IN THE SUPREME COURT OF APPEAL OF FLORIDA

CASE NO. 74,913

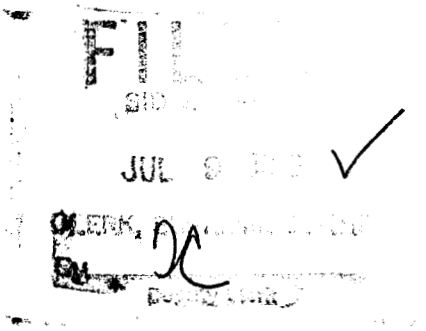
JOSE MAQUEIRA,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.



AN APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA CRIMINAL DIVISION

INITIAL BRIEF OF APPELLANT

CALIANNE P. LANTZ, ESQUIRE
Special Assistant Public Defender
9100 South Dadeland Boulevard
Suite 512
Miami, Florida 33156
(305) 670-1992
Florida Bar No.: 301671

TABLE OF CONTENTS

TABLE OF CITATIONS

STATUTES AND OTHER PROVISIONS:

INTRODUCTION

The appellant, Jose Maqueira, was the defendant in the trial court. The appellee, the State of Florida, was the prosecution. In this brief, the parties will be referred to as they appear before this court. The symbol "R" will be used to refer to the record on appeal and transcript of proceedings. All emphasis has been supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

Appellant was charged in a four (IV) count indictment filed in the Circuit Court of the Eleventh Judicial Circuit, in and for Dade County, Florida in Case No. 87-39099, on January 14, 1988, with two counts of first degree murder, one count of armed burglary and one count of attempted robbery. (R. 1-3A). A superseding indictment was filed on January 4, 1989, charging Appellant, Jose Maqueira, with one count of first degree murder of Raquel Rodriguez (Count I), one count of first degree murder of Miguel Rodriguez (Count II), one count of armed burglary (Count III), and one count of armed robbery (Count IV). (R. 4-6A).

Appellant Maqueira, by appointed counsel, filed various pre-trial motions. On April 19, 1989, Appellant filed a motion to prohibit introduction of evidence of non-statutory aggravating circumstances and to permit evidence of non-statutory mitigating circumstances at penalty phase. (R. 25-27). The court granted

said motion on July 17, 1989. (R. 25). A motion to declare Florida Statute Section 922.10 unconstitutional was also filed on April 19, 1989. (R. 28-29). Said motion was denied by the Honorable David Tobin, Circuit Judge, on July 17, 1989. (R. 28). A motion for statement of particulars and demand for discovery as to aggravating circumstances was also denied on July 17, 1989, by the trial court. (R. 30-34).

A motion in limine seeking to limit the prosecution and prosecution witnesses not to defer or allude to certain matters under Rule 3.190 and Rule 3.220(1), Florida Rules of Criminal Procedure, was also filed on April 19, 1989. (R. 37-42). The request to limit any description of the deceased which refers, in detail, the effects of a gunshot wound on the human body, was denied by the trial court on July 17, 1989. (R. 37). The request to limit any evidence concerning any pictures of the deceased or pictures taken at the scene of the crime which depict the extensive injuries to the body was also denied by the trial court. (R. 37-38). The request to limit any reputation evidence concerning Jose Maqueira until determination outside the presence of the jury whether the witness testifying had adequate opportunity to know the accused or his reputation was granted by the trial court. (R. 38). The request that the prosecution request stipulations to testimony outside the presence of the jury was granted by the trial court. (R. 38).

A motion to preclude challenges for cause against persons who

would not, and possibly might not, be able to impose a penalty of death was also filed prior to the commencement of trial in April of 1989. (R. 39-42). Said motion was denied on July 17, 1989. (R. 39). A motion to prohibit the State from introducing evidence to rebut mitigating circumstances in its case in chief was granted without objection on July 17, 1989. (R. 43-44).

The State of Florida filed a motion for order in limine #1 on July 17, 1989 seeking to prevent defense counsel from inquiring of any state witnesses, or of any defense witness, or of making any argument to the jury concerning the arrest of initial co-defendant, Carlos Vivancia, and subsequent no action of the charges. Appellee further moved to prevent defense counsel from inquiring of any state witness or any defense witness or making any argument to the jury concerning the lack of arrest of the co-defendant Lazaro Diaz. (R. 80-81). Appellee also filed a motion for order in limine #2 seeking to prevent defense counsel from arguing to the jury during the trial without first obtaining permission the defense of duress or necessity in defending the indictment for first degree murder. (R. 82-83). Both motions were granted by the trial court on July 17, 1989. (R. 80, 84).

A motion to appoint a psychologist for examination and assistance in the preparation for the penalty phase was filed by Appellant and granted by the Court on July 17, 1989. (R. 84-85).

Appellant entered into two written stipulations with Appellee

on July 19, 1989. The parties stipulated that the human being autopsied under medical examiner case no. 83-1431 was known in life as Raquel Rodriguez. It was further stipulated that the human being autopsied under medical examiner case no. 83-1428 was known in life as Miguel Rodriguez. (R. 86). In the second stipulation the State and defense stipulated and agreed that Dr. Jay Barnhart, associate medical examiner for Dade County, could testify in place of former Dade County Associate Medical Examiner, Sigmund M. Menchel and that the testimony would be from the business records kept at the medical examiner's office regarding medical examiner case no. 83-1431 and case no. 83-1428. The defense agreed to waive any and all objections as to the chain of evidence. (R. 87).

In addition to other pre-trial motions noted herein, Appellant filed, on April 19, 1989, a motion to suppress a confession illegally obtained and memorandum of law. (R. 45-51).

On June 19, 1989 Appellant filed a supplement to the motion to suppress. (R. 54-68). The State of Florida, Appellee, filed a written response to the motion to suppress statements on July 10, 1989. (R. 72-79).

Appellant asserted in his motion to suppress and his supplement thereto that while in prison on unrelated charges, he made statements to a fellow inmate, Ramiro Gonzalez, who has frequently and over a period of years worked with the police as an inside informant and engaged in conversations with Mr. Gonzalez

based on persistent, direct or implied promises made by Gonzalez to Appellant. Thus, any statements allegedly made by Appellant to Mr. Gonzalez should have been held inadmissible. The improper influence of Mr. Gonzalez, without Appellant benefitting from the assistance of counsel, rendered the alleged confession involuntary. (See: R. 45-49; 54-68).

An evidentiary hearing was held on July 13, 1989, before the Honorable David Tobin, Circuit Judge, as to Appellant's motion to suppress statements. (R. 330-466). At said hearing, Appellant, Jose Maqueira, testified in support of his motion to suppress. Mr. Maqueira stated that at the time of the hearing he had been in prison for about five years on another charge. (R. 332, 333). While in prison, Appellant met a man by the name of Ramiro Gonzalez approximately two and one-half ($2\frac{1}{2}$) to three (3) years prior to that time. They became good friends and Maqueira loved Gonzalez like a father because of the time that they had spent together in prison and based upon his belief that Gonzalez was the only person that would help him, as he had no relatives in the United States. (R. 334). Jose Maqueira had also met and spoken to Ramiro Gonzalez's mother who had given him money four or five times because he would share his things with Gonzalez. (R. 335). Maqueira was aware that Gonzalez had worked with the police concerning an individual nicknamed "Santiago" who had been set free, according to Gonzalez, as a result of cooperation with detectives. (R. 336). Appellant testified that he talked to

Ramiro Gonzalez about his particular case because Gonzalez told him that there were detectives who were friends or relatives of his that would help him resolve a case. (R. 337).

According to Appellant's further testimony at the suppression hearing, about one year after Santiago was brought to Miami Gonzalez promised Maqueira that if he were to speak to detectives about a double murder case, he could obtain benefits if he gave the names of the other two people. Maqueira did not approach Gonzalez with the information, it was Gonzalez who induced Maqueira into giving him information. Maqueira told Gonzalez to talk to detectives and that they could go see him and speak to him. (R. 338). Ramiro Gonzalez knew the severity of the case involved and did not warn him not to confess to police unless he was sure it would be okay for him. Ramiro Gonzalez promised Maqueira that the detectives would promise him something before they spoke. He spoke directly to detectives on the telephone prior to giving a statement. During the telephone conversations, he stated that he knew of a double murder. The detectives told him to remain calm and that everything would be okay and that they would go to the institution and talk about the problem. (R. 339, 340).

In October, 1987, Detectives Cadavid and Dominguez went to see Jose Maqueira at Martin Correctional Institute. They spoke to Ramiro Gonzalez at least fifteen minutes before they spoke to

Appellant. Appellant then spoke to the detectives for twenty or thirty minutes before the detectives taped additional statements. Detective George Cadavid told Jose that it was okay to talk, that Ramiro knew how the job was and that everything could come out allright. (R. 341). Appellant told the detective before speaking further that he wanted immunity and a reduction on the sentence that he was serving and that he did not want any problems with immigration. According to Appellant, the detective responded that if Maqueira testified against Lazaro Diaz and Carlos Villavicencio, that he would resolve the matters raised in Appellant's request for him. (R. 341). These statements were allegedly made in the presence of Detective Dominguez who appeared to be in accord with Detective Cadavid. Although Appellant was told that the detective had to speak to the prosecutor, the Detective did not tell Maqueira that he did not have the authority to fullfill these promises. (R. 342). It was also discussed that Ramiro Gonzalez had worked with a lot of people and had succeeded in getting people out of prison. Once Appellant allegedly confessed, he was given the Miranda rights warning waiver paper to sign and told to sign it because it was routine. Prior to signing the form, the Detective and Appellant had spoken about a lawyer and the detective told him that he did not need one. (R. 343). Appellant then gave a statement to the Detectives. (R. 343-345).

Appellant was subsequently brought to Miami and had telephone

conversations with Detective George Cadavid, Detective Singleton and another individual whose name he did not recall. (R. 346-347). Detective Cadavid and another partner went to see Appellant at the Dade County Jail. At that point, Appellant communicated to the officers that he was concerned due to delay and inquired as to immunity. Appellant was told that if he gave a second confession, everything was going to be resolved because the police were interested in Carlos Villavicencio. (R. 348). According to Appellant, the officers wanted a second tape recorded statement because Appellant had allegedly made a lot of mistakes, or was confused, in his initial statement. (R. 348). During the recording of the second tape recorded statement, Detective Cadavid asked Appellant twice if he had been promised anything and he responded "no". He answered negatively because he was told by the officers that the statements would not be of any use if he answered affirmatively. He was also told that the police wanted a second confession because he had allegedly made a few little mistakes on the first recording and that they wanted to tape the statement at the (police station) department in front of certain witnesses. (R. 349). On cross examination Appellant admitted to having prior convictions.

Detective George Cadavid testified on behalf of the State at the suppression hearing and stated that he had received a telephone call in 1987 from a Sgt. Singleton, Metro Dade Homicide, who informed him that a person at the Martin

Correctional Institution by the name of Ramiro Gonzalez had information on a murder that Detective Cadavid had previously investigated. (R. 376-377). Sgt. Singleton told Detective Cadavid that Gonzalez had given the name of Jose Maqueira as an individual having confessed to him as being involved in a double murder and shooting of a woman. (R. 377).

On October 5th of that year, Detective Cadavid and his partner, Detective Danny Dominguez, went to Martin County to the Correctional Institution. When they first arrived they spoke with Ramiro Gonzalez. (R. 378-379). Subsequent to his conversation with Ramiro Gonzalez, the detective met with Mr. Maqueira. Prior to taking a recorded statement from Appellant, Detective Cadavid spoke with Appellant for one-half hour to forty-five minutes. (R. 403, 404). According to the officer, he allegedly read Appellant a Constitutional Rights Waiver Form in Spanish and obtained Appellant's signature. (R. 385). Although the officer testified that he did not make Appellant any promises in order to get to speak with him, the officer did acknowledge that he had discussed the issues brought up by Appellant such as help with his sentence for robbery and some type of immunity. (R. 385, 386).

On cross-examination, Detective Cadavid acknowledged that Detective Singleton had told him that it was Ramiro Gonzalez's style to become friendly and establish a personal relationship that he ended up informing on or turning over to the State. (R.

397, 398). Jose Maqueira had wanted Ramiro Gonzalez to be present when the officer interviewed him because he trusted the informant, Ramiro Gonzalez. (R. 407). The officer also acknowledged that he had written a letter to the Parole Commission on behalf of Ramiro Gonzalez. (R. 398, 399). It was because of the informant Ramiro Gonzalez's work that the detective and the Metro Dade Police Department were able to solve the unsolved murders that were regarded as "cold" cases. (R. 399). Furthermore, the Detective never told Appellant, Jose Maqueira, that he would not be helped by the prosecutor, nor by the Court. (R. 411). The first tape recorded statement did not contain statements by Appellant to the effect that he had not been promised anything. (R. 416). In addition, the officer stated that prior to obtaining statements from Appellant, he had no evidence whatsoever linking Jose Maqueira to the instant crime. The officer testified that he did not know whether Appellant was aware that he was facing a potential death penalty by giving the so-called confession to the officers. (R. 406). The officer did not make Appellant aware that he would be facing a potential death penalty. (R. 406, 407).

Detective Al Singleton of the Metro Dade Police Department also testified at the suppression hearing. The officer testified that on May 14th or 15th, 1987 he received a call from Ramiro Gonzalez (R. 425, 426). The officer testified that Ramiro had called him from Martin Correctional Facility and had informed him

that he knew of an inmate that was involved in a homicide that occurred several years prior and that this inmate wanted to give up this information to investigators. (R. 426). Ramiro Gonzalez called the officer approximately fifty times from 1983 to 1987. Ramiro Gonzalez had been involved with the Metro Dade Police Department as to several investigations since 1983. Detective Singleton also wrote a letter to the Parole Board on behalf of Ramiro Gonzalez. (R. 431, 432).

Ramiro Gonzalez testified on direct examination that Appellant had approached him for help when another inmate, Santiago Cantino, was released from prison based upon cooperation with the Metro Dade Police Department. (R. 434). Gonzalez called Sgt. Singleton on Appellant's behalf after Gonzalez made it clear to Jose Maqueira that Gonzalez was a friend of certain policemen such as Falcon, Lloyd Huff and Sgt. Singleton. (R. 435). It was not until after Gonzalez allegedly implied that he was well connected with the police, that Appellant told him details concerning his case. (R. 435, 436). Although Ramiro Gonzalez testified that Detective Cadavid did not make Appellant any promises when Maqueira spoke to him, he acknowledged that he became a good friend of Appellants in prison and Appellant had trusted him. (R. 441-444). On cross-examination, the witness further alleged that he had spoken about the possibility of Jose Maqueira being sentenced to death in the electric chair, however, he acknowledged that Appellant was under the impression that

cooperation with Ramiro's police friends that the alleged co-defendants would instead be sentenced to death and that Appellant would benefit from his cooperation, as did Santiago. (R. 445).

Another individual who had been an inmate at Martin Correctional Institution in October, 1987, Pedro Torres, testified on Appellant's behalf at the suppression hearing. (R. 452-463). In October of 1987, Mr. Torres was having a telephone conversation with Detective Cadavid and Detective Cadavid asked that Mr. Torres put Mr. Maqueira on the telephone. (R. 454). Mr. Torres was aware the Appellant Maqueira wanted his 32 year sentence reduced and to receive immunity on this case, as well as immunity from an immigration hold. (R. 454). It was brought out by defense counsel that Torres had stated in deposition that Detective Cadavid had told him to tell Maqueira that he was trying to reach the prosecutor about trying to give Maqueira immunity. (R. 454-460).

At the close of the hearing the Court orally denied Appellant's motion to suppress statements. (R. 455-456). In making its oral ruling, the Court found that the defendant was sophisticated as he had been in the system with eight prior cases and that Ramiro Gonzalez was not an agent of the State. (R. 466). The Court further found the testimony of the defendant contradictory to the other witnesses and that there was no coercive activity by the State. (R. 466).

On July 19, 1989 a jury trial commenced before the Honorable David L. Tobin, Circuit Judge. (R. 823-825). The first witness called on behalf of Appellee, the State of Florida, was Rachel Beatrice Rodriguez. She testified that on May 25, 1983 she left her house to buy flowers around 9:15 to 9:30 (a.m.). (R. 893-896). When she returned home, she saw her mother, Raquel Rodriguez (R. 894-896) sitting on one of the chairs on the porch. The front door grill area that covered the front door was completely open, along with the door itself. (R. 896-897). Ms. Rodriguez lived in an efficiency, or converted garage, adjacent to her parents home. (R. 896). According to her testimony, she was invited into her parent's portion of the home by her mother. She went into her bedroom to put the flowers in the vase and heard the phone ring. (R. 897). While she was talking on the telephone she heard two shots. (R. 898). She ran toward the front of the house, trying to get into the house to see what happened and observed two men run past her. (R. 899-900). When she entered the house she observed her mother crying on the floor, grasping her stomach and screaming. Her mother told her to go see her father and close the door. (R. 901). She went into the bedroom and saw her father lying on the bed covered with blood, she tried to assist her father and then went to call the police. (R. 901-902). She did not have a chance to see if any property was missing at that time. (R. 903). She went on to testify that she identified an individual as a man she saw

running from her house with a gun in his hand when shown photographs by Detective George Cadavid in November of 1987. (R. 904-910). She identified two individuals from two photo line-ups.

On cross-examination, Ms. Rodriguez stated that she never saw Appellant, Jose Maqueira, inside the house or inside an area depicted by a sketch presented to her on direct examination. (R. 921). Jose Maqueira was not the individual she identified in the first photo line-up. She never saw him standing by a light pole by her house. (R. 922). She also stated that Jose Maqueira was not the second person she identified as the individual she saw running outside the house. (R. 923). She further stated that at some point in time she subsequently learned that her father supposedly had $70,000.00 in cash or in a cashier's check in the house and that he was traveling to Costa Rica. She later learned that there was another airline ticket purchased in a ladies name of "Ryna Cucet". (R. 924-925). Ms. Rodriguez did not know who Ryna Cucet was, nor did she know her mother to use that name.

The next witness called by the prosecution was I.D. Technician Robert Sarno, Miami Police Department. (R. 926). He testified that on May 25, 1983, he was called to the scene of a homicide located at 3071 N. W. 6th Street, Miami, Dade County, Florida at approximately 11:15 in the morning. (R. 928). When he arrived at the scene, yellow tape had already been placed in front of the premises. (R. 929). The bedroom appeared fairly

neat, as did the rest of the house. (R. 930). The male victim was found in the southeast bedroom laying on the head of the bed with part of his torso protruding over the bed. Below the victim's feet, there was some yellow rope. A weapon was found in one of the drawers by the victims bed. The weapon was a five shot revolver that was holstered in a drawer and was loaded with five live rounds of amunition. The weapon was subsequently identified as belonging to the victim. (R. 930-932). He noticed blood stains in the area and later found a spent casing in the bedroom, on a window ledge by the headboard of the bed. (R. 933).

On cross-examination, the technician stated that to the best of his recollection no fingerprints ever identified as belonging to Jose Maqueira were found on the scene. (R. 934). A travel bag was also found on the scene. The technician conceded that the rope found at the bottom of the victim, Miguel Rodriguez's feet, could have been used to tie up the travel bag. (R. 950).

Metro Dade Police Department Crime Laboratory Criminalist Melvin Zahn also testified on behalf of Appellee at the trial. (R. 955). Mr. Zahn was designated as an expert in the field of firearms and tool marks. (R. 956). He examined the projectile that was removed from Miguel Rodriguez. (R. 958). He determined that it was a .38 automatic caliber bullet in a cooper jacket.

Dr. Jay Barnhardt, a medical doctor employed by the Dade County Medical Examiner's Office, testified that he reviewed the

business records of the Medical Examiner's Office with regard to Medical Examiner's Case Nos. 83-1431 and 83-1428. (R. 972-974). Medical Examiner Case No. 83-1431 involved an autopsy performed on Raquel Rodriguez on May 25, 1983. Her general condition was consistent with her stated age of 52 (R. 974). She had been to the hospital and received treatment for an apparent gunshot wound. At the hospital, tubes had been placed down her windpipe and in her nose. She had a surgical incision which had been placed across the left side of her chest in order to go in and explore the injured area. There was evidence of a gunshot wound on the left side of the body, appearing to pass through the body from front to back and somewhat downward. (R. 974-976). The bullet had apparently exited on her left lower back around her waist. The apparent entrance point was on the left upper front. (R. 976). The associate medical examiner came to a conclusion that the cause of death of Mrs. Rodriguez was a gunshot wound which caused her to bleed to death internally. (R. 978).

Medical Examiner Case No. 83-1428 involved an autopsy performed on Miguel Rodriguez on May 25, 1983. (R. 980). He had a gunshot wound to the abdomen, the projectile was recovered from the chest on the right side of the back side of the chest cage. (R. 982). The doctor testified that Mr. Rodriguez died from the gunshot wound that he received. (R. 988). On cross-examination, the doctor testified that the type of gunshot wound received by Mr. Rodriguez resulted in a relatively quick death, as would the

type of wound received by Mrs. Rodriguez. (R. 990).

Fire-Rescue Lieutenant Lange Wilson Poole, City of Miami Fire Department, was the next witness called at the trial. (R. 993). On May 25, 1983 he responded to an emergency call at 3071 N. W. 6th Street, at approximately 10:44 in the morning. (R. 994). He was part of the treatment team that actually treated Mrs. Rodriguez for one shot to the abdomen. (R. 994-995).

Carlos Montero testified that at the time of the incident in question he was a one man patrol unit for the City of Miami Police Department. (R. 1036, 1037). He arrived on the scene at approximately 10:42 in the morning on the day in question. (R. 1038). He testified as to his observations on the scene and descriptions of clothing given to him by the daughter of the victims, Rachel Rodriguez. (R. 1043-1056).

City of Miami Police Department, Detective George Cadavid also testified that he reported to the scene at the time in question. (R. 1060). He never saw Mrs. Rodriguez in the home, as Fire-Rescue had already taken her to Jackson Memorial Hospital. (R. 1061). The Detective further testified as to questioning an individual named Lazaro Diaz as an initial suspect because police had received a tip that Mr. Diaz had been seen driving a blue car similar to one allegedly described by Rachel Rodriguez. (R. 1066-1067).

In September, 1987, Detective Cadavid had been informed by Sgt. Singleton as to information provided by Ramiro Gonzalez, a

reliable informant with a past history with the police department, that he had obtained a confession from Jose Maqueira. (R. 1069). The detective went with his partner and spoke to Ramiro Gonzalez before obtaining statements from Mr. Maqueira. Statements allegedly made by Appellant to the detective at Martin Correctional Institution, during the officers' interrogation, were testified to during the trial. (R. 1071-1086). According to the officer, Appellant had told him that Maqueira and an individual named Carlos Villavicencio had been living together. (R. 1080). A man named Lazaro Diaz had gone to their house and said he knew of a house where there was $65,000 in a safe and he had a key to the safe and the combination. They allegedly made a surveillance of the house a week and a half before the incident and waited for an opportunity to find the door to the house open. (R. 1081).

On the day of the incident, Lazaro allegedly picked Appellant and Villavicencio up and gave them guns and ropes. Lazaro gave Appellant a key, or some kind of an adapter to turn the combination on the safe. The three individuals allegedly drove to the house in two different cars. Carlos was supposedly driving Lazaro's car, a two door blue car. (R. 1082). They drove past the house after having coffee and noticed that the front iron gate was open and that the front door was open. (R. 1083). They circled the block and walked to the house. Carlos Villavicencio

walked in first and made an immediate right. They then noticed an older woman in the back of the house in the Florida room with her back turned toward them. (R. 1083-1084). Maqueira allegedly went in and hid behind the sofa. According to the testimony, Appellant allegedly said that within moments there was a shot that came out of the bedroom and that a man screamed out. The woman started running in the direction of the living area toward the bedroom and that Carlos Villavicencio pointed the gun at him and said that he had gotten his hands dirty and that it was Appellant's turn to get dirty. At that time the woman was running towards him and he fired a shot. He did not see the woman fall. They then ran out to the car and left. (R. 1084). They went to Lazaro's house where Lazaro supposedly took the rope and guns.

During the course of his investigation, the Detective spoke with Rachel Rodriguez and obtained a description of two men that ran from the house. (R. 1094). According to the officer, she identified Carlos Villavicencio and Lazaro Diaz from photo line-ups. (R. 1097-1103).

On cross-examination, Detective Cadavid testified that he was aware of Appellant Jose Maqueira's prior history and that he knew that if Maqueira confessed to the instant crime, there was a potential of a sentence of life in prison or death in the electric chair. (R. 1116-1117).

On October 5, 1987, the detective met with Mr. Maqueira

beginning at 12:40 p.m. (R. 1117). The tape recording did not commence until 1:30 p.m., at least forty minutes after the signing of the Miranda Form. (R. 1118). The officer acknowledged that he had promised Appellant that he would make his cooperation known to the prosecutor and to the Judge. (R. 1120). The officer further stated that the detective failed to tell Appellant, during the course of obtaining the recorded statement, that he allegedly could not make any promises concerning immigration, his 32 year sentence and immunity for the double homicide. (R. 1121).

The detective also stated that Ramiro Gonzalez was older than Appellant and had been in prison for a longer period of time and was able to get Jose Maqueira, as well as other individuals, to confess. (R. 1131-1132). The officer knew that Ramiro Gonzalez had obtained Maqueira's trust only to gain information from Maqueira to assist Ramiro in getting a quicker parole. The officer also stated that he thought that Ramiro had told Jose that he would not get railroaded by the police because Ramiro "knew what the law was". (R. 1128-1129). It was further illicited on cross-examination by Detective Cadavid that Ramiro Gonzalez had assured Appellant that it was proper police procedure to give a recorded statement. (R. 1123). The officer never questioned Ramiro Gonzalez if he knew the proper police procedure. It was not until after this assurance that Jose Maqueira gave his tape recorded statement. (R. 1124). Detective

Cadavid stated that his job was "made easier" because Ramiro Gonzalez through his "friendship" had placed Jose Maqueira in the state of mind to make the confession in question. (R. 1139).

The officer also stated that he had a telephone conversation with Appellant sometime in November, 1987 and may have mentioned that he would make Appellant's cooperation known to the Judge and prosecutor, during the course of the telephone call(s). (R. 1141-1142). On November 23rd, the officer picked up Ramiro Gonzalez from the Dade County Jail about 10:30 a.m. Both Ramiro Gonzalez and Jose Maqueira had been transported to the Dade County Jail prior on or about that date. Ramiro Gonzalez did not give the officer a sworn statement until 12:00 noon, even though he had been in the officer's presence since 10:30 a.m. (R. 1142-1143). After taking Gonzalez's statement, Gonzalez was interviewed for an hour and a half in a meeting between Detective Cadavid, Ramiro Gonzalez and Prosecutor Oscar Marreira. (R. 1143-1144). As a result of that meeting, a decision was made to take another confession from Jose Maqueira. (R. 1144-1145). The officer was instructed to get a second confession and specifically make reference to the fact that no promises were made by either the officer or Ramiro Gonzalez to Jose Maqueira. (R. 1145). On November 24th, a second statement was given by Appellant between 10:00 to 10:35 a.m. (R. 1146). As a result of the interview, Appellant was hungry as he had missed lunch at the Dade County Jail. The officer took Appellant to the third floor

and had lunch with him, he also let Appellant speak over the telephone with his girlfriend. (R. 1146). During the course of these events the officer was preparing a case to go to the grand jury to seek an indictment against the Appellant for two counts of first degree murder. (R. 1146).

During re-direct examination of Detective Cadavid, the following colloquy took place as a result of questioning by the prosecutor and response by the detective.

> (BY MS. MILIAN:)
>
> Q. Mr. Hark referred to that meeting with Chief Assistant Abe Laser and Mr. Marrero, the previous prosecutor on this case, do you remember that?
>
> A. Yes.
>
> Q. And I think the way he phrased it is that everybody was very worried about potential promises that Ramiro Gonzalez had made. What did you all know that had happened as soon as this defendant got an attorney?
>
> MR. HARK: Objection, Your Honor.
>
> THE COURT: Sustained.
>
> BY MS. MILIAN:
>
> Q. In that tape of November 24 you specifically inquired as to this man whether any promises had been made by anyone to him?
>
> A. Yes.
>
> Q. And what did the man tell you?
>
> A. No promises.
>
> Q. And then he confessed to two counts of first degree murder and armed robbery and armed burglary, did he not?

A. Yes.

MR. HARK: I'd like to reserve a motion for sidebar.

(R. 1152, 1153).

A motion for mistrial based upon the prosecutor's comment as to defense counsel was made outside the presence of the jury shortly thereafter. (R. 1155).

The State rested its case following re-cross of Detective Cadavid. (R. 1156). The defense renewed all prior motions at that time. (R. 1156). Appellant also moved for a judgment of acquittal as to the insufficiency of the evidence. (R. 1157). After conferring with Appellant, defense counsel announced, outside the presence of the jury, that Appellant had chosen not to testify. (R. 1159). The Court questioned the Appellant outside the presence of the jury as to his decision not to testify. (R. 1166-1169).

Following a charge conference and closing argument, the Court instructed the jury and the jury retired to deliberate. (R. 1312).

On July 21, 1989, the jury returned verdicts of guilty as to first degree murder of Raquel Rodriguez as charged in Count I (R. 205, 1318), guilty as to first degree murder of Miguel Rodriguez as charged in Count II (R. 206, 1318), guilty as to burglary with a firearm as charged in Count III (R. 207, 1318), guilty as to attempted robbery with a firearm as charged in Count IV of the indictment (R. 208, 1319).

On August 3, 1989, the jury returned its advisory sentences as to

the murder charges in Counts I and II of the indictment. (R. 1706, 1707). The jury voted by a vote of 9-3 to advise and recommend to the Court that it impose a death penalty upon Jose Maqueira as to the murder of Raquel Rodriguez. (R. 1706). The jury also rendered the advisory sentence as to the murder of Miguel Rodriguez that the Court impose a sentence of life imprisonment by a vote of 9-3. (R. 1706).

On September 5, 1989, the trial court made oral sentencing pronouncements. (R. 1721-1745). The trial court's written sentencing order as to Counts I and II was filed for record on that same date. (R. 263-271). As to Count I in the indictment, the murder of Raquel Rodriguez, the Court made the findings paraphrased below:

A. That the defendant was previously convicted of another felony involving the use of threat or violence to a person under Florida Statute §921.141(5)(b). (R. 264-265, 1724-1726).

B. That a capital felony was committed while the defendant was engaged in an armed burglary and an attempted armed robbery under Florida Statute §921.141(5)(d). (R. 265-266, 1726-1728).

C. That the capital felony (murder of Raquel Rodriguez) was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody under Florida Statute §921.141(5)(e). (R. 266, 1728-1729).

D. That capital felony was committed for pecuniary gain under Florida Statute §921.141(5)(f). (R. 266-267, 1729-1730).

E. That the capital felony was especially heinous, atrocious, or cruel under Florida Statute §921.141(5)(h). (R. 267, 1730-1732).

The Court made the following findings concerning the mitigating circumstances:

A. The Court found that the defendant had a significant history of prior criminal activity under Florida Statute §921.141(6)(a). (R. 268, 1732-1734).

B. That the defendant did not act under extreme duress or under the substantial domination of another person under Florida Statute §921.141(6)(c). (R. 268-269, 1734-1736).

C. The Court rejected other non-statutory mitigating circumstances, including those presented by the defense relating to the childhood of the defendant and the testimony of his wife. (R. 269-270, 1736-1737).

D. The Court found that there were four aggravating factors and no factors in mitigation of the death penalty. (R. 270-271, 1737-1739).

The Court therefore stated that it was of the opinion that there are sufficient aggravating circumstances to justify the sentence of death and that the mitigating circumstances do not outweigh the aggravating circumstances enumerated. (R. 271, 1740). The Court entered a judgment of guilty and sentenced Appellant to death as to Count I, the first degree murder of Raquel Rodriguez. (R. 271, 1740). As to Count II of the indictment, the court entered a judgment of guilty as to the first degree murder of Miguel Rodriguez, and sentenced Appellant to life in prison without possibility of parole for a period of twenty-five years and noted that the sentence was to be consecutive to the sentence imposed as to Count I. (R. 271, 1740). As to Count III of the indictment, the Court adjudicated Appellant guilty of armed burglary and sentenced him to serve life in prison with a three year minimum mandatory sentence consecutive with the sentence imposed in Counts I and II. (R. 1741, 1742). As to Count IV of the indictment,

Appellant was adjudicated guilty of attempted robbery and sentenced to serve fifteen years in State prison, said sentence to run consecutive to the sentences imposed as to Counts I, II and III. The Court also found Appellant to be a habitual violent felony offender under §775.084, Florida Statutes. (R. 1742).

On September 12, 1989, the Court clarified that the sentence imposed by the Court pursuant to this case was to be consecutive to the sentence which Appellant was serving pursuant to Case No. 85-207(A).

A notice of appeal from the final order of judgment and sentence, sentencing Appellant to death was subsequently filed. (R. 273). This appeal follows. Appellant respectfully reserves the right to argue additional pertinent facts in the argument portion of this brief.

POINTS INVOLVED ON APPEAL

I

WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS STATEMENTS?

II

WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR MISTRIAL BASED UPON AN IMPROPER PROSECUTORIAL COMMENT?

III

WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL?

IV

WHETHER THE TRIAL COURT ERRED IN SENTENCING APPELLANT TO DEATH FOR THE MURDER OF RAQUEL RODRIGUEZ?

SUMMARY OF THE ARGUMENT

I

Appellant submits that the trial court committed reversible error in denying his motion to suppress statements, as the statements were involuntary as a result or from inducements made by one Ramiro Gonzalez, an individual in the same jail where Appellant had been housed on unrelated charges. In the instant case, the statements obtained by the police were obtained in violation of his rights guaranteed by the Fifth Amendment to the United States Constitution as applied to the States by the Fourteenth Amendment and Article I, Section 9 of the Florida Constitution. Furthermore, Appellant contends that his statements were taken in violation of his Sixth Amendment Right to effective assistance of counsel. The attending circumstances of Appellant's alleged confession were calculated to delude the prisoner as to his true position, or to exert improper and undue influence over his mind. Thus, the denial of the motion to suppress statements constitutes reversible error.

II

Appellant submits that the trial court committed reversible error by denying Appellant's motion for mistrial based upon improper prosecutorial comments made by the prosecution during

re-direct examination of prosecution witness Detective George Cadavid. The prosecutor's statements in the presence of the jury constituted comments as to defense counsel that repeatedly bring into question the personal integrity of defense counsel and suggest that counsel was not being truthful and was deliberately misleading the jury. The prosecutor's statements thereby vitiated the fairness of the entire trial and the motion for mistrial should have been granted.

III

At the close of the State's case, Appellant moved for a judgment of acquittal as to the insuffiency of the evidence presented. Appellant Maqueira submits that absent the introduction of his illegally obtained statements (see Point I, infra.), the State's case as to all charges is based largely upon circumstantial evidence. Even if Appellant's alleged statements are taken into account, the evidence is insufficient to sustain his convictions for the alleged first degree murders of Raquel and Miguel Rodriguez and the alleged attempted armed robbery and burglary. As in the cases of the charged homicides, proof of the alleged attempted robbery to sustain a conviction requires proof of specific intent.

IV

The trial court erred in sentencing him to the death penalty for murder of Raquel Rodriguez. Appellant submits that the record does not support, beyond a reasonable doubt, the finding of the aggravating circumstance that Appellant was engaged in an armed burglary and attempted armed robbery under Section 921.141(5)(d), Florida Statutes, nor the finding that the murder of Raquel Rodriguez was committed for the purpose of avoiding or preventing lawful arrest or effecting an escape from custody under Section 921.141 (5)(e), Florida Statutes. Furthermore, the aggravating circumstance that the capital felony was especially heinous, atrocious, or cruel under Section 921.141 (5)(h) was not proven beyond a reasonable doubt. Appellant further asserts that the Court should not have rejected the mitigating circumstance that Appellant did not act under extreme duress or under the substantial domination of another person under §921.141 (6) (c), Florida Statutes , nor the non-statutory mitigating circumstances including those presented by the defense relating to the childhood of the defendant and the testimony of his wife, as well as Appellant's remorse and history of addiction to alcohol, marijuana, cocaine and heroin. Furthermore, the sentence of death is disproportionate on the facts of the instant case and the sentence should therefore be reversed. Appellant additionally submits that to apply the death penalty sentencing statute to Appellant Jose Maqueira, as the Court's Order now stands would constitute cruel and unusual punishment under the Eighth and Fourteenth Amendments to the

United States Constitution based upon the facts of this case as noted, infra, and in light of the means of execution used by the State of Florida.

ARGUMENT

I

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS STATEMENTS.

Appellant asserted in his pre-trial motion to suppress statements and supplement thereto (R. 45-51, 54-68), that while in prison on unrelated charges, he made statements to fellow inmate, Ramiro Gonzalez, who had frequently worked with the police as an inside informant and had engaged in conversation with Mr. Gonzalez.

Appellant submits that the trial court erred in denying his motion to suppress, as his statements were, in fact, involuntary as they resulted from inducements made by Ramiro Gonzalez. In the instant case, Mr. Maqueira testified at the suppression hearing below that he had been in prison for about five years on another charge (R. 332, 333) when he met a man by the name of Ramiro Gonzalez. He knew Mr. Gonzalez for approximately two and one-half ($2\frac{1}{2}$) to three (3) years and they became good friends. Maqueira loved Gonzalez like a father because of the time that they had spent together in prison and based upon his belief that Gonzalez was the only person that would help him, as he had no relatives in the United States. (R. 334). Jose Maqueira had also met and spoken to Ramiro Gonzalez's mother who had given him money four or five times because he would share his things with Gonzalez. (R. 335). Appellant was aware that Gonzalez had

worked with the police concerning an individual nicknamed "Santiago" who had been set free, according to Gonzalez, as a result of cooperation with detectives. (R. 336). Appellant testified that he talked to Ramiro Gonzalez about his particular case because Gonzalez told him that there were detectives who were friends or relatives of his that would help him resolve a case. (R. 337).

According to Appellant's testimony at the suppression hearing, about one year after Santiago was brought to Miami, Gonzalez promised Maqueira that if he were to speak to detectives about a double murder case, he could obtain benefits if he gave the names of the other two people. Maqueira did not approach Gonzalez with the information, it was Gonzalez who induced Maqueira into giving him information. Maqueira told Gonzalez to talk to detectives and that they could go see him and speak to him. (R. 338). Ramiro Gonzalez knew the severity of the case involved and did not warn him not to confess to police unless he was sure it would be okay for him. Ramiro Gonzalez promised Maqueira that the detectives would promise him something before they spoke. He spoke directly to detectives on the telephone prior to giving a statement. During the telephone conversations, he stated that he knew of a double murder. The detectives told him to remain calm and that everything would be okay and that they would go to the institution and talk about the problem. (R. 339, 340).

In October, 1987, Detectives went to see Appellant at Martin Correctional Institute and spoke to Ramiro Gonzalez at least fifteen minutes before they spoke to Appellant. No counsel was present at that time. The detectives then spoke to Appellant prior to taping any testimony. Detective Cadavid told Appellant that it was okay to talk and that Ramiro (the informant) knew how the job was and that everything could come out allright. (R. 341). It was discussed with Appellant that Ramiro Gonzalez had worked with a lot of people and had succeeded in getting people out of prison. Once Appellant allegedly confessed, he was given the Miranda Right's Warning Waiver paper to sign and told to sign it because it was routine. Prior to signing the form, the detective and Appellant had spoken about a lawyer and the detective told him that he did not need one. (R. 343). Appellant then gave a statement to the Detectives. (R. 343-345).

Detectives subsequently went to see Appellant at the Dade County Jail. Appellant was told that if he gave a second confession everything was going to be resolved because the police were interested in one Carlos Villavicencio. (R. 348). Although, according to Appellant, the officers wanted a second tape recording, allegedly because of mistakes in the initial statement, Appellant answered negatively when asked if he had been promised anything because he was told by the officers that the statements would not be of any use if he answered affirmatively. (R. 349).

Detective George Cadavid testified on behalf of the State at the suppression hearing and stated that he had received a telephone call in 1987 from a Sgt. Singleton, Metro Dade Homicide, who informed him that a person at the Martin Correctional Institution by the name of Ramiro Gonzalez had information on a murder that Detective Cadavid had previously investigated. On cross-examination, Detective Cadavid acknowledged that Detective Singleton had told him that it was Ramiro Gonzalez's style to become friendly and establish a personal relationship with a person that he ended up informing on or turning over to the State. (R. 397, 398). The officer acknowledged that he had written a letter to the Parole Commission on behalf of Ramiro Gonzalez. (R. 398, 399). It was because of the informant's work that the detective and the Metro Dade Police Department were able to solve the unsolved murders that were regarded as "cold" cases. (R. 399). The informant, Ramiro Gonzalez, had been involved with the Metro Dade Police Department as to several investigations since 1983. On cross-examination, at the suppression hearing, Ramiro Gonzalez allegedly spoke about the possibility of Jose Maqueira being sentenced to the electric chair. However, he acknowledged that Appellant was under the impression that cooperation with Ramiro's police friends, that the alleged co-defendants would instead be sentenced to death and that Appellant, Maqueira, would benefit from his cooperation with Ramiro Gonzalez as apparently had the

individual named "Santiago". (R. 445).

When a confession is induced by a direct or implied promise of a benefit, the confession cannot stand. Rivera v. State of Florida, 547 So.2d 140, 144 (Fla. 4th DCA 1989), citing to State v. Kettering, 483 So.2d 97 (Fla. 5th DCA), rev. denied, 494 So.2d 1153 (Fla. 1986); Puccio v. State, 440 So.2d 419 (Fla. 1st DCA 1983); Henthorne v. State, 409 So.2d 1081 (Fla. 2d DCA 1982).

The burden of proof is on the government to show the voluntariness of a confession by a preponderance of the evidence. State v. Kettering, supra, at 483 So. 2d 98 citing to Lego v. Twomey, 404 U.S. 477, 92 S.Ct. 619, 30 L.Ed.2d 618 (1972); Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964). A confession has been held not to be "free and voluntary" when "obtained by any direct or implied promises, however slight". Kettering, supra; Bram v. United States, 168 U.S. 532, 542-543, 18 S.Ct. 183, 186-187, 42 L.Ed. 568 (1897); Frazier v. State, 107 So.2d 16 (Fla. 1958).

Appellant Maqueira submits that in the instant case his statements to police were obtained in violation of his rights guaranteed by the Fifth Amendment to the United States Constitution as applied to the States by the Fourteenth Amendment to the United States Constitution, and Article I, Section 9 of the Florida Constitution as interpreted by Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966); Michigan v.

Mosley, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975); and State v. Belcher, 520 So.2d 303 (Fla. 3d DCA), rev. denied, 529 So.2d 695 (Fla.), cert. denied, ____ U.S. _____, 109 S.Ct. 270, 102 L.Ed.2d 258 (1988). Furthermore, Appellant contends that his statements were taken in violation of his Sixth Amendment right to effective assistance of counsel.

The question of whether the behavior of the State's law enforcement officials in this case was such as to overbear appellant's will to resist and bring about confessions not freely self determined, the trial court should have made its determination with complete disregard of whether or not Appellant in fact spoke the truth. Rogers v. Richmond, 365 U.S. 534, 544 (1961).

It is established law that a confession should be excluded if the attending circumstances, or the declaration of those present at the making of the confession, are calculated to delude the prisoner as to his true position, or to exert improper and undue influence over his mind. Williams v. State, 441 So.2d 653, 655 (Fla. 3d DCA 1983).

Appellant Maqueira submits that in the instant case Ramiro Gonzalez intentionally created a situation likely to induce appellant to make incriminating statements without the assistance of counsel, thus the police, by virtue of their involvement with Mr. Gonzalez, violated Appellant's Sixth Amendment right to coun-

sel; similar to the situation presented in United States v. Henry, 447 U.S. 264, 100 S.Ct. 2183, 65 L.Ed.2d 115 (1980). In Henry, supra, the defendant was arrested and indicted for bank robbery. Counsel was appointed and Henry was held in jail pending trial. Another inmate at the same jail, a paid informant for the Federal Bureau of Investigation, told a Government agent that he was housed in the same cell block as several federal prisoners, including Henry. The agent told the other inmate, Nichols, to pay attention to statements made by these prisoners, but expressly instructed Nichols not to initiate any conversation and not to question Henry regarding the bank robbery. Nichols and Henry subsequently engaged in some conversation during which Henry told Nichols about the robbery. Nichols testified about these conversations at Henry's trial and Henry was convicted. The Supreme Court of the United States reversed Mr. Henry's conviction, finding that the government had "deliberately elicited" incriminating statements from Henry within the meaning of Massiah. In Massiah v. United States, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964), more recently in Maine v. Moulton, 474 U.S. 159, 106 S.Ct. 477, 88 L.Ed.2d 481 (1985), the United States Supreme Court made it clear that the Sixth Amendment guarantees the accused, at least after the initiation of formal charges, the right to rely on counsel as a medium between him and the State. Knowing the exploitation by the State of an opportunity to confront the accused without counsel being present is

as much a breach of the State's obligation not to circumvent the right to assistance of counsel as is the intentional creation of such an opportunity. Accordingly, the Sixth Amendment is violated when the State obtains incriminating statements by knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and a State agent. In Malone v. State, 390 So.2d 338, 339, this Court reversed defendant's convictions and sentences on the basis that his incriminating statements made to the State informant while in custody in the Pinnelis County Jail should have been suppressed because these statements were made in the absence of counsel, with no prior waiver of counsel, were directly elicited by the State's strategist, deliberately designed to elicit any incriminating statements from the defendant. It was held that the introduction of the statements violated that defendant's Sixth Amendment right to the assistance of counsel.

In the instant case, just as in Malone, supra, the subterfuge employed by the informer and condoned and participated in by the State precipitated the incriminating statements made by Maqueira. It is clear that the facts of the instant case bring the case within the area sought to be reached by the United States Supreme Court in its decision in Massiah, in particular, that the Sixth Amendment must apply to indirect, surepticious interrogations.

Although this Court has distinguished precedent cited herein, such as Henry or Moulton in Dufour v. State, 495 So.2d 154 (Fla.

1986), Appellant contends that Dufour is distinguishable from the case at bar. Although the testimony at the suppression hearing indicated that the initiation of contact between the accused and the agent was made by the Appellant, there was an intentional creation of such an opportunity to approach the agent by virtue of Ramiro Gonzalez's course of conduct and in telephone conversations with the police, and in particular with Detectives Singleton and Cadavid. Thus, the instant case is more similar to the situation presented in Maine v. Moulton, supra, where there is that "knowing exploitation" of the relationship that had developed over a period of years between Appellant and the subsequent agent/informant, Ramiro Gonzalez. Appellant did not directly approach the authorities on his own, unlike the fact patterns presented in cases discussed in Dufour, supra. Rather, the initiation of formal contact with authorities was, in fact, a result of the actions of Ramiro Gonzalez. Appellant therefore submits that the trial court committed reversible error in denying his motion to suppress and that reversal of his convictions and sentences is mandated to insure preservation of Appellant's Constitutional rights under both the State and Federal Constitutions.

II

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR MISTRIAL BASED UPON AN IMPROPER PROSECUTORIAL COMMENT.

Appellant submits that the trial court committed reversible error by denying Appellant's motion for mistrial based upon improper prosecutorial comments made by the prosecution during re-direct examination of prosecution witness Detective George Cadavid. (R. 1152, 1153).

During re-direct examination of Detective Cadavid, the following colloquy took place as a result of questioning by the prosecutor and response by the detective.

(BY MS. MILIAN:)

Q. Mr. Hark referred to that meeting with Chief Assistant Abe Laser and Mr. Marrero, the previous prosecutor on this case, do you remember that?

A. Yes.

Q. And I think the way he phrased it is that everybody was very worried about potential promises that Ramiro Gonzalez had made. What did you all know that had happened as soon as this defendant got an attorney?

MR. HARK: Objection, Your Honor.

THE COURT: Sustained.

BY MS. MILIAN:

Q. In that tape of November 24 you specifically inquired as to this man whether any promises had been made by anyone to him?

A. Yes.

Q. And what did the man tell you?

A. No promises.

Q. And then he confessed to two counts of first degree murder and armed robbery and armed burglary, did he not?

A. Yes.

MR. HARK: I'd like to reserve a motion for sidebar.

(R. 1152, 1153).

Shortly thereafter, the following argument was made outside the presence of the jury:

MR. HARK: I am going to file a motion for mistrial based upon the prosecution's question, as to the last question on her redirect about the law of the defense attorney. That is something that is sacred to the United States Constitution and the inference that it left is a defense attorney is looking to do anything except preserving and protecting a defendant's crucial right is improper.

I don't think there is any cautionary instruction to give to this jury and just the inference that is left pollutes this whole trial, I move for a mistrial.

MS. MILIAN: For the record, Judge, I asked a question, you sustained it and there's no evidence before this jury on which to grant a mistrial.

THE COURT: Okay. Motion for mistrial is denied at this time.

MR. MARK: Okay, Your Honor.

(R. 1155).

The prosecutor's statements in the presence of the jury constituted comments as to defense counsel that repeatedly bring

into question the personal integrity of defense counsel, Mr. Hark, and suggest that counsel was not being truthful and was deliberately misleading the jury. The prosecutor's statements thereby vitiated the fairness of the entire trial and the defense motion for mistrial should have been granted, as the trial proceedings were constitutionally improper. See, Briggs v. State, 455 So.2d 519 (Fla. 1st DCA 1984).

Unlike the situation in Briggs, supra, the conduct complained of in this case should not be considered harmless, as the evidence was not overwhelming, especially when one takes into account the claims raised in Point I, infra, as to the illegality of the admission of Appellant's statement into evidence. The court in Briggs, supra, nonetheless took the opportunity to point out that improper prosecutorial statements would not go unnoticed by appellate courts. The conduct complained of in this case, as in Briggs v. State, supra, at 455 So.2d 521, and the cases cited therein, is demonstrative of excessive prosecutorial preoccupation with obtaining a conviction at any expense. The court noted that such preoccupation disregards the prosecutor's duty in representing the people of the State of Florida to see that justice is obtained because obtaining a conviction at the expense of a fair trial is not justice. Id.

In Cochran v. State, 287 So.2d 42, 43 (Fla. 1st DCA 1973), the First District Court of Appeal noted:

> It is the duty of a prosecuting attorney in a trial to refrain from making remarks or committing acts which would or might tend to affect the fairness and impartiality to which the accused is entitled. His duty is not to obtain convictions, but to seek justice, and he must exercise that responsibility with the circumspection and dignity the occassion calls for. Cases brought on behalf of the State of Florida should be conducted with a dignity worthy of the client. In violating this duty, the prosecuting attorney jeopardizes all the effort and work expended by those above mentioned.

This Court, as far back as 1953, in Irvin v. State, 66 So.2d 288 (Fla. 1953), warned prosecutors against making improper comments. Notwithstanding the language in cases such as Irvin and Cochran, the prosecutor in Simpson v. State, 352 So.2d 125 (Fla. 1st DCA 1977) also made an improper comment. The appellate court admonished that prosecutor for making the comment and labeled it a gratuitous insult to the adversary system of justice. Nonetheless, the conviction of that appellant was affirmed, apparently based upon the harmless error doctrine, as noted in Briggs, supra. In yet another case, Hufham v. State, 400 So.2d 133 (Fla. 5th DCA 1981) the prosecutor made improper comments which the appellate court analogized to comments in Cochran. That conviction was also affirmed. In Melton v. State, 402 So.2d 30 (Fla. 1st DCA 1981), another subsequent decision, another gratuitous insult to the adversary system of justice was made. Although the comment was found to be improper and unethical, the First District affirmed.

The prosecutor in the case at bar apparently succumbed to temptation to "try" defense counsel rather than the issues. As

the First District Court of Appeal stated in Westley v. State, 416 So.2d 18, 20 (Fla. 1st DCA 1982), ". . . the prosecutor's indulgence in improper argument is a perilous practice." See, also: McGee v. State, 435 So.2d 854 (Fla. 1st DCA 1983).

The cases enumerated above and cited for the most part in Briggs, supra, clearly demonstrate that although appellate courts of this State have not necessarily approved improper or unethical comments, the very practice of holding these statements to constitute harmless error results in injustice to the accused standing trial in the courts of this State. It is clear that, notwithstanding the disapproval of prosecutorial tactics involved in the cases enumerated above, the prosecutors merely continue to indulge in the improper argument designed to obtain convictions at all costs.

Appellant therefore submits that the comments made in the instant case should be considered reversible, not harmless, error and that the convictions appealed from herein should be reversed.

III

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL

At the close of the State's case, Appellant moved for a judgment of acquittal as to the insuffiency of the evidence presented. (R. 1156, 1152). Appellant Maqueira submits that absent the introduction of his illegally obtained statements (see Point I, infra.), the State's case as to all charges is based largely upon circumstantial evidence. Where the State relies on circumstantial evidence to establish the accused's assistance and intent to participate, it is necessary to exclude every hypothesis of innocence. Cochran v. State, 547 So.2d 928, 930(Fla.1989); McArthur v. State, 351 So.2d 972, 976 n. 12 (Fla.1977).

As to the murder convictions, Appellee did not prove either premeditation or felonious intent under a felony-murder theory, beyond a reasonable doubt, the appropriate burden of proof. See, e.g., Hernandez Ramos v. State, 496 So.2d 837, 838 (Fla.2d DCA 1986). Where the element of premeditation is sought to be established by circumstantial evidence, the evidence relied upon by the State must be inconsistent with every other reasonable inference. Cochran v. State, supra; Wilson v. State, 493 So.2d 1019 (Fla. 1986); Hall v. State, 403 So.2d 1231 (Fla. 1981). "Premeditation" is the fully formed, conscious purpose to kill, and is the essential element which distinguishes first degree murders from other homicides. Wilson v. State, supra.

Under Section 777.011, Florida Statutes, in order to be guilty as a principal for a crime physically committed by another, one must intend that the crime be committed and do some act to assist the other person in actually committing the crime. Statton v. State, 519 So.2d 622, 624 (Fla. 1988), citing to Ryals v. State, 112 Fla. 4, 250 So. 132 (1933); Collins v. State, 438 So.2d 1036 (Fla. 2d DCA 1983) and Chaudoin v. State, 362 So.2d 398 (Fla. 2d DCA 1978).

During the trial the daughter of victims, Raquel and Michael Rodriguez, Rachel Beatriz Rodriguez, testified that while she was talking on the telephone at her parents home on the date in question (R. 898), she heard two shots. She ran toward the front of the house, trying to get into the house to see what happened and observed two men run past her. (R. 899-900). When she entered the house she observed her mother crying on the floor, grasping her stomach and screaming. Her mother told her to go see her father and close the door. She went into the bedroom and saw her father lying on the bed covered with blood, she tried to assist her father and then went to call the police. (R. 901-902). She did not have a chance to see if any property was missing at that time. (R. 903). She went on to testify that she identified an individual as a man she saw running from her house with a gun in his hand when shown photographs by Detective George Cadavid in November of 1987. (R. 904-910). She identified two individuals from photo line-ups.

On cross-examination, Ms. Rodriguez stated that she never saw Appellant, Jose Maqueira, inside the house or inside an area depicted by a sketch presented to her on direct examination. (R. 921). Jose Maqueira was not the individual she identified in the first photo line-up. She never saw him standing by a light pole by her house. (R. 922). She also stated that Jose Maqueira was not the second person she identified as the individual she saw running outside the house. (R. 923). She further stated that at some point in time she subsequently learned that her father supposedly had $70,000.00 in cash or in a cashier's check in the house and that he was traveling to Costa Rica. She later learned that there was another airline ticket purchased in a ladies name of "Ryna Cucet". (R. 924-925). Ms. Rodriguez did not know who Ryna Cucet was, nor did she know her mother to use that name.

Even if Appellant's alleged statements are taken into account, the evidence is insufficient to sustain his convictions for the alleged first degree murders of Raquel and Miguel Rodriguez and the alleged attempted armed robbery and burglary. As in the cases of the charged homicides, proof of the alleged attempted robbery to sustain a conviction requires proof of specific intent. Blanco v. State, 502 So.2d 1374 (Fla. 2d DCA 1987). According to Detective Cadavid's testimony at trial, Appellant allegedly confessed that he was present on the scene and had told the officer that he had walked into the victims' home with Carlos

Villavicencio and they had noticed an older woman in the back of the house in the Florida room with her back turned toward them. (R. 1083-1084). Appellant Maqueira allegedly went in and hid behind the sofa. According to the testimony, Appellant allegedly said that within moments there was a shot that came out of a bedroom and that a man screamed out. The woman started running in the direction of the living area toward the bedroom and Carlos Villavicencio pointed the gun at him and said that he had gotten his hands dirty and that it was Appellant's turn to get dirty. At the time the woman was running towrds him and he fired a shot. He did not see the woman fall. They ran out to the car and left. (R. 1084). Thus, the evidence adduced at trial does not sustain a conclusion that Appellant possessed the requisite intent necessary to sustain convictions for murder, attempted robbery and burglary.

IV

THE TRIAL COURT ERRED IN SENTENCING APPELLANT TO DEATH FOR THE MURDER OF RAQUEL RODRIGUEZ.

Appellant Maqueira respectfully submits that the trial court erred in sentencing him to the death penalty for murder of Raquel Rodriguez. Appellant submits that the record does not support, beyond a reasonable doubt, the finding of the aggravating circumstance that Appellant was engaged in an armed burglary and attempted armed robbery under Section 921.141(5)(d), Florida Statutes (R. 265-266, 1726-1728), nor the finding that the murder of Raquel Rodriguez was committed for the purpose of avoiding or preventing lawful arrest or effecting an escape from custody under Section 921.141 (5)(e), Florida Statutes (R. 266,1728-1729). It is further submitted that the aggravating circumstance that the capital felony was especially heinous, atrocious, or cruel under Section 921.141 (5)(h)(R. 267, 1730-1732), was not proven beyond a reasonable doubt. Appellant does not challenge the finding that he was previously convicted of another felony involving the use of threat or violence to a person under Section 921.141 (5) (b), Florida Statutes (R. 264-265, 1724-1726). In addition, Appellant contends that the Court should not have rejected the mitigating circumstance that Appellant did not act under extreme duress or under the substantial domination of another person under §921.141 (6) (c), Florida

Statutes (R. 268-269, 1734-1736) nor the non-statutory mitigating circumstances including those presented by the defense relating to the childhood of the defendant and the testimony of his wife.(R. 269-270, 1736-1737). Thus, assuming arguendo that Appellant's convictions are not vacated in accordance with the relief requested in Points I, II and III, infra, the case should be remanded for resentencing. See, Elledge v. State, 346 So.2d 998 (Fla. 1977); See also: Hill v. State, 549 So.2d 179, 183 (Fla. 1986); Skipper v. South Carolina, 476 U.S. 1, 106 S. Ct. 1669, 90 L.Ed.2d 1 (1986).

A. The State Failed To Show Beyond A Reasonable Doubt That The Murder of Raquel Rodriguez Was Committed While Engaged in an Armed Burglary and Attempted Armed Robbery

Appellant submits that there was a reasonable doubt that the appellant committed the murder of Raquel Rodriguez while engaged in an armed burglary and attempted armed robbery. As noted in Point III, infra, the basis for the State's proof as to the alleged burglary and attempted robbery during the guilt phase was based largely upon circumstancial evidence and statements illegally obtained from Appellant through the State's use of inmate Ramiro Gonzalez as an informant. Likewise, this was the same character of the testimony relied upon by the State during the penalty phase. (R. 1383-1415). Thus, Appellant submits that the evidence was insufficient to support the trial court's deter-

mination as to the applicability of this aggravating factor to the case at bar. See, Eutzy v. State, 458 So.2d 755 (Fla. 1984), cert. denied 471 U.S. 1045, 105 S. Ct. 2062, 85 L.Ed.2d 336 (1985).

B. The State Failed To Show Beyond A Reasonable Doubt That The Murder Of Raquel Rodriguez Was Committed For The Purpose of Avoiding Or Preventing Lawful Arrest Or Effecting An Escape From Custody

Appellant submits that there was a reasonable doubt that the murder of Raquel Rodriguez was committed for the purpose of avoiding or preventing lawful arrest or effecting an escape from custody under Section 921.141 (5)(e), Florida Statutes (R. 266, 1728-1729). In order to support this finding where the victim is not a law enforcement officer, the State must prove beyond a reasonable doubt that the dominant motive for the murder was the elimination of a witness. Correll v. State, 523 So.2d 562, 567 (Fla. 1988); Doyle v. State, 460 So.2d 353 (Fla. 1984); Menendez v. State, 368 So.2d 1278 (Fla. 1979); Riley v. State, 366 So.2d 19 (Fla. 1978), cert. denied, 459 U.S. 981, 103 S.Ct.317, 74 L.Ed.2d 294 (1982). See also: Schafer v. State, 537 So.2d 991, 998 (Fla. 1989).

In the cause sub judice, the victim in question, Raquel Rodriguez, was not a law enforcement officer. The victim's daughter, Rachel Rodriguez, was present in her efficiency or con-

verted garage adjacent to her parents' house at the time of the killings. She was not harmed whatsoever when two men (including one allegedly with a gun) ran past her at the scene of the crimes. (R. 893-925). The very fact that Ms. Rodriguez was alive and completely unharmed creates a reasonable doubt, in and of itself, that the Appellant's dominant motive for the murder, if he did in fact commit it, was the elimination of a witness. See, e.g. Cook v. State, 542 So.2d 964, 970 (Fla.1989). Appellant was not in custody nor was there any immediate threat of arrest. Appellant therefore submits that the trial court committed reversible error in finding this aggravating circumstance applicable to the case at bar.

C. The State Failed To Show Beyond A Reasonable Doubt That The Murder Of Raquel Rodriguez Was Especially Heinous, Atrocious, or Cruel

Appellant submits that there was a reasonable doubt that the murder of Raquel Rodriguez was especially heinous, atrocious, or cruel under Section 921.141 (5)(h), Florida Statutes (R. 267, 1730-1732). It is clear that Raquel Rodriguez died of a single gunshot wound. (R. 972-978). As noted by this Court in its decision in Cochran v. State, 547 So.2d 928, 931 (Fla. 1989), this Court's cases make it clear that where, as here, death results from a single gunshot wound and there are no additional acts of

torture or harm, this aggravating circumstance does not apply. Jackson v. State, 451 So.2d 409 (Fla. 1986), cert. denied, 482 U.S. 920, 107 S.Ct. 3198, 96 L.Ed.2d 686 (1987); Fleming v. State, 374 So.2d 959 (Fla. 1979). Failure to get medical attention for the victim does not make a murder especially heinous, atrocious or cruel. Cochran, supra, citing to Teffeteller v. State, 439 So.2d 840, 846 (Fla. 1983), cert. denied, 465 U.S. 1074, 104 S.Ct.1430, 79 L.Ed.2d 754 (1984).

D. The Court Should Not Have Rejected As A Mitigating Factor That Appellant Acted Under Extreme Duress Or Under the Substantial Domination Of Another Person

Although it is within the trial court's province to decide whether a mitigating circumstance is proven and the weight to be given it, Teffeteller v. State, supra; Scull v. State, 533 So.2d 1137, 1143 (Fla. 1988), Appellant submits that the trial court abused its discretion in rejecting this mitigating circumstance, as set forth in the statutory provision enumerated in Section 921.141(6)(c), Florida Statutes. Dr. Merry Haber testified on Appellant's behalf during the penalty phase of proceedings. Dr. Haber testified as an expert in the field of clinical psychology. (R. 1479). Dr. Haber testified that her examination of Appellant, along with his history, indicated that Appellant was not a leader, but rather a follower and that this pattern had been established when Appellant Jose Maqueira was a child. (R. 1488). The doctor opined that if Carlos Villavicencio had put a gun to Appellant Jose

Maqueira's head, this would cause Appellant to kill. Appellant's history indicated that he had suffered from alcohol and drug (heroin) abuse since his youth. (R. 1486-1490). Appellant also testified to facts and events strongly indicating that he was acting under extreme duress and/or under the substantial domination of Carlos Villavicencio during the events in question. (R. 1531-1599). Therefore, there was evidence adduced in the case at bar indicating Appellant was subjected to both internal and external provocation. As such, the appellant acted under duress or the domination of another in the context envisioned in and encompassed by the statutory language. See, Toole v. State, 479 So.2d 731, 734 (Fla. 1985) (defining term, "duress). Cf., Gore v. Dugger, 532 So.2d 1048, 1050 (Fla. 1988). Thus, it is clear that the trial court abused its discretion in rejecting this factor as a mitigating factor.

E. The Court Should Not Have Rejected Non-Statutory Mitigating Factors Indicating That Appellant Had An Abusive Childhood And Suffered From Alcohol And Drug Dependency Since Childhood

Appellant Maqueira submits that the testimony of Dr. Merry Haber (R. 1489-1493) during the penalty phase, as well as testimony of Appellant himself (R. 1531-1557) and of his wife, Elsa Maqueira (R. 1617) established the existence of non-statutory mitigating factors which should have been given weight

by the trial court in its determination as to which sentence to impose for the alleged murder of Raquel Rodriguez. Dr. Haber testified that Appellant had been abused and had serious emotional problems which are diagnosed and are in the Diagnostic and Statistical Manual of Mental Disorder as severe substance abuse disorders. (R. 1491). Jose Maqueira's heroin use, cocaine use , intravenous injection and his tolerance for alcohol led to extreme emotional disturbance and was reflected in his lack of judgment . (R. 1491). This disturbance and history of child abuse led Appellant to follow older people who were unhealthy role models. (R. 1491).

Appellant testified that his parents had been divorced before he was born in Cuba. (R. 1532, 1533). Appellant met his father when he was five (5) years old and his father hit him on the arm, on the thighs and on the back. When he was eleven years old, Jose's father punched him and he fell from a ledge. He injured his head, his lip and lost a tooth. (R. 1534). Appellant was in the hospital for approximately six months. (R. 1536). Appellant did not see his father for numerous years thereafter. His stepfather was also abusive to Jose and his mother and had a drinking problem. (R. 1537, 1538).

Appellant Jose Maqueira testified that he had started drinking alcohol when he was twelve (12) or thirteen (13) years old. Carlos Villavicencio had taken Appellant to a place in Cuba

when Jose was fourteen (14) years old and Carlos was approximately twenty-seven (27) where Carlos had purchased marijuana for Jose to smoke. (R. 1539, 1540). Appellant began smoking marijuana every two or three days, as well as always on the weekends. (R. 1540). Appellant began to get drunk every day when he was in Cuba. (R. 1542). He left Cuba by sneaking into the Peruvian Embassy. (R. 1542). When he arrived in the United States he continued smoking marijuana and began snorting cocaine. (R. 1543). Appellant began to sell cocaine to support his habit of injecting heroin and cocaine. (R. 1546, 1547).

Thus, there was ample evidence to support mitigation based upon Appellant's abusive childhood and drug and alcohol addiction problems. The trial court should have therefore given weight to the non-statutory mitigating circumstances noted herein. See, Lucas v. State, 417 So.2d 250 (Fla. 1982).

F. The Court Should Not Have Imposed The Death Penalty As That Sentence Is Disproportionate To the Crime of Murder Of Raquel Rodriguez In Factually Similar Cases

It is clear that in the State of Florida it is the intent of the Legislature and the interpretation of this Court that the death penalty is to be reserved for the least mitigated and the most aggravated murders. Songer v. State, 544 So.2d 1010, 1011 (Fla. 1989); State v. Dixon, 283 So.2d 1 (Fla. 1973),

cert. denied, 416 U.S. 943, 94 S. Ct. 1950, 40 L.Ed.2d 295 (1974). Appellant Jose Maqueira therefore submits that alleged murder of Raquel Rodriguez by a single gunshot wound does not merit imposition of the death penalty in a proportionality analysis. In addition to Appellant's own statements and those of other defense witnesses, Dr. Merry Haber testified during the penalty phase that Appellant was remorseful and did not know at the time that he had killed the victim. (R. 1489). Furthermore, Appellant was under the influence of drugs and the duress and imposing influence of Carlos Villavicencio during the events in question. (R. 1486-1490). As in the case in Songer, supra, Appellant's reasoning abilities were clearly impaired by his addiction to hard drugs. In addition, Appellant had an abusive childhood. (R. 1531-1551). Thus, the sentence of death is disproportionate on the facts of the instant case and the sentence should therefore be reversed.

G. The Death Penalty Constitutes Cruel and Unusual Punishment In Light Of The Facts Of This Case And The Means Of Execution Used by the State of Florida

Appellant submits that to apply the death penalty sentencing statute to Appellant Jose Maqueira, as the Court's Order now stands would constitute cruel and unusual punishment under the Eighth and Fourteenth Amendments to the United States Constitution based upon the facts of this case as noted, infra, and in light of the means of execution used by the State of

Florida, as evinced by the horror of the electrocution of Jesse Tafero. Should Appellant's convictions be affirmed, Appellant submits that the instant case should be remanded to the trial court for resentencing.

CONCLUSION

Based upon the foregoing reasons and citations of authority, Appellant respectfully submits that the convictions and sentences imposed by the trial court be reversed and vacated and the case remanded to the trial court for new proceedings.

Respectfully sumbitted,

CALIANNE P. LANTZ, ESQUIRE
Special Assistant Public Defender
9100 South Dadeland Boulevard
Suite 512
Miami, Florida 33156
(305) 670-1992
Fla. Bar No. 301671

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief of Appellant was served by mail upon The Honorable Robert Butterworth, Attorney General, 401 N. W. Second Avenue, Suite N-921, Miami, Florida 33128 on this 9th day of July, 1990.

CALIANNE P. LANTZ, ESQUIRE