SUPREME COURT OF FLORIDA

CASE NO. 71,646

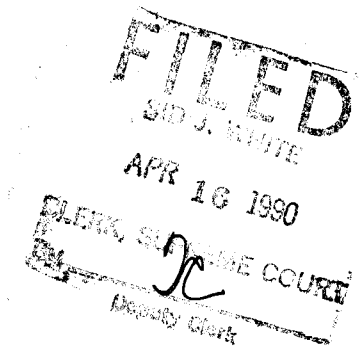
KRISHNA MAHARAJ,

Appellant,

v.

STATE OF FLORIDA,

Appellee.




# INITIAL BRIEF OF APPELLANT

On Direct Appeal From the Circuit Court
For the Eleventh Judicial Circuit,
In and For Dade County, Florida

KROLL & TRACT
Attorneys for Appellant
Miami Center - Suite 1330
201 S. Biscayne Boulevard
Miami, Florida 33131
Tel: (305) 577-4848
By: Kenneth E. Cohen

## TABLE OF CONTENTS

**TABLE OF CONTENTS CONTINUED:**

## INTRODUCTION

This appeal is based upon the conviction and sentencing of KRISHNA MAHARAJ, for the double murder of Duane and Derrick Moo Young. Pursuant to a jury's recommendation, the trial court pronounced a sentence of death for the murder of Duane Moo Young and life imprisonment for the murder of Derrick Moo Young.

Throughout this INITIAL BRIEF, the parties will be referred to as follows:

KRISHNA MAHARAJ shall be referred to either as the DEFENDANT/APPELLANT or by proper name.

The STATE OF FLORIDA shall be referred to as the STATE.

All references to the Record on Appeal shall be by the designation "R-" and references to the trial transcript shall be by the designation "TR-".

All emphasis is supplied unless otherwise indicated.

## TABLE OF CITATIONS OF AUTHORITY

Table of Citations of Authority (Continued):





KROLL & TRACT, MIAMI CENTER, 201 SOUTH BISCAYNE BOULEVARD, MIAMI, FLORIDA 33131 • (305) 577-4848

Table of Citations of Authority (Continued):

Table of Citations of Authority (Continued:)

## STATEMENT OF THE CASE AND THE FACTS

### PRE-TRIAL

On November 5, 1986, a seven (7) count Indictment was returned against KRISHNA MAHARAJ alleging, inter alia, that on October 16, 1986, the DEFENDANT/APPELLANT committed the first degree murders of Derrick Moo Young (Count I) and Duane Moo Young (Count II).

Other counts in the Indictment included the allegations that MR. MAHARAJ committed armed burglary (Count III), two counts of armed kidnapping (Counts IV and V), aggravated assault (Count VI) and the unlawful possession of a firearm while engaged in a criminal offense (Count VII). (R 1-5).

The 'facts' as excerpted from the arrest form ("A" Form) alleged that the DEFENDANT/APPELLANT and the victims were inside Room 1215 of the DuPont Plaza Hotel in Miami on October 16, 1986, when an argument arose over monies owed by the victims to KRISHNA MAHARAJ which was the subject of a pending civil lawsuit. (R 33A) While in the room, and during the course of the argument the DEFENDANT/APPELLANT allegedly shot both victims and was arrested for the crimes that evening after a black male companion of the DEFENDANT/APPELLANT was questioned by the police, inculpated MR. MAHARAJ in the shootings and arranged a meeting between himself and the latter at the police's request, triggering the DEFENDANT/APPELLANT'S arrest (R 33A)

A Motion for Pretrial Release was filed with the Court alleging that, inter alia, the DEFENDANT/APPELLANT was a forty-six year old man never previously charged with an offense



KROLL & TRACT, MIAMI CENTER, 201 SOUTH BISCAYNE BOULEVARD, MIAMI, FLORIDA 33131 • (305) 577-4848

in any jurisdiction, is a native of Trinidad and a citizen of the British Commonwealth, holds a multiple entry visa to this country and a valid British Commonwealth passport, is the publisher of a newspaper entitle The Caribbean Times in Fort Lauderdale, Florida and had resided in Broward County, Florida with his wife of ten years, Marita. (R 34-36) Bond was sought based upon the fact that the allegations of the "A" Form appeared to be more consistent with an allegation of second degree murder rather than first degree. (R 34)

In addition, a Motion for Statement of Particulars was filed seeking the exact day and time of the murder, as well as the location of the commission of the crime. (R 37)

Application for bond at the "Arthur Hearing" was denied on November 13, 1986 without the right given to DEFENDANT/APPELLANT of presenting alibi witnesses. (R 39). The only eyewitness to the "murders", the individual described as the black male in the "A" Form, was presented at the "Arthur Hearing" and testified against DEFENDANT/APPELLANT (R 40). As revealed in a later filed Application for Admission to Bail, this black male eyewitness also happened to be a reporter for a rival newspaper, the "Caribbean Echo", which was in direct competition with KRISHNA MAHARAJ'S newspaper and which had previously published articles against DEFENDANT/APPELLANT'S character. (R 40).

By agreement of both the State and defense, the polygraph of the eyewitness, Neville Butler was ordered by the trial Court. (R 187) Extensive discovery was commenced. The State filed a Motion for Order in Limine seeking an order prohibiting the



KROLL & TRACT, MIAMI CENTER, 201 SOUTH BISCAYNE BOULEVARD, MIAMI, FLORIDA 33131 • (305) 577-4848

DEFENDANT/APPELLANT from eliciting on cross-examination the fact that DEFENDANT/APPELLANT had no prior felony convictions. (R 1162). Among the depositions taken were several alibi witnesses who placed DEFENDANT/APPELLANT in Fort Lauderdale at the time of the murders.

Included as alibi witnesses were George Bell, the accountant of KRISHNA MAHARAJ (R 949) and Douglas Scott (R 1121), an employee of the DEFENDANT/APPELLANT'S newspaper, both of whom met with MAHARAJ at his newspaper's office at the time of the murders. Further, Ronald Kisch testified at deposition that he saw the DEFENDANT/APPELLANT at a restaurant that he managed (Tark's in Fort Lauderdale) on the date and time of the murders (R 811, 829).

In contravention of the above alibi witnesses, the State offered the same alleged eyewitness, Neville Butler. (R 850) Prior to the actual commencement of Mr. Butler's second deposition, however, the STATE proffered the fact that Butler had changed his testimony regarding the circumstances of the alleged murders from both his original statement to the arresting officer, as well as his prior deposition to counsel for the defense. (R 852) It was Butler's 'newly corrected' testimony that at the urging of the DEFENDANT/APPELLANT, Butler arranged for a meeting between the victims and, unbeknownst to them, the DEFENDANT/APPELLANT at the DuPont Plaza Hotel in Miami so that the DEFENDANT/APPELLANT could extract a confession from the victims relating to an extortion of some one hundred sixty thousand ($160,000.00) Dollars. (R 858,864) It was Butler who,

according to this new story, arranged this meeting at the request of the DEFENDANT/APPELLANT utilizing the pretext of a business meeting with several Bahamian individuals (Prince Ellis and Eddie Dames) who were interested in the import and export of certain products. (R 866, 867)

Butler continued his deposition testimony by stating that both Derrick Moo Young and, unexpectedly, Duane Moo Young, his son, appeared at the hotel room, in accordance with the plan and that once inside, DEFENDANT/APPELLANT appeared from behind a door and ordered Butler to tie up the victims, subsequently entering into an argument with Derrick Moo Young over the money owed. (R 889, 896-897) At that time, KRISHNA MAHARAJ allegedly shot Derrick Moo Young and subsequently shot his son, Duane Moo Young, who had been taken to the second floor of the hotel suite. (R 897)

Butler continued his deposition by stating that he subsequently met with the two Bahamian gentlemen (used as the pretext to lure the victims to the hotel) and later met with the police and gave an 'original' version of the events to the arresting officer. (R 906-908) Originally, Butler testified that he had no involvement in the crimes and merely was present at the hotel room when DEFENDANT/APPELLANT surprisingly appeared at the hotel suite. (R 853)

As a further defense witness, attorney Levi England gave his deposition to the State and testified that he had been retained by KRISHNA MAHARAJ to file lawsuits against the Moo Youngs for the various monies owed by the latter to the DEFENDANT/APPELLANT

(R 1166, 1176 et seq.) Mr. England testified that in his opinion, MAHARAJ stood an excellent chance of recovery in those suits, predicated upon the frauds of Derrick Moo Young. (R 1181; 1209).

The STATE filed a Motion for Handwriting Specimens of the DEFENDANT/APPELLANT for the purpose of identifying the signature on two letters written to the victims discussing monetary problems between them. (R 1556) Said motion was granted by the Court. (R 1557; TR 1910).

In addition, the STATE filed several Motions for Order in Limine. The first Motion for Order in Limine sought to exclude from the jury any testimony regarding that fact that the DEFENDANT/APPELLANT had passed a polygraph examination regarding his lack of involvement in the murders. (R 1558; 1559). The second Motion for Order in Limine sought to exclude as evidence a document entitled the "Scott Report", which was a report prepared at the behest of the Trinidadian Government which implicated the victims in various drug trafficking and money laundering operations in Trinidad and throughout the West Indies. (R 1560, 1561)

**GUILT PHASE**

The trial of this cause commenced on October 5, 1987, before the Honorable Howard Gross, Circuit Court Judge. (TR 1923) At that time, the Court, without objection, granted the STATE'S Motion in Limine directed to the "Scott Report". (TR 1924) Further, the Court granted the STATE'S Motion in Limine directed to the polygraph issue (TR 1925).

The Court also deferred ruling on a third Motion in Limine which would have permitted the STATE to recall several witnesses at a later period in the trial after their original testimony had been completed. (TR 1928, 1929).

At that time, prior to the commencement of jury selection, the State nolle prossed one count of the Indictment, to wit: Count V dealing with the alleged armed kidnapping of Neville Butler (TR 1930). The rule on sequestration of courtroom witnesses was then invoked by the Court (TR 1932)

A jury panel was then brought in for questioning. (TR 1934) During the preliminary remarks, the Court "questioned" the jury panel as follows:

> "Once again, folks, let me remind you that as to the second part of the trial, the penalty phase, once again, that is only an advisory opinion on your part. It is up to me, the Judge in this case, to make the final decision as to any sentence the defendant shall receive". (TR 1943)

During the following voir dire of the prospective panel, the STATE discussed the death penalty phase as follows:

> "There is really one trial, and that is whether the defendant is or is not guilty or not guilty, okay, and assume for a moment that you are in there deliberating and your note, you all agree, all twelve of you vote that the defendant is guilty, only then comes the second phase, and in that phase, you could consider certain aggravating factors and certain mitigating factors enumerated by the law, the Judge will give you those factors of what they are". (TR 2122)

The jury panel was subsequently chosen (TR 2132) and sworn (TR 2153a).

Exhibits and objections to evidence were then discussed out of the presence of the jury. (TR 2159a) Defense counsel

objected to the introduction of STATE'S Exhibit 1B, 1C, 1D and 1E (Exhibits 2, 3, 4 and 5) which were newspaper articles from the Caribbean Echo, a rival West Indian publication in Broward County edited by one Eslee Carberry (TR 2166a). The basis of the objection was that the articles accused the DEFENDANT/APPELLANT of committing various extraneous crimes, i.e. money laundering, etc., and were thus irrelevant and unduly prejudicial (TR 2166a). The Court overruled the objections and permitted the newspaper articles to be entered into evidence at the trial. (TR 2169a).

The defense further objected to the introduction of State's Exhibit 2X for identification. (TR 2185a). That Exhibit was a passport of the victims which were not shown to the defense subsequent to a discovery request. (TR 2185a) The Court deferred ruling on the admissibility of the passport. (TR 2186a).

The STATE then commenced its case on October 6, 1987. (TR 2151). The first witness called was TINO GEDDES (TR 2187) a journalist originally from Jamaica who worked for the newspaper of Eslee Carberry, the Caribbean Echo. (TR 2191). GEDDES testified about money paid by the DEFENDANT/APPELLANT to Carberry for the purpose of the publication of an article about the fraudulent dealings of the victim, Derrick Moo Young. (TR 2196). GEDDES identified the newspaper articles previously objected to by defense counsel. (TR 2197-2208) The articles were published to the jury at the STATE'S request. (TR 2209)

GEDDES further testified that he left the employ of the Caribbean Echo to work for the rival Caribbean Times, the paper operated by the DEFENDANT/APPELLANT. (TR 2201, 2202) At that

time, according to GEDDES, the DEFENDANT/APPELLANT allegedly enlisted GEDDES in an attempt to do bodily harm to Carberry. (TR 2215) GEDDES testified as to how the DEFENDANT/APPELLANT attempted to run Carberry off the road in a truck, how the DEFENDANT/APPELLANT had dressed in army fatigues and camouflage outfits, how the DEFENDANT/APPELLANT had a stack of weapons (shotguns, cross-bows, etc.) in his car to be utilized against Carberry, (TR 2213-2220) all over the objection of the defense. (TR 2213) GEDDES finally testified about an alleged previous attempt to do harm to Derrick Moo Young at the DuPont Plaza Hotel (TR 2227).

PRINCE ELLIS was next called as a witness in this matter. (TR 2261). Mr. ELLIS, a food caterer in the Bahamas (TR 2264) testified that he and his partner, Eddie Dames, were in Miami on the date of the shootings on October 16, 1986 on business (TR 2267). ELLIS was to meet Dames at his hotel room (number 1215) at the DuPont Plaza (TR 2268). ELLIS met Dames at the DuPont Plaza on the morning of the shooting but never went to room 1215. Upon meeting Dames, he was introduced to Neville Butler who accompanied Dames in the lobby of the hotel. (TR 2276). Both ELLIS and Dames then left the hotel to conduct their business. (TR 2277) Upon returning to the hotel, the police questioned ELLIS and Dames regarding the murders which had occurred in the room registered in the name of Dames, room 1215. (TR 2283) Neville Butler, seeing that both ELLIS and Dames were being taken to the police station for questioning, disappeared (TR 2285) only to reappear in the parking lot of the police

station. (TR 2287) Both Dames and ELLIS questioned Butler and encouraged him to discuss his knowledge of the murders with the police. (TR 2290) BUTLER agreed, but not until he changed his blood soaked clothing. (TR 2311) Neither he nor Dames had any business plans to meet either Derrick or Duane Moo Young at the DuPont Plaza Hotel that day. (TR 2296).

State Trooper Stephen Veltra was called as a witness by the STATE and testified concerning a traffic stop of the DEFENDANT/APPELLANT on July 26, 1986. (TR 2324-2326) Upon the arrival at the scene, the trooper observed other State Troopers questioning the DEFENDANT/APPELLANT (TR 2329) and observed various weapons in the trunk of DEFENDANT/APPELLANT'S car. (TR 2333-2335). Included in the description of the weapons were cross bows, hunting knives and Chinese throwing stars. (TR 2339-2341). None of the weapons were illegal to possess. (TR 2345).

ESLEE CARBERRY was next called as a witness by the STATE and testified that he was the publisher of a newspaper called the Caribbean Echo, (TR 2347) , which caters to South Florida's West Indian community. (TR 2347) CARBERRY testified he agreed to publish a story at the DEFENDANT/APPELLANT'S request regarding the victim, Derrick Moo Young. (TR 2352-2353) CARBERRY thereupon identified the newspaper article (State's Exhibit I) which was published to the jury (TR 2354) Likewise, State's Exhibit II, another edition of the Echo, was again published to the jury as CARBERRY detailed the contents of the article (which was the Moo Young's accountings against the DEFENDANT/APPELLANT. (TR 2360)

Subsequently, CARBERRY detailed STATE'S Exhibits 3, 4 and 5 (TR 2364) which alleged that the DEFENDANT/APPELLANT was a money launderer, etc. (TR 2365, 2366). CARBERRY finally related a story to the jury which occurred at a nightclub where the DEFENDANT/APPELLANT allegedly threatened to kill him. (TR 2377).

Various employees of the DuPont Plaza Hotel were next called as witnesses by the STATE. ANA FERNANDEZ, security officer testified that she had previously seen the victims in the lobby of the hotel one hour before she discovered their bodies (TR 2403). She further testified that Room 1215 is a suite with an upstairs and downstairs. (TR 2405) Finally, FERNANDEZ testified that, though there were a number of workmen on the floor below, no gunshots of any kind were heard by the staff or crew of the hotel. (TR 2408).

Next, LORETTA MOLASKEY, a maid at the hotel, was called by the STATE. (TR 2410) MOLASKEY testified that only two suites on the twelfth floor of the hotel were occupied on October 16, 1986. (TR 2412) At the approximate time of the murder, she saw blood in the hallway in front of Room 1215 (TR 2420). Finally, upon cross-examination, MOLASKEY testified that, although she cleaned the rooms on the twelfth floor during the hours of the murders, she heard no shots being fired or noise of any commotion. (TR 2429)

MIGUEL SUEIRAS, the head housekeeper of the hotel had a crew of thirty workers on the floor below but heard no gunshots fired. (TR 2442-2443). JORGE APARICIO, a former security guard at the hotel knocked on the door of the room after seeing blood in the

hallway, (TR 2447, 2448) and identified the response from inside the room as coming from an individual around 25 years of age. (TR 2455).

Crime scene technician SYLVIA ROMANS was next called by the STATE (TR 2463) and testified about her procedure in lifting latent fingerprints, gathering evidence, sketching and photographing the scene of the murders. (TR 2472-2493). ROMANS testified that latent fingerprints of Neville Butler were found inside of Room 1215, (TR 2576) as were fingerprints of the DEFENDANT/APPELLANT. (TR 2582) Nineteen cards of latent fingerprints were lifted from Room 1215 without identification as to any known identity (i.e. prints of employees of the DuPont Plaza Hotel were checked as were all crime scene personnel and subsequently eliminated). (TR 2604-2611).

NEVILLE BUTLER was next called as a witness by the STATE and testified in a manner consistent with his testimony in his second deposition. (TR 2730) BUTLER testified that he currently is employed as a reporter for the Miami Times, a publication for the general black community in Miami. (TR 2732) Prior to that employment, BUTLER was employed by the Caribbean Echo, (TR 2732) a paper known for 'sensationalism'. (TR 2735) The Echo catered to the tastes of the West Indian Community of South Florida (TR 2736) and, as previously testified to, was published by ESLEE CARBERRY. (TR 2734) BUTLER identified newspaper articles (Exhibits 3 and 4) as his authorship. (TR 2739, 2741).

BUTLER testified that he was solicited by the DEFENDANT/APPELLANT to join his rival newspaper, the Caribbean

Times. (TR 2745-2747) BUTLER did join the Times and he submitted various articles for publication to that paper. (TR 2750).

The DEFENDANT/APPELLANT allegedly asked BUTLER to arrange a meeting between himself and Derrick Moo Young. (TR 2753-2756) BUTLER testified that the DEFENDANT/APPELLANT was interested in exposing Derrick Moo Young's alleged extortion of his relatives in Trinidad. (TR 2753) According to BUTLER, he was to tell Moo Young that a friend of his (Eddie Dames) was interested in meeting him for the purpose of importing/exporting. (TR 2758, 2759). According to BUTLER, Moo Young would never agree to a meeting with the DEFENDANT/APPELLANT in attendance. (TR 2757, 2758) The overall purpose of the meeting was to get a confession regarding the extortion from Moo Young. (TR 2760).

BUTLER testified that the DEFENDANT/APPELLANT suggested that the meeting occur at the DuPont Plaza Hotel in Miami. (TR 2764) BUTLER contacted the Moo Youngs for the meeting on October 14, 1986. (TR 2766) BUTLER met Dames at the hotel on October 15, 1986 (TR 2768) and told him that he was being used as a "big buyer" to lure the Moo Youngs into a meeting regarding the import/export of products. (TR 2772, 2785). BUTLER then confirmed the meeting with Derrick Moo Young for the next day. (TR 2773, 2774).

Dames did not stay in the hotel room on the evening of the 15th (TR 2779), but on the morning of the 16th, BUTLER picked Dames up at a young lady's home. (TR 2779) Both BUTLER and Dames went to the hotel lobby where they saw the DEFENDANT/APPELLANT. (TR 2781, 2782). BUTLER and Dames went up to Room 1215 for a

short while and then Dames met Prince Ellis at the hotel, whom BUTLER allegedly did not know would be present. (TR 2782, 2784) Both Dames and Ellis left the hotel. (TR 2785)

BUTLER arranged for the meeting with the Moo Youngs at twelve o'clock in Room 1215. (TR 2785) BUTLER met the DEFENDANT/APPELLANT in the lobby of the hotel (TR 2786) and they traveled to the suite. (TR 2788) According to BUTLER the DEFENDANT/APPELLANT had previously purchased a pad of paper for a confession for Derrick Moo Young, as well as electrical cords, allegedly to tie up the victims, from the hotel gift shop. (TR 2793, 2794). BUTLER testified that the DEFENDANT/APPELLANT never mentioned to him the use of a gun, only that Moo Young might have to be "roughed up". (TR 2794; 2795) BUTLER stated that he called Derrick Moo Young to confirm his presence at the hotel. (TR 2798)

According to BUTLER, the DEFENDANT/APPELLANT wanted to (1) extract a confession of fraudulent activity from Derrick Moo Young, (2) require the victim to issue two checks to repay him for the fraud, (3) have BUTLER go to the bank with the checks for the purpose of certifying them at which time the DEFENDANT/APPELLANT would allow the victim to leave upon hearing from BUTLER of the certification. (TR 2799) There was never any discussion or knowledge that Derrick Moo Young would bring his son, Duane. (TR 2800).

The Moo Youngs arrived at the hotel and came up to the suite. (TR 2803) Once inside, Moo Young asked for Dames and the DEFENDANT/APPELLANT appeared with a gun in his right hand and a small pillow in his left hand. (TR 2804) According to BUTLER,

an argument arose over the $160,000 which the DEFENDANT/APPELLANT claimed was owed by Derrick Moo Young. (TR 2806)

After six or seven minutes of arguing, the DEFENDANT/APPELLANT allegedly fired a shot at the leg of Derrick Moo Young. (TR 2807, 2808) According to BUTLER, he attempted to leave the room at that time but was ordered by the DEFENDANT/APPELLANT to stay. (TR 2808, 2809) At that time, BUTLER, was ordered to tie up Duane Moo Young with the immersion cord. (TR 2809) Subsequently, BUTLER also tied up Derrick Moo Young. (TR 2810)

Before he was able to tie up Derrick Moo Young, Moo Young lunged at the DEFENDANT/APPELLANT (TR 2812) and the DEFENDANT/APPELLANT fired three or four shots at the victim. (TR 2812) No silencer was used. (TR 2814)

After the shooting of Derrick Moo Young, BUTLER testified that the DEFENDANT/APPELLANT then turned his attention to Duane and allegedly spent the next three or four minutes questioning him regarding the money that was owed. (TR 2814) During this time, Derrick Moo Young crawled out the door into the hallway (TR 2815) and the DEFENDANT/APPELLANT shot him and pulled him back into the room. (TR 2816)

BUTLER continued by stating that shortly thereafter, Duane Moo Young broke loose and hurled himself at the DEFENDANT/APPELLANT. (TR 2820) BUTLER held Duane back (TR 2820) and the DEFENDANT/APPELLANT then allegedly took Duane upstairs to the second floor of the suite (TR 2821), questioned him about the money (TR 2822, 2823), and then BUTLER heard one shot. (TR 2829)

The DEFENDANT/APPELLANT then came downstairs to where BUTLER was and both left the room. (TR 2824)

According to BUTLER, both he and the DEFENDANT/APPELLANT waited in a car in front of the hotel some three hours for the arrival of Dames. (TR 2829, 2830).

BUTLER admitted to the STATE that he had previously lied to the police regarding his participation in the murder, as well as the DEFENDANT/APPELLANT'S participation (TR 2833-2835) BUTLER concluded his direct testimony by stating that neither the State Attorney's Office nor police department had promised him immunity for his testimony. (TR 2839) The proceedings terminated for the evening. (TR 2851)

The next morning, after the jury arrived, the Chief Judge of the Criminal Division, Herbert Klein, made the announcement that the presiding Judge Howard Gross, could not continue the trial. (TR 2853)[1] The DEFENDANT/APPELLANT'S COUNSEL stated that no Motion for Mistrial would be made. (TR 2858) The DEFENDANT/APPELLANT was asked whether he agreed with his counsel's representation and the following occurred:

> "MR. RIDGE (the State): The only other matter is that Mr Hendon has not made any Motion for a Mistrial at this particular point and I assume----
>
> "MR. HENDON: A waiver there and we would not be making a Motion for Mistrial. I just want that part of the record.
>
> "THE COURT: I think you made that specifically on the record and you do not want a mistrial?
>
> "MR. HENDON: We are not interested in a mistrial.

[1]Judge Gross, in a much publicized arrest was arrested and charged by officers of the Florida Department of Law Enforcement in a bribery conspiracy.

"THE COURT: You have discussed this with your client?

"THE DEFENDANT: Yes, sir.

"THE COURT: If you are in agreement with that and that you understand what a mistrial is, and that is to discharge this jury and to pick another jury?

"THE DEFENDANT: No, sir.

"THE COURT: Let me call the jury in." (TR 2858)

The new presiding Judge, HONORABLE HAROLD SOLOMON, again questioned the DEFENDANT/APPELLANT as to whether he desired a mistrial, to which the accused responded that he wished to proceed. (TR 2865-2867) The Court subsequently certified that it had read the testimony of the previous witness, as well as BUTLER, and was ready to proceed with the case. (TR 3009) Without objection, a second alternate juror was excused for personal reasons. (TR 3015)

Upon cross-examination, BUTLER admitted that he had lied on several prior occasions regarding the events of the murders (TR 3052) because he was concerned that he "was as guilty as the man who pulled the trigger". (TR 3052) BUTLER admitted that he made the arrangements for the fatal meeting (TR 3053), admitted he lied to defense counsel at his deposition regarding the fact that he had ever been in the gift shop of the hotel to purchase electrical cords (TR 3056, 3057), admitted lying to defense counsel regarding a meeting with DEFENDANT/APPELLANT at the hotel on the date prior to the murders (TR 3057, 3058); and, in fact, admitted lying to the STATE, the police and defense counsel on numerous other matters. (TR 3062, 3063). Further, BUTLER, admitted that it was he who locked Duane Moo Young in the

upstairs powder room of the hotel suite. (TR 3078) BUTLER additionally admitted having told the defense that Dames was to meet Moo Young the morning of the 16th of October in Room 1215 but, at trial, denied that fact. (TR 3117). BUTLER admitted that his actions regarding the various fabrications were out of "self-preservation"
(TR 3144).

IVAN ALMEIDA was next called by the STATE as a witness. (TR 3145). ALMEIDA, a latent print examiner with the City of Miami Police Department (TR 3146) testified that the DEFENDANT/APPELLANT'S fingerprints appeared inside Suite 1215 at various sites. (TR 3167-2182) ALMEIDA also found latent fingerprints of NEVILLE BUTLER in the room. (TR 3186).

DR. CHARLES WETLI, Deputy Chief Medical Examiner of Dade County (TR 3196) was called as a witness by the STATE. DR. WETLI performed autopsies on the bodies of Derrick and Duane Moo Young (TR 3200) and found six (6) gun shot wounds on the body of Derrick and one wound on the body of Duane (TR 3210). DR. WETLI testified that none of the victims' gunshot wounds would have been painful. (TR 3228, 3230, 3236 and 3240). Only one of the gunshot wounds to Derrick Moo Young was fatal. (TR3235) The lone gunshot wound to Duane Moo Young was fatal, severing the artery and resulting in a loss of consciousness fairly quickly. (TR 3255, 3256).

On cross-examination, DR. WETLI testified that the execution style "squatting" position of Duane Moo Young prior to his death (as testified to by NEVILLE BUTLER) was inconsistent with the position

that he found the body of Duane Moo Young when he arrived at the DuPont Plaza Hotel room. (TR 3259) DR. WETLI testified that the position of the body was more consistent with the scenario of Duane Moo Young hiding under the bed and attempting an escape or sudden thrust resulting in his being shot. (TR 3260-3263).

DETECTIVE RICHARD BELLROSE of the City of Miramar testified that he sold the DEFENDANT/APPELLANT a Smith and Wesson model 39 semi-automatic pistol in 1986. (TR 3264; 3265; 3269) The color of the gun was a bright silver (TR 3269) THOMAS QUIRK of the Metro-Dade Police Department, a firearms examiner (TR 3303) testified that the carriage and spent bullets were nine (9) millimeter (TR 3330), fired from the same weapon (TR 3330, 3342) and that weapon was, in his opinion, a Smith and Wesson model 39 (TR 3344). On cross-examination, however, QUIRK testified that Smith and Wesson produced 270,000 of these weapons since inception. (TR 3376) Further, QUIRK testified that this model weapon could have a silencer designed for its use. (TR 3379).

OFFICER GREGORY JAMESON next was called as a witness by the STATE (TR 3384) and testified that on July 26, 1986 he conducted a traffic stop of DEFENDANT/APPELLANT'S automobile and observed a rifle, crossbow, throwing stars, and a nine millimeter handgun, (TR 3386) along with military type camouflage clothing. (TR 3386)

DETECTIVE JOHN BUHRMASTER, the lead detective of the City of Miami Police Department was called by the STATE. (TR 3390) BUHRMASTER testified that he interviewed Dames and Ellis (TR 3404, 3405), as well as Jaime Mejia, the occupant of the suite across from 1215. (TR 3406) He also interviewed NEVILLE BUTLER

(TR 3411) who arranged a meeting with the DEFENDANT/APPELLANT at BUHRMASTER'S request. (TR 3412) BUHRMASTER testified that BUTLER told him that the DEFENDANT/APPELLANT'S presence at Room 1215 was a complete surprise to him and then related the shooting scenario to the officer. (TR 3415) Once at the station and after having been given his Miranda warnings, BUHRMASTER discussed the events with the DEFENDANT/APPELLANT who stated that he discussed events regarding his newspaper with NEVILLE BUTLER outside the hotel on the morning of October 16, 1986, but was never inside the hotel. (TR 3452, 3453) Further, the DEFENDANT/APPELLANT stated that he had not seen the Moo Youngs on that date. (TR 3454) BUHRMASTER concluded his interrogation and placed DEFENDANT/APPELLANT under arrest based on BUTLER's statements. (TR 3465)

BUHRMASTER, upon cross-examination, testified that he did not obtain elimination prints from Mr. Mejia, the occupant of Room 1214 (TR 3498) nor did he verify that Mejia was at work between the morning hours of the 16th of October. (TR 3495) No parafin tests were taken of anyone in this case by BUHRMASTER for the purpose of determining the existence of gunpowder residue. (TR 3509) BUHRMASTER admitted that he believed BUTLER'S earlier story and, notwithstanding BUTLER'S altered testimony and admitted lies, still found him credible. (TR 3516)

TINO GEDDES was recalled as a witness by the STATE (TR 3601) and testified that he and Clifton Sagree, a friend, met the DEFENDANT/APPELLANT at the Miami International Airport on the day of the murder at approximately 7:00 P.M. (TR 3606) The DEFENDANT/APPELLANT allegedly instructed GEDDES that, if

questioned, he should say that they were together earlier that day at a lounge in Fort Lauderdale. (TR 3616) GEDDES also testified that he was instructed to convince Sagree to claim he was with the DEFENDANT/APPELLANT that morning. (TR 3621) GEDDES admitted that he had also previously lied to the defense counsel's investigator in that he had claimed to be with the DEFENDANT/APPELLANT the morning of the 16th of October in a sworn Affidavit. (TR 3624)

GEDDES testified that the Assistant State Attorneys prosecuting this case came to Jamaica to interview him and he then told them of the DEFENDANT/APPELLANT'S attempt to set up his alibi. (TR 3637) Further, GEDDES testified that one of the Assistant State Attorneys went to Court in Jamaica to testify in favor of GEDDES in a felony prosecution of GEDDES for possession of ammunition. (TR 3646, 3647)

CLIFTON SEGREE met with the DEFENDANT/APPELLANT at Miami International Airport the evening of October 16th. (TR 3684) At the Denny's Restaurant near the airport, the DEFENDANT/APPELLANT allegedly asked SEGREE to provide him with an alibi. (TR 3690) SEGREE said "no". (TR 3690) SEGREE also stated that TINO GEDDES had told him that he was involved in the murders. (TR 3716; 3720).

The STATE then rested its case (TR 3723, 3724) and the defense moved for judgment of acquittal. (TR 3724) The Court addressed Count VI of the Indictment (aggravated assault upon BUTLER) (TR 3725) and Count III of the Indictment (armed burglary of the dwelling of BUTLER) (TR 3726). The STATE argued that

BUTLER had paid for the room and it was under his custody. (TR 3727) The defense argued that the room was leased under the name of Eddie Dames and was thus not in the custody of BUTLER. (TR 3727)

The trial Court denied the Motion for Judgment of acquittal. (TR 3730). The Defense then rested its case without presentation of any witnesses. (TR 3731) The Court questioned the DEFENDANT/APPELLANT as to whether he wished to testify to which the DEFENDANT/APPELLANT responded that he did not wish to testify.(TR 3731) The defense then renewed its previously argued Motion for Judgment of Acquittal. (TR 3742; 3748) Said motion was denied by the Court. (TR 3742; 3748)

The Court then began the charge conference after excusing the jury for the evening. (TR 3748; 3749) The Defense stated to the Court that it did not wish the inclusion of lesser included offenses. (TR 3751) The Court inquired as to whether the DEFENDANT/APPELLANT agreed with his counsel regarding the exclusion of lesser included offenses. (TR 3753) DEFENDANT/APPELLANT responded: "I want either first degree or nothing". (TR 3753) After questioning, the Court found that the DEFENDANT/APPELLANT had voluntarily and intelligently waived his right to lesser included offenses. (TR 3757)

The STATE sought to have a second degree murder charge included as a lessor offense to Count I, the murder charge regarding Derrick Moo Young. (TR 3757) The Court denied that request. (TR 3758) During discussions, the STATE conceded that it was proceeding upon a premeditation murder theory and not a

felony murder theory. (TR 3761) In addition, defense counsel announced he was "not requesting any lessors on any of the crimes". (TR 3765) The STATE also sought the lesser included offense of false imprisonment under the kidnapping counts (Counts IV and V) over objection of the defense. The Court subsequently permitted the lessors on both kidnapping and first degree murder counts. (TR 3788, 3793).

Closing argument commenced for the defense (TR 3812) followed by the STATE'S argument. (TR 3907) The STATE initially discussed the fact that it at no time was required to establish "motive". (TR 3911) Yet, the STATE also argued as follows:

> "Let's talk about motive. Mr. Hendon told you don't waste your time reading these newspaper articles. Don't waste your time.
>
> "Well, ladies and gentlemen, the best time that you will spend in that jury room deliberating is reading those articles because each and every one of those articles gives you the motive". (TR 3912)

The STATE then commenced an explanation of each and every article entered into evidence over defense objections. (TR 3913) The STATE, in establishing motive argued as follows in discussing one of the articles attacking the DEFENDANT/APPELLANT:

> "Imagine how he must have felt.
> "Once again, you didn't have to imagine because you heard the testimony of Mr. Geddes." (TR 3918)

The STATE, however continued to emphasize the accusations set forth in the newspaper articles to the jury notwithstanding the fact the witnesses had already done so. (TR 3919) The STATE further encouraged the jury to read the articles to learn more about the DEFENDANT/APPELLANT. (TR 3921)

"Do yourself a favor, do this case a favor, read those articles." (TR 3922)

Subsequent to the conclusion of the closing arguments, the Court charged the jury without objection from the defense (TR 4141) and reviewed the verdict forms with the jury. (TR 4167). The jury commenced deliberations (TR 4182).

After the jury had concluded its deliberations, it returned to the courtroom and the following verdicts were read by the Clerk on October 21, 1987:

(1) Guilty as to Count I, first degree murder of Derrick Moo Young;
(2) Guilty as to Count II, first degree murder of Duane Moo Young;

(3) Not Guilty as to Count III, armed burglary;

(4) Guilty as to Count IV, kidnapping of Derrick Moo Young with firearm;

(5) Guilty as to Count V, kidnapping of Duane Moo Young with a firearm;

(6) Not guilty as to Count VI, aggravated assault; and

(7) Guilty as to Count VII, unlawful possession of a firearm while engaged in a criminal offense. (TR 4184-4187).

The jurors were then polled (TR 4187) and acceded in their verdicts. (TR 4188). The DEFENDANT/APPELLANT collapsed after hearing the verdicts and was helped out of the courtroom. (TR 4191, 4192). The Court later made a finding of the DEFENDANT/APPELLANT'S guilt. (TR 4218)

**PENALTY PHASE**

On November 6, 1987, the penalty phase of the trial commenced. (TR 4223) Prior to the presentation of the testimony, the defense counsel objected to the instructions for the penalty

phase as prepared by the STATE. (TR 4225) The Court read the instructions which, inter alia, contained the following:

> "Ladies and gentlemen of the jury, it is now your duty to advise the Court as to what punishment should be imposed upon the defendant for his crime of first degree murder as to each victim.
> "As you've been told, the final decision as to what punishment shall be imposed is the responsibility of the judge." (TR 4227)

After setting forth the aggravating circumstances to be considered by the jury (TR 4228, 4229) the Court then instructed on the mitigating circumstances as follows:

> "Should you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances.
>
> "Among the mitigating circumstances you may consider, if established by the evidence, are:
>
> "The defendant has no significant history of prior criminal activity, any other aspect of the defendant's character on record and any other circumstance of the offense." (TR 4229)

The STATE then recalled the Deputy Chief Medical examiner, DR.CHARLES WETLI, who testified that the body of Derrick Moo Young had six gunshot wounds. (TR 4236; 4237) DR. WETLI testified that there would be little or no pain associated with any of those wounds. (TR 4239; 4254; 4255).

DR. WETLI testified that Duane Moo Young may have been conscious for a short while after receiving his wound (TR 4249) or may have lost consciousness very quickly or even immediately. (TR 4252). Further, the execution style theory of the death of Duane Moo Young was one of many possible theories as to what could have happened to Duane Moo Young upon his being shot. (TR 4252). In fact, DR. WETLI testified that the position of the

bullet wound was consistent with the deceased darting out from under the bed and then getting shot. (TR 4250)

The STATE rested without calling any other witness for the penalty phase. (TR 4258)

The defense first called United States Congressman MERVYN DYMALLY. (TR 4258) Congressman DYMALLY testified that the DEFENDANT/APPELLANT was a good friend of his (TR 4262) with characteristics of truthfulness and honesty with no propensity for violence. (TR 4262).

Upon cross examination, the STATE attempted to impeach the witness' opinion testimony with the fact that the DEFENDANT/APPELLANT had been convicted of two violent offenses. (TR 4270) The following colloquy occurred:

> "Q. Well, what about two counts of first degree murder conviction premeditated found by this jury? How about that evidence?
>
> "A. Well, that is subject to personal judgment. Judgment history is loaded with cases where there have been errors in evidence and innocent people have been guilty.
>
> "There have been retrials. There have been change of decisions by the courts. History books have changed those, sir.
>
> "Q. Why don't you look at this jury and tell them that they made a mistake in this case, sir?
>
> "THE COURT: Sustained." (TR 4271)

The next several pages of transcript contained the STATE arguing with the witness and the Court's admonishment of the STATE'S actions. (TR 4278-4281)

Next, LEVI ENGLAND, was called as a witness for the defense. (TR 4286) ENGLAND, DEFENDANT/APPELLANT'S civil attorney,

testified that he was hired to litigate claims against the victim, Derrick Moo Young. (TR 4288) ENGLAND testified that, in his opinion, the DEFENDANT/APPELLANT had a "very substantial chance of prevailing" in those claims. (TR 4290) ENGLAND testified that the suits remain pending against the estate of the deceases. (TR 4302) The death of the victims would make the suit more difficult to establish however. (TR 4304, 4305)

The defense called RETIRED JUSTICE FRANK NAISER of Trinidad to the stand. (TR 4323-4325) JUSTICE NAISER testified that he has known the DEFENDANT/APPELLANT for forty (40) years (TR 4328) and testified about his early life in Trinidad. (TR 4329) According to JUSTICE NAISER, the DEFENDANT/APPELLANT, was not a violent person (TR 4329) and one who donated monies to charitable organizations. (TR 4330)

Next, the defense called DR. KRISENDATH MAHARAJ, a medical doctor from Trinidad (TR 4335, 4336). DR. MAHARAJ, no relation to the DEFENDANT/APPELLANT, has known DEFENDANT/APPELLANT for over forty (40) years (TR 4338) and testified that he knew nothing to indicate that the DEFENDANT/APPELLANT was prone to violence. (TR 4339)

Finally, the DEFENDANT/APPELLANT took the witness stand. (TR 4356) The DEFENDANT/APPELLANT testified that he was forty-nine (49) years of age and received his initial schooling in Trinidad. (TR 4356, 4357) In 1960, he left Trinidad and went to live in and receive an education in London. (TR 4357) The DEFENDANT/APPELLANT was not able to complete his business college education because of financial reasons and began driving a truck

to earn a living. (TR 4357) Soon thereafter, the DEFENDANT/APPELLANT began an import business by borrowing Three Thousand ($3,000) Dollars from a bank. (TR 4359) The import business (exportation of beef to Nigeria) was very successful. (TR 4360) Later, the DEFENDANT/APPELLANT embarked in a catering business supplying shipping lines with food. (TR 4361) In all, the DEFENDANT/APPELLANT was in business in England from 1960 to 1984 when he came to Florida. (TR 4361)

MAHARAJ testified that he first met Derrick Moo Young in 1965 through business contacts. (TR 4362) MAHARAJ shipped Moo Young a truck in Jamaica. (TR4363) Much later, in 1984, the DEFENDANT/APPELLANT formed a corporation with Moo Young called KDM Corporation. (TR 4363) The corporation was in the business of purchasing new construction homes and renting them, however, in 1986, the DEFENDANT/APPELLANT discovered that Moo Young did not pay the rents received from tenants to the mortgage company, but rather kept the monies for himself. (TR 4364, 4365). This was the basis of the lawsuits filed on MAHARAJ'S behalf by attorney England. (TR 4365).

The DEFENDANT/APPELLANT testified that he repaid some of the money that Moo Young stole from several ladies from Trinidad (TR 4365, 4366) and wrote letters to Moo Young revealing his discovery of the Moo Young's thefts. (TR 4366) He never, however, committed any violence against Derrick Moo Young. (TR 4367)

The DEFENDANT/APPELLANT testified that though he was upset with the newspaper articles, he left it to the Courts to gain

retribution (TR 4367, 4368) and he categorically denied that he murdered either Derrick or Duane Moo Young. (TR 4368)

The DEFENDANT/APPELLANT then sent a prepared letter to the jury outlining his numerous gifts to charities over the years (TR 4373; 4375), as well as charitable work for Amnesty International in London. (TR 4373) Mr. MAHARAJ begged for his life so that, in time, he could establish his innocence. (TR 4374)

The STATE commenced its cross-examination of the DEFENDANT/APPELLANT (and maintained this same tone throughout), with the following opening line:

> "Q. Since October 16th of 1986 until November 6th, 1987, I wanted to ask you one question, one question.
>
> "A. Yes, sir.
>
> "Q. What did you do with the murder weapon? That's the only question that's left, the only one. What did you do with it?" (TR 4376)

After responding, the STATE again asked the question:

> "Q. Did you hear my question? What did you do with your model 39 Smith and Wesson semiautomatic pistol? Where is it today?
>
> "A. Right. I told Detective Buhrmaster - are you going to let me answer your question, please sir?
>
> ...
>
> "Q. You are telling us that the trooper stole --
>
> "THE COURT: Counsel, Counsel.
>
> "BY MR. KASTRENAKES:
>
> Q. (Continuing -- that the trooper stole the murder weapon?
>
> "A. I never said that.

"MR. HENDON:

Your Honor, I am going to object. My client said nothing -- .

"THE COURT: Hold it. Sustained. Sustained.

...

"Don't answer it until I tell you to.

"The Court does not believe at this time that we should go into matters that would have come out on cross-examination at trial.

"A decision has been made by this jury as to guilt or innocence.

"MR. KASTRENAKES:

Excuse me judge.

"THE COURT:

Yes.

"MR. KASTRENAKES:

I don't mean to interrupt the Court.

"But maybe we should have a side bar at this point.

...

"Judge, with all due respect to this Court, this defendant has taken the stand and proclaimed his innocence.

"I feel I can cross-examine him concerning the evidence in the case and I plan on doing that, Judge.

...

"MR. HENDON: Your Honor, I am going to object.

"THE COURT: Your objection is noted.

"What is going to happen to the next step here?

"We're on a sentencing case. We are on a sentencing part of this case.

...

"MR. HENDON: Your Honor, we are not here for the trial of this case again.

"MR. RIDGE: He is coming before the jury and said, you have made a mistake, you shall feel guilty, ladies and gentlemen of the jury, because you have convicted an innocent man.

"And to prevent us from going into the facts and circumstances of this murder to show that this man is taking the witness stand this afternoon and lying to them is unfair and prejudicial to the State of Florida, Judge.

...

"THE COURT: The only thing I want to keep from doing here this afternoon is bringing in every witness that testified before to counter anything this gentleman says now. (TR 4376-4384)

The State was permitted to recall Detective Burhmaster to the stand, notwithstanding the fact that he had remained in the Courtroom during the cross-examination of the DEFENDANT/APPELLANT while under subpoena. (TR 4387)

The cross-examination of the DEFENDANT/APPELLANT continued:

"BY MR. KASTRENAKES:

"Q: My question to you is what did you do with your nine millimeter Smith and Wesson model 39?

"A: I said, I said to you the last time I saw the gun was the day the State Trooper stopped me at the motor way and the gun was put back in the trunk of the rented car in the bottom of the rented car.

"I never said that the State Trooper stole the gun".

...

"Q: So where is the gun?

"THE COURT: I think that's been answered, hasn't it?

"THE WITNESS: I been answering. The last time I saw it was when it was put back in the bag in the rented car.

"I didn't say the State Trooper stole it, sir.

...

"Q: Sir, you don't know where the gun is today?

"A: No, sir. (TR 4388-4392)

"Q: You were a car salesman in Trinidad?

"A: Yeah. I was a car salesman, when I left, I was a truck salesman.

"Q: You were a good car salesman; weren't you?

"A: Well, if you, according to what relative --

"Q: You were successful?

"A: I was pretty successful. I wouldn't say I was successful.

"Q: And during the years that you were in England you began an import - export business; correct?

"A: Yes, sir.

"Q: Which involved your being a salesman again, isn't that right, sir?

"A: Yes, sir...

...

"Q: You have been a good salesman your whole life, haven't you? (TR 4394-4395)

...

"Q: You were friends with Derrick Moo Young for 23 years?

"A: 1965 to 1986, yes.

"Q: 21 years.

"A: 21.

"Q: You trusted him like a brother?

"A: Yes. That is true". (TR 4395-4396)

THE STATE then commenced cross-examining the DEFENDANT/APPELLANT on the fall out of the business relationship between DEFENDANT/APPELLANT and Derrick Moo Young. The STATE questioned

MR. MAHARAJ regarding a business deal which Derrick Moo Young had "blown", (TR 4396) and further questioned him regarding the newspaper articles which he was supposed to have "sponsored". (TR 4401)

THE STATE then accused the DEFENDANT/APPELLANT of blackmailing the victim (TR 4405) bringing both an objection from the defense and a "sustained" from the Court. (TR 4406) Further, the STATE then began cross-examining the DEFENDANT/APPELLANT regarding the lawsuits being handled by his civil lawyer, Levi England. (TR 4409) The STATE then discussed the underlying crimes set forth in the newspaper articles published in the Caribbean Echo which the DEFENDANT/APPELLANT was accused of committing. (TR 4409-4410) The defense continued its objections.

"MR. HENDON: Your Honor, I'm going to object.

"BY MR. KASTRENAKES:

"Q: (Continuing) - resulted in the charge of fraud and conversion against you.

"MR. HENDON: Your Honor, I am going to object to the nature--.

"THE COURT: Hold it.

"MR. HENDON: That's far beyond the scope of anything established through his direct testimony.

"THE COURT: Mr. Kastrenakes, let's move on with this thing.

"You can answer the question on this one and let's not go further and retry this case by picking out the evidence and showing them now.

"I think this is supposed to be aggravating and mitigating circumstances and I realize the defendant has made certain statements here.

"You have a right to cross-examination but let's not go through the entire package of evidence." (TR 4410)

The STATE, however, continued to cross-examine the DEFENDANT/APPELLANT regarding the accusations of money laundering in the Echo. (TR 4411) For example:

"THE STATE: Q: Tell us about the anger you felt about those articles." (TR 4412)

In response to additional defense objections, the Court ruled as as follows:

"THE COURT: Sustained.

"Counsel for the State, I think we have gone beyond reasonable cross-examination.

"We are getting back deeper and deeper at the case. (TR 4413)

The STATE next cross-examined the DEFENDANT/APPELLANT regarding his claim for veracity on the stand.

"BY MR. KASTRENAKES:

"Q. Tino Geddes is a pathetic liar; is that correct?

"A. Well, Tino Geddes --

"THE COURT: Counsel, please, we are going back into the facts of the case.

"MR. KASTRENAKES: He just said he is the only one to tell the truth.

"THE WITNESS: Tino Geddes admitted he was lying, sir.

"THE COURT: Counsel for the State.

"MR. HENDON: I didn't hear my client say pathetic liar.

"THE COURT: Sustained.

"The jury has heard the evidence in the case and reached a decision.

"They also can reach a decision as to mitigating, aggravating circumstances. That's the reason we're here now. Let's try to hold to that." (TR 4415-4416)

The Court further admonished the STATE several more times as the STATE continued to cross-examine the DEFENDANT/APPELLANT regarding the substance of other witnesses' lies. (TR 4416-4417)

Finally, out of exasperation, the Court excused the jury and the following procedures were held.

"THE COURT: Counsel, it's one thing, it's one thing to have cross-examination on a point regarding a gun.

"It's another thing to let that cross-examination drift into review of all the testimony, everything said by witnesses that now the defendant denies.

"The jury hears this.

"This gentleman did not take the stand. Therefore, he denied, isn't that the law, the law is if you don't take the stand, your plead not guilty at the beginning to everything that is said. That is the law.

"If you don't take the stand, your plea of guilty remains forever.

"Now, we are not going to try this case again, Mr. Kastrenakes, I am not going to have you go on here until six or seven o'clock tonight regarding ongoing testimony that this witness, the defendant, denies what was said or says people are lying.

"I just think we have to put an end to this and I am going to call an end to it now.

...

"This is a hearing for aggravating and mitigating circumstances and we're going to keep it at that.

...

"We will be here forever on a hearing that should not take new evidence in the trial but only take evidence as to aggravating and mitigating circumstances." (TR 4421-4423)

Finally, after further discussions with the STATE regarding the cross-examination of the DEFENDANT/APPELLANT the Court opined:

"I think we are going far afield. I think --

"MR. KASTRENAKES: Judge --

"THE COURT: (Continuing) -- you are creating error here, gentlemen." (TR 4428)

The Court then refused to permit the DEFENDANT/APPELLANT to read a letter to his counsel from the STATE regarding a polygraph of the STATE'S main witness, Neville Butler. (TR 4435-4437)

Various letters were then admitted into evidence on behalf of the DEFENDANT/APPELLANT for the Court's review. (TR 4440)

Lastly, Detective JOHN BUHRMASTER was recalled to the witness stand, in rebuttal, by the STATE. BUHRMASTER testified, again, as to his past arrest interrogation of the DEFENDANT/APPELLANT. (TR 4442) Particularly, BUHRMASTER stated that he had never told Mr. Maharaj that he had located the murder weapon (TR 4442); that he never had stated that latent fingerprints had been lifted from the weapon (TR 4443); and that DEFENDANT/APPELLANT never had an unused plane ticket on his person (TR 4445).

Prior to the commencement of closing statements the STATE offered a Motion in Limine seeking an order from the Court preventing defense counsel from discussing the method and manner of execution (TR 4449). The Court admonished defense counsel not to go beyond mentioning or describing the method of execution. (TR 4451).

The STATE then commenced its closing. During its closing, the STATE made the following remarks:

"...the final decision as to what punishment shall be imposed rests solely with the Judge of this Court.

"However, the law requires that you, the jury, render to this Court an advisory sentence as to what the punishment should be imposed, as to what punishment should be imposed upon this defendant.

"Remember, ladies and gentlemen, it is only a recommendation.

"The Court is the final decision maker in this instance. The Court will impose whatever it sees fit to impose based upon the facts of the case and the law but the Court is asking for an advisory decision from you.

"You may say to yourself, if I vote that the defendant is guilty of first degree murder, I may be responsible for placing a man in Florida's electric chair.

"That is not a matter to be taken lightly but, as it is not a matter to be taken lightly, it is also not your responsibility.

"You are not putting the defendant in the electric chair. You did not put this defendant in this chair". (TR 4455, 4456)

...

"If you recommend the death sentence and if the Judge imposes it, it is not you. It is not the Judge who is responsible.

"It is the defendant who is responsible." (TR 4457)

The STATE then focused on the aggravating factors for the jury's consideration.

"Number one, you can consider that the defendant at the time of this trial has been convicted at the same time for other capital felonies and also other violent crimes. (TR 4463)

...

"And I would submit to you that an individual who is committing other violent crimes and not one but two first degree murders within the space of minutes certainly under the law deserves special circumstances, deserves a greater punishment.

...

"You will also consider that the defendant committed the first degree murder in the commission of a felony. The felony in this case, the felony that you have found by your vote is kidnapping." (TR 4464)

"The law allows you to consider as an aggravating circumstance the fact that he was actually committing any other felony when he killed Derrick and Duane Moo Young, a second aggravating factor.

"And finally, in addition to the contemporaneous conviction, the fact that he kills two human beings within a space of minutes, I'd like you to focus upon when you go back, in addition to that, three other ones and there are as follows, the hindrance of governmental authority or preventing a lawful arrest, the defendant prevented or attempted to prevent his own arrest.

"Number two, that the homicide, the murder was especially wicked, evil, atrocious and cruel and that, in addition to that, the murder was cold, calculated and premeditated." (TR 4465)

The STATE began a description of the murders of the victims. The STATE, in discussing the testimony of the Assistant Medical Examiner, Dr. Wetli, told the jury that:

"he was not allowed to testify to the psychological emotional pain suffered by those individuals prior to their death." (TR 4471)

Yet, the STATE, without support in the testimony, argued that the psychological factors of being told to kneel down and having a gun "put in his face" constituted a wicked, atrocious and cruel act deserving of the death penalty. (TR 4472)

Subsequent to the defense argument, the Court charged the jury. (TR 4486) The Court emphasized that the "final decision as to which punishment shall be imposed is the responsibility of the judge." (TR 4486) The Court repeated the statutory aggravating circumstances (TR 4487) and then stated the following, as to the mitigating circumstances:

"Among the mitigating circumstances you may consider if established by the evidence are:

"That the defendant has no significant history of prior criminal activity, any other aspect of the defendant's character or record or any other circumstances of the offense". (TR 4488)

Subsequent to the reading of the instructions, and over the objections of the defense, all of the evidence was given to the jury to consider. (TR 4494)

After deliberation on November 6, 1987, the jury returned an advisory sentence as to Derrick Moo Young of life imprisonment by a six to six vote. (TR 4497) As to Duane Moo Young the majority of the jury voted seven to five to recommend the death penalty. (TR 4498) The jury was polled and acceded in the verdicts. (TR 4499)

After the jury's discharge, on November 19, 1987, the defense presented one additional character witness, MR. GERALD STEWART, who is the equivalent of the State Attorney in Trinidad. (TR 4519, 4520) STEWART knew the DEFENDANT/APPELLANT both in Trinidad and in London and was impressed by the manner which he looked after the affairs of his younger brother who was studying law in London. (TR 4523) Further, STEWART testified that the DEFENDANT/APPELLANT was not prone to committing acts of violence (TR 4523) but was quite benevolent from the standpoint of charitable causes. (TR 4524)

The next day, on November 20, 1987, DR. ARTHUR STILLMAN, a medical doctor specializing in the practice of psychiatry was called as a defense witness. (TR 4530) The Court, familiar with DR. STILLMAN, accepted him as an expert in the field of forensic

psychiatry. (TR 4531) DR. STILLMAN testified that he interviewed the DEFENDANT/APPELLANT and examined him. (TR 4532) DR. STILLMAN concluded that Mr. Maharaj was not a violent man nor was a risk to society of future violence. (TR 4536) Sentencing was then postponed until December 1, 1987. (TR 4557)

On December 1, 1987, the Court entered its Sentencing Order. (R 1761) In support of the jury's advisory sentence of death for the murder of Duane Moo Young, the Court found:

> (1) that "the DEFENDANT was previously convicted of another capital felony or of a felony involving the use of or threat of violence to the person. F.S. 921.141(5)(b)" (R 1763)

The Court based this finding upon the contemporaneous conviction of Mr. Maharaj for the murder and kidnapping of Derrick Moo Young. (R 1763)

> (2) "the capital felony was committed while the Defendant was engaged or was an accomplice in the commission or the attempt to commit kidnapping. F.S. 921.141(5)(d)" (R 1764)

The Court again based this finding upon the kidnapping convictions of the DEFENDANT/APPELLANT. (R 1764-1765)

> (3) that "the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody. F.S. 921.141 (5)(e)" (R 1766)

The Court found that DEFENDANT/APPELLANT murdered Duane Moo Young solely for the reason of eliminating him as a witness to the earlier murder of Derrick Moo Young. (R 1766) The Court relied upon the testimony of TINO GEDDES as it related to the alleged earlier attempt by the DEFENDANT/APPELLANT to murder Derrick Moo Young as well as the testimony of Neville Butler, the eyewitness to the crime. (R 1766) The Court also relied upon the testimony

of Dr. Wetli, the medical examiner, that this was an execution type slaying, done in order to eliminate a witness. (R 1767)

> (4) that "the capital felony was especially heinous, atrocious, or cruel. F.S. 921.141(5)(h)" (R 1767)

The Court relied upon the fact that Duane Moo Young witnessed the murder of his father, Derrick Moo Young, and had charged at the DEFENDANT/APPELLANT in an effort to struggle over the weapon. (R 1768)

> (5) that "the capital felony was a homicide and was committed in a cold, calculated, and premeditated manner, without any pretense of moral or legal justification. F.S. 921.141 (5)(i)" (R 1769)

The Court held that the planned murder of Derrick Moo Young and anyone accompanying Mr. Moo Young was sufficient. (R 1770) Further, according to the Court, the fact that several minutes had elapsed between the initial murder and the murder of Duane Moo Young was sufficient for the Court to hold that the slaying of Duane Moo Young was premeditated. (R 1770)

The Court then held the following mitigating factors was present:

> (1) "The Defendant has no significant history of prior criminal authority. F.S. 921.141 (6)(a)" (R 1772)

The Court rejected the testimony of the character witnesses, the testimony of Dr. Stillman relative to future violent acts, and further rejected the DEFENDANT/APPELLANT'S charitable acts. (R 1776)

The Court concluded that the five (5) aggravating factors outweighed the mitigating circumstances and, in fact, the Court held that "anyone of the aggravating factors, existing alone, in and of themselves outweigh the mitigating circumstances presented

to this Court". (R 1779, 1780) Thus, the Court sentenced the DEFENDANT/APPELLANT to death for the murder of Duane Moo Young. (R 1780)

Shortly thereafter, a Supplemental Sentencing Order was entered as to Counts I, IV, V and VII. (R 1782) On Count I, the first degree murder of Derrick Moo Young, the DEFENDANT/APPELLANT, was sentenced to life imprisonment without possibility possibility of parole for twenty-five (25) years (R 1782) to run consecutively to the death sentence of Duane Moo Young.

As to Count IV, V and VII, the DEFENDANT/APPELLANT "scored" three hundred and thirty-five (335) points and a recommended guideline sentence of twelve (12) to seventeen (17) years in state prison. The Court departed from the guidelines based upon the murder convictions. Thus, the DEFENDANT/APPELLANT was sentenced on Count IV to life imprisonment consecutive to the sentence announced in Counts I and II; on Count V to life imprisonment consecutive to Counts I, II and IV; and on Count VII to fifteen (15) years to run consecutive to the sentences announced in Counts I, II, IV and V. (R 1783, 1784)

Notice of Appeal was timely filed on January 6, 1988 (R 1787) after the DEFENDANT/APPELLANT'S Motion for New Trial was denied.

## ISSUES ON APPEAL

I

WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN PERMITTING THE STATE TO INTRODUCE PREJUDICIAL NEWSPAPER ARTICLES ACCUSING THE DEFENDANT/APPELLANT OF COMMITTING VARIOUS CRIMES FOR THE ALLEGED PURPOSE OF SHOWING "MOTIVE".

II

WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN PERMITTING THE STATE TO ELICIT TESTIMONY FROM ONE OF ITS WITNESSES ABOUT AN ATTEMPT TO MURDER AN INDIVIDUAL UNRELATED TO THIS ACTION.

III

WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FAILING TO APPRISE THE DEFENDANT/APPELLANT IN A LEGALLY ADEQUATE MANNER, OF THE EFFECTS OF A MISTRIAL, WHEN THE ORIGINAL TRIAL JUDGE COULD NOT CONTINUE WITH THE CASE DUE TO HIS ARREST FOR BRIBERY.

IV

WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN PERMITTING THE STATE TO ELICIT FROM POLICE OFFICER WITNESSES THE FACT THAT SEVERAL MONTHS PRIOR TO THE MURDERS, THE DEFENDANT/APPELLANT HAD A VARIOUS ASSORTMENT OF WEAPONRY IN THE TRUNK OF HIS AUTOMOBILE, NONE OF WHICH WAS ILLEGAL TO POSSESS NOR RELEVANT TO THE CHARGED OFFENSES.

V

WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN SENTENCING THE DEFENDANT/APPELLANT TO DEATH WHEN, FROM THE STANDPOINT OF PROPORTIONALITY, THE UNINDICTED COCONSPIRATOR, NEVILLE BUTLER, TESTIFIED FOR THE STATE AND WAS NEVER CHARGED WITH ANY CRIME.

VI

WHETHER THE STATE COMMITTED REVERSIBLE ERROR IN FAILING TO CONFINE ITS CROSS-EXAMINATION OF THE DEFENSE WITNESSES IN THE PENALTY PHASE TO MATTERS RELATING TO THE AGGRAVATING/MITIGATING CIRCUMSTANCES SURROUNDING THE OFFENSES.

VII

WHETHER THE STATE'S COMMENTS TO THE JURY REGARDING THE MERE "ADVISORY" ROLE OF THE JURY IN THE SENTENCING PHASE DENIGRATED THE JURY'S ROLE IN THESE PROCEEDINGS RESULTING IN REVERSIBLE ERROR.

VIII

WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT THE MURDER OF DUANE MOO YOUNG WAS COMMITTED IN AN ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL MANNER.

IX

WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT THE MURDER OF DUANE MOO YOUNG WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER, WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION.

X

WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT THE MURDER OF DUANE MOO YOUNG WAS COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST.

## SUMMARY OF THE ARGUMENTS

I

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN PERMITTING THE STATE TO INTRODUCE PREJUDICIAL NEWSPAPER ARTICLES ACCUSING THE DEFENDANT/ APPELLANT OF COMMITTING VARIOUS CRIMES FOR THE ALLEGED PURPOSE OF SHOWING "MOTIVE".

Over objection, the STATE introduced a series of newspaper articles from the rival newspaper, the Caribbean Echo, which set forth a number of crimes alleged to have been committed by the DEFENDANT/APPELLANT. The ostensible purpose of this evidence was to establish the motive of the DEFENDANT/APPELLANT in murdering Derrick Moo Young.

The record, however, is replete with the STATE'S emphasis of the contents of the articles and the focus of the trial centered around these exhibits rather than the events at the scene of he alleged crimes. Further, there was no ten (10) day notification pursuant to Section 90.404, Florida Statutes, nor sufficient similarity to bring the evidence of "other wrongs, crimes, etc." within the purview of the Williams Rule.

II

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN PERMITTING THE STATE TO ELICIT TESTIMONY FROM ONE OF ITS WITNESSES ABOUT AN ATTEMPT TO MURDER AN INDIVIDUAL UNRELATED TO THIS ACTION.

This issue, like the above, centers around the STATE'S erroneous attempt to present collateral issues in this trial. The STATE presented testimony that, on a prior occasion, the DEFENDANT/APPELLANT attempted to "run off the road" one Eslee Carberry, the editor of the Caribbean Echo. Neither the facts of this case are sufficiently similar to the facts of the charged

offenses to bring it within the purview of Section 90.404, Florida Statutes nor was statutory notice given by the STATE.

Further, as above, the prejudicial effect of this evidence so far outweighed its probative value as to constitute reversible error.

III

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FAILING TO APPRISE THE DEFENDANT/APPELLANT IN A LEGALLY ADEQUATE MANNER, OF THE EFFECTS OF A MISTRIAL, WHEN THE ORIGINAL TRIAL JUDGE COULD NOT CONTINUE WITH THE CASE DUE TO HIS ARREST FOR BRIBERY.

The original trial judge in this cause was arrested for bribery in a much publicized event shortly after the commencement of the trial of DEFENDANT/APPELLANT. Though the DEFENDANT/APPELLANT was offered a mistrial by the successor judge, this option was turned down by his counsel. The DEFENDANT/APPELLANT likewise stated on the record that he did not want the mistrial, however, the record in no way reflects a knowing and intelligent waiver of that right to a mistrial. A knowing and intelligent waiver of the right to a mistrial must be made by the DEFENDANT/APPELLANT prior to the trial court's waiving of the right on behalf of the DEFENDANT/APPELLANT.

IV

WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN PERMITTING THE STATE TO ELICIT FROM POLICE OFFICER WITNESSES THE FACT THAT SEVERAL MONTHS PRIOR TO THE MURDERS, THE DEFENDANT/ APPELLANT HAD A VARIOUS ASSORTMENT OF WEAPONRY IN THE TRUNK OF HIS AUTOMOBILE, NONE OF WHICH WAS ILLEGAL TO POSSESS NOR RELEVANT TO THE CHARGED OFFENSES.

Two police officers testified that, during a traffic stop several months prior to the date of the murders, the DEFENDANT/APPELLANT had a number of exotic weapons in the trunk of his car. This testimony was completely irrelevant to the charged offenses as well as prejudicial in that the possession of these weapons was not illegal.

Further, there was no Williams Rule notification regarding the possession of the weaponry nor sufficient similarity to the murder weapon to permit the introduction of this testimony. The obvious prejudicial effect of this testimony is self-evident and the sole basis for the introduction of this testimony was to paint the DEFENDANT/APPELLANT in a bad light in the eyes of the jury.

V

WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN SENTENCING THE DEFENDANT/APPELLANT TO DEATH WHEN, FROM THE STANDPOINT OF PROPORTIONALITY, THE UNINDICTED CO-CONSPIRATOR, NEVILLE BUTLER, TESTIFIED FOR THE STATE AND WAS NEVER CHARGED WITH ANY CRIME.

Neville Butler fully participated in the alleged crimes, even tying the victims with electrical cords at the DuPont Plaza Hotel suite where the murders occurred. Butler was not charged with any offense. It is respectfully suggested that the doctrine

of proportionality should be extended to unindicted co-conspirators and the trial court erred in failing to consider this factor in mitigation of the sentence imposed upon the DEFENDANT/APPELLANT.

VI

WHETHER THE STATE COMMITTED REVERSIBLE ERROR IN FAILING TO CONFINE ITS CROSS-EXAMINATION OF THE DEFENSE WITNESSES IN THE PENALTY PHASE TO MATTERS RELATING TO THE AGGRAVATING/ MITIGATING CIRCUMSTANCES SURROUNDING THE OFFENSES.

The STATE continually went far afield from the issues of aggravating/mitigating circumstances during the penalty phase of the trial. The STATE accused and cross-examined the DEFENDANT/APPELLANT characterizing him as a 'used car salesman' during his plea for life. The STATE, over continual warnings by the trial court, attempted to interject emotion into the penalty phase by asking the DEFENDANT/APPELLANT where he placed the murder weapon. The failure to adhere to the purpose of the penalty phase and the injection of emotionalism into the jury's decision making process warrants the vacating of the sentence and the resentencing of the DEFENDANT/APPELLANT.

VII

WHETHER THE STATE'S COMMENTS TO THE JURY REGARDING THE MERE "ADVISORY" ROLE OF THE JURY IN THE SENTENCING PHASE DENIGRATED THE JURY'S ROLE IN THESE PROCEEDINGS RESULTING IN REVERSIBLE ERROR.

Throughout the opening statement, voir dire and penalty phase opening, the STATE continually referred to the jury's role in the penalty phase as merely "advisory". While this Court has previously stated that this characterization is not erroneous the

STATE, sub judice, also commented that the decision regarding the penalty was not the responsibility of the jury and was not on the shoulders of the jury. This added commentary, when combined with the constant reminder that the jury's role was merely advisory constituted error and, in a case wherein the jury recommended death by a seven to five vote, warrants a new penalty hearing.

VIII

WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT THE MURDER OF DUANE MOO YOUNG WAS COMMITTED IN AN ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL MANNER.

The sole testimony regarding the facts of the offense came from the Assistant Dade County Medical Examiner, Dr. Charles Wetli, who stated that the victim died almost simultaneous with the lone gunshot wound to his head. There were no attendant circumstances surrounding the murder of Duane Moo Young which would characterize the act as "especially heinous, atrocious or cruel".

IX

WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT THE MURDER OF DUANE MOO YOUNG WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER, WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION.

The evidence adduced at trial and during the penalty phase did not support the position that "witness elimination" was the dominant motive in the murder of Duane Moo Young. Nor was there proof beyond a reasonable doubt that there was the requisite "heightened premeditation" necessary to establish this aggravating circumstance.

The testimony of Dr. Wetli, the medical examiner, was that the forensic evidence at the crime scene was consistent with an attempt at fleeing, charging at the gun wielder or any number of scenarios, in addition to an execution style slaying. Further, even the testimony of the STATE'S main witness, Neville Butler, was to the effect that a period of discussion by the witness and the DEFENDANT/APPELLANT occurred prior to the sound of the gun shot.

When combined, the testimony of Dr. Wetli as to various scenarios, and the testimony of Butler regarding the conversation between the victim and the DEFENDANT/APPELLANT, neither established the evidence sufficient to prove "heightened premeditation" nor "witness elimination".

X

WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT THE MURDER OF DUANE MOO YOUNG WAS COMMITTED FOR THE PURPOSE OF PREVENTING A LAWFUL ARREST.

The Court again based its Finding of this aggravating factor upon the 'witness elimination' theory. Not only was the evidence insufficient to establish "witness elimination" as the dominant factor sub judice, but the trial Court's utilization of that finding to support this aggravating circumstance as well as the above circumstance of "cold, calculated and premeditated" constituted an impermissible doubling, mandating the vacating of the DEFENDANT/APPELLANT'S sentence of death.

## ARGUMENT

I

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN PERMITTING THE STATE TO INTRODUCE PREJUDICIAL NEWSPAPER ARTICLES ACCUSING THE DEFENDANT/APPELLANT OF COMMITTING VARIOUS CRIMES FOR THE ALLEGED PURPOSE OF SHOWING "MOTIVE"

The defense objected to the introduction of STATE'S exhibits II through V, which were various newspaper articles attacking the character of the DEFENDANT/APPELLANT and accusing him of committing various crimes, including money laundering, etc. (TR 2166a) Though the STATE volunteered to the jury that it was not proving "motive" (TR 2169a; 3911) it is clear that the ostensible purpose of the introduction of the articles was to do just that -- i.e. to establish motive for the murder of Derrick Moo Young. It had been the STATE'S theory throughout the litigation that the DEFENDANT/APPELLANT was motivated to commit the instant murders predicated upon the allegations of the articles in the Caribbean Echo.

Yet, motive was testified to by Eslee Carberry, the editor of the rival newspaper, Caribbean Echo, as well as Neville Butler and Tino Geddes, newspaper employees and alleged co-conspirators of the DEFENDANT/APPELLANT. (TR 2347) There was absolutely no basis for the introduction into evidence of the articles. The STATE, nevertheless, continued to emphasize the newspaper articles throughout the trial. In fact, the basic contents of those articles and the underlying facts surrounding the printing of same were emphasized and reemphasized through the testimony of the various STATE witnesses, as well as the prosecution even at

closing argument. (TR 2365, 2366)

Yet, the verbal recitation of the background of the alleged feud between the DEFENDANT/APPELLANT and the Moo Youngs (through witnesses) was not sufficient for the STATE. Instead, the STATE introduced the newspaper articles which detailed extraneous matters including various crimes attributed to the DEFENDANT/APPELLANT.

Further, the STATE, throughout the trial as well as during its closing statement, emphasized the newspaper articles and even encouraged the jury to take the articles to the jury room and read them before deliberation. (TR 3912).

It is obvious that the STATE utilized the newspaper articles to establish far more than "motive". Notwithstanding the fact that the STATE announced that it need not establish motive, the STATE had the requisite witnesses to present "motive" without the need of the newspaper articles. By emphasizing those articles, the STATE introduced allegations of various crimes against the DEFENDANT/APPELLANT which not only violated the dictates of Williams v. State, 110 So.2d 654 (Fla. 1959), cert. den. 361 U.S. 847 and Section 90.404(2)(a), Florida Statutes, but also served to focus the attention of the jury away from the charged crimes and toward the 'bad character' of the DEFENDANT/APPELLANT. Clearly the focus of this trial was on the collateral issues set forth in the articles and not in the events at the DuPont Plaza Hotel.

The codification of the 'Williams Rule' (Williams v. State, supra) contained in Section 90.404(2)(a) requires that evidence

of other crimes or wrongful acts must be both similar to the charged offense and be admissible to establish motive, intent, plan, etc. (i.e. relevant).

Further, Section 90.404(2)(b)1, Florida Statutes, requires at least ten (10) days notification to the defense of the STATE'S intent to utilize this type of evidence.

The record is quite clear that no ten (10) day notification occurred. Further, there is no similarity between the crimes alleged in the newspaper and the crimes for which the DEFENDANT/APPELLANT was charged so as to come within the purview of Section 90.404(2)(a). Money laundering, theft and drug dealing is not similar to murder!

Even assuming arguendo that such similarity did exist it is clear that the introduction of the newspaper articles were overly prejudicial when compared to any probative value and should have been excluded under Section 90.403, Florida Statutes, as the evidence was confusing and misleading to the jurors, diverting the jury's attention from the facts of the charged offenses and amounted to mere cumulative evidence already introduced through the testimony of Carberry, Geddes and Butler. This Court has often held that the collateral crimes sought to be introduced must not be the focus of the trial and be utilized to merely establish the bad character of the defendant. State v. Lee, 531 So.2d 133 (Fla. 1988); and Randolph v. State, 463 So.2d 186 (Fla. 1985); cert. den. 105 S.Ct. 3533, 473 U.S. 907, 87 L.Ed.2d 656 (1986).

It is evident that the continued emphasis upon the newspaper

articles did nothing more than focus the attention of the jury away from the scenario at the DuPont Plaza Hotel and to merely emphasize the bad character of the DEFENDANT/APPELLANT mandating a new trial.

In Randolph v. State, supra, this Court warned that even "relevant" collateral crimes should not be made the feature of a trial and must not be utilized to show merely the bad character or propensity of a defendant to commit an offense. Further, this Court went on to compare the similarity between the collateral crime and the charged offense.

Similarly, in State v. Lee, supra, this Court again warned that collateral crimes must be relevant to establish motive, intent, absence of mistake and/or scheme and must not be used solely to establish bad character or propensity to commit crimes. This Court reversed the conviction of the accused in Lee because there was no connection with the collateral crimes evidence and the offense charged, i.e. a prior bank robbery with a gun which could not be connected with a subsequent kidnapping and robbery.

Where, as here, the STATE'S sole case is based upon the "eyewitness" testimony of Neville Butler, an admitted liar whose credibility was strained numerous times throughout the discovery and trial phase, it cannot be said that the error in admitting these collateral offenses was harmless. Based upon the continued emphasis of the collateral offenses, it is clear that the jury "accepted" this evidence and its admission contributed to the verdict or "possibly" contributed to the verdict. Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed2d 705.

In sum, there was no notification of the use of collateral offenses to establish motive, etc. as provided by statute. Further, the collateral offenses were not similar to the charged offense in any way and were made the focus of the trial. Clearly, the newspaper articles should not have been admitted and constituted harmful error, warranting a new trial.

II

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN PERMITTING THE STATE TO ELICIT TESTIMONY FROM ONE OF ITS WITNESSES ABOUT AN ATTEMPT TO MURDER AN INDIVIDUAL UNRELATED TO THIS ACTION.

The STATE, in an attempt to focus the attention of the jury away from the events at the DuPont Plaza Hotel, further presented the testimony of Tino Geddes to the jury. (TR 2187) Geddes, an employee of the Caribbean Echo related how he and the DEFENDANT/APPELLANT attempted to do away with Eslee Carberry, the editor of the Echo, one evening by running him off the road. (TR 2213-2220) Geddes further described various weapons in the DEFENDANT/APPELLANT'S automobile trunk which were to be utilized in the 'murder' of Carberry. (TR 2213-2220)

This alleged unrelated attempt on the life of Eslee Carberry clearly violated the dictates of Section 90.404(2) in that there was an absence of any similarity between the alleged attempt on the life of Carberry and the murders of the Moo Youngs at the DuPont Plaza Hotel some months thereafter. Further, the testimony of an attempt on Carberry's life was irrelevant to establish motive, intent, scheme, etc. This Court, in the often cited case of Williams v. State, 110 So.2d 654 (Fla. 1959), cert.

den. 361 U.S. 847, 80 S.Ct. 102, 4 L.Ed.2d 86, has clearly stated that in order to be admissible, the act sought to be introduced must be both similar in nature to the charged offense and be relevant to establish motive, opportunity, intent, etc.

Sub judice, it was clearly the intent of the STATE to focus the attention of the jury upon the bizarre events as testified to by Geddes, the only relevance of which was to establish the bad character or propensity to commit violence of the DEFENDANT/APPELLANT in violation of Section 90.404(2)(a).

Further, even assuming that the evidence was "similar" and relevant to establish an overall "scheme" or "plan" then the Court nevertheless erred by allowing its admission, as testimony, into evidence as the STATE failed to give the requisite ten (10) day notice of similar act evidence to the defense pursuant to Section 90.404(2)(b)1.

Again, it is clear that the STATE'S modus operandi was to focus the attention of the jury away from the events at the DuPont Plaza Hotel where it was forced to rely upon the admittedly perjured and inconsistent testimony of its 'star' witness, Neville Butler. To accomplish this task, the STATE, along with the irrelevant newspaper articles discussed above, presented the testimony of Geddes relating to an isolated attempt to do harm to an individual unrelated to the deaths of the victims at the DuPont Plaza Hotel.

The "refocusing" of the jury away from the task at hand was impermissible and mandates the reversal of DEFENDANT/APPELLANT'S conviction and its remand for a new trial, as the evidence

produced at trial by the STATE could not lead any appellate court to say beyond reasonable doubt that the erroneous admission of the collateral crime evidence did not affect the outcome. State v. Lee, 531 So.2d 133 (Fla. 1988).

Geddes' testimony about the attempt on Carberry's life, as well as various threats alleged to have been made by the DEFENDANT/APPELLANT to Carberry was far less similar and relevant than the admissible testimony of a collateral robbery of a black taxicab driver in Kight v. State, 512 So.2d 922 (Fla. 1987), cert. den. 108 S. Ct. 1100, 99 L.Ed2d 262. In Kight, the robbery and murder of the collateral crimes taxicab driver occurred on the same day at the same place with the same weapons, etc., etc. Sub judice, the attempt at Carberry occurred months before under completely different circumstances and was, even assuming relevant, too remote for introduction into evidence. see Garron v. State, 528 So.2d 353 (Fla. 1988).

As in Buenoano v. State, 527 So.2d 194 (Fla. 1988), the collateral crimes offense must be similar in nature to the crime charged (i.e. poisoning). There is no similarity sub judice and, there could be no harmless error where, as here, the STATE focussed its attention on these collateral offenses. Chapman v. California, supra.

## III

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FAILING TO APPRISE THE DEFENDANT/APPELLANT IN A LEGALLY ADEQUATE MANNER, OF THE EFFECTS OF A MISTRIAL, WHEN THE ORIGINAL TRIAL JUDGE COULD NOT CONTINUE WITH THE CASE DUE TO HIS ARREST FOR BRIBERY.

The trial of the DEFENDANT/APPELLANT commenced on October 5, 1987 before the Honorable Howard Gross. (TR 1923) Several days later, the jury arrived in the morning and heard from the Chief Judge of the Criminal Division, Herbert Klein, that Judge Gross could not continue with the trial. (TR 2853) (That morning, Judge Gross was arrested by officers of the Florida Department of Law Enforcement on bribery related charges).

While the defense counsel stated to the Court, when offered, that he was not moving for a mistrial (TR 2858), the Court's colloquy with the DEFENDANT/APPELLANT was painfully of little substance:

> "MR. HENDON: We are not interested in a mistrial.
>
> "THE COURT: You have discussed this with your client?
>
> "THE DEFENDANT: Yes, sir.
>
> "THE COURT: If you are in agreement with that and that you understand what a mistrial is, and that is to discharge this jury and to pick another jury?
>
> "THE DEFENDANT: No sir.
>
> "THE COURT: Let me call the jury in." (TR 2858)

The following day, the new presiding Judge, Harold Solomon, explained the situation to the DEFENDANT/APPELLANT in the following manner:

> "THE COURT: You understand if you request a mistrial, if I grant it that would mean this jury is discharged.

> They are sent along and we would pick another jury as soon as possible, that is maybe tomorrow or sometime this week. Do you understand that?" (TR 2866)

It is respectfully urged that the obvious right to a mistrial sub judice is a "valued right" which, once offered by the Court, must be explained in the same manner as a waiver of jury trial, waiver of counsel or plea. See United States v. Dinitz, 96 S.Ct. 1075, 424 U.S. 600, 47 L.Ed.2d 267 (1976). In Dinitz, the United States Supreme Court opined that the traditional waiver concepts have little relevance where a defendant must determine whether to request or consent to a mistrial in response to a judicial error.

Thus, it is incumbent upon the Court to insure that the ramifications of waiving a mistrial are made knowingly and intelligently, as are other valued rights. See Jackson v. State, 468 So.2d 346 (Fla. 1st DCA, 1985) requiring a knowing and intelligent waiver in waiving the right to jury trial; Scott v. Wainwright, 617 F.2d 99 (5th Cir. 1980), cert. den. 101 S.Ct. 240, 449 U.S. 885, 66 L.Ed.2d 111 (1981) requiring a knowing and intelligent waiver of the right to counsel; and Williams v. State, 316 So.2d 267 (Fla. 1975) requiring a knowing and intelligent waiver of certain constitutional rights i.e. right to remain silent, right to jury trial, for the taking of a plea.

Sub judice, the record does not reveal anything resembling a knowing and intelligent waiver by the DEFENDANT/APPELLANT. Rather, the record merely sets forth an inadequate explanation of the effect of a mistrial on the general proceedings and the rights of the accused. See Dinitz, supra. For example, the

trial court mentioned that a new jury would be chosen but failed to apprise the DEFENDANT/APPELLANT of the fact that the testimony would have to be repeated and that double jeopardy might be a factor to consider in the determination of whether to accept the mistrial. Further, based upon the Williams Rule violation, a mistrial would have afforded the requisite ten day notice to adequately prepare for the evidence of the newspapers and the testimony of Geddes, etc. assuming same were admissible.

In any event, the colloquy between the DEFENDANT/APPELLANT and the trial court was woefully inadequate to establish a knowing and intelligent waiver of the right to a mistrial necessitating the granting of a new trial. Dinitz, supra.

IV

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN PERMITTING THE STATE TO ELICIT FROM POLICE OFFICER WITNESSES THE FACT THAT SEVERAL MONTHS PRIOR TO THE MURDERS, THE DEFENDANT/ APPELLANT HAD A VARIOUS ASSORTMENT OF WEAPONRY IN THE TRUNK OF HIS AUTOMOBILE, NONE OF WHICH WAS ILLEGAL TO POSSESS NOR RELEVANT TO THE CHARGED OFFENSES.

Both State Trooper Stephen Veltra (TR 2339-2341) and Officer Gregory Jameson (TR 3386) were called as witnesses by the STATE and testified regarding a traffic stop of the DEFENDANT/APPELLANT'S motor vehicle on July 26, 1986. Both gentlemen testified about seeing numerous weaponry in the trunk of the DEFENDANT/APPELLANT'S motor vehicle -- none of which was illegal and none of which was relevant to the charged offenses.

It is obvious that the STATE'S sole motive and the sole basis for the admission of the above testimony of the police officers was to paint a picture of the DEFENDANT/APPELLANT as a

violent man, with bad character and intent. The fact of the matter is, however, the testimony of the officers added nothing to the proof of the crimes charged. In fact, the testimony of the officers was to the effect that the weapons were not illegal to possess.

Under either a "relevancy" or "collateral crimes" argument, the STATE'S elicitation of the possession of the weapons was harmful error. If the trial court allowed the introduction of the testimony as being somehow relevant, then it is respectfully suggested that the prejudice far outweighed the "relevance" of the testimony and same should have been excluded pursuant to Section 90.403, Florida Statutes.

On the other hand, if the basis of the testimony was somehow utilized to establish motive, intent, or preparation, then it is again respectfully suggested that reversible error occurred in that no notice of same was ever given by the STATE to the defense pursuant to Section 90.404 (2)(b)1, and further, the mere lawful possession of the above stated weapons could in no manner be deemed "similar" to come within the purview of Williams v. State, 110 So.2d 654 (Fla. 1959), cert. den. 361 U.S. 847, 80 S.Ct. 102, 4 L.Ed.2d 86.

Regarding 'relevancy', it is obvious that the weapons were in no way utilized by the assailant in the instant case and could not be utilized to prove any issue involving the crime. See Huhn v. State, 511 So.2d 583 (Fla. 4th DCA, 1987). Even, assuming arguendo, that relevance could somehow be established, the testimony regarding the possession of the weapons centered

upon the date of the traffic stop, on July 26, 1986, several months prior to the murders. This remoteness of time certainly vitiated any relevance, or at least, created such confusion of the issues and focused the attention of the jury away from the events at the DuPont Plaza so as to be deemed inadmissible under Section 90.403, Florida Statutes; Tafero v. State, 403 So.2d 355 (Fla. 1981), cert. den. 102 S.Ct. 1492, 455 U.S. 983, 71 L.Ed.2d 694.

Even assuming that the relevance of the testimony outweighed its prejudicial effect, the STATE'S introduction of the testimony of the weapons violated the Williams Rule (as cited above). Either the testimony of the possession of the weapons was utilized as an offense, in an of itself; or the weapons possession was being utilized to show an overall scheme involving the attempted 'doing away' of Eslee Carberry, the editor of the rival newspaper. In either event, there was no statutory notice given by the STATE under Section 90.404, Florida Statutes, nor is there any remote similarity between the crimes charged to bring this 'offense' within the confines of Williams v. State, supra.

Accordingly, it is eminently clear that the testimony of the possession of the weaponry was both irrelevant and highly prejudicial, leading only to the conclusion that the STATE merely attempted to show the "bad character" and "propensity to commit violence" of the DEFENDANT/APPELLANT, in violation of the law. Randolph v. State, 463 So.2d 186 (Fla. 1984), cert. den. 105 S.Ct. 3533, 473 U.S. 907, 87 L.Ed.2d 656 (1985). Given the fact that the admission of the collateral crimes evidence was

erroneous, a review of the record demonstrates that the STATE cannot establish beyond a reasonable doubt that the jury was not affected by the erroneous inclusion of the testimony thus mandating a new trial for the DEFENDANT/APPELLANT. Lee v. State, ___So.2d___ (Fla. 1988), 13 F.L.W. 532, (opinion filed September 1, 1988); Chapman v. California, supra.

V

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN SENTENCING THE DEFENDANT/APPELLANT TO DEATH WHEN, FROM THE STANDPOINT OF PROPORTIONALITY, THE UNINDICTED COCONSPIRATOR, NEVILLE BUTLER, TESTIFIED FOR THE STATE AND WAS NEVER CHARGED WITH ANY CRIME.

The record is quite clear that Neville Butler accompanied the DEFENDANT/APPELLANT to the DuPont Plaza and aided him in renting the suite. (R 850) Butler was also advised that the purpose of the 'meeting ' was to extract a confession from Derrick Moo Young regarding a fraud which he had perpetrated against DEFENDANT/APPELLANT and to hold Moo Young captive until two checks could be certified by a bank to reimburse the DEFENDANT/APPELLANT for the thefts. (R 858,864) Butler further was aware that the victim would have to be tied up (as he accompanied the DEFENDANT/APPELLANT to the hotel sundry shop to purchase cords to tie the victims) and Butler actually called the victim on the telephone to arrange the meeting at the DuPont Plaza (R 866,867).

Thus, Butler was keenly aware of the fact that the victim could be roughed up, tied, held against his will (i.e. kidnapped) but "only" was unaware that a gun might be utilized by the DEFENDANT/APPELLANT. (TR 2794;2795) The jury was unimpressed

with Butler's lack of knowledge of the ultimate outcome to the extent that they found the DEFENDANT/APPELLANT not guilty of those charges directed to Butler, as a victim. (R 4184-4187)

Butler testified that he had previously lied to the defense and STATE predicated upon his own evaluation that he was as guilty as the DEFENDANT/APPELLANT for the murders of the Moo Youngs. (TR 2730) Nevertheless, Butler was neither arrested nor charged for the offenses or any lesser crimes associated with the offenses (R 1-5), nor charged with perjury for his lies. (TR 2833-2855), (R 1-5)

This Court has held that the disparate treatment received by an accomplice as compared with that of the capital offender is a factor to be considered in any sentencing decision. Craig v. State, 510 So.2d 857 (Fla. 1987), cert. den. 108 S. Ct. 732, 98 L.Ed. 2d 680 (1988); Spivey v. State, ___So.2d____(Fla. 1988); 13 F.L.W. 445, opinion filed July 14, 1988; Williamson v. State, 511 So.2d 289 (Fla. 1987); cert. den. 108 S. Ct. 1098, 99 L.Ed.2d 261 (1988); Brooklyn v. State, 495 So.2d 135 (Fla. 1986); Herring v. State, 446 So.2d 1049 (Fla. 1984), cert. den. 469 U.S. 989 (1985).

In Herring, supra, this Court opined that the disparity in sentences given to co-defendants is an appropriate element to be considered by the trial judge in imposing a sentence upon a defendant. There is no reason why that factor should not be extended to accomplices who are not charged by the STATE.

A review of the judge's sentencing order makes no mention of the fact that Neville Butler was not charged with these offenses.

Clearly, the trial judge should have considered Butler's freedom from prosecution as a non-statutory mitigating circumstance as set forth in Herring, supra. The Court's failure to consider same should mandate a vacation of the trial court's sentencing order.

VI

THE STATE COMMITTED REVERSIBLE ERROR IN FAILING TO CONFINE ITS CROSS-EXAMINATION OF THE DEFENSE WITNESSES IN THE PENALTY PHASE TO MATTERS RELATING TO THE AGGRAVATING/MITIGATING CIRCUMSTANCES SURROUNDING THE OFFENSES.

This Court has held that egregious prosecutorial misconduct warrants the vacating of a death sentence and the remanding of he matter for a new penalty phase trial. Bertolotti v. State, 476 So.2d 130 (Fla. 1985).

Recently, in Garron v. State, 528 So.2d 353 (Fla. 1988), this Court reversed and remanded a death sentence based upon the injection of "emotion" into the jury's deliberations. In Garron, and similarly sub judice, the prosecution emphasized the pain and anguish of the victims and the dying thoughts of those victims.

Sub judice, the prosecution was warned and admonished by the Court for his actions during the penalty phase. (TR 4278-4281) The Court even admitted that the prosecution was committing error by his persistent inflammatory and irrelevant questioning of the DEFENDANT/APPELLANT and his witnesses. (TR 4271)

Repeated questioning of 'where's the gun' and comments regarding the pain and suffering of the victims were violative of Garron, supra. Comments relating to the DEFENDANT/APPELLANT as a "used car salesman" as the DEFENDANT/APPELLANT asked the jury for

mercy on his life could net nothing but appeal to the jury's emotion to reject any plea of the DEFENDANT/APPELLANT. (TR 4374)

The utter disregard for the parameters of the 'penalty phase' and the repeated disregarding of the trial court's admonitions regarding inflammatory and irrelevant comments dictate that a new sentencing hearing be held in accordance with the mandate of Bertolotti, supra.

In addition, the STATE repeatedly interjected the DEFENDANT/APPELLANT'S lack of compassion as a basis for the rendering of the death sentence.

> "This defendant, no compassion, no compassion whatsoever. Yet he's going to ask you for compassion. A man who to this day walks in front of you and insults you and tells you, as the members of this jury, that you have convicted an innocent man.
>
> "The audacity of that individual. The utter audacity of that individual. He's going to ask you for your compassion.
>
> "He showed no compassion for Derrick Moo Young and Duane Moo Young and he deserves none from you." (TR 4469-4470).

The above, coupled with the DEFENDANT/APPELLANT'S denial of his guilt, knowledge and participation in the murders of the Moo Youngs clearly is tantamount to an argument that the DEFENDANT/APPELLANT lacked remorse. As lack of remorse is a non-statutory aggravating factor, a re-sentencing is mandated. Hill v. State, 549 So.2d 179 (Fla. 1989); and Pope v. State, 441 So.2d 1073 (Fla. 1983).

## VII

THE STATE'S COMMENTS TO THE JURY REGARDING THE MERE "ADVISORY" ROLE OF THE JURY IN THE SENTENCING PHASE DENIGRATED THE JURY'S ROLE IN THESE PROCEEDINGS RESULTING IN REVERSIBLE ERROR.

This Court has previously held that the STATE'S comments to a jury in a penalty phase to the effect that its decision was "advisory" only did not create error. Foster v. State, 518 So.2d 901 (1987). Yet, sub judice, the STATE'S continued de-emphasis upon the importance and 'great weight' of the jury's recommendation clearly violated Florida's procedure as it related to jury recommendations. Tedder v. State, 322 So.2d 908 (Fla. 1975); Caldwell v. Mississippi, 472 U.S. 320 (1985), 105 S.Ct. 2633, 86 L.Ed.2d 231. This is so, notwithstanding the fact that a failure to give a separate instruction regarding 'great weight' has been held not to constitutionally offend the process. Grossman v. State, 525 So.2d 833 (Fla. 1988); Ford v. State, 522 So.2d 345 (Fla. 1988).

The comments of the prosecution sub judice clearly violated the constitutional safeguards of the Eighth Amendment and are not unlike the comments of the prosecution in Mann v. Dugger, 817 F.2d 1471 (11th Cir. 1987) wherein reversible error was demonstrated when the STATE commented that the jury's penalty phase verdict was not only "advisory" but that imposing the death penalty was "not on your shoulders". Mann, supra at 1481, 1482; see also Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988) and Adams v. Wainwright, 804 F.2d 1526 (11th Cir., 1986), critical of the analysis that a jury override by the judge somehow obviates an Eighth Amendment violation based upon the denigration of the

jury's role as merely "advisory".

During the penalty phase, the STATE not only emphasized the role of the jury as "advisory" but also emphasized that the decision was "not your responsibility". (TR 4456) Based upon this erroneous role of the jury, a vote of seven to five in favor of the death penalty was rendered by the jury. (TR 4498)

In sum, the facts sub judice not only reveal a continued emphasis upon the "advisory" role of the jury but, when combined with the comments of the STATE vis-a-vis "not your responsibility" clearly diminished the jury's role in violation of the Eighth Amendment to the Constitution and Mann v. Dugger, supra. Given the fact that the jury recommended death by a mere seven to five, the sentence of death should be vacated and remanded for a new sentencing proceeding.

VIII

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT THE MURDER OF DUANE MOO YOUNG WAS COMMITTED IN AN ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL MANNER.

The trial judge, in his sentencing order, found, as an aggravating factor, that the murder of Duane Moo Young was committed in an especially heinous, atrocious or cruel manner. (R 1769, 1768) The Court based its decision upon the fact that the victim witnessed the slaying of his father. (R 1768)

This Court, in Bundy v. State, 471 So.2d 9 (Fla. 1985); cert.den. 107 S. Ct. 295, 479 U.S. 844, 93 L.Ed.2d 269, defined the terms "heinous", "atrocious", and "cruel" as utilized in Section 921.141 (5) (h). As defined, "heinous" meant extremely wicked or shockingly evil; "atrocious" meant outrageously wicked

and vile; and "cruel" meant designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. Bundy v. State, supra at 21.

As there was no eyewitnesses to the murder of Duane Moo Young, save for the alleged murderer, the DEFENDANT/APPELLANT, the only testimony of how the murder occurred has come from the medical evidence of the deputy medical examiner, Charles Wetli. Dr. Wetli's testimony of how the murder occurred, by examination of the bullet wound, etc. is the circumstantial evidence of how the actual scenario developed. This Court, in Eutzy v. State, 458 So.2d 755 (Fla. 1984); cert. den. 105 S. Ct. 2062, 471 U.S. 1045, 85 L.Ed 336, opined that when circumstantial evidence is utilized to establish an aggravating factor, it must be inconsistent with reasonable hypotheses of other explanations, or a negating factor.

Dr. Wetli testified in both the culpability and penalty phase of the trial that the placement of the body of Duane Moo Young, as well as the entry wound of the single bullet which killed Moo Young was as equally susceptible to a theory of an attempt to escape or charge at the gun wielder as it was to an execution like slaying. (TR 3260-3263) Thus, the hypothesis being susceptible to various theories, at least one of which would negate the aggravating factor of "execution", there could be no proof of this aggravating factor beyond a reasonable doubt. Eutzy v. State, supra; Williams v. State, 386 So.2d 538 (Fla. 1980).

The trial court utilized the circumstance of Duane's

father's death as a factor in supporting the instant aggravating factor emphasizing Duane's State of mind in viewing his father's murder. Yet, in Trawick v. State, 473 So.2d 1235 (Fla. 1985); cert. den. 106 S.Ct. 2254, 476 U.S. 1143, 90 L.Ed.2d 699, this Court opined that an independent crime (i.e. the murder of Derrick Moo Young) cannot be used to establish the aggravating factor of 'heinous, atrocious or cruel'. Thus, the trial Court could not correctly find that the murder of the victim's father could be utilized to establish this aggravating factor.

The murder of Duane Moo Young, itself, occurred by a single gunshot wound to the head. (TR 3255,3256) Such a death has been ruled not to be "especially heinous, atrocious or cruel". See Scull v. State, 533 So.2d 1137 (1988), cert. den. 109 S.Ct. 1937, 104 L.Ed.2d 408. The wound was swift and painless and was not "torturous to the victim"; State v. Dixon, 283 So.2d 1, 9 (Fla. 1973) cert. den., 416 U.S. 943 1974); nor was there "toying" with the victim's life, Menduk v. State, 545 So.2d 846 (Fla. 1986); nor a beating, strangulation or slow death, Hildwin v. State, 531 So.2d 124 (Fla. 1988), cert. den. 109 S.Ct. 2055; nor was there clear evidence of any struggle. Bundy v. State, 471 So.2d 9 (Fla. 1985).

The Court's reliance upon Hooper v. State, 476 So.2d 1253 (Fla. 1985); Washington v. State, 362 So.2d 658 (Fla. 1978); and Cooper v. State, 492 So.2d 1059 (Fla. 1986) is misplaced sub judice.

In Hooper, supra, this Court addressed the killing of a nine year old child who had just witnessed his mother's murder as

establishing the aggravating factors of cold, calculated and premeditated and witness elimination to avoid a lawful arrest. Nowhere does Hooper address the aggravating factor of heinous, atrocious and cruel. Thus, the trial court erred in relying upon that decision to support its position.

Further, in Washington, supra, the victim was stabbed nine times and shot with a bullet that did not penetrate her skull. Thus, the victim had a painful and slowly agonizing death. Sub judice, Dr. Wetli's testimony was that Duane Moo Young died quickly from one single bullet. Further, the murder in Washington occurred to the victim while the victim was spread eagle, tied to a bed. Sub judice, there is no direct evidence of the victim being tied nor executed as in Washington. As stated above, Dr. Wetli conceded that the victim could have been in any number of positions and could have been lunging or attempting an escape.

Lastly, the Court relies upon Cooper, supra as authority to find that the murder of Duane Moo Young was especially heinous atrocious or cruel. In that decision, there was evidence that a gun pointed at the victim's head "misfired" three times before the mortal wound. Further, a second victim pleaded and begged for his life while this misfiring of the murder weapon occurred. Again, those type of facts are absent sub judice.

The evidence does not reveal a torturous death. Rather the evidence reveals a single gun shot to the head. The aggravating facts found in the above cases are not supported in the facts sub judice.

Furthermore, the United States Supreme Court has held that the language of the Oklahoma aggravating circumstance "especially heinous, atrocious, or cruel" gave the jury no guidance as to when the death penalty should be imposed. Maynard v. Cartwright, 108 S.Ct. 1853 (1988). Under the Oklahoma and the similar Florida death penalty statute, there is no principled means to distinguish between those individuals who received the penalty from those who did not. Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980). Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). The application of this aggravating circumstance, outrageously or wantonly vile, horrible and inhuman was held to be unconstitutionally vague.

> In the case before us, the Georgia Supreme Court has affirmed a sentence of death based upon no more than a finding that the offense was 'outrageously or wantonly vile, horrible and inhuman! There is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every number as 'outrageously or wantonly vile, horrible and inhuman! Such a view may, in fact, have been one to which the members of the jury in this case subscribed. If so, their preconceptions were not dispelled by the trial judge's sentencing instructions. These gave the jury no guidance concerning the meaning of any of [the aggravating circumstances] terms. In fact, the jury's interpretation of [that circumstance] can only be the subject of sheer speculation. Id, at 428-429, 100 S.Ct. at 1764-1765.

Though this Court has rejected the rationale of Maynard, supra, counsel is compelled to raise this issue for the record.

Accordingly, the trial Court's imposition of the death penalty must be vacated because the aggravating factor of "especially heinous, atrocious or cruel" was not present and because these terms are unconstitutionally vague. Maynard v.

Cartwright, supra.

IX

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT THE MURDER OF DUANE MOO YOUNG WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER, WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION.

The trial court held that the murder of Duane Moo Young was committed in a cold, calculated and premeditated manner. (R 1769) The Court based its finding of a violation of Section 921.141 (5) (i), Florida Statutes, upon the alleged premeditated design to eliminate Duane Moo Young as a witness to the offense (R 1769) as well as the "several minutes" of contemplation between the murder of Derrick Moo Young and Duane Moo Young (R 1770).

In Harmon v. State, ____So.2d___(Fla. 1988), 13 F.L.W. 332, (opinion filed May 19, 1988), this Court held that a "witness elimination" type murder would qualify to establish the aggravating circumstance of Section 921.141 (5) (i). See also, Routly v. State, 440 So.2d 1257 (Fla. 1983), cert. den. 104 S.Ct. 359, 468 U.S. 1220 (1984) and Herring v. State, 446 So.2d 1049 (Fla. 1984), cert. den. 469 U.S. 989 (1985).

Yet, witness elimination must be the 'dominant motive' behind the killing, Doyle v. State, 460 So.2d 353 (Fla. 1984) and the 'premeditation' qualifying under Section 921.141 (5) (i) must be 'heightened premeditation', over and above that which accompanies a first degree murder conviction. Rogers v. State, 511 So.2d 526 (Fla. 1987), cert. den., 108 S.Ct. 733 (1988), 98 L.Ed.2d 681; Bates v. State, 465 So.2d 490 (Fla. 1985), appeal

after remand, 506 So.2d 1033, cert. den., 108 S. Ct. 212, 98 L.Ed.2d 163; and Caruthers v. State, 465 So.2d 496 (Fla. 1985).

The record sub judice can neither establish the requisite 'heightened premeditation' nor 'witness elimination' theory encompassed within these terms. As set forth under Point VIII, the medical examiner, Dr. Wetli, testified that the death of Duane Moo Young may have occurred in a number of ways, including Moo Young's attempt to flee or his charge at the gun wielder. (TR 3260-3263) Further, Neville Butler, who did not witness the shooting, testified that there was questioning occurring between the victim and DEFENDANT/APPELLANT as to the perpetration of the alleged fraud. (TR 2806) Thus, there is far less than "proof beyond a reasonable doubt" of the requisite 'heightened premeditation' or 'witness elimination' factors necessary to invoke Section 921.141 (5) (i). In actuality, the facts demonstrate a conversation questioning between the victim and the DEFENDANT/APPELLANT and an escape attempt/struggle -- which could not support a 'cold, calculated and premeditated' finding.

What the Court has appeared to do is to speculate as to the purpose of the murder of Duane Moo Young. This Court has held that speculation of witness elimination was not sufficient to find an aggravating factor of cold, calculated and premeditated. Scull v. State, 533 So.2d 1137, (Fla. 1988) cert. den. 109 S. Ct. 1937, 104 L.Ed2d 408. The record is clear that there was no evidence to show that Duane Moo Young would accompany his father to the DuPont Plaza Hotel, Amoros v. State, 531 So.2d 1256 (Fla. 1988) and the mere fact of "knowing" the perpetrator or

identifying the perpetrator is insufficient to establish this aggravating factor. Floyd v. State, 497 So.2d 1211 (Fla. 1987); Perry v. State, 522 So.2d 817 (Fla. 1988).

Where there are two explanations as to the circumstances surrounding a victim's death, "witness elimination" cannot be utilized to establish the heightened premeditation necessary for the aggravating factor of cold, calculated and premeditated. Jackson v. State, 502 So.2d 409 (Fla. 1986), cert. den. 107 S.Ct. 3198, 482 U.S. 920, 96 L.Ed.2d 686.

X

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT THE MURDER OF DUANE MOO YOUNG WAS COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST.

The trial court held that Duane Moo Young was murdered "solely for the reason of eliminating him as a witness to the earlier murder of his father, Derrick Moo Young". (R 1766) In support of this finding, the Court utilized the testimony of Dr. Wetli, which the trial court characterized as "overwhelming". (R 1767).

Yet, Dr. Wetli's testimony did not coincide with the Court's characterization. In fact, Dr. Wetli testified that the positioning of Derrick Moo Young's body, as well as the trajectory of the bullet wound, indicated that the scenario could have been one of attempted flight, struggle or any number of other scenarios. (TR 3260-3263)

As "witness elimination" must be the 'dormant motive' of a killing, it is necessary to establish this motive beyond a reasonable doubt, eliminating all other theories of the

killing. Doyle v. State, 460 So.2d 353 (Fla. 1984). As the STATE'S own witness could not testify as to the 'witness elimination' theory versus a struggle, escape or other scenario, and as Neville Butler, the STATE'S eyewitness did not see the murder, but rather overheard the questioning of the victim regarding the perpetrated fraud by the DEFENDANT/APPELLANT, it cannot be said that the sole, dominant motive was the elimination of the victim as required by Doyle, supra; see argument under Point IX.

Further, it appears as though the trial court utilized its finding of "execution/witness elimination" to establish the aggravating factors of "avoiding or preventing a lawful arrest", in violation of Section 921.141 (5) (e) as well as "cold, calculated and premeditated", in violation of Section 921.141 (5) (i).

Under both findings, the trial court emphasized the "heightened manner of premeditation and coldness of this execution-style killing" Section 921.141 (5) (i) (R 1771) and that "the murder of Duane Moo Young was an execution, done in order to eliminate a witness" (Section 921.141 (5) (e) (R 1767). This utilization of the same factors to establish two separate aggravating circumstances constitutes an impermissible doubling, even assuming arguendo that the facts sub judice can support either aggravating circumstance. See Suarez v. State, 481 So.2d 1201 (Fla. 1985), cert. den. 106 S.Ct. 2908, 476 U.S. 1178, 90 L.Ed.2d 994; and Provence v. State, 337 So.2d 783 (Fla. 1976), cert. den., 97 S.Ct. 2929, 431 U.S. 969, 53 L.Ed.2d 1065.

Accordingly, at the very least, one of the above two statutory aggravating circumstances must be eliminated.

## CONCLUSION

Based upon the foregoing citations of authority and arguments contained herein, it is respectfully urged that the DEFENDANT/APPELLANT be given a new trial. In the alternative, should this Court not reverse the conviction in this matter, it is further urged that the sentences imposed by the trial court be vacated, and a new sentencing hearing be held at the earliest date.

The STATE erroneously featured collateral issues involving newspaper articles concerning other crimes purportedly committed by the DEFENDANT/APPELLANT; possession of weapons some months before the incidents at the DuPont Plaza; and an attempt upon the life of a third individual. All of the above were admitted in violation of the Williams Rule safeguards and merely to focus the jury away from the events at the DuPont Plaza and its star witness, the admitted perjurer, Neville Butler. Clearly, this mandates a new trial. Also, the failure to inform the DEFENDANT/APPELLANT of the ramifications of a mistrial requires a new trial be afforded him.

Even assuming that this Court denies DEFENDANT/APPELLANT a new trial, then a resentencing is mandated by the Court's failure to consider the disparate treatment of Neville Butler as a mitigating factor and the erroneous conclusions that the offenses were committed in an (1) especially heinous, atrocious and cruel manner; (2) were committed in cold, calculated fashion and; (3) were committed to eliminate a witness.

For all of the above reasons, reversal is sought.

Respectfully submitted,

KROLL & TRACT
Attorneys for Appellant
Miami Center - Suite 1330
201 South Biscayne Blvd.
Miami, Florida 33131
Tel: (305) 577-4848

By: 
Kenneth E. Cohen

## CERTIFICATE OF SERVICE

**WE HEREBY CERTIFY** that a true and correct copy of the INITIAL BRIEF was mailed this 12th day of April, 1990, to: The Office of the Attorney General, Atten: Fariba Komeily, Esq., 401 N.W. Second Avenue, Miami, Florida 33128.

KROLL & TRACT
Attorneys for Appellant
Miami Center - Suite 1330
201 South Biscayne Boulevard
Miami, Florida 33131
Tel: (305) 577-4848

By: Kenneth E. Cohen