IN THE SUPREME COURT OF FLORIDA

BRADLEY P. SCOTT,

Appellant,

vs. Case No. 72,091

THE STATE OF FLORIDA,

Appellee.

_____/

INITIAL BRIEF OF APPELLANT

(On Appeal from the 20th Judicial Circuit
In and for Charlotte County, Florida)

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STATEMENT OF THE CASE AND OF THE FACTS

On October 12, 1978 Linda Pikuritz, a twelve year old girl, left her home on her bicycle at about 3:45 P.M. (R890,894) When she left she was wearing "blue jeans, a yellow Hardy Boys Shawn Cassidy tee shirt, and maroon or red sneakers." (R890). She was also wearing a shell necklace. (R891, 1426). She owned three of these necklaces. One of them had broken earlier and the shells had flown all over. (R905)

Various witnesses saw Linda on her bicycle that afternoon. (R909-910, 1300, 1336). All of these witnesses were familiar with Linda and placed her between her house and a neighborhood L'il General store on the evening of October 12, 1978. One of the witnesses indicated that Linda expressed an intent to go to the L'il General Store and get a pack of gum. (R909). Another remembered that she had a leather visor strapped to the handlebars of her bicycle. (R1306).

Other witnesses allegedly saw the Appellant on the evening of October 12, 1978 talking to a young girl who generally resembled Linda. Lou Kelly one of these witnesses, allegedly saw the Appellant talking to a young girl on Midway Blvd. at about 6:00 or 6:30 P.M. (R1178) When Mr. Kelly allegedly saw the Appellant, he was talking to a young girl on a boys bike. (R1196-97) Linda rode a girls bike. (R1793) The contact between the driver and the young girl did not appear to be a threatening one. (R1200) Prior to trial Mr. Kelly was hypnotized by police officers and under hypnosis recalled a tag number for the car he

observed which differed from that of the Appellant's car. (R1272-74). The defense attempted to elicit this, but it was excluded. (R1284).

Daniel Lurtz, a clerk at the L'il General store in question indicated that Linda came into the store on the afternoon or evening in question and bought a package of bubble gum. (R1322)

Patricia Lynn Radford identified neither the Appellant nor the alleged victim herein. (R1381) She did indicate however that she lived close to the L'il General in October of 1978. (R 1379) On that evening she went into her yard and observed a young girl on a bicycle talking to a man in a dirty white car in the road by her house. (R1379,1381) She observed the car and the people for about five minutes and then went into her house. (R 1381) She came out to check on the car a short time later and the car and girl were still there. (R1382) When she came out a third time the girl and the car were gone. (R1384) In 1983 she was driven around the County to look at cars and try to identify one similar to the one she saw. She was unable to identify any cars at that time. (R1389) In 1984 this witness was shown vehicle books and identified a Mercury Montego as similar to the car which she observed on her road in 1978. (R1392) After picking a similar vehicle from the books, the witness identified the Appellant's vehicle from a four photo line up as the vehicle she saw on October 12, 1984. (R1394) This vehicle identification took place in 1987, nine years after the viewing. The bicycle ridden by Linda Pikuritz on the evening in question was

ultimately discovered hidden in the bushes in immediate proximity to where this witness saw this contact. (R1756-1781) This witness at one time was also hypnotized. (R3476)

Ann Zwilling Tagliaferri indicated that she saw the Appellant talking to a young girl at the L'il General store on the evening in question. (R1984). She identified a photo of Linda Pikuritz taken from a newspaper article as the girl with whom the Appellant was speaking. (R1985) When she saw the Appellant talking to the girl, the girl was standing in the "v" of the driver's door. (R1985) The expression on the Appellant's face was glaring and he appeared to be upset. (R1987) The witness never saw the girl get into the Appellant's car and when she came out of the store the car was leaving. (R2020).

This witness identified the Appellant and had earlier viewed a photo ID line up and identified the Appellant as the person she saw on the evening in question. (R1990)

The witness acknowledged that she knew the Appellant in 1978 and in fact had seen him on several prior occasions. (R1943) She knew him to be the boyfriend of Kathy Stetcher, who she alleged was a work mate of hers at Sambos' Restaraunt at that time. (R2011) She also indicated that she saw the Appellant in a conversation with Kathy Stetcher at Sambo's on October 12, 1978 immediately prior to allegedly viewing these events at the Little General Store. (R 1994) When confronted with work records from Sambo's Restaraunt, Ms. Zwilling acknowledged that she did not in fact begin working at the Sambo's Restaraunt until November of

1978 and worked there for only ten days.(R 2023) Prior to October 12, 1978, this witness had met Bradley Scott and had in fact been introduced to him. (R2014) This witness called the police two days after the evening of October 12th of 1978 and indicated to them what she had seen. (R 2015) At the time she made her report in 1978 she indicated that the man she saw had "sandy-blond hair, wearing a tank top and was possibly Mexican." (R 2015) In 1978 the Appellant had black hair with streaks of grey. (R2074). The witness did not indicate in 1978 that the man was someone she knew, or even that she had seen him before. When she viewed a photo line-up in 1985, she allegedly realized for the first time that the man she saw in 1978 was in fact Bradley Scott. (R1953) The record does not indicate whether or not this witness was hypnotized prior to her viewing of the photo identification or prior to her testimony in court. Louis Kelly was interviewed by the same officer at about the same time and he was hypnotized.

On October 12, 1978 Linda did not return home and the police were called at about 9:00 P.M. (R894). A body of what appeared to by a young female was discovered at the scene of a fire at approximately 11:57 P.M. (R1507). The body had been burned. (R1515) At the scene the officers found the following:

a. a shell necklace within some drag marks. (R1514) There appeared to be one shell missing from the necklace. (R1514, 1676)

b. a leather visor was found 18 feet, 9 inches from the body (R1586) The name Dorothy Pikuritz was written on the visor. (R1638)

c. a pair of girls panties were found 14 feet 10 inches from the body. (R1586) The panties were identified as similar to those of Linda Pikuritz. (R1807)

d. A shoe was located 20 feet 8 inches from the body. The name Linda Pikuritz is written on the shoe. (R1639)

e. A package of bubble gum was also discovered. (1690)

No identification of the body was made by use of dental records, hair samples, teeth comparison or direct eye witness identification. (R1570)

The medical examiner indicated that the body was consistent with a girl approximately twelve years of age. (R1710) His examination indicated that there were apparently clothes piled on the chest of the girl during the fire (R1711), and the girl was naked. (R1711) Presence of black particles and soot in the trachea led the doctor to conclude that the cause of death was smoke and soot inhalation. (R1721) The victim was unconscious at the time of death, (R1733) and examination revealed no evidence of trauma or injuries not caused by the fire. (R1719-1720). There was no evidence of sexual assault and the hymen was intact. (R1718). No sperm was present. (R1718,1735) The doctor found metal like buttons and the remains of a zipper adhering to the chest area of the body. (R1710).

Various experts testified concerning the fire itself. One of them indicated that scientific tests had identified the presence of gasoline in the soil samples taken from the vicinity of the body. (R1879). Another testified concerning burn

patterns, indicating that the point of origin of the fire was at the body (R1916), and that an accelerant was used to start the fire. (R1929-30)

Lisa Carver, a friend of Linda Pikuritz, indicated that the Appellant would frequently have contact with herself, Linda Pikuritz and Angela Byrd at the L'il General store. (R2035) The Appellant on occasion talked to this witness for about an hour and she saw the Appellant have contacts with Linda Pikuritz. (R2035-2037) The Appellant "treated them like adults." (2037). The girls saw the Appellant at the L'il General Store three or four times commencing in the month of September. (R2036) The Appellant bought beer and marijuana for the girls, (R2042) and had smoked marijuana with Linda Pikuritz in the past. (R2044) There was no mention of any improper sexual advances or suggestions on the part of the Appellant. A witness earlier indicated that on the day in question Linda Pikuritz had discussed skipping school, getting marijuana, and getting high. (R1310)

Angela Byrd was also a friend of Linda Pikuritz. She indicated that the Appellant sometimes met and talked with her and Linda Pikuritz at the L'il General Store. (R2186) The meetings began in September, 1978. (R2187). The conversation would generally conclude at dark and they would all go home. (R2188) The witnesses indicated that the Appellant treated them like adults and bought them beers. He also flirted with the girls. (R2188-89) On October 12th, the girls were going

to meet at the L'il General Store.(R 2195) Linda Pikuritz was supposed to bring some marijuana so they could "go cruising with guys." (R2196) Counsel for the Appellant attempted to establish that the source of this marijuana was an individual named Phil Drake, but the judge would not allow this cross examination. (R2200)

A woolen cap was introduced into evidence and identified as purportedly belonging to Linda Pikuritz. (R1818). A juror sua sponte indicated she could not hear and the judge instructed her that the hat belonged to Linda Pikuritz. (R1818) Testimony ultimately indicated that a fragment of hair recovered from this hat (R2369) was compared with a sample of hair recovered from the car of Bradley Scott. (R2580, 2631) The hair in the car and the hair from the hat were characterized as indistinguishable. (R2613) The expert witness also indicated that the hair recovered from the vehicle was "forcibly removed." (R2616)

A shell was also recovered from the car of the Appellant. (R2435) The recovery of the hair and the shell both occurred in 1979 when the Appellant traded in his car to a local dealer. (R2416) Analysis of the shell indicated that it was a dove shell, a species peculiar to India and the Philippines. (R2561)

The shell necklace discovered at the scene of the body was composed of dove shells. (R2551-52) This particular type of dove shell is allegedly imported into this country only in necklaces and not as individual loose shells. (R2551-52) The shell necklaces vary in length from fourteen to seventeen inches, but

there was no set number of shells on each necklace. (R2556) Hundreds of thousands of these shell necklaces were imported into the United States, most of them going to the Shell Factory, a novelty department store located in Fort Myers, Florida. (R2563)

An expert testified concerning the shell found in the car of the Appellant and the shell necklace found near the body. He indicated that when concepts of standard deviation were applied, it was possible for the shell to fit onto the necklace strand. (R2473) The witness could not definitely state that the shell fit onto the necklace strand. (R2486) The witness also could not definitively state that the two ends of the existing monafilament strand had at one time been joined. (R2494)

The Appellant was employed by Budget Sprinklers in October of 1978, This company was owned by Alberta Boule and her husband (R2045). On October 13, 1978 the Appellant called Alberta Boule. (R2059). At this time the the Appellant allegedly told this witness that he had been stopped at a roadblock the night before and learned of a little girl that had been murdered. (R2060) This witness made a previous statement to a police officer indicating that the Appellant did not say this to her, that she had heard of the roadblock statement from a neighbor. (R2076)

Dan Boule, the Appellant's employer, indicated that on the Monday following October 12, 1978 while riding with Mr. Boule and Dennis Anderson, another employee, the Appellant told them he had been stopped at a roadblock on the morning of October 13, 1978.

(R2104) He also supposedly pointed out the site of the roadblock. (R2104) This witness indicated that the exact language of the appellant at this time was "stop, this is right where the policemen stopped me." (R2105)

During the defense case Dennis Anderson testified and indicated that he was never present when the Appellant made statements concerning a roadblock or pointed out a roadblock site. (R2723)

At the conclusion of the state's case the Appellant moved for a judgment of acquittal, contending that this was a circumstantial evidence case and the state had failed to make out a prima facie case. (R2646-2656) The motion was denied. (R2656) This motion was renewed at the conclusion of the defense case. (R 3019-24)

The defense presented a hair expert who testified that the the hair identification was unreliable because only a portion of the hair strand was available for analysis. (R2677) The witness conceded that there were similarities, but contended that the hair sample could have originated from a source other than Linda Pikurizt. (R2678) The witness also indicated that the procedure uses in obtaining the hair for comparison, namely, recovery from the wool hat was an unreliable method of obtaining a known sample for comparson. (R2667)

Teresa Scott, the Appellant's mother, indicated that she was a shell collector and her collection contained many dove shells. (R2689) She transported her shells in the Appellant's car and it

is likely that shells spilled when she rode in the car. (R2696) On many occasions the witness scooped shells from under the car seat. (R2697) Thus an independent source for the shell was established.

An employee of Shell World indicated that the shell necklaces were very common and it was not unusual for the necklaces to have slack in the line. (R2701) He also indicated that the monafilament line would stretch, since when there was insufficient slack the store would simply stretch the line.(R2701)

Other witnesses established that the death of the girl was a topic of conversation at the Sambo's restaurant early the following morning. Others heard of it when they arrived at work. (R2716-2720) The knowledge of the Appellant the following morning was therefore not unique or unusual.

The defense proffered testimony concerning a jailhouse confession that another had allegedly made to this crime. Specifically the defense contended that Brian Kane, while in the jail in Sarasota indicated to Virgil Shelton, a defense witness, that he had been present when the murder occurred and it was committed by Phil Drake, not the Appellant. (R2851) Earlier the Appellant was prevented during cross from exploring the relationship between the girls and Phil Drake (R2200) In support of the proffer the Appellant showed the following corroboration:

1. A previous witness, Lisa Carver, indicated Linda Pikuritz used PCP. Phil Drake dealt in PCP. (R2195, 2200)

2. Another witness indicated that Linda planned to try and obtain marijuana and bring it with her on October 12. (R2196)

3. Phil Drake had been seen in the vicinity of the offense on October 11 and 13. (R2937, 2943)

4. Phil Drake and Brian Kane were friends. (R2812) Both were from Illinois and involved in the sale of PCP. (R2813-14) Around the time of the murder Phil Drake had some PCP stored under the seat of a rental car and the PCP disappeared. (R2813)

5. Philip Drake drove a white car with a black top. (R2815)

6. Phil Drake had previously been a suspect in the case and had in fact been given transactional immunity in order to secure testimony from him regarding the whereabouts of his car on the evening in question. (R2824) Gene Berry, then assistant state attorney, was convinced that Phil Drake lied about his involvement in this matter and caused perjury charges to be filed against him. (R3481)

7. Virgil Shelton was aware of facts which could arguably only come from Brian Kane. These were the fact that Phil Drake drove a white car; that Brian Kane was in jail for selling a guitar; that Brian Kane and Phil Drake sold PCP and that some PCP disappeared from under a car seat; that the crime occurred close to an area that some of Kane's friends were moving to. The arms of the victim were broken. She was alive when burned. The officers gave Shelton no facts. (R2893, 2854)

8. Brian Kane denied knowing Phil Drake, but acknowledged helping move a friend, Jamie Mitchum. (R2830)

9. Independent testimony established that Phil Drake's car was at the Mitchum house during the move. (R2820) However it was felt that this was before the discovery of the body. (R2820) The Mitchum house was located close to the woods where the body was discovered.

10. Linda Pikuritz used speed and Phil Drake was a speed dealer. (R2195)

The substance of Virgil Shelton's testimony was that he met Brian Kane while in the Sarasota County jail. (R2847) Mr. Kane told him that he and a guy named Phil were helping in a move and that they went to the store to get boxes. (R2850) He saw a girl get into the car but doesn't know how she got there. When he came to they were in some woods. (R2851) Kane was "spaced out on drugs" but when he awoke Phil had burned the girl, raped her, and broke her arms . (R2851) Kane further told Shelton that the girl was alive, but unconscious when she was burned. (R2851) Kane also told Shelton that Phil drove a white car, a Plymouth or Chevy; (R2852) That he was in jail for selling a guitar, that he was "selling dope down here from Illinois," that he had eighteen grams of PCP under the seat of his car when he got here (R2852) and that this crime occurred in some woods close to an area where some of his friends were moving to. (R2852)

Shelton indicated that officers from Charlotte County spoke to him in the jail and indicated that if he spoke to Mr. Kane and "found out some evidence they'd drop the charges on me." (R2854) The police told him that Kane was a suspect in the rape and death of a girl but they did not tell him how she died. (R2854) They did not mention Phil Drake to him either. (R2882)

When confronted with the statement of Virgil Shelton, Brian Kane denied making it although he did acknowledge that he might have mentioned this incident to Virgil Shelton since it is what the police questioned him about. (R2835) He acknowledged telling

Shelton that he was arrested for selling a stolen guitar and that he was dealing dope from Illinois. (R2833) He further told him that he had 18 grams of PCP under the seat of his rental car. (R2834) He specifically denied the balance of the statement. (R2827-36) The testimony of Virgil Shelton regarding Brian Kane's jailhouse confession was excluded by the judge. (R2918-19)

During the voir dire and initial instructions to the jury the judge commented on the evidence as follows:

> Q. To familiarize yourself about the facts of the case, I believe that the child-- a fire occurred in October of '78 in a wooded area off Toledo Blade Road. Do you know where it is? It's in Port Charlotte.
>
> A. No.
>
> Q. And when the fire department went to put the fire out, they found the body of a 12 year old girl who apparently was set on fire. Does that refresh your recollection of the details? (R145)
>
> And when they got there, they found the body of a 12 year old girl, Linda Pikuritz. And it was determined later that -- it is the belief of the people who investigated that, she had been deliberately burned. And at the time, she was 12 years old. Does that refresh your recollection? (R182)
>
> Q. Just to bring out a little bit about the facts. Of course, in October of 1978, a fire was discovered at about 11 p.m. off Toledo Blade Road. The fire department went out to put out the fire. And in the process of putting out the fire discovered the body of a 12 year old girl whose name is Linda Pikuritz. And that's essentially the facts of the case. And the investigation indicated that her death was not by accident. That was a conclusion of the people who investigated the case. (R211-12)
>
> Q. -------The firemen put out the fire and they found a body of a little girl, Linda Pikuritz. So

> that's when it occurred and the basic facts. (R315)
>
> Is there anyone who-- the victim in this case was a 12 year old at the time. Her name is Linda Pikuritz. (R406)
>
> And in the process of putting out the fire, discovered the body of a 12 year old girl whose name is Linda Pikuritz. And that's essentially the facts of the case. And the investigation indicated that her death was not by accident. That was a conclusion
>
> Q. --Toledo Blade Boulevard in Port Charlotte where there was a fire in a wooded area ---they found a body of a 12 year old girl, Linda Pikuritz and the investigation, the people investigating, concluded that it was set deliberately and she was deliberately burned. (R275)

An indictment against Mr. Bradley was returned on June 6, 1986, charging him with premeditated first degree murder. (R3825).

The Appellant, prior to trial filed a motion requesting that the statute, 921.141 be declared unconstitutional because it was vague in its definitions of various aggravators. (R4027,32) This motion was denied.

Prior to trial the Appellant also filed a motion to dismiss the indictment herein, alleging that pre-trial delay resulted in a violation of the Appellant's due process rights guaranteed him under the Fifth and Fourteenth Amendments to the United States Constitution and Section 1, Article 9 of the Constitution of the State of Florida. (R4027-32) This motion was brought on to be heard initially on December 14, 1987 and continued thereafter to December 15, 1987 and December 29, 1987. The motion was denied.

Testimony presented during this hearing indicated that various witnesses had prepared reports and or had records available to them in 1978 and 1979. The statements today are lost and unavailable. Thurlin Runkle (R3352-53) interviewed witnesses. His reports are lost. Joseph Kardel wrote a report regarding his case involvement which no longer exists (R3361).

Terry Branscome, current supervisor in charge of the evidence section for the Charlotte County Sheriff's Department performed an inventory of the evidence room when he assumed his responsibilities as supervisor of the evidence room. (R3372) The inventory of the evidence room is unavailable at this time. (3372) The Pikuritz file was part of the inventory.

Reports of polygraph examinations are no longer available (R3374) although testimony indicated that the results of these tests were inconclusive (R3376), and records reflecting the results of fingerprints analysis are no longer available (R3378-80). The fingerprint technician indicated however that he had conducted tests on a page of a magazine.(R 3378) Until literally the day of the hearing the page in question was believed to be lost. At the commencement of the hearing, the magazine was produced, having been discovered in a file cabinet in the state attorney's office, rather than in the evidence room. (R3513). No explanation was given for how the magazine left the evidence room and came to be in the state attorney's office. (R3391) Reports of the original detective assigned to the case and the first officer on the scene are also lost and unavailable at this

time. Reports written by Thomas Burns, the original detective assigned to this case are also lost. (R3410) Harold Wilkie, Jr. and Lou Kelly are both civilian witnesses. Both indicated that they once had business records which reflected their activities on crucial dates and times but they are no longer available. (R3428-30, 3432) Bill Clement, another Charlotte County police officer, indicated that he believed he submitted reports but cannot be sure at this time. (R3441) The reports if submitted are not available at this time.

Frederick Kleinen was an evidence technician in this case in October of 1978. (R3456) This witness prepared and submitted a police report reflecting the collection of evidence in this case. (R3458) It is not available at this time. (R3458-59)

Perry Kirkland was a police officer at the time of this investigation and participated in it. He prepared numerous reports reflecting his activities. His reports are not available. (R3469)

Bill Clement was employed by the Charlotte County Sheriff's office in 1978. In that capacity he had occasion during this investigation to interview a potential suspect. (R3441) The suspect who is unknown and unnamed at this time was interviewed in the Charlotte County Sheriff's Department and apparently confessed that he had committed this homicide. (R3442) A report may have been submitted but is lost at this time. (R3442) Admittedly the record regarding this point is confusing. The absence of the report however makes it impossible to clarify an

apparent confession to this crime.

Margaret Kleiment a civilian witness was employed by Sambo's restaurant. In 1985 she was asked to produce work records reflecting the date and times of employment by Kathy Stetcher in October of 1978. (R3461-62) In reviewing the Sambo's records it was discovered that the entire month of October was missing. (R3461-62) The month preceding the date in question and the month following the date in question was available and present in her files. She does not know who removed the records or when they were taken. (R3463-64)

Testimony indicated that the evidence room itself was arguably not secure and the procedures used in the evidence room were insufficient. Specifically it was shown that evidence at one time had been stored in an unsecure area, the photo lab. (R3365) Also the one time evidence room custodian had been reprimanded for allowing trustees access to the evidence room. (R3362-64). Also the evidence custodian had been placed on probation for improperly handling the evidence and the improper maintenance of the evidence room and witness log. (R3366) Further, evidence from apparently unrelated matters was now intermingled with the Pikuritz evidence file. (R3405) Some evidence demonstrably contained in the Pikuritz evidence file at one time is now lost. A burnt map of New England was at one time part of the evidence in this case. (R3423-24) Oral Woods, a technician at an FDLE lab received a New England road map in this case for consideration and testing. Thereafter he returned them

to the Charlotte County Sheriff's Department. (R3423-24) Robert Dennis, the current evidence custodian for the Charlotte County Sheriff's Department, indicated that at present the eleven pieces of burnt map are not in the evidence file for this case. (R3505)

Ken Barton became the case agent in this case in 1985. (R3512) Dennis indicated that Ken Barton often removed items of evidence from the Pikuritz file and he did not interfere with this because, "I was advised that he had sole control over it to do as he pleased." (R3508)

Allen Lebeau was sheriff of Charlotte County in 1978. (R3470) Mr. Lebeau interviewed and hypnotized at least two possible witness in this case. (R3472, 3476) A tape was made of these hypnosis sessions. (R3473) The tape is lost at this time, (R3473) and one of the witnesses deceased. (R3475) The taped statement of the deceased witness however contained a description of the vehicle allegedly seen with the young girl. (R3475)

Mr. Labeau, as sherriff, was familiar with the fact that an alibi was given by Bradley Scott and his girlfriend while Lebeau was responsible for this investigation. (R3479) The alibi was "checked out" by the Sheriff's department at that time. (R3479) After checking the alibi the Sheriff's department submitted the case to the state attorney and requested prosecution. (R3479-80) The state attorney, aware of the alibi, refused to prosecute at that time citing insufficient evidence. (R3480)

In 1981 Michael Gandy joined the Sheriff's department and

assumed responsibility for the Pikuritz case. (R3482) He verified that when he assumed responsibility for the case records supporting the alibi of the Appellant were in the files. (R3487) He does not recall what these records were exactly. (R3487) When he took over this case he took steps to contact Kathy Stetcher to verify the alibi again. He did this because of "the change that had occured in Mrs. Stetcher's life at that time." (R3488) This officer also indicated that the case had been earlier presented to the state attorney for consideration and prosecution was refused because of "a problem with the alibi according to Mr. D'Allessandro." (R3492) Mr. D'Allessandro is and was the state attorney of the Twentieth Judicial Circuit.

Jim Jones, Mr. Gandy's predeccessor in the Sheriff's Department indicated that when he surrendered the case to Mr. Gandy there was an alibi for Mr. Scott which he had investigated. (R3565) As part of this investigation he believes that he or someone verified the work records of Kathy Stetcher at Sambo's on October 12, 1978. As the case agent he recalls that the alibi was one of the reasons that prosecution in this matter was refused by the state attorney initially. (R3566) At the time the case was submitted initially for prosecution the hair and shell were available. (R3566). He further stated that when he surrendered the case to his successor the alibi was "in tack." (sic) (R3566)

Lisa Carver and Angela Byrd were witnesses known to the Sheriff's Department from the early stages of the case. (R3535) They were not interviewed until 1985 when they indicated that the

Appellant and the victim were acquainted and had been seen together on occasions prior to October 12, 1978. (R3535)

Mr. Kelly and Ms. Zwilling Tagliaferri, both witnesses who identified the Appellant on the evening of October 12, 1978 were also known to the Charlotte County Sheriff's Department since the early stages of the case, and certainly before the involvement and 1985 investigation. (R3549)

The shell necklace and hair sample had both been submitted to an FBI or FDLE laboratories for analysis before 1985. (R3550) Both were in the possession of the Sheriff since 1979. (R3536)

Irene Rasmussen, in a statement in 1978 indicated that Phil Drake's car was present at her residence on October 14, 1978. Subsequent to the giving of this statement Ms. Rasmussen died.

At jury trial the Appellant was found guilty of first degree murder and the trial proceeded to a penalty phase. During an abbreviated charge conference the judge indicated that he would charge the jury on the following aggravating factors: that the homicide occurred during the course of or while the Appellant was attempting a sexual battery (R3206-07); that the homicide was committed for the purpose of avoiding or preventing a lawful arrest, and that the homicide was committed in a cold, calculated manner. (R3213-16) The court further indicated that heinous, atrocious and cruel would be permitted as an aggravator. (R3219)

The jury recommended that death be imposed upon the

Appellant. (R3269). The judge followed the jury recommendation and imposed a death sentence upon the Appellant. (R4236-37)

SUMMARY OF ARGUMENTS

The delay in prosecution herein prejudiced the ability of the Appellant to defend himself in this matter. The absence of reasons for the delay demands that the matter be dismissed.

The evidence herein is insufficient to support the verdict. Three separate cases, one of them a decision of this Honorable Court considered facts which were virtually indistinguishable from those sub judice and found these facts insufficient to support a conviction. The court erred therefore in denying Appellant's motion for judgment of acquittal.

During trial the court improperly commented on the evidence thereby abandoning its role of impartiality. Such comments are improper and prevented a fair trial herein.

Further the court improperly excluded evidence of the out of court confessions of a third party. The third party confession was excluded as hearsay. The exclusion violated the fundamental right of the Appellant to present evidence. This fundamental right was also violated when the court excluded testimony which showed that a witness, during hypnosis, recalled facts favorable to the Appellant.

The court also erred in imposing the death penalty herein. First the court erred in denying the pre-trial motion to dismiss based upon the vagueness of Section 921.141 (Fla. Stat. Ann. 1989). Second the court erred in its determination that various aggravating factors were present sub judice. The court also misinstructed the jurors during the penalty phase regarding the

aggravators and mitigators. Finally the court considered and weighed nonstatutory aggravators in the balancing process.

During closing argument the prosecutor made repeated and highly prejudicial comments and arguments. The arguments and comments constitute fundamental error.

Finally a juror was wrongfully excused as a Witherspoon rationale.

ISSUE ONE: THE COURT ERRED IN EXCLUDING THE TESTIMONY OF VIRGIL SHELTON REGARDING STATEMENTS MADE BY BRIAN KANE.

The Appellant offered testimony which indicated that Brian Kane made statements that he was present when a third person, Phil Drake, committed this homicide. The statements were made in the context of a jailhouse confession and were corroborated by independent facts.

The admissibility of this type of testimony, an out of court confession by an alleged perpetrator was considered by the United States Supreme Court in Chambers v. Mississippi, 410 U.S. 284, 35 L.Ed. 2d 297, 93 S.Ct. 1038 (1973). In Chambers a written confession was elicited from the alleged perpetrator of a homicide and oral confessions were made to three separate persons. The author of these pre-trial statements was called by the defense to testify but the witness repudiated his earlier statements and instead insisted that he was not the perpetrator of the homicide. The defense attempted to impeach the witness with his prior statements but the Mississippi court refused to allow this impeachment. The "voucher" rule was utilized by the Mississippi courts to exclude the testimony of the witness. Further the Mississippi court found the out of court statements to be hearsay. Chambers rejected both the voucher rule and hearsay objection and instead held:

> "That testimony also was critical to Chambers defense. In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." Id. at 410 U.S. p. 313.

The Supreme Court in Chambers rejected the notion that evidence of another's confession to a crime should be excluded by a mechanistic application of the rules of evidence. The ability to present such testimony goes to a fundamental due process right on the part of a defendant accused of a criminal offense. This right takes precedence over a strict interpretation and application of the evidentiary rules. This is so whether or not the confession is to a third person.

Barnes v. State, 415 So.2d 1280 (Fla. App. 1982) approved exclusion of testimony which merely raised an inference or possibility that another person might have committed the offense. Barnes differs from the instant case since here there is specific testimony by the witness Shelton that his cellmate Kane confessed to him and evidence corroborating the Shelton statement. The corroboration is:

> 1. A previous witness, Lisa Carver, indicated Linda Pikuritz used speed. Phil Drake dealt in PCP. (R2195)
>
> 2. Another witness indicated that Linda planned to try and obtain marijuana and bring it with her on October 12. (R2196)
>
> 3. Phil Drake had been seen in the vicinity of the offense on October 11 and 13. (R2937 2943)
>
> 4. Phil Drake and Brian Kane were friends. (R2812) Both were from Illinois and involved in the sale of PCP. (R2813-14) Around the time of the murder Phil Drake had some PCP stored under the seat of a rental car and the PCP disappeared. (R2813)
>
> 5. Phil Drake drove a white car with a black top. (R2815)

6. Phil Drake had previously been a suspect in the case and had in fact been given transactional immunity in order to secure testimony from him regarding the whereabouts of his car on the evening in question. (R2824) Gene Berry, then assistant state attorney, was convinced that Phil Drake lied about his involvement in this matter and caused perjury charges to be filed against him. (R3481)

7. Virgil Shelton was aware of facts which could arguably only come from Brian Kane. These were the fact that Phil Drake drove a white car; that Brian Kane was in jail for selling a guitar; that Brian Kane and Phil Drake sold PCP and that some PCP disappeared from under a car seat; that the crime occurred close to an area that some of Kane's friends were moving to. The arms of the victim were broken. She was alive when burned. The officers gave Shelton no facts. (R2893, 2854)

8. Brian Kane denied knowing Phil Drake, but acknowledged helping him move a friend, Jamie Mitchum. (R2830)

9. Independent testimony established that Phil Drake's car was at the Mitchum house during the move. (R2820) However it was felt that this was before the discovery of the body. (R2820) The Mitchum house was located close to the woods where the body was discovered.

Phil Drake in fact was a suspect in this matter during the early stages of the investigation. He was questioned by Gene Berry, then Assistant State Attorney. During questioning Drake was afforded transactional immunity and despite the grant of transactional immunity continued to lie about his involvement in the offense. (R2752, 2824, 3401) The failure of Phil Drake to speak truthfully regarding his activity even after the granting of transactional immunity is further corroborative evidence. The Kane statement goes beyond inference and in fact indicates that he saw the crime committed; was arguably an accomplice thereto;

and observed the perpetrator.

A second Florida case which considers this issue is Jackson, v. State, 421 So.2d 15 (Fla. App. 3 Dist. 1982). The case provides some limited assistance in the resolution of these issues. Jackson in footnote 7 at pages 17, 18 indicates that although the hearsay testimony regarding the commission of a crime by another person was properly excluded, it nonetheless notes that upon presentation of corroborating evidence such testimony should be admitted. Thus Jackson supports the defense contention that the testimony of Shelton should have been admitted because it was supported by corroborating evidence.

Testimony of the police officers further bolstered Shelton's credibility. During the proffer, the officers denied that they gave any facts or circumstances to Shelton regarding the commission of the offense. (R2854, 2893) Nonetheless Virgil Shelton knew many specific details relating to the offense. Virgil Shelton knew that the victim was alive when she was set afire. (R2851) Shelton knew the victim's arms were broken. (R2851) Shelton knew that Phil Drake drove a white car. (R2852) Shelton knew that the offense took place in a wooded area close to the residence of Jamie Mitchum where the move was taking place. (R2850) These facts if not told to Shelton by the police could only have come from Brian Kane.

Few rights are more fundamental than that of an accused to present witnesses in his own defense. Chambers, supra. p. 312. Chambers recognizes that when hearsay rules conflict with a

fundamental right of the defendant to ascertain guilt or innocence the hearsay rule should not be applied to defeat the ends of justice. Moreno v. State, 418 So.2d 1223 (Fla. App. 3 1982) although not precisely on point does shed light on the nature of the defendant's right in a criminal trial to present evidence. Moreno states:

> ".... Where a defendant offers evidence which is of substantial probative value and such evidence tends not to confuse or prejudice, all doubt should be resolved in favor of admissibility. Holt v. United States, 342 F.2d 163 (5th Cir. 1965); Commonwealth v. Keizer, 385 N.E.2d 1001 (Mass. 1979). Where evidence tends, in any way, even indirectly, to prove a defendant's innocence, it is error to deny its admission. Chandler v. State, 366 So.2d 64 (Fla. 3d DCA 1979); Watts v. State, 354 So.2d 145 (Fla. 2d DCA 1978)...." Moreno, supra. p. 1225.

The Shelton statement was based upon first hand knowledge and did not merely raise speculation that another might have committed the crime. It went directly to the heart of the issue and there was sufficient indicia of reliability to justify its admission. The circumstances under which the statements were made could have been fully explained to the jury. It was the function of the jury to determine whether or not the testimony of Virgil Shelton was credible under these circumstances. Unfortunately the jury did not have the opportunity.

Assuming, however, that this Honorable Court chooses not to recognize the Chambers rationale, the statement nonetheless was admissible as a prior inconsistent statement under Section 90.614, Fla. Stat. Ann. (1979). Reference to the record herein reveals that the witness Kane was specifically afforded an

opportunity to acknowledge the existence or making of the prior statement. (R2834-36) He denied making the statement. Section 90.614 thereupon provides for the admission of extrinsic evidence of the statement. Section 90.614(2) states:

> (2) Extrinsic evidence of a prior inconsistent statement by a witness is inadmissible unless the witness is first afforded an opportunity to explain or deny the prior statement and the opposing party is afforded an opportunity to interrogate him on it, or the interests of justice otherwise require. If a witnes denies making or does not distinctly admit that he has made the prior inconsistent statement, extrinsic evidence of such statement is admissible. This subsection is not applicable to admissions of a party-opponent as defined in s. 90.803(18).

Precisely this issue was considered by the Second District Court of Appeal in Irons v. State, 498 So.2d 958 (Fla. App. 2 Dist. 1968). In Irons the defense attempted to introduce testimony which indicated that witnesses who testified for the state had made prior statements indicating that the defendant had not committed the robbery. The trial court excluded these statements. The Second District Court of Appeals reversed on other grounds but stated:

> "Apparently on grounds of hearsay, the court refused to permit this testimony because the witnesses were unable to say that Tremayne specifically admitted committing the robbery himself. The court properly refused to permit the testimony but not for the reasons discussed at the trial. The testimony could have been introduced to impeach Jolly by prior inconsistent statements. Section 90.608(1)(a), Fla. State. (1985). However, as presented, the testimony was inadmissible because of the failure to first afford Jolly an opportunity to explain or deny the prior statements. Section 90.614(2). Id. at p. 960

The requirements of Section 90.614 were met here. The

statement should have been admitted. A mechanical application of the hearsay rule or voucher rule to the facts in this case has no place in a fair determination of guilt or innocence.

Florida recognizes a modified version of the "voucher rule." Section 90.608 Fla. Stat. Ann. (1979), indicates that a party calling a witness shall not be permitted to impeach the witness's character generally but if the witness proves adverse a party may contradict the witness by other evidence or may prove that the witness has made an inconsistent statement at another time, without regard to whether the party was surprised by the testimony of the witness. Florida thus has specifically softened the otherwise inflexible voucher rule to provide for contradiction of a witness by use of a prior inconsistent statement. In the case sub judice the defense would have shown by use of the prior inconsistent statement that in fact it was Brian Kane and Phil Drake who perpetrated the homicide not the Appellant. The use of his prior oral statement to impeach Brian Kane was proper under Section 90.608 as a mode of contradiction and should have been allowed.

In the alternative the witness could have been called as a court's witness as sanctioned by Section 90.615 Fla. Stat. Ann. (1979). This court in Jackson v. State, 498 So.2d 906 (Fla. 1986) recognizes that Section 90.615 should be utilized in an instance where neither party can present eyewitness testimony because of the voucher rule. Jackson states:

> Permitting a court to abandon its position of

> neutrality by calling a witness as its own was intended to prevent the manifest injustice which might occur if the testimony of an eyewitness to a crime was not placed before the jury because of the inability of either party to vouch for that witness. We believe that court witnesses should be limited to those situations where there is an eyewitness to the crime whose veracity or integrity is reasonably doubted. Id. at p. 909.

Counsel for the state contended that the Shelton statement should be excluded on the basis of Baker v. State, 336 So.2d 364 (Fla. 1976). Reference to Baker reveals that the state's reliance is unjustified. Baker established for the first time penal interests as a hearsay exception. The issue in Baker was not the mechanics of application but rather the broad philosophical principles upon which the admission against penal interest concept is based. Baker established a rule of inclusion, not a mechanical rule of exclusions. This Honorable Court states in Baker:

> More is involved here than doctrinal incongruities. Law courts depend for such effectiveness as they have on the cooperation of the wider community, and trials must be conducted in a way that will earn the cooperation and support of people of good will in every walk of life. Excluding from one man's trial another man's confession to the offense charged is no means to that end. Id. at p. 369.

Thus the philosophical lynch pin of the court's decision in Baker was a search for a means to admit exactly this type of proferred testimony. To use Baker as a tool of exclusion is totally at odds with the language and spirit of the decision.

The Shelton statement was relevant and highly probative. Its exclusion was error. The error prevented a fair trial herein.

ISSUE TWO: THE COURT ERRED IN COMMENTING ON THE EVIDENCE.

The corpus delecti in a homicide case consists of the fact of death; criminal agency of another; the identity of the deceased. Buenoano v. State, 527 So.2d 194 (Fla. 1988). The repeated comments by the trial judge regarding the identity of the victim (R145,182,194,211,275,315,406); the fact that the fire was not an accident (R145,211,275); and the fact that investigations revealed the fire was deliberately set went directly to the heart of the issues. The further comment regarding ownership of the hat (R1818) served to inject the opinions of the judge into a disputed and sensitive area.

Statements indicating "those are the basic facts" and "investigation revealed" cannot fail to convey the judge's opinions to the jury. Thus at the very inception of these proceedings the jury was advised by the judge that the victim was Linda Pikuritz and this was no accident. Further venue was satisfied. (R145,211,275) In expressing these thoughts the judge abandoned the role of neutrality and entered the fray. Such an occurence creates a fundamentally flawed trial.

The repeated comments by the court during the voir dire phase constituted a comment on the evidence by the trial court and worked to serve as an instruction to the jury that certain disputed matters were in fact established. Such comment on the part of the trial court is improper and should result in a reversal of the conviction herein. The comments by the trial

court regarding the ownership of the cap also constituted error. (R1818)

Florida prohibits comments on the evidence by the trial judge. In Whitfield v. State, 452 So.2d 548 (Fla. 1984) this court states:

> "A trial court should scrupulously avoid commenting on evidence in a case. (citation omitted) Especially in a criminal prosecution, the trial court should take great care not to intimate to the jury the court's opinion as to the weight, character or credibility of any evidence adduced." Id. at p. 549.

This view has been repeated often in Florida courts. Lee v. State, 324 So.2d 694 (Fla. App. 1 Dist. 1976), Hamilton v. State, 261 So.2d 184 (Fla. App. 3 Dist. 1972).

The judge's comments were not confined to voir dire. The court sua sponte answered a juror's question regarding ownership of a hat. (R1818). The comment impacted directly on a contested element, the source of the hair recovered from the hat and identity of the deceased.

The judge's comments here are similar to the comment in Beckham v. State, 209 So.2d 687 (Fla. App. 2 Dist. 1968). In Beckham the trial court commented that a gun "was found at the scene of the crime." The comment in Beckham resulted in a reversal of the conviction therein. A comparison of the comment in Beckham with those made by the court herein reveals that the nature, substance and number of comments made sub judice are far more egregious than the isolated and ambiguous comment in Beckham.

The many repetitions and the nature of the comments by the trial court during voir dire worked to destroy the impartiality of the trial herein. Through the comments during voir dire and concerning the hat, the judge specifically instructed this jury on three essential elements of the offense and commmunicated to them that certain facts, in the judge's opinion had been established. Ownership of the hat was essential to the state's case. The comment by the judge precluded doubt and argument. (R1818).

Flicker v. State, 374 So.2d 1141 (Fla. App. 5 Dist. 1979) is similar to the case sub judice. In Flicker the court made a comment to the jury as follows:

> "and the court will rule that sufficient evidence has been established to create a conspiracy between defendant and the witness." Id. at p. 1142

The judge's finding that a conspiracy existed in Flicker is analogous to the finding herein that the identity of the victim was Linda Pikuritz and that the death was not by accident. In considering the comment in Flicker, the Fifth District found that these types of comments are improper. The decision states:

> Because of the trial judge's position in the courtroom, the jury hangs on his every word and is most attentive to any indication of his view of the proceedings. Therefore, we cannot escape the conclusion that the statement from the bench, in the course of the murder trial, that sufficient evidence had been established to create a conspiracy between the appellant and the witness, an alleged accomplice, was prejudicial to the appellant and deprived him of his right to a fair trial. Id. at p. 1142.

The comment that a conspiracy existed in Flicker was found to be

prejudicial and required reversal. Certainly the numerous similar comments herein are far more damaging than the one in Flicker.

In Hamilton v. State, 109 So.2d 422 (Fla. App. 3 Dist. 1959) a murder conviction was considered. In Hamilton as in the case sub judice the trial judge made certain unintentional remarks which contained an assumption that the deceased had been murdered. In reversing the conviction the appellate court considered the following comments. The trial judge asked the decedent's wife "Do you still live where you lived at the time your husband was murdered?" Id. at p. 423. The defendant in Hamilton did not object to this question. At another point in the proceeding the court restated an answer in the presence of the jury. "The witness testified that he did not know and he seriously doubted if anyone else knew what was in that man's mind at the time he committed the murder." Id. at p. 424. Again defense counsel in Hamilton failed to object to this comment.

Both remarks were found by the Third District to constitute a comment by the trial judge on the evidence. Further the court in the face of the state's contentions that failure to object constituted a waiver found that the failure of the defendant to object did not constitute a waiver and was not fatal to a review on appeal. In its decision the Hamilton court states:

> "The dominant position occupied by a judge in a trial of a cause before a jury is such that his remarks or comments, especially as they relate to the proceedings before him, overshadow those of the litigants, witnesses, and other court officers.

> Where such comment expresses or tends to express the judge's view as to the weight of the evidence, the credibility of a witness, or the guilt of an accused, it thereby destroys the impartiality of the trial to which the litigant or accused is entitled. The court's remarks as delineated above, although unintentional, nevertheless constituted a comment by the court upon the guilt of the appellant and as such were prejudicial and denied him a fair and impartial trial." Id. at pp. 424, 425

Even though the remarks are unintentional the effects of these comments, are prejudicial to the defendant and should result in a reversal of the conviction and a remand for new trial.

The fact that most of the judge's comments occurred during voir dire is immaterial if in fact they can reasonably be construed as constituting a comment on the evidence. In Lester v. State, 458 So.2d 1194 (Fla. App. 1 Dist. 1984) the First District considered judicial comments which occurred during the voir dire proceedings. Notwithstanding the fact that the comments occurred during voir dire proceedings and subsequent thereto the juror in question was excused for cause, the District Court of Appeal nonetheless found that the comments of the trial judge could reasonably be construed as a comment by the court on the evidence. Such a comment on the evidence, whenever it occurs during the course of trial, is reversible error. Lester, Id.

ISSUE THREE: THE COURT ERRED IN EXCLUDING TESTIMONY THAT THE WITNESS LOU KELLY HAD BEEN HYPNOTIZED AND DURING HYPNOSIS RECALLED EVIDENCE WHICH WAS FAVORABLE TO THE DEFENDANT.

At trial the Appellant attempted to elicit evidence on cross from the witness Lou Kelly which showed that witness had been hypnotized and during hypnosis recalled facts which were favorable to the Appellant. (R1272-74) Specifically the license number of a car which the witness observed blocking the road was recalled and was apparently different than the license number of Bradley Scott's vehicle. (R1273). The Appellant was not permitted to explore this area. (R1284).

Florida has adopted a per se rule of exclusion as it relates to hynotically refreshed testimony. This Honorable Court in Bundy v. State, 471 So.2d 9 (Fla. 1985) (Bundy II) states:

> "We hold that any post hypnotic testimony is inadmissible in a criminal case if the hypnotic session took place after this case becomes final. We further hold that any conviction presently in the appeals process in which there is hypnotically refreshed testimony will be examined on a case by case basis to determine if there was sufficient evidence, excluding the tainted testimony, to uphold the conviction." Id. at pp. 18, 19

Recently the United States Supreme Court has had occasion to consider the application of a state's rules of evidence as they apply to per se exclusion of hypnotically refreshed testimony. Rock v. Arkansas, 483 U.S. 44, 107 s.Ct. 2704, 97 L.Ed 2d 37 (1987) considered whether or not an application of a state rule of evidence could result in the total exclusion of a defendant's testimony. In considering the per se exclusionary rule of

Arkansas the court indicated that it would not uphold a per se rule of exclusion as it pertained to the testimony of the defendant herself. The decision admittedly does not address third party testimony. The Appellant however contends that an arbitrary rule of exclusion which interferes with the Appellant's right to compel the presence of witnesses and testimony thereby is as fundamentally defective as a rule which results in the exclusion of testimony by the defendant. In the Rock decision the court implies that it has historically struck arbitrary applications of state rules of exclusion and will continue to do so if they interfere with presentation of evidence by a defendant. The court states:

> "This is not the first time this court has faced a constitutional challenge to a state rule, designed to insure trustworthy evidence, that interfered with the ability of a defendant to offer testimony." Id. at 97 L.Ed. 2d at p. 47

This Honorable Court has had occasion to revisit the issue of hypnosis in criminal cases subsequent to Rock. In Morgan v. State, 537 So.2d 973 (Fla. 1989) this Court once again considered the use of post hypnosic testimony. This Court in applying Rock appears to retreat from the strict rule of exclusion which had earlier been espoused in Bundy II. The Court notes that the Bundy II decision post Rock cannot be read to exclude statements of the defendant if made to experts in preparation for trial even though the experts might have utilized hypnotic techniques in obtaining the statements. In Morgan this Court notes the following:

> "We note that although Bundy prohibits the offering of hypnotically refreshed testimony as direct evidence, it does not preclude all uses of hypnosis. In Bundy II, this Court stated that "we do not undertake to foreclose the continued use of hypnosis by the police for purely investigative purposes. Any corroborating evidence obtained is admissible in a criminal trial subject to other evidentiary objections." (citations omitted). Morgan, supra. at p. 19.

When considering the limiting language used in Bundy II, and repeated in Morgan an interesting anomaly develops. This Honorable Court has acknowledged that corroborative evidence developed during the course of hypnosis is admissible. It is impossible to reconcile the admissibility of corroborative hypnosis testimony with the exclusion of impeachment materials developed during the course of hypnosis since both arguably enjoy the same stature. A reading of Bundy v. State, 455 So.2d 330 (Fla. 1984) (Bundy I) Bundy II Morgan, and Rock indicates that it is only direct evidence which is excluded by the hypnosis rule espoused in any of these cases. Collateral evidence be it corroborative or impeaching, should not be excluded by the Bundy rules. Thus the Appellant sub judice was barred improperly from presenting impeachment testimony during his cross examination. The limitation on his cross examination was improper both in light of the Bundy and Morgan decisions as well as a violation of his right to confront and right to present evidence in his own behalf as guaranteed by the United States and state constitution. The right to call witnesses and present evidence is certainly as basic as the right to testify personally. The court erred in excluding this testimony.

ISSUE FOUR: THE COURT ERRED IN DENYING APPELLANT'S MOTION TO DISMISS BASED UPON PRE-INDICTMENT DELAY.

The Appellant prior to trial filed a pre-trial motion to dismiss alleging that the delay in Indictment in this case worked a violation of his due process rights under the Fifth and Fourteenth Amendments and Article I Section 9 of the Florida Constitution. (R4027-32) The matter was brought on for hearing before the Honorable trial court on December 14, 1988. At hearing evidence presented indicated that the offense occurred on October 12, 1978. On or about April of 1979 the investigation centered on the Appellant and he was questioned by the Charlotte County Sheriff's Department regarding his whereabouts on the evening of October 12, 1978. Kathy Stetcher, the Appellant's girlfriend was also questioned. As a result of the interviews with Ms. Stetcher and Mr. Scott it was discovered that the Appellant had an alibi for the evening in questions. (R3479-80, 3487, 3492, 3494-95) Efforts were made by the Charlotte County Sheriff's Department to verify the bona fides of the Appellant's alibi and they were unable to shake the alibi. Notwithstanding the alibi, a request was submitted to Joseph P. D'Allessandro, State Attorney, Twentieth Judicial Circuit for an indictment against Mr. Scott. (R3480,87,92,95, 3566). Mr. D'Allessandro refused to prosecute, indicating there was insufficient evidence. Witnesses indicated he specifically referred to the existence of an alibi in his decline. (R3492, 3495-95, 3479, 3566).

The matter thereafter was left in the hands of the Charlotte

County Sheriff's Department. In 1983 a witness who had been previously interviewed was asked to identify a vehicle. (R3484) She was unable to do so specifically, but indicated that she believed a car chosen from a manufacturer's book resembled the vehicle or was like the vehicle. (R3485-86) In about 1984 two different witnesses were interviewed who placed the Appellant or his vehicle at varying locations talking to a young girl, the approximate age and size of the victim in this case. These witnesses were known in 1979 but not interviewed. (R3448-49) A shell that had been in the possession of the state since 1979 was resubmitted to the Department of Law Enforcement laboratory for further testing. (R3536) The testing consisted of measurements of the shell size and further examinations by the technicians of a monafilament necklace which was discovered at the scene of the crime. (R3550-51) The results of the scientific testing was inconclusive, indicating only that it was possible for the shell discovered in the Appellant's car to have been among the shells contained on the strand of monafilament which constituted the base for the shell necklace. Further testimony indicated that it was possible that the monafilament had been broken and was at one time joined. The scientific testimony concerned tests available in 1979, and did not constitute newly discovered evidence as a result of ongoing investigations. Both the witnesses who allegedly saw the Appellant in the presence of a female the approximate age and size of the victim and the witness identifying a vehicle similar to the Appellant's vehicle were

available to the state at all times during the pendency of the case prior to 1986, the date of the arrest.

The only difference between the status of the case in 1979 and 1986 was that a review of the case had been undertaken in 1983 and 1985 by the police. As a result of the passage of time the police realized the Appellant could no longer establish the bona fides of his alibi. Specifically an officer went to Foxmoor Casuals and discovered that records of the business transactions on the evening of October 12, 1978 were no longer available. (R3553-54) Rather the only record of what occurred on that evening was the fragile memories of former employees. (R3554) After a passage of six years they were unable to verify or disprove the alibi of the Appellant. Likewise work records from Sambo's restaurant establishing dates of employment for Kathy Stetcher, Appellant's then fiance were not available in 1985. (R3461-64)

Ken Jones, one time chief investigator, and Michael Gandy, indicated that they had in previous years reviewed the authenticity of the Appellant's alibi. (R3492, 3556) The Appellant's alibi had also been considered by Joseph D'Allessandro a trained and skilled prosecutor. (R3492, 3556, 3572-73) These examinations in earlier years had been unable to discredit the Appellant's alibi. Six years later however an ambitious police officer discovered that records had now vanished and the only support for the Appellant's alibi were faded memories.

This is not simply a instance however where the defendant contends that faded memories have prejudiced his case. The credentials of the Appellant's alibi had previously been submitted to the acid test of scrutiny by both the Charlotte County Sheriff's Department and trained analysis by a skilled prosecutor. This previous analysis had found the alibi to be unshakable. So strong in fact was the alibi that the state attorney of the Twentieth Judicial Circuit refused to institute prosecution despite requests from his assistant state attorney in Punta Gorda and various law enforcement personnel. Only with the passage of time, the loss of records and the fading of memories did the alibi no longer support the Appellant's contention of innocence.

A bare assertion that missing witnesses exist will not support a Fifth Amendment or Fourteenth Amendment claim of a due process violation in this area. Howell v. State, 418 So.2d 1164 (Fla. App. 1st Dist. 1982). Rogers v. State, 511 So.2d 526 (Fla. 1987). This case however differs significantly from a bare bones allegation that witnesses are missing or memories faded. Here the case was submitted to the prosecutor in 1979 or 1980 for prosecution. At that time however an alibi existed and when the prosecutor considered the alibi he rejected the request for an indictment.

Appellant today cannot recreate his alibi. In 1979, he voluntarily disclosed it, it was scrutinized by law enforcement and found sufficient. Unwilling to meet the alibi while it was

young and strong, the prosecutor decided to wait and see whether or not the passage of time, as it so often does, caused the alibi to age and grow frail. The Appellant meanwhile, reasonably believing he was no longer a suspect, made no efforts to maintain records, witnesses or memories. For after all, his alibi had been tested, his innocence established, and prosecution refused. How could the Appellant know that the prosecutor had not cleared his name, but rather was simply waiting for his alibi to weather? Such a possibility is so frightening, it is almost inconceivable. Unfortunately this is what occurred.

The standard to be applied in reviewing pre-indictment delay is unsettled. Some cases require that the delay must be one which is deliberately aimed at securing a tactical advantage. The Eleventh Circuit apparently has established this as the standard. U.S. v. Russo, 796 F.2d 1443 (11th Cir. 1986), U.S. v. Reme, 738 F.2d 1156 (11th Cir. 1984), U.S. v. Corbin, 734 F.2d 643 (11th Cir. 1984), U.S. v. Caporale, 806 F.2d 1487 (11th Cir. 1986).

The requirement of deliberate delay appears to be a standard created in the lower federal appellate courts and not the Supreme Court. The Supreme Court considered the issue in United States v. Lovasco, 431 U.S. 783, 97 S.Ct. 2044, 52 L.Ed. 2d 752 (1977). In Lovasco the court espoused this ill defined standard:

> We are to determine only whether the action complained of here, compelling respondent to stand trial after the Government delayed indictment to investigate further - violates those "fundamental conceptions of justice which lie at the base of our

civil and political institutions. Id. at p. 759.

Florida rejected the harsh standard set by the Eleventh Circuit and instead chose to retain the standard established by the Fifth Circuit in United States v. Townley, 665 F.2d 579 (5th Cir. 1982) and adopted by the 1st District in Howell v. State, supra. In Rogers v. State, supra. this Honorable Court states:

> If the defendant meets this initial burden, the court then must balance the demonstrable reasons for delay against the gravity of the particular prejudice on a case-by-case basis. The outcome turns on whether the delay violates the fundamental conception of justice, decency and fair play embodied in the Bill of Rights and fourteenth amendment. See Townley, 665 F.2d at 581-82. Because Rogers has not met his initial burden of proof, we conclude that he has suffered no prejudice proscribed by the constitution. Id at p. 531.

In evaluating the delay herein the court must determine whether the Appellant has shown actual prejudice. The sheer volume of lost reports and faded memories after the passage of eight years should be sufficient but Appellant further established that in 1979 he was able to establish an alibi sufficient to withstand scrutiny. Eight years later he was unable to do so due to lost employment records of Sambo's, lost inventory records of Foxmoors and faded memories of other witnesses.

Having established prejudice this court must now "balance the demonstrable reasons for delay against the gravity of the particular prejudice on a case by case basis." Rogers, id. In doing so here the Court will discover that there were no reasons for the delay. The two "new witnesses" who place the Appellant

or his car in the presence of a young girl were known to the police within days of the discovery of the body. (R3549). The hair and shell was recovered from the Appellant's car in 1979. (R2416). Lisa Carver and Angela Byrd, the victims friends were known virtually from the discovery of the offense. Although the state at hearing complained mightily of investigative delays, it is apparent that the only meaningful investigation occurred in 1985 when the police checked the Appellant's alibi and discovered the records were lost and memories faded. The dirth of reasons when weighed against the prejudice to the Appellant must surely violate "the fundamental conception of justice, decency, and fair play embodied in the Bill of Rights and Fourteenth Amendment." One is haunted by the question; if not this, then what does violate these principles?

If the court chooses to require deliberate tactical delay this standard is still met here. Is it not tactical delay to simply wait for your opponent to weaken, periodically checking his defenses? Any gathering of criminal defense attorneys can illuminate the desirability of this "tactic" when faced with a strong case. It is not necessary to show affirmative action on the part of the prosecutor. A decision to delay prosecution simply because the defense has an airtight alibi in hopes that this alibi some years down the road will no longer be available certainly represents a tactical delay aimed at obtaining an advantage over the Appellant. This would especially be true when coupled with the negligence on the part of the state to interview

witnesses and to go forward with scientific testing in the matter.

The delay in this case is unconscionable when considered in light of the state's decision in 1979 to review the Appellant's case and thereby lull him into a false sense of security, causing him to relinquish his alibi and abandon his defenses. Intentional or not the harm is apparent. When coupled with an inexplicable failure on the part of the state to investigate it justifies dismissal of the indictment. Failure to do so constitutes error.

ISSUE FIVE: THE COURT ERRED IN DENYING THE APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL.

(I). The Circumstances Herein are Insufficient to Support a Finding of Guilt.

At the conclusion of the state's presentation of evidence the Appellant moved for a judgment of acquittal contending that the state's case was circumstantial and failed to make a prima facia showing of guilt. (R2646-2656) This motion for judgment of acquittal was renewed at the conclusion of the Appellant's case. (R3019-3024)

The evidence against the Appellant consisted of the following. The Appellant was familiar with the victim in that prior to the incident he had occassionally met with her at a local convenience store, conversed with her, supplied her with beer, supplied her with marijuana and had casual contacts with her. (R2042-44, 2186) These contacts began about a month prior to the date of the offense. (R2042-44, 2186) Second, evidence indicated that a car similar to that of the Appellant was allegedly observed stopped on a public road and the driver of the car was observed in conversation with a girl who was the approximate age and size of the victim. (R1379-81) The girl with whom the Appellant was engaged in conversation was on a bicycle. These alleged conversation was observed at approximately 6:30 P.M. on October 12, 1978 on a public road. (R1178) Third, a witness allegedly observed the Appellant and his vehicle at a local convenience store. (R1984) The Appellant

was conversing with a young girl identified as Linda Pikuritz and appeared upset. (R1987) The girl was in the "V" of the driver's door, but no one saw the girl leave in the Appellant's vehicle. (R2020) Fourth, a vehicle similar to the Appellant's vehicle was observed stopped on a neighborhood road and the driver was engaged in conversation with a unidentified young girl. (R1379) This conversation lasted for some period of time but did not appear to be a violent or forced conversation. The bicycle of the alleged victim was subsequently discovered in bushes adjacent to this viewing. (R1756-81) These observations were made on the evening of and in the vicinity of the alleged homicide herein. (R1379-81)

Subsequent to the date of the alleged homicide the vehicle of the Appellant was obtained from a used car dealer. (R959) The vehicle was thereupon sent to the FDLE laboratory for examination and testing. (R2416) Hairs were obtained from the vehicle which could have originated from the head hair of the victim. (R2613) Further a shell was discovered in the Appellant's vehicle which could have originated from a shell necklace worn by the victim. (R2473) However hundreds of thousands of shells of this type had been shipped into the state of Florida. (R2563) They were sold primarily by a local shell distributor, specifically the Shell Factory. (R2563) Testimony concerning the shell indicated only that it was a dove shell and it was possible that it could have fit onto the necklace. (R2473, 2486)

The Appellant allegedly made statements indicating he was stopped at a roadblock whereupon he learned of the death of the young girl. (R2104) Prior inconsistent statements made by one of the state's witnesses indicated that the source of this knowledge was not directly from the Appellant but from a neighbor. (R2076) Testimony by a defense witness indicated that the Appellant did not make these statements. (R2723) The state during its case in chief presented evidence which showed that no roadblocks were held or set up in the location indicated by the Appellant.

The Appellant's alleged characterization of his stop as "roadblock" is by no means conclusive. The state did not preclude the possibility that the Appellant was stopped at another locale or simply stopped by a police officer in an investigative type of stop. The Appellant could have easily characterized such a stop as a roadblock thereby misinterpreting the nature and extent of the police officers activity. The language used by the Appellant, "Stop, this is right where the policemen stopped me" supports this contention. (R2105) In any event the Boule testimony is contradicted by the evidence of Dennis Anderson who indicates that such statements were never made by the Appellant. (R2723). Likewise the initial comments by the state's witnesses indicates that they were told by neighbors that the roadblock existed. Appellant contends that the tenuous, conflicting nature of this testimony must be considered in determining its weight.

No one indicated that the victim in this case was seen in the car of the Appellant at any time on the evening of the offense. The only activity observed was conversations which were allegedly taking place between the Appellant and a young girl. Further, in one of the contacts the young girl was not identified. In another neither the Appellant nor the victim was identified. In only one contact was the Appellant and victim identified. All the contacts involved only conversations in public areas. Notwithstanding these shortcomings in the evidence, the state argued that the jury and this court should infer that in each instance the girl was in fact the victim. Assuming arguendo that it was the Appellant and he was talking to Linda Pikuritz, what distinguishes this contact from the contacts and conversations that were ongoing between the two for a long period of time?

No witness indicated that the victim in this case was ever seen within the vehicle. The witness who testified regarding observations at the L'il General store did not see the victim leaving the store in the Appellant's vehicle. The testimony of Lou Kelly indicates only that he observed conversations taking place between the Appellant and an unidentified girl on the public streets of Charlotte County. The testimony of the girl taking down the flag only indicates that she saw non-threatening conversations taking place between an unidentified male driving a white car and an unidentified young girl on the public streets of Charlotte County. To proceed on this road to guilt one must

assume that the girl was the victim and then assume that she got into the Appellant's car. To go further assume that the Appellant accosted the victim in his car. Also assume the necklace broke and the hair came out during a struggle. Assume now that the shell necklace broke in the car during a struggle and not under innocent circumstances as it did in the pizza parlor earlier. (R905)

Ignore the fact that the hair could have been transferred to the Appellant or his vehicle during any of the prior innocent contacts between the Appellant and victim. Ignore the fact that hairs break during brushing or during any number of other innocent activities. Ignore the fact that hundreds of thousands of the dove shells exist and one witness indicated she transported dove shells from her collection in the car. (R2696) Ignore the fact that the necklace was found broken in the woods but otherwise intact. Ignore the obvious question, if the necklace broke in the car, how did it come to be transported intact into the woods? Ignore the fact that another similar necklace broke in the pizza parlor for no reason and all of the shells fell into the pizza. (R905)

It is apparent that the state's case is built upon inferences piled on inferences and only if one assists the state by accepting the right assumptions will it stand. At best the cold record indicates that a male with a car similar to Appellant's had a conversation with an unidentified female on the evening of the offense. Beyond that the record is silent.

To arrive at guilt one must assume:

1. The male in the white vehicle was the Appellant.
2. The young girl was the victim.
3. The victim got in the car.
4. The hair belongs to the victim.
5. The shell is from the victim's necklace.
6. The hair was deposited during a struggle on October 12.
7. The shell necklace broke during a struggle and not under innocent circumstances.
8. If a struggle occurred, the Appellant thereafter killed the victim.

Only if one is willing to make each of these assumptions is the state's case established. This piling of inference on inference is clearly improper.

It is well settled that to prove a criminal charge by circumstantial evidence the circumstances must be inconsistent with any reasonable hypothesis of innocence. This basic premise of law has been repeatedly applied by this Honorable Court in homicide cases in this state. Ross v. State, 474 So.2d 1170 (Fla. 1985) states:

> We recognize that to prove a fact by circumstantial evidence, the circumstances must be inconsistent with any reasonable hypothesis of innocence. Id, at p. 1173

In Duest v. State, 462 So.2d 446 (Fla. 1985) this Honorable Court again recognizes this same standard. In considering circumstantial evidence this Court states:

> Such circumstantial evidence must not only be consistent with the defendant's guilt, but must also be inconsistent with any reasonable hypothesis of innocence. Id. at p. 448

Applying this rule of law regarding circumstantial evidence to this case, two reasonable hypotheses of innocence are readily

apparent. The first hypothesis is that the hair discovered is not from Linda Pikuritz and the shell is not from the necklace. The second hypothesis is the Appellant talked to the victim on October 12; perhaps she was even in his car and the hair and shell were left. Then he left her alive and someone else killed her.

It was established that the Appellant had an existing relationship with the victim and had talked to the victim on numerous occasions for extended periods of time in the past. No one indicated that the Appellant at any time made improper advances. He had given the girls beer and marijuana on occassion, he did not fondle them or make lewd suggestions. Thus there is nothing unusual in the fact that the Appellant was talking to the victim, if it was the victim, on October 12th. He talked to her, perhaps she got in his car, perhaps the necklace broke, perhaps a hair fell out or even snagged on something and was pulled out. Then she got out and he drove away.

These innocent scenarios are reasonable, indeed they are inescapable. They are also consistent with innocence. Further enhancing the reasonableness of these scenarios is the testimony by the Appellant's mother that she engages in shell craft work and in fact had transported dove shells in that car on numerous occasions. (R2696). The shell discovered in the car of the Appellant, even when considered in a fashion giving the most favorable interpretation to the state's evidence could have come from the shell collection of the mother. The nature of the shell

itself and the large numbers of these shells that were available in this particular area lends credence to Appellant's suggestion that the presence of the shell in his car is not inconsistent with a reasonable interpretation of innocence.

Horstman v. State, 530 So.2d 368 (Fla. App. 2 Dist. 1988) is very similar to the facts sub judice. In Horstman the evidence linking the defendant to the victim included unsuccessful sexual advances in a bar, pubic hair on the corpse which was indistinguishable from the defendant's, inconclusive blood analysis and a fingerprint not matching the defendant on a cigarette lighter near the victim. The victim's pubic hair had been singed. The Second District Court in considering such evidence found that this was insufficient circumstantial evidence to support a finding of guilt. Herein a comparison was made between a hair sample found in the Appellant's car and a head hair which allegedly belonged to the victim but was obtained from a ski cap. The head hair sample was broken and incomplete but a state's witness indicated that they were comparable. Further, there was testimony which placed the Appellant in the company of the alleged victim, just as there was testimony which placed Hortsman in the company of the victim. Blood analysis in Horstman was inconclusive. Appellant contends that the inconclusive blood analysis in Horstman is analogous to the inconclusive nature of the testimony concerning the source of a dove shell.

In Horstman the Second District Court specifically

considered the nature and weight to be given to hair sample evidence. The Court stated:

> ...In a somewhat similar case (citation omitted), this court discussed the problem of basing a conviction on hair comparison evidence. While admissible, hair comparison testimony does not establish certain identification as do fingerprints. Id. at p. 370.

The state's expert sub judice was an FBI expert, Agent Malone. Coincidentally the same expert testified in Horstman and the court commented on his zeal. The court states:

> The strongest evidence implicating Horstman in Peterson's murder is the hair that was found on her body. Although hair comparison analysis may be persuasive, it is not 100% reliable. Unlike fingerprints, certainty is not possible. Hair comparison analysis, for example, cannot determine the age or sex of the person from whom the hair came. The state emphasizes that its expert, Agent Malone, testified that the chances were almost non-existent that the hairs found on the body originated from anyone other than Horstman. We do not share Mr. Malone's conviction in the infallibility of hair compairson evidence. Thus, we cannot uphold a conviction dependent on such evidence.
>
> Moreover, as we explained in Jackson, even if the hair evidence were as positive as a fingerprint, the state failed to show that the hair could only have been placed on the victim during the commission of the crime. Id. at p. 370

The Second District Court recognized that hair comparison testimony, while admissible, does not establish certain identification as do fingerprints. Horstman, supra. The decision also recognizes the fact that even though Horstman was in the vicinity of the crime and with the victim, this coupled with hair identification is nonetheless insufficient to establish beyond a reasonable doubt that he was the perpetrator of the

homicide.

Jackson v. State, 511 So.2d 1047 (2 Dist. 1987) also considers hair comparison in a circumstantial evidence case and once again the facts are similar. The decision states:

> "There were three items of crucial evidence presented by the state: first, the consistent bite mark; second, Jackson's statement to the Fullers that the victim had been bitten; and third, the strands of hair found on the victim matching Jackson's hair." Id. at p. 1049

Comparing these three items of crucial evidence in Jackson with the items present in the case sub judice it is clear that the two are on all fours. The shell is comparable to the bite mark which upon judicial analysis was deemed to be inconclusive. The statement herein is comparable to Jackson's knowledge statement. Here a hair identification links the victim to the Appellant's car. In Jackson however the hair evidence is stronger since the hair was the defendant's on the deceased's body.

The Second District in Jackson rejected the contention that a conviction could be had upon the basis of this evidence.

> Given the quality of the state's evidence, it is clear that Jackson's conviction hinges on two hairs found on the victim's clothing which matches his hair sample. Hair comparison testimony, while admissible does not result in identification of absolute certainty. Id. at p. 1049

The hair identification herein should be given less weight than that in Horstman and Jackson. In these cases the identification was of a hair of the defendant's found on or about the corpse. Herein the hair was found in the Appellant's car far removed from the corpse in both time and distance. Thus even if

one crosses the hurdle of identification, there is still the lack of evidence regarding how it came to be there.

This Honorable Court recently had occassion to apply the circumstantial evidence rule to a homicide case. In Cox v. State, 14 FLW 600 No. 50, December 22, 1989 (Supreme Court of Fla., Case No. 73,150) this court reaffirms the general rule and adopts the reasoning of Horstman, supra, and Jackson, supra, as it applies to hair identification and circumstantial evidence. Again the facts in Cox as they are in Horstman and Jackson are virtually indistinguishable from the facts sub judice. The decision of the court herein should also be the same.

The question is then does the inconclusive hair sample when coupled with the inconclusive shell and considered in light of the ambiguous statement give rise to proof beyond a reasonable doubt? The answer is clearly no. The evidence creates no more than a possibility or an inference that Mr. Scott committed this offense. Equally likely possibilities indicate innocence. Under such circumstances the decision must be reversed.

(ii). The State Failed to Establish a Corpus Delecti.

As earlier stated the corpus delecti in a homicide case consists of:

1. the fact of death,
2. the existence of the criminal agency of another,
3. the identity of the deceased.

Buenoano v. State, supra. In order to sustain a conviction for the offense each of these elements must be proven beyond a

reasonable doubt. If direct evidence is not available, circumstantial evidence may be resorted to with regard to proof of identity. The circumstantial evidence used however must be of the most convincing, satisfactory and unequivocal proof that is compatible with the nature of the case. Trowel v. State, 288 So.2d 506 (Fla. App. 1 Dist. 1973). The Court in Raulerson v. State, 358 So.2d 826 (Fla. 1978) states:

> If circumstantial evidence is resorted to, the proof must be the most convincing, satisfactory, unequivocal proof that is compatible of the nature of the case. Id. at p. 829

Application of this standard to the case at bar indicates that proof of the identity of the victim must be evidence of a nature which is the most compelling possible. This case was compatible with the application or use of scientific tests in determining the identity of the discovered body. Specifically dental records were available. (R1738-39) Arguably fingerprints and or blood typings were also compatible with the nature and evidence of the case sub judice. These tests however were not resorted to or in the alternative were lost due to a passage of time. This lost time however cannot ease the state's burden of proof.

Trowel, supra., considers different methods whereby identity of a deceased can be established. One of these methods recognizes that circumstantial evidence such as the contents of the body's billfold, rings and other personal effects can be utilized. Trowel arguably contemplates that the personal effects

utilized will be of such a personal nature that they are intimately connected with the body. A billfold for example is normally associated with a pocket on or about the body. A ring is worn on the finger. Garments are normally found on the body. This is what is arguably contemplated in Trowel. Such is not the case sub judice. There was testimony regarding the presence of brass butttons which were compatible with those found on jeans worn by the victim, but these buttons were not identified as being so unique or individual that they were distinguishable from other generic buttons. It is significant to note also that the intimate garments which were allegedly discovered in the area of the body were not connected or immediately associated with the remains. Rather they were discovered some distance from the body and cannot be said to be connected specifically or intimately associated with the corpse.

It is insufficient to prove the identity of the body by a preponderance of the evidence or by circumstances indicating a likelihood that the body is in fact the deceased. This is a specific element of the crime and must be proven beyond a reasonable doubt. Trowel, supra., Buenoano, supra., Raulerson, supra.,

Certain concessions were made during the opening statement by trial counsel. These concessions however cannot work to relieve the state of its burden of proof with regard to these essential elements of the offense. Arguments of counsel, be it opening or closing, are not evidence. At worst these

concessions are in the nature of a stipulation, and the defense cannot stipulate to these matters. This Honorable Court has rejected the validity of such a stipulation and has in fact indicated that the defense in a homicide does not have the ability to stipulate as to these essential elements. Foster v. State, 369 So.2d 928 (Fla. 1979) considered the validity of a defendant's stipulation to the existence of criminal agency and identity. The court rejected a stipulation of this nature stating:

> "A defendant cannot, by stipulating as to the identity of a victim and the cause of death, relieve the state of its burden of proof beyond a reasonable doubt." Id, at p. 930

Admittedly the defense motive for stipulation in Foster differs from the misstatement herein. The rule of law however remains the same. The inartful concessions made during an opening statement are of a much less solemn and binding nature than a stipulation. If a defendant in a murder case cannot stipulate to the existence of essential elements such as these then certainly he cannot by inadvertence create their existence. In this case reference to the record and the evidence presented shows that there is simply insufficient proof of this particular element, identity of the deceased.

Due to the failures of proof in the state's case, the trial court's denial of the Appellant's motion for judgment of acquittal must be reversed, and the Appellant's conviction and sentence vacated.

ISSUE SIX: FLORIDA STATUTE 921.141 IS UNCONSTITUTIONAL.

Section 921.141(5)(h) Fla. Stat. Ann. (1979) sets forth the following as an aggravating factor justifying imposition of the death penalty:

> (h) The capital felony was especially heinous, atrocious, or cruel.

The Appellant filed a pre-trial motion attacking this statute, alleging that Section 921.141 was unduly vague. (R4027-4032). The motion was denied.

The language in the Florida Statute is identical to the language contained in an Oklahoma statute considered by the United States Supreme Court in Maynard v. Cartwright, 100 L.Ed. 2d 372, 486 U.S._____ 108 S.Ct._____ (1988).

In Maynard the court initially reiterated the fundamental principles underlying the death penalty. The court stated:

> .... Since Furman, our cases have insisted that the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action. Id at p. 380 (citations omitted).

The court then applied this concept to the language in question. It stated:

> ... especially heinous, atrocious, or cruel - gave no more than guidance than the "outrageously or wantonly vile, horrible or inhuman" language that the jury returned in its verdict in Godfrey. Id. at p. 382

The court thereafter rejected the notion that the use of the

word "especially" gave sufficient guidance and rejected the Oklahoma statute and this aggravator in toto. It follows inescapably that the Florida statute is similarly flawed.

The fact that the jury's finding is reviewed by the trial judge is likewise insufficient. In considering the sufficiency of judicial review the court found that the Oklahoma courts finding that "the events recited by it adequately supported the jury's finding was indistinguishable from the action of the Georgia court in Godfrey which failed to cure the unfettered discretion of the jury and to satisfy the commands of the Eighth Amendment." Maynard, id. at p. 382.

A jury recommendation of life must be afforded great weight upon appellate review. The fact that a jury may arbitrarily define these terms impacts directly upon the Eighth Amendment and the due process rights of the Appellant.

The vague language of the statute itself might be acceptable if this Court in its decisions established a benchmark. Unfortunately this has not been done. Reference to the cases upholding a death penalty based on a heinous aggravation displays a lack of consistency. They provide no discernable consistent standard, and without this standard the statute is infirm.

Section 921.141(5)(i) Fla. Stat. Ann. (1989) recognizes that if the homicide was committed in a cold calculated manner without moral or legal justification it merits the death penalty. This section suffers from the same infirmities as does the heinous, atrocious aggravator previously discussed. It fails to provide

the sentencing jury with sufficient guidelines to assure that it will be applied in a rational manner and not arbitrarily. By definition all premeditated murders are cold and calculated. Absent an intent to kill and sufficient time for reflection, a first degree homicide has not occurred. Thus whenever the jury convicts of first degree premeditated murder the jury could, and likely will, conclude that this aggravating factor applies. Having just convicted a defendant of premeditated murder is it likely the jury will thereafter find some "legal or moral justification" during the sentencing phase? Thus this aggravator does not guide the jury in limiting its discretion. Instead it provides a mechanism whereby every case can become a death case. Such an aggravator obviously does not fulfill the "channeling and limiting of the sentencer's discretion" called for in Maynard. The statute is therefore improper.

ISSUE SEVEN: THE CLOSING ARGUMENT OF THE PROSECUTOR IN THE PENALTY PHASE IS FRAUGHT WITH IMPROPER COMMENT AND PREJUDICIAL APPEALS TO THE JURY. ALTHOUGH NO OBJECTION WAS MADE IT CONSTITUTED FUNDAMENTAL ERROR.

The inappropriate comments commence in the opening paragraphs of the state's argument. Initially the state comments improperly on inartful language used by defense counsel in his cross-examination of witnesses. They impliedly suggest that the language used by defense counsel should be held against the Appellant and thereby attempt, in closing, to inflame the passions of the jury. The state indicates "that was the damn girl on the bicycle that Mr. Johnson told you about." (R3065). Although no objection is made the only purpose in repeating these unfortunate comments is to prejudice the jury against the Appellant by highlighting inappropriate conduct on the part of defense counsel. Such a tactic is improper. Conduct of counsel is not evidence. Although the statement was made, it should not be a feature of the closing comments by the state.

The state makes reference to the fact that the Appellant sometimes smoked marijuana and shared it with twelve year old girls. (R3075) Appellant concedes that evidence of his marijuana usage was introduced during cross-examination. Its use in closing argument however is simply to argue propensity. If the only purpose an argument serves is to inflame the passions of the jury, it is inappropriate to comment upon it. The context of this comment by the state serves no purpose other than to bring to the attention of the jury the fact that the Appellant had

allegedly smoked marijuana with young girls. It does not enhance or detract from the state's argument, it simply prejudices the Appellant by demonstrating propensity. The cumulative effect is to mislead the jury regarding its proper function. Although no objection was voiced the cummulative effect mounts.

On (R3081) the state began a theme which they continued throughout their argument. This theme consisted of a misstatement of law, the effect of which was to misinform the jury and to mislead them as to the proper method whereby they should evaluate evidence in the case. The state argues "the court will inform you that possibilities are not reasonable constructions to be considered by you in judging this evidence. (R3081). This statement is totally incorrect in that it urges the jury to ignore reasonable "possibilities" which might arise from the evidence. In a circumstantial evidence case the jury's total function is to weigh and evaluate the reasonableness of various competing possibilities. By urging the jury to ignore possibilities, the state totally misled the jury as to how evidence should be evaluated. This theme of ignoring inferences from the evidence is continued. The state indicates "you will be asked to speculate as to that, because no evidence was introduced in that regard in this case." (R3082) The jury is again urged to ignore "possibilities" and comments without foundation in the evidence. (R3084) The theme is used repeatedly to urge the jury to ignore possibilities which can reasonably be deduced from the evidence. This is contrary to the jury instruction and is

repeated to the jury again and again during the state's argument. An argument which confuses and misleads the jury is improper even if no objection is voiced.

The state further erred by denigrating defense witnesses. The prosecutor characterizes the defense witnesses as "drug pusher gents." (R3084) The state argued, "and yesterday, Mr. Johnson brought his drug pusher gents in and he paraded them in front of you." (R3084) He repeatedly pointed out that the defense witnesses were involved in drugs. This denigration of defense witnesses culminates with the following comment "Ladies and gentlemen of the jury I do not condone drug pushers. I would rather prosecute them than listen to them testify from this witness stand." (R3085) These comments do nothing to assist the jury in evaluating the credibility of witnesses. They are nothing more than inflammatory remarks aimed at arousing the passions of the jury against the defense case through the use of statements of personal opinion by the prosecutor. This type of argument was considered in Duque v. State, 498 So.2d 1334 (Fla. App. 2 Dist. 1986). In this case the Second District had occasion to consider a reference to defense witnesses as "scum bags." The court indicates:

> The statement was that the witness was "the type of person, characterized around this courthouse as a scum bag." We agree with defendant's arguments that this was an improper expression of opinion by the prosecutor, the prejudice of which was exacerbated by the indications that others in the courthouse would share the same opinion.
> Id. at p. 1337

The Appellant contends that a characterization as a "drug pusher gent" is no less offensive than a scum bag labeling. Regardless of the relative rankings the harm condemned in Dugue is present in the case sub judice. It is important to note also that in Dugue there was no contemporaneous objection to this name calling during closing argument. Nonetheless the Second District reversed, apparently finding that the harm caused by such conduct worked fundamental error.

The Third District also has considered and strongly condemned personal opinion and name calling during closing. When a prosecutor called the defendant a Dragon Lady, an appellation he borrowed from the testimony of the defense psychiatrist, the court stated in Green v. State, 427 So.2d 1036 (Fla. App. 3 Dist. 1983):

> "It is improper in the prosecution of persons charged with a crime for the representative of the state to apply offensive epithets to defendants or their witnesses, and to engage in vituperative characterizations of them. There is no reason, under any circumstances, at any time for a prosecuting attorney to be rude to a person on trial; it is a mark of incompetency to do so." Id. at p. 1038

The state compounds the error here by stating: "Ladies and gentlemen, I believe I was talking to you about the drug pusher defense." (R3086) These comments by the state do not meet the merits of the defense or comment on inferences raised by the evidence. They instead emotionally and improperly denigrate the defense and their witnesses. They are not argument, they are improper statements of opinion, the cumulative effect of which

amounts to a fundamental denial of a fair trial to the Appellant.

The lamentable chain of prejudicial comments continues with the opening remarks of the state attorney on rebuttal. The record states:

> "Ladies and gentlemen of the jury: I am going to be brief. You heard what I anticipated you would hear: Innuendo, speculation, possibilites, imagination, more game shows and a new twist, fairy tales. This is not what a trial is about." (R3126)

Thus the same errors are repeated with a "new twist, fairy tales." A similar fairy tale allusion during closing was considered in Jackson v. State, 421 So.2d 15 (Fla. App. 3 Dist. 1982), and condemned. In Jackson the state argued:

> Ladies and gentlemen of the jury, there are only four words missing from Mr. Smoley's unbelievable summation. There are only four words missing: once upon a time. Id. at p. 15

The references to once upon a time in Jackson and to fairy tales here are personal opinions of the state attorney and have no place in argument. The oblique reference to fairy tales in Jackson was harshly condemned by the court and contributed to the reversal therein. The same condemnation should occur in the case sub judice.

Immediately after calling the defense case a fairy tale the prosecutor commented on the fact that the Appellant did not testify. He stated:

> A trial is about testimony. A trial is about evidence. A trial is about credibility of all parties in the case....(emphasis supplied) (R3126)

A comment on the failure to testify has been universally condemned. When as here it is part of ongoing improper comments

it contributes to fundamental error. Ryan v. State, 457 So.2d 1084 (Fla. App. 4 Dist. 1984).

The state attorney again adds to the cumulative error by reminding the jury that:

> "... Bradley Scott was indicted by a grand jury of the people of this state sworn under oath to investigate that matter; an oath similar to your own; an oath similar to the officers who investigated this case that they take when they wear their badge." (R3130-31)

It is difficult to conceive of more offensive comments. What relevant argument is premised on the fact that a grand jury under oath investigated the crime? None. What relevant argument is predicated by an impassioned reminder that officers under oath investigated the crime? None. In the midst of these emotional appeals the state golden rules the jury, reminding them that the oath of the grand jury and the officers is "similar to your own." (R3130) These three improper emotional appeals in just six lines aptly demonstrate the overall theme and tone of the state's argument.

In closing the state argued that transactional immunity was not given to a witness.

> "Mr. Johnson spoke to you about Eugene C. Berry, an Assistant State Attorney murdered in this county in 1982. He's not here to testify for you. Mr. Johnson implied that Eugene C. Berry granted immunity for murder to Phil Drake. The evidence did not show that. And that's simply not true." (R3130).

Shortly thereafter the prosecutor again stated:

> "Transactional immunity; Phil Drake didn't happen." (R3131).

These comments are objectionable on two grounds. First they imply that if Gene Berry were present, he would testify in some fashion favorable to the state. Arguments of this type which imply that other witnesses if available would testify for the state are improper. Richardson v. State, 335 So.2d 835 (Fla. App. 4 Dist. 1976). More importantly however the state's assertions are false, and the state knew they were false. The record throughout supports the fact that Phil Drake was given transactional immunity. (R2752, 2824, 3401) In Periu v. State, 490 So.2d 1327 (Fla. App. 3 Dist. 1986) the state, as they did herein, argued a fact which they knew to be false to the jury. This was condemned, and resulted in reversal.

Fundamental error can occur from an accumulation of errors. Although unobjected to, if the court finds that as result of this accumulation of errors the defendant was denied a fair trial, the conviction must be reversed and a new trial granted.

The litany of errors in this case commenced when an eight year delay occurred before the arrest herein. It continued during voir dire where the jury was instructed repeatedly that the death was not an accident, the victim was Linda Pikuritz and an investigation had substantiated these facts. It continued with the judge's comments during the trial on a key point as to how a particular issue should be resolved and with defense counsel's unfortunate references to the deceased "as a damn little girl." (R1234) It culminated in closing arguments when extremely prejudicial comments were made by the state in its

summation and the defense counsel cursed at the jury, (R3119, 3106, 3105, 3095) so offending the court that he was ordered to show cause. (R3122-3126) The culminative effect thereof was to deny the Appellant a fair trial. Even though many of these errors were not objected to they nonetheless worked a deprivation upon the Appellant and the conviction should be reversed.

ISSUE EIGHT: THE COURT ERRED IN ITS ANALYSIS OF THE EXISTENCE OF AGGRAVATING AND MITIGATING FACTORS AND ITS DECISION TO IMPOSE THE DEATH PENALTY.

The Court found that the homicide herein was heinous, atrocious and cruel. (R4236) This finding is unsupported by the record.

The medical examiner indicated that the victim in this case was unconscious at the time of death. (R1733) No evidence indicates what type of trauma, if any, was inflicted prior to death. (R1733) One can only speculate and theorize in this area. Aggravating factors however must be established beyond a reasonable doubt. The heinous, atrocious and cruel aggravator cannot be applied if in fact the victim is semi-conscious or unconscious and unable to appreciate the nature of his or her death at the time of occurance. Scott v. State, 494 So.2d 1134 (Fla. 1986); Jackson v. State, 458, 463 (Fla. 1984); Herzog v. State, 439 So.2d 1372 (Fla. 1983). While the circumstances sub judice may be unsettling they are insufficient to support a finding that they are heinous, atrocious and cruel. Reference to the written findings by the trial court indicate that the judge in making this finding acknowledged that he did not know whether the victim felt pain or even was aware of her impending death. (R4236)

The court further found as an aggravating factor that the Appellant committed the crime while engaged in the commission of a kidnapping. (R4235) There is no evidence to support this finding. In determining whether an aggravating factor exists

there must be proof beyond and to the exclusion of every reasonable doubt. A finding that a kidnapping occurred requires a finding that the defendant forceably, secretly or by threat confined, abducted or imprisoned the victim against his or her will. A set of circumstances involving a voluntary accompaniment to the scene of the crime followed by an attack which rendered the victim unconscious at the scene would not support a finding of kidnapping herein. Such an explanation is certainly consistent with the sketchy evidence which was presented by the state. It is apparent that the confinement and or transportation of the victim herein, if it occurred, occurred as an incident to the homicide and not as an independent crime. This Honorable Court has recognized that a kidnapping does not occur where the victim is moved an insignificant distance in a short period time. Fitzpatrick v. State, 437 So.2d 1072 (Fla. 1983). Further, if the transportation to the scene was consentual and the movement occurred only after the victim was rendered senseless, a kidnapping based on modern cases did not occur and the court's reliance on kidnapping as an aggravating factor is misplaced. Fitzpatrick. id. The case sub judice differs from Ruffin v. State, 397 So.2d 277 (Fla. 1981) in that in Ruffin the facts of the kidnapping were known and proven by the state during its case in chief. The facts here are unknown and only speculation is possible.

It should be noted that the jury was not instructed regarding a kidnapping. (R3254) In fact this aggravating factor,

a kidnapping, was not even requested by the state. Instead the jury was instructed concerning sexual battery, a possibility devoid of record support. No indication was given that a kidnapping was or would be considered as an aggravating factor. Appellant is aware that previous rulings have indicated that he is not entitled to pre-trial notice of the aggravating factors with which he must contend. It is nonetheless inappropriate to specifically advise the Appellant that only a homicide occurring in the course of an attempted sexual battery will be considered and then unbeknownst to the Appellant expand consideration by the court to include a totally separate aggravating factor. Such a practice thwarts the requirements of Section 921.141 which requires that the aggravating factors be submitted to the jury for consideration. It is assumed that a properly instructed jury will thereafter render an appropriate advisory sentence. It is a denial of due process to misinstruct the jury as to the applicability of one factor and thereafter substitute a wholly separate factor; one never submitted to the advisory jury for justification of a death sentence. The statute confers substantive rights upon the Appellant. He cannot be deprived of these without creating a denial of due process. The statute requires that aggravating factors be submitted to the jury for consideration and an informed recommendation made thereon. If an advisory sentence is to have meaning, it must be the product of a jury that has been properly instructed. The fact that the trial judge can thereafter accept or reject the jury

recommendation is of no concern because the standard of review for the imposition of a death penalty following a recommendation of death differs from the standard of review for the imposition of a death sentence following a recommendation of life. The procedure utilized by the court also deprived the Appellant of his rights to meaningfully argue the merits of the various aggravators since he was advised specifically of the factors which would be considered and the court thereafter considered others.

The court also found that the homicide occurred to permit the Appellant to avoid his own lawful arrest. (R4235) The record does not support this finding. In fact there is no indication in the record as to what motivated the perpetrator of this homicide. Admittedly one arguable motivator was the desire to avoid lawful arrest. Unfortunately in today's times another equally arguable motivator is some deviant sexual preference or sadistic drive on the part of the perpetrator. Such a sadistic drive, although horrifying does not give rise to the witness elimination aggravator. Another equally plausible explanation for the nature of this homicide is that the perpetrator believed the victim was in fact dead at the time the gasoline was poured. The testimony of the medical examiner unequivocally indicated that the victim was unconscious at the time. It is easy to imagine a scenario whereby the victim, having been rendered unconscious by some unknown means, is believed by the perpetrator to in fact be dead. Thereafter under this mistaken belief

gasoline is poured in an attempt to obliterate evidence from a corpse, not testimony from a living person. This scenario is certainly a possibility under these facts and therefore negates the use of the witness elimination aggravator. Rogers v. State, 511 So.2d 526 (Fla. 1987) considers the applicability of the witness elimination aggravating factor. In doing so this court states:

> "This particular factor requires clear proof beyond a reasonable doubt that the killing's dominant or only motive was the elimination of a witness." Id. at p. 533

Accord Bates v. State, 465 So.2d 490, 492 (Fla. 1985); Caruthers v. State, 465 So.2d 496, 499 (Fla. 1985). It is possible to speculate endlessly about the motivation for this tragedy. The fact that such speculation at this time is possible in itself indicates that this aggravating factor has not been proven.

Finally the court found that the homicide was committed in a cold calculated and premeditated manner without any pretense of moral or legal justification. (R4236) Once again the motivation for this crime lends itself to horrible speculation. However speculation is the only insight which we now have regarding the motivation for or the circumstances surrounding this homicide. If the perpetrator believed the victim to in fact be deceased at the time of the immolation then the aggravator does not exist. Aggravating factors must be proven beyond a reasonable doubt. Bates, supra. at p. 493; Caruthers, supra. at p. 498. The inability at this juncture to determine the facts and

circumstances surrounding this tragedy preclude the finding of this aggravating factor.

The death penalty is to be used sparingly, only in those instances when the aggravating factors have been established beyond a reasonable doubt. If the death penalty is based upon speculation, supposition, or assumptions, then the proofs have failed and the death penalty is not justified. Each of the aggravating factors found herein by the trial court are not supported by the record. It was therefore improper to consider them, and the sentence of death should be vacated.

As mitigators the Appellant presented evidence that he was:

1. A good son. (R3227-29, 3229-30).
2. A good husband. (R3223-26).
3. A good father. (R3223-26).
4. A good prisoner who is not violent or causes problems. (R3232-33).
5. A hard worker. (R3230-31).

This testimony constitutes five separate mitigating factors. The court however improperly lumped these mitigators into one factor, good character. The court states in its written findings, "the defense presented evidence as to only one -the good character of the defendant." This failure to recognize the multitude of mitigators clearly skewed the balancing process and resulted in an erroneous finding. The judge's misunderstanding of the nature of mitigating factors is reflected in the fact that he misinstructed the jury in this area. Specifically the jury was instructed by the judge that their consideration of mitigating factors was limited to the character of the Appellant. (R3255) This instruction is clearly erroneous. In Floyd this court states:

> The trial court must at the very least instruct in accordance with the standard jury instruction that the jury may consider in mitigation:
>
> 8. Any other aspect of the defendant's character or record, and any other circumstance of the offense. Fla. Std. Jury Instr. (Crim.) (Penalty Proceedings-Capital Cases at 81)

It is further apparent that the court in balancing the mitigating factors against the aggravating factors improperly considered non-statutory aggravating factors. When weighing the mitigators the court states:

> "The court was moved as she related that her three year old daughter had trouble sleeping and longs for the comfort and protection of her father. In the words of defense attorney, Mark Cooper during his address to the jury came back to me: "The Bradley Scott before you today is not the same man who committed this crime in 1978." That may be.
>
> But then I reflect that Linda Pikuritz would be 21 years of age now. Linda Rizzo and Angela Boules, Linda's classmates who testified in this trial, both are married and have babies today. Linda Pikuritz was never allowed that chance. And of Bradley Scott -he was afforded six long years of freedom after his crime; six long years he did not deserve -time enough to start a family." (R4236)

The court's analysis does not weigh the mitigating factors against the aggravating factors. It instead weighs the mitigators against the fact that Linda Pikuritz was denied her opportunity to raise children. It further weighs the mitigating factors against the fact that Bradley Scott was not prosecuted for six years. The balancing process requires a balancing of the mitigating against the existing aggravators, not the mitigating against non-statutory aggravating factors. The court's written analysis makes it clear that improper balancing factors were

considered by the court, and the decision to impose death in the case was flawed. The decision should therefore be set aside.

ISSUE NINE: THE COURT ERRED IN EXCUSING JUROR GOSTYLA FOR CAUSE ON A WITHERSPOON ANALYSIS.

To excuse a death scrupled juror for cause the record must establish that a juror's principles, whatever their source, must be so strong that they would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. Wainwright v. Witt, 83 L.Ed. 2d 841, 852, 469 U.S. 412, 1055 S.Ct. 844 (1895).

The court erred in applying this standard to the responses of juror Gostyla. (R120). The responses of this juror indicated initially that she would be unable to recommend a death penalty under any circumstances. (R122) Ultimately however she indicated that she could follow the law and consider the imposition of death. She stated:

> The Court: Does that mean in the appropriate circumstance. that you could make a recommendation in facor of teh death penalty to the Court?
>
> Mrs. Gostyla: I imagine I could, then. (R124).

Thereafter the juror recognized the difficulties the consideration of the death penalty would cause her but reaffirmed her ability to set aside those problems and follow the law. (R125).

The Appellant's right to a fair trial encompasses the right to a jury panel which represents a cross section of the community. This is a right which is premised on the Sixth Amendment of the United States Constitution. If a juror is to be excused for cause on a Witherspoon rationale there must be a

record showing that the juror's scruples would prevent or substantially impair his or her ability to follow the law and her oath. Witherspoon v. Illinois, 391 U.S. 510 88 S.Ct. 1770, 20 L.Ed 2d 776 (1968), Wainwright v. Witt, supra. No such showing is present in this record. In fact the contrary is established. The juror repeatedly voices her willingness to follow the law despite her convictions. Excusal under these circumstances is error.

Improper excusal for Witherspoon reasons is reversible error, not subject to a harmless error analysis. Gray v. Mississippi, 481 U.S. 648, 107 S.Ct. 2045, 95 L.Ed 2d 622 (1987). The death penalty imposed herein should therefore be set aside or the matter remanded for further proceedings.

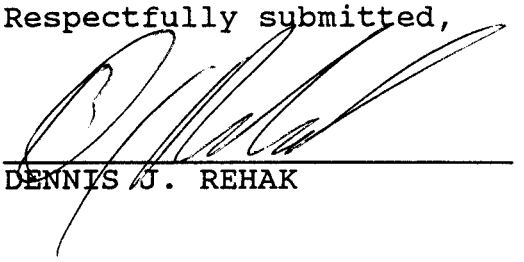
CONCLUSION

The court erred in denying the Appellant's pre-trial motion to dismiss and motion for directed judgment of acquittal. The matter should be remanded with instructions that the charges be dismissed and the Appellant discharged.

In the alternative the Appellant did not receive a fair trial due to the exclusion of testimony by the court, comments on the evidence by the trial court, and improper arguments by the prosecutor during closing. The matter should be remanded for a new trial.

Finally the death sentence was improperly imposed. It should be set aside.

Respectfully submitted,



DENNIS J. REHAK

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Brief of Appellant BRADLEY P. SCOTT, has been forwarded to Davis Anderson, Asst. Attorney General, Dept. of Legal Affairs, Park Trammell Bldg., 8th Floor, 1313 Tampa Street, Tampa, FL 33602 this 8th day of January, 1990.

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