner.

(R. 1810-1811)

After defining premiditated and felony first-degree murder, the attempted first-degree murder, and second-degree murder, the trial court read:

> THE COURT: Before you can find the Defendant guilty of manslaughter, the State must prove the following elements beyond a reasonable doubt:
>
> 1. Willie E. Grimes is dead;
>
> 2. The death was caused by the act of the Defendant.
>
> However, the Defendant cannot be guilty of manslaughter if the killing was either justifiable or excusable homicide as I have previously explained those terms.
>
> (R. 1815)

The trial court then defined "procure," followed by a definition of "culpable negligence." (R. 1815-1816).

It has been held that failure to include full definitions of justifiable and excusable homicide as well as culpable negligence as part of the instruction on manslaughter is fundamental error. In Alejo v. State, 483, So.2d 117 (Fla. 2d DCA 1986), wherein the defendant was convicted of second-degree murder, the District Court reiterated that an instruction defining justifiable and excusable homicide is necessary to provide a complete instruction on the crime of manslaughter, and that the court's failure in that case to give a complete instruction was reversible error, notwithstanding defense counsel's failure to

make a timely objections. The First District Court Of Appeal, in Ortagus v. State, 500 So.2d 1367 (Fla. 1st DCA 19871, made it clear that the complete definition of excusable or justifiable homicide must be given "as part" of the instruction on manslaughter:

> Florida courts have consistently held, starting with Hedges v. State, 172 So.2d 824 (Fla. 19651, that when a trial court gives an instruction on manslaughter it is reversible error for the court to fail to give an instruction on justifiable and excusable homicide. [Citations omitted.] Therefore, we are called upon to determine whether the trial court's summary definitions on excusable and justifiable homicide given at the beginning of the jury instructions, and not in connection with the instruction on manslaughter, satisfied this fundamental obligation. We find it did not.

Id., 500 So.2d at 1370. In Ortagus, the jury received an even more extensive definition of manslaughter than did Defendant's jury, plus "a brief and general definition of excusable and justifiable homicide." Id., 500 So.2d at 1369. The Ortagus Court found that the incomplete manslaughter instruction

> . . . failed to cover material elements of the offense, making the instruction necessarily misleading and prejudicial to the accused. [Citations omitted.] [Emphasis supplied.]

Id., 500 So.2d at 1370.

In Walker v. State, 520 So.2d 606 (Fla. 1st DCA 19871, the defendant was convicted of second-degree murder. A different panel of district judges relied upon the holding in Ortagus that:

> . . . even though the jury was give an abbreviated instruction on justifiable and excusable homicide at the beginning of the homicide instruc-

> tions, it was reversible error not to read the justifiable and excusable homicide defenses in their entirety contemporaneously with the manslaughter instruction give later. Ortagus at 1370. This is because manslaughter is a residual offense, defined by what it is not. See, Kelsey v. State, 410 So.2d 988 (Fla. 1st DCA 1982). Consequently, the failure to fully instruct on the applicable defenses results in omitting material elements of the offense, which is necessarily misleading and prejudicial to the accused. [Citations omitted.] [Emphasis supplied.]

See also, Spaziano v. State, 522 So.2d 525 (Fla. 2d DCA 1988) (failure to object to omission of complete definition of justifiable homicide constitues negligence on the part of counsel and requires a new trial).

Appellant was entitled to have his jury instruced on the justifiable use of force, and the trial court's failure to fully instruct the jurors thereon constitutes reversible error.

VII. THE TRIAL COURT ERRED IN SENTENCING THE DEFENDANT, EDDIE ALVIN, TO DEATH.

After the jury returned its verdict finding the Defendant guilty of murder in the first degree as charge in the indictment, but before the penalty phase began, the Defendant objected to proceeding with the death penalty hearing on the grounds that Fla.Stat. **921.141,** and the applicable jury instructions, were unconstitutional. Specifically, the defendant alleged, and maintains herein, that the death penalty proceeding violated his due process and equal protection rights under the FLA. **CONST.** and the Fifth and Fourteenth Amendments to the **U.S. CONST.;** and they further violated the defendant's right against cruel and unusual punishment as guaranteed under the Eighth and Fourteenth Amendments to the **U.S. CONST.** (R. 1880-1882).

Due process and equal protection were violated because the death penalty proceeding contains no instruction to the jury as to the weight, or standards to be used by them in evaluating, aggravation or mitigation, and the application is therefore arbitrary and a chance decision by a jury. Further, the fact that the advisory opinion need not be unanimous substantially increases the probability that the Defendant would not be protected from an arbitrary imposition of the death penalty. Which is what happened herein.

In addition to the Defendant's challenge to the constitutionality of the death penalty per se, three additional errors occurred in the implementation of the death penalty in this proceeding.

A. THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON AGGRAVATING CIRCUMSTANCES, AND IN FINDING AGGRAVATING CIRCUMSTANCES SUFFICIENT TO IMPOSE THE DEATH PENALTY HEREIN.

At the sentencing proceeding the trial court instructed the jury on two aggravating circumstances for them to consider in their advisory opinion: first, that the Defendant in committing the crime for which he was to be sentenced knowingly created a great risk of death to many persons; and second, the crime for which the Defendant is to be sentenced was committed while he was engaged or an accomplice in an attempt to commit the crime of robbery and/or kidnapping (R. 1999). It is respectfully suggested that there was no evidence to support the jury instruction on the aggravating circumstance that the Defendant knowingly created a great risk of death to many persons.

In the conference prior to instructing the jury in the penalty phase, the Defendant objected to the instruction on the aggravating factor of "knowingly created a great risk of death to many persons", because there was no evidence that many persons were present at the time of the homicide. The evidence showed that the two victims, Grimes and Powell, were present; that Letha Paynes was in her car some distance from the shooting; and that there was no evidence of any other persons in the immediate vicinity. The State argued that this aggravating factor was proper because the homicide occurred in a business area with a bar across the street; that there were fifty people present when the police arrived five minutes after the shooting; and that the guns contained high velocity bullets (R. 1950-1955). Based on these factors, the trial court denied the Defendant's objection and subsequently instructed the jury on this aggravating factor.

The jury thereafter deliberated, and the majority of the jury, by a vote of seven to five, advised and recommended to the Court that it imposed the death penalty upon Eddie Eugene Alvin (R. 2008; 2150). (The jury also recommended a sentence of life for Marvin Brown.)

At sentencing the Defendant again renewed his objection to the Court considering the aggravating factor of "knowingly created a great risk of death to many persons", and specifically cited to this Court's opinion in Lucas v. State 490 So.2d 493 (Fla. 1986), for the proposition that the presence of three people at the scene of the homicide do not constitute "many persons" for purposes of aggravating the Defendant's penalty (R. 2051-2052). The State again argued that the presence of fifty people at the scene of the homicide within five minutes of the shooting, coupled with the velocity and force of the bullets used, together with the fact that there was a bar in the area, constituted sufficient evidence to support this aggravating factor (R. 2053). The trial court denied the Defendant's renewed objection and found sufficient evidence for the jury to consider that aggravating factor (R. 2054). The trial court, in its findings of fact later also found that the Defendant created a great risk of death to many persons to have been proven beyond a reasonable doubt (R. 2151-2153); and in reliance thereon sentenced the Defendant to death.

To sustain a sentence of death, the State must prove beyond a reasonable doubt the aggravating circumstances relied upon. Williams v. State 386 So.2d 538 (Fla. 1980). Lucas v. State, *supra*, involved a shoot-out. As in Lucas, the evidence that was presented herein simply does not support an instruction on that aggravating circumstance. At best, the evidence of danger to many persons is speculative. This is particularly true since the police never located a

single additional eyewitness who was present at the shooting. Accordingly, it is respectfully urged that this matter be remanded for the imposition of a sentence of life imprisonment; or alternatively, that it be remanded for a new sentencing hearing.

B. THE TRIAL COURT ERRED IN IMPOSING THE DEATH PENALTY HEREIN, WHEN IT IS DISPROPORTIONATE TO THE OFFENSE.

Four people were charged with criminal offenses herein. Eddie Alvin, Marvin Brown, and Willie Simmons were charged as codefendants with first degree murder for the death of Willie Grimes; attempted first degree murder for the shooting of Willie Powell; and attempted armed robbery and attempted kidnapping. Wesner Remy was charged as an accessory after the fact. At the trial of Eddie Alvin and Marvin Brown, Wesner Remy was granted immunity. Remy testified that Marvin Brown was driving the car at the time of the shooting, and that it was Brown's idea to get Willie Grimes; that Eddie Alvin and Willie Simmons got out of the car, confronted, and thereafter shot Willie Grimes and Willie Powell (R. 885-887). At the conclusion of the joint trial of Eddie Alvin and Marvin Brown, Alvin was sentenced to death after a seven to five jury recommendation for death; Brown received a recommendation for life and was sentenced to life imprisonment. In his seperate trial, Willie Simmons was convicted of first degree murder (and other lesser offenses), and was sentenced to life imprisonment without the court even reconvening the jury for a death penalty recommendation.

Disproportionate sentencing was disapproved of in Furman v. Georgia **408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.** 2d **346 (1972).** Further,

> "Since then [Furman v. Georgia] the Court has emphasized is pursuit of the "twin objectives" of "measured, consistent application and fairness to the accused" (Citation ommitted).
>
> * * *
>
> If a state has determined that death should be an available penalty for certain crimes, then it must administer that penalty in a way that can rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not (citations ommitted).

Spaziano v. Florida **468 U.S. 447, 459-460, 104** S.Ct. **3154, 82 L.Ed. 340 (1984).**

And as noted by Justice Shaw in his concurring opinion in Grossman v. State **13** FLW **127** (Fla. February **26, 1988):**

> There are two pertinent and controlling propositions of law to be drawn from Furman and its progeny. First, it is cruel and unusual punishment to impose the death penalty on a particular defendant if the penalty is disproportionate to the facts surrounding the particular murder. The penalty should be reserved for the most aggravated and unmitigated crimes. [State v. Dixon **283 So.2d** 11 at **7.** Second, from a systemic viewpoint, the system must impose the penalty with regularity, not arbitrarily or capriciously. This is done by "rationally distinguishing between the individuals for whom death is an appropriate sanction and those for whom it is not." Spaziano **468 U.S.** at 460...

There is no rational justification or reason for imposing the death penalty on Eddie Alvin while sentencing two co-defendants who appear equally culpable to life imprisonment. The only obvious distinction between Alvin and Simmons which would appear to affect the sentencing results, was that Willie Simmons was tried seperately, whereas Eddie Alvin was tried jointly with Marvin Brown. A jury might well feel required to sentence to die, the "more

culpable" codefendant in a joint trial, regardless of whether the murder itself is of the most aggravated and unmitigated of first degree murders. It would therefore violate the constitutional prohibition against cruel and unusual punishment to sustain the death penalty herein.

C. THE TRIAL COURT ERRED IN INSTRUCTING THE JURY AT THE PENALTY PHASE THAT ITS DECISION MUST BE BY VOTE OF A MAJORITY OF THE JURY.

At the beginning of the charge conference prior to the penalty phase, the Court indicated that it would give the standard jury instructions on the penalty phase (R. **1878-1879).** The balance of the conference related to discussion of the aggravating and mitigating circumstance to be included with the standard jury instructions. However, in reading the standard jury instruction to the jury, the trial court interjected material which was prejudicial to the Defendant, and which actually prejudiced the Defendant herein. Specifically, the trial court wrongly instructed the jury that "your decision may be by a majority of the jury" (R. 2001); and thereafter, prior to the jury retiring to deliberate, again instructed them "as indicated, it is by majority, not unanimous." (R. 2005). Thereafter, the jury returned its recommendation, voting by a majority of seven to five, that Eddie Alvin be sentenced to death.

Defense counsel did not object to this improper instruction after it was presented to the jury. The only excuse available for not objecting was that this first degree murder trial was proceeding at a marathon rate, to which the Defendant had repeatedly objected (see, R. 1431, 1442, **1695,** 1880); trial had proceeded at the rate of approximately ten hours per day for the six consecutive

preceding days, and the failure to object was therefore due to excusable inadvertness. In any event, the Defendant is entitled to have the jury properly instructed, and failure to do so may constitute fundamental, reversible error.

Harich v. State 437 So.2d 1082 (Fla. 1983), is similar to this case. In Harich, the trial court instructed the jury that the penalty recommendation must be by majority vote. The Defendant likewise did not object to that instruction. This Court then reviewed that improper instruction, and stated that "the jury returned a death recommendation by a nine-to-three vote, and there is nothing in the record to show that the jury was confused by the instruction. In view of the jury's vote, we find no prejudice." (Id. 1086) [emphaisis added]. In the present case the jury vote was seven-to-five, and the potential for prejudice is therefore obvious. As implied by the analysis in Harich it is urged that this matter be remanded for a new sentencing procedure before a properly instructed jury.