SUPREME COURT OF FLORIDA
CASE NO. 75,844

NORBERTO PIETRI,
Appellant,

v.

STATE OF FLORIDA,
Appellee.
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INITIAL BRIEF OF APPELLANT

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AUTHORITIES CITED

PRELIMINARY STATEMENT

Appellant was the Defendant and Appellee was the Prosecution in the Criminal Division of the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida.

In the brief, the parties will be referred to as they appear before this Honorable Court of Appeal although Appellee will also be referred to as the State or the prosecution.

The following symbols will be used:

"R" Record on Appeal

STATEMENT OF THE CASE AND FACTS

On August 18, 1988 Appellant walked away from the Lantana Community Correctional Center Work Release Program. He began a four day drug binge, ingesting cocaine day and night (R 2838). On Monday morning, August 22nd, Appellant had exhausted his supply of cocaine. He had been committing burglaries to support his habit. When he ran out of cocaine, he would commit another burglary (R 2338-2348).

Appellant located a house to burglarize and proceeded to steal several items of jewelry and other property, including two guns. The acquisition of all this property was for one purpose: to get cocaine (R 2377-2381).

After committing the burglary, Appellant drove south on Interstate 95, exceeding the speed limit, destined for the location where he could trade the stolen goods for cocaine (R 2385). Appellant exited the highway and proceeded past Officer Chappell, who was sitting on his motorcycle by an old restaurant. Officer Chappell was observing the motorists who passed by, apparently watching for those exceeding the speed limit (R 1874).

When Appellant passed Officer Chappell he was driving at a relatively high rate of speed. The officer began to follow Appellant (R 1875-1876). He pursued Appellant, with his blue lights on, as he drove over an overpass, turned right at an intersection, and turned right at the next street (R 1840). When Appellant stopped his truck, which was stolen, it was apparently too close to the intersection. Officer Chappell

called out to Appellant to drive further forward, which he did R 1894). The officer then got off his motorcycle and approached the truck. While the officer was by the back tire, and within arm's reach of the truck, a hand holding a gun was seen emerging from the driver's window. One shot was fired and the truck sped away (R 1908-1910). Appellant, who is blind in his right eye, had struck Officer Chappell in the heart.

Appellant drove to his sister's house. Taking his nephew with him, Appellant disposed of the truck by dumping it into a canal which runs along Florida's turnpike. The truck was later recovered and identified as the one at the scene of the shooting. Appellant's fingerprint was inside the driver's door R 2145-2150 and R 2251).

The death of Officer Chappell generated an intensive search for his killer. Appellant soon became the prime suspect. On Wednesday evening, two and a half days after the shooting, the police closed in on Appellant's sister's house. Appellant fled from the home with the police in pursuit R 2075-2081).

In his flight from the police, Appellant came upon Tami Nelson as she sat in her car in the driveway, waiting for her husband. Appellant ordered her to drive. When Tami Nelson hesitated, Appellant pushed her from the car and put the car in reverse. As he was backing away, Keith Nelson, Tami's husband, ran up to the car. Unknown to Appellant, the Nelson's five year old son was strapped in a seat belt in the back seat. Keith Nelson approached the car intending to remove his son.

Seeing this, Appellant slowed the car allowing the father to remove his son from the car (R 2210-2211 and R 2218-2219).

The police eventually located Appellant driving the Nelson's car. A high speed chase occurred with Appellant crashing the car on a golf course. Appellant left the car and fled on foot. As the police closed in on Appellant, he reached into his pants. The police thought he was going for a gun. Appellant, who was wearing shorts and nothing else, did not have a gun. What he removed from his pants and put into his mouth was cocaine (R 2236-2238).

Appellant was indicted for sixteen counts of various crimes, including first degree murder (R 3177). Count nine, possession of a firearm by a convicted felon, was severed. A single trial was held on the remaining counts. At the conclusion of a jury trial Appellant was found guilty as charged of all counts tried, including first degree murder, except he was acquitted of false imprisonment of the Nelson boy (R 3603).

Two weeks after the guilt phase of Appellant's trial, a sentencing phase was held. At this second phase, the State's only witness was a deputy clerk who testified to various criminal records of Appellant's that he had previously prepared (R 2824-2826). In contrast, Appellant presented the testimony of several family members who testified to Appellant's impoverished upbringing and cocaine addiction. Also presented was the testimony of Yoris Santana, who had been with Appellant the four days before the shooting and observed him ingesting

cocaine, day and night (R 2838-2840). Two experts testified to the ramifications of Appellant's upbringing and cocaine addiction, both stating that Appellant's cocaine addiction would significantly impair his judgment (R 2925-3024).

The jury recommended by an eight-to-four vote that Appellant be sentenced to death (R 3680). On March 15, 1990, the trial court followed the jury's recommendation and imposed the death sentence along with various prison terms for the other offenses (R 3708-3717). A timely Notice of Appeal was filed (R 3739). This appeal follows.

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SUMMARY OF THE ARGUMENT

Appellant was deprived of a fair trial because of the jury selection process employed by the court. This process included the empaneling of the venire, the actual questioning of the jurors, denying Appellant's motion for a change of venue and preventing Appellant from properly presenting evidence establishing the need to change venue. Prior to the empaneling of prospective jurors, Appellant had requested the trial court to strike the venire based on comments made to the prospective jurors by the Clerk of Court. Not only did the trial court deny Appellant's request to strike the venire, he refused to compel the Clerk to appear and present testimony as to what he had said to the prospective jurors. Continuing with the jury selection process, the trial court denied Appellant's request to ask jurors having knowledge of the case, what it was they knew. It was necessary to conduct this inquiry because of the tremendous amount of publicity given Appellant's case, and the inflammatory nature of that publicity. This publicity was such that nearly half of the jurors having knowledge of the case admitted they could not be impartial. Also, there had been publicity of a mistrial in Appellant's case and several jurors indicated they had recent knowledge of the case which may have included knowledge of the mistrial. This could not be determined without asking jurors the nature of the knowledge they had of Appellant's case. It was also necessary to ask jurors what they knew of Appellant's case in order to properly determine if venue should be changed. Based upon the trial

court's earlier ruling that it would determine the need to change venue after an attempt to select a jury was made, it was necessary to ask jurors the nature of their knowledge in order for the trial court to make this determination.

The trial court erred in denying Appellant's challenges for cause of jurors who had knowledge of Appellant's case. The trial court also erred in denying several challenges for cause of jurors who indicated an inability to be impartial, regardless of their knowledge. These jurors indicated by their answers that they could not follow the law on premeditation and/or voluntary intoxication.

During Appellant's trial, the court made the comment "he would appear to have a very strong case". This comment, if heard by the jury, created the inference that the trial court thought Appellant was guilty of first degree murder. The trial court should have granted Appellant a mistrial after making this comment. Not only did the trial court not grant a mistrial, it failed to conduct an adequate inquiry to determine whether any juror heard the comment.

A police officer was allowed to testify that when he attempted to stop Appellant's vehicle, he observed Appellant "waving me up." There was no evidence that when Appellant shot the police officer, the Appellant had "waved up" the victim. Thus, the police officer's testimony of Appellant "waving me up" was totally lacking in probative value. However, it was extremely prejudicial in that it created the impression of Appellant having a propensity to lure police officers before

shooting them.

The trial court allowed the State to introduce as State's exhibit number 1 an eight-by-ten inch glossy portrait photograph of the police officer who was shot by Appellant. This photograph served no purpose but to convey the loss suffered by the death of the victim. By introducing this portrait photograph, and labeling it State's exhibit number 1, the State was clearly introducing personal characteristic evidence of the victim. The photograph had no relevant purpose and was designed merely to arouse the sympathy of the jury.

The State conceded prior to trial that it could not prove first degree murder of Appellant other than by showing the killing to have occurred from a premeditated design. The State then attempted to establish the element of premeditation through the use of circumstantial evidence. This circumstantial evidence was not inconsistent with any reasonable hypothesis of innocence. It was of equal probability that the shooting occurred as the result of panic as from a premeditated design. Therefore, the trial court was required to reduce the first degree murder charge against Appellant to second degree murder.

The trial court instructed the jury that it could determine if Appellant committed the killing from a premeditated design based on the circumstances of the killing, and Appellant's flight from the killing. But the trial court failed to give the jury an instruction on circumstantial evidence whereby it was required, under the law regarding

circumstantial evidence, that it adopt that position consistent with innocence if the evidence failed to exclude every reasonable hypothesis of innocence. The trial court erred in failing to give an instruction on circumstantial evidence. It also erred in failing to give an accurate instruction on the element of premeditation.

Appellant's death sentence is the result of caprice and emotion. Prior to trial, both the State and Appellant had agreed to a settlement of the case whereby Appellant would be sentenced to two life sentences followed by two hundred years imprisonment. The State subsequently withdrew its approval of this settlement solely because the victim's family wanted Appellant sentenced to death. Since this was nothing more than an arbitrary seeking of the death penalty, the trial court was required to prevent the State from seeking the death penalty against Appellant.

During the voir dire, one juror stated he would automatically vote for the death penalty if Appellant were convicted of premeditated killing of a police officer. Appellant's challenge for cause to this juror should have been granted.

Since the State agreed prior to trial that it could not seek a conviction of first degree murder on the theory of felony murder, the State was prevented from using felony murder as an aggravating circumstance. Having in essence dropped the charge of felony murder against Appellant, the State could not claim, at phase two, that it was an aggravating circumstance

that the killing occurred during the commission of a felony, or flight therefrom.

The killing of the police officer was the result of a chance meeting between Appellant and the victim which lasted but a few minutes. The killing therefore was not the result of "heightened premeditation". The trial court therefore improperly found the aggravating circumstance that the killing was committed in a cold, calculated and premeditated manner.

The trial court acknowledged that three aggravating circumstances on which the jury were instructed could only be treated as a single aggravating circumstance. These three aggravating circumstances were that the killing occurred to "avoid arrest", "hinder law enforcement", and that the "victim was a law enforcement officer". Yet, the State used these three aggravating circumstances in arguing for the death penalty for appellant. It also argued that, unlike the trial court, the jury could treat these aggravating circumstances as two aggravating circumstances. This inflated number of aggravating circumstances undoubtedly prejudiced the jury against Appellant and deprived him of a fair sentencing proceeding.

Section 921.141(5)(j), Florida Statutes (1989), specifies the aggravating circumstance that the victim of the killing was a law enforcement officer. This aggravating circumstance is unconstitutional because it established victim status as a factor for imposing the death penalty. Since the jury had already been informed that it could recommend the

death penalty because the killing occurred to avoid arrest or hinder the enforcement of the law, that the victim was a police officer was nothing more than imposing the death penalty because of the status of the victim.

The trial court refused to read a list of nonstatutory mitigating circumstances requested by Appellant to the jury. The jury could not expect to be able to determine what it could consider as a mitigating circumstance without the reading of this nonstatutory list.

Since a guilty verdict by less than a "substantial majority" of a twelve-member jury is so unreliable as to violate due process, the same must be said of a verdict recommending a sentence of death. In Appellant's case, the jury recommended death by a vote of eight-to-four. This death recommendation is unconstitutional as denying Appellant due process and should not be treated as a death recommendation. This is particularly true since the jury was never told that it could recommend a life sentence despite the existence of aggravating circumstances.

The death sentence imposed upon Appellant is clearly disproportionate. Based on his history, and the circumstances of the offense, Appellant clearly does not fall within the category of "the most aggravated, the most indefensible of crimes". This is particularly true since the State was only seeking the death penalty against Appellant to fulfill the wishes of the victim's family.

POINT ONE

APPELLANT WAS DEPRIVED OF A FAIR TRIAL BY THE JURY SELECTION PROCESS EMPLOYED BY THE COURT.

When police officer Brian Chappell was killed, it generated an enormous amount of publicity. Numerous news articles were devoted to his killing, his funeral, and the pursuit of his killer (See, Xerox Copy of Exhibits, pp. 33-71). The publicity of this event was so intense that the trial judge himself initially suggested that careful consideration be given to a change of venue (R 12).

Appellant did file a Motion To Change Venue. This motion was ultimately denied (R 825 and R 1775). Appellant also moved to strike the venire and to individually voir dire prospective jurors regarding their knowledge of Appellant's case. These motions were also denied (R 824 and R 845-846). At the conclusion of the voir dire, Appellant had exhausted all of his peremptory challenges. His request for additional challenges was denied. Appellant also voiced his objection to the composition of the jury and renewed all of his motions pertaining to the manner in which the jury was selected. Appellant's numerous objections were denied and the case proceeded to trial. The denial of Appellant's motion to strike the venire, motion to individually voir dire prospective jurors, and motion to change venue amounted to a jury selection process that deprived him of a fair trial.

A. Motion To Strike The Venire

Prior to the commencement of jury selection, Appellant moved to strike the venire. The basis for

Appellant's motion was that John Dunkle, the Clerk of Court, had made several improper statements of law to the jury panel that was to be brought into court, and Appellant was not present when these statements were made (R 792-799). The trial court informed Appellant that it needed a record of what was said (R 800). In response, Appellant requested the court to compel the attendance of Mr. Dunkle to testify to the statements he made (R 801). The trial court denied this request advising Appellant that it was necessary to have had a court reporter present (R 801). Appellant then presented a witness to the remarks by Dunkle (R 802). The court, however, again noted that the witness would be merely testifying to hearsay and was not the same as a record. Appellant, pursuant to the Sixth Amendment, again asked the court to compel Dunkle's attendance, which was again denied (R 802).

Appellant presented the testimony of Gordon Richstone. He testified to several improper statements made by Dunkle. Dunkle told the prospective jurors they were to decide guilt or innocence (R 804); both parties presented witnesses (R 805); challenges for cause are for people who know something about the case (R 806); most trials are run of the mill (R 807); the lawyers will try to convince you to reach their conclusion (R 807); a basic premise is the defendant is innocent until proven guilty (R 807); the prosecution must prove the material allegations beyond a reasonable doubt but not the frivolous allegations (R 808); negotiated plea bargains were presently occurring (R 809); objections were technical

(R 813). Richstone noted that Dunkle appeared very much as an authority figure to the jury (R 812). At the conclusion of Richstone's testimony, Appellant once again requested the court to call Dunkle as a witness. This was denied. The trial court also denied Appellant's motion to strike the venire.

Article 1, Section 16 of the Florida Constitution and the Sixth Amendment to the United States Constitution guarantee the right to an impartial jury. There is no question this right is violated when there is communication with a jury in a judge's absence. See, Brown v. State, 538 So.2d 833 (Fla. 1989). The communication is particularly egregious when it pertains to legal issues. "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." Holzapfel v. State, 120 So.2d 195 at 197 (Fla. 1960). In Holzapfel, it was deemed improper for a bailiff to have advised the jury of the difference between grand larceny and other larceny. In McQuay v. State, 352 So.2d 1276 (Fla. 1st DCA 1977) it was considered reversible error for the bailiff to tell the jury what would happen if it failed to reach a verdict.

The question is whether there should be a difference between communication with a jury and communication with a venire from which a jury is to be picked. Certainly there should be no difference when an authority figure, such as the clerk of court, appears before the jury panel and instructs them on the law. Even correct statements of law, when made by someone other than the judge, are improper. Holzapfel, supra

at 197. It is even worse when the statements are either inaccurate or incorrect.

To preserve the issue the trial court felt Appellant needed a court reporter to have recorded Dunkle's statements (R 800-801). Yet, inexplicably, the trial court refused to call Dunkle himself to the witness stand. Just as due process requires a defendant have an opportunity to present available witnesses in support of his defense, Morgan v. State, 453 So.2d 394 (Fla 1984), it is also essential to a fair hearing. Horton v. State, 170 So.2d 470 (Fla. 1st DCA 1964). "The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process." Chambers v. Mississippi, 410 U.S. 284, 294, 93 S.Ct. 1038, 1045, 35 L.Ed.2d 297, 308 (1973).

Appellant presented testimony establishing some impropriety in the clerk's communication with the jury panel. Instead of faulting Appellant for not having an actual recording of Dunkle's statements, the trial court was required to invoke Appellant's Sixth Amendment right to compel the attendance of witnesses. It was incumbent upon the trial court to either ascertain the statements of law made by the clerk to the venire, or simply grant Appellant's motion to strike the venire.

B. Individual Voir Dire

In Mu'Min v. Virginia, 59 U.S.L.W. 4519 (May 30, 1991), the United States Supreme Court held, by a vote of five-to-four, that the Sixth Amendment guarantee to a

fair and impartial jury does not require that jurors be asked the specific knowledge they have of the defendant's case. In the instant case Appellant repeatedly sought to question those jurors who admitted having knowledge of the case, what it was they knew. Despite the holding of Mu'Min, the trial court's denial of Appellant's request deprived him of a fair trial.

Appellant's case differs significantly in many respects from Mu'Min. In Mu'Min, only twenty-six jurors were summoned to the courtroom. Sixteen of these jurors admitted having heard of the defendant's case but only one juror felt he could not be impartial due to his knowledge of the case. In contrast, at Appellant's trial one hundred sixty-nine prospective jurors were summoned, one hundred thirty-nine of whom were excused (R 1951). Of sixty-three prospective jurors asked if they had heard of Appellant's case, fifty-two said they had. Of these, twenty-five felt their knowledge was such that they could not be fair and impartial. Several others were also excused because of prejudices they held against Appellant or the nature of the case.

That only one juror admitted his knowledge of the case might affect his ability to be impartial certainly influenced the Court's holding in Mu'Min. As noted by the Court, if the pretrial publicity generates a "wave of public passion" against the defendant then the Due Process Clause of the Fourteenth Amendment may require a more extensive examination than that in Mu'Min. The Court does not say what

constitutes a "wave of public passion" but cites to Irvin v. Dowd, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961) where the court excused over half of the prospective jurors for their inability to be impartial. Similarly, nearly half of the jurors who had knowledge of Appellant's case said they could not be impartial. Thus, Appellant's case is more akin to Irvin that to Mu'Min. When twenty-five of the fifty-two jurors who heard the case admitted their knowledge would render them unable to be impartial, it raises some suspicion of the other twenty-seven jurors who claimed to be unaffected by their pretrial knowledge. A juror is poorly placed to assess whether he can be impartial. Jordan v. Lippman, 763 F.2d 1265 (11th Cir. 1985). It was therefore incumbent upon the trial court to inquire of those twenty-seven jurors the nature of their knowledge of the case.

Another significant difference between Mu'Min and Appellant's case is the type of questioning conducted by the trial court. In Mu'Min the Court found the judge's questioning to be "by no means perfunctory". The Court noted that the judge would ask four separate questions about the pretrial publicity and then conducted further questioning in panels of four prospective jurors. This differs significantly from what the trial court did in Appellant's case. An example of how the trial court would initially address the entire panel of prospective jurors is as follows:

> So when you are in the jury box and we ask you about knowledge of the case, do not tell us what you have heard.

> We are interested primarily in two inquires. Number one: If you otherwise feel you can serve and if you have read something about it, but don't say anything about what you have heard.
>
> The question and the bottom line signal question we ask is can you assure these lawyers that you will base your decision, your judgment, only on what happens in the court and disassociate and eliminate from consideration anything else you may have heard about the case prior to coming here. It's a very important proposition. (R 1547-1548, emphasis supplied)
>
> ********
>
> Let me remind you again, while you are being questioned and from now until you are excused from this case, you are not allowed to say anything that you may have heard, read or learned about the allegations in this case.
>
> So simply say, "Yes, I have heard something about it, I don't remember much or whatever it is," but just don't go beyond that. (R 1432-1433, emphasis supplied)

As indicated by the foregoing, the trial court not only refused to allow counsel to inquire what knowledge a juror may have of Appellant's case, it even once suggested the answer a juror should give when asked if they had any knowledge of the case. If a juror did indicate he had knowledge of the case the trial court did not conduct a probing inquiry to assure that juror's impartiality. Instead, the juror was simply asked if he could lay aside his knowledge. Often the trial court would add the qualifying phrase "insofar as it is humanly possible." This is no different than asking a juror if he will at least "try" to be fair, to give it his best shot. Very few jurors would refuse to lay aside their knowledge of the case "insofar

as it is humanly possible." This qualifying phrase guaranteed Appellant would be denied a fair trial. Yet it was used by the trial court repeatedly throughout the voir dire (R 1285, 1439, 1445, 1574). This is the type of perfunctory questioning the Court indicated in Mu'Min that it would not allow under the United States Constitution.

Not only did the trial court conduct a perfunctory inquiry regarding a juror's knowledge of the case and his ability to lay aside that knowledge "insofar as it is humanly possible," the trial court refused to ask jurors who had recent knowledge of the case what it was they knew. This was particularly significant because the trial court had granted a mistrial in Appellant's case the week before the current jury was being selected. The granting of the mistrial was reported by the media (See, Xerox Copy of Exhibits, p. 33). This report included comments by the trial judge pertaining to the appellate process in capital cases, which caused the mistrial. The United States Supreme Court has declared such comments improper. Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). As with all jurors having knowledge of the case, Appellant sought the same specific inquiry of those jurors stating they had recent knowledge. The trial court denied this request. As a result, it is unknown whether these jurors knew of the court's granting of a mistrial, and the reason for it. If they did, they certainly should have been excused just as the trial court had excused the entire venire the week before. Appellant challenged for

cause these jurors (R 1209, 1279, 1411, 1538, 1587). Having denied Appellant's request for a specific inquiry, the trial court should have granted Appellant's challenges for cause.

In reaching its decision, the simple majority in Mu'Min expressly refused to follow the Standards For Criminal Justice promulgated by the American Bar Association which require prospective jurors to be asked what knowledge they have of the defendant's case. 59 U.S.L.W. at 4523-29. The Court also refused to follow several federal precedents. See, e.g., Silverthorne v. United States, 400 F.2d 627 (9th Cir. 1968); United States v. Dellinger, 472 F.2d 340 (1972); United States v. Davis, 583 F.2d 190 (5th Cir. 1978). To follow the holding of Mu'Min, supra, this Court would have to similarly reject longstanding Florida precedent.

In Singer v. State, 109 So.2d 7 (Fla. 1959), this Court recognized one of the main purposes of voir dire:

> [T]he goal to be sought is a jury composed of persons whose minds are free of any preconceived opinions of the guilt or innocence of an accused, persons who can in fact give to an accused the full benefit of the presumption of innocence, persons who can because of freedom from knowledge of the cause decide it solely on the evidence submitted and the law announced at the trial. Id. at 23 (emphasis supplied).

Toward accomplishing the foregoing goal, voir dire serves the dual purpose of establishing challenges for cause and ascertaining whether a peremptory challenge should be exercised. Mitchell v. State, 458 So.2d 819 (Fla. 1st DCA 1984). It also allows counsel an opportunity to uncover latent

or concealed prejudgments held by prospective jurors, an opportunity which is necessary to a fair trial. Stano v. State, 473 So.2d 1282 (Fla. 1985). Obviously this goal and its related purposes cannot possibly be achieved when a juror is allowed, even instructed, to keep to himself knowledge he may have of the case. It is also improper under Florida law for the trial court to rely on a juror's self-assessment of impartiality. As noted by the Third District Court of Appeal in Weber v. State, 501 So.2d 1379 (Fla. 3d DCA 1987):

> While it is also said that a juror may be deemed to be fair and thus qualified to sit even though not totally ignorant of the facts and issues in the case, a juror's assurance that he is equal to the task of laying aside his impressions or preconceived notions is not dispositive of the juror's ability to be impartial, indifferent and fair. Id. at 1382 (quotations omitted).

In Appellant's case, the trial court's reliance on a juror's self-assessment of impartiality was particularly egregious since on several occasions the self-assessing juror was asked if he could be impartial "insofar as it is humanly possible."

Not only was the publicity in Appellant's case extensive, it was also highly prejudicial. Several items disclosed by the media would deny Appellant a fair trial if known by a juror. Included in these items were "facts" that: Appellant was a prison escapee serving a seven year sentence at the time of the shooting; he had been in trouble with the law since he was seventeen and had a long history of arrests; he was considered armed and extremely dangerous; he was the prime suspect in the shooting of the victim; he was a violent

criminal; the police were convinced Appellant was the killer and felt their case was airtight; the police were also quoted as wanting to build the "strongest case possible" and felt the evidence was indeed sufficient to obtain a conviction of first degree murder; when apprehended Appellant appeared to be reaching for a gun; the court refused to set bail; Appellant was charged with several offenses including possession of a firearm by a convicted felon; the gun used to kill the victim was stolen and had been linked to Appellant; Appellant admitted to being in the truck when the victim was shot; at the time of the shooting Appellant had edged his truck forward ostensibly to draw the victim away from his motorcycle (See, Xerox Copy of Exhibits, pp. 33-71). Finally, the funeral of the police officer was highlighted in the local newspaper. In bold print headlines it was noted that the victim "will be missed tremendously" (See, Xerox Copy of Exhibits, p. 53).

Virtually all of that which appeared in the newspapers was clearly improper for a juror to know. Particularly prejudicial to Appellant were remarks attributable to the police themselves that the case was airtight, they were convinced Appellant was the killer, and they felt there was sufficient evidence to obtain a conviction of first degree murder. These comments directly violated previous instructions by this Court that "[l]aw enforcement officials likewise must be required to abstain from making pretrial statements regarding the details of crimes under investigation by them, which statements tend to establish the guilt or innocence of

one accused of the crime." Singer v. State, supra, at 17. As recognized in Singer, it would be virtually impossible for a juror aware of such comments by the police to disregard them.

The Court in Mu'Min acknowledged that "content" questioning regarding pretrial publicity would provide counsel with useful information in exercising peremptory challenges. But the Court considered this irrelevant because the United States Constitution does not require counsel be provided with peremptory challenges. It therefore followed, according to the Court, that this could not be a basis for requiring questioning about a juror's knowledge of the case. Under Florida law, however, counsel does have the absolute right to peremptory challenges in selecting a jury. See, Florida Rules of Criminal Procedure 3.350. By refusing to ask jurors their knowledge of the case the trial court denied Appellant the proper exercise of his peremptory challenges. The denial of the proper exercise of a defendant's peremptory challenges is error. See, Hill v. State, 477 So.2d 553 (Fla. 1985). Furthermore, Florida law recognizes that a defendant's right to a fair trial includes the right to exercise peremptory challenges intelligently. See, Mitchell v. State, supra, at 821. There is no question that this intelligent exercise of peremptory challenges requires knowing to what degree a prospective juror retained knowledge of Appellant's case. More importantly, any juror who recalled some of the above-mentioned news articles would be subject to a challenge for cause.

In rejecting the American Bar Association standards

requiring prospective jurors to be asked what they know about the defendant's case, the United States Supreme Court justified its position on the basis that the standards stem from the substantive rule that a juror should be automatically excluded for having knowledge of "highly significant information." The Court noted that the United States Constitution does not contain such a per se exclusion rule. In contrast, to ensure one's right to a fair trial, this Court, and Florida's district appellate courts, has held certain prospective jurors to be ineligible per se for possessing certain knowledge. A juror who "knew" Appellant confessed to the crime would be automatically excluded. See, Reilly v. State, 557 So.2d 1365 (Fla. 1990). The same result would be required if a juror knew Appellant were a convicted felon, or had a history of arrests. See, State v. Vazquez, 419 So.2d 1088 (Fla. 1982), and Wilding v. State, 427 So.2d 1069 (Fla. 2d DCA 1983).

Although the trial court committed several errors in conducting the cursory examination of jurors regarding their knowledge of Appellant's case, one less obvious error is that it presupposes that the news item has been accurately reported, that the prospective juror has accurately read or heard the item, and that the prospective juror has accurately recalled the item. None of these assumptions guaranteed Appellant a fair trial without conducting a careful and specific inquiry as to a juror's knowledge of the case. In other words, what a prospective juror "thinks" he knows about the case can be just as harmful as the knowledge he actually possesses. In fact, it

can be substantially more harmful.

It was quite apparent during the voir dire that not all jurors had an accurate recollection of the case. For instance, one juror advised the trial court that he did not feel he could sit on Appellant's jury as he recalled reading that Appellant had mental problems. Incredibly, the trial court informed the prospective juror that perhaps he was confusing Appellant's case with someone else! (R 1412-1413). This demonstrates the inherent dangers of refusing to ask jurors what they know. As equally important as their knowledge is what they think they know. It does not matter that Appellant had never had "mental problems." A prospective juror thinking he did is clearly prejudicial. Similarly, it doesn't matter that Appellant had never been convicted of a violent crime prior to the instant offense. However, it matters greatly if some juror believes he has read that Appellant has previously been convicted of a violent crime (it was reported that Appellant was a "violent criminal" [R 827 and R 830]). It will never be known whether such a juror sat on Appellant's jury since the trial court repeatedly refused to conduct the requested inquiry. It is not beyond the realm of possibility that a juror in Appellant's case thought Appellant had previously been convicted of murder. It will never be known. What is certain is that if a juror retained even a portion of the items reported in the media, Appellant did not have a chance of being tried by a fair and impartial jury.

Mu'Min v. Virginia, supra, differs from Appellant's

case in several respects, including the vastly greater number of jurors who felt the publicity had rendered them unable to be impartial, and the perfunctory type of questioning committed by the trial court. So even under Mu'Min, the trial court was required to ask jurors their specific knowledge of Appellant's case in order to ensure his Sixth Amendment right to trial by a fair and impartial jury. But regardless of Mu'Min's applicability, a significant difference between it and Florida law is the latter's recognition of peremptory challenges as an important aspect of the right to a fair trial. Indeed, to grant peremptory challenges and then preclude the intelligent exercise of them would itself constitute a denial of due process under both the United States and Florida Constitutions. See, e.g., Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967).

By a vote of five-to-four, the Mu'Min "decision turns a critical constitutional guarantee--the Sixth Amendment's right to an impartial jury--into a hollow formality" 59 U.S.L.W. at 4524, (Marshall, J. dissenting). Even if the facts of Mu'Min and the legal bases for the Court's decision were identical to Appellant's case, this Court should avoid creating the same "hollow formality." As a matter of State law, and under the Florida Constitution, an accused should be allowed to inquire of prospective jurors what knowledge they have of a case where it is established that there has been ample, and often prejudicial, publicity. Without this right, there is no guarantee of an impartial jury.

C. Motion To Change Venue

In Mu'Min v. Virginia, supra, the defendant had initially requested a change of venue upon which the trial court deferred ruling pending an attempt to select a jury. The United States Supreme Court noted that at the conclusion of jury selection the defendant did not renew his motion to change venue or make any other objection to the composition of the jury. In contrast, at the conclusion of jury selection at Appellant's trial he did renew his motion to change venue and object to the composition of the jury (R 1773-1775).

As previously noted, the trial court itself, apparently recognizing the tremendous amount of publicity Appellant's case received, mentioned the need to consider a change of venue (R 12). Appellant did in fact file a motion to change venue (R 3535). At the hearing on Appellant's motion, counsel noted that Appellant's case had been the subject of all aspects of the local media. Not disputing this fact, the trial court instead decided to attempt to pick a jury locally and made the following comments:

> My understanding of the law is, that if in picking a jury we cannot find a group of citizens who say, "Yes, I have heard about the case, I know at this point it is only an allegation and a charge, and my mind is not made up, it will yield to the evidence and I promise and commit that I will base my decision only on what happens in the court during the actual trial," that that can be a fair juror (R 208-209).
>
> ********
>
> If we encounter a jury that looks like

> everybody has made up their mind and they were all woefully infected, then I will let you renew the motion (R 211-212).

As stated by the Florida Supreme Court in Holsworth v. State, 522 So.2d 348 (Fla. 1988):

> Generally, the test to determine whether a change of venue is required is whether the general state of mind of the inhabitants of a community is so infected by knowledge of the incident and accompanying prejudice, bias, and preconceived opinions that jurors could not possibly put these matters out of their minds and try the case solely on the evidence presented in the courtroom. In order to meet this test, the defendant must establish that the general atmosphere of the community was deeply hostile to him, which can be demonstrated either by inflammatory publicity or great difficulty in selecting a jury. Id. at 350 (quotations and citations omitted).

There are thus two ways by which a defendant can show the need for a change of venue: inflammatory publicity or great difficulty in selecting a jury. It was Appellant's position that the amount of publicity was such that there would be great difficulty in selecting a jury. In essence, the amount of publicity was such that the community was so infected with knowledge of the incident that it could not possibly try the case solely on the evidence presented in the courtroom. The trial court prevented Appellant from demonstrating this fact by refusing to allow the jurors to be asked what knowledge they possessed of the case. There simply is no way to determine how infected a juror is with knowledge if that juror does not disclose this knowledge. Again, by repeatedly asking jurors if they could disregard what they knew "as far as is humanly possible," the trial court ensured Appellant would be

unable to demonstrate the need for a change of venue.

There is certainly an indication that a change of venue was needed. There were one hundred sixty-nine jurors on the original panel. Of these, many asked to immediately be excused without disclosing what they knew of the case. Of the sixty-three jurors who were asked, fifty-two said they knew of the case and twenty-five of these said they would be prejudiced by what they knew. So of the sample presented, almost half said they would be prejudiced. This leaves some question whether the other half could be truly impartial especially when many were asked if they could at least be impartial "as far as is humanly possible." See, Murphy v. Florida, 421 U.S. 794, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975).

Just as it was improper for the trial court to prohibit Appellant from asking prospective jurors what knowledge they possessed to determine any individual juror's ability to be fair and impartial, so too was it improper for the trial court to prevent such questioning to allow Appellant the opportunity to demonstrate the need for a change of venue.

"A trial judge is bound to grant a motion for a change of venue when the evidence presented reflects that the community is so pervasively exposed to the circumstances of the incident that prejudice, bias, and preconceived opinions are the natural result." Manning v. State, 378 So.2d 274 (Fla. 1979). But how can the defendant show "the community is so pervasively exposed" when he is prevented from asking members of the community, the prospective jurors, what their knowledge

is of the case?

It is well to remember the words of this Court in Singer v. State, 109 So.2d 7 (Fla. 1959):

> [E]very trial court in considering a motion for change of venue must liberally resolve in favor of the defendant any doubt as to the ability of the State to furnish a defendant a trial by fair and impartial jury. Every reasonable precaution should be taken to preserve to a defendant trial by such a jury and to this end if there is reasonable basis shown for a change of venue a motion therefor properly made should be granted. Id. at 14.

When Appellant is denied the opportunity to ask prospective jurors their knowledge of the case, it can hardly be said the trial court took "every reasonable precaution" to provide him a fair trial. Since the trial court did not allow inquiry into the prospective juror's knowledge of the case, its only alternative was to grant Appellant's motion for change of venue.

The whole manner in which the trial court conducted the jury selection process deprived Appellant of a fair trial under both the United States and Florida Constitutions. It was clear the trial court should have granted Appellant's motion to strike the venire or at least conduct a more extensive hearing on the matter. It was clear the trial court should have inquired of the prospective jurors what knowledge of the case they possessed. It was clear the trial court should have granted Appellant's motion for a change of venue. That the trial court did none of this certainly deprived Appellant of a fair trial as guaranteed by the United States Constitution and the Florida Constitution.

POINT TWO

THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT'S CHALLENGES FOR CAUSE.

As this Court said in Singer v. State, 109 So.2d 7 (Fla. 1959):

> [I]f there is basis for any reasonable doubt as to any juror's possessing that state of mind which will enable him to render an impartial verdict based solely on the evidence submitted and the law announced at the trial he should be excused on motion of a party, or by the court on its own motion. Id. at 23-24. See also, Hill v. State, 477 So.2d 553 (Fla. 1985).

Since the trial court denied Appellant's request to ask prospective jurors what knowledge they had of the case, it could only guarantee Appellant a fair trial by excluding all jurors Appellant challenged for having knowledge of the case. That it did not was error. In addition, there was reasonable doubt that at least four jurors were unable to render an impartial verdict, regardless of their knowledge of the case. For example, during the jury selection, defense counsel was questioning the jurors about their understanding of the difference between first and second degree murder when the following exchange occurred:

> Mr. Birch (defense counsel): Okay. Now, Norberto Pietri is charged with first degree premeditated murder. If he commits an act that causes someone's death, okay, regardless of what is in his mind for such an act, you would require the prosecutor to prove that it has to be what was in Norberto Pietri's mind? Do you follow me?
>
> Ms. Wise (juror): Premeditated.
>
> Mr. Birch: Okay. Ms. Miller, do you follow me there? Do you realize it is a subjective state of mind, whatever was on his mind?

Ms. Miller: Yes.

Mr. Birch: Do you think you can do that?

Ms. Miller: I'll do my best. (R 1042-1043).

Whenever a prospective juror is equivocal in responding there is a reasonable doubt as to that juror's ability to be fair and impartial. Also a juror's assurances that he will "try" to be fair or he "thinks" he can be fair are insufficient to withstand a challenge for cause. See, Longshore v. Fronrath Chevrolet, Inc., 527 So.2d 922 (Fla. 4th DCA 1988); South v. State, 463 So.2d 542 (Fla. 5th DCA 1985). By the same token, Ms. Miller should have been excused for cause as doing her "best" does not establish beyond all reasonable doubt that she could be fair and impartial. Nonetheless, the trial court denied Appellant's challenge for cause as to Ms. Miller (R 1411).

Another juror questioned about his ability or willingness to distinguish between first degree murder and second degree murder was Mr. Kizis, in which the following exchange occurred:

> Mr. Birch (defense counsel): Mr. Kizis?
>
> Mr. Kizis (juror): I think it would be impossible in terms of what his state of mind was. I don't think they have to prove it.
>
> Mr. Birch: I'm sorry?
>
> Mr. Kizis: I don't think they have to prove it.
>
> Mr. Birch: You don't think they would have to prove it?
>
> Mr. Kizis: What is going on in his mind. I don't see how they could.

The Court: Maybe I can help. I think what he is trying to say, Mr. Kizis, is if you or one of your fellow jurors wished to consciously kill the bailiff over there next to the wall and you fired a shot at him, well, you were looking at him and you know it's a shot and you know that that can kill and you have a premeditated intent to kill.

On the other hand, assume he is not there and one of you has a gun and just fires it in that direction.

Well, there are two other courtrooms with jurors in them right now in that same line.

While you have no specific intent to kill any particular human being, you still are committing an act that could reasonably kill someone because there might well be someone in the path of that bullet.

Do you see a difference between those two?

Mr. Kizis: Yes, I do.

The Court: But you don't see it here?

Mr. Kizis: Well, the issue is what's going on in his mind. I think looking at the evidence, the acts and the witnesses that will come, if there are any, and the testimony determines if he pointed the gun at the guy and shot him, and maybe he didn't.

But I don't see how you can determine what is going on in the man's mind. I don't know if it's accidental.

You have a reckless endangerment type of firing a weapon as opposed to shooting a man and I know the difference between the two. I think everybody in the room knows the difference between the two.

The Court: Do you understand there will be evidence hearing on state of mind? There is in almost all trials and the lawyers will be arguing that this action reflects this and then the jury will decide.

Mr. Kizis: Right.

The Court: Go ahead, Mr. Birch.

Mr. Birch: Do you feel that there shouldn't be a distinction between first and second degree murder?

Mr. Kizis: Is that addressed to me?

Mr. Birch: Yes, sir.

Mr. Kizis: I think there should be a distinction.

Mr. Birch: If the distinction lies with what is in the perpetrator's mind and that must be proved to you, would you be so sympathetic, if you will, to the requirement of proving that where you would say "It has to be first degree murder," instead of requiring proof of a state of mind?

Mr. Kizis: I'm not sure. (R 1044-1046, emphasis supplied)

When Appellant challenged prospective juror Kizis for cause (R 1077) the trial court conducted further inquiry:

The Court: Okay. Mr. Kizis, I think you expressed some difficulty in seeing a difference or a distinction between second degree homicide and first degree homicide.

Mr. Kizis: No.

The Court: You do see the distinction, Mr. Kizis?

Mr. Kizis: Yeah. That wasn't the problem. I see the distinction.

Mr. Birch: The answer to my question maybe indicated that.

The Court: That cleared it up at least for me. The other concern was you said it would be very difficult for a jury to reach a conclusion as to what was in a person's mind.

Mr. Kizis: Yes.

The Court: Do you understand that there are a number of factors that you can use which are basically common sense?

Mr. Kizis: Right.

> The Court: It is clearly in my mind that I own a fountain pen or a ballpoint pen which is in my hand. My action demonstrates that to all.
>
> Do you still think you would have difficulty with that concept? See, the jury makes these findings themselves.
>
> Mr. Kizis: I think I would come to a decision on what I thought was in a person's mind, because if you present it, I could imagine what he's thinking right now but I'm not sure. I'm not absolutely certain.
>
> My answer was it would be very difficult for anybody to know what is in anybody else's mind.
>
> I know you have a pen but I don't know if you're going to throw it across the room or it you intend to --
>
> The Court: Or if I'm thinking when are we going to take a break.
>
> Mr. Kizis: I only meant to say that you don't know what is going on in people's minds.
>
> The Court: Thank you. I am going to allow him on both.
>
> Mr. Birch: I would exercise a peremptory as to Mr. Kizis. (R 1078-1080).

At the beginning of the inquiry of Mr. Kizis, he made it clear that he did not feel the State should have to prove what is in the defendant's mind as part of its case. Yet, this is the difference between first degree murder and second degree murder. Although Kizis conceded he could see the distinction he obviously did not feel it could be proved. Indeed, Kizis admitted that he might very well relieve the burden of the State and just create a presumption that the requisite mental state existed so "It has to be first degree murder." Based upon Kizis initial answers that he did not feel the State

should have to prove state of mind, and his uncertainty whether he would even require it, there is no doubt he should have been excused. That his subsequent responses were not so patently contrary to law did not render him qualified. Once a prospective juror makes it clear he is not qualified, subsequent "correct" answers, particularly when in response to questions by the judge, are not sufficient to rehabilitate the juror. See, Hamilton v. State, 547 So.2d 630 (Fla. 1989). If the Singer reasonable doubt standard for excusing a juror is to be given any vitality, Mr. Kizis should have been excused for cause. Certainly a person who would presume an act constituted first degree murder is not a fair and impartial juror. This is particularly true where the heart of Appellant's defense was he did not shoot the victim with a premeditated intent to kill.

Another juror indicated some difficulty with the concept between the two degrees of murder:

> Mr. Birch (defense counsel): Okay. If I understand correctly, first degree murder would require a premeditated intent to kill?
>
> Mr. Mosier (juror): Correct.
>
> Mr. Birch: If that premeditated intent to kill were not there, then you would have to decide was that an unlawful killing by an act imminently dangerous to another and evincing a depraved mind regardless of human life?
>
> Mr. Mosier: Yes, sir.
>
> Mr. Birch: Having excluded first degree murder, would you agree with me it doesn't automatically make it second degree murder, it just excludes first degree murder?
>
> Mr. Mosier: Yes, sir.
>
> Mr. Birch: Now, you would certainly agree

> that pushing somebody over a thousand foot cliff is an act that a person of ordinary judgment would know is reasonably certain to kill or do serious bodily injury, right?
>
> Mr. Mosier: Yes, sir.
>
> Mr. Birch: Let me ask you this: In shooting someone, would you automatically feel that shooting someone carries with it a premeditated intent to kill?
>
> Mr. Mosier: Yes, sir. (R 1034-1035, emphasis supplied)

Appellant's challenge for cause of Mosier was denied (R 1411). Mosier unequivocally stated that the act of shooting another person would automatically constitute, in his mind, premeditated intent to kill. That Appellant was facing the death penalty based on his shooting a police officer, and that his defense was it was second degree murder and not first degree murder, made the trial court's denial of Appellant's challenge for cause of Mosier particularly prejudicial. As far as Mosier was concerned, Appellant was guilty of first degree murder once the State merely established that he did indeed shoot the police officer.

Another juror was challenged for cause due to his inability to accept voluntary intoxication as a defense:

> Mr. Murrell (defense counsel): Okay. You heard the discussion about drug use. How do you feel about that? You mentioned no one in your family had any problems with drugs?
>
> Mr. Wolfe (juror): Right.
>
> Mr. Murrell: Do you think you can listen to the evidence and weigh it knowing that drugs were involved and there will be testimony about that?
>
> Mr. Wolfe: I don't like drugs but I have no problem hearing about it.

Mr. Murrell: All right. You heard the discussion about drug use being a possible defense or a possible reason why a person may not be able to form the intent to commit first degree murder. How do you feel about that?

Mr. Wolfe: I don't know if that should be a deterrent or not. I don't really know.

Mr. Murrell: Prior to hearing it here did you ever know that that was the law?

Mr. Wolfe: No.

Mr. Murrell: Did it surprise you when you heard that? What was your reaction?

Mr. Wolfe: Nothing surprises me since I've been here. Some of the things I've heard are good and bad.

The Court: Ten points for Mr. Wolfe.

Mr. Wolfe: It doesn't bother me. I don't know what to say.

Mr. Murrell: Did it make you angry at all? I would think some people could respond to hearing that in a rather angry fashion. A person is charged with first degree murder and they say "Well, I didn't have the intent to kill because I was high or because I was impaired with alcohol."

Mr. Wolfe: Well, like I say, I don't think that drugs or alcohol or whatever should be a deterrent.

Mr. Murrell: A defense?

Mr. Wolfe: A defense, yes, sir.

Mr. Murrell: All right. If you were told that it is in fact a factor to weigh, can you consider and do that?

Mr. Wolfe: Now that I know, yes.

Mr. Murrell: Even though you don't necessarily approve of it?

Mr. Wolfe: I don't approve of it.

Mr. Murrell: When I say approve, I'm not talking about drug use, I'm talking about the law that says --

Mr. Wolfe: It's not that I don't approve of the law. I don't approve of the drugs. The law, I didn't know about that. If that's a factor, then that would be a factor.

Mr. Murrell: Does that law make sense to you? When we talk about first degree murder being a premeditated killing, we talk about drug use and how it can influence a person's mind to the point where they might not be able to form that intent, does it make a legal or technical sense to you? I mean, does it seem intellectually honest?

Mr. Wolfe: To a point.

Mr. Murrell: Okay. Could you elaborate on that?

Mr. Wolfe: No. I don't really--there again, I don't agree, I've drank before and I've done things probably halfway crazy and stuff, but I mean, I didn't murder anyone, you know. I didn't dismember anyone or whatever. I don't know.

Mr. Murrell: We're not saying that you can claim to have used drugs and then say, "That's what made me do it," and you should get off. Do we have any argument over that?

Mr. Wolfe: No.

Mr. Murrell: Does it seem possible to you that someone could consume alcohol and/or drugs to the extent that they may not be able to form the intent to kill?

Mr. Wolfe: I'm sure they could.

Mr. Murrell: You would consider that as a possibility in weighing the evidence?

Mr. Wolfe: Yes.

Mr. Murrell: All right.

The Court: Mr. Wolfe, let me just add to what Mr. Murrell has discussed with you. You heard me give the example, maybe you didn't

yesterday about a case I had when a man robbed a Christmas tree.

Mr. Wolfe: Right.

The Court: I had the case and he had no memory of having done that, see? You heard me earlier, when Mr. Murrell was questioning on this point, which is a delicate and important point, tell the jury that you decide the extent of impairment, whether the impairment was sufficient to constitute a defense or was not sufficient.

Mr. Wolfe: Right.

The Court: Do you understand that is your determination? The lawyers and the judge don't enter into that. Do you understand?

Mr. Wolfe: Yes.

The Court: Okay. (R 1229-1233, emphasis supplied)

A juror is considered competent if he can lay aside his bias and prejudice and base his verdict upon the evidence presented and the instructions of law received from the court. Lusk v. State, 446 So.2d 1038 cert. denied, 469 U.S. 873, 105 S.Ct. 229, 83 L.Ed.2d 158 (1984). Juror Wolfe indicated his disapproval for drug use and his belief that it should not be a defense although he said he could consider the law regarding voluntary intoxication. Such diametrically opposed answers certainly create a reasonable doubt as to Wolfe's competence as a juror. At best it may have been a close question; "[c]lose cases involving challenge to the impartiality of potential jurors should be resolved in favor of excusing the juror rather than leaving doubt as to his or her impartiality. Longshore v. Fronrath Chevrolet, Inc., supra.

Appellant exercised all of his peremptory challenges

and requested more (R 1647). Several of the jurors Appellant challenged for cause were eventually seated on the jury. Appellant also advised the court that the jury selected was unacceptable (R 1775). The trial court's denial of the challenges for cause as to the jurors quoted above was clearly error and deprived Appellant of a fair trial as guaranteed by the United States Constitution and the Florida Constitution. Under the **Singer** reasonable doubt standard, the jurors quoted above should have been excused.

POINT THREE

APPELLANT WAS DEPRIVED OF A FAIR TRIAL WHEN THE COURT COMMENTED ON THE EVIDENCE.

During the testimony of a police officer the State sought to introduce into evidence the radio dispatch received from the victim after he was shot. Appellant objected to the radio dispatch as a garbled message that would prejudice the jury. The trial court conducted a bench conference regarding Appellant's objection. During this bench conference, the court made the remark: "he would appear to have a very strong case" (R 2062). Standing by itself in a cold record, the meaning of this remark is unclear. However, counsel for Appellant was advised by co-counsel, who was sitting at the defense table when the comment was made, that he heard the remark and it sounded as though the court was referring to the strength of the State's case. In fact, that was the nature of the court's statement. Both the court and the State stipulated that co-counsel for Appellant heard the court tell the State it had a strong case (R 2128-2129).

If any member of the jury heard the trial court say "he would appear to have a very strong case," and understood "he" to be the prosecutor, there is no question Appellant was denied a fair trial. Comments on the evidence by the judge have long been disapproved in this state.

> [A] trial court should avoid making any remark within the hearing of the jury that is capable directly or indirectly, expressly, inferentially, or by innuendo, of conveying any intimation as to what view he takes of the case or that intimates his opinion as to the weight character, or

> credibility of any evidence adduced. Leavine v. State, 109 Fla. 447, 147 So. 897 at 902 (1933).

This principle was reaffirmed in Raulerson v. State, 102 So.2d 281 (Fla. 1958).

The remark made by the trial court in the present case was obviously within hearing of the jury because it was heard by co-counsel seated at the defense table, a distance further from the judge than most of the jurors (R 2122). There is also no doubt a juror, at the very least, would inferentially interpret the remark as a comment on the strength of the State's case. It was therefore incumbent upon the court to grant a mistrial. No curative instruction could cause a juror to disregard the judge's remark that the State has a strong case. This was recognized by this Court in Raulerson v. State, supra. In Raulerson, the trial judge said in the presence of the jury: "these people [the defendant and alleged accomplices] have been shown to be all acting in a conspiracy together" Id. at 284. The trial judge attempted to defuse his statement by telling the jury to disregard it. This Court found the curative instruction inadequate since it could not refute the judge's belief that a conspiracy existed. Similarly, nothing said to the jury in Appellant's case could dispel the trial judge's belief that the State had a strong case.

It was because a curative instruction would be inadequate that Appellant requested an immediate mistrial (R 2123). Appellant also pointed out to the court there was no

way to discover whether a juror had heard the remark without disclosing its content. Yet, the trial court refused to grant a mistrial. Then, Appellant requested, without waiving his motion for mistrial, the court individually ask the jurors whether any of them had heard, during the last bench conference, a statement by the court regarding the strength or weakness of the case (R 2128).

The trial court refused to conduct an individual inquiry of the jurors (R 2128). It also did not ask the question proposed by Appellant. Instead, the trial court addressed the jury as a whole and posed a general question:

> [W]e have had a number of private bench conferences up here where the lawyers and I review legal points. My assumption would be that all of you would understand that is not to be heard and that is considered to be private and off the record as far as you are concerned. But you may, somebody may have heard something. So my question is, at any of these bench conferences up here, have any of you heard what we have been talking about? Okay. They are all negatives. (R 2132) (emphasis supplied)

To guarantee Appellant a fair trial it was crucial to know whether any juror heard the trial court's remark that "he would appear to have a very strong case." But instead of a careful inquiry to ascertain if this had happened, the trial court told the jury it would be improper for any of them to overhear any remarks made during a bench conference. Having said this, the court then asked if by chance any juror had indeed committed the transgression of hearing something said during a bench conference. Not surprisingly, no juror responded to the court's cursory examination. Appellant

objected to the court's manner of inquiry and again requested a mistrial. This was denied (R 2134-2135).

The potential prejudice of the court's statement "he would appear to have a very strong case" cannot be exaggerated. If any juror overheard this remark Appellant was doomed. There is simply no way a juror could ignore the apparent belief of the trial judge that the State's case was very strong. Indeed, any juror hearing the remark would certainly convict Appellant of first degree murder, and possibly recommend a death sentence. Given the risk of such extreme prejudice, it was incumbent upon the trial judge to conduct a careful inquiry of each juror individually to ensure the remark was not heard. This was not done. Subsequent to trial, but before the commencement of phase two, Appellant filed a motion to interview the jury (R 3642). Appellant sought to ask the jurors if any of them heard the remark by the trial judge. This motion was denied (R 2709).

As noted in **Raulerson**, **supra**, any remark by the judge that even indirectly conveys to the jury his opinion of the evidence is improper. Here, the judge commented not simply on the evidence but on Appellant's guilt by referring to the strength of the case. Appellant's motion for mistrial should have been granted. But, at a very minimum, a careful inquiry of the jury should have been conducted. To do neither deprived Appellant of a fair trial.

POINT FOUR

THE TRIAL COURT ERRED IN ADMITTING PREJUDICIAL SIMILAR FACT EVIDENCE THAT HAD NO PROBATIVE VALUE.

The killing of Officer Chappell occurred during a traffic stop of Appellant's vehicle on the morning of August 22, 1988. Officer Chappell was shot as he approached Appellant's vehicle. At Appellant's trial, John Donovan of the Delray Beach Police Department testified that he was involved in a pursuit of Appellant's automobile two days after the shooting (R 2226). During this pursuit, Officer Donovan testified Appellant pulled his car off to the side of the road. Officer Donovan pulled up behind Appellant and turned on the blue lights of his marked police vehicle (R 2227-2228). Officer Donovan testified that when he started to get out of his vehicle, with his weapon drawn, Appellant drove away (R 2228). However, prior to exiting his vehicle, Officer Donovan observed Appellant "waving me up." (R 2228). This testimony was admitted over Appellant's objection (R 2225).

As noted by this Court in Straight v. State, 397 So.2d 903 (Fla. 1981):

> It is improper for a jury to base a verdict of guilt on the conclusion that because the defendant is of bad character or has a propensity to commit crime, he therefore probably committed the crime charged. Therefore, evidence of criminal activity not charged is inadmissible if its sole purpose is to show bad character or propensity to commit crime. But evidence of criminal activity not charged is admissible if relevant to an issue of material fact. If irrelevant, its admission is presumed harmful error because of the danger that a jury will take the bad character or

> propensity to crime thus demonstrated as evidence of guilt of the crime charged. Id. at 908 (citations omitted, emphasis supplied).

Although evidence of Appellant's waving forward Officer Donovan is not, by itself, evidence of bad character or propensity to commit crime, it was nonetheless highly prejudicial. The obvious purpose of Officer Donovan's testimony was to establish Appellant's alleged propensity to wave police officers forward during traffic stops. The clear implication is that if Appellant waved forward Officer Donovan, he probably did the same to Officer Chappell before shooting him. Yet, there was absolutely no evidence Appellant had at any time motioned for Officer Chappell to come forward. Ralph Galan, the only eyewitness who testified, said it was the police officer who told Appellant to move his truck forward after Appellant had initially stopped at the intersection (R 1894). Galan did not at any time testify that he saw Appellant wave the victim forward.

In Keen v. State, 504 So.2d 396 (Fla. 1987) the defendant was on trial for the murder of his wife. During the cross-examination of the defendant, he was asked whether he had told another witness of an attempt to kill his brother's wife several years earlier. This Court, in reversing the defendant's conviction, held the trial court should have granted a mistrial because of the inflammatory and prejudicial nature of the question. The error in Appellant's case was even more egregious. In Keen, the defendant was on trial for the murder of his wife and the inadmissible evidence was the

alleged attempted murder of his brother's wife. In the present case, Appellant was on trial for the murder of a police officer. The sole issue in the case was whether the shooting was with a premeditated intent to kill. An argument could be made either way. But to support its argument, the State introduced evidence of a traffic stop, totally unconnected to the shooting, in which Appellant supposedly "waved up" the police officer. This evidence was introduced even though there was no evidence of Appellant waving forward the officer he shot. Therefore, it was not what Appellant did when Officer Chappell (the victim) stopped him, but what he supposedly had a propensity to do during traffic stops that was demonstrated by the testimony of Officer Donovan. It is this evidence of propensity that has been condemned by every case since **Williams v. State, 110 So.2d 654 (Fla. 1959).** It is also this evidence which denied Appellant a fair trial.

In Keen v. State, supra, this Court reiterated the basis for determining whether the admission of irrelevant evidence denied a defendant a fair trial:

> Application of the [harmless error] test requires not only a close examination of the permissible evidence on which the jury could have legitimately relied, but an even closer examination if the impermissible evidence which might have possibly influenced the jury verdict ... The question is whether there is a reasonable possibility that the error affected the verdict. The burden to show the error was harmless must remain on the state. If the appellate court cannot say beyond a reasonable doubt that the error did not affect the verdict, then the error is by definition harmful. Id at 401 quoting State v. DiGuilio, 491 So.2d 1129 (Fla. 1986) (brackets and ellipses original).

There is no question the jury may have been influenced by the impermissible evidence. As already noted, Appellant's sole defense was that he did not have a premeditated intent to kill when he shot the police officer. Without the testimony of Officer Donovan, the evidence was susceptible to different inferences, one consistent with premeditated intent and one consistent with no premeditated intent. However, evidence that Appellant may have waved forward another police officer at another time carries with it a false air of solemnity, as though Appellant were preparing to shoot Officer Donovan as well (there is no evidence Appellant even had a gun when pursued by Officer Donovan). A jury trying to decide Appellant's state of mind when he shot Officer Chappell could not help but be influenced in their decision by knowledge that Appellant had waved forward another police officer. This knowledge could easily have tipped the scales in favor of a verdict of first degree murder instead of second degree murder which, for Appellant, was the difference between life and death.

By allowing the testimony of Officer Donovan, the trial court committed error. This error deprived Appellant of a fair trial as guaranteed by the United States Constitution and the Florida Constitution.

POINT FIVE

THE TRIAL COURT ERRED IN ADMITTING A PORTRAIT PHOTOGRAPH OF THE VICTIM.

In Booth v. Maryland, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987) the United States Supreme Court held that evidence regarding personal characteristics of a victim is irrelevant to a capital sentencing decision. The risk is that a jury will impose the death penalty in an arbitrary and capricious manner. At Appellant's trial the State, albeit in more subtle fashion, presented evidence depicting the personal characteristics of the victim. This evidence was in the form of an eight-by-ten inch glossy portrait photograph of the victim (See, Xerox Copy of Exhibits, p. 80). This photograph portrays the victim in full dress uniform posed as though he had just graduated from the police academy. The photograph could easily be titled: "Man With a Future." As an added touch, though his motives were transparent, the prosecutor introduced this photograph as State's exhibit number 1 (R 79).

When Appellant objected to the introduction of this photograph the State claimed it was necessary for purposes of identification (R 1842-1844). But the witnesses did not view the victim as he appeared in the portrait photograph. He was seen as he lay on the street. Yet, the prosecutor expressly declined to use any photograph depicting the victim as he appeared at the scene of the incident (R 1843).

Having succeeded in getting the portrait photograph into evidence as State's exhibit number 1, the prosecutor had witnesses identify the victim from this photograph no less than

four separate times (R 1845, 1895-1896, 1920, 2023) even though the identity of the victim was never an issue (R 1843). The personal characteristic evidence condemned in Booth, supra, was in the nature of verbal descriptions of the victims. But a single photograph can often more poignantly portray the personal characteristics of the victim. Viewing the photograph introduced in Appellant's case, one cannot help but feel a deep sense of loss occasioned by the death of the victim. A single photograph can be so inflammatory as to unfairly prejudice the jury. Henry v. State, 574 So.2d 73 (Fla. 1991).

Even if identity of the victim were a relevant issue, the portrait photograph was still inadmissible as being unduly prejudicial. In South Carolina v. Gathers, 490 U.S. ____, 109 S.Ct. 2207, 104 L.Ed.2d 876 (1989) the prosecution introduced a tract entitled "The Game Guy's Prayer" as one of the items strewn about the victim when his body was discovered. The Court found that though the item itself may have been relevant, its contents were not. Similarly, the State could have easily identified the victim from the testimony of other officers. An eight-by-ten inch portrait photograph of the victim was simply irrelevant for identification purposes. Its only purpose, implemented four times by the prosecutor, was to inflame the passions of the jury. This deprived Appellant of a fair trial as guaranteed by the United States and Florida Constitutions.

POINT SIX

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL TO FIRST DEGREE MURDER AND TO REDUCE THE CHARGE TO SECOND DEGREE MURDER.

At the close of the State's case Appellant moved for a judgment of acquittal on all charges. In addition, Appellant requested the trial court reduce the charge of first degree murder to second degree murder for the State, as a matter of law, had failed to prove the element of premeditation (R 2255). First degree murder may be committed in two ways: by a killing which occurs during the commission of a particular felony (felony murder), or by killing with a premeditated design to effectuate the death of another (premeditated murder). The State stipulated prior to trial that it could not prosecute Appellant on the basis of felony murder (R 291). It was therefore incumbent upon the State to prove a first degree murder by presenting evidence of premeditation. This the State failed to do.

As this Court recently confirmed in Jackson v. State, 16 FLW S151 (Fla. 1991):

> Premeditation, as an element of first degree murder, is a fully-formed conscious purpose to kill, which exists in the mind of the perpetrator for a sufficient length of time to permit of reflection, and in pursuance of which an act of killing ensues. Premeditation does not have to be contemplated for any particular period of time before the act, and may occur a moment before the act. Evidence from which premeditation may be inferred includes such matters as the nature of the weapon used, the presence or absence of adequate provocation, previous difficulties between the parties, the manner in which the

> homicide was committed and the nature and manner of the wounds inflicted. It must exist for such time before the homicide as will enable the accused to be conscious of the nature of the deed he is about to commit and the probable result to flow from it insofar as the life of the victim is concerned. Id. at S152 (citations omitted).

During the State's case-in-chief, various witnesses testified to seeing the victim as he followed Appellant's truck, apparently attempting to effectuate a traffic stop. Only one witness, however, testified to actually seeing the shooting. This was Ralph Galan, a twelve year old boy. Galan testified that he saw Appellant stop his truck at the intersection. As the truck passed by, Galan noticed the driver's window was partially up and Appellant had both hands on the steering wheel. Galan heard the police officer tell Appellant to pull his truck further forward. He did so. As the officer walked up to the truck, Galan saw a hand emerge from the driver's window. He did not see Appellant's face. One shot was fired. The truck then sped away (R 1888-1911).

It is not clear where Galan believed the officer was standing relative to the driver when he was shot. At trial he testified he thought the officer was closer to the driver's window than the rear of the truck (R 1895). Yet, Galan agreed he initially told the investigating police officer that he saw the victim standing by the back tire of the truck when he was shot (R 1908). The firearms examiner testified there was no residue on the victim's gun belt, indicating he was a distance of more than three feet from the gun and possibly no closer than seven feet (R 2171 and 2184-2185).

It is certainly arguable that Appellant did not immediately stop his truck when pursued by the victim because he was contemplating killing him. But it is equally arguable, if not more so, that Appellant was uncertain of what to do and fired the gun out of impulse or panic. If Appellant had a premeditated intent to kill, why did he stop his truck at the intersection and pull forward only upon the officer's command; why did he shoot the officer while he was toward the back of the truck instead of waiting until he reached the driver's window; why did Appellant only fire one shot; why was only Appellant's hand emerging from the window and not more of his body to facilitate a better shot (Sgt. Johnston testified that the victim's approach to the vehicle was such as to require the driver to expose himself if he intends to do "anything" [R 2068]); and why would the shot be fired at the officer's chest and not his head (there is the specious argument that the bullet penetrating the victim's heart indicated an intent to kill. But how would Appellant be certain of striking the victim's heart? Several rounds fired at a person's head is far more indicative of an intent to kill than a single shot at the chest). See, e.g., Rivera v. State, 545 So.2d 864 (Fla. 1989); Brown v. State, 526 So.2d 903 (Fla.), cert. denied, 488 U.S. 944 (1988); Burns v. State, 16 FLW S389 (Fla. 1991). In short, Appellant's actions indicate impulsive, not premeditated, behavior.

There is no question that shooting someone in the chest is an act reasonably certain to kill. But that renders

the offense second degree murder and not first degree murder. See, Florida Standard Jury Instructions In Criminal Cases, p. 65. More is required for a conviction of first degree murder. There must be a premeditated intent to kill. The evidence presented by the State did not establish a premeditated intent to kill. Thus, it was incumbent upon the court to reduce the charge to second degree murder. As noted in State v. Law, 559 So.2d 187 (Fla. 1989):

> It is the trial judge's proper task to review the evidence to determine the presence or absence of competent evidence from which the jury could infer guilt to the exclusion of all other inferences. That view of the evidence must be taken in the light most favorable to the state. The state is not required to rebut conclusively every possible variation of events which could be inferred from the evidence, but only to introduce competent evidence which is inconsistent with the defendant's theory of events. Once that threshold burden is met, it becomes the jury's duty to determine whether the evidence is sufficient to exclude every reasonable hypothesis of innocence beyond a reasonable doubt. Id. at 189 (emphasis original, citations omitted).

Premeditation may be proved by circumstantial evidence. But the State is required to present evidence that is inconsistent with every reasonable hypothesis of innocence. Holton v. State, 573 So.2d 284 (Fla. 1991); Duckett v. State, 568 So.2d 891 (Fla. 1990). Under Law, supra, the trial court was required to review the evidence at the close of the State's case. Such a review compels the conclusion that, at best, the State has presented a possible inference of Appellant's actions: a premeditated intent to kill. But the simple establishment of an inference consistent with guilt does not

automatically exclude every reasonable hypothesis of innocence. Indeed, even if the State's desired inference were more probable than any hypothesis of innocence, the court is still required to grant a motion for judgment of acquittal if that inference does not exclude all others. McArthur v. State, 351 So.2d 972 (Fla. 1977). Since it could just as easily be said that Appellant fired the gun from panic as from a premeditated intent to kill, the trial court was required to grant Appellant's motion for judgment of acquittal and reduce the charge of first degree murder to second degree murder.

After the trial court denied Appellant's motion for judgment of acquittal at the close of the State's case, he took the stand in his own defense. Appellant testified that he began using cocaine in 1984 and eventually developed a six to seven hundred dollar a day habit. He committed burglaries to support his cocaine habit. In 1988 Appellant was serving a seven year prison sentence. In July, 1988 he was transferred to the work release center in Lantana. A few days before the shooting Appellant walked away from the work release center. Thereafter, all of his waking moments were focused upon getting and ingesting cocaine. The morning of the shooting Appellant had run out of cocaine. He located a house where he could commit another burglary. During this burglary he found a gun. He took the gun with him.

After committing the burglary, Appellant was headed to where he could exchange the merchandise for cocaine. Appellant was "jonesing," that is, undergoing cocaine

withdrawal. As he exited the highway and headed for the place where he could trade the stolen goods for cocaine, Appellant noticed the police officer behind him. Appellant did not know what to do. At first, he thought to give himself up. Then, he thought of stopping the truck and making a run for it.

Appellant stopped his truck. The officer told him to move forward. As the officer got off his motorcycle Appellant grabbed the gun, stuck his hand out the window and fired. Appellant froze for a few seconds and then fled. When firing the gun, Appellant, who is blind in his right eye, did not aim it. All he thought about was getting away. He was not thinking of killing the officer (R 2265-2527).

The State did not offer any evidence in rebuttal of Appellant's testimony. After Appellant testified, both sides rested. Appellant renewed his motion for judgment of acquittal. With Appellant's testimony added to the evidence, the trial court had no choice but to conclude that the State had failed to exclude every reasonable hypothesis of innocence. The motion for judgment of acquittal should have been granted. The trial court erred in failing to do so.

POINT SEVEN

THE TRIAL COURT ERRED IN DENYING APPELLANT'S REQUESTED JURY INSTRUCTION ON CIRCUMSTANTIAL EVIDENCE.

If the trial court did not err in denying Appellant's motion for judgment of acquittal and reducing the charge of first degree murder to second degree murder (see Point Six), it certainly committed error in refusing Appellant's requested jury instruction regarding circumstantial evidence. Although circumstantial evidence may be used to prove premeditation, the evidence must exclude all reasonable hypotheses of innocence. Whether all reasonable hypotheses of innocence are excluded by the circumstantial evidence is generally a question for the jury. See, Holton v. State 16 FLW S136 (Fla. 1991). If there is sufficient basis for denying a motion for judgment of acquittal, the jury will be called upon to answer this question.

The difference between first degree murder and second degree murder is the element of premeditation. Without this element, Appellant, at most, was guilty of second degree murder. If the jury is to decide whether premeditation exists, fairness requires it be instructed on the law regarding circumstantial evidence when that type of evidence is relied upon to establish premeditation. It is fundamental that a jury receive complete instructions on the elements of a crime. See, Schuck v. State, 556 So.2d 1163 (Fla. 4th DCA 1990). See also, Screws v. United States, 325 U.S. 91, 65 S.Ct. 1031, 89 L.Ed.2d 1495 (1945).

Appellant was not accorded a fair trial when the

jury was asked to decide whether premeditation was proven by circumstantial evidence but was not told the law pertinent to such evidence. The trial court denied Appellant's request that the following instruction be given to the jury:

> Circumstantial evidence is legal evidence and a crime (any fact to be proved) may be proved by such evidence. A well-connected chain of circumstances is as conclusive, in proving a crime (fact), as is positive evidence. Its value is dependent upon its conclusive nature and tendency.
>
> Circumstantial evidence is governed by the following rules:
>
> 1. The circumstances themselves must be proved beyond a reasonable doubt.
>
> 2. The circumstances must be consistent with guilt and inconsistent with innocence.
>
> 3. The circumstances must be of such a conclusive nature and tendency that you are convinced beyond a reasonable doubt of defendant's guilt (the fact to be proved).
>
> If the circumstances are susceptible of two reasonable constructions, one indicating guilt and the other innocence, you must accept that construction indicating innocence. (R 3565)

At Appellant's trial the State argued Appellant's driving of his vehicle to the next street after the officer activated his blue lights showed a premeditated intent to kill (R 2568-2569). This argument was merely the State's interpretation of Appellant's actions. There was no evidence to substantiate this argument. On the other hand, Appellant testified he drove down the street not knowing what to do. At one point he decided to surrender, at another point he decided to flee. Then, after stopping, while the officer approached

his vehicle, Appellant grabbed the stolen gun. In a moment of panic, he picked up the gun, stuck his hand out the window and fired without aiming (R 2391-2392). The State did not present evidence to rebut Appellant's version of events.

If the State's version were correct, that Appellant drove his vehicle down the road having formed an intent to kill the officer, Appellant would be guilty of first degree murder. If Appellant's version is true, that he fired the gun in a moment of panic without an intent to kill, he is guilty of, at most, second degree murder. There is no evidence the State's version is more probable than Appellant's. Indeed, an independent view of the evidence is more supportive of Appellant's version. Nonetheless, a juror could have concluded the State's version and Appellant's were equally plausible. Under Florida law, it is Appellant's version which must be accepted. But the jury, being asked to resolve the facts under the law, were never instructed on the pertinent law.

The harm to Appellant in failure to give an instruction on circumstantial evidence was exacerbated by other instructions given by the court. It told the jury it was to consider the circumstances surrounding the killing in deciding whether Appellant was guilty of first degree murder or some lesser offense (R 2623). The court also instructed the jury it could consider Appellant's "flight or concealment" immediately after the commission of a crime in determining guilt or innocence. (R 2647-2648). The trial court did not restrict or in any way qualify the jury's consideration of flight in

determining guilt or innocence of any, or all, crimes charged.

The circumstances surrounding a killing, including flight, are often ambiguous and subject to interpretation. An argument can always be made supporting one theory or another. This is particularly true in Appellant's case. His flight, and other circumstances surrounding the shooting, is at least as equally consistent with panic as with a premeditated intent to kill. Yet, this is not sufficient to support a conviction of first degree murder, much less send someone to the electric chair. Even probable guilt is not sufficient. "Where the only proof of guilt is circumstantial, no matter how strongly the evidence may suggest guilt a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence." McArthur v. State, 351 So.2d 972, 976, n.12 (Fla. 1977). No lay person sitting on a jury can reasonably be expected to know this fundamental principle of law. One view of the evidence might support a finding of premeditated murder. But that is not sufficient for a guilty verdict. A jury's verdict that is supported by one theory but not another cannot be upheld. Mills v. Maryland, 486 U.S. 365, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988). It is somewhat ironic that the judge, the prosecutor, and the defense would know the law applicable to circumstantial evidence. But the jury, the entity to actually apply the law, would not. It clearly deprived Appellant of due process under the United States Constitution and the Florida Constitution.

POINT EIGHT

THE TRIAL COURT COMMITTED FUNDAMENTAL ERROR IN ITS INACCURATE JURY INSTRUCTION ON PREMEDITATION.

The trial court gave an erroneous jury instruction on premeditation. There was no objection to this erroneous instruction but it denied Appellant due process of law and a fair trial as guaranteed by the Fourteenth Amendment to the United States Constitution. In Schuck v. State, 556 So.2d 1163 (Fla 4th DCA 1990), the court held: "It is well settled that giving a misleading jury instruction constitutes both fundamental and reversible error."

Section 782.04(1)(1), Florida Statutes (1989), defines first degree murder. It provides for two forms of the offense. One is murder from a premeditated design, and the other is felony murder. Appellant was only prosecuted for premeditated murder. The statute defines murder by premeditated design as follows:

> The unlawful killing of a human being:
>
> 1. When perpetrated from a premeditated design to effect the death of the person killed or any human being.

In McCutchen v. State, 96 So.2d 152, 153 (Fla. 1957), this Court defined the "premeditated design" element as follows:

> A premeditated design to effect the death of a human being is a fully formed and conscious reflection and deliberation, entertained in the mind before and at the time of the homicide.
>
> ********
>
> If the design to take human life was formed a sufficient length of time before its

> execution to admit of some reflection and deliberation on the part of the party entertaining it, and the party at the time of the execution of the intent was fully conscious of a settled and fixed purpose to take the life of a human being, and of the consequence of carrying such purpose into execution, the intent or design would be premeditated within the meaning of the law although the execution followed closely upon formation of the intent. Id. at 153 (emphasis supplied)

In Owen v. State, 441 So.2d 1111 (Fla. 3d DCA 1983), the court wrote:

> "Premeditation" and "deliberation" are synonymous terms, which, as elements of first degree murder, mean simply that the accused, before he committed the fatal act, intended that he would commit the act at the time that he did, and that death would be the result of the act. Deliberation is the element which distinguishes first and second degree murder. It is defined as a prolonged premeditation and so is even stronger than premeditation. Id. at 113 n.4 (emphasis supplied) (citations omitted).

The trial judge has a duty to instruct the jury on the law. Florida Rules of Criminal Procedure 3.390(a) provides in pertinent part: "The presiding judge shall charge the jury only upon the law of the case at the conclusion of argument of counsel." Due process requires instructions on the elements of the offense charged. See, Screws v. United States, 325 U.S. 91, 65 S.Ct. 1031, 89 L.Ed. 1495 (1945) (willfully depriving person of civil rights; jury not instructed as to meaning of "willfully"). Materially erroneous jury instructions which adversely affect a defense constitute fundamental error. Smith v. State, 539 So.2d 514 (Fla. 2d DCA 1989).

The federal and state constitutional rights to trial

by jury carry with them the right to accurate instructions as to the elements of the offense. See, Motley v. State, 155 Fla. 545, 20 So.2d 798, 800 (1945). A jury instruction that relieves the State of the burden of proof or of persuasion as to an element of the offense is unconstitutional. See, Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979); Francis v. Franklin, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985). The standard jury instruction of first degree murder does not explicitly state that "a premeditated design" is an element of first degree murder. Instead, it states the distinguishing element of first degree murder as follows:

> There was a premeditated killing of (victim).
>
> "Killing with premeditation" is killing after consciously deciding to do so. The decision must be present in the mind at the time of the killing. The law does not fix the exact period of time that must pass between the formation of the premeditated intent to kill and the killing. The period of time must be long enough to allow reflection by the defendant. The premeditated intent to kill must be formed before the killing.
>
> The question of premeditation is a question of fact to be determined by you from the evidence. It will be sufficient proof of premeditation if the circumstances of the killing and the conduct of the accused convince you beyond a reasonable doubt of the premeditation at the time of the killing.
>
> If a person had a premeditated design to kill one person and in attempting to kill that person actually kills another person, the killing is premeditated.

Appellant contends that the standard instruction unconstitutionally relieves the State of its burden of proof

and persuasion as to the statutory element of premeditated design. The only attempt in defining the premeditation element is: "'Killing with premeditation' is killing after consciously deciding to do so." There is no mention of the requirement, under McCutchen, that the State prove a "fully formed and conscious purpose to take human life, formed upon reflection and deliberation," and that "the party at the time of the execution of the intent was fully conscious of a settled and fixed purpose to take the life of a human being, and of the consequence of carrying such purpose into execution."

Additionally, the standard instruction relieves the State of the burden of proof and persuasion as to the requirement that the premeditated design be fully formed before the killing. While the standard instruction states that "killing with premeditation" is killing after consciously deciding to do so, it relieves the State of its burden by creating a presumption: "It will be sufficient proof of premeditation if the circumstances of the killing and the conduct of the accused convince you beyond a reasonable doubt of the premeditation at the time of the killing." Thus, the jury is told that it need only find premeditation at the time of the killing. Finally, it does not instruct the jury that the premeditated design element, in conjunction with the element of deliberation, requires more than simple premeditation.

In Polk v. State, 179 So.2d 236 (Fla. 2d DCA 1965), the court explained the importance of a thorough and adequate

definition of premeditation:

> It is rudimentary, and should require no citation of authority, that the one essential element which distinguishes first degree murder from second degree murder is premeditation. The term "design," as mentioned in each of the two degrees, means the specific intent may, or may not, be present. The difference is, that in second degree murder, if it is present, it is not premeditated. Thus, premeditation is the ever-present distinguishing factor; and no doubt should be left in the minds of the jury as to its complete and full legal import. No door should be left open for confusion as to what it means. Without the full and complete definition of premeditation, the jury would have neither an understanding of what they were looking for to determine it nor what to exclude to reject it. Id. at 238.

Appellant's only defense to the charge was that he did not act in a premeditated design. This erroneous instruction on the crucial issue of the case results in fundamental reversible error. Therefore Appellant's conviction for first degree murder should be reversed.

POINT NINE

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO PRECLUDE THE STATE FROM SEEKING THE DEATH PENALTY.

"It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." Gardner v. Florida, 430 U.S. 349 at 358, 97 S.Ct. 1197 at 1204, 51 L.Ed.2d 393 at 402 (1977). Prior to the commencement of phase two proceedings, Appellant filed a Motion To Preclude Death Penalty (R 3654). As stated in his motion, Appellant and the State had reached a settlement in the case whereby Appellant would plead to all charges and be sentenced to two consecutive life terms followed by an additional two hundred years imprisonment. However, because the victim's family insisted the State seek the death penalty, the plea offer was withdrawn.

Appellant's case went to trial only because the victim's family would not approve a negotiated settlement. This is not a case where the prosecutor changed his mind and revoked the plea offer before acceptance by the court. This is not a case where the defendant decided he wanted a trial. This is not a case where the prosecutor decided the circumstances of the crime or the history of the defendant justified seeking a death sentence. This is a case where the sole reason the death penalty was sought by the State, and ultimately imposed by the court, was that it coincided with the wishes of the victim's family. Conversely, if the victim had come from a family that

did not believe in the death penalty, Appellant would not be on death row. This is not a death sentence based on reason. It is clearly a death sentence based on "caprice and emotion," the caprice and emotion of the victim's family.

At the hearing on the Motion To Preclude Death Penalty, the State did not refute the facts set forth by Appellant. To the contrary, the State agreed with the facts in Appellant's motion (R 2724-2725). The State in essence agreed it was seeking the death penalty because of the family's wishes and desires.

Death is a unique punishment. It is therefore reserved for "only the most aggravated and unmitigated of most serious crimes." State v. Dixon, 283 So.2d 1 (Fla. 1973). Yet, death was "reserved" for Appellant not because he committed the "most aggravated and unmitigated of most serious crimes," but because it was what the victim's family wanted. Florida's death sentence procedure was upheld by the United States Supreme Court because it assumed that the death penalty would not be imposed in an arbitrary or capricious manner. Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). There can be little doubt Florida's procedure would not have been upheld in Proffitt if the defendant's death sentence were the result of what the victim's family wanted.

Without question, the pain and suffering endured by the family of a murdered loved one is extreme. But to allow this family to decide whether the person who caused their pain and suffering is to live or die, undeniably subjects the death

penalty to caprice or emotion. In Booth v. Maryland, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987) the United States Supreme Court reaffirmed its holding that "a jury must make an individualized determination of whether the defendant in question should be executed based on the character of the individual and the circumstances of the crime." Id. at 502, 107 S.Ct. at 2532, 96 L.Ed.2d at 448 (emphasis original) quoting Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983). In Booth, the Supreme Court held the use of "victim impact statements" in a capital sentencing decision violates the Eighth Amendment to the United States Constitution. "[T]he degree to which a family is willing and able to express its grief is irrelevant to the decision whether a defendant, who may merit the death penalty, should live or die." Booth, supra, 482 U.S. at 505, 107 S.Ct. at 2534, 96 L.Ed.2d at 450.

Appellant's death sentence is an even more flagrant violation of the Eighth Amendment than the violation committed in Booth. In Booth the prosecutor had apparently determined the defendant warranted the death penalty and therefore pursued it. The family's grief was only one factor in considering whether the death sentence should be imposed. In Appellant's case, the State had decided Appellant's crime and history did not warrant the death sentence. Unlike Booth, the family's grief in Appellant's case was not simply evidence presented to the jury in considering whether to recommend the death penalty, it was the reason the jury was considering the question at all!

The State Attorney, of course, has the exclusive authority to prosecute violations of criminal law. Similarly, it has the discretion to determine when to seek the death penalty. But this does not end the inquiry. For although selective enforcement of the law is not automatically a constitutional violation, it does violate due process when that selectivity is "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." Oyler v. Boles, 368 U.S. 448 at 456, 82 S.Ct. 501 at 506, 7 L.Ed.2d 446 at 453 (1962). See also, Bordenkircher v. Hayes, 434 U.S. 357, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978).

The State's decision to seek the death penalty against Appellant was based upon an arbitrary classification: the desire of the victim's family. Indeed, a classification could not be more arbitrary. When the State candidly admitted to the facts contained in Appellant's Motion To Preclude Death Penalty (R 2724-2725), the trial court erred in denying the motion. To allow the State to selectively seek the death penalty against Appellant clearly violates due process and unquestionably constitutes cruel and unusual punishment as prohibited by the Eighth Amendment to the United States Constitution. But for the whim of the victim's family, Appellant would not be on death row.

POINT TEN

THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT'S CHALLENGE FOR CAUSE OF A JUROR WHO WOULD AUTOMATICALLY VOTE FOR THE DEATH PENALTY FOR ONE CONVICTED OF THE FIRST DEGREE MURDER OF A POLICE OFFICER.

As previously noted (see Point Two), if there is any reasonable doubt as to a juror's ability to be fair and impartial he should be excused for cause. See, Singer v. State, supra. This requirement is equally applicable to a juror who is to hear evidence at a phase two proceeding and then recommend a sentence of life or death. Floyd v. State, 569 So.2d 1225 (Fla. 1990). At the voir dire of Appellant's trial a prospective juror unequivocally stated he would automatically recommend the death penalty if Appellant were convicted of the first degree murder of a police officer:

> Mr. Birch (defense counsel): You heard yesterday perhaps though that the person killed was a police officer.
>
> Mr. Carroll (juror): I heard that.
>
> Mr. Birch: Would that affect you in any way so you would be unable to be fair and impartial?
>
> Mr. Carroll: I have to say if the verdict came down from the jury as being guilty of first degree murder, then I would have a stronger opinion about the Defendant killing a police officer than not a police officer.
>
> Mr. Birch: Would you automatically vote for the death penalty if there was a verdict of first degree murder as to a police officer?
>
> Mr. Carroll: I would. (R 1259) (emphasis supplied)

When Appellant challenged juror Carroll for cause

because of his position on the death penalty (R 1274), the trial court agreed the juror made the foregoing statement on the issue but decided to question him further:

> The Court: Well, left in the context of the question, he did say that. I am going to question him.
>
> Mr. Carroll, I have not dwelled on this a great deal. If there is a conviction of murder in the first degree, that is a big if, then there is at the convenience of the parties and the jury, a second trial with somewhat relaxed rules of evidence and procedures and the lawyers will prove and present evidence of aggravating and mitigating factors. Okay. Then the jury will decide what aggravating and mitigating factors outweigh or cancel each other or whatever that may be. There is no limit on the lawyers, I mean, there is very little limit on what they do, although it's not usually a very long trial. Then the jury makes an advisory recommendation to the Judge which carries, I emphasize again, the greatest weight with the Court. The Court does not lightly receive that.
>
> You are in fact the primary sentencers. Now, you said earlier in answering a question, that if a jury found beyond a reasonable doubt that a person was guilty of killing a police officer, you thought the death penalty automatically followed. Is that what your answer was?
>
> Mr. Carroll: My answer was if there is no question, no reasonable doubt that a person willfully premeditatedly killed a police officer, then I believe capital punishment should be inflicted.
>
> The Court: Well, the process I've explained gives you a weighing and a balancing process in phase two. There might be mitigating circumstances that the jury, a jury would find persuasive and valuable and important, do you understand that?
>
> Mr. Carroll: I would be willing to listen to and be as objective as possible about it.

The Court: Okay. Do either of you lawyers want to ask him any other questions?

Mr. Burton (prosecutor): Briefly, Judge. I think what you have said, Mr. Carroll, correct me if I'm wrong, you would be able to weigh the mitigating evidence versus the aggravating evidence?

Mr. Carroll: I would want to.

Mr. Burton: Well, do you think you can do it? That is really the question.

Mr. Carroll: Nothing is cast in concrete in my mind.

Mr. Burton: You know the victim was a police officer.

Mr. Carroll: Yes.

Mr. Burton: So if we get to phase two, really what I'm asking is if you're going to go back there and say, "look, we found him guilty of first degree murder, it's automatic, and I'll vote for the death penalty," or would you weigh the mitigating circumstances versus the aggravating circumstance?

Mr. Carroll: I would weigh the mitigating and aggravating factors.

The Court: Can you foresee the possibility? It is possible the mitigating factors can outweigh the aggravating factors.

Mr. Carroll: Yes. As I mentioned before, panic or something that might take away from the strong premeditation, planning it for weeks, getting him, premeditation, and I think yesterday you talked about timing. There is no time. In a second I'm going to shoot that person and whether he meant to shoot to kill him.

The Court: You would be weighing those factors?

Mr. Carroll: Yes, I would.

The Court: Does that now qualify your answer that it would automatically follow?

Is your answer qualified to say, "that's a strong factor in my opinion but I'm going to consider them all and I would weigh the other mitigating factors"? Is that your answer?

Mr. Carroll: Yes, that's my answer.

The Court: Anything else, gentlemen?

Mr. Burton: No, sir.

Mr. Birch: No, Judge.

The Court: I disallow the challenge for cause. (R 1275-1279) (emphasis supplied).

After juror Carroll had twice stated he would automatically recommend the death penalty if Appellant were convicted of the first degree murder of a police officer, there is no doubt he would realize, by the questioning of the court and prosecutor, his initial answer was "unacceptable." So, not surprisingly, the juror eventually concurred with the court that his initial answer was now "qualified" to the extent that he would indeed consider possible mitigating circumstances. Yet, as this Court has noted, the giving of "correct" answers to questions, particularly when posed by the judge, does not alter the juror's initial inability to be impartial. **Hamilton v. State**, 547 So.2d 630 (Fla. 1989). Thus, once juror Carroll unequivocally stated he would automatically recommend the death penalty for one convicted of the first degree murder of a police officer, he should have been excused for cause. That the trial court did not do so denied Appellant the right to a fair and impartial jury at phase two of his trial as guaranteed by the Florida and United States Constitutions.

POINT ELEVEN

THE TRIAL COURT IMPROPERLY FOUND THE AGGRAVATING CIRCUMSTANCE THAT THE CAPITAL FELONY WAS COMMITTED WHILE APPELLANT WAS ENGAGED IN FLIGHT AFTER COMMITTING A BURGLARY.

One of the aggravating circumstances found by the trial court was that "[t]he capital felony was committed while the Defendant was engaged in flight after committing a burglary (a dwelling)" (R 3709). The court applied this aggravating circumstance even though prior to trial the State agreed the evidence was insufficient to prove Appellant committed felony murder. This constituted double jeopardy and a denial of due process in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article 1, Section 9 of the Florida Constitution.

Prior to trial Appellant filed a motion to preclude the State from prosecuting Appellant on a theory of felony murder with burglary as the underlying felony (R 3517). It was Appellant's contention that the evidence was such that he could not be convicted of felony murder under Section 782.04(1)(a), Florida Statutes. The State stipulated to Appellant's motion (R 253), stating it was not prosecuting Appellant for felony murder (R 291).

Pursuant to the State's stipulation, Appellant was prosecuted for first degree murder exclusively on the basis that he had a premeditated intent to kill. The State did not argue, nor was the jury instructed, on a theory of felony murder. Yet, after Appellant was convicted of first degree murder, the State claimed it was not prevented from arguing the

aggravating circumstance of Section 921.141(5)(d), Florida Statutes, in that the killing occurred while Appellant was "engaged in flight after committing or attempting to commit the crime of burglary" (R 2693). The trial court denied Appellant's motion to preclude the State from using this aggravating circumstance (R 3660).

In Delap v. Dugger, 890 F.2d 285 (11th Cir. 1989) the court addressed the issue whether one who is acquitted of felony murder could still be subjected to the death penalty for having committed a murder while in the commission of a felony. In Delap, the trial court found the evidence insufficient to support a conviction of murder on a theory of felony murder. Nonetheless, the trial court found as an aggravating factor, in sentencing the defendant to death, that the murder occurred during the commission of a felony. The Eleventh Circuit Court of Appeals held that:

> [W]here a defendant has been acquitted of felony murder because there was insufficient evidence that he committed the felony, and where double jeopardy principles bar any subsequent prosecution for that felony murder, the defendant cannot then be charged in a Florida death sentence proceeding with the aggravating circumstance that the killing occurred while the defendant was engaged in committing the same felony for which he was acquitted. Id. at 316 (footnote omitted).

The State attempted to distinguish Delap by claiming that Appellant was not actually acquitted of felony murder. It contended that it had proceeded exclusively on a theory of premeditated murder at phase one of Appellant's trial simply because it was "being conservative" (R 2693). The State made a

similar argument in Delap. In that case the State claimed the trial court's statement that the evidence was "insufficient" to support a conviction for felony murder was not tantamount to an acquittal but merely a "personal comment" by the court. The Eleventh Circuit Court of Appeal was not persuaded by the State's argument. It first noted that a trial judge's characterization of his actions does not control whether an actual "acquittal" has occurred for double jeopardy purposes. Instead the court considered significant the fact that there was nothing to indicate the jury had found the defendant guilty of felony murder or, for that matter, the trial court had even instructed the jury on felony murder. As a result, the court determined the trial judge's use of the term "insufficient" to be a legal conclusion and that the defendant was indeed acquitted of felony murder.

Appellant's case presents a more compelling conclusion that he was acquitted of felony murder than what existed in Delap. In Appellant's case the State stipulated prior to trial that the evidence was insufficient to convict Appellant of felony murder. Appellant's motion was based on his claim that the killing and the burglary were such that he could not be convicted of felony murder under Section 782.04(1)(a), Florida Statutes. This stipulation by the State was tantamount to a nol pros of the charge of felony murder.

In Wilson v. Meyer, 665 F.2d 118 (7th Cir. 1981), the defendant was prosecuted for premeditated murder and felony murder. After a verdict of guilty was returned on both counts,

the prosecution dropped the felony murder count. On appeal the premeditated count was reversed. On retrial, the State attempted to once again prosecute the defendant on the theory of felony murder. The Seventh Circuit Court of Appeal held that by entering a nol pros to the felony murder count, the provisions against double jeopardy prevented the State from subjecting the defendant to a retrial on this count.

In the instant case the trial court denied Appellant's motion because he had not been actually "acquitted" of felony murder. But the State's stipulation to Appellant's pretrial motion was the equivalent to dropping the charge of felony murder. Had the State stipulated to Appellant's motion when he moved for a judgment for acquittal, the court would have been compelled to enter an "acquittal" on the felony murder count. By stipulating that it would not prosecute Appellant for felony murder the State terminated all consideration and judicial review of this aspect of the prosecution. Similarly, the court in **Wilson** found the State's nol pros precluded any appellate review of the felony murder count. The court noted that had such appellate review occurred, and the evidence at that time been determined insufficient, double jeopardy clearly would prevent a retrial. "The abandonment of prosecution by the State of the felony murder count effectively foreclosed [the defendant] from exploring that avenue upon appeal." Id. at 124. By the same token, by stipulating to Appellant's motion the State ended the prosecution for felony murder. To resurrect it at sentencing,

in the form of an aggravating factor is clearly contrary to the double jeopardy and due process clauses of the Florida and United States Constitutions.

POINT TWELVE

THE TRIAL COURT IMPROPERLY FOUND THE AGGRAVATING CIRCUMSTANCE THE KILLING WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER.

In sentencing Appellant to death the trial court found six aggravating circumstances. One aggravating circumstance was that the killing was cold, calculated and premeditated (R 3708). This finding by the trial court was clearly improper.

This Court has often said that the aggravating circumstance of cold, calculated and premeditated required "heightened premeditation" which involved "a careful plan or prearranged design." Rogers v. State, 511 So.2d 526, 533 (Fla 1987), cert. denied, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988). See also, Thompson v. State, 565 So.2d 1311 (Fla. 1990).

In Farinas v. State, 569 So.2d 425 (Fla. 1990), the defendant abducted his estranged girlfriend and subsequently fired a gun at her as she fled from his vehicle. This shot paralyzed her. The defendant then approached the victim, unjammed his gun three times, and fired two shots into the victim's head. This Court found the killing in Farinas, supra, was not cold, calculated and premeditated.

In Young v. State, 16 FLW S373 (Fla. 1991), the defendant and three companions were attempting to steal a car when the victim approached, causing the four to run to their own car. When the defendant was ordered from his vehicle by the victim, he took his shotgun with him and lay on the

ground. The defendant subsequently fired two shots at the victim. The gun used by the defendant had to be manually reloaded after each shot. This Court found the evidence insufficient to establish the killing was committed in a cold, calculated and premeditated manner.

If the facts of **Farinas** and **Young** do not constitute a cold, calculated and premeditated killing, the facts of Appellant's case certainly do not. In both **Farinas** and **Young** the defendants had much more time for reflection and deliberation than did Appellant. If the killing committed by Appellant were cold, calculated and premeditated, all killings are such. The entire contact between Appellant and the victim was but a few minutes, from the time the officer initiated the traffic stop to the shooting one street over. The manner of the killing also negates heightened premeditation: one shot, rapidly fired, while the officer was at the back of the truck. Based upon the facts of Appellant's case, the aggravating circumstance of a cold, calculated and premeditated killing certainly is not applicable. To justify a death sentence upon this aggravating circumstance would be a denial of due process and constitute cruel and unusual punishment under the Eighth and Fourteenth Amendments to the United States Constitution and Article 1, Section 9 of the Florida Constitution.

POINT THIRTEEN

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON THREE AGGRAVATING CIRCUMSTANCES THAT COULD ONLY BE TREATED AS A SINGLE AGGRAVATING CIRCUMSTANCE.

At phase two of Appellant's trial the jury was instructed on six aggravating circumstances it could consider in deciding what sentencing recommendation to make to the court (R 3677). Included in these six factors were: "the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody" (Section 921.141[5][e]); "the capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws" (Section 921.141[5][g]); and "the victim of the capital felony was a law enforcement officer engaged in the performance of his official duties" (Section 921.141[5][j]). In Bello v. State, 547 So.2d 914 (Fla. 1989) the defendant was sentenced to death for the shooting of a police officer. This Court held it improper for the trial court to have considered as separate aggravating circumstances that the shooting was to avoid arrest and hinder the enforcement of the law. It was held that both aggravating circumstances were to be treated as one.

The aggravating circumstance of killing a police officer did not exist at the time the defendant in Bello went to trial. However, the reasoning in Bello would undoubtedly compel the result that this aggravating circumstance would also merge with Section 921.141(5)(e) and Section 921.141(5)(g). Indeed, in sentencing Appellant to death the trial court

considered the three aggravating circumstances as only one (R 3709). Nonetheless, the trial court erred in instructing the jury on all three aggravating circumstances.

This Court has previously determined that it is proper for a jury to be advised of aggravating circumstances that merge. See, Suarez v. State, 481 So.2d 1201 (Fla. 1985). The question is when does the number of aggravating factors that are identical reach a level that violates due process. In Suarez this Court stated "[t]he jury instructions simply give the jurors a list of arguably relevant aggravating factors from which to choose in making their assessment as to whether death was the proper sentence in light of any mitigating factors presented in the case." Id. at 1209. This reasoning assumes the jury will be able to discern factors which overlap and avoid the "doubling" of those factors. In Appellant's case the jury was given three aggravating circumstances that the law required the sentencing court to treat as one. The court knew these three circumstances were required to be treated as a single aggravating circumstance. But the trial court allowed the State to argue, and the jury to consider, the aggravating circumstances separately. It makes no sense to expect a jury to discern aggravating circumstances sufficiently to merge those that overlap. If the jury were given ten circumstances, with only subtle differences, the law would require the trial court to treat these circumstances as a single factor. There is no question that the jury would be affected by the sheer number of aggravating circumstances. It is unreasonable, and a

denial of due process, to expect a jury to possess the same sophistication as a judge. The more overlapping aggravating circumstances given a jury, the less reliable its recommendation.

Unlike Suarez, the court's instruction to the jury was not simply a "list of arguably relevant aggravating factors." It allowed the prosecutor to ask the jury to consider recommending the death penalty because of the existence of two aggravating factors he knew could only be considered by the court as one (the prosecutor conceded to the jury that "avoiding arrest" and "hindering the enforcement of law" were the same). Thus, the jury was told it could recommend the death penalty on an illegal basis. This clearly deprived Appellant of due process of law under the United States and Florida Constitutions.

By adding the aforementioned three aggravating circumstances to the three others read to the jury, the State was able to double the number of circumstances considered by the jury. Yet, two other aggravating circumstances were also invalid: that the killing was cold, calculated and premeditated (see Point Twelve), and that the killing occurred while Appellant was in flight from the commission of a burglary (see Point Eleven). So there was only one other aggravating circumstance (that Appellant was under sentence of imprisonment at the time of the killing). As a result, the jury rightfully could only consider two aggravating circumstances. But it was actually instructed on six. It can hardly be said that the eight-to-four jury recommendation for death would not have been

different had the jury been instructed on two aggravating circumstances instead of six.

POINT FOURTEEN

THE AGGRAVATING CIRCUMSTANCE OF SECTION 921.141(5)(j), FLORIDA STATUTES IS UNCONSTITUTIONAL BECAUSE IT ESTABLISHES VICTIM STATUS AS A FACTOR FOR IMPOSING THE DEATH PENALTY.

Section 921.141(5)(j), Florida Statutes (1989), sets forth the following aggravating circumstance: "The victim of the capital felony was a law enforcement officer engaged in the performance of his official duties." This aggravating circumstance violates Appellant's right to due process and constitutes cruel and unusual punishment contrary to the Florida and United States Constitutions.

In Booth v. Maryland, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), the United States Supreme Court:

> [W]hile this Court has never said that the defendant's record, characteristics, and circumstances of the crime are the only permissible sentencing considerations, a state statute that requires consideration of other factors must be scrutinized to ensure that the evidence has some bearing on the defendant's personal responsibility and moral guilt. 482 U.S. at 507, 107 S.Ct. at 2532-33, 96 L.Ed.2d at 448 (emphasis original, quotations and citation omitted).

In Booth, the Court expressly disapproved of evidence pertaining to the personal characteristics of the victim. One's position as a police officer is a professional, not personal, characteristic. But it is still a Booth violation. To sentence someone to death for killing a police officer has no more relevance than if the victim were a minister, or a doctor, or a firefighter. Nor can it be said that this

aggravating circumstance is valid in that it provides greater protection to police officers. This protection already exists under either Section 921.141(5)(e): "The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody" or Section 921.141(5)(g): "The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws." Both these aggravating circumstances clearly encompass the killing of a police officer while in the performance of his duties. See, Valle v. State, 16 FLW S303 (Fla. 1991). Therefore, the addition of Section 921.141(5)(j) is tantamount to instructing the jury that it should consider, as an aggravating circumstance, the killing of a police officer because of who he is and not because of what he does. This circumstance therefore, has no bearing to Appellant's "personal responsibility and moral guilt" as required by Booth v. Maryland, supra.

Prior to the adoption of Section 921.141(5)(j), this Court had considered the killing of a police officer to not be separate and distinct from the killing of any other person. See, Fleming v. State, 374 So.2d 954 (Fla. 1979). This Court has also rejected the claim that killing a police officer automatically renders the murder to be heinous, atrocious and cruel. Brown v. State, 526 So.2d 903 (Fla. 1988); Cooper v. State, 336 So.2d 1133 (Fla. 1976). Since a police officer's killing did not constitute an aggravating circumstance before Section 921.141(5)(j), the legislature has clearly circumvented

this Court's prior rulings. But by doing so, it has created an aggravating circumstance directly related to a characteristic of the victim.

The application of Section 921.141(5)(j) was particularly prejudicial to Appellant and could have easily affected the jury's eight-to-four recommendation for the death penalty. The trial court denied Appellant's request to declare Section 921.141(5)(j) unconstitutional (R 2719). It also denied Appellant's motion to prevent the State from arguing this aggravating circumstance along with the duplicate aggravating circumstances of "avoiding arrest" and "hindering the enforcement of laws" (Section 921.141[5][e] and 921.141[5][g]) (R 2724). As a result, the State was allowed to ask, and did ask, the jury to recommend the death sentence for Appellant because he killed to avoid arrest and he killed a police officer (R 3045). Thus, the status of the victim as a police officer was emphasized to the jury in seeking a recommendation for the death penalty. To allow the victim's status to be argued as a reason for imposing the death penalty clearly violates the Eighth and Fourteenth Amendments to the United States Constitution and Article 1, Section 9 and Section 17 of the Florida Constitution.

POINT FIFTEEN

THE TRIAL COURT ERRED IN REFUSING TO ADEQUATELY INSTRUCT THE JURY ON MITIGATING CIRCUMSTANCES.

Appellant requested several special jury instructions regarding mitigating circumstances, all of which were denied (R 3627, 3630, 3632, 3673, 3675). Appellant also requested the court to inform the jury of a specific list of nonstatutory mitigating circumstances it could consider (R 3635). The trial court's denial of Appellant's requested instructions renders his death sentence invalid and in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

This Court has previously held it was not required for a jury to be instructed on specific nonstatutory mitigating circumstances. Robinson v. State, 574 So.2d 108 (Fla. 1991). Yet in Lucas v. State, 568 So.2d 18 (Fla. 1990) it was held that the defense is required to specify those nonstatutory circumstances it wants the court to consider. Otherwise, the court could not be faulted for failing to consider such circumstances. If a sentencing judge cannot be expected to consider mitigating circumstances that are not specified, it makes no sense to expect lay persons on a jury to do so. As noted by the United States Supreme Court "it is not enough simply to allow the defendant to present mitigating evidence to the sentencer. The sentencer must also be able to consider and give effect to that evidence in imposing sentence." Penry v. Lynaugh, 492 U.S. ____, 109 S.Ct. 2934 at 2947, 106 L.Ed.2d 256 at 278 (1989). This Court has expressly recognized general

categories of nonstatutory mitigating circumstances including an abused or deprived childhood and remorse. Campbell v. State, 571 So.2d 415 at 419, n.4 (Fla. 1990). But it is unreasonable to expect a jury to draw the same conclusion. In fact, too often is the public heard to deride the "excuse" of one's childhood as a reason for socially aberrant behavior. The trial court is constitutionally required to consider and weigh the nonstatutory mitigating circumstances. Campbell, supra. This Court must also independently weigh those circumstances. Parker v. Dugger, 498 U.S. ____, 111 S.Ct. 731, 112 L.Ed.2d 812 (1991). It logically follows the jury, for a death recommendation to be possibly valid, must also be required to weigh the mitigating circumstances. But a jury cannot be expected to weigh mitigating circumstances it does not know exist. To tell a jury it may consider "any aspect of the defendant's character or record, and any circumstance of the offense" in mitigation is insufficient (R 3678). Such a practice subjects Appellant's life to the whim of the jury. It allows the jury to decide what is a mitigating circumstance and what is not. This renders a recommendation for death unreliable and unconstitutional.

POINT SIXTEEN

APPELLANT'S DEATH SENTENCE IS INVALID BECAUSE IT IS BASED UPON A LESS THAN UNANIMOUS RECOMMENDATION BY THE JURY.

At the conclusion of phase two of Appellant's trial the jury recommended the death penalty by a vote of eight-to-four. Appellant filed a motion requesting the trial court to declare this recommendation invalid as it was based upon a less than unanimous verdict (R 3700). A verdict by a bare majority violates due process and constitutes cruel and unusual punishment as prohibited by the Eighth Amendment to the United States Constitution.

A guilty verdict by less than a "substantial majority" of a twelve-member jury is so unreliable as to violate due process. Johnson v. Louisiana, 406 U.S. 356, 92 S.Ct. 1620, 32 L.Ed.2d 1523 (1972). See also, Burch v. Louisiana, 441 U.S. 130, 99 S.Ct. 1623, 60 L.Ed.2d 96 (1979). A vote of eight-to-four is not a substantial majority. If a less than "substantial majority" verdict is unreliable for imposing a punishment less than death, it logically follows that such a verdict should not be relied upon for imposing a sentence of death. But that is what happens when a verdict of eight-to-four is considered by the court as a recommendation for death.

This Court has rejected the contention that a penalty verdict for death must be unanimous. Alvord v. State, 322 So.2d 533 (Fla. 1975). But in Alvord this Court did not specifically decide the separate issue of whether a bare

majority verdict was constitutional. The subsequent authority of Burch, supra, indicates that a verdict by less than a "substantial majority" violates due process. A jury's recommendation is considered to carry great weight and can only be overridden if the court is able to conclude that no reasonable person can differ as to the sentence that should be imposed. See, Tedder v. State, 322 So.2d 908 (Fla. 1975). If the jury in Appellant's case had recommended a life sentence, the circumstances of the killing and Appellant's history are not such as to warrant a jury override under Tedder. Therefore, if Appellant's death sentence is allowed to stand, its correctness and reliability will have forever hinged upon the judgment of two people. Considering the jury selection process employed by the court in Appellant's trial (see Point One), and considering that one of the jurors who participated in phase two had earlier stated he would automatically recommend the death penalty for the first degree murder of a police officer (see Point Eleven), to allow Appellant to be put to death because of the vote of two people would constitute the utmost injustice.

POINT SEVENTEEN

THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY IT COULD RECOMMEND A LIFE SENTENCE DESPITE THE EXISTENCE OF AGGRAVATING CIRCUMSTANCES.

Not only did the trial court refuse to instruct the jury on the mitigating circumstances it could consider before making a recommendation as to the sentence to be imposed (see Point Sixteen), the trial court also refused to instruct the jury that it could always recommend a life sentence despite the presence of aggravating circumstances. Prior to the jury deliberating at phase two, Appellant requested the trial court to instruct the jury that it could recommend life despite the existence of aggravating circumstances (R 3633). This request was denied (R 2736). This denial deprived Appellant of due process as required by the Fourteenth Amendment to the United States Constitution and renders his death sentence to be cruel and unusual punishment under the Eighth Amendment to the United States Constitution.

In Cunningham v. Zant, 928 F.2d 1006 (11th Cir. 1991), the defendant was sentenced to death in accord with a jury's recommendation. At the sentencing phase the trial court instructed the jury that it could consider all the evidence received including mitigating facts and circumstances. The trial court did not define mitigating circumstances. The trial court, in its instruction on aggravating circumstances, did not tell the jury that it could recommend a life sentence even if one or more aggravating circumstances were proved. The Eleventh Circuit Court of Appeals found the court's failure to

define mitigating circumstances, and to instruct the jury that it could recommend life despite the existence of an aggravating circumstance, rendered the defendant's death sentence invalid. In Appellant's case the trial court committed an identical error. Appellant's death sentence is likewise invalid.

POINT EIGHTEEN

APPELLANT'S DEATH SENTENCE IS DISPROPORTIONATE TO SENTENCES IMPOSED FOR SIMILAR OFFENSES.

"Any review of the proportionality of the death penalty in a particular case must begin with the premise that death is different." Fitzpatrick v. State, 527 So.2d 809, 811 (Fla. 1989). Death is a unique punishment, one requiring "the most aggravated, the most indefensible of crimes" to be imposed. State v. Dixon 283 So.2d 1, 8 (Fla. 1973), cert. denied 416 U.S. 943 (1974). The purpose of proportionality review is "to assure that the death penalty will not be imposed on a capriciously selected group of convicted defendants. The Supreme Court of Florida reviews each sentence to ensure that similar results are reached in similar cases." Proffitt v. Florida, 428 U.S. 250, 258 (1976) (opinion by Powell, J.); see, Dixon, supra, 283 So.2d at 8; Brown v. Wainwright, 392 So.2d 1327, 1331 (Fla. 1981). Proportionality review compares the death sentence "to the cases in which we have approved or disapproved a sentence of death." Garcia v. State, 492 So.2d 360, 368 (Fla. 1986).

The trial court found six aggravating circumstances and no mitigating circumstances existed to justify imposing the death sentence upon Appellant for his conviction of first degree murder (R 3708-3709). However, of the six aggravating circumstances the court merged three of them into a single aggravating circumstance: the killing occurred to avoid arrest (Section 921.141[5][e]; the killing occurred to hinder the enforcement of law (Section 921.141[5][g]); the victim of the

killing was a law enforcement officer (Section 921.141[5][j]). The remaining three aggravating circumstances were: the killing occurred while Appellant was serving a sentence of imprisonment (Section 921.141[5][a]); the killing was committed while Appellant was in flight from the commission of a burglary (Section 921.141[5][d]); and the killing was cold, calculated and premeditated (Section 921.141[5][i]). Of these three aggravating circumstances only one, that Appellant was serving a sentence of imprisonment, is valid (see Points Eleven and Twelve). By merging three aggravating circumstances and discarding two others, there are only two aggravating circumstances applicable to Appellant.

The trial court erred in finding there to be no mitigating circumstances in Appellant's case. Substantial evidence of mitigating circumstances was presented. Among these mitigating circumstances was the abused and deprived childhood of Appellant which this Court has expressly recognized is a mitigating circumstance. See, Campbell v. State, 571 So.2d 415 at 419, n.4 (Fla. 1990). As to Appellant's childhood, he was born in Puerto Rico in 1963 (R 2836). He was the eighth of nine children (R 2858). The family was very poor. They lived in a small four-room house, including two bedrooms shared by the nine children and two parents (R 2851 and R 2855). There was no running water and no bathroom. The children wore the same clothes during the week (R 2851). Appellant's father was an alcoholic. Virtually every day he would get drunk and beat Appellant's mother and

the children (R 2852-2853). Eventually the father left Puerto Rico, leaving the family to fend for themselves. One of Appellant's older brothers, who was fifteen at the time, quit school to support the family. This was the family's only financial support (R 2857-2858).

Appellant was sexually abused over an eighteen month period beginning when he was five. The man who abused him lived with the family, and fathered one of the children borne by Appellant's mother (R 2960).

There was very little family structure during Appellant's upbringing (R 2961). As testified by Dr. Glenn Caddy, a clinical psychologist, Appellant's upbringing was such that:

> By age fourteen I viewed the development of a person who has all the trappings of a weak internal, very sensitive internal structure because of the abuse, a person who has built such a shield around him to protect himself, that not too many people are going to get in. He handled the abuse from other people reasonably well." (R 2967).

The evidence of Appellant's abused and deprived childhood was not rebutted by the State. Under Campbell, supra, the trial court was required to find this mitigating circumstance to exist and weigh it accordingly. This was not done. No mention of Appellant's childhood was made in the trial court's sentencing order (R 3708) or in the State's Memorandum Of Law For Sentencing which the trial court adopted (R 3712). Although Campbell is to be given prospective effect only, Gilliam v. State, 16 FLW S292 (Fla. 1991), this does not allow the court to completely ignore uncontroverted mitigating

evidence.

Another mitigating circumstance presented by Appellant was his mental impairment at the time of the offense resulting from his severe cocaine addiction. Appellant's brother testified Appellant started using drugs in 1983 and returned to using cocaine after serving a prison sentence for burglary (R 2876-2877). His younger sister testified that she grew up with Appellant (R 2902). He often took her and her friends skating, or to the park. She considered him one of the nicest brothers she had (R 2903-2904). However, she noticed a change in Appellant when he began using cocaine in 1983 or 1984, developing a daily habit (R 2905-2906).

Yoris Santana testified he was with Appellant for four days prior to the shooting of Officer Chappell. During these four days Appellant was ingesting cocaine rock almost constantly, day and night (R 2839-2840). Dr. Caddy testified Appellant had developed a six to eight hundred dollar a day habit (R 2982).

Jody Iodice, an expert on the effects of alcohol and drug abuse, testified that one with Appellant's background would find "drug use compelling and attractive to them to alleviate and reconcile some of the limitations they grew up with" (R 2934). She also testified that freebase cocaine, the most potent type of cocaine, is highly addictive (R 2935). One experiencing a cocaine high would feel extreme anxiety, exhilaration and restlessness. Once the high subsides, the person would undergo extreme irritability, erratic and

unpredictable behavior (R 2936). The use of cocaine does not affect memory but it does alter one's judgment (R 2937). A cocaine addict does not consider the consequences of his actions but are the result of impulse (R 2951).

Dr. Caddy testified that Appellant's abused childhood made him extremely vulnerable to drug or alcohol abuse (R 2967). Appellant resorted to committing burglaries to support his several hundred dollar a day habit (R 2981-2982). Dr. Caddy stated Appellant's cocaine withdrawal at the time of the incident would cause him to have relatively poor judgment and clouded appreciation of the consequences of his behavior (R 2990). It was his opinion that the shooting of Officer Chappell "was an incompetent reactive killing" and not cold, calculated and premeditated (R 3022).

The State did not present any testimony to rebut the evidence of Appellant's cocaine addiction or the experts' opinions as to the effect this addiction had on Appellant. Instead, the State, in its Memorandum Of Law For Sentencing, claimed the only evidence of cocaine use was presented by Appellant himself, and his ability to recall the incident refuted his use of cocaine. Both allegations are incorrect. Three witnesses, other than Appellant, testified to their direct knowledge of Appellant's cocaine addiction (R 2839-2840, 2877, 2905) and it was clearly established that cocaine does not cause a loss of memory (R 2937, 2995-2996).

Since three lay witnesses testified to Appellant's severe cocaine addiction, and since two experts testified

Appellant's behavior was impulsive or reactive and indicative of impaired judgment, the trial court's statement in its sentencing order that "I reject as contrived and fabricated his self serving claim of cocaine intoxication" is clearly erroneous (R 3709). Although a trial court's finding is presumed correct, it still must be "supported by sufficient competent evidence in the record" Campbell, supra, at 419 n.4 citing Brown v. Wainwright, 392 So.2d 1327, 1331 (Fla. 1981). No evidence whatsoever was presented to refute Appellant's drug addiction or show it was "contrived and fabricated." Mental impairment through drug abuse is a mitigating factor recognized by this Court. See, Songer v. State 544 So.2d 1010 (Fla. 1989). Since this factor was reasonably established by the evidence, the trial court was required to weigh it against the aggravating circumstances. This was not done.

In its limited consideration of mitigating circumstances, the trial court asserts Appellant "has a shocking criminal history" (R 3709). What the court did not consider was that of Appellant's prior criminal convictions, not one involved the use or threat to use violence. No violent history is a significant mitigating factor. Ross v. State, 474 So.2d 1170 (Fla. 1985); Nibert v. State, 574 So.2d 1059 (Fla. 1990).

The trial court also did not consider Appellant's offer to plead guilty in return for a life sentence. As noted in Point Nine, the only reason this case went to trial was the victim's family's insistence that the State seek the death

penalty. An offer to plead guilty is a recognized mitigating circumstance. Caruthers v. State, 465 So.2d 496 (Fla. 1985). Similarly, remorse is a mitigating circumstance. See, Campbell, supra, at 419, n.4. Appellant apologized in open court to the victim's family after the jury returned with its recommendation (R 3105).

Section 921.141(5)(c), Florida Statutes (1989), lists risk of death to others as an aggravating circumstance. Conversely, the absence of injury to others should be considered a mitigating circumstance especially where, as here, the State charges a series of crimes which transpired over a period of days and Appellant had the opportunity to inflict injury upon others but did not. The most poignant example occurred while Appellant was pursued by police the night of his arrest. During this pursuit Appellant jumped into the car of Tami Nelson. She was sitting in the driver's seat of her car, parked in the driveway, with the engine running, waiting for her husband to come out of their house. Their five year old son was sitting in the back seat (R 2210-2211). Appellant pushed Mrs. Nelson from the car and started to back out of the driveway (R 2213). The boy's father, Keith Nelson, ran to the car. Instead of abducting the boy to use as a hostage, Appellant slowed down so Keith Nelson could get his son out of the car (R 2223). Letting the little boy go was certainly a humanitarian gesture, another type of mitigating circumstance recognized by this Court. Campbell, supra, at 419, n.4. It is also another mitigating circumstance given absolutely no

consideration by the trial court.

He walked away from a work release program and shot a police officer several days later. He had no history of violence but did have a long history of drug abuse. He showed sincere and heartfelt remorse for his actions. He had an emotionally impoverished upbringing. He had been a positive influence on his family. He had developed strong religious standards. His is not the crime for which the death penalty should be imposed: "the least mitigated and most aggravated of murders" 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). In 1973, his name was Carl Songer. In 1988, his name was Norberto Pietri.

There is no significant factual distinction between Appellant's case and Songer v. State, supra. The only legal distinction is that the legislature has now made the killing of a police officer an aggravating circumstance. Even if this aggravating circumstance were valid (see Point Fourteen), it is not a distinction upon which a death sentence can be based.

> If the State has determined that death should be an available penalty for certain crimes, then it must administer that penalty in a way that rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not. Parker v. Dugger, 498 U.S. ____, 111 S.Ct. 731 at 739, 112 L.Ed.2d 812 at 826 (1991) quoting Spaziano v. Florida, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984).

There is simply no way in which to rationally distinguish between the defendant's life sentence in Songer and Appellant's

death sentence in the present case. Appellant's death sentence is cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

POINT NINETEEN

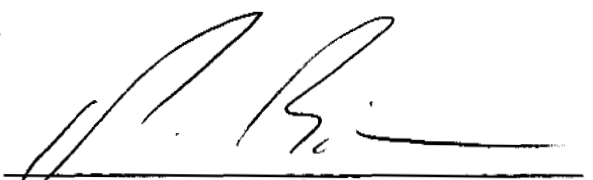
THE TRIAL COURT ERRED IN FAILING TO PREPARE A GUIDELINES SCORESHEET WHEN SENTENCING APPELLANT FOR THE NON-CAPITAL OFFENSES.

In its sentencing order in which the trial court imposed various prison sentences for the non-capital offenses with which Appellant was charged, a guidelines scoresheet was not prepared or utilized in any manner (R 3708-3717). This was clearly error. See, Florida Rules of Criminal Procedure 3.701.

C O N C L U S I O N

WHEREFORE, based upon the foregoing argument and authorities cited therein, Appellant respectfully requests this Court to reverse the judgments and sentences of the trial court and grant a new trial and to preclude the State from seeking the death penalty against Appellant. Alternatively, Appellant requests this Court to reduce his sentence of death to life imprisonment without the possibility of parole for twenty-five years or to grant a new sentencing hearing.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished by mail to CELIA TERENZIO, Assistant Attorney General, 111 Georgia Avenue, West Palm Beach, Florida, 33401, on this 12th day of June, 1990.

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