IN THE SUPREME COURT OF FLORIDA

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CASE NO. 76,493

RAYMOND PADILLA,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

SCOTT W. SAKIN, ESQ.
Counsel for Appellant
1411 N.W. North River Drive
Miami, Florida 33125
(305) 545-0007

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INTRODUCTION

In the trial court, the Appellant, RAYMOND PADILLA, was the defendant and the Appellee, the State of Florida, was the prosecution. In this brief, the parties will be referred to as they stood in the lower court. The symbol "R" will be used to refer to portions of the record on appeal and trial transcript which have been numbered as follows:

1. Record on Appeal pp. 1-286
2. Transcript - 3/12/90 - Vol. I pp. 287-486
3. Transcript - 3/12/90 - Vol. II pp. 487-570
4. Transcript - 3/13/90 pp. 571-801
5. Transcript - 3/14/90 pp. 802-1001
6. Transcript - 3/14/90 - Vol. II pp. 1002-1017
7. Transcript - 3/15/90 pp. 1018-1119
8. Transcript - 3/21/90 pp. 1120-1125
9. Transcript - 4/12/90 pp. 1126-1311
10. Transcript - 4/13/90 pp. 1312-1451
11. Transcript - 5/25/90 pp. 1452-1485

All emphasis is supplied unless the contrary is indicated.

STATEMENT OF THE CASE

On March 1, 1989, an indictment was filed charging the defendant with first degree murder of Paul Gomez and the attempted first degree murder of Marisella Davila. (R.1-2A). On March 12-15, 1990, a jury trial was conducted before the Honorable Roy T. Gelber, Circuit Judge. (R.8-21). At the conclusion of the trial, the jury returned guilty verdicts on both counts, as charged. (R.20,21,228,229). The trial court adjudicated the defendant on both counts. (R.230,231).

On April 12 and 13, 1990, the jury was reconvened for the penalty phase of the trial. (R.2-7). Following the receipt of testimony, the jury recommended by a vote of nine to three that the defendant be sentenced to death on the first degree murder count. (R.173).

On May 25, 1990, the trial judge entered a sentencing order in which be found three aggravating circumstances and one mitigating circumstance. (R.235-240). Finding that the aggravated circumstances outweighed the sole mitigating circumstance, the judge sentenced the defendant to death on the first degree murder court. (R.232-234,235-240). The Court imposed a consecutive twenty-seven year sentence on the attempted first degree murder charge. (R.232-234).

On July 19, 1990, undersigned counsel was appointed to represent the defendant on Appeal. (R.280). On August 9, 1990, a Notice of Appeal was filed. (R.281). This appeal follows.

STATEMENT OF THE FACTS

During jury selection in this cause, the Defendant moved to strike for cause prospective jurors Mr. Wallen **and** Ms. Negron. **(R.546, 547).** In both instances, the basis for the Defendant's motion was that each juror had expressed difficulty with the **concept that the** Defendant might not testify. **Both** jurors had indicated that the Defendant's failure to testify **could** affect their deliberations. **(R.546,547).**

In response to questioning, juror Wallen commented:

> **Defendant's counsel:** Mr. Wallen, is there any reason that you can think of that you would not make a fair juror in this case?
>
> **Wallen: The** only thing I can think of is that I **was** hoping I would get a chance to hear the Defendant speak and you just said that he might not speak in this case."
>
> D's Counsel: "And would that bother you at all?"
>
> **Wallen: "Yes"**
>
> * * *
>
> **Wallen: "I** don't see the reason for, during the course of this trial, not hearing his side of the story. We are trying to decide this case. I would think he **was** trying to trick us here.**"**
>
> D's Counsel: **"If** we have given that impression, we **don't** mean to **do** that."
>
> **Wallen:** "But **I** feel **very** strongly that that's what he's trying to do."
>
> **(R.523).**
>
> The Court: "Speaking only for myself--"
>
> **Wallen: "From** the **way** I've been hearing it now, it was seems that, if I have been paying attention, he may not speak. In other words,

> that is kind of in the back of mind. It is kind of anticipating that he is not going to say anything. That kind of bothers me as a prospective juror, the fact that they got me thinking like this; but I never thought that it would occur until you brought it up."
> (R.526).

The Court sought to rehabilitate Mr. Wallen by asking him if he could follow the Court's instructions on the Defendant's right to remain silent. (R.537). After Mr. Wallen responded in the affirmative, the Court denied the Defendant's challenge for cause. (R.537, 547, 548). Juror Wallen remained on the jury and served as foreman of the jury. (R.11,228,229).

In response to questioning, Juror Negron commented:

> Ms. Negron: "In a case like this and he chose not to speak, yes, I would have a problem with that."
>
> * * * (R.513)
>
> Ms. Negron: "It would depend on the evidence that I heard, but I would point-- I would formulate my opinion on the evidence and what I heard. If I personally feel that he is innocent, and I understand that you have professional expertise here, but you know, unless it is proven to me that he is mute or cannot talk or he doesn't speak English or he's illiterate, then I don't understand why he won't take the stand in his own defense. He should try to defend himself.
>
> * * * (R.515)
>
> Mr. William: And you're saying that given that scenario that you might still convict him even though it's not beyond and to the exclusion of every reasonable doubt?
>
> Ms. Negron: I'm saying that I need to hear his side. If I had enough proof that the state proved its case by the evidence they presented, I would have a problem if he did

not talk to us.

Mr. Williams: Well--

Ms. Negron: I understand that I may be-- it may sound like I'm going against the law, but I really can't make that kind of a decision until I hear the facts and the situation.

* * * (R.516)

Ms. Nogron: Well, all I am saying is that if they present a case before me and I have--and I feel they have proven their case and I am leaning towards a guilty verdict from everything that they gave me, that is my assessment of the case and that is what I am leaning towards.

Mr. Williams: Well, if there is still a possibility of doubt, what would your verdict be?

Ms. Negron: If he spoke or whether he didn't speak?

Mr. Williams: If the situation was that he didn't speak?

Ms. Negron: If he didn't want to speak, I probably would think that he was guilty.

Mr. Williams: And if he speak?

Ms. Negron: It depends on what he says?

Mr. Williams: And if he doesn't speak, you are going to find him guilty even though the law says that he can remain silent.

Ms. Negron: I understand his right to remain silent, but if someone is not guilty, then they shouldn't have anything to hide.

(R.518-519).

Following the questioning of Ms. Negron, the Defendant moved to strike her for cause because Ms. Negron had insisted upon hearing the Defendant testify. Defense counsel argued that her

views affected her ability to accept other fundamental concepts such as the presumption of innocence and the State bearing the burden of proof. (R.546,547). The Court denied the motion to strike for cause. (R.547). The Defendant then exercised a peremptory challenge on Ms. Negron. (R.9). The Defendant exhausted his remaining peremptory challenges and requested additional peremptory challenges on several occasions. (R.542,543,550,551).

During the State's opening statement, the prosecutor commented that the Defendant had gone to Marisella Davila's former apartment and had fired several shots into the premises. (R.589,592,593). Defense counsel objected and moved for a mistrial on the ground that there was no evidence to tie the incident to the Defendant and that the remark concerned uncharged, irrelevant collateral criminal conduct. (R.589-592). The Court deniedthe Defendant's motion and permitted the comments. (R.591).

Louis Rodriguez testified that he saw the Defendant at noon on February 10, 1989, and that at that time the Defendant gave him a .38 caliber gun as collateral for some money that Rodriguez had lent the Defendant. (R.609,610). At dinner time that day, the Defendant came to Rodriguez' home and asked for the return of his gun. (R.610,611). The defendant told Rodriguez that the "gordo" and his cousin had beaten him. (R.611). Rodriguez stated that the defendant was bleeding from the head and was in "bad shape". (R.610,628). As the defendant left with the gun, he told Rodriguez that "a man has to do what a man has to do". (R.612).

One half hour later, the defendant returned to Rodriguez' home

and asked for more bullets. (R.613). The defendant said that he had wasted some bullets, but did not say how he had wasted them. (R. 613, 632, 633). Rodriguez gave the defendant two or three more bullets and the defendant left a second time. (R. 613). The defendant returned a half hour later and told Rodriguez that he had shot "them". (R. 614).

Wendell English testified that he was standing outside his apartment at 2860 N.W. 135th Street between 6:30 and 7:00 p.m. on February 10, 1989, when he observed the defendant walk towards him on the second floor balcony. (R. 634-637, 643-645). In the parking lot below, a heavy set man had just dumped several boxes in the trash dumpster. (R. 642-644). As the heavy man returned to his apartment, the defendant raised a gun from his waistband, stated " I got you now, mother fucker" and fired a single shot at the heavy man in the parking lot. (R. 648, 649). English stated that before the shot was fired, the victim had not said or done anything to the defendant, (R. 650). As English ran to his apartment, he saw a lady come out of her apartment. (R. 651). The defendant went down the stairway and fired a shot in the direction of the lady's apartment. (R. 651, 652, 669). Subsequently, English saw the lady in the parking lot and he noticed that she was bleeding from the head. (R. 653).

Bobby Flowers also witnessed the shooting. He heard the defendant say, "I got you now, mother fucker" and then saw the defendant fire one shot at a man walking in the parking lot. (R. 689-694). Flowers also saw the defendant fire one shot at the

lady's apartment. (R. 695-698).

Officer Ray Suarez arrived at the scene of the shooting and found Paul Gomez dead from a gunshot wound to the back of the head. (R. 716). Officer Suarez removed a loaded 9 mm pistol from the waistband of Gomez and secured the scene. (R. 717, 719).

Crime scene Technician Michael Byrd examined an apartment at the homicide scene and found that one shot had been fired through the door of apartment #95. (R. 744-786). Byrd recovered a projectile from inside the apartment. (R. 752).

Detective Louis Alvarez was present at Jackson Memorial Hospital the night of the shooting, when Marisella Davila identified the defendant as the man who had shot her. (R. 781, 782). Detective Alvarez also assisted in taking the defendant into custody when he was arrested on the morning of February 11. (R. 782-785).

Detective Thomas Romagni also assisted at the location of the defendant's arrest. Romagni stated that the defendant directed him to a canal where he claimed he had disposed of the gun. (R. 791). A search of the area was conducted but the gun was not recovered. (R. 791).

Prior to the testimony of Marisella Davila, the defendant renewed his objection to any testimony or exhibits regarding shots fired at Marisella Davila's old apartment. (R. 798-799). The court denied the defendant's motion. (R. 799)

Marisella Davila testified that she had met the defendant a few months prior to the charged incident and that for a brief time

in January of 1989, she had lived with the defendant. (R. 807-809). Their relationship apparently ended when she asked the defendant to move out of her apartment. (R. 809).

Davila stated that she moved from her old apartment to her apartment near the scene of the shooting at 6:00 p.m. on the day of the shooting. (R. 815). Over objection of defense counsel, Davila identified photographs of her old apartment that depicted bullet holes that Davila claimed were not present when she left the apartment at 5:00 p.m. (R. 816-818).

At 6:00 p.m. on the day of the shooting, Davila's nephew, Hector, informed her that he and her other nephew, Paul Gomez, had had a fight with the defendant. (R. 825). Subsequently, Paul went out into the parking lot to take out the garbage. (R. 827). Davila then heard a loud pop. (R. 827). She opened the door and saw the defendant pointing a gun at the door from a distance of fifteen feet. (R. 828). Davila closed the door and ran to the bathroom. (R.830). On the way, she heard a noise and noticed that she had suffered a head wound, (R. 830, 832).

On cross examination, Davila testified that she had had no problems with the defendant after she ended the relationship with him. (R. 835).

Thomas Quick, a Metro-Dade firearm examiner tested and compared a projectile received from the Medical Examiner's Office, a projectile recovered from Davila's new apartment at the homicide scene and four projectiles recovered from Davila's old apartment. (R. 932-933). Examination of the Medical Examiner's projectile and

the projectile recovered from Davila's new apartment revealed that they were fired by the same gun. (R. 937-939). These projectiles were .38 special or .357 magnum copper **jacket** projectiles. (R. 936-937). The bullets recovered from Davila's old apartment were lead projectiles. (R. 939-940). Due to mutilation of the projectiles, Quick could not state that those **projectiles** were fired by the same gun that fired the other projectiles he had examined. (R. 940).

Associate Medical Examiner Dr. J.S. Barnhardt performed the autopsy on Paul Gomez. Dr. Barnhardt determined that the gunshot wound to the back of Gomez' head **was** the cause of death and that the wound had instantly incapacitated the victim. (R. 965, 971, 974).

Detective James McDermott interviewed the defendant on February 11, 1989. In an informal pre-interview, the defendant told McDermott that at 6:00 p.m. on the previous evening, Paul Gomez and "Fat Boy" came to his place of employment and beat him up. (R. 859). The defendant made no mention of a shooting.

Detective Romagni then told the defendant that they knew the defendant was tired of being harassed by Gomez and his relatives. (R. 860). The defendant then amended his informal statement by relating that he had gone to Davila's apartment with a gun. (R. 861). The defendant said that when he saw Gomez, he fired one shot at him. The defendant added that when he **saw** the apartment door open, he thought that it was "**Fat** Boy". He admitted to firing two shots into the apartment. He then threw the gun into a canal. (R.

863).

Detective Mc Dermott then had the defendant give a formal statement. (R. 864). The defendant's formal statement was consistent with his prior statement. He added that he had been threatened by Gomez and "Fat Boy" in the past. (R. 874). He admitted that he went to Davila's apartment to shoot "Fat Boy". (R-875). After he shot Gomez, the defendant thought that it was "Fat Boy" who had opened the door to Davila's apartment. (R.897).

Detective Mc Dermott concluded by noting that at the time the defendant gave his statement, the defendant had cuts and bruises on his face and finger. (R.881).

During the charge conference held after the close of all evidence, the defendant requested that the court read the jury instruction limiting the probative value of the Williams rule evidence admitted by the court, namely, the evidence of the shooting at Davila's former apartment, (R. 1007, 1008). The Court denied the defendant's request.

Based upon the foregoing evidence, the jury returned guilty verdicts on both courts, as charged. (R. 1111, 1112).

The penalty phase was convened on April 12, 1990. Prior to taking testimony, defense counsel moved to preclude the State from advising the jury that the defendant had previously been charged with murder in New York, since the defendant had pled guilty to a reduced charge of manslaughter in the case. (R.1156). To allow mention of the original murder charge, defense counsel argued, would allow the jury to consider a non-statutory aggravating

circumstances. (R.1156). The court overruled the defense's objection. (R. 1158).

Defense counsel also moved to exclude any evidence of theft or robbery by the defendant which allegedly occurred at the time of the prior manslaughter in New York. The defendant argued that since the defendant was not charged with or convicted of those acts, any testimony regarding them would be proof of a non-statutory aggravating circumstance that would prejudice the defendant. (R. 1191, 1195). The court denied the defendant's motion. (R.1196).

William Lisbon, the defendant's parole officer, testified that the defendant had been serving a twenty year sentence for manslaughter in the State of New York, when he was paroled on June 27, 1986. (R. 1207, 1209). The defendant was scheduled to be on parole until October, 1994. (R. 1209).

Prior to the testimony of Santos Brocato, a retired New York Detective, the parties stipulated that the defendant was the man who has pled guilty to manslaughter in New York and had received a twenty year sentence. (R. 1214).

Brocato testified that he investigated the death of Charles Demeaz on July 4, 1974. (R. 1216). Brocato stated that when he arrived at the scene, he found Demeaz' apartment in disarray with dresser drawers pulled out and contents strewn about. (R. 1217-18). The defendant renewed his objection to any testimony that inferred that a robbery had taken place; the defendant also moved for a mistrial. (R.1219). The court denied the defendant's motion.

(R. 1219). Brocato continued by noting that he found Demeaz dead in a bathtub full of water. (R. 1220). Demeaz was nude. (R. 1220).

Brocato stated that on July 9, 1974, the defendant came to the station house and gave a statement (R. 1221). The defendant told Brocato that Demeaz had invited him to his apartment to have a beer. (R. 1226) Demeaz then began to fill the bathtub with water and asked the defendant if he wanted to have fun. (R. 1227). Althoughthe defendant indicated that he was not interested, Demeaz nevertheless took his clothes off and approached the defendant. (R. 1227-1228). The defendant hit Demeaz to ward him off. The blows knocked Demeaz out and Demeaz fell into the bathtub. (R. 1227-1228). The defendant then looked around the apartment for valuables. (R. 1228). When Demeaz tried to get out of the bathtub, the defendant held Demeaz underwater. (R. 1229). Subsequently, the defendant took jewelry, a camera and a television. (R. 1229,1230). The defendant pawned the jewelry and the camera for $50.00. (R.1232). Defense counsel then objected and moved for a mistrial because the State had elicited evidence of another uncharged crime, dealing in stolen property. (R. 1232). The Court denied the motion. (R. 1233).

Brocato concluded by noting that the Defendant had been charged with murder in the second degree and had pled guilty to manslaughter. (R. 1236, 1237).

Yolanda Padilla, the defendant's sister, testified that their father was violently abusive towards the defendant during the time that the defendant lived with his parents. (R. 1241-1243). Ms.

Padilla stated that their father punched and kicked the defendant three or four times a week. (R. 1244-1245). The defendant was also beaten with an electrical cord and a belt by his parents. (R. 1252). The defendant was frequently left with cuts and bruises on his face. (R. 1246).

Ms. Padilla stated that at age ten, the defendant was taken to a place where his head was shaved and where he received electrical shock therapy. (R. 1247-1248). At age thirteen, the defendant was hospitalized in a mental institution in Cleveland. (R. 1249). While in the institution, the defendant was frequently attacked by other patients. (R. 1250).

On cross examination, Ms. Padilla revealed that her parents' violence towards her brother was reduced somewhat after the family moved to Ohio. (R. 1250). She stated that her brother did witness her being beaten by her parents on several occasions during that time. (R. 1251).

Later on cross examination, the prosecutor asked Ms. Padilla, "And you're aware of the fact that your brother, Raymond Padilla, beat his wife?". Defense counsel objected to the unfounded allegation and moved for a mistrial. (R. 1255). The court warned the prosecutor about bringing up other uncharged crimes but denied the defendant's motion for mistrial. (R. 1255).

Dr. Jethro Toomer, found by the court to be an expert in the field of psychology, testified that he had interviewed the defendant on eight occasions. (R. 1257-1260). His work in this case led him to the conclusion that the defendant was suffering

from a borderline personality disorder that had formed during the defendant's childhood. (R. 1260, 1272). The doctor further opined that the defendant could not appreciate the criminality of **his** conduct and could not conform his conduct to the requirements of the law. **(R. 1260).**

Dr. Toomer found that the defendant was emotionally and physically abused as a child. **(R. 1261).** Dr. Toomer remarked on the pattern of beatings that the defendant endured which consisted of kicking, punching, whipping with an electrical **cord** and near strangulation. (R. **1262-1263).** When the defendant **was** approximately eight years old, he **was** beaten so badly that he required hospitalization. (R. 1263).

Dr. Toomer stated that when the defendant was between the ages of eight and ten, he received electro-shock therapy on two or three occasions at the Cumberland Psychiatric Institute in New York. (R. **1266).** Dr. Toomer noted that the psychiatric community now considers electro-shock therapy to be barbaric. (R. **1267).** The defendant received additional treatment as an in-patient at children Land Psychiatric Institute in Cleveland. (R. **1268).** While there, the defendant received **therapy** and was medicated with thorazine. (R. 1269). The defendant was victimized on several occasions during his hospital stay. On one occasion, he was attacked by an inmate and was knocked unconscious after being hit with a pool cue. (R. **1269).**

Dr. Toomer found that **the** emotional abuse of the defendant also had its origins in constant verbal abuse of the defendant by

his parents. (R. 1263-1264). The defendant also witnessed several beatings of his mother by his father. (R. 1264).

All of the above-described events contributedto the formation of a lifelong personality disorder in the defendant. (R. 1273). Dr. Toomer concluded by noting that the conduct that formed the basis for the charges in this case was the product of the defendant's personality disorder. (R. 1301-1302).

The defendant testified that he was beaten a great deal by his father during childhood. (R. 1332-1334). The defendant confirmed that he was hospitalized for injuries sustained during one of the beatings. (R. 1335). He was also hospitalized on two different occasions for psychiatric problems. (R. 1337-1341).

The defendant stated that he had liked Paul Gomez. (R. 1350). His problems with Gomez began after his relationship with Marisella Davilla came to an end. (R. 1352). After that point, Gomez and his relatives threatened him with weapons three or four times. (R. 1352). The defendant said that on the day of the incident, Hector (Fat Boy) beat him severely. (R. 1354).

The defendant testified that he now realizes that he should not have gone after Gomez with a gun. (R. 1354). The defendant stated that he regretted shooting Gomez. (R. 1354). The defendant said that he has difficulty handling abuse from someone and that he has a problem with his temper. (R. 1357). The defendant stated that he knows that he needs help in handling his problems. (R. 1358).

Following the arguments of counsel, the jury returned with a

recommendation that the defendant be sentenced to death. (R. 1448). The vote was nine to three. (R. 1448).

On May 25, 1990, the court again heard from Dr. Toomer. On this occasion, Dr. Toomer testified that the defendant had a longstanding drug and alcohol abuse problem. (R. 1454). Beginning at age 14, the defendant used barbiturates, inhaled spot remover, sniffed glue, smoked marijuana and used cocaine, heroin, hashish, crack and LSD. (R. 1455-1456). The defendant also consumed large amounts of alcohol. (R. 1455-1456). Despite this pattern of serious substance abuse, the defendant had never been offered any type of drug treatment program. (R. 1457).

At the conclusion of Dr. Toomer's testimony, the court entered an order sentencing the defendant to death for the murder of Paul Gomez. (R. 235-240). The Court found that the evidence established three aggravating circumstances. They were that the murder was committed while the defendant was under a sentence of imprisonment, that the defendant had a previous conviction for a violent felony and that the murder was committed in a cold, calculated and premeditated manner. (R. 236-237).

The court found that one statutory mitigating circumstances had been established; that the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance. (R. 237-238). The court found that the mitigating factor in Section 921.141(6)(f), regarding the defendant's ability to appreciate the criminality of his conduct and to conform his conduct to the requirements of the law, had not been adequately

proven. (R.238). The court made no finding regarding the defendant's history of substance abuse. Although the court did find that the defendant was remorseful, the court concluded that the aggravated circumstances outweighed the mitigating circumstances and thus sentenced the defendant to death. (R. 239).

SUMMARY OF ARGUMENT

During jury selection, it became apparent that prospective jurors Wallen and Negron were troubled by the notion that the defendant had the right not to testify in this case. Both jurors indicated that they believed that if the defendant was innocent, he had nothing to hide and should therefore testify. Wallen stated that if the defendant did not testify, he would think that the defendant was trying to "trick" the jury. Negron stated that even if she had a doubt about the defendant's guilt, she would find the defendant guilty if he did not testify. Although the comments by

the jurors raised serious questions about their ability to be fair and impartial, the trial judge denied defense counsel's motions to excuse both jurors for cause. The defendant exercised a peremptory challenge on juror Negron and subsequently exhausted his remaining peremptory challenges. Wallen remained on the jury and served as the jury's foreman.

During the state's case, the State was permitted to introduce evidence of shots fired into Marisella Davila's former apartment. Defense counsel sought to exclude the evidence because it was irrelevant to the charges filed, which arose from an incident that occurred at a different time and place. Although the State informed the jury in opening statement that they would prove that the defendant had fired the shots into the former apartment, the State failed to introduce clear and convincing proof that the defendant was the perpetrator of this alleged, collateral criminal act. The defendant was highly prejudice by the admission of the evidence because the State was improperly allowed to rely on it as evidence of premeditation in the subsequent homicide.

The trial court further committed reversible error when he refused to read to the jury the statutory mandated limiting instruction on Williams rule evidence. The trial court refused to do so, despite defense counsel's request to the contrary. This allowed the jury to consider the inflammatory evidence without any guidance and gave the jury discretion to convict the defendant because of an alleged propensity to commit crime or because of his allegedly violent character.

During the sentencing phase of the trial, the court permitted the State to introduce nonstatutory aggravating circumstances of bad acts the defendant allegedly committed as part of a prior manslaughter conviction. These bad acts consisted of robbery, dealing in stolen property, burglary and beating his wife. The defendant was never charged, much less convicted of any of these bad acts. These bad acts were not relevant to prove any issue, but were presented to the jury to show the defendant's bad propensity.

The defendant established during the sentencing phase the mitigating circumstance of the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. This circumstance was proven through the testimony of a medical expert who found that the defendant had an abused childhood and suffered from a personality disorder. In light of the testimony the trial court should have found this mitigating circumstance and erred by giving it no weight.

The trial court erred in finding the homicide was committed in a cold, calculated, and premeditated manner. However, this was not a contract or execution style murder. Rather, the defendant had a pretense of moral or legal justification. The victim and his friend "Fat Boy" had earlier beat the defendant and over the course of a few weeks threatened the defendant with physical harm. The victim was known to carry a gun and was in fact armed with a 9 mm pistol at the time of the shooting. The defendant presented a colorable claim that the murder was motivated out of self defense

which was consistent with the State's theory of prosecution.

The trial court erred by failing to expressly evaluate in its written sentencing order each mitigating circumstance proposed by the defendant. The court did not address whether the victim was a participate in the defendant's conduct or whether the defendant acted under extreme duress. The court must consider any relevant mitigating evidence. The victim started the actions which eventually resulted in his death. The defendant's reaction to the victims threats and beating was that of a mentally imbalanced person who acted under duress.

The trial court erred in sentencing the defendant for attempted first degree murder above the permitted guideline range where the trial court stated no reasons for the departure. The record is void as to why the court departed from the sentencing guidelines.

ARGUMENT

I

THE TRIAL COURT ERRED IN DENYING DEFENSE CHALLENGES FOR CAUSE MADE AT TRIAL AGAINST PROSPECTIVE JURORS WALLEN AND NEGRON, WHERE A REASONABLE DOUBT WAS ESTABLISHED CONCERNING THE JURORS' ABILITY TO RENDER AN IMPARTIAL VERDICT BASED SOLELY ON THE EVIDENCE, THEREBY DENYING THE DEFENDANT HIS RIGHT TO AN IMPARTIAL JURY GUARANTEED BY THE SIXTH AMENDMENT TO THE U.S. CONSTITUTION.

The question of whether a prospective juror is competent to serve as a juror is a mixed question of law and fact and will not be disturbed on appeal unless the trial court's decision is

manifestly erroneous. *Singer* v. *State,* 109 So.2d 7 (Fla. 1959); *Leon* v. *State,* 396 So.2d 203 (Fla. 3d D.C.A. 1981), rev. *denied,* 407 So.2d 1106 (Fla. 1981). However, this standard is tempered by the rule that

> [I]f there is a 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.

Singer v. *State,* 109 So.2d at 23-24); accord Moore *v. State,* 525 So.2d 870 (Fla. 1988); Hill *v. State,* 477 So.2d 553 (Fla. 1985); and *Price v. State,* 538 So.2d 486 (Fla. 3d D.C.A. 1989). A juror is not impartial when one side must overcome a preconceived opinion in order to prevail. *Hamilton* v. *State,* 547 So.2d 630, 633 (Fla. 1989); *Price* v. *State,* supra. Close cases should be resolved in favor of excusing the juror rather than leaving doubt as to his or her impartiality. *Club* West *v. Tropigas* of *Florida, Inc.,* 514 So.2d 426 (Fla. 3d D.C.A. 1987); *Sydelman* v. *Benson*, 463 So.2d 533 (Fla. 4th D.C.A. 1985). In the present case, the questioning of prospective jurors Wallen and Negron raised grave doubts as to their ability to render an impartial verdict based solely on the evidence submitted and the law announced at trial, and consequently defense counsel's motion to excuse Wallen and Negron for cause should have been granted.

During the voir dire questioning of prospective juror Wallen by defense counsel, the following exchange occurred:

> Mr. Williams: Mr. Wallen, is there any reason that you can think of that you would not make

a fair juror in this case?

Mr. Wallen: The only thing I can think of is that I was hoping 1 would get a chance to hear the defendant speak and you just said that he might not speak in this case.

Mr. Williams: He might not speak.

Mr.Wallen: 1 was given the impression that you were trying to set us up that he is not going to say anything.

Mr. Williams: And would that bother you at all?

Mr. Wallen: Yes.

Mr. Williams: Why?

Mr. Wallen: Well, even though he may not have done it, I don't know why that would bother him now.

Mr. Williams: He's having a difficult time accepting why--

Mr. Wallen: He has a hard time pronouncing words-- I think he can be articulate and speak English. If he can't speak English. If he can't speak English, that is moot. I don't know why he can't be asked questions. I'm starting to get the idea that's the way it's going to go.

Mr. Williams: What if you heard--

Mr. Wallen: I don't see the reasons for, during the course of this trial, not hearing his side of the story. We are trying to decide this case. I would think he was trying to trick us here.

Mr. Williams: If we have given that impression, we don't mean to do that.

Mr. Wallen: But I feel very strongly that that's what he's trying to do.

(R. 524, 525)

* * *

> Mr. Wallen: If you had a feeling that you were innocent, wouldn't you want to tell everybody?
>
> The Court: Speaking only for myself--
>
> Mr. Wallen: From the way I've been hearing it now, it seems that, if I have been paying attention, he may not speak. In other words, that is kind of in the back of mind. It is kind of anticipating that he is not going to say anything. That kind of bothers me as a prospective juror, the fact that they got me thinking like this; but I never thought that it would occur until you brought it up.
>
> (R. 526).

Immediately upon defense counsel's completion of his questioning, the trial judge engaged in the following exchange with juror Wallen:

> The Court: I have a couple more questions for Mr. Wallen. I have got to get this straight here so 1 have it straight in my mind. If I give you an instruction and tell you the State has the burden of proof and the defendant has to say nothing whatsoever, you will not hold it against him even if you would like to, you can't, or even if I told you you could not discuss it, not even in the jury room, would you be able to follow my instructions?
>
> Mr. Wallen: Yes.
>
> The Court: okay. That is good enough for me.
>
> (R. 537).

When counsel thereafter moved to excuse Wallen for cause, the judge denied the motion. Defense counsel subsequently exhausted his peremptory challenges and Wallen ultimately became the foreman of the jury. (R. 547,548).

Clearly, **a** reasonable doubt was established on this record concerning Mr. Wallen's ability to render an impartial verdict. The theme that ran throughout Mr. Wallen's answers to counsel's questions concerning the defendant's right to remain silent, was Mr. Wallen's belief that he could not be a fair juror if the defendant elected not to testify on **his** own **behalf.** (**R. 564,** ***565).*** After initially expressing a doubt about his ability to fair, Juror Wallen twice unequivocally informed the court that if the defendant did not take the stand, it would bother him. (R. **524-526).** Juror Wallen explained that an innocent person would want to tell everyone **his** story and that he saw no reason for the defendant not to tell his side of the story. (R. **524-526).** If the defendant did not testify, **Juror** Wallen felt "very strongly" that the defendant was "trying to trick" the jury. (R. **524,** ***525).***

Similar doubts about a prospective juror's ability to be fair and impartial were raised by the answers given by prospective juror Negron:

> **Ms.** Negron: In **a** case like **this** and he chose not to speak, yes, I would have a problem with that.
>
> **Mr. Williams: But,** if they only prove it probably--
>
> Ms. Negron: If they proved it probably, then in my mind he probably did do it, and I would have to answer to myself whether or not he did it or did not do it. In order to form that opinion, I would want to hear his side.
> Mr. Williams: What would your verdict be?
>
> Ms. Negron: From what we have talked about, probably.
>
> **Mr. Williams: The law is** beyond and to **the**

exclusion of a reasonable doubt.

Ms. Negron: Well--

Mr. Williams: So, in a civil case, we talk about 51 percent versus 49 percent, just tipping the scales in the other parties' favor. In a criminal case, the burden is beyond and to the exclusion of a reasonable doubt. Do you understand what I'm saying?

Ms. Negron: Well, there is a possibility-- there is a problem in my mind that he may still have done it.

Mr. Williams: There's also a part that says that he may not have done it.

Ms. Negron: Well--

Mr. Williams: Which one would you go with?

Ms. Negron: It would depend on the evidence that I heard, but I would point--I would formulate my opinion on the evidence and what I heard. If I personally feel that he is innocent, and I understand that you have professional expertise here, but you know, unless it is proven to me that he is mute or cannot talk or he doesn't speak English or he's illiterate, then I don't understand why he won't take the stand in his own defense. He should try to defend himself.

Mr. Williams: Now, doesn't that seem to you that you're going against the law and beyond and to the exclusion of reasonable doubt? Have you doubted that he may be guilty.

Ms. Negron: I see what you are saying. Yes, it does sound like I am going against the law and not following the law. I can't formulate that kind of an opinion without have heard the facts and having the facts in front of me.

Mr. Williams: When you talk about legal theories, and it seems pretty clear to me that beyond and to the exclusion of reasonable doubt means something more than probably.

Ms. Negron: Right.

Mr. Williams: That it means something more than maybe?

Ms. Negron: Right.

Mr. Williams: And you're saying that given that scenario that you might still convict him even though it's not beyond and to the exclusion of every reasonable doubt?

Ms. Negron: I'm saying that I need to hear his side. If 1 had enough proof that the State proved its case by the evidence they presented, I would have a problem if he did not talk to us.

(R. 513-516).

* * *

Ms. Negron: Well, all 1 am saying is that if they present a case before me and I have--and I feel they have proven their case and I am leaning towards a guilty verdict from everything that they gave me, that is my assessment of the case and that is what I am leaning towards.

Mr. Williams: Well, if there is still a possibility of doubt, what would your verdict be?

Ms. Negron: If he spoke or whether he didn't speak?

Mr. Williams: If the situation was that he didn't speak?

Ms. Negron: If he didn't want to speak, I probably would think that he was guilty.

Mr. Williams: An if he speak?

Ms. Negron: It depends on what he says.

Mr. Williams: And if he doesn't speak, you are going to find him guilty even though the law says that he can remain silent.

Ms. Negron: I understand his right to remain silent, but if someone is not guilty, then they shouldn't have anything to hide.

(R. 518-519).

The Court then asked Ms. Negron:

> The Court: Ms. Negron, I think it is important that I ask a question here. I understand what you said. However, if I instruct you that the State has the burden of proof and the Defendant need not say anything, would you hold that against him? Could you disregard those feelings that you have and could you find him not guilty?
>
> Ms. Negron: If the State doesn't meet its burden, even if he chose not to defend himself--if they could not satisfy me of his guilt, is that what you are saying?
>
> The Court: Well, not satisfy your standards. If I instruct you--if I give you an instruction that you cannot find him guilty, that the State has not proven their case, would you still find him guilty?
>
> Ms. Negron: No.
>
> The Court: Even though you will not hear from the defendant, could you still follow my instructions and follow the guidelines, even though you do not know what the guidelines are right now, could you still follow them?
>
> Ms. Negron: Are you asking me on a hypothetical basis?
>
> The Court: Well, not hypothetical. You will be given a definition on reasonable doubt and on burden of proof, and if the State hasn't convinced you beyond a reasonable doubt that the defendant did commit this crime, then you must find him not guilty. Could you go along with that?
>
> Ms. Negron: I would find him not guilty.
>
> The Court: She's all yours.

(R. 519-520).

When counsel thereafter moved to strike Ms. Negron for cause, the judge denied the motion and counsel was forced to use a peremptory

challenge to remove her. (R. 9, 546, 547).

As was the case with Mr. Wallen, Ms. Negron clearly indicated that she had severe difficulty with the concept that the defendant had a right to remain silent. On at least four occasions, Ms. Negron indicated that she would be troubled if she did not hear from the defendant. (R. 513-516, 518, 519). Like Mr. Wallen, Ms. Negron felt strongly that if someone was not guilty, he should be expected to take the stand in his own defense because he should have nothing to hide. (R. 518, 519). Ms. Negron's convictions were so strong in this area that she stated that if after weighing the State's case, she possessed a doubt about the defendant's guilt, she would resolve that doubt and "probably would think that he [the Defendant] was guilty" if the defendant did not speak. (R. 518, 519). Ms. Negron held to her convictions even though she understood that she was not following the law. (R.516-519).

The reasonable doubts concerning juror Wallen's and Ms. Negron's ability to be fair and impartial were not cured by the Trial Judge's brief attempt to rehabilitate both jurors. While it is true that both jurors answered that they would follow the law in response to leading questions propounded by the Judge, it is clear that such answers to leading questions "must never be determinative of a juror's capacityto impartially decide the cause to be presented." *Price* v. *State*, supra at 489. *Singer* v. *State*, supra. As such, Florida courts have consistently rejected "the reasoning which suggests that one who acknowledged the presence of bias or prejudice in his mind at a given moment in time can, a few

moments later after perfunctory, generic questioning, declare his mind then free of such tainting influence". *Tenon* v. *State,* 545 So.2d 382, 385 (Fla. 1st D.C.A. 1989); *Price v. State, supra; Leon* v. *State,* supra. Mr. Wallen's and Ms. Negron's single unequivocal indication that they could base their verdict on the law and the evidence, coming as it did after extensive discussion in which they revealed that they would be hindered in their ability to be fair should the defendant elect not to testify, did not remove the substantial doubts concerning their ability to be impartial. As a result, the Judge abused his discretion by refusing to excuse Wallen and Negron for cause.[1]

Two recent cases are on point. In *Hamilton* v. *State,* supra, this court reversed the defendant's conviction for first degree murder because the trial court failed to excuse for cause a juror who, by her answers to questioning, raised doubts about her ability to be impartial. Like Wallen and Negron in the present case, the juror in *Hamilton* indicated that she would want the Defendant to introduce evidence to establish that he was innocent. Althoughthe juror subsequently indicated that she could judge the evidence with an open mind and could base her verdict on the evidence at trial and on the instructions given by the court, this court concluded that her responses, taken as a whole, raised a reasonable doubt

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'Given Wallen's strong bias against a Defendant's right to remain silent, the defendant was highly prejudiced by the trial court's refusal to strike Wallen for cause, because Wallen subsequently served as the foreman on the jury and the defendant elected not to testify during the guilt phase of his trial.

about the juror's ability to be impartial. The juror ultimately sat on the defendant's **jury** because the defendant later exhausted his preemptory challenges. This Court found that the trial court's failure to excuse the juror for cause deprived the defendant of his constitutional right to a fair trial and reversed the defendant's conviction.

Similarly, in Gibson v. ***State,*** 534 So.2d 1231 (Fla. 3d **D.C.A.** 1988), the Third District reversed the defendant's conviction because the trial court failed to strike a juror for cause who **had** indicated that she would expect an innocent person to tell his side of the story to the Judge. Although the juror indicated that she understood that the defendant had a right to remain silent, she stated that she would not "necessarily" hold the defendant's failure to testify against him. After stating that she wanted to hear all the evidence before rendering a verdict, the juror answered that she could not acquit the defendant, even if **she** had a reasonable doubt, if the defendant did not testify. The Third District, finding that there was a reasonable doubt about the juror's ability to be impartial, held that it was reversible error for the Court to **have** failed to excuse the juror for cause.

The defendant in this case was likewise denied a fair trial when the trial court refused to excuse two jurors for cause whose impartiality was seriously in **doubt.**[2] In the case of Juror Negron, the defendant was wrongfully required to exercise a peremptory

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[2]**The** defendant has met the requirements for establishing reversible error as set forth in this court's recent decision in Trotter v. State, ___So.2d___ (case No. 70,714; **Fla.** 12/20/90).

challenge to excuse her fromthe jury. Subsequently, the defendant exhausted his peremptory challenges and was denied additional preemptory challenges. (R. 542, 543, 550, 551). Juror Wallen remained on the jury after the judge wrongfully refused to excuse Wallen for cause. (R. 550, 551). Based upon the decisions in Hamilton, Gibson and the standards established therein, a reversal of the Defendant's convictions is warranted.

ARGUMENT

II

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR MISTRIAL MADE IN RESPONSE TO THE STATE'S INTRODUCTION OF EVIDENCE OF COLLATERAL CRIMINAL ACTIVITY, NAMELY, THE FIRING OF SHOTS INTO THE FORMER APARTMENT OF MARICELLA DAVILA, WHERE THE STATE FAILED TO ESTABLISH THE RELEVANCE OF THAT EVIDENCE BY FAILING TO PROVE THAT THE DEFENDANT WAS THE PERSON WHO HAD FIRED THE SHOTS, THEREBY DEPRIVING THE DEFENDANT OF THE FAIR TRIAL GUARANTEED TO HIM UNDER THE FIFTH, SIXTH AND FOURTEEN AMENDMENTS TO THE U.S. CONSTITUTION.

During the State's opening statement, the defendant moved to preclude the State from arguing to the jury or introducing into evidence any testimony or exhibits concerning shots fired into the former apartment of Marisella Davila. (R. 589-591). The defendant argued that there would not be proof that the defendant had committed this uncharged, collateral, criminal act, and that admission of any such evidence would be highly prejudicial to the defendant. (R.589-591). Over defense counsel's objection and motion for mistrial, the court permitted the State to argue to the jury and to introduce evidence of the prior shooting. (R.592).

Subsequently, in her opening statement, the prosecutor informed the jury that the defendant had gone to the former apartment of Marisella Davila, prior to the shooting of Paul Gomez, and fired three shots into the apartment. (R. 592-593). As defense counsel correctly predicted, this highly prejudicial allegation was never substantiated by evidence.

The State established through the testimony of Marisella Davila that shots had not been fired into her former apartment as of the time she left the apartment at 5:00 p.m. on February 10, 1989. (R. 818). It was not until late on the following day, February 11, that she and Detective Mc Dermott discovered that three shots had been fired into the apartment. (R. 833, 886). The State introduced no other evidence to narrow the twenty-four hour time period during which the shots could have been fired.

The State brought forth no eyewitnesses who could establish that the defendant had fired the shots into the former apartment. Instead, the State sought to establish the defendant's identity as the shooter by comparing the projectiles found on the scene with those recovered at the scene of the Paul Gomez shooting. The State's expert, Thomas Quick, however, could not state that the bullets fired into the old apartment were fired by the same gun that had fired the shots at the homicide scene. (R. 939-40). All that Quick could say was that the bullets were similar because they were lead and round. (R. 951).

The State argued that the testimony of Louis Rodriguez provided the evidence to tie the Defendant to the shooting incident

at Davila's former apartment. (R. 590-591). Rodriguez testified that the Defendant had come to his house asking for the return of the Defendant's gun. (R. 610,611). The defendant said that he had been beaten by the "gordo" and his cousin. (R. 611). The defendant took the gun, only to return one-half hour late. The defendant asked Rodriguez for more bullets because he had wasted the bullets that he had. (R.613). Rodriguez did not know how many bullets had originally been in the gun and he did not know how the defendant had wasted the original bullets. (R. 627, 632, 633).

Clearly, the facts relied upon by the State to support the admissibility of the evidence relating to the shooting at Davila's former apartment, are insufficient to meet the standards set forth by this Court in *State v. Norris*, 168 So.2d 541 (Fla. 1964). In Norris, the Defendant was charged with the first degree murder of a man by administering arsenic. The trial judge permitted testimony regarding the arsenic content found in the exhumed bodies of Norris' late husband and a business associate. This court found that it was reversible error for the trial court to have admitted the evidence. This Court opined:

> "It simply means that in order for such evidence [of collateral crimes] to be allowed against an accused, there must be accompanying evidence to identify or connect the accused with the collateral facts...
> In this respect mere suspicion is insufficient. The proof should be clear and convincing. . . a contrary rule would most often lead to the improper construction of inferences upon inferences.!!

State v. Norris, supra at 543. Finding that to establish the

relevancy of the evidence in Norris, it would have been necessary to infer that lethal doses of arsenic had been administered to the late husband and the business associate, and to also infer that Norris had administered it, this court found that the evidence was inadmissible and reversed the defendant's conviction.

Similarly, in *Chapman* v. *State,* 417 So.2d 1028 (Fla. 3d D.C.A. 1982) the Third District applied the standard set forth in *State* v. Norris, *supra,* and found the evidence connecting the defendant to an uncharged rape to be lacking. See *also Diaz v. State,* 467 So.2d 1061 (Fla. 3d D.C.A. 1985); *Huhn* v. *State,* 511 So.2d 583 (Fla. 4th D.C.A. 1987) and *Dibble* v. State, 347 So.2d 1096 (Fla. 2d D.C.A. 1977).

As in Norris, the evidence of collateral crimes in this case failed to rise to the level of relevancy. Rather than the necessary clear and convincing proof required to establish the predicate for introduction of collateral crimes evidence, the State adduced a few facts that established nothing more than suspicion and innuendo. Even if we were to assume that the defendant had "wasted" the original bullets by actually firing them from his gun, there is no basis in this record to pile on the additional assumption that the defendant had fired them into Davila's former apartment. If the standards set forth in Norris are to have meaning, it is clear that they were intended to prevent the type of guesswork fostered by the Court's ruling in this case.

Admission of the evidence of the shots fired at Davila's old apartment highly prejudiced the defendant. The State used this

evidence to establish premeditation in this case, despite the trial court's ruling made outside the presence of the jury at the close of all of the evidence, that the apartment shooting was not circumstantial evidence of premeditation. (R. 1007). On two occasions in her closing argument, the prosecutor made reference to the apartment shooting as an example of the defendant's intent in this case. (R. 1059, 1063). In light of the defense at trial, which claimed that the defendant had not acted with premeditation; the introduction of the collateral crime evidence over constant defense objections constituted reversible error. (R. 798, 799, 822, 823, 833, 1063).

ARGUMENT

III

THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT REFUSED DEFENSE COUNSEL'S REQUEST TO INSTRUCT THE JURY ON HOW TO CONSIDER COLLATERAL CRIME EVIDENCE.

As related in Point II *infra*, the defendant continuously opposed the admission of any evidence of the shooting at Davila's former apartment, on the ground that as collateral crime evidence, it was irrelevant because the State had insufficient proof to tie the defendant to the collateral crime. Once the court overruled the defendant's objection, it was incumbent upon the court to instruct the jury about the limited purpose for which the evidence was being admitted, if so requested by defense counsel. Defense counsel, during the charge conference, did request that the court read the jury the limiting instruction. (R. 1007, 1008). The court's denial of the defendant's request constituted reversible

error.

Collateral crime evidence, while admissible for certain limited purposes, has been traditionally viewed with caution because of the concern that such evidence will only prove an accused's bad character or propensity to commit the charged offense. To safeguard against the improper admission of collateral crime evidence and its use for improper purposes, Section **90.404** (2)(b) and case law require adherence to certain procedural safeguards.

Unlike other relevant evidence, collateral crime evidence cannot be admitted until these procedural safeguards are met. The prosecution must provide the defense with written notice of the collateral crimes evidence at least ten days prior to trial. **590.404** (2)(b) **1., *Florida Statutes*** (1988). This written notice must allege the wrongs with at least as much specificity as is required in an information. Id. Prior to the admission of any collateral crimes evidence for which a conviction has not been obtained, the trial court must make a determination that there exists sufficient evidence of the collateral act to place it **before** the jury. *Chapman* v. ***State,*** supra. Finally, once a trial court **has determined that collateral crime evidence is admissable, the** Evidence Code requires that a special instruction must be given explaining to the jury the proper purpose of the evidence. [3]

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[3]**In** the seminal case of Williams v. State, 110 So.2d **654, 658** (Fla. **1959),** this Court, noted that the trial judge had admonished the jury that the collateral crimes evidence admitted there could be considered only as evidence regarding the issues of identity, intent, and scheme.

Because of the extreme danger that such evidence will considered for an improper purpose, the trial court must go to great lengths to assure that such collateral crime evidence is admissible under Section **90.404** (2)(b) 2, and then to safeguard that the jury will properly consider such evidence. See Williams **v.** State, 110 So.2d **654**, 662 (Fla. 1959).

To protect the defendant from improper consideration by the jury of Williams rule evidence, the Florida legislature has specified that at the close of all the evidence, the jury **"shall"** be instructed on the limited purpose for which collateral crime or Williams rule evidence can be used in deciding a criminal case. §90.404(2)(b) 2, ***Florida Statutes*** (1988). Section 90.404(2)(b)2 states as follows:

> 2. When the evidence is admitted, the court shall, if requested, charge the jury on the limited purpose for which the evidence is received and is to be considered. After the closed of the evidence, the jury shall be instructed on the limited purpose for which the evidence was received and that the defendant cannot be convicted for a charge not included in the indictment or information.

Id. The instruction required to be read **after** the close of the evidence reads as follows:

> The evidence which has been admitted to show similar crimes, wrongs, or acts allegedly committed by the defendant will be considered by you only as the evidence relates to proof of [motive] [opportunity] [intent] [preparation] [plan] [knowledge] [identity] [the absence of mistake or accident] on the part of the defendant.

Florida Standard Jury Instruction (Criminal) "***Williams*** Rule" Florida Statutes **90.404.**

The defendant in this case did not receive the protection to which he was statutorily entitled. By refusing to read the **jury** the standard limiting instruction, the court allowed the **jury** to be free to consider the collateral crime as evidence of the defendant's propensityto comment the charged crime **and** to conclude that the defendant was a violent individual. Under similar circumstances, the First and Fourth District Courts of Appeal have held that a trial court's failure to construct the **jury** on the limited use of collateral crime evidence constituted reversible error. *Lowe* v. ***State, 500*** So.2d ***578*** (Fla. 4th D.C.A. 1986); ***Rivers V. State,*** **425** So.2d 101 (Fla. 1st **D.C.A.** 1982).

The defendant **was** entitled to deliberations by a jury that had been instructed on how to consider inflammatory collateral crime evidence. The court's failure to provide the jury with the necessary instructions required by the Florida Legislature deprived the defendant of a fair trial. **A** new trial for the defendant is warranted.

ARGUMENT

IV

THE TRIAL COURT ERRED DURING THE PENALTY PHASE BY PERMITTING THE STATE TO INTRODUCE EVIDENCE OF NONSTATUTORY AGGRAVATING CIRCUMSTANCES OF THE DEFENDANT'S PRIOR CONDUCT WHICH NEVER RESULTED IN A CHARGE OR CONVICTION.

Florida Statute 921.141(5) indicates that aggravating circumstances shall be limited to the enumerated circumstances. One of the aggravating circumstances found by the trial court **was** § 921.141 (5)(b) which permits the jury to hear evidence of the

defendant's previous conviction for another capital felony or of a felony involving the use or threat of violence to the person. It is strictly prohibited for the jury to hear testimony of prior bad acts which the defendant was never charged nor convicted. Unauthorized aggravating factors, especially in a close case, may tip the scales of the weighing process in favor of death. ***Elledge* v. *State*,** 346 So.2d **998** (Fla. 1977).

Although **§ 921.141** (1) permits the introduction of any evidence during the penalty phase of the proceedings there are limitations such as relevance and, the probative value should outweigh any prejudice Rules 90.401, **402**, 403, Florida Rules of Evidence.

The defendant had previously been convicted of manslaughter in New York in 1975. **(R.** 272, **R. 1213). Although** the defendant attempted to stipulate that the defendant had a previous manslaughter conviction which resulted in a twenty year sentence the State insisted on making this prior crime the **focus** of the penalty phase. (R. ***88***, 91).

The State had the police detective who investigated the manslaughter in **1974** testify to the investigation. Instead of limiting the testimony to relevant facts the court permitted the witness to testify about collateral crimes which the defendant was never charged much less convicted. The testimony began with the witness describing the crime scene from 1974 which included the uncharged bad acts of burglary and robbery.

> Prosecutor: When you got to apartment 16C what did you notice about the condition of the

apartment, or any persons inside of it?

Witness: In the bedroom, the bedroom was in disarray. Drawers, the furniture, **was** pulled out, the clothing was thrown around the apartment. And on the floor of the bedroom it appeared as though someone had been going through **the** room--

Defendant's Counsel: Objection. Calls for speculation.

Prosecutor: Sustain the objection.

Prosecutor: Drawers pulled out and clothing on the ground?

Defendant's Counsel: Objection. Leading.

Prosecutor: Just trying to restate where we were at.

The Court: Go to the next question.

Prosecutor. Now, did you notice any other disarray in any other part of the apartment?

(R. 1217, 1218).

The defendant's motion for mistrial **was** denied (R. 1219). The jury **was** never instructed not to consider these collateral crimes.

The witness further testified that the defendant struck the manslaughter victim and held his head under water in a bath tub. (R. 1229). The State then brought out additional uncharged bad acts which were nonstatutory aggravating factors:

Prosecutor: At the point you said he pushed him under the water?

Witness: Yes, pushed him under the water face down. He now goes back into the apartment and he starts searching for additional items.

Prosecutor: Did he, in fact, find any items which he took, according to his testimony to you?

> witness: Yes.
>
> Prosecutor: And what was that?
>
> Witness: He found a wedding band, a gold necklace with a religious medal on it.
>
> Defendant's Counsel: Same objection.
>
> The Court: Overruled.
>
> Prosecutor: Anything else?
>
> Witness: A Polaroid camera, and a 21 inch cabinet television set.
>
> (R. 1229, 1230)

The witness testified about additional uncharged crimes in describing how the defendant disposed of the property.

> Prosecutor: Did he indicate in the statement given to you that he did anything with the property he took?
>
> Defendant's Counsel: Same objection.
>
> The Court: Overruled.
>
> The Witness: He said that the following day, Thursday-- July the 4th was on Thursday -- on July the 5th he went to a pawn shop in the area and he pawned the jewelry and the camera, and he got $50 for it.
>
> Defendant's Counsel: Objection, and I request a sidebar at this time.
>
> (R. 1231, 1232)

Evidence of dealing in stolen property by the defendant in 1974 had no relevance in determining the defendant's advisory sentence and can only be considered by the jury as an aggravating circumstance. The State argued in closing as part of an aggravating circumstance that the defendant took property during the 1974 manslaughter. (R. 1396). The jury's consideration of

uncharged crimes allegedly committed in 1974 which bear no relationship to statutory aggravating circumstances §921.141(5)(b) is clearly error. The weighing process by both the jury and the judge may have been different had the impermissible aggravating factors not been present. *Elledge v. State,* 346 So.2d at 1003.

As another nonstatutory aggravating circumstance the State suggested to the jury that the defendant beats his wife. During cross examination of the defendant's sister, Yolanda Padilla, the State was attempting to show the defendant was a particularly violent person:

> Prosecutor: You don't consider yourself a particularly violent person?
>
> Defendant's Sister: No.
>
> Prosecutor: Do you consider yourself -- your brother Raymond a particularly violent person?
> Defendant's Sister: No.
>
> Prosecutor: And you're aware of the fact that your brother, Raymond Padilla, beat his wife?
>
> Defendant's Counsel: Objection and request a sidebar.
>
> (R. 1254).

The defendant's motion for mistrial was denied. Although the court sustained the objection, the jury heard the allegation as further proof of the defendant's uncharged bad acts. (R. 1255). The defendant was prejudiced by the introduction of this evidence. The jury was never told not to consider this evidence.

ARGUMENT

V

THE TRIAL COURT ERRED BY FAILING **TO** FIND AS A MITIGATING CIRCUMSTANCE THE CAPACITY OF THE **DEFENDANT** TO APPRECIATE THE CRIMINALITY OF HIS **CONDUCT OR TO CONFORM** HIS CONDUCT **TO** THE REQUIREMENTS OF LAW WAS **SUBSTANTIALLY** IMPAIRED WHEN **THIS** CIRCUMSTANCE WAS ESTABLISHED BY THE GREATER WEIGHT OF THE EVIDENCE.

Florida Statute § 921.141 (3) requires specific written findings of fact based upon aggravating and mitigating circumstances. The Court must find each proposed factor that is mitigating in nature which has been reasonably established by the greater weight of the evidence. Campbell ***v. State*, 571** So.2d **415,** 419 (Fla. 1990) "Although the relative weight given each mitigating factor is within the province of the sentencing court, a mitigating factor once found cannot be dismissed as having no weight." Campbell, at **420.**

The Court's sentencing order reflects that "the court finds no "credible" evidence that the level of the defendant's problems as enumerated above **rise** to the level of mitigation. The court finds this mitigating factor **not** present." (**R**. 238). However, the court found the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance pursuant to Florida Statute **§921.141(6)** (b), based on the testimony of Dr. Jethro Toomer, a forensic psychologist. (R. 1257). (R. **237, 238).**

The defense called Dr. Toomer who was accepted by the State and the Court as an expert witness. (R. 1259). Dr. Toomer had spoken to **the** defendant on eight **(8)** occasions **(R. 1259).** Dr. Toomer found that the defendant suffers from a borderline

personality disorder and an emotional disturbance. (R. 1260, 1272). The defendant had an abused childhood both physically and emotionally. (R. 1261). His father would beat him with a garrison belt and an extension cord. (R. 1262). The defendant was beat so hard his head would swell (R. 1262). At age six (6) the defendant was strangled by his mother so severely that the defendant was rendered unconscious and the mother had to be pulled away by his step-sister. (R. 1262). At age eight or nine the defendant was kicked and punched by his mother so hard that he had to be hospitalized. (R. 1262, 1263). The defendant experienced a pattern of child abuse. (R. 1263). The defendant's mental state was so impaired that as a child he was an out-patient at the Cumberland Psychiatric Institution in New York where he received electric shock therapy. (R. 1265, 1266). Later, the defendant was hospitalized at Children Land Psychiatric Institute as an in-patient for five or six months where he received anti-psychotic medication. (R. 1268, 1269). The defendant's personality disorder developed at childhood and is a life long disorder. (R. 1272, 1273). Dr. Toomer testified that the defendant's mental disease leaves little tolerance for frustration, vulnerable to stress, and opposition is usually met by aggression. (R. 1273). The defendant learned violence and aggression because he never had a chance to learn any other way. (R. 1277).

The Doctor later testified that the defendant is a chronic substance abuser. (R. 1457) On the day of the homicide the defendant had utilized a gram or two of cocaine, three (3) six-

packs of beer and a half bottle of rum. (R. 1456).

Dr. Toomer provided the Court with his opinion, which was unrebutted, that as a result of the defendant's personality disorder he is unable to appreciate the criminality of his conduct.

> Defendant's Counsel: As a result of the borderline personality disorder that Mr. Padilla has, is Mr. Padilla able to appreciate the criminality of his conduct?
>
> Witness: No, I believe he does not.
>
> Defendant's Counsel: And does he have the ability to conform his conduct to the requirements of the law?
>
> Witness: No, he -- I do not believe he does.
>
> Defendant's Counsel: Do you believe that Mr. Padilla has a -- an emotional disturbance?
>
> Witness: Yes, I do.
>
> (R. 1260)

The court should have considered the substantial expert testimony concerning the defendant's mental condition at the time of the shooting along with his previous mental illness.

ARGUMENT

VI

> THE TRIAL COURT ERRED IN FINDING THE HOMICIDE WAS COMMITTED IN A COLD, CALCULATED, AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OF LEGAL JUSTIFICATION.

Florida law requires that before the court can find a homicide was committed in a cold, calculated, and premeditated manner pursuant to Florida Statute § 921.141(5)(i), the State must prove beyond a reasonable doubt that the "calculation" consisted of a

careful plan or prearranged design. Rogers v. *State*, 511 So.2d *526*, 533 (Fla. 1987). This aggravating factor usually applies to execution style or contract murders, Scull v. *State*, 533 So.2d 1137 (Fla. 1988); and requires a heightened level of premeditation above what is required in the guilt phase of the trial. ***Nibert v. State*, *508* So.2d** 1 (Fla. **1987).** In addition, **"before** a murder can be deemed cold, calculated, and premeditated, it must be committed without any pretense of moral or legal justification." Banda v. *State*, *536* So.2d 221 (Fla. 1988). **"A** pretense of justification is any claim of justification or excuse that, though insufficient to reduce the degree of homicide, nevertheless rebuts the otherwise cold and calculating nature of the homicide." ***Banda*,** 536 So.2d at ***225***

In the instant case Paul Gomez along with Hector ("Fat Boy") came to the defendant's job. "Fat Boy" beat the defendant while Paul Gomez held an uzi firearm on the defendant. (R. 112, **873, 874).** The difficulties began after the defendant ended a relationship with Paul Gomez' aunt, Maricella. Paul Gomez and "Fat Boy" came by the defendant's house on several occasions carrying firearms. **The** purpose of the visits were to scare and intimidate the defendant. Gomez and "Fat Boy" warned the defendant not to come out of his house or go to work. The defendant reasonably believed that "Fat Boy" and Gomez **intended** to bring harm to the defendant. (R. 1352). Paul Gomez **was** in fact armed with a loaded ***9*** mm pistol at the time of the homicide. (R. 717).

It is clear that the defendant's actions were that of a

mentally imbalanced person who was scared of Paul Gomez. Paul Gomez and "Fat Boy" were violent men who made threats against the defendant. The killing of Paul Gomez was surely not a careful plan. According to the defendant's statement he wanted to shoot "Fat Boy". (R. 114, 875). It was only upon Paul Gomez going for a gun that the defendant fired the one shot at Paul Gomez, the unintended victim (R. 1383). The trial court did not make a finding that the defendant had a prearranged design to kill Paul Gomez (R. 237). This was more of a spontaneous act which resulted from the defendant's fear of Gomez and "Fat Boy".

In *McCray* v. *State*, 416 So.2d 804 (Fla. 1982) the Appellant approached the van where the victim was seated and yelled, "this is for you, mother fucker," and shot the victim three times. The court found that the aggravating circumstance of cold, calculated, and premeditated did not apply. Similarly, in this case there is no competent and substantial evidence to indicate heightened premeditation.

The State failed to prove that the murder of Paul Gomez was committed "without any pretense of moral or legal justification." In *Banda v. State*, *supra* at 225 the court defined a "pretense of justification" a5

> any claim of justification or excuse that, though insufficient to reduce the degree of homicide, nevertheless rebuts the otherwise cold and calculating nature of the homicide.

Paul Gomez was known to the defendant as being a violent person who made threats against the defendant and who was known to carry a gun. Thus, the defendant established a reasonable doubt

as to the "no pretense of justification" element. Just as in *Banda*, at 225, "a colorable claim exists that this murder was motivated out of self-defense, albeit in a form clearly insufficient to reduce the degree of the crime." The defendant believed that his actions were justified to save his own life. The trial court never addressed the moral or legal justification aspect of this aggravating circumstance.

ARGUMENT

VII

THE TRIAL COURT ERRED BY FAILING TO EXPRESSLY EVALUATE IN ITS WRITTEN SENTENCING ORDER EACH MITIGATING CIRCUMSTANCE PROPOSED BY THE DEFENDANT

The trial court is required to address each mitigating circumstance in its sentencing order which is proposed by the defendant to determine whether it is supported by the evidence. Campbell *v.* State, 571 So.2d 415, 419 (Fla. 1990); Florida Statute § 921.141 (3). The defendant requested and the court instructed the jury on five (5) mitigating circumstances (R. 1443, 1444). The court totally failed to address the following two mitigating circumstances in its sentencing order. (R. 235-240):

1. The victim was a participate in the defendant's conduct or consented to the act. Florida Statute § 921.141 (6)(c).

2. The defendant acted under extreme duress or under the substantial domination of another person. Florida Statute § 921.141(6) (e).

The victim set into motion the action which caused his death

by beating and threatening the defendant. Dr. Toomer testified that due to the defendant's mental condition the defendant reacted with aggression.

The trial court gave no weight to these mitigating circumstances, thus excluding them from consideration. The trial court cannot as a matter of law refuse to consider any relevant mitigating evidence. Campbell, at 419. Failure to make the requisite findings pursuant to Florida Statute 921.141 (3) requires a remand to the trial court.

ARGUMENT

VIII

THE TRIAL COURT ERRED IN SENTENCING THE DEFENDANT FOR ATTEMPTED FIRST DEGREE MURDER ABOVE THE PERMITTED GUIDELINE RANGE WITHOUT ARTICULATING OR DELINEATING THE REASON(S) FOR THE DEPARTURE IN VIOLATION OF RULE 3.701 (d)(11), FLORIDA RULES OF CRIMINAL PROCEDURE

Rule 3.701 (d)(11) of the Florida Rules of Criminal Procedure requires the sentencing Judge who departs from the permitted range of the sentencing guidelines to articulate reasons for the departure at the time sentence is imposed. The reason(s) must be contemporaneous with the sentencing proceeding and be in writing.

The sentencing guidelines score sheet submitted by the state (R. 239) reflects a guidelines sentence of 17 to 22 years. However, the score sheet indicates a total of 222 points which is a recommended range of 12 to 17 years. (R. 239A). Rule 3.988 (a), Florida Rules of Criminal Procedure reflects a permitted range of 7-22 years based on 222 points. Thus, the Court's sentence of 27 years on Count Two of the indictment (R. 1, 2), wherein the

defendant was found guilty of attempted first degree murder is a departure from the permitted range.

During the sentencing the trial court did not articulate *any* reason for a guideline departure. (R. 1481-1484) The State Attorney advised the trial court that the sentencing guidelines called for a sentence of 17 to 22 years. (R. 1483). Moreover, the trial court failed to support the departure with any type of written statement to inform the parties of the reason for departure. The record is void as to why the trial court departed from the permitted guideline range.

Thus, the 27 year sentence must be vacated, and remanded to the trial court for imposition of a sentence within the sentencing guidelines with no possibility of departure from the guidelines. Pope v. *State*, 561 So.2d 554 (Fla. 1990); *Shull v. Dugger*, 515 So.2d 748 (Fla. 1987).

CONCLUSION

Based on the foregoing, defendant requests this Court to reverse the judgment of the trial court and the sentence of death, and to remand with directions to afford the defendant a new trial.

Respectfully submitted,

SCOTT W. **SAKIN,** ESQ.
Attorney for Appellant
1411 **N.W.** North River Drive
Miami, Florida 33125
(305) [illegible]45-0007

BY:
SCOTT W. **SAKIN,** **ESQ.**
Florida Bar No. 349089

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **was** furnished by U.S. Mail to the Attorney General, 401 N.W. 2nd Ave, Suite N921, Miami, Florida 33125 this 5th day of April, 1991.

SCOTT W. SAKIN, ESQ.