IN THE SUPREME COURT OF FLORIDA

CASE NO. 74,867

BORIS McKINNEY

Appellant,

vs.

THE STATE OF FLORIDA

Appellee.

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

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# INITIAL BRIEF OF APPELLANT

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WILLIAM A. CAIN
Special Assistant Public Defender
1390 N.E. 162nd Street
North Miami Beach, Florida 33162
Telephone: (305) 944-4858
Fla Bar No. 250260
Counsel for Appellant

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## INTRODUCTION

The Defendant, BORIS McKINNEY, the Appellant herein, was prosecuted by the State of Florida, the Appellee herein, in the Circuit Court of the Eleventh Judicial Circuit of Florida, In and For Dade County. For continuity, we shall refer to the Appellant and Appellee in this Brief as "Defendant" and "State" respectively.

The symbol "R" as used herein designates the Record on Appeal which includes the transcript of trial proceedings. The Symbol "SR" as used herein designates the Supplemental Record on Appeal which is primarily the transcript of the proceedings in the penalty hearing of this cause.

## STATEMENT OF THE CASE

Defendant was charged by Indictment filed on the 3rd day of March, 1987 with First Degree Murder, (Count 1), use of a firearm in commission of a felony (Count 2), Armed Robbery (Count 3), Kidnapping while armed (Count 4), Burglary of a Conveyance While Armed, (Count 5), and Grand Theft while acting in concert with one Wilfred Gaiter (Count 6), all of which allegedly occurred on the 12th day of February, 1987. (R. 1-5).

The following defense Motions were made: (1) Motion to Suppress Defendants Confessions, Admissions and Statements (R. 135-136), (2) Motion for Individual Voir Dire and Sequestration of Jurors During Voir Dire (R. 137-138), (3) Motion to Have Police Officers Before The Court For Identification (R. 139), (4) Motion to Disclose Grand Jury Testimony (R. 131-132), (5) Motion in Limine (R. 355-356) and (6) Motion To Prohibit State From Introducing Evidence To Rebut Mitigating Circumstances In Its Case In Chief. (R. 357-358).

Trial commenced May 30, 1989. (R. 6). The jury rendered guilty verdicts on all 6 counts on June 7, 1989. (R. 347-352).

The Court entered Judgment on all 6 verdicts on June 7, 1989. (R. 353). The penalty phase was continued to July 12, 1989. (R. 368-369). The jury by an 8 to 4

vote recommended the death penalty on the murder charge. (R. 368). The Court imposed the death penalty on Count One, the murder conviction. (R. 370). The Court further sentenced Defendant to life imprisonment on the Armed Robbery (Count 3) to run consecutive to the murder sentence with credit for time served in jail of 881 days. (R. 371). As to Count 4, Kidnapping While Armed, and Count 5, Burglary of a Conveyance while Armed, the Court sentenced Defendant to imprisonment for life to run consecutive to each other and consecutive to Count 3, the Armed Robbery. (R. 372).

The Court did not sentence the Defendant on Count 2, use of a firearm in the commission of a felony, nor on Count 6, grand theft while acting in concert with Wilfred Gaiter.

Notice of Appeal was filed September 28, 1989. (R. 389).[1] This appeal follows.

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1. The jurisdiction of this Court is invoked pursuant to Article V, Section 3(b)(1) of the Constitution of the State of Florida, Section 921.141(4) Florida Statutes (1983), and Florida Rules of Appellate Procedure 9.140(b)(4) and 9.030(a)(i). This Court also has jurisdiction to review the convictions for kidnapping while armed and armed burglary which arose from the same transaction and trial as did the murder conviction. Riley v. State, 366 So. 2d 19, 20, n. 1 (Fla. 1978), appeal after remand, 413 So. 2d 1173, cert den. 103 S. Ct. 317, 459 U.S. 981, 74 L. Ed. 2d 294, reh. den. 103 S. Ct. 773, 459 U.S. 1138, 74 L. Ed. 2d 985; Huckaby v. State, 343 So. 2d 29, 30, n. 1 (Fla. 1977).

## STATEMENT OF THE FACTS

## MOTION TO SUPPRESS

As to all confessions oral or written. (R. 603-604)

DETECTIVE HOLLIS ANDREWS

OFFICER JESUS PEREZ

DETECTIVE JON SPEAR

were all called as witnesses for the State and their testimony was the same as in the trial in chief which we have included in the trial portion hereof.

BORIS McKINNEY called as a witness in behalf of his Motion to Suppress. He was 22 and did not kill Franz Patella. (R. 712). The police hit him, Detective Jon Spear shoved him against a wall, Officer Bishop put a pump shotgun to his temple and told him to confess and sign it. Before that they jumped on him and beat him beside his head 3 or 4 times. The sergeant came in and did the same thing. (R. 713).

Told them 3 or 4 times he was never on 36th Street He told police there was a suitcase in the car trunk and he threw it in a dumpster. On the trip to the dumpster they stopped and showed him the location (R. 714) where the man was killed and dumped and accused him of doing that.

He first got into this automobile at 10:00 A.M. at 47th Terrace and 11th Avenue. He drove it around with Wilfred Gaiter. Never took nor hocked a Rolex watch. (R.715).

He was never in the alley at 43rd Street. Spear's account that he told them where to go is false. Near the

dumpster was an empty apartment and the police searched it for the gun. They took him back to the station and "jumped" on him some more. (R. 716). He first drove the car about 10:58 or 11:00 A.M. (R. 717).

Other than when they forced or threatened him he never said he killed anybody. He had $10.00 when picked up. (R. 718).

On cross exam he went through details of beatings until the Court showed him State's Exhibit 3. (R. 741). That picture, Exhibit 3, was taken ... "After I signed the confession."

THE COURT: Which confession was signed? (R. 742). The defendant again reiterated that picture was taken after he "gave" his statement. (R. 743).

THE COURT: "If that picture had indicated any abuse, at all, I might very well have thought differently about this case, but this is a jury question, based upon this man's sworn testimony and the 'detectives' sworn testimony, whether this statement was given freely and voluntarily. And for that reason, the Motion To Suppress is denied. (R. 744).

## TRIAL

The first witness called by the State was Jose Santos (R. 1153) who in the month of February, 1987 worked in a small car shop on northwest 7th Avenue and 43rd Street in Miami. (R. 1157). Around 8:30 or 9:00 in the morning, the exact date not mentioned by the witness or prosecutor, he heard dogs inside the warehouse barking. Walking to a door gate on the side of the building looked into the alleyway where he saw a car drive.

He noticed a black male walk around the car to the driver's area. He opened the door, leaned over and pulled a body from the car and papers and stuff fell out of the car. He threw the body on the side of the alley and kicked the body to get inside the car as the legs were in the way. (R. 1158).

The witness yelled to his wife who was in front to tell her what transpired. He got back in the car, backed up the car to the end of the alley stopped to look down the alley and drove off. Immediately Santos ran across the street to a bar and called 911. Fire Rescue arrived a couple of minutes later. (R. 1159).

When he saw the black male get out of the car he was about 25 or 20 yards away. It was light, morning. (R. 1160). The subject was about 5 nine or 10; 160, 165 pounds wearing blue jeans, red long pullover type of thing, sweat shirt type and white sneakers. No one else seen around

the car at that time. (R. 1161).

He did not walk over to the body but did describe the auto to police; a 4 door white sedan, he thinks a Chevy Celebrity or something of that nature. (R. 1162).

Santos did not see the face of the black man nor did he describe his face. (R. 1165). Defendant's Exhibit A a photograph of a shirt was not the shirt worn by the black male that morning. (R. 1170).

The witness did not hear any shots. (R. 1173). He could not say that Boris McKinney was the black male he saw. The black male was wearing a pullover with horizontal lines. (R. 1176).

LIEUTENANT JAMES POUGH with City of Miami Rescue called by the State testified. (R. 1177). On February 12, 1987 they were dispatched at 9:22 and arrived at the scene 9:25 A.M. When victim first seen very gray and very pale (R. 1180) an indication of a lot of loss of blood. Several bullet wounds were obvious and a head bruise. Because of low blood pressure and the pulse rate (R. 1181) and color we knew he was hemorrhaging. He heard him say "It was a black that shot me." Oxygen was given (R. 1182) trying to keep his vital signs up. On the ride to the hospital he was still able to talk but only semi-conscious. He was conscious and alive when police arrived at Jackson Memorial Hospital. (R. 1183).

DIANE BARNES, the State's next witness, a Miami police officer now involved in police training. (R. 1188).

On February 12, 1987 she was a patrol officer dispatched to the scene arriving at 9:35 A.M. She radioed that Fire Rescue said there was a shooting with 4 or more shots. (R. 1189). She requested ID units for prints, photos and the like and battery units because of injury. She asked victim's name and bent down on her knees to hear him say Franz Patella. Fire Rescue handed her a car rental agreement with that name on it. (R. 1190).

She noticed a nasty scar on his chest. Fire Rescue asked him if he had open heart surgery and he said "yes." She saw blood on him and not on the ground so asked him "Did it happen here" and he nodded his head yes. He said he did not know the person that did it.

She asked him "Well who brought you here? Did you bring him here? or did he bring you here? and he said, "yes" and he said 38th and 36th. So I assumed he was saying 38th Avenue and 36th Street.

So I asked him again, "Are you saying 38th Avenue and 37th Street?" and he said "No, no, three." "Are you saying 3 Avenue and 37th Street?" And he said, "3 Avenue and 37th Street. (R. 1191).

She again asked him "Did he bring you here or did you bring him here?" "I asked him for some assistance to get 95." and I said, "So, instead he brought you here?" "Yes."

He said it was a black male but then they placed an oxygen mask over his face. He was fading fast. (R. 1192).

He kept saying "A, K." She asked if that was the

auto tag and he said yes and nodded his head. (R. 1194). Much later on that day or the next day she saw defendant. (R. 1194). Detective Bishop to the room defendant was in and he was smiling and laughing. This was about 6:30 A.M. or right after roll call. (R. 1195).

Other officers told her more than two were picked up with defendant, more than two in the car when they found it. (R. 1201).

TECHNICIAN SYLVIA ROMANS, the State's witness, goes to a crime scene and photographs, sketches and processes for latent fingerprints and collects evidence at the scene. (R. 1208).

February 12, 1987 at 10:05 A.M. she was dispatched to the scene, arriving at 10:30 A.M. (R. 1209). Victim already taken away. She observed clothing on the ground in the alleyway. She took aerial photographs of the crime scene area. (R. 1210). State's Exhibit 10 is a photo of what she was told was the victim's clothing. State's Exhibit 12 is a view from the center of the alley, west towards 7th Avenue, showing the building on the north side of the alley which is the cabinet shop where there is a large metal drum. (R. 1219). State Exhibits 18 through 26 are photos of the clothing left on the scene. (R. 1221-1222).

State's Exhibit 18 shows a navy blue blazer, a blue and white striped shirt and other articles. Exhibits 19, 20 and 21 are closer photos of those items. (R. 1223). Found bullet holes in the shirt.(R. 1224). A long sleeved blue and

white shirt with initials FP on pocket. Bullet holes in the right side, the arm and torso. (R. 1225).

Black powder marks on clothing suggest gunshot residue. No holes on left side of shirt. (R. 1226). They searched the alleyway, tops of low lying roofs. No weapon was recovered in connection with this case. (R. 1227). Clothing brought to Medical Examiner, Dr. Barnhart to compare holes in the shirt and jacket to the victim. She took additional photographs there (R. 1228), Exhibits 27, 28, 29 and 30. (R. 1229).

She collected clothing that belonged to Defendant and Gaiter and sent it to the lab. (R. 1242). She didn't see any visible blood on defendants' clothing. (R. 1243). She sent defendants' sneakers along with his clothing to be checked for blood. (R. 1247). She photographed 2 red shirts. (R. 1254).

DETECTIVE HAROLD BISHOP a Miami Police Officer, called by the State. (R. 1262). Lead homicide detective on February 12, 1987 investigating the Franz Petella case. Sgt. Vincent picked him up and they arrived at the scene at 11:50. Crime scene technicians and other police personnel were already there. (R. 1263). He stayed at scene until 12:45, 12:50. (R. 1264). Met at police station with Detectives Spear and Amado. Victim was staying at Airliner Motel. We contacted family members, (R. 1266), in Nassau. (R. 1267).

Came into contact with defendant and investigation continued about one month after that. (R. 1269).

DETECTIVE HOLLIS ANDREWS called as a State's witness (R. 1272) assigned to Robbery Division of Miami Police Department. On February 12, 1987 worked 7 P.M. to 3:00 A.M. shift. (R. 1273).

February 12, 1987 at about 10:15 P.M. he was getting on I-95 at 95th Street to go South, driving an unmarked white Dodge Aries. Noticed a vehicle in front which bore license Y-A-K, 73-D which he was previously advised was a stolen vehicle. After verification with the dispatcher he followed it south on I-95. When first spotted it was on entrance ramp from where it proceeded to a middle lane. (R. 1277).

It exited at 69th Street and he followed it to the south side of Circle K store, located at 7th Avenue and 69th Street. (R. 1278). That car stopped and a vehicle was parked behind them. He pulled in behind the parked vehicle. First Officer to arrive with Andrews was Officer Kinchen. (R. 1279).

Then the passenger exited the passenger door walking to the front of the vehicle. Motioned to Officer Kinchen that the subject involved was walking around the front of the vehicle. The other subject was closer to Andrews who at gunpoint had him put his hands against the wall of the store. (R. 1280).

The witness identified the Defendant as the one he arrested. At that time Officer Perez arrived as back up and was told by Andrews to cuff and place Defendant in back of his car and say nothing to him. (R. 1281). Neither he

nor Perez told Defendant why he had been stopped. Also told Kinchen to put his subject in back of his vehicle and not to speak to him. (R. 1286). Later that evening he came to the homicide office. (R. 1287).

Gaiter was the driver the night of the arrest and McKinney was the passenger. (R. 1291). He never told them why they were under arrest. At the instant of arrest he did not know of the car keys being thrown away but found out later. (R. 1294). He was advised when he was on I-95 that the car was in a robbery murder that's why he ran the tag on the radio. (R. 1295).

Defendant had on a red shirt (R. 1296) Gaiter was also wearing a red shirt. Didn't notice blood on Mr. McKinney's shirt or pants. (R. 1298). He did not see any blood on the car. This was about 10:15 - 10:20 P.M. (R. 1300).

He was never assigned to the investigation of this homicide, (R. 1302).

OFFICER REGINALD KINCHEN, a witness for the state; a uniformed patrol officer of Miami Police Department working the midnight shift which begins about 9:00 P.M. (R. 1310). He heard Detective Andrews transmissions while following the car on February 12, 1987. (R. 1311). Kinchen turned his car around to serve as a back up officer. When he arrived he saw Detective Andrews with Defendant with his hands up against the wall being held at gunpoint. Andrews pointed to the west, the rear of the store and he observed Gaiter walking in the rear of the store. The white car was on the side. He

jumped out his car and drew his service revolver and saw Gaiter throw (R. 1312) a silver object to the ground. Never advised either of the two why they were stopped. (R. 1313).

Other police officers recovered the thrown silver object. (R. 1316).

OFFICER JESUS PEREZ a state's witness; at the time of the occurrence a patrol officer with the Miami Police Department. Worked from 3:00 P.M. to 1:00 A.M. (R. 1319). After hearing Andrews' transmission he went to arrest scene where Andrews told him to cuff Defendant. (R. 1320). Neither Andrews nor Kinchen said anything to Defendant nor did Perez at Andrews instruction. (R. 1321).

When transporting Defendant to station, Defendant asked: "What is it that I was supposed to have done, killed someone?" Enroute to the station Defendant said "Oh, shit." I took him to 5th floor Homicide Office and was relieved by Officer Kinchen. (R. 1325).

He would guess there were more than 5 officers at Homicide when he arrived with Defendant. He stayed there about one hour. (R. 1329).

DETECTIVE JON SPEARS, called as a State's witness; a homicide investigator for the Miami Police Department. (R. 1332). Investigated Franz Patela homicide of February 12, 1987. Worked with Detective Bishop the lead investigator and Sergeant Vincent. (R. 1333).

Went to the scene (R. 1334). Left for the day and was called at home to come to Homicide Office as the victim's car was recovered with two individuals in it. There he came in contact with Defendant. (R. 1335). This was after midnight some time. (R. 1336). Reviewed the constitutional rights warning, Exhibit 34 with Defendant. (R. 1337). Defendant after reading same and advising he understood them initialed each one at Spears request. (R. 1340). Defendant signed the document, Spears and Bishop witnessed it. (R. 1341). He was alert, conscious and calm. He was not under influence of narcotics or alcohol. Never requested anything.

After reviewing the waiver of rights the witness conversed with Defendant. (R. 1342). Told us he was at his girlfriend's house and was picked up by another person in the car shortly before stopped and arrested by the police. He did not provide witness with name of girl friend. He said he was picked up Wilfred Gaiter prior to being stopped. (R. 1343).

Told us that was the 1st time during that day that he saw that vehicle. The witness accused Defendant of killing this person. He said he didn't kill the man, Wilfred did. (R. 1344).

An old man. The witness again accused Defendant of the killing which he denied. (R. 1345). Detective Bishop and this witness then left the interview room.

Witness returned to room after talking to Detective Bishop and told Defendant he should tell the truth. This time he said Benny Copeland, the same one that did some other case,

did it. He accused Copeland of this and another murder. (R. 1346).

The witness urged him to tell the truth and he again said it was Benny Copeland. Witness exited room and to supervisor and Bishop.

The supervisor, Sergeant Vincent went in there for 4 to 5 minutes and came out and said McKinney is going to tell the truth now. Vincent is off and disabled with 2 heart attacks and now retired.

Spear went back in with Bishop. (R. 1347). They told Defendant they didn't believe him too many inconsistencies, too many stories. Pleaded with him to tell the truth. He said it was Benny and Wilfred Gaiter.

First he denied any involvement. Second, it was Wilfred Gaiter; 3rd, Benny Copeland and 4th Benny Copeland and Wilfred Gaiter. When pointed out the inconsistencies Defendant said:

"I'm going to tell you the truth, I killed him." (R. 1348).

Said victim first encountered at N.W. 10th Avenue and 36th Street. We knew that wasn't right address because of victim's story at scene, which was 3rd Avenue and 36th Street. Said party pulled up in his car, leaned over to ask directions. Defendant saw door was unlocked so opened it jumped in and hit him in the head. Then ordered the victim to drive to a location over the overpass (R. 1349) of Northwest 7th Avenue about 43rd Street; told him to turn

right on 43rd Street at which time he shot him. Then forced the car over to an alleyway which is right next to 43rd, in between 43rd and 44th Street. In the alley shot him 2 more times, pushed his body out and fled. Said he took Mr. Patela's brown attache case, money and a watch. (R. 1350).

Up to this point the police had no idea of the location of the attache case. Then we left the station, Sergeant Vincent drove, Bishop was in front passenger seat, and witness sat in back seat with the handcuffed defendant. At 7th Avenue and Northwest 36th Street he nodded to the right or east and said down there is where I first saw the old man. We drove north over the overpass to Northwest 43rd Street and he said right here. When passing the alley he said this is where I shot him. He then directed Sergeant Vincent to turn right at the next street, 44th Street. The Sergeant did. (R. 1351). He directed police through the alley where he said this is where he shot him again, threw his body out and left. After that, we asked him to lead us to the attache case.

He directed us to drive North on 7th Avenue to Northwest 58th Street, west on 58th Street, one block and then turned left (Southbound). Told us to stop at a large apartment building with 2 large green dumpsters in front. (R. 1352).

At this point he said the attache case was in some plastic under a carpet in the second dumpster where Vincent and Bishop found it. Witness identified picture of dumpster. (R. 1353).

Defendant then directed them to northwest corner of Northwest 3rd Avenue and 36th Street and said that's where victim pulled up and was confronted. (R. 1356).

They returned to office where they requested Defendant to make a formal statement in writing. (R. 1357).

The unsigned, unsworn statement Exhibit 2-A for Identification was the subject of colloquy by Court and Counsel as the Court had serious doubts as to its admissibility. (R. 1357-1363).

McKinney agreed to give a formal statement but then denied everything he said in the last interview the police had with him. (R. 1364). The only other witness Officer Spear knows of is Benny Copeland and a female who was in front of Copeland's house. (R. 1377). Detective Bishop talked to the female witness whose name is unknown to Spear. (R. 1378).

McKinney was in homicide office from after 11:00 until six something in the morning. (R. 1390). Most of the time Spear asked the questions and when McKinney decided to tell the truth Spear stayed with it. Truth, in Spear's mind, was when McKinney indicated he was quilty of something. (R. 1391.).

The statement was never signed because it was early morning hours and McKinney was tired and went back to the County Jail. (R. 1394).

During interrogation Defendant changed his personality. One minute he was smiling, he was laughing.

The next minute he was serious and the next minute he was actually even crying. (R. 1404). The only facts that police have to tie McKinney to murder is that he was in the victim's car. There's no gun, no watch. (R. 1407). Mr. Haft then tried to introduce the transcript to the interrogation to which he had previously objected and that was denied. (R. 1417).

McKinney during interrogation said a couple of times that he didn't want (sic) to be stopped being beaten but nobody was beating him. (R. 1418). In his unsigned statement he said on February 12, 1987 he was not in the area of Northwest 3rd Avenue and 36th Street. (R. 1420).

Four times Defendant said he had never been in the area of Northwest 3rd Avenue and 36th Street. (R. 1424).

At one time Defendant in his statement said he found the car behind the basketball court behind the Sister's (nuns) house and said "you going to beat me up again, I'm telling you the truth." (R. 1430).

Defendant originally said the gun was at his house in a closet, then he changed it and said at Benny Copeland's house and then it was at an apartment building close by 36th Street and Northwest 7th Avenue. Two dumpsters were there. (R. 1436).

In State's Exhibit 35, Mr. Patelas briefcase was paperwork, documents belonging to the victim. They were tested but he doesn't know the results. (R. 1438).

RALPH GARCIA called as a witness for the State; is a crime scene technician with Miami Police Department. (R. 1455-56). Became involved in this investigation at 11:00 P.M. on February 12, 1987. (R. 1457). Took aerial photographs. (R. 1458).

Latent fingerprints are not visible to naked eye. People touching surfaces do not always leave fingerprints, it depends on a variety of conditions. (R. 1462). Obtained prints off the vehicle at the scene. (R. 1464).

He recovered the vehicle's keys at the scene, a small alley on the side of the rear of the Circle K, on the ground. (R. 1466). At 4:50 A.M. on February 13, 1987 dispatched to 740 N.W. 56th Street to an apartment building. (R. 1467). He photographed the dumpster with the briefcase on top of it. (R. 1468). Impounded it and turned it over to Technician Sylvia Romans, lead technician. (R. 1469).

LAZADO FERNANDEZ, technician, City of Miami, Police Department called by the State. Obtained Gaiter's fingerprints and Boris McKinney's fingerprints (R. 1476) and placed on a card. (R. 1477).

WILLIAM ANTHONY DAVIS called as a State witness, in February, 1987 was an assistant accountant at Bayview Village, a condominium resort owned by Franz Patela in Nassau. (R. 1481).

A week prior to February 12, 1987 he obtained bank checks and currency for Mr. Patela who was going to Miami. (R. 1487) where his boat was being repaired and supplies had

to be ordered. Cash was in U.S. funds. (R. 1488). The amount of cash was $11,500.00. Patela always wore a Rolex watch.(R. 1490). It was gold. Ms. Adderly, the front office manager, she would cash the checks and bring funds to Davis. (R. 1491). Remembers all bills were taken care of. (R. 1501).

PERCY ADDERLY employed at Bayview Village was the State's next witness. (R. 1502). One week prior to February 13, 1990 she went upon instructions of Mr. Davis to the bank. (R. 1503). She obtained $11,000.00 U.S. currency and gave it to Davis who would give it to Patela. (R. 1504). Identified State's Exhibit 50 as a photograph of Mr. Patela. (R. 1505).

CHARLES LABOSKY a State's witness lives in Nassau. (R. 1508). Worked on Patela's yacht called Lady Heidi after his wife. (R. 1510). Labosky was to supervise repairs in Miami. (R. 1511). He was in Miami about 3 weeks prior to February 13, 1987 to supervise. (R. 1512). He met with Mr. Patela in Miami the day before this incident and Patela had a white Chevrolet. On the 12th I met him in the lobby where he gave Labosky some money. (R. 1514). Patela dropped him at boatyard about 8:00 A.M. and left. (R. 1515).

SIGFRIED LANGE General Manager Bayview Village on Paradise Island, Nassau was the State's next witness. (R. 1519). He mainly discussed with Mr. Patela needs and supplies for operating the place. (R. 1521). Had a few Miami companies where they had credit accounts, others were COD. (R. 1522). He wore a wedding band and a gold Rolex watch. (R. 1534).

The day following the death of Mr. Patela, Chuckie, the boatmate had in his possession $1400 or $1500.00 cash to pay Sunburst Furniture, plus a few coins found in Mr. Patela's pockets. (R. 1535).

TERRY GAITHER GIBSON called as a witness by the state is a finance cashier at Jackson Memorial Hospital. Her brother is Wilfred Clarence Gaiter. (R. 1551). In February 1987 her brother lived at 4701 N.W. 10th Avenue with the witness and her parents. (R. 1552). On February 12, 1987 her son who is usually picked up by a school bus at 8:30 A.M. did not go to school because he overslept. She had taken her mother, who had to be at work at 6:30 A.M. to Jackson Hospital where her mother works in nutrition. (R. 1553). She returned home at 6:45 and knew Wilfred was home because he had the music loud and his light was on. She and her son then fell asleep.

At 8:30 A.M. her brother came in the room and told her you lettin the bus go. (R. 1554). Her brother then went to the kitchen to cook breakfast. (R. 1555). She heard pots, water and stuff in the kitchen. Her father had already left for work. Then he left saying he was going to the car wash where he works. Didn't see him leave but heard the door. (R. 1556).

She left to go to work about 12:00, 12:15. She drove to work and her mother brought it back home. Last time she saw her brother that morning was 9:00 or 9:15. (R. 1557).

She did not know whether he arrived late at the car wash about 10:30 or 11:00 A.M. All she knows is where he told her he was going. (R. 1560).

STANLEY HAMILTON a construction worker, called by the State. (R. 1561). February 12, 1987 he worked at Latimore's Car Wash at 756 52nd Street, Northwest. Wilfred Gaiter worked with him and came in late that morning. (R. 1562). He arrived about 9:10 A.M. The owner looked at the clock when Gaiter arrived and so did this witness. (R. 1563). Gaiter stayed about 10 minutes after the owner said he was late. (R. 1564).

TOMMY LEE LATIMORE the owner of the car wash was called as a State's witness. Gaiter had worked for him for years. (R. 1565). On February 12, 1987 he was supposed to be there at 8:30 A.M. but came in around 9:00 or 9:30 so Latimore sent him away. (R. 1566). He doesn't know Stanley Hamilton. He has a big clock in the car wash. (R. 1567).

WILLIE BELL an officer with Miami Police Department was the State's next witness. (R. 1568). In the early morning of February 13, 1987 Officer Bell went to a dumpster at 56th Street between 7th and 6th Avenue N.W. and saw Defendant at that location. (R. 1569). He was not at the dumpster but in the seat of an unmarked vehicle with a couple of homicide detectives. He was calm and said hello. (R. 1570). Saw no shotgun in the car. (R. 1571).

TECHNICIAN SYLVIA ROMANS was recalled as a State's witness.

State's Exhibit 35 is a briefcase (R. 1579) received from Technician Ralph Garcia. She found latent prints on case and contents and turned fingerprint cards over to latent detail. (R. 1580). The latent examiner's name is Ivan Alemida. (R. 1589).

IVAN ALMEIDA a latent print examiner with Miami Police Department was called as a witness by the State. (R. 1594). Of comparisons made of the deceased's, Gaiter, Copeland and McKinneys prints McKinney's matched one lifted from the gear handle of the automobile involved in this incident. (R. 1600). As to the briefcase and contents comparing the prints of all 4 persons he matched the deceased's and Defendant's prints. Did not find any prints of Copeland or Gaiter on briefcase nor its contents. (R. 1603).

DR. JAY S. BARNHART forensic pathologist for Dade County Medical Examiner's Office was called as a State witness. (R. 1610). Qualified as an expert in pathologies. (R. 1616). He examined the body of Franz Patela. (R. 1617). Found a total of 7 gunshot wounds involving the right side of his body. (R. 1619). A gunshot wound across the back surface of the right forearm. A graze wound. (R. 1621). The bullet came from right to left. (R. 1622). An injury to the right forehead and face was consistent with having been inflicted by a butt of a gun.

There was a gunshot wound on the back of the right upper arm. (R. 1624). Soot found with this wound indicates the distance between the muzzle of the gun and his arm was

probably less than a couple of inches. (R. 1626). This could have continued in a straight line or perhaps another gunshot wound entered the right side of the chest through the rib space, the right lung and lodged (R. 1627) in the spine. This was a life threatening wound in immediate need of treatment. (R. 1628).

There was another gunshot wound on the right side of the back, just below the shoulder blade. It's consistent with the bullet having been fired while victim was in a hunched position. It lodged in the spine. (R. 1629).

Another gunshot wound entered a little bit below and to the outside of the right breast region. It also went through the right lung passing through the diaphragm and into the abdomen, passing through the liver, the stomach and continuing from right to left, passed through the spleen and then just beneath the skin on the left side of the abdomen where it could be felt as a little protrusion. This was an extremely potentially lethal (R. 1632) injury which required medical attention from which one could die very quickly. (R. 1633).

Another bullet also went through the liver, stomach and large bowel, travelling again from right to left. It was a very serious injury involving several vital organs. (R. 1634).

Another bullet was on the right abdomen, about the level of the belt. (R. 1635).

Without objection the assistant state attorney used

the Court bailiff to have the witness put prepared stickers on the bailiff to indicate wounds. (R. 1635-1637). At one point she called the bailiff by name: "Thank you Tony." (R. 1636, line 18).

Four of the seven wounds the witness would expect the person to die if not treated immediately. Two of them, the liver and stomach and the one that went through the liver, stomach and spleen, a person would be expected even with the best of care had a risk of dying within a few hours of those wounds. (R. 1638).

Franz Patela died from the internal disruption of his body organs caused by those bullets. (R. 1639).

Bullet was from a 38 calibre gun. (R. 1641). Seven wounds could have been caused by 6 bullets. (R. 1642).

LAWRENCE COOK, a job developer for the State of Florida a witness called by the State. On February 12, 1987 he had an appointment with Benny Lee Copeland (R. 1661) at 8:30 A.M. (R. 1662).

He set an appointment for Copeland at 10:30 A.M. that day with Pan American Chemical Company. (R. 1663). Copeland didn't leave Cook's office until about 10:15. (R. 1664).

Defense Motion For Directed Verdict of Acquittal denied. (R. 1702).

WHEREUPON THE STATE RESTED.(R. 1680).

HUGH DONALD McKINNEY called as a witness for the Defense testified:

The brother of Defendant (R. 1708), employed by Florida Power and Light. (R. 1709). His mother lived with Defendant at 1509 Northwest 56th Street. He was over there the evening before February 12, 1987 left his beeper so returned on February 12, 1987 to get it about 8:30, 8:35 A.M. Stayed about five minutes, no more than fifteen. Someone knocked on the door asking for Defendant and witness told him he was asleep in the bedroom. That person left right before the witness. (R. 1710). He was Hubert Charles. (R. 1711).

When he arrived at his mother's house, Molly, Defendant, his brother Tyrone and Eugene were there that morning. (R. 1714).

He never mentioned Hubert Charles during his deposition though when asked "Did you talk to any of your brothers while you were (R. 1718) home?" he answered "No, I ain't talked to nobody." He didn't, as he thought that referred to anyone else but his brother. (R. 1719).

HUBERT CHARLES called as a Defense Witness. (R. 1721). 22 years old he works for Wanedison Car Care Center. Never knew Defendant to have a gun or be violent. (R. 1722). Remembers February 12, 1987 as day Defendant went to jail. Early morning of that day he went to Defendant's house (R. 1723) at 46th Street and 10th Avenue. Talked to his brother Hugh. Next saw Defendant on 56th Street between 9:30 and 10:00 A.M. Defendant was in a white Cavalier car. He

needed $5.00 to go to senior high to pick up girls for the lunch break so Hubert gave him $5.00. (R. 1725). At 11:30 A.M. Defendant came back with the girls and stayed about 10, 20 minutes because girls had to go back to school. The car was a four door. (R. 1726).

There was no blood on the car nor in it. (R. 1727). When watching TV he saw Defendant was caught with a stolen car. The $5.00 was for gas.

On cross examination the assistant state attorney asked:

> Q. "Mr. Charles, how many times have you been convicted of a crime?
>
> A. I can't really say. I ain't been convicted yet.
>
> Q. How many cases, felony cases, do you presently have pending on the system?" (R. 1729).

An objection was sustained and Defense counsel asked "Will you say that in front of the jury?"

THE COURT: "I'm merely going to sustain the objection." (R. 1730).

On deposition he said he saw Defendant about 10:30 A.M. (R. 1736). Defendant told him the car had been parked in the alleyway behind his house. (R. 1738).

On his deposition he said he again saw him 11:00, 11:45 on lunch break. When on trial he was then asked was at 10:00, 11:45 or 12:00 he answered during lunch break which lasts until 12:45. (R. 1740). Gaiter was in the car with him and a girl named Rene. He didn't know the other girl's name. (R. 1741).

When the prosecutor asked "Would it surprise you to learn that the car had a full tank of gas." An objection that there was no such testimony was overruled. (R. 1743).

VIRGIL FISHER called as witness is 21 and employed by Joe's Stone Crab. (R. 1747). His house and Defendant's is separated by an alley (R. 1749) saw Defendant on February 12, 1987 about 9:00 A.M. (R. 1750). Knew the time because Gunsmoke was on TV. He went in Defendant's house through the back to get some bread about 9:05 A.M. and saw Defendant, in his shorts. (R. 1751).

They then went outside and sat and talked about an hour. He knew it was an hour because he wears a watch and the TV program was going off. (R. 1752).

About 10:05 Defendant asked for money and the witness gave him $1.00. Defendant was wearing a flower reddish short maroon as Defendant's Exhibit A shows. (R. 1753).

Next saw Defendant about 12:00, 12:30. When he came back he was in the car. (R. 1754). That was the last time he saw Defendant that day. (R. 1755).

Didn't remember on his deposition he said Defendant came to his house when the witness first saw him on that day. (R. 1758). On cross exam he said he told the jury that on the 11th he went to Defendant's house. (R. 1760.

At side bar defense counsel told the court he thought the witness was on drugs. The Court stated either that or he is slow. "He can't comprehend this. It's on the record." (R. 1761). He did not remember giving answers on

the deposition which the prosecutor put to him on cross examination. (R. 1762).

Whereupon the Defense Rested. Motion for Directed Verdict of Acquittal was renewed (R. 1774) and denied. (R. 1775).

WHEREUPON the State called the following witness in rebuttal:

DAVID MULLIGAN an investigator with the State Attorney's Office in Dade County. (R. 1784). On September 15, 1988 he was summoned to the State Attorney's office (R. 1785) to serve a subpoena on Hubert Charles for a deposition to take place in the Assistant State Attorney's office. Present was defense counsel, Hubert Charles, a private investigator and the interrogating attorney. During the deposition defense counsel kept interrupting and caused commotion to the point where witness told him if he didn't (R. 1786) discontinue his actions, "I would take some action to ensure that he would discontinue his actions, that I would take some actions to ensure that he would discontinue what he was doing."

"I think I might have told him if he didn't discontinue I would have to place him under arrest."

He then calmed down somewhat. The deposition was thereafter able to be successfully completed. (R. 1787).

On cross examination the witness admitted that Mr. Edgecomb a former top investigator who was present left

the room. The following then ensued:

Q. "You and I - - - I said to you, what authority do you have to come in and do this, and you got on your hind legs and said I'll put you under arrest and - -

A. I don't think that's the correct conversation.

Q. Put you under arrest if I hear anymore from you.

Objection.

Sustained.

Q. Then you were part of the - - -

Objection.

THE COURT: Sustained. Don't testify Mr. Haft.

Q. Weren't you part of the intimidation of Dannely (the ASA) and yourself as to the witness that was there, an uneducated witness? (R. 1789).

A. If you want me to respond to that in an intelligent manner, I did not call it intimidation. I made statements to you, what would I do if you didn't discontinue interrupting the deposition.

Q. Don't I have a right, sir, as a defense attorney, to ensure or interface myself in protecting anybody that the State is taking the deposition from, or do you think it's an inquisitive program, what's your feeling as to taking of a deposition? Can you explain that to the jury? Do I have a right, do I have a right to do what I have to do and to protect the witness or anybody else?

Objection: Compound, argumentative and testifying.

THE COURT:

> Not only that, I don't know that he's really qualified to answer the question. Sustain the objection." (R. 1788-1790).

Q. Does he (Defense Counsel) have a right to object in a deposition?

THE COURT: (without objection by ASA)

> Sustained. I really don't know at this point whether he's qualified to answer that question.

DEFENSE COUNSEL: Well, he was there.

THE COURT: I understand that, but he's not qualified as a lawyer."

The witness to his recollection threatened to arrest Defense Counsel only once. (R. 1791).

RECROSS: The Court sustained an objection to the question by the State of this witness that he has already advised that the trial Judge had already been visited by the ASA and had issued an order that this was the procedure to be followed for the rest of the deposition. (R. 1792).

The Court further stated...."I don't think any of this is relevant except that it was brought up at that time.. You have covered it." (R. 1793).

THE ASA: "How would you like me to handle this area Judge?

THE COURT: You have already handled it. I don't think there's anything else you have to handle." (R. 1794).

The ASA then persisted:

Q. Did the conversation involve my discussion of you, of an order by the Honorable Judge Kornblum, concerning the importance, the continuing importance of that deposition?

A. Yes, it did. (R. 1795).

Q. Did you remain in attendance because of that order?

A. Yes, I did." (R. 1796).

PENALTY HEARING

The preliminary instruction of the Court was partially:

> "The final decision as to what punishment shall be imposed or what the penalty - - what penalties is imposed rests solely with the Judge of this Court. (S.R. 21). However, the law requires that you, the jury, render to the Court an advisory sentence as to what punishment should be imposed upon the Defendant." (S.R. 22).

LIEUTENANT JAMES POUGH called as a witness by the state is with Fire Rescue. (SR 23). Upon arrival at the scene deceased was gray, a sign of shock due to massive blood loss. The gunshot wounds, 5 he believed, would back this up. He was talking.(SR 25). He was aware that he had been shot and the seriousness of it. A mast suit was put on him. It's a military anti-shock trouser. (SR 26).

It is inflated to help stabilize diminishing blood pressure. His was 50 while in normal people its like 120, 130, in that range. You feel pressure from it all around your legs and waist. He remained conscious and talking at the scene. He was taken to Jackson Memorial Hospital. (SR 27).

During the trip to the hospital he was conscious. He was taken to the trauma room. (SR. 28). He was still conscious and speaking. We arrived at 9:44 (SR 29) and were back in service at 10:15. We arrived at the scene at 9:25. So in his presence for about 25 minutes he was conscious, speaking and aware of the circumstances. (SR. 30)

DR. JAY BARNHARDT called as a witness by the state

is a forensic pathologist, Dade County Medical Examiner's Office. (SR 31). There were 2 lacerations and a bruise to Mr. Patela's head. One laceration on the right side of his forehead is an area with a lot of nerve endings and it would cause pain, also a lot of capillaries and small arteries which cause bleeding. (SR 35).

The skin is one area of the body sensitive to pain, it would hurt. There were 7 gunshot wounds which either punctured, lacerated or tore the skin. One wound went in and out of the arm, punctured the skin in two area. (SR 36). So there was a total of 8 areas of his skin punctured or torn by bullets. Those, other than the arm wounds, were on the right side of his chest. Membranes that surround organs are sensitive to pain. (SR. 37).

One such membrane surrounds bone called the periosteum. It's not the bone itself that hurts, it's the membrane around it which causes pain. Two bullets struck his spinal column and would have produced severe pain. (SR. 38). The membrane called the pleura line the lungs. Pleurisy is painful. One bullet after going through the skin, and the lung lodged in the 12th vertebra. Another bullet penetrated the sensitive membrane surrounding the bone and lodged in the first lumbar vertebra.

There were 2 other wounds that perforated the pleura and in doing so, resulted in tears in the pleura resulting in immediate pleurisy. (SR. 42). They also cause the right lung

to collapse. It caused that lung to bleed and be incapable of breathing. The bleeding would be internal collecting around the lung. If conscious he would have been aware he only had one half the ability to breathe and would have to struggle to breathe. (SR 43).

The lining of the peritoneal cavity, the periosteum, if inflamed or disturbed causes peritonitis. Three of the gunshot wounds went through the liver, the stomach, the large and small bowels.

Another came through the large and small bowels, causing painful injury to the membrane and causing the stomach contents (SR 44) and the small and large bowels to spill into the peritoneal cavity causing immediate peritonitis. This with the collapsed lung and blood loss leads to shock.

Pain would have been immediate. (SR 45). If conscious he would felt all of those injuries at the time they were caused. If conscious for at least 25 mintues and talking he would have been suffering the painful sensations of all those injuries. (SR 46).

People who are developing shock have a sense of impending doom; they somehow know they are dying and experience feelings that tell them something really horrible is happening to them. (SR 47).

The State rested.

The Defense called the following witnesses:

ALICE McKINNEY, the Defendant's mother. He is the youngest of seven. Her husband left her 10 years ago. (SR 54). Employed by Marriott In-Flight Service for 23 years. She raises the children by herself. (SR 53).

Defendant was very slow in school, not keeping up with his classes. He did badly in school. (SR 56).

Never had a gun in the house. She leaves home at 5:30 - 5:45 A.M. for work. She visited Defendant in jail practically every week. (SR 57). He always told her he didn't do it. No trouble with him at home except for school Another son Eugene has a mental problem; being treated at Jackson Hospital.

DR. LEONARD HABER called as a witness for the defense, a clinical psychologist. (SR 70). Saw Defendant, pursuant to a Court order, at the Dade County Jail on June 9, 10, 12 and 16, 1989. (SR 72).

Gave Defendant the Wexler Intelligent Test, average score would be 90 to 110. A low average score would range between 80 and 90. Below that would be called borderline. A score 70 or below would be beginning mental deficiency. Defendant achieved an overall score of 72, technically, a borderline category. School records at an early age showed an attention deficit. (SR 73).

His school performance was the lowest 5 to ten percent percentile meaning about 90 to 95 percent of all

students performed better than he did. In high school he exhibited disruptiveness and attention deficit disorder and appeared unable to learn. He is basically functionally illiterate, has an I.Q. which is borderline and close to the beginning (SR 74) of mental deficiency. A history of disruptive and assault behavior.

School records do not reflect any treatment. (SR 75). He functions somewhere around the 3rd grade level, measuring that in age would be a 9 or 10 year old. (SR 79).

Defendant tests out as borderline intelligence, slightly above beginning mental deficiency with a history of attention deficit disorder in childhood, a learning disability, disruptive behavior and also, an organic brain syndrome, that is, some evidence of brain (SR 83) disfunction. (SR 84).

He said he did not do this but was pushed into saying he did it. (SR 85). Alcohol and Drug history reported by Defendant was substantial and varied. (SR 87).

When at school he frequently cut classes, didn't pay attention to his teachers and engaged in violent, assaultive behavior to classmates. (SR 103). He got poor grades, chose to use drugs and when extremely involved with that use dropped out of school. (SR 104). He is more easily frustrated and has less tolerance than the average individual. (SR 111).

He talked to Drs. Crown and Jaslow, but not Dr. Castillo and read their reports. (SR 119).

The witness suggested that Defendant be evaluated

by a toxicologist. In connection with the brain the neuropsychologist. (SR 128).

DR. BARRY CROWN called as a witness by the Defense. (SR 143). A clinical, forensic psychologist and neuropsychologist, the latter dealing with the relationship between brain function and behavior. (SR 144).

Saw him July 7, 1989 in an interview room at the Dade County Jail. Defendant's reading was at .05 percentile level. Ninety nine out of one hundred people would score higher than he did. It's below third grade level (SR. 148). In spelling he was at the .1 percentile. Again, ninety nine out of one hundred people would score higher. On arithmetic he was at .09 percentile. Again ninety nine out of one hundred people would do better. (SR. 149).

He reviewed school records with Dr. Haber. Indicated he was functionally impaired. (SR 150). These achievement tests are standard in the profession and in school systems throughout the United States. (SR 152).

He administered a screening test which is a test for organic brain damage. (SR 153). He found a mild to moderate impairment. (SR. 154). Defendant could not comprehend relatively simple instructions that are designed for brain injured people. Statistically, he was two to two and a half standard deviations below the mean. (SR 156).

PhD is in counseling not psychology but it meets the American Psychological Association of the 1980 Rule. (SR. 157). Neuropsychology training would be through

postdoctoral, post graduate courses. (SR 160). Having relied on Dr. Haber's review of school records if they were faulty or insufficient he would have relied on same as to school records. (SR 162).

He has no idea of Defendant's mental state or abilities as presented to other doctors in 1987 when the crimes were committed. (SR 165).

BORIS McKINNEY called as a witness for the Defense. (SR 172).

He lives at 1059 N.W. 46th Street. On February 12, 1987 he got up in the morning and put on pants and a shirt. (SR 173). Close to 9:00 A.M. the guy in back of him came for some bread which he gave him and went to his house until close to 10:00 A.M. or a little after. He left and ran into somebody who gave him a car in which he was arrested. Going towards the car he saw Gaiter and rode in the car all day and all night. In the afternoon they went to Northwestern (school) and picked up two females to have lunch and then just rode around in the car. (SR 174).

About 10:00 P.M. they were arrested on 7th Avenue and 69th Street. He got out of the passenger side. Gaiter jumped out of the car, threw the keys down and ran towards the store. Before Defendant could get past the store the arresting officer got him and put him on the wall and more cars arrived.

They put him in the police car and Gaiter on the side. He asked the police (SR 175) "You know what happened?"

He knew he was arrested for grand theft auto. He knew it was wrong for driving the car. When taken in the police said they were looking for him for murder that happened earlier in the car. He started asking where the gun was and he said I didn't have no gun. He said that they only thing in the car was a suitcase, he and Gaiter. And the police said "The man is missing $7,200.00." Defendant said he didn't get any money, or watch about which the police asked him. He as then asked if he could show where the briefcase was. (SR 176).

Defendant said yes and he showed him it was the garbage can. On the way there the police showed him where the killing took place and where he supposedly stopped the man and got into the car. On the way back from the garbage can they showed where they said he got in the car and where he dumped the man.

When they returned to the station they put him in a room, asked Gaiter some questions then jumped on Defendant and roughed him up. Gaiter said Defendant did it. Defendant said neither of them did it. And they said, Well, we know you did. (SR 177).

Than a man put stuff on his hands to see if he had been firing a gun and after the test the man said "McKinney aint been firing no gun." They took his clothes, gave him other clothes, roughed him up and sent him to County Jail. He never shot anyone, and was never in that alley before.

Between 9:00 and 10:30 that morning he was with a

girl named Renee and Michelle. (SR 178). The house in back was Virgil Fisher's and Dwayne Brown and Audrey Brown live in back of him. Benny told him the location of the car right around the corner. (SR 179).

If there was any blood on the car and if he knew somebody got killed he wouldn't have gone in the car. (SR 180).

Defense rested. (SR. 195).

DOCTOR ANASTASIO CASTILLO called as a witness by the State. A psychiatrist with expertise in psychiatry, appointed by the Court to examine (SR 197) Defendant. (SR 198). Did not find any intelligence, attention or reasoning deficit that indicated a problem with his ability to function mentally. No problem found with his orientation as to time, place, person or situation. No defects in his past or recent memory and he was able to concentrate (SR 199). He was able to discuss the issues without any apparent difficulty. He was average, intellectually. Manifested no difficulty in answering questions or self expression. (SR 200). Only complaint of Defendant was nervousness about charges he faced. Defendant said people were threatening him. He gave a very detailed, clear version. (SR 204).

Defendant moved to put the Doctor's report in evidence after witness identified it but Court sustained an objection to it, Exhibit A-4 for identification. (SR 209).

Defendant said he never committed the murder. Told

him he was riding in the car because he was kind of afraid of the other people. (SR 210). He said he had been threatened by Copeland and Gaiter after incarceration that they would kill him. (SR 211). He did not talk the other doctors in this case nor did he read their reports. (SR 212).

If he had found some basis to believe some presence of organic brain disfunction or attention disorder he would recommend neurological testing. (SR 214). He did not find evidence of organic brain disfunction. He never gave Defendant a test for brain damage. (SR 215).

ARTHUR BROWN called as a witness for the State is nursing director for the Department of Human Resources Office of Health Services at the Jail, (SR 216) in charge of the nurses. He's record custodian (SR 231). He examined the file of Defendant. (SR 232).

At time of booking every person is evaluated to see if medical attention is required. It may take place in jail and if further treatment is needed the person is referred to Ward D at Jackson Memorial Hospital. (SR 235).

The Intake Medical Screening Form is signed by Defendant. (SR 236).

Objection to its admission was overruled. (SR 239).

There is no indication on the form of any injury, nor complaint of illness mental or physical. (SR 241).

The receiving screening form (SR 244) is signed by nurse Ruth Taffin. (SR 245). Objection on basis of hearsay and best evidence rule was overruled and document was marked

States Exhibit 4. (SR 246).

No indication by the nurse of injuries present or complained of by Defendant. (SR. 248).

Three days after Defendant had been taken to a bond hearing and assigned an attorney he started to complain of injuries. (SR 254). On February 17 he complained his head hurt bad, can't sleep. He was hit in the head by police February 14 during his arrest. That's the first mention in the file of any injury to Defendant. Medical personnel looked at him. (SR 255).

There was no history of head problems, no visible bruises noted, but complained of inability to sleep due to pain back of head.

February 23, 1987 a follow up complaint by Defendant. (SR 256). A physician examined him and found no objective symptoms. (SR 257).

DR. ALBERT JASLOW called as a witness by the state is a psychiatrist (SR. 260). Appointed by Court to render an opinion as to Defendant. (SR 261). Examined Defendant for presence of clinically indicated organic brain disfunction. He found none. No psychosis. (SR 262).

State rested. (SR 277).

Court instructed jury aggravating circumstances were:

1. Committed while in commission of or attempt to commit, robbery, burglary or kidnapping.
2. Crime was expecially wicked, evil, atrocious or cruel.

3. Crime was committed in a cold calculated and premeditated manner without any pretense of moral or legal justification. (SR 305).

Mitigating circumstances were described by the Court as:

1. Defendant had no significant history of prior criminal activities.

2. The age of the Defendant at time of commission.

3. Any other aspects of Defendant's character or record and any other circumstances of the offense. (SR 306).

Jury left for deliberation 7:25 P.M. (SR 311) and returned 8:05 P.M. (SR 314) with an 8 to 4 advisory opinion of death. (SR. 315).

In the sentencing pleas held by the Court on August 14, 1989, almost one month after the advisory verdict recommended death the trial Court stated in the record:

"This Court believes that the death penalty in any case is wrong. It is especially wrong in this case. Considering other cases in which the State has sought and obtained the Supreme penalty, imposing death in this case seems to be disproportionate.

The death penalty in any case is inappropriate and more so in this one. It is cruel and inhumand punishment which is best described as barbaric."(S.R. 1982). (Underlining ours)

## SUMMARY OF THE ARGUMENT

It is apparent from the record that defense counsel was ineffective in his representation of Defendant and placed himself in such an unfavorable light with the jury that his own wild characterizations of the deceased, wholly unfounded, and his aspersions on otherwise respectable witnesses discredited him in the eyes of the jury and prevented Defendant from obtaining a fair and impartial trial.

The Court erred in admission of testimony as to confessions, particularly a typed confession, which contained references to physical abuse of Defendant which the Court denied admission in evidence, without independent proof of the corpus delecti as to murder, and/or armed kidnapping, armed burglary/robbery, Grand Theft and Display of a firearm in the commission of a felony.

In violation of Section 918.07 of the Florida Statues the Court's bailiff told the jury they were not to rule on premediated murder. This was done ex parte by this lay person without consent of Court nor prosecutor nor defense counsel. The Court recognized this as a violation of the sanctity of the jury but did nothing to remedy this abuse in a case in which Defendant was sentenced to death.

An instruction on kidnapping was given the jury omitting the required instruction as to the lesser included offense of False Imprisonment. In addition, the Court threatened defense counsel with contempt in front of the jury.

The death sentence in this case, as was stated by the trial court is disproportionate in this case. To quote the Court: "It is especially wrong in this case." And again, ". . . more so in this one." (S.R. 1982).

ARGUMENT

I.

DEFENDANT WAS DENIED A FAIR TRIAL GUARANTEED HIM BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA AND BY ARTICLE ONE, SECTION SIXTEEN OF THE FLORIDA CONSTITUTION BY INEFFECTIVE ASSISTANCE OF DEFENSE COUNSEL APPARENT ON THE FACE OF THE RECORD.

"We cannonize the courthouse as the temple of Justice. There is no more appropriate justification for this than the fact that it is the only place we know where the rich and the poor, the good and the vicious, the rake and the rascal - in fact every category of social rectitude and social delinquent - may enter its portal with the assurance that they may controvert their differences in calm and dispassionate environment before an impartial judge and have their rights adjudicated in a fair and just manner...'SAT CITO SI RECTE' (soon enough if right or just) encourages devotion to such a pattern."

Such was the opinion of this Court written in Williams v. Florida, 143 So. 2d 484 (Fla. 1962).

"Bullshit. He's lying."

When one is confronted with such an utterance in the record the only inference thereafter when viewing (THEMIS) the statue of justice with a blindfold over her eyes, is that it is in reality a handkerchief, to absorb the tears which she of necessity must shed at this indecent expression to the court.

This profane, vulgar, ugly, street language was the response of the assistant state attorney to a statement by defense counsel during the hearing on the Motion to Suppress that he did not know about other confessions.

THE COURT: No attacks right off the bat. (R. 602).

This portion of the trial was the highpoint. It was the last and highest vestige of professional conduct by either counsel. Observe the record please with appellant counsel and envision the screaming back biting back of the yard fight between a skilled, but contemptuous prosecutor and an obviously seasoned defense counsel who for some reason was unable to provide defendant with the constitutionally required effective assistance of counsel.

We beg your indulgence in reviewing herein some of the many instances of lawyer misconduct contained in the record.

In the Opening Statement of the State;

Ms. Dannelly: Mr. McKinney was asked to give a sworn statement.

> "Sure, I'll be happy to." And what do (R. 1125) you think he did in the sworn statement? He said, "I didn't do it, Gaiter did it. No, no, no, not Gaiter, it was Cooplands (sic) who did it. No, no it was Gaiter and Cooplands (sic) that did it. I didn't do it. It wasn't me. They killed him. They took his stuff."
>
> "You'll have an opportunity to read the statement." (R. 1126). (Underlining ours)

Later in this brief we will discuss fundamental error and at that point it will be apparent that not only was the statement not sworn to, it was not even signed by Defendant, nor witnessed.

In his opening statement defense counsel said the following:

In response to the opening statement of the State wherein the deceased was described as an immigrant and to which Defense interposed no objection, defense counsel said:

> "...He was an immigrant. He fought with the Nazis and he was given the iron cross." (R. 1128).

Upon the State's objection, when questioned side bar defense counsel referred to an article in the Miami News and one Vincent on the radio said he was a Nazi. (R. 1129).

The State brought in the Miami Daily News of February 13, 1987 which indicated deceased left Germany in 1933.

MS. DANNELLY: Where is the reference to him being a Nazi?

MR. HAFT: He worked with the Germans and got the iron cross, all right? Now you'll probably say I wrote the article. (R. 1130).

MS. DANNELLY: I'm going to put a witness on the stand.

MR. HAFT: What?

MS. DANNELLY: And I'm going to jam it down your throat.

MR. HAFT: Don't tell me your going to jam anything down my throat. (R. 1131).

THE COURT: I overruled the objection, but frankly, I have to tell both of you and I've warned you both and I don't think I have to warn you again, I warned you that during argument, I think you're both in contempt of Court. Ms. Dannelly made a personal attack on you and vice versa. (R. 1132).

The Court reserved all rulings on motions for sanctions. (R. 1134).

When the jury was recalled the Court instructed them that if there is no evidence to support defense counsels "NAZI" characterization it would be stricken from the record and they will be told to disregard it.

Notwithstanding all of the foregoing in front of the jury defense counsel persisted as follows:

MR. HAFT: ...When I stated that Franz Patella was a nazi, it was based upon a newspaper article in which the information --

MS. DANNELLY: Excuse me, Judge.

THE COURT: Sustained.

MR. HAFT: The information was given by the lead investigator in this case, Vinson, who is ill and will not be before you. In that article, he stated specifically --

MS. DANNELLY: Same objection, Judge

THE COURT: Sustained. (R. 1136).

The Court then reversed its ruling and allowed defense counsel to continue. Defense counsel then advised the jury the article stated specifically what happened in the case, a watch missing, a Rolex and money taken and Vinson won't be in Court to testify. (R. 1137).

And again defense counsel when stating he didn't blame the State for trying to get a killer told the jury it's wrong to kill anyone whether he was a NAZI or whatever. (R. 1142).

When cross examining Officer Romans defense counsel stated:

MR. HAFT: That's all you know about this scene, is that correct? Don't look over to Ms.

Dannelly. I mean, she's not going to give you any help, ma'am.

THE COURT: You don't have to make any speeches.

MR. HAFT: Let the record reflect she looks over to Dannelly.

MS. DANNELLY: Judge, anybody in this courtroom can testify --

THE COURT: I don't want any trouble today.

MR. HAFT: I'm not having any trouble, Your Honor.

THE COURT: The jury can see for themselves what the attitude and demeanor of the witness is. You don't have to make any remarks about it... (R. 1255).

At sidebar after the Court overrulled a defense objection the following occurred:

MS. DANNELLY: Would you mind terribly asking counsel not to wag his finger at me, not to point at me, and not to summon me.

When the state on redirect of Detective Andrews asked if its the policy of the City of Miami Police Department to allow detectives from other unrelated units to partake in an investigation the prosecutor was interrupted as follows:

MR. HAFT: Objection as to what the policy is. It's corrupt.

THE COURT: All right, okay --

MS. DANNELLY: That's it.

THE COURT: Take the jury out please.

MS. DANNELLY: That's it.

MR. HAFT: What is that's it?

MS. DANNELLY: That's it.

Whereupon the jury was removed.

THE COURT: Mr. Haft, I have warned you repeatedly throughout this trial not to make (R. 1303) comments like that.

MR. HAFT: I'm sorry, sir.

THE COURT: That was unsolicited, uncalled for comment on your part and you have deliberately disobeyed the orders of this Court. I'm holding you in Contempt of Court.

MR. HAFT: All right, sir. After what I have said, all right, sir, I agree with you. It came out sir. (R. 1304).

The Court reserved sentencing on the contempt. (R. 1305).

When the jury was recalled the following occurred:

THE COURT: All right. The comment made by counsel will be stricken from the record, and the jury is instructed to disregard completely the comment made unsolicited by Mr. Haft. (R. 1306).

Defense Counsel objected to Admission of State Exhibit 2 for ID an unsigned confession, which contained exculpatory statements about beatings. (R. 1360-1365). Otherwise the Court would have admitted it. (R. 1360).

With regard to a transcript of Defendant's unsigned and unsworn confession which Defense Counsel objected to (R. 1357-1365) the following occurred:

THE COURT: Mr. Haft will you come back please? Tell me why it's admissible in this case. It's an unsworn statement, its not signed by him. Without the reporter being here to verify this is what he said, how can it be admissible? (R. 1359).

MS. DANNELLY: Judge, if Mr. Haft doesn't want the document admitted, that's fine with me.

THE COURT: I would think he would want it admitted. (R. 1360).

Later, in the Record, Mr. Haft recanted, but to no avail.

MR. HAFT: State didn't put it in, so I'm going to. (R. 1415).

THE COURT: You know you shouldn't do that. (R. 1416).

When the State called William Anthony Davis, former assistant accountant at Bayview Village (R. 1480), to testify at to deceased, Mr. Haft objected and said he was never given this witness. The assistant State Attorney said Mr. Haft deposed him in Nassau. Mr. Haft in part of his reply after admitting he took depositions of all witnesses in Nassau stated: "I never saw this man, did I?" The assistant State Attorney said he did and his name appeared on the witness list. (R. 1483).

Since Mr. Haft made allegations that deceased was a Nazi, the Court felt the State could go into the background of deceased, but not mere conclusions of the witness. (R. 1484).

When at sidebar concerning a document dispute the following occurred:

THE COURT: Did you get a copy of this from the State attorney?

MR. HAFT: No, neved did.

MS. DANNELLY: Yes, he did, in Nassau, he got a copy of all of those documents.

MR. HAFT: My investigator got this. She never gave me this.

Again, when on redirect the prosecutor asked witness Lange,

Q. Did Mr. Haft ask you to bring any of those documents to Court today?,

the following occurred:

MR. HAFT: Motion To Strike.

THE COURT: All right.

MS. DANNELLY: Wait, excuse me, Judge?

THE COURT: Wait a second. Wait a second. Come side bar please.

THE COURT: Go ahead.

MR. HAFT: I want to withdraw what I said, on the record. I just--this woman is impossible. I just wanted the prosecutorial misconduct--(R. 1538).

THE COURT: Come on. I'm sick and tired--

MR. HAFT: Her snide insinuations, I don't like.

THE COURT: Are you withdrawing the objection?

MR. HAFT: Yes.

Again, when jurors were excused the following took place:

MR. HAFT: I have never in my career had 15 to 20 lawyers say she's a liar and cheat and the prosecutorial misconduct--and I can line up 15 lawyers to say she's a liar.

THE COURT: Wait, Ms. Dannely, do not leave.

MS. DANNELY: I'm not going to stand here and be slandered like this. I'm tired of his behavior.

THE COURT: Mr. Haft--Mr. Haft, I have warned you repeatedly, repeatedly, repeatedly (R. 1548) and the personal attacks continue. You are in contempt of Court. Is there any reason why I should not hold you and sentence you in contempt of court?

MR. HAFT: What about her?

THE COURT: I have also held her in contempt of Court and intend to impose appropriate sanctions, which is going to include a report to the Bar Association about both of you.

I am going to tell you what I am going to do right now. I'm holding you in Contempt of Court for your personal attacks right now several times on contempt sanctions. I am going--

MR. HAFT: She said I was committing perjury.

THE COURT: You called her a liar, and I have told you--

MR. HAFT: I didn't say that she was a liar. I said that I could get 10 or 15 lawyers to testify she's a liar.

MS. DANNELY: I'm not going to stand here and listen to this. (R. 1549).

The Court fined defense counsel $500.00 for this contempt. (R. 1550).

On cross examination of Defense witness Mr. Fisher the following occurred:

MS. DANNELY: Mr. Fisher, your testimony before this jury is that Mr. Haft was present at your deposition and got into a big fight with me, that's what you just testified about?

A. Yes.

Q. And he got thrown out by some investigator and one of the investigators was there; is that correct?

A. Yes.

Q. That's your testimony?

A. Yes.

Q. Let me show you your deposition. Note the appearance of the parties, Mr. Fisher.

MR. HAFT: Your honor, I object to the testimony. The court reporter was no longer taking down when she brought the cops in and threatened to have me arrested. (R. 1772).

MS. DANNELY: Your Honor, I submit to the Court the deposition of Mr. Hubert Charles at which Mr. Haft was present. And Mr. Virgil Fisher, of which Mr. Haft chose not to be present.

THE COURT: Okay.

MR. HAFT: I was present and she did threaten to have me arrested.

THE COURT: You're not testifying and I'll hold you both in contempt. (R. 1773).

In final argument Mr. Haft said:

"Do police lie? Yes, they lie?"...(R. 1847).

"...Now if you recall Hasmer said he was dispatched at--

MS. DANNELY: Objection, Judge, there was no Hasmer as a witness.

THE COURT: All right. Sustained.

MR. HAFT: Just a moment. I'm sorry, I have the wrong name." (R. 1848).

and again:

"Think about yourself being framed. Why is this a frame?"

The state objected on golden rule grounds.

THE COURT: Have to sustain that. Don't put the jury in Mr. McKinney's place sir. (R. 1854).

MR. HAFT: "...When you analyze the case in the room, analyze it like you would your own son or your own daughter, or whatever it may be."

Objection was sustained. (R. 1863).

In rebuttal the state used defense counsel's characterization of the victim as a Nazi against the defense

as any experienced defense counsel would expect. (R. 1878).

During Penalty hearing when cross examining jail medical records custodian Defense counsel asked:

Q. And in the McDuffy case, when he was hit and killed, the records were--

THE COURT: Sustain the Objection.

MS. DANNELY: I'm going to--

THE COURT: The jury is to (S.R. 258) disregard it...

MR. HAFT: You maintained all the records of the medical association down there and are you with the employees all the time? Is everything they write on the records true and correct? Are there no errors in those records?

A. To the best of my knowledge.

Q. To the best of your knowledge?

A. That's right.

MR. HAFT: I have no further questions.

THE COURT: Nothing else, is there?

MS. DANNELY: No, of course not.

MR. HAFT: Lie, lie.

THE COURT: Please disregard the comments. It's getting late and we want to complete this. (S.R. 259).

When Dr. Jaslow, a court appointed psychiatrist was cross examined the following occurred:

In referring to an appointment Mr. Haft had with the Doctor on what defense counsel thought was March 13, 1988 and which the witness corrected as March 14, 1988 the witness was asked:

Q. And do you remember me asking you questions

about this case?

A. Yes.

Q. And do you remember me asking you a question about, "Did you run any I.Q. tests?" And you said, "No, what can I do for $150.00?" (SR 265). Do you remember saying that to me?

A. Never.

Q. You don't?

A. I never would say anything about the costs of such. I would have said that I did not do an I.Q. test, but I would have said also, that the mental status evaluation is a mild form of an I.Q. test. But I never would have mentioned, in terms of finance, that had nothing to do with me.

Q. You certainly said it to me, didn't you? Just try to recall it now. I sat in your office. I went over all the type of tests to take. And you didn't say, "What do you expect me to do for $150.00?"

A. Never.

Q. And isn't that what you got paid in this case? Isn't that what you got paid in this case?

A. For the exam and the report, yes. That is a standard fee. (SR 266).

In her final argument to the jury in the penalty phase the assistant State Attorney acknowledged that Defendant was found guilty of felony murder. (SR 282, lines 20, 21).

In his final argument in the penalty phase defense counsel argued:

> . . . I think within a year or maybe less, you're going to find out who the killer is, much like the Richardson case, where they framed him about killing the children.

Though an objection thereto was sustained, defense counsel continued:

> Somewhere along the line, I know there's going to be somebody here that did actually murder this man.

MS. DANNELLY: Objection.

THE COURT: Sustained. Sustained. Please Mr. Haft. This is the (S.R. 298) penalty phase. (S.R. 299).

The Sixth and Fourteenth Amendments to the Constitution of the United States of America and Article One, Section sixteen of the Florida Constitution guarantee the right of the accused to the assistance of effective counsel.

In the case at bar, there was no eye witness as to the identity of this defendant as the culprit. There was circumstantial evidence of his possession of the rented automobile of deceased after the fact; his trip to a dumpster with the police to recover a briefcase which belonged to the deceased and his fingerprints on the gear shift, the briefcase and its contents. Sans the confession, that was it.

In review, one must consider that this was a bifurcated trial. One phase being guilt or innocence, the other being penalty.

The trial judge evaluated the infliction of the death penalty in this case in part as follows:

> "As to the death penalty...It is especially wrong in this case... imposing death in this case seems to be disproportionate. The death penalty in any case is inappropriate and more so in this one." (R. 1982).

While we will urge error in a later point in this brief based upon infliction of the death penalty in this case, suffice it to say that the constant characterizations by defense counsel of the deceased, of corrupt police procedures, of lies

by witnesses, of references to other notorious cases, of violations of the golden rule, of objecting to the introduction of an unsigned confession the bulk of which had been relayed to the jury by a police officer, which confession contained repeated exculpatory references to beatings and physical abuse by the police to make him confess, when during the guilt or innocense phase defense counsel knew, or should have known he was not going to put the defendant on the witness stand to get those beatings or acts of physical cruelty before the jury in any other manner, was ineffective assistance of counsel apparent on the face of the record.

This, under authority of Stewart v. State 420 So. 2d 862, (Fla. 1982), Whitaker v. State, 433 So. 2d 1352 (3rd D.C.A. 1983) both cited in Gordon v. State, 469 So. 2d 795 (4th D.C.A. 1985) at page 797, Review denied 480 So. 2d 1296 compels appellate counsel to bring it before this high tribunal on direct appeal since, as to the characterizations of defense trial counsel, no evidence existed to support same, no documentary evidence existed as to the claim of police brutality, except, the unsigned confession and other conduct referred to herein could only result in the demeaning of defense counsel to the point where the jury closed its ears to his pleas thus incurring for the defendant the dreaded extreme penalty.

There is a reasonable probability sufficient to undermine confidence in the outcome. A verdict only weakly supported by the record is more likely to have been affected

by defense counsel's unprofessional errors than one with overwhelming record support. Strickland v. Washington, 104 S. Ct. 2052, 80 L. ED. 2d 674 (1984).

The ineffectiveness in this case was not due to an error in judgment, nor a decision of strategy made on the spur of the moment in a heated trial, but an outright disdain for the orderly presentation of truth and candidness.

Judgment and Sentence was rendered on August 7, 1989. (R. 375-380).

If the Court will not consider this issue on direct appeal, we respectfully request, with the provisions of Rule 3,850 in mind that the Court relinquish jurisdiction as to this issue and remand to the trial court for possible post conviction relief.

Without apology for doing what appellant counsel is of the opinion is absolutely necessary in this case please accept our assurance that this point is one that we sincerely wish we did not have to raise.

It is apparent that the trial judge shared our concerns about effective assistance of counsel when he stated:

> "My conscious (sic) compels me to state for the record that though defense counsel has a long and distinguished career, I feel his talents and abilities have been dimmed by his illness and treatment for it. I cannot say, however, that the verdict or recommendation of the jury were affected by defense counsel's representation."

We respectfully, with the knowledge that "there but for the grace of God go I," must urge that the conscience of

the trial court control the action of this high court; not the trial court's compassion. The life of a human being weighs heavily in favor of conscience.

## II

THE COURT ERRED WHEN IT ADMITTED TESTIMONY ABOUT THE CONFESSIONS AS TO ALL CHARGES WITHOUT THE CORPUS DELECTI HAVING FIRST BEEN ESTABLISHED AND INSTRUCTING AND ENTERING JUDGMENT ON DUAL CONVICTIONS.

On February 12, 1987 about 8:30 or 9:00 A.M., Jose Santos, the only eye witness in this case, hearing dogs barking walked to an alleyway and noticed a black male exit a car, walk to the driver's side, open the door, lean over and pull a body from the car, throw the body on the side of the alley kicking it to get inside the car as the legs were in the way. (R. 1158).

The black man then drove the 4 door white sedan away. The witness then called police. (R. 1159). He didn't see the man's face, nor could he describe it. (R. 1165). He did not hear any shots fired. (R. 1173). He could not identify Defendant as the black male involved. (R. 1176).

The victim, Franz Patella was alive when police and Fire Rescue arrived and said he was brought there from 3rd Avenue and 36th Street. He said he asked for assistance to get 95. He had a rental car agreement with Hertz. (R. 1192). He kept saying A, K and affirmed it was the auto tag.(R. 1194).

Officer Hollis Andrews stopped the car about 10:15-10:20 P.M. that same night and arrested Defendant who was a passenger and a person named Gaiter was driving. (R. 1278-1291).

At this point in time, no watch, no briefcase, no cash and no gun were discovered in the possession of Defendant by either the eye witness or the police.

Detective Jon Spears then took oral confessions from Defendant as well as an unsigned, unsworn transcript replete with exculpatory statements by Defendant. (R. 1332-1438).

No watch, gun or cash were ever presented in evidence nor attributed to Defendant, except in his unsigned, unsworn confession. He did take the police to a dumpster where the briefcase was recovered. Later in the trial it was established that his fingerprints were on the case, the papers within as well as on the automobile gear shift. He then related picking up the victim, shooting him, driving to the alley where he shot him again, took his watch, cash and briefcase.

The confession was never signed because Defendant was interrogated from after 11:00 P.M. until six something in the morning and Defendant was tired and taken to the County Jail. (R. 1390-1394).

Defense counsel objected to this line of testimony and the Court questioned the admissibility of the transcribed statement, but said the officer could testify if he remembered what Defendant said. (R. 1359) and indeed the Officer testified in full about the Statement. (R. 1349-1358).

It is important to note that the Indictment contained the following charges:

COUNT I

Premeditated murder or such while engaged in perpetration of a Robbery, and/or Burglary, and/or Kidnapping by shooting Franz Patella, with a revolver in violation of Florida Statutes 782-04 and 775.087.

COUNT II

Display of a revolver while committing a felony, to wit; Murder, and/or Robbery, and/or Burglary, and/or Kidnapping as provided by Florida Statutes 782.04 and/or 812.13, and/or 787.01, and/or 810.02 in violation of 790.07.

COUNT III

Armed Robbery of jewelry or cash of value of more than $300.00 in violation of Sections 812.13 of the Florida Statutes.

COUNT IV

Armed Kidnapping to commit or facilitate any felony, to wit; Robbery and/or Murder, and/or Kidnapping in violation of Florida Statute 787.01 and 775.087.

COUNT V

Armed Burglary with intent to commit, Robbery, Kidnapping or murder therein in violation of Florida Statutes 810.02.

COUNT VI

Grand Theft of an automobile in concert with Wilfred Gaiter in violation of Section 812.014 of the Florida Statutes. (R. 1-5).

The prosecutor, in her opening statement repeated discussions of Defendant with the police and followed that with

> "...there came a time, when the defendant finally admitted what he had done, and he didn't just admit what he had done to the police, he took them to every location, at his direction, that was involved in this homicide." (R. 1124).

She further told the jury.

> "You'll have an opportunity to read the statement." (R. 1126).

The state failed to establish the Corpus Delecti of each crime charged prior to the introduction of oral confessions and testimony as to a transcribed but unsigned, unwitnessed and unsworn confession. It had no place in her opening statement. Discussing the charges by Counts the record indicates:

COUNT I

Charged premeditated first degree murder or while engaged in the felony of Robbery, Burglary and/or kidnapping said killing accomplished with a revolver.

It is apparent from the record that notwithstanding the catch all language of this count the state proceeded on

Felony murder. From opening statement of the Prosecutor the felony murder theory is clear:

> "The defendant...leaped into his car, took out his gun, struck Mr. Patella in the head with that gun, and ordered him to drive..several blocks away..."
>
> "...as he pulled through the alley, the Defendant relieved him of the watch that his son Peter had given him for a birthday present, relieved him of the money that Mr. Patella had received from his bookkeeper to pay bills in Miami...and he relieved him of his life by shooting him repeatedly...(R. 1119). Then Defendant drove off. (R. 1120).

There were no objections by Defense counsel which omission we request this Court to consider under Point One of this Brief.

Absent the confessions the police would not have recovered the briefcase which the Prosecutor failed to mention in her opening statements. Without them the State had only circumstantial evidence as follows:

A. A dying man who suffered bullet wounds and who indicated part of an auto tag number before he died and that he sought advice on how to get to 95 and was driven to the alley in which he was found.

B. Defendant's fingerprints on the briefcase and contents and on the gear shift of the car.

C. A Hertz car rental agreement with the deceased.

In her final argument the Prosecutor argued the only thing she had, which was information from the confession of

Defendant and that argument was felony murder:

> "The one man who had struck Mr. Patela in the head, the one man who had shot him, the one man who had taken his belongings...the Defendant..." (R. 1841).

We submit, Felony murder requires an underlying felony. That is not to say the underlying is a lesser included offense, but in the case at Bar Defendant was convicted of all of the felonies charged.

We are aware of the cases that define the corpus delecti of first degree murder as the fact of death, the identity of the victim and the criminal agency of another. Drysdale v. State, 325 So. 2d 80, 82-82. (4th DCA, 1976).

However, we request the Court to reconsider that limited definition. This Court in State v. Allen, 335 So. 2d 823, (Fla. 1976) stated at page 825:

> "The State has a burden to bring forth 'Substantial evidence' tending to show the commission of the charged crime. This standard does not require the proof to be uncontradicted or overwhelming, but it must at least show the existence of each element of the crime. (Underlining ours).

What are the elements of First Degree Murder?

We respectfully submit this issue was addressed by this Court in the Standard Jury Instructions In Criminal Cases approved by this Honorable Court and given in every First Degree Murder Case in this State. The juries are instructed:

"Before you can find a defendant guilty of First Degree Premedidated Murder the State must move the following three elements beyond a reasonable doubt:

ELEMENTS:

1. (Victim) is dead.

2. The death was caused by the criminal act or agency of (defendant).

3. There was a premeditated killing of (victim).

Premeditated is then defined.

The following applicable to the case at Bar is as follows:

FELONY MURDER - FIRST DEGREE
F.S. 782.04(1)(a)

Before you can find the defendant guilty of First Degree Felony Murder, the State must prove the following three elements beyond a reasonable doubt:

ELEMENTS:

1. (Victim) is dead.

2. a. (The death occurred as a consequence of and while (defendant) was engaged in the commission of (crime alleged).)

   b. (The death occurred as a consequence of and while (defendant) was attempting to commit (crime alleged).)

   c. (The death occurred as a consequence of and while (defendant), or an accomplice, was escaping from the immediate scene of (crime alleged).)

Give 3a if defendant actual perpetrator

3. a. ((Defendant) was the person who actually killed (victim).)

Give 3b if defendant not actual perpetrator

b. ((Victim) was killed by a person other than (defendant) who was involved in the commission or attempt to commit (crime alleged) but (defendant) was present and did knowingly aid, abet, counsel, hire or otherwise procure the commission of (crime alleged).)

In order to convict a First Degree Felony Murder, it is not necessary for the State to prove that the defendant had a premeditated design or intent to kill.

Notes to Judge

1. Define the crime alleged. If Burglary, also define crime that was the object of burglary.

2. If 2b above is given, also define "attempt" (see page 55).

3. Since the statute does not require its proof, it is not necessary to define "premeditation."

(Underlining ours)

As to the other Counts, what circumstantial evidence in possession of the State was substantial evidence sans the confessions introduced, as to Count II, Display of firearm in commission of a felony, Count III, armed Robbery, Count IV Armed Kidnapping to facilitate any felony, Count V armed Burglary with intent to commit a felony in the conveyance or Count VI Grand Theft, which at best from the circumstantial evidence only could raise an inference through possession if it was shown Defendant knew or should have known it was stolen property?

Kidnapping, Section 787.01 of the Florida Statutes; Burglary, Section 810.02 of the Florida Statutes; and Theft, Section 812.014 of the Florida Statutes all are specific intent crimes. The circumstantial evidence of the State without the

confession failed to establish that intent.

It is readily apparent that Counts II, Display of a firearm while in commission of a felony, I, Felony Murder with a revolver, III Armed Robbery, IV Armed Kidnapping, and V armed Burglary all have as an integral element of the corpus delecti a firearm, to wit, a revolver. No gun was ever produced in this case, nor did any witness see Defendant with a revolver. That essential element of those counts was not sustained by circumstantial evidence. The confessions, and only the confessions, placed a revolver in the hands of the Defendant.

The admission of the confessions over objection, when the only eye witness to the car and body never connected a weapon at that time and place with the Defendant was a flagrant violation of the corpus delecti rule which states that "...before a Defendant's confession can be admitted into evidence at a criminal trial, there must be proof by substantial evidence of the corpus delecti of the crime independent of the statement..." Fla. Dept. of Law Enforcement v. Dukes, 484 So. 2d 645 (4th DCA 1986), citing Stone v. State, 378 So. 2d 765 (Fla. 1980).

A conviction solely based on appellant's confession is prohibited by the well established corpus delecti doctrine. Ruiz v. State, 388 So. 2d 610 (3rd DCA 1980), rev. denied 392 So. 2d 1380 (Fla. 1981).

In Harrison v. State, 483 So. 2d 757, (2nd DCA 1986), the Defendant appealed his conviction of possession of a firearm

by a convicted felon. The Court opined at page 758:

> Before a defendant's confession can be admitted into evidence, the state must prove by substantial evidence the corpus delecti of the crime independent of the statement...None of the state witnesses observed appellant in possession of a gun.

In the case at Bar, Defendant was convicted of Armed Robbery, Armed kidnapping and armed burglary which convictions were considered as factors in aggravation. (R. 377).

Thus, without independent proof of an armed defendant in the commission of robbery kidnapping and burglary, confessions were admitted, a jury was instructed about firearms, in the course of robbery, burglary and kidnapping, their verdict affirmed the use of a firearm, and the Court found the convictions as a factor in aggravation. (R. 377).

As a matter of fact clearly borne out by the record, there was no circumstantial nor direct evidence of robbery, kidnapping and burglary without the confessions of the Defendant. This we respectfully submit is fundamental error for which justice requires a reversal.

In addition to the foregoing, what circumstantial evidence presented by the State was substantial evidence, without the confessions as to:

1. Robbery - that there was a taking of money or other property which may be the subject of larceny from the person or custody of another when in the course

PAGE(S) MISSING

of taking there was the use of force, violence, assault, or putting in fear as required by Section 812.13(1) of the Florida Statutes?

For possession of the automobile the Defendant was found guilty of Grand Theft, Count VI of the Indictment.

A man who dies of bullet wounds on the streets of Miami, without other proof, can not be assumed to have been the victim of robbery to satisfy the corpus delecti requirement before admission of a confession.

Nor should Defendant have been convicted of robbery and grand theft. In State v. Bing 514 So. 2d 1101, (Fla. 1987) this Court referred to its decision in Carawan v. State, 515 So. 2d 161, (Fla. 1987) and reiterated at page 1102:

> "We found that robbery and grand theft address essentially the same evil, i.e. the taking of property without consent, and held the legislature's probable intent was only to provide for a more severe penalty when a single theft was accompanied by an additional aggravating factor, not to multiply punishments because other aggravating factors also concurred."

The opinion of the DCA to reverse was therefore approved.

Indeed, Section 812.13(2)(2) of the Florida Statutes expresses legislative intent in upgrading a robbery committed

with a firearm or other deadly weapon to a first degree felony. The dual convictions for Grand Theft and Robbery in the case at Bar should, therefore, be reversed.

The Defendant was also convicted of Use of a Firearm In The Commission of a felony Count II. And judgment was entered thereon. (R. 353). He, therefore, was not only dually convicted of Robbery and Grand Theft, but was dually convicted of armed robbery and use of a firearm while committing that robbery and other felonies.

This Court addressed the propriety of such dual conviction in Hall v. State 517 So. 2d 678, (Fla. 1988). The District Court of Appeal in 470 So. 2d 796 affirmed the dual conviction and certified the question to this Court as one of great public importance.

This Court reaffirmed its decision in Carawan v. State, Supra and quashed and remanded, holding that defendant could not be convicted for both armed robbery and possession of a firearm while committing that robbery.

2. Kidnapping, which under Section 787.01 of the Florida Statutes means forcibly, secretly, or by threat confining, abducting, or imprisoning another person against his will and without lawful authority with intent to:

(2) Commit or facilitate commission of any felony.

Wherein did the circumstantial evidence without the confession establish the MENS REA required for this charge before confessions could be admitted?

3. Burglary which means entering or remaining in a conveyance with the intent to commit an offense therein. Again, no corpus delecti of burglary was established before admission of the confessions.

In these three charges as well as the felony murder there was no circumstantial evidence prior to the admission of the confessions, of any revolver. If, we are to travel a primrose path and borrow from Mark Anthony's oration at Julius Caesar's funeral, that Caesar's wounds were "poor dumb mouth's" that spoke more eloquently than he could of the act of the assasins, let us remember that, there were eye witness to the action of the "Brutish Beats" alluded to by Anthony.

Such are not the facts in the case at Bar. The only eyewitness in this case did not even hear any shots. (R. 1173).

The first degree murder case against Defendant became enhanced in the penalty phase by the aggravating circumstance in the judgment and sentence of the court because the capital felony was committed while Defendant was engaged in the commission of robbery, burglary and kidnapping. (R. 377). In addition, Defendant was charged with possession of a firearm during a felony.

In Bradshaw v. State 528 So. 2d 473 (1st D.C.A. 1988) the Court said at page 474:

> "Upon the enhancement of the murder and attempted murder convictions, the charge of possession of a firearm during commission of a

> felony became a lesser included offense, so that appellant could not properly be convicted of the firearms possession charge in addition to the murder and attempted murder charges."

Thus in the case at Bar Defendant was dually convicted of:

1. Armed Robbery and possession of a firearm in the commission thereof.
2. Armed Burglary and possession of a firearm in the commission thereof.
3. Armed Kidnapping and possession of a firearm in the commission thereof.
4. First degree murder and possession of a firearm in the commission thereof.

Though armed burglary was not included in Count IV; commission of a felony while possessed of a firearm this jury found him guilty of armed burglary. (R. 2-3).

Wherefore, the convictions require reversal.

## III

THE COURT COMMITTED FUNDAMENTAL ERROR WHEN IT DISCOVERED IT'S BAILIFF HAD AN EX PARTE COMMUNICATION WITH THE JURY ABOUT PREMEDITATED FIRST DEGREE MURDER AND COMPOUNDED THAT ERROR WHEN IT FAILED ON IT'S OWN MOTION TO DECLARE A MISTRIAL, INTERROGATE THE JURY OR GIVE A CAUTIONARY INSTRUCTION EVEN THOUGH IT WAS OF THE OPINION THAT EX PARTE COMMUNICATION CONFUSED THE JURY.

Section 918.07 of the Florida Statutes provides:

ADMONITION TO OFFICER IN CHARGE OF JURORS:

> "When the jury is committed to the charge of an officer, he shall be admonished by the court to keep the jurors together in the place specified and not to permit any person to communicate with them on any subject except with the permission of the court given in open court in the presence of the defendant or his counsel. The officer shall not communicate with the jurors on any subject connected with the trial and shall return the jurors to court as directed by the court."

After instructions were given the following was said to the bailiff Mr. Mancaruso:

THE COURT: Mr. Mancaruso, give the jury a set of instructions. (R. 1921). Then, conversation between the court and counsel ensued. When finished with conversation:

THE COURT: All right. Would you please give the instructions to the jury and you may now retire to consider your verdict. (Thereupon the jury retired) (R. 1922).

No admonition required by Section 918.07 of the Florida Statutes was given by the Court to Mr. Mancaruso, the bailiff at this crucial moment of the trial.

The jury then asked certain questions of the Court. (R. 1925).

THE COURT: . . . now having read the instructions I gave to the jury on first degree felony murder and second degree felony murder, I understand why the jury is confused. The instructions were erroneous and I just feel they have to be re-read correctly and that's what I'm going to do. . .I'm going to read all the felonies.

Objection was made by the Defense, taking it out of context. (R. 1937).

The questions of the jury were:

THE CLERK: Clarify the differences for mumber two A on felony first degree and felony 2nd degree murder and What is the range of sentence for second degree murder? (R. 1942).

Defense objection to any further instruction. (R. 1943).

THE BAILIFF: Five are signed and one is not.

THE COURT: That's what they are waiting for. The questions.

THE BAILIFF: Five are signed and one it not- -

THE COURT: I'm going to reread the things-- (R. 1945)

Whereupon the Court in the presence of the jury, reread the penalties for first degree murder, as well as the substantive instructions for premeditated and felony murder, robbery, kidnapping and burglary, again without the lesser included offense of false imprisonment as to the kidnapping charge. (R. 1946-1959).

The jury was then retired to continue their deliberations again without the Section 918.07 admonition to the bailiff, the officer in charge of the jurors. Whereupon the following occurred:

THE BAILIFF: They had a question. It was on premeditated murder. I told them it was part of the instructions. They were not to rule on premeditated murder.

THE COURT: That's all very well and (R. 1959) good. I don't know if you should be giving them instructions.

MS. DANNELY: If they have a question tell them to write it down and the Court will consider it.

THE BAILIFF: That's what I had them do. They said, no, they just wanted that clarification.

THE COURT: You can't give them that clarification.

THE BAILIFF: I told them that.

THE COURT: You tell them to bring out the question. You cannot give them that clarification. Question is we have a verdict sheet for first degree--they want to know if they should have separate verdict.

They have three forms of verdict and I think what they're confused about according to what the bailiff said is the difference between premeditated and felony first degree. (R. 1960) (Underlining ours).

The court ordered the jury returned and again instructed them on first degree murder, premeditated and felony murder. (R. 1962). And second degree felony murder. (R.1963).

Thus, we have a bailiff who under 918.07 is mandated not to communicate with the jurors on any subject connected with the trial, in effect, directing a verdict as to premedi-

tated murder, that is, "they were not to rule on premeditated murder." Since premeditation in this case was almost impossible to prove who can say the defense was not prejudiced by in effect being told by their custodian that this was a felony murder case.

The benefit of the doubt must be given a condemned Defendant under this outrageous interference by a bailiff with the administration of justice. It was fundamental error for the Court not to have sua sponte declared a mistrial.

In the case at the Bar there is no doubt as to what actually happened between the bailiff and the jury as there was in Holzapfel v. State, 120 So. 2d 195 (3rd DCA, 1960) wherein the Court stated at pages 196 and 197:

> Since it thus appears that there is some doubt as to the report that was made of the incident, it is not certain as to what actually happened between the bailiff and the jury. In the criminal law the procedural aspects affecting the substantial rights of the defendant must be strictly observed for it is essential that an accused receive a fair and impartial trial as guaranteed by § 11 of the Declaration of Rights of the Constitution of Florida, F.S.A. To this end the statutes of the State of Florida prescribe certain safeguards pertaining to the conduct of a trial which must be followed exactly...
>
> The position of the State that the answers of the bailiff were a correct statement of the law

> is not sufficient. The court and the court alone is entitled to instruct jurors as to the law and this must be done in the presence of the defendant. Smith v. State, Fla. 1957, 95 So.2d 525, 527.
>
> Another of these safeguards is section 918.07, Fla. Stat., F.S.A. One of the admonitions to the officer in charge of jurors in this latter section is as follows: "Such officer shall not communicate with the jurors on any subject connected with the trial, * * *." It is thus apparent that the error complained of is not a minor one.

In McQuay v. State, 352 So.2d 1276 (1st D.C.A., 1977) stated at page 1278:

> It was reversible error for the bailiff to reply to the jury's question concerning the effect of the failure of the jury to agree upon a verdict, and to advise the jury of their duty to deliberate further. The bailiff should have immediately advised the judge that the jury desired to ask of the court such question whereupon it would be proper for the court to cause the jury to be seated in the jury box and to ask the question in open court.

and again at page 1280:

> It is, therefore, apparent that the trial judge made every effort to determine if the bailiff's communications adversely affected the jury, and the foreman assured him that such communications did not. We cannot, however, dismiss as harmless error the action of the bailiff in advising the jury

> as to the legal effect of a verdict not unanimous, in giving to the jury what was the equivalent of a layman's understanding of the charge given by the court to a jury that is unable to agree on a verdict, or in charging them their responsibility to take their time and to deliberate in an effort to reach a verdict. See Bell v. State, 311 So.2d 179, at 181 (Fla. 1st DCA 1975); and Thomas v. State, 348 So.2d 634, at 635 (Fla. 3d DCA 1977). The State's reliance upon Ennis v. State 300 So.2d 325 (Fla. 1st DCA 1974), is ill-placed. The communication by the bailiff with the jury in that case, although branded as improper, was found to be on a subject that was helpful to the defendant.

In the case at the Bar the Court made no effort to determine if the bailiff's communications adversely affected the jury as the Court realized at the very least it's bailiff's remarks confused the jury, and this, in a capital case.

The Judge himself could not out of the presence of the attorneys for the State and Defense, communicate with the jurors, let alone a bailiff who in the case at Bar interpreted the Court's instructions to the jury.

In Williams v. State, 488 So.2d 62, (Fla. 1986) this Court held at page 62:

> In Ivory v. State, 351 So2d 26 (Fla. 1977), the trial judge gave documentary exhibits to the jury upon request without advising either the state or defense. The documents included

one exhibit not in evidence which was subsequently withdrawn after approximately forty-five minutes. We found that this was an obvious violation of rule 3.410. In determining whether the error was harmful, we agreed with the court in Slinsky v. State, 232 So.2d 451 (Fla. 4th DCA 1970), and reasoned:

> Any communication with the jury outside the presence of the prosecutor, the defendant, and defendant's counsel is so fraught with potential prejudice that it cannot be considered harmless.

Ivory, 351 So.2d at 28. Accordingly, we held

> it is prejudicial error for a trial judge to respond to a request from the jury without the prosecuting attorney, the defendant, and defendant's counsel being present and having the opportunity to participate in the discussion of the action to be taken on the jury's request. This right to participate includes the right to place objections on record as well as the right to make full argument as to the reasons the jury's request should or should not be honored.

We reaffirm Ivory by holding that violation of rule 3.410 is per se reversible error. Accord Curtis v. State, 480 So.2d 1277 (Fla. 1985). We recognize that the language of Ivory can be expansively read to

> mean that any communications between the judge and jury without notice to the state and defense is per se reversible error. Communications outside the express notice requirements of rule 3.410 should be analyzed using harmless error principles. Accord Hitchcock.

In Rhodes V. State, 547 So.2d 1201 (Fla. 1989). Wherein the bailiff, on order of the Court informed jurors that polling after the penalty phase was a possibility this Court, applying a harmless error analysis did not believe the state had shown beyond a reasonable doubt that the jury verdict was not affected by the communication between the trial judge and jury. The question asked demonstrates the jurors were concerned about being polled. (P. 1201).

In the case at the Bar they were told by the Bailiff they were not to rule on premeditated murder a much more substantive directive by a lay person without consultation with the Court first had.

We can not forfeit the life of a Defendant upon such unauthorized extra judicial misconduct of Court personnel and maintain our nation of laws.

## IV

THE COURT ERRED WHEN AFTER IT GAVE AN INSTRUCTION ON KIDNAPPING, IT FAILED TO INSTRUCT ON THE LESSER INCLUDED OFFENSE OF FALSE IMPRISONMENT AND DEMEANED DEFENSE COUNSEL IN FRONT OF THE JURY.

The Court gave an Instruction on Kidnapping (R. 316 and R. 1956) but did not include an instruction on the lesser included offense of false imprisonment.

This Court decided in the case of State v. Sanborn, 533 So.2d 1169 (Fla. 1988) that false imprisonment is a necessarily lesser included offense of kidnapping, and that the failure to give the instruction on false imprisonment when requested is reversible error, approving Sanborn v. State, 513 So.2d 1380, (3rd DCA, 1987). The general intent element of false imprisonment is included in specific intent of kidnapping statute.

Simmons v. State of Florida, 541 So.2d (3rd DCA 1989) also, on the strength of State v. Sanborn (supra) applied that reasoning to attempted kidnapping. Review denied 548 So.2d 663.

While it is true that in the case at Bar no instruction for false imprisonment was requested by Defense counsel, that fact, unfortunately corroborates the relief sought in Point I of this Brief.

The record indicates that this had to be a very trying trial for the Judge. One can not visualize the

outrageous conduct of both contemptuous counsel occurring in an American Court of law. Had this been a so called "hanging judge" both counsel would have been jailed for direct criminal contempt, been brought before the Florida Bar on charges and a mistrial would have been declared. That would, at the very least, have assured this Defendant a fair and impartial trial.

It is distasteful to accuse a merciful judge with error because counsel, who appear before the Court have so contemptuously conducted themselves that the trial became a mockery.

We urge this Honorable Court, the constitutional tribunal which disciplines lawyers and determines those among us who are fit to enjoy the privilege to practice law to consider the case of Wilkerson v. State, 510 So.2d 1253, (1st DCA 1987).

In Wilkerson, the trial judge made derogatory remarks repeatedly about defense counsel. The analogy in the case at the Bar to that case is not based on the identical factual pattern, but the reasoning of the Court about the danger to the client of impropriety at the trial level is applicable.

In the case at the Bar the Court threatened defense counsel with contempt in front of the jury as in Wilkerson.

The Court allowed testimony about a deposition wherein defense counsel alleged he was threatened by a state attorney investigator that if he persisted in certain conduct he would be arrested.

MR. HAFT: I was present and she did threaten to have me arrested.

THE COURT: You're not testifying and I'll hold you both in contempt. (R. 1772-1773).

In Wilkerson the Court held at page 1255 that accusing defense counsel of extreme unfairness and threatening him with contempt, required granting of a new trial.

> When the trial gets out of bounds, or when the judge demonstrates his ill feeling and animosity toward one of the lawyers, it is not the lawyer who suffers, rather it is the client who is being deprived of the highest level of justice that is the handiwork of a fair, temperate and impartial mediator in the judge's chair. (citations omitted)
>
> It is difficult to see how Wilkerson could not have been prejudiced by the unremitting browbeating his attorney endured before the trial judge. The trial judge helps guide the trial and although he may be tempted to become impatient with counsel he must resist this impulse. See Hunter v. State, 314 So.2d 174 (Fla. 4th DCA 1975). Consequently, the trial judge should avoid the type of comment which would result in prohibiting counsel from giving full representation to his client or which might bring counsel to disfavor before the jury at the expense of the client. Id. at 175. The trial court judge's remarks in the case at bar engendered the occurrence of both these results, and Wilkerson is therefore entitled to a new trial.
>
> REVERSED.

When the State called David Milligan, an investigator with the State attorney's office prior to the foregoing threat of contempt he was allowed to testify (without objection by Defense counsel, for which we again refer the Court to our Point I of this Brief):

> A. During the taking of the deposition, the defense attorney, Mr. Haft, kept interrupting, and causing some commotion in the room to the point where I had to speak to to him and tell him if he didn't (R. 1786) discontinue his actions, that I would take some actions to ensure that he would discontinue what he was doing.
>
> and again:
>
> A. I think I might have told him if he didn't discontinue, I would have to place him under arrest. (R. 1787).

After a belated objection the following was said at sidebar:

> THE COURT: ...I don't think any of this is relevant except for the fact that it was brought up at the time. (R. 1793).

We respectfully submit it was not only irrelevant; it put defense counsel on trial and might have brought counsel to disfavor before the jury at the expense of his client's freedom, indeed, life itself, and requires a reversal.

## V

THE COURT'S SENTENCE OF DEATH WAS INAPPROPRIATE AND DISPROPORTIONATE IN THIS CASE.

Infliction of the death penalty in this case is disproportionate, where trial court expressly found Defendant's lack of significant history of criminal activity; in fact there was no evidence introduced that Defendant had any past criminal history. (S.R. 1980). The Defendant's age at the time of the crime was also considered by the Court as a mitigating factor. (S.R. 1981).

In its pronouncement of the sentence of death the trial Court stated in part:

> "This Court believes that the death penalty in any case is wrong. It is especially wrong in this case. Considering other cases in which the State has sought and obtained the supreme penalty, imposing death in this case seems to be disproportionate.
>
> The death penalty in any case is inappropriate and more so in this one." (S.R. 1982). (Underlining ours)

The Court considered as aggravating factors:

1. The capital felony was especially heinous, atrocious or cruel.

2. The capital felony was a homicide and was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

3. The capital felony was committed while the Defendant was engaged in commission of robbery, burglary and kidnapping. (S.R. 1977-1980).

As to the factual scenario of the crime itself con-

sidered by the Court in its arrival at finding factors 1 and 2 in aggravation (S.R. 1978), they were all predicated on the testimony of Detective Spear, over objection, from the unsigned, unwitnessed, unsworn confession of Defendant. (R. 1349-1353). This confession was the subject of a Motion To Suppress which was denied. (R. 477).

In the Motion To Suppress in cross examination of Detective Spear the following was read from the typed statement:

> Q. Why are you changing your story now?
>
> A. Because I did not do it. If I thought you were all going to jump on me.
>
> Q. Has anybody harmed you?
>
> A. No, sir. (R. 691).

and again referring to the typed statement:

> Q. Did he say in that statement anywhere that you were jumping all over him, either you or Bishop or Vincent?
>
> A. Yes Sir, he did. (R. 692).

Defendant during the typed statement said in an answer to a question: "You're going to beat me up.(R. 698), I'm telling you the truth...(R. 699).

Though these references to police brutality at the time of the confession were contained in the confession itself and even though the Court when defense counsel first objected to its introduction by the State stated: "I would think he would want it admitted," the confession was not admitted when later, Defense counsel sought its admission. (R. 1415-1416).

Thus, these exculpatory statements as to the

voluntariness of the confession could not have been considered by the jury. Oddly enough, though Defendant did not take the stand, the Court instructed the jury about a statement made by the defendant outside of Court which "has been placed before you." It went on to explain volunariness thereof: (R. 336).

The trial Court in its' denial of the Motion to Suppress stated: "If that picture had indicated any abuse, at all, I might very well have thought differently about this case, but this is a jury question, based upon this man's sworn testimony and the detectives' sworn testimony, whether this statement was given fr ely and voluntarily." (R. 744).

We submit the jury which found him guilty and sentenced him to death on aggravating factors I and II never had the document before them about which Detective Spear testified in detail and which was the only evidence indicating the course of the crime from beginning to end.

Without going into detail, the court in its judgment and sentence when characterizing the crime as especially heinous, atrocious and cruel traced the path of the victim, the entry of the Defendant into the car, the driving away to the alley, and the shooting, (S.R. 1978) all of which came only from the confession upon which Detective Spear was allowed to testify; but the physical document itself was denied admission into evidence for consideration by the jury.

A.

This Court has vacated the death penalty in several cases in which the aggravating factor of heinous, atrocious

and cruel had been erroneously found applicable by the trial court in situations analagous to the case at bar in that they involve murders which are not set apart from the usual murder which are not unecessarily tortuous to the victim, in:

Lloyd v. State, 524 So.2d 396, (Fla. 1988) where the victim was shot twice in front of her five year old child.

Proffitt v. State; State v. Proffitt, 510 So.2d 896 (Fla. 1987). Where it was stated at Page 898:

> Appellant claims that this Court has never affirmed the death penalty for a homicide during a burglary unaccompanied by any additional acts of abuse or torture to the victim, where the defendant has no prior record of criminal or violent behavior.
>
> Here, not only is there no aggravating factor of prior convictions, but the trial judge expressly found that Proffitt's lack of any significant history of prior criminal activity or violent behavior were mitigating circumstances.

State v. Dixon, 283 So. 2d 1 (Fla. 1973)

> It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies - the conscienceless or pitiless crime which is unnecessarily torturous to the victim. Dixon, at 9.

Mills v. State, 425 So. 2d 172 (Fla. 1985)

> The criminal act that ultimately caused death was a single shot from a shotgun. The fact that the victim lived for a couple of hours in undoubted pain and knew that he was facing imminent death, horrible as this prospect may have been, does not set this senseless murder apart from the norm of capital felonies.
> Mills, at 178.

Blanco v. State, 452 So. 2d 520 (Fla. 1984)

> Victim shot six times during home invasion, dying on top of his fourteen year old niece - factor improperly found.

Clark v. State, 443 So. 2d 973 (Fla. 1983)

> Factor improperly found where disabled, elderly woman shot during robbery and died in the presence of her husband.

B.

From the facts it is readily apparent that this was not an execution-type nor a contract murder to sustain the charge that this was a cold, calculated, and premeditated murder, without justification.

Lloyd v. State, supra:

> There was an insufficient showing of the heightened premeditation, calculation, or planning that must be established to support a finding that the murder was cold, calculated, and premeditated. In view of our recent decision in Rogers v. State, 511 So.2d 526 (Fla. 1987), cert. denied, --U.S.--, 108 S.Ct. 733, 98 L.Ed. 2d 681 (1988), we agree this aggravating circumstance has not been established because there is insufficient evidence of a calcu-

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lated plan or prearranged design.

McCray v. State, 416 So. 2d 804 (Fla. 1982)

> "Finally, we conclude that this was not a murder committed in a 'cold, calculated, and premeditated manner without pretense of moral or legal justification.' Section 921.141(5)(i), Fla. Stat. (1979). That aggravating circumstance ordinarily applies in those murders which are characterized as executions or contract murders, although that description is not intended to be all-inclusive." McCray, at 807.

Cannady v. State, 427 So. 2d 723 (Fla. 1983)

> "During his confession appellant explained that he shot Carrier because Carrier jumped at him. These statements establish that appellant had at least a pretense of a moral or legal justification, protecting his own life.
>
> The trial judge expressed disbelief in appellant's statements because the victim was a quiet, unassuming minister and because appellant shot him not once but five times. Though these factors may cause one to disbelieve appellant's version of what happened, they are not sufficient by themselves to prove beyond a reasonable doubt that the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification." Cannady, at 730.

Herzog v. State, 439 So. 2d 1372 (Fla. 1983)

> "The trial court found that the facts supporting this factor are as follows: '(T)he killing was the consummation of prior threats and arguments based on defendant's belief that the victim had previously taken some of his money or drugs.' This finding speaks to the issue of premeditation, however it is

not sufficient to establish the requirement that the murder be "cold, calculated . . and without any pretense of moral or legal justification." Herzog, at 1380.

Maxwell v. State, 443 So. 2d 967 (Fla. 1983)

"Proof of this aggravating circumstances requires a showing of a state of mind beyond that of the ordinary premeditation required for a first degree murder conviction. Here the evidence showed that appellant killed Donald Klein intentionally and deliberately but there was no showing of any additional factor to establish that the murder was committed in a 'cold, calculated, and premeditated manner without any pretense of moral or legal justification.'" Maxwell, at 971.

Hardwick v. State, 461 So. 2d 79 (Fla. 1984)

Factor improperly found despite evidence that defendant planned other crime against victim; premeditation cannot be transferred from other felony to murder.

Herring v. State, 446 So. 2d 1049 (Fla. 1984)

Factor improperly found where defendant first shot in purported self defense but then shot a second time to kill during course of convenience store robbery.

Peavy v. State, 442 So. 2d 200, (Fla. 1983) at page 202:

(5) While some may view this homicide as cold, calculated, and premeditated, it does not meet the standard for finding this aggravating circumstance. Jent v. State, 408 So.2d 1024 (Fla. 1981), cert. denied, 457 U.S. 1111, 102 S.Ct. 2916, 73 L.Ed.2d 1322 (1982); Combs v. State, 403 So.2d 418 (Fla. 1981), cert. denied, 456 U.S. 984, 102 S.Ct. 2258, 72 L.Ed.2d 862 (1982).

> This murder occurred during the commission of a burglary and robbery and is susceptible to other conclusions than finding it committed in a cold, calculated, and premeditated manner, The trial court improperly found the existence of this aggravating circumstance because the evidence does not establish it beyond a reasonable doubt.

Gorham v. State, 454 So. 2d 556 (Fla. 1984)

> Prohibits transferring of premeditation for felony to murder which occurs in the course thereof.

The killing in the case at the bar was no more, no less, than during the commission of a robbery/burglary which went awry. On the facts, neither the heinous nor cold, calculating circumstances of aggravation were applicable.

Appropriate Defense Motions in this regard were made to the trial Court.

We submit that the conscience of the trial Court which was expressed in its condemnation of this Defendant, as a case in which it is wrong to inflict the extreme penalty should be given great weight. We submit that it is an expression of a Court which felt the law compelled it to sentence defendant to the extreme penalty. A situation similar to the old saying: "Reason be damned-it's company policy." We respectfully suggest that the Court erred in its belief that the advisory opinion of the jury, mandated the Court to not exercise the discretion afforded it by law, as a result of which the grave injustice by this absence of judicial descre-

tion, to which this Defendant constitutionally is entitled, will, if not reversed, put defendant in his grave. This by order of a court which expressed the death penalty in this case is disproportionate.

Justice requires a reversal of the death penalty in this case.

## CONCLUSION

It is apparent that the trial court felt the representation of defendant by counsel was not of the calibre expected in a case of this magnitude where the defendant was in jeopardy of the extreme penalty and did indeed, suffer the full wrath of the law.

With the circus like atmosphere created by both attorneys whe were each adjudged in contempt it is not surprising that the Court erred as follows:

1. Admitting testimony as to a confession, but denying admission of the transcribed confession which contained explicit language as to police brutality, important enough for the Court to give an instruction on the voluntariness of same. All this, though without the confession the corpus delecti of display of a firearm in the commission of a felony, armed robbery, armed burglary, and armed kidnapping had not been established.

2. The giving of a kidnapping instruction without an instruction on the lesser included offense of flase imprisonment. The giving of instructions on dual crimes which resulted in dual convictions.

3. The total acceptance of an ellegal ex parte directive of a lay person, the Court's bailiff to the jury even though the Court was of the opinion that the ex parte communication of the Court's bailiff "confused" the jury.

4. The demeaning of defense counsel in front of the jury that the Court was going to hold him in contempt.

5. The sentence of death based upon the advisory opinion of the jury predicated upon two instructions as to (A) heinous, atrocious and cruel acts, and (B) as to cold, calculated and premeditated murder neither of which under the law were applicable to the case at bar. In addition to which there was a complete absence of judicial discretion in sentencing defendant to death where the Court was of the opinion that such a decision was disproportionate.

We respectfully submit the foregoing require a reversal on all counts and remand for a new trial.

Respectfully submitted,

William A. Cain

WILLIAM A. CAIN, ESQUIRE
Special Assistant Public Defender
1390 N.E. 162nd Street
North Miami Beach, Florida 33162
Telephone: (305) 944-4858

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Initial Brief of Appellant was mailed to the Office of the Attorney General, 401 N.W.2nd Avenue, Suite N921, Miami, Florida 33128 this 24 day of May, 1990.

William A. Cain

WILLIAM A. CAIN