IN THE SUPREME COURT OF FLORIDA

CASE NO. 76,928

CHARLES STREET,

Appellant,

-vs-

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT CHARLES STREET

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TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER AUTHORITIES

STATEMENT OF THE FACTS

STATE'S CASE

At 6:00 p.m. on Sunday, November 27, 1988, the day before the shootings of Officers Richard Boles and David Strzalkowski, Florida Highway Patrol Trooper Alan Major was dispatched to a "Signal 20" -a mentally-ill person suspected of trying to jump off a northbound I-95 overpass at Northwest 79th Street. [TR 9340] He found Street kneeling on the ground with his arms nervously wrapped around the guard rail. [TR 9346] As Major approached, he turned off the front portion of his emergency lights not wanting to frighten what the dispatcher had confirmed was a "disturbed person." [TR 9348] Immediately upon his arrival, Street appeared relieved and ran towards the officer. [TR 9350] Street complied with the officer's order to stop and place his hands on the police vehicle. [TR 9351-52] A thorough search of Street's person revealed nothing. [TR 9353-9357]

Street told Major that he lived in Boynton Beach and was trying to hitchhike home. Street told Major that he was scared he might fall off the bridge. [TR 9394] He explained that the "bridge" shook when trucks drove over it and he became "real nervous." [TR 9360] Street said he was trying to locate his girlfriend in Liberty City whom he had not seen in nine years since he had just gotten out of prison. Major offered that Street wore brand-new shoes and pants, the type which "they give you in prison." [TR 9362] Street said he had been chased by "some guys" who "thought that he could be a snitch...". [TR 9363] Major offered Street a ride (in handcuffs for his safety) to the county line. Their conversation was cut short, however, by the officer's need to respond to a nearby automobile accident. [TR 9365] Major described Street as coherent and reported to the dispatcher that there was no need for a "Signal 20." [TR 9370] However, Major did not believe anyone was mentally ill unless they said they were being chased by nonexistent pursuers or that they had seen flying saucers. [TR 9467-9470] Major did not determine Street to be under the influence of alcohol or narcotic drugs. [TR 9376-9378] Back-up trooper Aubrey Brunson also searched the defendant and found nothing. [TR 9477] He, too, denied observing of the defendant any symptoms of intoxication. [TR 9484-87]

Street, however, was nervous because the bridge was shaking and said he did not want to fall off. [TR 9535-36] He complained that "some guys chased him." [TR 9534]

At 12:18 a.m. the following morning, EMT Peterson responded to a dispatch of an "unknown reference." [TR 9574-75] Four minutes later the rescue truck responded to a service station at 19255 Biscayne Boulevard. [TR 9576] Upon seeing "the patient" Street, fire fighter Higginbotham made the statement, "this is a Baker Act." [TR 9579] Street explained that he had been harassed by some people, that they had left some food along the way which he had eaten, that the people had come back and told him the food was poisoned, and that he was suffering from diarrhea. [TR 9584-85]

At one point, in apparent fear, Street said, "are you going to leave me here to be murdered?". [TR 9660] Later, Street said he had faked eating the food. [TR 9586] After the shootings, Peterson created notes indicating that Street was not intoxicated. [TR 9588-90] Rescue personnel stayed with Street for an hour and a half. [TR 9592] At one point, a white car passed by which Street indicated was one of the vehicles containing the people harassing him. [TR 9609] Peterson called for the police. [TR 9612] One of the officers who responded was Officer Boles. [TR 9615]

Officer Eric Rossman also responded to the service station. After listening to Street's complaint that people were throwing rocks at him and his announcement that there were people with guns on a nearby roof trying to kill him, Rossman told Street they could not take him to Boynton Beach. Street responded, "Fuck you; you cops do not care." [TR 9928] Except for his complaint of stomach pains and cramps, Street exhibited no signs of illness. Rossman specifically concluded that Street exhibited no symptoms of cocaine use or cocaine psychosis. [TR 9931-9934] However, Rossman had described Street as "unresponsive, at best." [TR 9936] In his police report, Rossman described Street as "extremely agitated" and "paranoid." [TR 9992-9993] Rossman testified that he meant to say "hostile."

Street alternatively asked to go home, to go to the hospital, and for police protection. [TR 9617] Ultimately, an ambulance was summoned. While waiting, Street said, "there is

a black man on the roof that is going to shoot me, over there" but he made no attempt to move. [TR 9631-32] When Street was informed that the only objects on a nearby warehouse roof were a vent and a white flag, Street said, "that is a black guy fucking a white chick." [TR 9634]

When the ambulance personnel arrived, Street refused to go to Jackson [Memorial Hospital]. Ambulance driver Joseph Pharol described Street as quiet and calm until he overheard that he was being taken to Jackson Memorial Hospital, where upon he yelled, "No Jackson! I'm not going to Jackson!" [TR 9850] After Officer [Boles] asked Street whether he wanted to go to the hospital or be dropped off at the county line, Street simply jumped out of the ambulance. [TR 9853-54] Pharol observed no signs of intoxication. [TR 9857] He admitted, however, thinking there was "something strange" about Street. [TR 9890] Street said (falsely) that he had a wife and kids and indicated that he had to get to work. [TR 9638]

After leaving the scene, Peterson saw Street again, jogging and then walking in the area of 196th Street. [TR 9642] Peterson, however, concluded that there was nothing wrong with Street or his conduct. [TR 9650] Detective Riley Smith responded to the service station and, in the minute or so that he spent with Street, noticed nothing unusual about him. [TR 9732-9750] Sergeant Albert Llapur also responded to the scene and observed nothing unusual about the defendant. [TR 9785]

An hour and a half later at about 2:19 a.m., a call went out reporting a black male causing a disturbance near a trailer park at 200th Street and West Dixie Highway. Rossman, Boles, and Strzalkowski responded. [TR 9954] K-9 officer Steven Anderson responded to a call of a man hurt and screaming, reportedly throwing rocks at vehicles. [TR 10393] Florent Verner testified that he heard a man screaming, "Help me, help me" outside his trailer at the Lone Pine Mobile Village. [TR 10077] Verner went outside to investigate as a police unit arrived. He followed the police car to where the man was running across Ives Dairy Road. [TR 10086]

Street ran in circles on Biscayne Boulevard as the first police car circled him. [TR 10138] Ultimately, another police vehicle arrived and he stopped. [TR 10095] A police officer exited each of the vehicles and one of them asked, "What is wrong?" [TR 10110] The officers positioned themselves on either side of Street and tried to take him by his arm(s). [TR 10113] Street pushed both officers against the car. [TR 10115] Four or five shots rang out and Verner saw one of the officers fall to the ground. [TR 10119] The other officer ran around the car and Street gave chase. Verner heard another gunshot or two and heard Street say, "Now, I have got my lift." [TR 10122-23] Street entered the police vehicle and drove north. [TR 10124] Five minutes later an emergency call went over the air when Officers Strzalkowski and Boles failed to answer their radios. [TR 9768] Boles' last radio transmission stated, "we are going to approach him now." [TR 9955]

Shortly before, Officer Boles had issued a radio broadcast involving "a violent 43" - 43 referring to the involuntary psychiatric commitment under the "Baker Act." [TR 9794-95] Llapur testified that "43" also constituted police jargon for "a flaming asshole." [TR 9807] Boles requested another unit because Street was running around in the road and was in danger of being hit. [TR 9796] Two minutes later, the officers were shot. [TR 9797] Various officers responded. Boles and Strzalkowski were found lying, shot, in the roadway. One of their service revolvers and one of their police cruisers were missing. [TR 9959]

Rossman spoke to eye-witness Brad Baker. Baker said a large black male came from the side of the road and threw a pipe at his car. Shortly thereafter, two police officers arrived and confronted the subject. Based on the information supplied, Rossman issued a BOLO. [TR 9974-9978]

At approximately 2:25 a.m., Hallandale police officer Patrick Seals observed the defendant driving a green and white Metro-Dade police car with its overhead lights on traveling north on Federal Highway. [TR 10442] When Seals heard on his police radio that a black male suspect traveling northbound into Broward County in a marked metro unit had just shot two officers, he and officer Morantz gave chase. [TR 10453-10456] The

defendant got away while negotiating a tight corner when Seals and Morantz crashed into each other. [TR 10459-10468]

Charlene Warner returned to her apartment on Charleston Street, Hollywood after going to the movies. She saw a marked patrol car with its emergency lights on in proximity to a small, red car occupied by Crystal Green and Jeremiah [Love] Locke. [TR 10566-10572] She watched as a large black man pointed a rifle at Green and Lock and stole their car. [TR 10575-10579] Warner later observed a small hole in a window of the patrol car, like a bullet hole, and blood inside. [TR 10583-84] She identified the black man as the defendant. [TR 10585] She did not think Street was high. [TR 10586] The defendant's hands were trembling on the gun and he appeared possibly paranoid. [TR 10593-94]

Crystal Green described Street's robbery of her mother's car. She described Street as looking "scared and frightened" and as if he "could have been on some type of drugs." [TR 10630] He looked "[kind] of crazy" and wild and when she looked at his eyes she could see something was wrong or strange about him. [TR 10632] After Street ordered Green out of the car, he said, "I just killed your cousin". [TR 10633]

Hollywood police officer Sejda received a broadcast at approximately 2:20 a.m. relating to the shootings of the two Metro-Dade police officers. [TR 10700] Traveling east towards I-95 on Stirling Road, Sejda saw a small red car traveling very slowly towards him with its headlights off. [TR 10702-06] Sejda pulled next to the vehicle, made eye contact with Street and tried to inform him of his inoperative headlights when the small red car accelerated away from him. [TR 10712] The officer initiated pursuit, lost sight of the red vehicle, and ultimately came upon a black male, yelling. [TR 10720] Street had his hands over his head in surrender. [TR 10721] He said, "I shot two cops. Please don't kill me." [TR 10723] A revolver was lying on the street approximately five to ten feet from him. [TR 10726] Street fell to his knees and flipped over onto his back. [TR 10727] Street spoke clearly and did not appear to Sejda to be under the influence of any drug or alcohol. [TR 10729] Street was bound hand and foot and taken into custody. [TR 10729-30] A police-

issue pump shotgun was recovered from the scene. [TR 10733] Street spoke very loudly, repeating himself for several minutes. [TR 10739]

Officer Gregory Mentzer saw Street exit the red car and throw a .38 caliber Smith and Wesson out onto Stirling Road as Mentzer trained his pistol at him. [TR 10771] He described how, when Street was laid over the trunk of the police vehicle, he began thrashing violently. [TR 10782] Street initially tried to hide in a nearby bush or tree. [TR 10027] During the search of his person, Street became violent, started kicking, and resisted the officers. [TR 10039] The defendant was restrained with rope. [TR 10042] Street continued to yell, "Don't kill me. Don't shoot me. Don't kill me", in a very loud tone of voice. [TR 10785] Although apparently frightened, Street did not look to Mentzer to be under the influence of cocaine. [TR 10788]

Once at the jail, although conscious, Street remained unresponsive to the officers' attempts to fingerprint and photograph him. [TR 10824] Numerous officers picked him up and carried him as he mumbled and chanted something like, "Chaka Zulu." [TR 10829] During the fingerprinting process, Street said, "I could head-butt you like I head-butt those other two cops." [TR 10832] And "I could take this other arm and whoop you to death with that one." [TR 10832] He said, "You think you had me like those other two cops had me." [TR 10834] Booking officer Gregory Mentzer described Street as calm, alert and conscious. [TR 10842] Mentzer did not believe Street was under the influence of cocaine. [TR 10844]

When Mentzer clicked Street's handcuffs off, Street asked, "Are you going to shoot me now?" [TR 10858] Upon Street's strip-search, it was discovered that he had urinated and defecated on himself. [TR 10859]

The state recalled officer Steven Anderson to testify that he saw the defendant between 6:30 and 7:00 a.m. in the Broward County Jail after his arrest. [TR 10475] Anderson testified that the defendant glared through the plexiglas window of his cell door and smirked at him. [TR 10489-90]

Technician Richard Ecott took hand swabs from Street after his arrest in Broward County. [TR 11218] Street said nothing and did not resist. [TR 11290]

When visited by public defender Tom Gallagher, Street refused to sign a document intended to protect his constitutional rights while in police custody. [TR 11437]

Street was transported from Broward to Dade County in an unmarked vehicle with tinted windows known as a "Baker Act Unit." [TR 11437] The police said its use had nothing to do with Street's mental condition. [TR 11438]

While being transported, Street looked at Officer Mike Santos and calmly said, "You should be glad that the mother-fucker is dead. You should congratulate me." [TR 11559]

Criminalists Brendon McBea determined from his examination of gun power residue on the shattered window of the police vehicle that a firearm had been discharged from the inside out. [TR 11602] While attending to Street's injuries after his transport to Dade County, Sergeant David Rivers heard Street repeat, several times, words to the effect, "I didn't mean to kill them, I didn't want to kill, I am sorry." [TR 11651]

Lieutenant Michael Castillo, who treated Street for a head injury, saw no indication that Street was under the influence of any type of drug or alcohol. [TR 11701]

Medical examiner Valerie Rao described a non-debilitating injury to Boles's abdomen consistent with a firearm projectile impact through his bullet-proof vest. [TR 11731-11734] Boles suffered a contact gun shot wound to the left armpit and a bullet wound to the left shoulder. [TR 11758-11760] She also described a bruise and a fatal gun shot to Officer Boles's face. [TR 11779-11783] Boles had abrasions to his wrist and knee. [TR 11785-11786-11791] Rao explained that the flow of blood into Boles's lungs ended his breathing. [TR 11791]

Officer Strzalkowski suffered a bruise to his upper left arm and defensive injuries to the palm and back of his left hand. [TR 11794-11797] His back was bruised from a gun shot into his bullet-proof vest. He sustained a non-fatal gun shot wound to the upper left back. [TR 11799-11803] Strzalkowski lived long enough for his brain to swell and push out through the bullet hole. [TR 11818]

Rao directed that blood and urine be taken from Street out of concern that defense lawyers would attempt to find "loop holes." [TR 11838-11840] Rao circled the police report reference to the "Baker Acting" of Street as an issue that defense lawyers would be particularly interested in. [TR 11853]

A Glades correctional officer related that in September, 1987, inmate Street told him, "I will kill the next mother-fucker that tries to bring me back to prison." [TR 9295] The officer made no mention of the statement to anyone or in a contemporaneously prepared disciplinary report. [TR 9300-9301]

DEFENSE CASE

Blanche Lee saw Street on the I-95 bridge acting like he was going to jump. Lee summoned his employer who ran to the bridge and repeatedly told Street to sit down. During a 15 minute conversation, Street asked that the police be called. When told that the police would take him to jail, Street said, "I don't care. All I want to do is get down." [TR 11891-11896] The police were summoned but, in the forty minutes it took them to arrive, Street was concerned that the police were not coming and kept saying, "They not coming; They not coming." [TR 11896-11897] Lee described Street as "nutted up", like he was going crazy. [TR 11899]

Barbara Bowers drew blood from the defendant at 9:10 a.m. pursuant to court order because Street had claimed that he had been poisoned. [TR 11973] An analysis of Street's blood revealed the presence of a cocaine metabolite, indicating the ingestion of cocaine at some point in time. [TR 12231] It could not be determined when the cocaine was ingested, how much was consumed, or the degree of Street's intoxication at any given time. [TR 12233-12235] The fact that Street's blood pressure and pulse were normal when tested by rescue personnel indicated that the physiological manifestations of the cocaine had worn off. [TR 12245]

Jeremiah Love, the Broward County robbery victim, described the defendant as looking sweaty, as having big eyes, and as looking scared and frightened. He looked paranoid, like he was in a rage, and wild. [TR 12131-12132]

When Street called 911 and asked for assistance, he said, "I am going to call my mother." His mother, in fact, had died over a year earlier. [TR 12192, 12195]

Mental health technician Eric Reznick saw Street on Biscayne Boulevard waving his hands in the air and shouting at passing cars. [TR 12260] He was screaming profanities. [TR 12261] Resnick spoke to Street who said "Society sucks" and rambled illogically about communism taking over the world. [TR 12263-12264] Street continued to repeat himself over and over and appeared to be disoriented. He was "kind of wobbly" and slurred his speech. He spoke only in phrases, not complete thoughts. [TR 12264-12265] He was not rational. His eyes were very red. [TR 12265] He was agitated and moved fast. [TR 12269] In Resnick's opinion, Street appeared to be intoxicated. [TR 12270]

Bradley Baker was traveling southbound on Biscayne Boulevard at 2:00 a.m. on November 28, 1988. He heard Street hollering and saw him throw a two foot long pipe towards his car. [TR 12430-12431] Baker subsequently watched as Boles and Strzalkowski confronted Street. A struggle ensued during which one officer reached for his handcuffs and the other reached for his gun. [TR 12435-12439] As the second officer reached for his gun as well, two or three shots ran out and he fell to the ground. [TR 12443] Street knocked the second officer down, picked up his gun, and said, "I'm getting out of here." [TR 12444] Baker never saw who fired the shots and did not see Street with a gun in his hand. [TR 12443-12444] As Baker laid down in the seat of his car, he heard two more shots. [TR 12445] The entire event took between a minute and a minute in a half. [TR 12446]

Arthur Lindahl, a resident of the Long Pine Trailer Park heard a man yelling, "Help, help. Call the police. Help, call Flo. Flo, call the police." in a very loud voice over and over. [TR 12506] He saw a man on the railroad tracks 55 feet away and saw a police car

coming towards him. [TR 12531] He thought the man was on alcohol or drugs. [TR 12537]

Broward county public defender Tom Gallagher met the defendant in a holding cell prior to his initial magistrate hearing subsequent to his arrest in Broward county. [TR 12886] Gallagher asked Street to execute a "revocation of rights form" to protect him from uncounseled interrogation but Street refused. [TR 12887-12888] Street appeared not to understand what Gallagher was saying. [TR 12888] His eyes darted. He was unable or would not make eye contact. [TR 12889] Gallagher repeated his attempts to obtain Street's signature on the form without success. [TR 12890] Street moved his hands to avoid having his handcuffs removed. [TR 12890]

While in the courtroom, Street screamed out that he wanted to make a phone call. Taken to the judge's chambers, Street was unable to manipulate the telephone dial. [TR 12893] Ultimately, Street reached someone apparently, and said "They are trying to kill me. They are trying to kill me. I want to speak to the press. I want to speak to the press.". [TR 12895] Gallagher concluded that Street did not understand where he was or what was happening to him. He did not believe him to be competent at the time. [TR 12903] He appeared confused and totally disoriented. [TR 12904]

Upon his arrival in the Dade County Jail, officers from the holding cell asked psychiatric nurse Eilse Duval to evaluate the defendant. [TR 12924] Duval tried to ask Street questions but he was irrational. [TR 12932] He refused to sign an admission slip to the clinic. [TR 12933, 12935] Duval ordered Street to be placed in a strip cell because he was emotional, unstable, and irrational. [TR 12950] She found him to be highly paranoid. [TR 12954] She ordered Street held in a strip cell on the psychiatric floor. [TR 12962] Two days later, however, Duval was able to obtain Street's cooperation to question him "perfectly." [TR 12936]

Addictionologist Jules Trop, M.D., described cocaine as both psychologically and physically addictive. Cocaine is a stimulant which speeds up the thinking process and induces a feeling of grandiosity and euphoria. [TR 13212] Its continued use can cause

paranoia, hallucinations, and degeneration leading to a total break with reality and psychosis. [TR 13213] He explained that a person suffering from extreme cocaine intoxication could appear lucid and normal one moment and then act in a bizarre fashion a moment later, regardless of the amount of cocaine consumed. [TR 13275] Cocaine lessens one's capacity to make rational choices and to direct one's own behavior. [TR 13276]

Trop explained that sometimes it takes days after a person has been intoxicated on cocaine or any other substance to rid himself of bizarre behavior and irrational thinking. [TR 13341]

Given an hypothetical set of facts consistent with those adduced concerning Charlie Street, Trop found Street's cocaine intoxication "entirely consistent." [TR 13322, 13325, 13335]

On the morning of November 28, Dorothy McKendrick, the chief investigator of the medical examiner's office, prepared a series of reports. The first report [Defendant's Exhibit T] referred to the officers' attempts to "Baker Act" the defendant immediately prior to the shootings. [TR 13446] McKendrick was subsequently contacted by Detective Nazario who said, "That is not correct. We are going to have to change that." [TR 13449] McKendrick ultimately wrote a new report [Defendant's Exhibit U] in which the reference to "Baker Act" was deleted and replaced by a reference to the officers' attempt "to solve the problem." [TR 13452-13453]

STATE'S REBUTTAL

Nurse Gail Ragland testified that her examination of the defendant's pupils upon his arrival at the Dade County Jail revealed them to be normal. [TR 13486] She found Street's demeanor to be abnormally cool, calm, and collected. [TR 13487] She concluded that Street's did not require hospitalization or Baker Act intervention. [TR 13488] She did, however, request a psychiatric evaluation to determine if Street was crazy. [TR 13490]

Detention Deputy Roger Knorr overheard Street tell the person on the line that he had been set up and that he had to kill both of them. [TR 13518] He did not observe the

defendant to have been under the influence of any kind of drug or alcohol. [TR 13521] Knorr attributed no significance to the fact that, while Street expressed fear for his life, his tone of voice remained at all times calm. [TR 13524]

Broward Sheriff's Officer T. V. Middleton testified that, over a period of several days, he consistently observed Street to be calm and relaxed. [TR 13540-13541] In fact, he was sluggish, lethargic, and dazed. [TR 13550]

Juan A. Valdez-Barry M.D., testified for the state having come out of retirement to work as a prison health services psychiatrist. [TR 13643] Having conducted an examination of the defendant at approximately 9:45 on November 29, 1988, he observed no cocaine withdrawal systems and found the defendant's behavior appropriate. [TR 13647-13648]

West Palm Beach police officer Richard De Carlo described his prior contact with the defendant on June 17, 1980. [TR 13783] He and officer Roy Blevins had responded to a domestic disturbance call. They found none, but Blevins exited his police vehicle and had contact with the defendant on the street. De Carlo overheard the defendant say something to the effect, "I am tired of you guys harassing me" whereupon he pulled down his pants, exposed himself, and told the officers to "kiss his mother fucking ass" and "suck his dick." [TR 13786-13788] Attempting to arrest Street for disorderly conduct, a struggle ensued. Street assumed a defensive stance and hit Blevins in the head. Street tried to retrieve DeCarlo's service revolver from its holster. [TR 13789-13791] A crowd gathered and Street said, "Get me gun, get me a knife so that I can kill these mother fuckers." [TR 13791] Ultimately, other officers arrived and Street was taken into custody. During the altercation Blevins's badge was removed from his uniform. [TR 13795] In DeCarlo's opinion, Street did not appear to be under the influence of alcohol or any type of drug. [TR 13795] The charge of battery against Officer DeCarlo was ultimately nolle prossed (as part of a plea package). [TR 16374]

Psychiatrist Saida T. Cruzet also saw Street on November 29, 1988. [TR 13866] Street was cooperative and rational. [TR 13868-13869] Street refused medication for his

nerves and said he was not crazy. [TR 13869] She found him to be normal and in touch with reality. [TR 13872] She saw no evidence that Street was mentally disturbed from cocaine or any other illicit drug. [TR 13873] Cruzet was unable, however, to offer any opinion concerning Street's condition on November 28, 1988. [TR 13874]

Psychiatrist Charles Mutter found no indication that Street suffered from cocaine intoxication or psychosis. [TR 14092] Mutter expressed the opinion that Street had the mental ability to form specific intent. [TR 16559]

PENALTY PHASE

The court considered pre-trial Defense's motion to suppress (actually to exclude) any trial testimony that would be hearsay in nature by Detective Calvin Bryant relative to the details of the crime(s) committed by Defendant in 1980 which led to his felony conviction and sentencing and which the State intended to have introduced with reference to the aggravating circumstance of having been convicted of a prior violent felony (T-8/3/90-45,46). In this regard, State argued, "....once there has been a guilty plea, they (i.e., Defense) are precluded from raising issues concerning this previous case (T-8/3/90-47). A ruling on that motion was not made following this initial consideration of it (T-8/3/90-45-51).

The court later returned to the matter of Defense's motion to suppress State's use of hearsay or in the nature of hearsay statements made to West Palm Beach Police Sgt. Calvin Bryant and in this regard State argued that Sgt. Bryant should be allowed to testify as to such statements because Defendant had entered a guilty plea in 1980 in the involved felony criminal case and that such plea waived any right Defendant would otherwise have had in the instant case to object to such statements. Following further argument on this point, the court again deferred its ruling thereon pending its holding an evidentiary hearing (T-8/6/90-9-14).

State then asked for three pre-trial exclusionary rulings by the court, to-wit: (1) that Defense not be allowed to put on any evidence concerning the method of execution in Florida, i.e., electrocution; (2) that Defense not be allowed to present any evidence dealing

with "the concept of lingering doubt" of Defendant's guilt in the instant case since the jury had already found him guilty; and (3) Defense not be allowed to offer any evidence," whether or not there is a possibility that the parole commission would do something in 25 years or not allow the Defendant to be released after 25 years or anything of that sort" (T-8/6/90-23). State added that it also wanted to have excluded any Defense argument on these three points (T-8/6/90-24).

In a partial ruling on these points, the court ruled it would grant State's motion excluding any Defense evidence that in the event of a life sentence Defendant might not be released after he had served 25 years but that it was reserving its ruling that Defense would not be allowed to argue this point (T-8/6/90-25).

Defense announced that it intended to raise the issue of Defendant's diminished capacity and that he was under the influence of cocaine at the time of the involved homicide (T-8/6/90-25,26). Defense advised it was not withdrawing its opposition to Defense's motion to suppress the statements of Defendant made with reference to his 1980 felony (T-8/6/90-37). After hearing argument of counsel on this question, the court announced it would hold an evidentiary hearing (T-8/6/90-37-43). Following this announcement by the court, respective counsel continued to argue the point, including threatening an appeal if he should lose on this suppression question which would delay the beginning of the penalty phase trial (T-8/6/90-43-49).

During some of the above-described argument, prosecutor Laeser said:

> "I do not tell them what to say once they are on the witness stand." (T-8/6/90-53)

Thereafter Defense waived all the statutory mitigating circumstances and announced it was proceeding only on non-statutory mitigating circumstances (T-8/6/90-54). During further discussion as a result of State questioning whether the Defendant had agreed to waiver of the matter, Defense said it was taking this action as a matter of tactics.

When thereafter asked by the court if he wanted to talk further to his lawyers regarding the waiver of the three statutory mitigating circumstances, Defendant said, in pertinent part:

"I would just like to go ahead with the case....I don't understand everything....I have not said nothing all of the time for 17 or 18 weeks. Why should I say anything now?....I refuse to answer any more questions." (T-8/6/90-66-68)

The pre-trial hearing then turned into a jury charge conference relative to the opening charge to be given the jury and at the outset thereof Defense announced it had submitted a proposed alternate instruction which would advise the jury that since Defendant had been convicted of two counts of first degree murder he could be sentenced to serve a mandatory 50 year sentence with no parole. In opposition thereto, State told the court:

"I do not believe they should be allowed to argue anything about that the life sentence can be imposed consecutive or concurrent." (T-8/6/90-69,70)

That matter was then left pending and the charge conference then returned to the question as to whether Defense was entitled to a jury instruction that the life sentences could be imposed consecutively or concurrently with State arguing, to-wit:

"It is not part of the mitigating circumstances, either statutory or non-statutory...." (T-8/6/90-72,73)

In further argument on this point, the prosecutor said:

"This Court knows that the defendant can be sentenced consecutively or concurrently, but that has nothing to do with the deliberations of the jury. The sentence portion is strictly up to the Court. There is a lot of information that this Court has or will ultimately have the jury will not." (T-8/6/90-75)

Thereafter the court stated, in pertinent part:

"The Court: These instructions, this argument, that is why I asked you for a specific response. This instruction the jury has no role in whether the sentence would be concurrent or consecutive. The only role it has is death or the life with a 25-year minimum mandatory and that is already covered. That is something that is solely upon the province of the Judge and it has nothing to do whatsoever with the jury." (T-8/6/90-76)

Then the following colliguy between defense counsel occurred:

"Mr. Godwin: As an alternative to striking the words, life sentence could be imposed concurrently or consecutively, can you simply advise the jury that you and only you have the discretion to determine whether it is concurrent or consecutive?
The Court: I do not think so. I do not think that I will do that.
Mr. Godwin: That is the law, Your Honor.
The Court: That does not mean that is something I have to tell the jury. I am not going to tell them that. Whether I tell them to later, I might, but right now I do not want to tell them that, but we can discuss it later. I will give you the right to bring that up later." (T-8/6/90-79,80)

Thereafter followed a colliguy between respective counsel and the court relative to the court's opening instruction of instructions prepared by Defense not containing a paragraph reciting that the final decision that would be imposed rests solely on the court. Then the following colliguy occurred:

> "Mr. Koch: It was left out by accident.
> Mr. Laeser: I submit to the Court it was not left out by accident.
> Mr. Koch: It was left out by accident. Mr. Laeser, we did not try to hid it. We do object to it though.
> Mr. Laeser: It was not left out by accident. It was left out on purpose.
> The Court: I am going to give it.
> Mr. Koch: We object to that on the basis of Caldwell versus Mississippi." (T-8/6/90-81)

The court then gave its opening instruction and told the jurors "(T)he punishment for each of these crimes is either the death penalty or life imprisonment without the possibility of parole for 25 years." There was no language in the opening instruction advising the jurors that the court could impose two life sentences consecutively or concurrently. Over a Defense objection that "(T)he state is limited to presenting evidence in statutory aggravating circumstances" the court told the jurors that their advisory sentence "should be based upon the evidence you have heard while trying the guilt or the innocence of the defendant and the evidence that will be presented to you in these proceedings" (T-8/6/90-83-85).

During the penalty phase opening statement the prosecutor told the jurors:

> "....the Judge makes the final decision but your recommendation has importance to the court. Your recommendation is sort of the advice of the community and for that reason...." (at this point a Defense objection was sustained)(T-8/6/90-87).

Thereafter in its opening argument, the prosecutor told the jurors:

> "The legislature had decided that even among killers, even among murderers, there has to be a distinction, based upon the person and based upon the facts of the crime. That some are worse than others, that <u>there is difference between somebody who has never committed a crime before and somebody who has.</u> There is a difference between a heinous and a cruel crime---." (T-8/6/90-89)

At this juncture, Defense objected and moved for a mistrial because of the inappropriateness of State's reference about there being a difference between somebody who had never committed a crime before and somebody who has, in light of the fact that

Defense had waived the mitigating circumstance of no significant past criminal record (T-8/6/90-90). Argued defense counsel:

> "He should be limited to those aggravating circumstances. He should be limited to what he is going to show in aggravation...." (T-8/6/90-90)

This Defense objection was sustained but the court nevertheless allowed the prosecutor to complete his statement. In this completed statement the prosecutor again invited the jurors to consider the evidence presented at the trial as well as the "additional evidence" it would bring before it (T-8/6/90-91,92).

With reference to prior convictions, the lead prosecutor then told the jurors:

> "....one of them is that we can prove to you the fact that we can only prove to you the fact that the defendant has already been convicted of felonies involving the use or threat of violence to some person through a capital felony....." (T-8/6/90-93,94)

Defense objected to the above prosecutorial statement as being one intentionally telling the jurors that defendant has "other prior convictions that (it) is not allowed to bring" under the law. The court overruled this objection (T-8/6/90-94).

This prosecutor also told the jurors in his opening statement:

> "You can decide after hearing about his prior convictions in addition to the evidence about this crime that has a certain weight that is not met by any of the other evidence that you might consider in mitigation." (T-8/6/90-96)

After enumerating and discussing the aggravating circumstances that would be relied upon, the said prosecutor told the jurors:

> "What is your job at the conclusion of evaluating all those aggravating circumstances? The Court will tell you that you decide on an individual basis whether or not the aggravating circumstances have been proven beyond a reasonable doubt, but you really do more than that because I want you to think about the other thing that you will be doing during the course of the next few days. You decide for yourself about something that each and every one of you mentioned during voir dire examination. If it were the right case, if it were bad facts, if it were a bad person, the person with a bad history under the right circumstances, that you could make a recommendation involving the death penalty."....What I am going to ask you to do is consider for the next few days, and when you get to the point of deliberating, is try to decide whether in your mind, on a scale of things, these crimes, these murders, fit there on the scale of things that defeats, where does he belong in terms of what he did, why he did it and what type of person he is. What do we know about him as a person? (T-8/6/90-103,104)

Following defense counsel's opening statement, State called its first witness, Paul Frere, a former Boynton Beach, Florida, police officer. Frere testified in great detail concerning his having made a traffic stop of Defendant on August 30, 1977, in Boynton Beach. He said Defendant, whom he said was driving a Cadillac, was travelling 55 mph in a 45 mph zone and that he was speeding, weaving an using his turn signals in a "neurotic manner" (T-8/6/90-109-113). He said after he "bluelighted" Defendant and pulled him over, Defendant raced toward him and screamed at him calling him a "cracker motherfucker." He said Defendant told him, "I am tired of this shit, punk, I will kill you." He described Defendant throwing his sunglasses on the ground with broken glass hitting both he and Defendant. He said he called for back up and that Defendant told him that if he touched the microphone again, he'd kill him "right now" and that, in addition, Defendant threatened the life of his family (T-8/6/90-109-118).

Frere described a second man from Defendant's vehicle walking toward the rear of his (i.e., Frere's) vehicle. He said he told Defendant he was under arrest for obstructing a police officer but that he didn't attempt to take him in custody until the back up officer would arrive. He said Defendant told him he was not going back to jail. He described a violent struggle between he and the back up officer and Defendant with Defendant pulling him backwards and swinging at him with a closed fist. He said that after they got a choke hold on Defendant and attempted to put him a car, Defendant kicked and head butted at them. He said Defendant told him he'd get him and his family even if he was in prison (T-8/6/90-119-125).

Defense objected and moved for a mistrial because in eliciting testimony from Frere that he was not going back to jail (or prison), State had clearly told the jury that he had been in prison for offenses occurring before the 1977 and 1980 prior violent criminal convictions upon which State was relying under the involved A.C. Defense was denied as to both the objection and the mistrial motion. When State thereafter suggested that the court admonish Frere to not again mention anything about any criminal convictions other

than the two being relied upon, the court wanted to know if State had spoken to this witness before he testified (T-8/6/90-126-128).

Frere described Defendant as making more threats and spitting at him on the way to the police station and as making more death threats upon him at the jail. He said Defendant was charged with careless driving, failure to sign a ticket, battery on a police officer and resisting arrest with violence and both that he was then arrested and that he was detained as a result of a pick-up order (T-8/6/90-130-133).

On cross-examination of Frere and after defense counsel asked him if a Lieutenant Gardner had had to counsel him on numerous occasions because of his performance of a police officer, Defendant exploded into an obscene outburst in the courtroom and after Defendant had been removed from the room and had met with his counsel, such counsel advised the court that Defendant realized his conduct had been inappropriate and that he would thereafter conduct himself as a gentleman (T-8/6/90-136-141).

Thereafter respective counsel argued with respect to State's objection to Defense questioning Frere regarding an incident wherein Frere shot an unarmed black man after the date he got involved with and arrested Defendant but before the trial below. State's objection thereto was that Defense was trying to use an act occurring subsequent to the date he arrested Defendant to show Frere's bad character as of the date of such arrest and Defense countered that State had opened the door by attempting to show Frere's good character by bringing it out before the jury that Frere initially exercised restraint in his encounter with Defendant which had nothing to do with proof of any aggravating circumstance (T-8/6/90-141-164).

This State objection was sustained.

Continued cross-examination of Frere followed with him testifying, in pertinent part, as follows: that when he stopped Defendant the speed limit on U.S. Highway #1 may have been 45 mph "as I recall"; that he has an 8 to 10 mph over limit discretion concerning stopping cars for speeding; that he stopped Defendant for speeding and other violations; that he didn't think Defendant was endangering other motorists; that he followed Defendant

for a mile; that Defendant was weaving in his lane and on occasions left his lane, which he described as "momentary weaving"; that he had not arrested anyone during the preceding ten years for "momentary weaving"; that he didn't recall if Defendant committed an abnormal use of his turn signals; and that Defendant was driving within the speed limit when he stopped him (T-8/6/90-164-173).

In further cross Frere testified that Defendant, who appeared to him to be highly agitated and whom he described as being larger than him, caused him to feel he was in great danger but that he, i.e, Frere, did not draw his weapon although there was nothing to prevent him from doing so.

Defense thereafter moved for a mistrial contending that State had for the third time contended in leading questions to Frere that Defendant had been driving a Cadillac, the grounds of such motion being that the fact Defendant was driving a Cadillac had nothing to do with any of the involved aggravating circumstances.

This motion was denied.

On redirect examination of Frere the prosecutor led his own witness into saying for the first time at this trial that one of the reasons he had stopped Defendant was because he suspected him of D.U.I. (T-8/6/90-181-184).

The next State witness was West Palm Beach Police Sergeant Calvin Bryant, who was to give testimony as to the details of Defendant's alleged prior violent felony which occurred on February 7, 1980. He testified that on the above-stated date, he received a radio dispatch regarding one Samuel Lamar Nubee having been shot at a local bar in West Palm Beach, i.e., the Florida Bar (T-8/6/90-187-190). Bryant said he went to the hospital to which Nubee had been taken and that he spoke with the victim's wife, brother, and friend, Thomas Ferguson, and that in direct interviews with these witnesses learned that the wife and Ferguson were direct witnesses to the shooting. He said the wife and Ferguson told him that Nubee was assaulted by,"members of a group known or perceived as dope dealers, narcotics dealing organization" (T-8/6/90- 190,191).

Bryant testified he thereafter went to the police station where he and other officers interviewed five individuals who had been picked up as potential suspects in the shooting, Willie Davis and Stanley Williams, gave statements with Williams saying that he was present when the "altercation" took place but that he fled when he realized "the groups that were involved" and that Davis identified Defendant "as being present at the time of the shooting (T-8/6/90-192-194). Bryant said that as a result of this information a photo line-up was prepared and that a Mr. Atler and a Mr. Alexander picked out Defendant as being the one "that did in fact shoot the victim" (T-8/6/90-192-195).

In response to State's question as to what Atler and Alexander told him, Bryant testified:

> "Essentially, I guess, that there were two separate incidents, one being an altercation between the victim and Mr. Street somewhat earlier during the morning of the same day in by where the victim, Samuel Lamar Nubee, was beaten somewhat by Mr. Street and other members of his association and that the later shooting itself resulted directly as a result of that altercation which happened earlier that morning concerning the incident itself that directly involved the shooting. Both Ms. Alexander and Mr. Atler indicated that they were present at the bar, the Florida Bar, when everything started and they did see Mr. Street and two associates and all three of them had been armed with guns and ultimately directly saw Charles Street shoot Samuel Nubee in the altercation." (T-8/6/90-196,197)

Bryant said he interviewed the victim thereafter and that he "instantaneously" picked out Street in a photo line-up. He said the victim said Defendant and his associates had approached him with drawn guns and that he got hit a few times with the butt of a gun and that Defendant then shot him with a gun (T-8/6/90-197-200).

Bryant said he told fellow officers he had probable cause to believe Defendant committed a crime and that Defendant appeared normal when he entered the interview room. He said he read Defendant the Miranda rights and that Defendant refused to sign the Miranda waiver of rights card. He said Defendant did not appear to be under the influence of anything (T-8/6/90-200-224).

Bryant testified that Defendant made a spontaneous statement to him after being Mirandized in which he said he didn't know anything about it, i.e., the involved incident(s); that he didn't know what was going on; and that others were lying about him (T-8/6/90-

225). He said that he then asked Defendant three questions even though Defendant had not indicated he wanted to talk to Bryant. He then said (initially) that Defendant had agreed to waive the right to counsel and thereafter he said that Defendant did not specifically say he would speak to him without counsel (T-8/6/90-225,226). Bryant then related the three questions (or two of them) and Defendant's alleged responses thereto (T-8/6/90-226,227).

On redirect by State, Bryant said that Defendant understood the Miranda rights (T-8/6/90-230-235), and that Defendant started making the spontaneous statement immediately after Defendant had told him it wasn't a good idea for him to sign anything for the police (T-8/6/90-230,231). He said that after being Mirandized and after saying he wouldn't sign anything. Defendant told him he did not know what Bryant was talking about (T-8/6/90-235).

Thereafter followed argument of counsel that the three questions Bryant asked Defendant and his answers thereto were not admissible and the court initially ruled that it would sustain the Defense objections thereto (T-8/6/90-236), and it then changed its mind and ruled to the contrary (T-8/7/90-3).

Then returning to the matter of Defendant's alleged volunteered statement, the court reiterated it was allowing State to have Bryant testify regarding the three questions and answers upon the rationale that Bryant's questions had been invited by Defendant as a result of his volunteered statement and that, in addition, the court said:

> ".....there is to be no testimony whatsoever that he refused to sign the card, just that he made the statement." (T-8/6/90-3-4)

Defense then objected to State being allowed to call Bryant as a penalty phase trial witness because his testimony would be irrelevant to any of the statutory aggravating circumstances and that therefore the only real purpose in State calling him would be to have presented to the jury non-statutory aggravating circumstances and State's response was that it had the right under the law to call him to prove that Defendant had a prior homicide (type) charge and a prior conviction and that to accomplish this it is allowed under the law to introduce explanatory evidence. More specifically, Defense argued that (in effect) it would be error for Bryant to be allowed to testify as to hearsay statements allegedly made to him

by other persons with respect to which Defendant would be denied his (Sixth Amendment) confrontation rights (T-8/7/90-12-14).

Thereafter there was further argument whether State should be allowed to go beyond introducing certified copies of the prior conviction and as to whether if it could go beyond that it should be allowed to have its past criminal convictions witnesses give hearsay testimony as to what other persons told them without denying constitutional confrontation rights with reference to the witnesses in the 1980 case, Defense counsel told the court, "....Mr. Nubee is nowhere to be found, nor anyone else" (T-8/7/90-39-46).

The court ruled that it was denying the Defense objection but that it would not allow Bryant to testify to "double hearsay", i.e., what someone told him they heard someone else say. Specifically, in this regard, the court stated it would allow Bryant to testify to "simple hearsay" (T-8/7/90-48-49). And of its own volition, the court ruled it would allow no references to Defendant's "crowd" being drug dealers nor any reference to "the Boynton group" (T-8/7/90-51,52).

Thereafter Sgt. Bryant commenced his direct testimony for State before the jury. He testified as follows: There were five persons detained in connection with the shooting at the Florida Bar. Mr. Williams said a gun or guns were involved but he didn't really see anything else. Mr. Davis described Defendant as being a participant but he didn't actually describe the details of the incident (T-8/7/90-60). Mr. Atler and Ms. Alexander both picked out Defendant's photo in a photo line-up.

Thereafter when State started to question Bryant concerning events that occurred the day before the shooting, Defense objected but this objection was overruled (T-8/7/90-65). Thereafter when Bryant resumed testifying, Defense objected to him testifying to what Atler had said if that information came from a statement someone other than Bryant had taken and after Bryant told the court he really couldn't distinguish between what Atler and Alexander said in such statements from what they actually told him, the court sustained this objection (T-8/7/90-66-71).

Bryant thereafter testified before the jury as to what 1980 victim Nubee's wife had allegedly told him, which, as succinctly stated as possible, was that after she had gone to the Florida Bar to locate her husband, six black males were in an alley area near the bar, whom her husband told her were some of the persons he had had trouble....with earlier that day and that after the black males separated into two or more groups, three of them were saying threatening things to her husband from across the street. He said the wife further told him that one of the said black males believed her husband had tossed a gun in her car and that thereafter three of them "pulled their guns", came across the street toward her husband and that after a scuffle ensued two of the said black males hit her husband "about the heard....with the guns" with "the gunshot "thereafter being fired and with her husband running for a distance and then collapsing (T-8/7/90-71-75).

Thereafter the following occurred at the trial:

> "Q. As a result of the interviews conducted by yourself and your fellow police officers as well, the positive identification of the----
> Mr. Koch: Objecting summarizing testimony.
> The court: Sustained."
> "By Mr. Ridge:
> Q. Did you sometime that evening on February 7, 1980, issue some type of order for the arrest of the defendant?
> A. Yes, sir. After having established identification, I felt I had sufficient cause at that time to issue an arrest order and I prepared what we refer to at our police station as a hot sheet. It is a standard eight and a half-by-11-inch sheet that had information----
> Mr. Koch: Objection.
> The Court: Sustained." (T-8/7/90-75)

Bryant next testified as to what Nubee (the 1980 victim) had told him the next day after the shooting at a hospital interview which included him saying that Defendant had pointed the gun at his wife and that Defendant shot him one time. He said that Nubee picked out Defendant's picture from a photo line-up.

Bryant testified that on the afternoon of the shooting he responded to the scene thereof after receiving a phone call (which was totally unauthenticated by State) that Defendant and several of his associates were at the Florida Bar and that he there arrested Defendant in connection with the shooting of Nubee, placed him in handcuffs and

transported him to the station. He said Bryant was taken to the interview room and that he read his Miranda rights to him.

The following then occurred:

> "Q. In addition to the verbal statement, yes, he understood his rights, did it appear to you from his demeanor, the body language of the defendant, that he appeared to understand his rights?
> A. Yes, sir, he appeared to understand. There was no look of confusion or questions on his part.....

Subsequently, the following colliguy occurred:

> "Q. Shortly thereafter, Sergeant, did the defendant make what could be determined to be a spontaneous statement concerning the shooting incident?
> A. Yes, sir.....
> Q. Did there come a time shortly thereafter when the defendant, Mr. Street, made what we would refer to as spontaneous statements to you concerning the shooting incident?
> A. He just stated that he didn't know what I was talking about; those people were lying, and stated that he didn't know what was going on with that guy."

When the prosecutor thereafter asked Bryant if he then asked Defendant several questions, Defense objected saying:

> "As long as the questions that are asked, that were asked by this officer and the three questions followed immediately without any intervening conversations, and the volunteered statements of the defendant, that Court will overrule the objection." (T-8/7/90-90,91)

Thereafter in response to the three questions Bryant testified that Defendant told him that as far as he could see "the guy" (Nubee) shot himself while fighting with himself, i.e., while he was clowning around with the gun; that he had been involved "in the beating of Russell Harrell; and that "we" refer to Harrell as "the police shooter" (T-8/7/90-92-94). Bryant said that Defendant was thereafter booked into the West Palm Beach jail based upon his probable cause affidavit (T-8/7/90-94).

Following cross-examination of Bryant the prosecutor asked him the following question to which he gave the following answer:

> "Q. How about the hospital, did the hospital say that he was shot?
> A. Yes, he was shot." (T-8/7/90-107)

Thereafter through a deputy clerk of the 15th Judicial Circuit of Florida the affidavit of probable cause and the affidavit of judgment of that court in the 1977 case was introduced in evidence over a Defense objection was overruled (T-8/7/90-111-117). With

reference to certified copies of the Information for the 1980 case, the Defense objection thereto that the Information charged an offense which is not a crime of violence and that the Information contained charges against a co-defendant was sustained but the court nevertheless allowed that document in evidence with the prohibited parts to be whited out (T-8/7/90-120-126).

The State then rested its case and Defense called Ms. Alonso, the social worker, as its first witness after describing her qualifications (State conceded she is well qualified in her field [T-8/7/90-152]). She proceeded to testify concerning a psycho-social history she prepared relative to Defendant which focused on his early childhood (T-8/7/90-153,154). She said she interviewed members of Defendant's family at Boynton Beach, which family included 12 siblings including Defendant and his father. The mother is deceased. Defendant had been born in Boston, Georgia. The family worked as sharecroppers. The family was very poor and, in fact, it was so poor that one of Defendant's brothers would steal Christmas presents because there weren't enough of them for all the family, and sometimes there wasn't enough to eat. The school attendance record of the children was very spotty because to the parents, being basically uneducated persons, making enough money to take care of the family was a higher priority. In this regard, the father had a second grade education. Because the children wore hand-me-down clothes, the family was known in the community as "the street dogs." In this regard, the girls couldn't wait to grow up and get married so they could get rid of the Street name. When Defendant was five or six years old the family moved to Range Line, Florida, to do farm work there and they subsequently moved back to Georgia at a place just outside of Atlanta where the father got a job as a driver and because this improved the family fortunes, the family had enough food to eat for the first time. The girls in this family generally got preference over the boys with reference to being able to go to school and getting clothes. Defendant went through the 9th grade and then quit school because it was "very embarrassing" to him to not have decent clothes to wear "or any other kind of things that would make him comfortable in school." The Street

family was impoverished and they thus "did not get exposed to a lot of possibilities" (T-8/7/90-153-170).

At the outset of his cross-examination, the prosecutor demeaned Alonso's qualifications and objectively, despite his having earlier conceded she was well qualified in her field, and, in addition, brought out before the jury that she is opposed to the death penalty and contending in his questions to her that she was hired by Defense in the instant case to assist in presenting information to present Defendant "in a humanizing manner" (T-8/7/90-170-172).

However, despite Alonso's insistence that she had not been hired by Defense to humanize Defendant, the prosecutor proceeded to immediately question how thereafter----as though she had not given that testimony----as to whether it wasn't true that "the methodology" or "the ways" to humanize a defendant vary. Thereafter as this prosecutor continued to pursue this line of questioning, despite Alonso's continued insistence that she was not hired to humanize Defendant, the following colliguy occurred:

> "A----(J)ust the same way that in a battered woman's case, I am asked to do an assessment for a prosecutor.
> Q----(Laeser) I think that is the third time that you have volunteered that. Is there going to be a necessity to do that again?" (T-8/7/90-173-177)

Alonso further testified on cross as follows: Despite the fact the Street family was poor, the parents were not mean or abusive to the children. The family was extremely close. They were God-fearing people (T-8/7/90-177,178).

Thereafter the prosecutor asked Alonso if she knew that "in two of the incidents in the defendant's history, he was driving a late model Cadillac automobile" (T-8/7/90-179). And shortly thereafter the same prosecutor asked her, "You are aware, I assume, of the defendant's history of incarceration?" A Defense objection was sustained to this latter question "at this time" (T-8/7/90-180-181). Alonso testified to Defendant having quit several jobs. The prosecutor thereafter asked the following questions to which Alonso gave the following answers with the following Defense objection being made:

> "Q....Do you know whether the defendant has ever been convicted of a crime?
> A. Yes.
> Q. How many times?

A. I think.
Mr. Godwin:I am going to object. This is not relevant to anything." (T-8/7/90-180,181)

This prosecutor argued that the relevancy of these questions was the credibility of Defendant with reference to her statements to Alonso and Defense argued that the State was trying to back-door into evidence testimony as to non-violent past crimes of Defendant to rebut the mitigating factors. During the course of this argument the following colliguy occurred regarding an appellate decision State contended applied:

"The Court: ....(H)is statement is simply, do you have an extra copy, why not?
Mr. Laeser: Because if I give them an extra copy then they will know what is coming. I do not have an extra copy in front of me. I will read it and give them a copy Your Honor." (T-8/7/90-181-185)

Thereafter defense counsel bitterly complained of hissing and noises from the prosecutor's table and by persons on the State's side of the courtroom which such counsel said had been going on during the entire prior 17 weeks the case had been in court and despite a denial thereof by the lead prosecutor, the court said he believed defense counsel and admonished the prosecutor against such happening again (T-8/7/90-186-190).

During the course of further argument as to whether State should be allowed to question Defendant as to the number of his past criminal convictions (T-8/7/90-193-205), State stated that he was not trying to rebut a specific mitigating circumstance because, "frankly, there is no specific mitigating circumstance the defense has raised...." (T-8/7/90-205).

The court then ruled as follows:

"The rule on impeachment requires materiality. The rule on asking a Defendant whether or not he had been convicted of a crime comes into play, plus by virtue of his testifying as an attack on his credibility, so when you impeach by prior crimes, you do not have to lay materiality as impeachment." (T-8/7/90-206,207)

Thereafter State admitted in further discussion of the point that what he was attempting to do was to have Alonso testify as to all eight of Defendant's prior convictions (T-8/7/90-210).

Following out-of-the-presence-of-the-jury testimony by Alonso as the conversations she had had with Defendant regarding his past criminal convictions, the court ruled it would allow State to question her regarding his 1973 conviction (T-8/7/90-212-219).

The court thereafter elaborated on that ruling by holding that State could only go into the fact of the 1973 conviction, i.e., it could not go into the details of the underlying case, etc. (T-8/7/90-220).

Defense objected to this overall ruling and moved for a mistrial and both were denied (T-8/7/90-221).

Alonso then resumed testifying and was asked the following questions and gave the following answers:

> "By Mr. Laeser:
> Q. I am sorry, Ms. Alonso. Let me go back to the area that I was covering. Are you aware, based upon your personal conversations with the defendant, as to whether or not he was convicted of an additional felony crime in 1973?
> A. Aside from the B&E?
> The Court: Just yes or no.
> The Witness: No.
> By Mr. Laeser:
> Q. Ma'am, did you interview the defendant concerning his criminal history?" (T-8/7/90-222)

State then asked Alonso about the arrest record of Defendant's family with reference to violent crimes but the court sustained a Defense objection thereto (T-8/7/90-225-227).

Thereafter the prosecutor blurted out in a question another reference to the past crimes of Defendant without any language included therein conveying the meaning that he meant the two past violent crimes which State was prosecuting as an aggravating circumstance (T-8/7/90-227).

When Alonso testified that Defendant had been gracious to her, the prosecutor asked her if it wasn't true that Defendant had an explosive nature and if he hadn't been "(E)xplosive to the point that others could be injured?" (T-8/7/90-229), and at a sidebar conference following Defense's objection to that question, Defense argued it had not put Defendant's character for non-violence in issue at the trial. The court sustained this objection but denied Defense's mistrial motion (T-8/7/90-234).

The next Defense witness was Dr. Hyman Eisenstein, a clinical psychologist with a specialty in neuropsychology. Following his stating his qualifications and State voir diring him, the court declared him an expert in neuropsychology (T-8/7/90-244-258).

Thereafter an outside-the-presence-of-the-jury conference was held on the objections Defense had raised to State's making a point of bringing out in front of the jury on two prior occasions that Defendant had been driving "a Cadillac" and "a brand new Cadillac" automobile at the time of his involvement in one or both of the past offenses. State conceded that "I did not say it was his Cadillac" and went on to explain that Defendant had been seen driving around "in a brand new Cadillac on two separate occasions,....a 1980 red and white El Dorado and a 1978 Seville" and that he had wanted to question Alonso how Defendant's having Cadillacs to drive around in squared with his alleged low level of poverty (T-8/7/90-259,260). The prosecutor further admitted that he wanted the jury to know one "Gold Mine" Turner and Defendant were both involved in a (drug) organization and that one of Defendant's ways of being compensated was "he got a new Cadillac when he was not in custody" (T-8/7/90-262). The prosecutor in his argument on this point was insistent that he wanted the jury to know of Defendant's involvement in the drug gang and to show this to be able to let the jury know Defendant got gifts from "Gold Mine" (T-8/7/90-263-265).

Defense contended that State had already substantially succeeded in putting this information before the jury and that it had been hampered by the Court's refusal or failure to grant Defense a sidebar conference when the Cadillac matter was first brought up by State and because at that time the courtroom was, in effect, in somewhat of a chaotic condition because Officer Boles' wife had left the courtroom crying (State had objected that Defense had not made a contemporaneous objection when the Cadillac matter came up). The court denied Defense's mistrial motion. Defense then requested a ruling that State could not again make reference to Defendant's having or driving a Cadillac and the prosecutor admitted he wanted to be able to do. Defense pointed out that Alonso's testimony relative to the Defendant's living in poverty had substantially related to his childhood although her testimony about him had also dealt with the years when he was in high school, but nothing

after that, and the prosecutor admitted his cross-examination of Alonso had gone beyond what she had been asked on direct examination.

The court then ruled (or modified a prior ruling for the umpteenth time) that State could only bring out the Cadillacs matter if it established that Defendant owned the cars (T-8/7/90-265-278).

Defense then renewed its motion to State's bringing out through its cross of Alonso that Defendant had "failed to avail himself of rehabilitative techniques while in prison" which ruling was reaffirmed by the court's failure to make a ruling (T-8/7/90-278-280).

Defense's direct examination of Dr. Eisenstein then continued. He said he was contacted by Defense in November, 1989, to do a neuropsychological evaluation of Defendant, which he described as, "....an evaluation of the brain capacity or what the brain can do on a day-to-day basis using standardized tests" (T-8/8/90-3,4). Dr. Eisenstein described the different roles of a neurologist and of a neuropsychologist by explaining that the former "looks at the physical nature of what is affecting the brain" while the latter "will look at the function capacity or what the brain can or cannot do in terms of function or in terms of ability on a day-to-day basis (T-8/8/90-4,5). He said he spent "about 25 hours" with Defendant during November and December of 1989. He said he administered Defendant "the Minnesota Multi-Phase Personality Inventory, or the MMPI...(and)...three motion measures and 16 other major tests" (T-8/8/90-6). He then described the nature of these tests. He identified a chart he said contained Defendant's personality profile from the MMPI, which he described as being subjective as to Defense and valid, i.e., meaning that Defendant was not faking (8/8/90-7-14).

Dr. Eisenstein then specifically testified as follows:

> "The profile indicates an individual who is trying very hard to hold onto his emotional grip, so to speak, he is a very brittle individual and this individual is possibly best generically described as what we would classify as an individual who is prone to having a nervous breakdown....he decompensates under stress and anxiety. He loses touch with reality and the ability to coherently operate and function, but then he regroups very shortly thereafter....there is a low link, so to speak. In other words, where the individual is placed with a certain amount of stress, the individual no longer has control. He is unable to exercise over his emotions and the emotions, so to speak, get the better of him and then he decompensates and literally has

> a nervous breakdown, which is just a psychological involvement....with a certain amount of stress, a certain amount of anxiety and under the conditions then he became extremely disorganized. He became withdrawn, irrational, with a final culmination as what I refer to as a nervous breakdown or decompensated state....Research indicates that any individual who takes cocaine and for that matter of fact, any substance, alcohol or any type of drugs, it impairs their level of thinking and concentration and judgment. That is clearly borne out in research. So, again, that is an additional factor, another variable, that places into account with the individual, so an individual who has one, two, three, four, five different areas of deficiency, you add that and it only exasperates it making it worse." (T-8/8/90-14-17)

Dr. Eisenstein thereafter described other tests he rendered Defendant including 16 other major tests, including tests designed to measure "sensory perceptual," i.e., the ability for your body to work in space, etc., speech, including communication; memory; Intellectual, i.e., I.Q. or intelligence; and school and educational background. He said "we"..."also did some sensitive brain measures, the Holsted Bright and the neuropsychological battery" (T-8/8/90-17,18).

He said he also reviewed records concerning Defendant, including police reports, and rendered Defendant various tests including the Wechsler Adult Intelligence Scale Revised, and he testified that Defendant's I.Q. was 77 which he said, "....falls into the borderline of the defective range which corresponds to a mild brain dysfunction" (T-8/8/90-23,24).

After further describing this testimony, Dr. Eisenstein said that from a neuropsychological aspect he found Defendant to be mentally disturbed and that that had been his emotional state for the past several years. He said he had compared his MMPI test results with another MMPI testing given him several months to a year prior to the homicide. He said Defendant's school records indicated that at 10-12 years of age, his achievement record "all fall within the lower percentile." He added that it was his further opinion that at the time of the two killings giving rise to the instant cause, Defendant's mental capacity to appreciate what he was doing was severely impaired (T-8/8/90-25,26).

Thereafter followed extensive argument of counsel with respect to whether Defense could (or should have) elicited the doctor's testimony that Defendant did not have the mental capacity to appreciate what he was doing when the two killings occurred, with State's objection being that that answer was almost the same as one of the mitigating

circumstances (the only difference being between "substantially impaired," which is the statutory language of "impaired"). Defense defended its right to rely upon Defendant's state of mind at the time of the homicides as a mitigating circumstance and, in this regard, the prosecutor told the court that one of the defense counsel had told him somewhere "on the record and during a court session that Defense would not be arguing Defendant's state of mind at the time of the homicides, the court insisted he produce such record but when called upon to produce where in the record this occurred, State answered it was withdrawing the objection (T-8/8/90-29-36).

Dr. Eisenstein then testified that he thought Defendant had always had a diminished mental capacity.

On cross-examination, Dr. Eisenstein testified that Defendant does not have Alzheimer's Disease nor retardation, but that he has had head trauma and does have "dementia", which latter condition he described as memory loss or impairment and diminished brain function (T-8/8/90-56,57). He admitted that MMPI tests results can vary from day to day. The following then occurred:

> "Q. Doctor, we all know why it took me eight hours to take your deposition.
> Mr. Godwin: I am going to object to what Mr. Laeser is trying to find out. I am going to object.
> The Court: No editorial comments." (T-8/8/90-60)

The doctor testified further on cross that he found no evidence upon his MMPI testing of hydrocephalgia, or water on the brain, no brain hemorrhages or lesions, and no evidence of any mass within the brain (T-8/8/90-63,64). The following occurred:

> "Mr. Laeser: I would like the court to pay attention as to whether or not this (the doctor's immediate last answer) was any of the law questions that I asked him.
> Mr. Godwin: Your Honor, please." (T-8/8/90-65)

The doctor responded that in going through all the other testing including that of Dr. Shubert, it would not be fair to say that there was no evidence of any type of seizures or severe head injuries that might show some sort of brain damage. He said there was no evidence of cranial damage but that Defendant's finger tapping was not normal in that he only tapped with one finger even though he was moving the other fingers.

On further cross-examination Dr. Eisenstein testified regarding other tests he gave Defendant, i.e., the grip test, a memory test; and the "Trails" test. With reference to one of his findings regarding the Trials test, prosecutor Laeser said:

> "You did not leave that one off in terms of making up this chart----. I assume that this chart was discussed between you and counsel?" (T-8/8/90-72)

The following then occurred:

> Q. The bottom line to what you have told us, and correct me if I am wrong, is that the defendant's mental capacity causes him to make impaired decisions; is that true?
> A. It is one factor.
> Q. From every scientific measurement that you are aware of, he will continue to make impaired decisions in the future; is that true?
> Mr. Godwin: I am going to object.
> The Court: Overruled.
> The Witness: The only way to scientifically prove that is to re-evaluate and reassess an individual at another given point in time.
> By Mr. Laeser:
> Q. Doctor, based upon your testing, isn't it your expectation that five years, ten years, 25 years from now, the defendant is still going to make impaired decisions?
> A. Yes, it is.
> Q. In fact, you are aware of three or four prior episodes in his life, based upon your conversations with the defendant, is that true?
> A. That is correct.
> Q. It is clear from your discussions with him and your testing that he did not have the ability to learn from the error of those earlier decisions?
> A. That is correct.
> Q. In fact, as a result of that, he continued to make bad choices?
> A. That is correct.
> Q. In all likelihood, he will continue for the rest of his life not learn how not to make bad choices?
> Mr. Godwin: Objection.
> The Court: Overruled.
> The Witness: That is correct.
> Mr. Laeser: I do not have anything else, Doctor. Thank you very much." (Emphasis added)(T-8/8/90-74)

Defense then requested a sidebar conference and there objected, in pertinent part, to the prosecutor having injected the issue of "future dangerousness" into the trial and in connection therewith stated that Defense had not put on any evidence that Defendant could be rehabilitated. The following then occurred:

> "Mr. Laeser: Certainly with experience, I am aware that I am not allowed to put on that kind of testimony, but he willfully and deliberately and I must say with the Court's blessing, is allowed to go into questions regarding future dangerousness.
> The Court: The Court has not given any blessing involved in this.

Mr. Godwin: The Court would not give us a sidebar when we asked for one in the middle of this highly prejudicial and improper line of questioning.
The Court: Your motion is denied. YOu have made your record." (T-8/8/90-79)

On redirect by Defense Dr. Eisenstein testified he asked Defendant maybe 1000 to 1500 questions. He said there is something abnormal in the left hemisphere Defendant's brain which he said was of no pathological significance, i.e.,meaning it could be treated by surgical intervention (T-8/8/90-88,89).

On recross of the doctor by State, the following occurred:

"Q. This tiny non-specific area similar to the tests that I asked you before, I assume that is going to stay there too, that is not going to get better or change in some way?
A. That is correct.
Q. If, in fact, it has some effect on the way the defendant acted or responded, it is always going to stay the same as well?
A. Correct.
Mr. Laeser: I do not have anything else, Doctor. Thank you.
Mr. Godwin: Thank you, Doctor.
The Court: You may step down. Thank you for coming down.
(Witness excused)
The Court: You may call your next witness.
Mr. Godwin: We need to go sidebar.
The Court: Do you need the court reporter?
Mr. Godwin: Yes." (T-8/8/90-91,92)

At sidebar Defense counsel renewed his motion for a mistrial based on the prosecutor's again going into "that in the future there is going to be something wrong with Mr. Street" and that Defense's raising as a non-statutory mitigating circumstance that Defendant has brain impairment, dysfunction, or damage did not open the door on "future dangerous" rebuttal argument. The motion for a mistrial was denied (T-8/8/90-92,93).

Then there was further discussion regarding the Cadillacs issue during the course of which the Court said to the prosecutor that after having thought about the matter overnight:

"I am concerned that there has been an unfair allusion by the State....You asked the question looking for a reply on a rebuttal to so-called poverty. It was asked with an intent to create the impression that he had the kind of finances to have these two cars.
Mr. Laeser: That is a fair inference because of the evidence that was already before the jury."

The court offered to make corrective statements to the jury if the Defense so desired (T-8/8/90-96,97).

The next witness Defense called was Otis Street, Defendant's father. He testified on direct as follows: He has 10 more living children besides Defendant. He went to or through the third grade. His wife and Defendant's mother, Ruth Street, died four or five years earlier. Defendant is his sixth child. He was doing sharecropping in Boston, Georgia, when Defendant was born in 1954. He did sharecropping for five or six years and their living conditions were poor including not having enough to eat. The family moved to Range Line, Florida, when Defendant was four years old to pick beans and peppers. The family lived in Range LIne for about three years and things were not easier for them there. Defendant started in school at Range Line but he didn't go to school too often, i.e., meaning he went "sometimes a day in a week and sometimes twice a week." He doesn't know how well Defendant did in school because his wife dealt with that. The family then moved to Connors, Georgia, because there they "had a better living." He drove a truck for the Jolly Home, "a place where they keep about four or five children..." The family had enough to eat when the lived in the Jolly Home and had plenty of clothes. Defendant was going to school regularly while they lived there. When Defendant was 11 or 12 the family moved to McDonald, Georgia, to pick cotton because the Jolly Home closed and they lived there about a year. He, i.e., the father, then got sick and the mother and the children did the cotton picking and Defendant was not going to school then. They thereafter moved back to Range Line where life was not good for the boys through the summertime and they had to pick up coke bottles to sell. While they were back at RAnge Line Mr. Street's sister-in-law's 10 children came to live with them and the Streets were responsible for their care and feeding. After two years in Range Line the family moved to Boynton Beach where Defendant returned to going to school but not very often. When Defendant was a baby, "he always slept all the time" and when he was seven or eight years old, he slept a lot. They took Defendant to the doctor but Mr. Street forgot what he said. Both he and Defendant's mother were close with the Defendant.

On cross Mr. Street said the following: Defendant was well behaved with no mental problems. They were able to keep the children supervised and under control. They were religious people and Defendant went to church plus they had Bible studies in the home throughout Defendant's life. He tried to teach his son to know the difference between right and wrong as he grew up. Defendant was well behaved from childhood through 16 or 18 years of age and he knew right from wrong.

The final Defense witness at the penalty phase was Gwendolyn Phillips, who was nine years old and lived in Belle Glade, Florida. She testified that Defendant was a nice man; that Defendant was his mother's husband; and that she had visited Defendant in prison and he was nice to her and told her to be a good girl (T-8/8/90-128-130).

Both sides then rested and State announced it had no rebuttal penalty phase witnesses.

The court refused to include in its charge language that the jury would not be allowed to take into account any facts or circumstances not included in the possible aggravating circumstances the jury would be charged to consider (T-8/8/90-151,152).

The court refused to charge the jury that it should presume Defendant innocent of each aggravating circumstance until it was proven beyond a reasonable doubt (T-8/8/90-153).

Upon State's objection the court removed language from its charge that it could not rely upon a "single aspect of the offense to establish more than a single aggravating circumstance."

There followed a lengthy discussion of Defense's entitlement to an instruction defining what a mitigating circumstance is. State vigorously objected to such an instruction arguing that "mercy" is not an arguable mitigating circumstance and that the effect of giving Defense a proposed definition statute would in effect constitute a "mercy mitigating circumstance" instruction. The court suggested its telling the jury that while MC's do not constitute an excuse for the homicides, they could be considered as a reason "as reducing the sentence from death to life", but even after the prosecutor appeared to agree for the

need for some kind of instruction to this effect, the court ultimately decided it would only tell the jurors that they consider all the (claimed) MC's and find from the evidence whether or not they outweigh the AC's. The court said it would not charge the jury that the MC's which it could consider were unlimited (T-8/8/90-162-183).

State argued that the court should consider all the AC's because in its final decision it would decide which applied and those which are duplicitous and do not apply. In this specific regard, the prosecutor stated:

> "It is absolutely clear that duplicity is only an issue for the court." (T-8/8/90-211)

Thereafter the prosecutor, in making continuing argument in this regard, made clear his feelings to the court that it was only its role that was important at this penalty phase trial (T-8/8/90-212,213).

Thereafter the court denied Defense's request that the jury be told its verdict would be given "great" weight rather than appropriate weight (T-8/9/90-2-5).

There followed more argument as to Defense's request that the jury be instructed that the possible life sentence could be imposed either consecutively or concurrently (T-8/9/90-13,14). The court denied this request but said that Defense counsel could argue the matter but that Defense shouldn't overdo it (T-8/9/90-13,20).

Thereafter State made its final argument followed by defense counsel's closing argument (the pertinent portions of the arguments will be detailed in the argument portion hereof).

The court then charged the jury and it retired and thereafter returned its advisory verdict recommending by a 12 to 0 vote that the death penalty be imposed upon Defendant for each of the two killings (T-8/9/90-101-116).

Thereafter on a subsequent date a hearing was held in advance of the date of the sentencing proceeding and on a separate date thereafter the court held the sentencing proceeding and imposed the death sentence on Defendant for each of the two homicide (Pertinent details of both the hearing and the sentencing will be dealt with in the Argument portion hereof).

SUMMARY OF THE ARGUMENT

I.

The trial court permitted the state to make unrelated, collateral acts of misconduct on the part of the defendant a feature of this first degree murder prosecution. In particular, the trial court allowed the introduction of evidence concerning a hostile encounter between the defendant and a law enforcement officer eight years prior to the events alleged in this indictment. The trial court's judgment was erroneous. It impermissibly and unfairly allowed the state to assail the defendant's character and attempt to demonstrate his propensity for violence and unlawful conduct. The defendant is entitled to a new, fair trial where he is tried and prosecuted only for the crimes charged.

II.

The central, if not only, issue in this lawsuit concerned the defendant's state of mind and his ability to form the specific intent and premeditation required to sustain his convictions. The defendant's defense was cocaine intoxication to the degree where he suffered a "toxic psychosis" which rendered his mental state incapable of forming such criminal intent. The trial court forbade the defendant from offering the defendant's proffered evidence of cocaine psychosis. That error denied the defendant due process of law, a fair trial, the right to present evidence, and the right to present a defense. It so emasculated the defendant in the presentation of his defense that a new trial must be granted.

III.

The defendant's receipt of a fair trial was rendered impossible by juror misconduct and contamination by outside sources. When it appeared that a juror had slept during the presentation of evidence, the trial court erred in failing to make any inquiry whatsoever or take any remedial action. Far more insidious and sinister, however, was the contact made with the jury by one or more apparent police officers who chanted, "Guilty, guilty" to the jury in the hallway during a recess. Again, the trial court took insufficient steps to

determine the extent and effect of the jury's contamination and seemed to have been overly concerned with "try[ing] to save the jury" rather than with preserving the defendant's right to a fair and impartial jury. For the criminal misconduct which occurred and the corruption of the jury which resulted, reversal of the defendant's convictions and sentences is compelled.

IV.

The trial court erred in failing to conduct a Richardson inquiry when the state offered highly prejudicial testimony about which the defendant had had no prior knowledge and had, in fact, been affirmatively misled to believe did not exist. The state, in order to refute the defendant's claim of cocaine intoxication, offered testimony of the defendant's mental state after his arrest. Notwithstanding the defendant's complaint that the witness had failed to disclose such evidence at his deposition and the state had never otherwise revealed the existence of such evidence, the trial court refused to afford the defendant any remedy at all. The trial court's refusal to conduct inquiry constituted error but more fundamentally, the defendant's inability to prepare for the offending testimony due to the state's failure to reveal it clearly implicated the defendant's constitutional right to due process of law. The defendant should be granted a new trial.

V.

The prosecutor's improper comments and misconduct during closing argument require reversal in and of themselves. The prosecutor referred to the defendant's "little killings", called him an "executioner", and referred to the victims as having been "assassinated." He suggested to the jury that its failure to find the defendant guilty would be tantamount to "cooperating with evil." In addition, and equally offensive to the defendant's promise of due process, was the prosecutor's exploitation of the defendant's demeanor off the witness stand. The trial court, however, denied the defendant's motion for mistrial and declared

the conduct of the prosecutor to be proper. The failure of the trial court to recognize the state's impropriety and its failure to grant the defendant relief constituted reversible error.

VI.

The trial court erred in failing to grant a mistrial upon the state's failure to substantiate the defendant's confession it described to the jury in opening statement. The defendant's alleged statement, described by the prosecutor to the jury in opening statement, attributed to the defendant the requisite criminal knowledge, premeditation, and intent to commit the homicides for which he has been sentenced to death. Subsequently, however, as the prosecutor conceded, he made "an affirmative decision not to present that evidence." The damage, however, was accomplished and irremediable. The only remedy available to the trial court was to grant the defendant's motion for mistrial. Because it did not, the defendant is entitled to a new trial.

VII.

During the defendant's presentation of his case, one of his defense witnesses did a sudden about-face, offering testimony not only inconsistent with her previous statements but establishing facts affirmatively damaging to the defendant's theory of the case. The defendant's request of the trial court that the witness be declared hostile and that he be permitted to put her prior statement before the jury should have been granted. Because the trial court denied all relief, the defendant suffered an unfairness implicating the very essence of his defense which can only be corrected by the grant of a new, fair trial.

VIII.

Despite the repeated urgings of defense counsel at the penalty advisory trial phase of this case, the Court refused to advise the jury that if the defendant was sentenced to life imprisonment on both first degree murder counts he would have to serve a minimum mandatory sentence of 50 years. In a case in which defense counsel were fighting to have

their client's life spared, it was crippling in the extreme to their being able to effectively make this argument for the jury not to hear this accurate statement of the law from the one person involved in the trial whom the jurors were told to look to to receive the law....The judge.

IX.

If there was any one central theme of the prosecution's case before the sentencing advisory jury, it was to bring home the message to the jurors that Charles Street was a bad guy with an anti-social personality whose pattern of criminal activity was getting more severe with the passage of time and that he therefore should be disposed of by having the death penalty imposed upon him, which prosecutorial actions and/or the failure of the Court to do anything to stop them denied defendant Street a fair sentencing trial.

X.

Allegedly, according to the prosecution and its witness Sgt. Calvin Bryant of the West Palm Beach Police Dept., Defendant made a spontaneous statement after being mirandized (it was not a hundred percent clear whether it was before or after the mirandizing) and that immediately thereafter Bryant asked his three questions arising out of the spontaneous statement with defendant then answering same. At the penalty trial after the defense motion to suppress these questions and answers was denied, defense counsel were prohibited from showing that defendant had refused to sign the miranda waiver card which defense wanted to argue to the jury showed defendant did not voluntarily waive his rights and answer the three questions. This deprived defense of being able to argue the voluntariness issue to the jury.

XI.

The lead prosecutor's extensive quoting from and arguing about portions of the Bible in his final argument to the sentencing advisory jury denied defendant a fair setencing trial

both because such conduct impermissibly appealed to the emotions of the jury and because it was nothing short of the involved prosecutor's telling the jury that it was found to follow the law of God (as interpreted by the said prosecutor) as well as the law of Florida.

XII.

In its zeal for the imposition of a death sentence upon Charles Street, the prosecutor got before the advisory jury over defense objections the most minute details and aspects of Street's two alleged past violent crime convictions (occurring in 1977 and 1980), that State was not relying upon to prove aggravating circumstance 5(b), plus "blurted out" and "shouted in" (in front of the jury) questions and statements about Street's having been involved in other crimes, all of which amounted to evidence of non-statutory aggravating circumstances, and with the result that the advisory jury was not given a principled, objective, or fair basis to determine the presence of that aggravating circumstance and with the further result of denying him a fair trial and the due process of law.

XIII.

With reference to these two past violent crimes State relied upon to establish the existence of statutory aggravating circumstance 5(b), and with particular reference to the 1980 past crime, the prosecution overtly sought to and succeeded in bringing before the jury that defendant had been driving in Cadillacs. This was not in rebuttal of any mitigating circumstance defense was relying upon and was the de facto asserting a forbidden non-statutory aggravating circumstance.

XIV.

Florida's death penalty law and/or its application to this case and to Charles Street violates both the federal and state constitutional protections against cruel, unusual and excessive punishments and the providing for the according of the due process of the law

because it failed to provide any guidance whatsoever to the advisory jury, the judge, or to the death penalty deciding magistrate of the first instance, the State Attorney's Office.

XV.

From the voir dire examination through the penalty phase there were repeated instances of individual prospective jurors, and thereafter the jury as a whole, being told by the prosecutor and by the Court itself that their (or its) role was only a recommending one and that the judge would be the only one who would really decide whether Charles Street would live or die. This denied Street a fair sentencing trial because it predisposed the jury to think that it would not matter that much what they recommended because the judge could straighten it out in the end.

XVI.

The imposition of the death penalty upon this defendant violates the cruel and unusual punishment and due process provisions of the federal and state constitutions because the killing by execution of members of America's near-permanent underclass consisting of ten to twenty percent of the total population of the nation. Such underclass largely consisting of economically deprived, culturally deprived, members of non-white ethnic minorities, such as defendant, coupled with defendant's having been raised in poverty, having had a deficient education and being of diminished mental capacity and under the influence of cocaine at the time of the two involved homicides, which situations probably would not have existed if defendant had not been of the underclass, constitutes punishing them in a savage and totally barbaric manner, in part, for the ills of the society they were born into without such punishment contributing one iota to the solving of those societal ills.

POINT I

THE TRIAL COURT ERRED IN PERMITTING THE STATE TO REPEATEDLY INTRODUCE PRIOR, UNRELATED, COLLATERAL EVIDENCE OF THE DEFENDANT'S MISCONDUCT, THEREBY MAKING THE PREDOMINANT THEME OF THIS PROSECUTION THE DEFENDANT'S PROPENSITY FOR CRIMINAL CONDUCT IN VIOLATION OF THE DEFENDANT'S RIGHT TO DUE PROCESS AND A FAIR TRIAL GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Throughout, and from the very beginning of, this trial the state attacked the defendant's character and exploited evidence of his alleged propensity for violence and unlawful conduct. Such evidence, and the state's portrayal of the defendant's violent character, became an unnecessary and unfair feature of this trial when, in fact, the promise of due process required its exclusion altogether. Even where the state may demonstrate the relevance of such testimony, in every instance involved here, particularly in light of the inherently inflammatory character of this prosecution, such relevance was so vastly outweighed by the prejudice of such evidence that the defendant was denied a fair trial.

The state's very first witness, a corrections officer, described a September 6, 1987 conversation in which he said to Street "...that he would be back because of the type of inmate he was within the institution." [TR 9287] Although the trial court sustained the defendant's immediate objection, it denied his motion for mistrial and permitted the officer to testify that he had said, "I am sure you are coming back" and the defendant's response, "You are wrong. I will kill the next mother-fucker that tries to bring me back to prison." [TR 9295] Pre-trial and during trial the defense sought unsuccessfully to exclude such testimony. [TR 9282]

Through the same witness, the state described the details of a disciplinary report written against Street for bringing currency into the penal institution. [TR 9302-9310] The state was permitted to introduce the defendant's statement to an officer shortly before the shootings that he was in the area of Liberty City trying to get to Boynton Beach to locate a girlfriend he had not seen in nine years because "he had just gotten out of prison." [TR

9333-35, 9361-62] In addition, the officer was permitted to describe his "brand-new shoes" and pants--"the type that they give you in prison." [TR 9362] The state even offered the spectre of drug dealing through the gratuitous comments of a fire rescue officer who expressed his fear that "...this was a bad drug deal that had gone sour and somebody comes by and machine guns us, like in the movies;..." [TR 9596] The trial court sustained the defendant's objection but denied his motion for mistrial. [TR 9598-99] The state deliberately elicited the fact that its witness worked with the "Career Criminal Section" of the Metro-Dade Police Department as well as his prior employment with the Crimes Suppression Team dealing "with matters of certain criminally-related activities that may incur with drug sales..." [TR 9727-29] Officer Michael Rossman, who also responded to the defendant prior to the shootings, went out of his way to demonstrate the defendant's criminal character:

> He came back with no past. I told Richie my first instinct was that he was lying to us, that there was no way this guy has never been arrested before just by the way he reacted. [TR 9943]

Thus, the state set the tone of its prosecution.

The trial court's most egregious error, however, involved the "DeCarlo incident"--an unrelated arrest of the defendant in 1980, eight years prior, by which the state purported to demonstrate a "pattern" of violence by Street against police officers and a rebuttal of the defendant's claim of cocaine intoxication/ psychosis. In fact, the evidence put before the jury established nothing of the kind and operated only to so profoundly contaminate this lawsuit with unfairly prejudicial evidence that the defendant's guarantee of a fair trial by an impartial jury was rendered illusory.

Prior to trial, in anticipation of DeCarlo's rebuttal testimony, the defendant moved for its exclusion. [R 869] After repeated objection and intense debate, however, the trial court allowed its presentation to the jury. [TR 13574-600, 13723-752, 13777-13890] In addition, there can be no doubt that the "DeCarlo incident" became, despite defense counsel's protestations, a central feature of the state's closing argument. [TR 14501-25]

West Palm Beach police officer Richard DeCarlo described his prior contact with the defendant on June 17, 1980. [TR 13783] He and officer Roy Blevins had responded to a domestic disturbance call. They found none, but Blevins exited his police vehicle and had contact with the defendant on the street. DeCarlo overheard the defendant say something to the effect, "I am tired of you guys harassing me" whereupon he pulled down his pants, exposed himself, and told the officers to "kiss his mother fucking ass" and "suck his dick." [TR 13786-13788] Attempting to arrest Street for disorderly conduct, a struggle ensued. Street assumed a defensive stance and hit Blevins in the head. Street tried to retrieve De Carlo's service revolver from its holster. [TR 13789-13791] A crowd gathered and Street said, "Get me a gun, get me a knife so that I can kill these mother fuckers." [TR 13791] Ultimately, other officers arrived and Street was taken into custody. During the altercation Blevins's badge was removed from his uniform. [TR 13795] In DeCarlo's opinion, Street did not appear to be under the influence of alcohol or any type of drug. [TR 13795] The state offered this evidence ostensibly to demonstrate:

> "that this particular defendant does not get along with police officers and has had similar incidents in the past when he is confronted by police officers in lawful performance of their duties, he resists, then he resists with violence, to show it was not due to cocaine in his system that led to his behavior, but something in the defendant himself." [TR 13580]

Under the circumstances here, however, the DeCarlo incident was remote. Its circumstances were not shown by the state to be sufficiently similar to the crimes charged for admission under §90.404(2) and the state's failure to establish that the defendant was not then under the influence of cocaine rendered its intended purpose nugatory. The DeCarlo incident was, therefore, irrelevant and to any extent that it was relevant, its probative value was so grossly outweighed by its prejudicial effect that its exclusion was compelled in any event. As such, the evidence was relevant solely to prove bad character or propensity. Just as the state argued, it was designed to show that when Street was confronted by police officers, he resists with violence. This is neither so remarkable nor so unusual as to assist the jury in its fact-finding mission. It is extremely effective, however, in portraying the defendant as an inherently violent character with a propensity for

misconduct who deserves extermination. Such is precisely what is not permitted under the law.

DeCarlo's contact with Street in 1980 lasted 10 or 15 minutes. DeCarlo did not note the condition of Street's eyes. No blood or urine test was performed. His pulse rate was unknown. [TR 13595-97] Even the trial court observed the extent to which the "DeCarlo incident" would become a decisively influential "feature" of this lawsuit:

> I am aware that this is extremely prejudicial to the defense. [TR 13598]
>
> * * *
>
> I am not prepared to enter a ruling on this very serious testimony. It is very important to the state to get it in. It is important to the defense to keep it out.
>
> It is extremely important evidence. Maybe if it is introduced it may be among the most telling pieces of evidence in this trial. It will be one of the most telling of pieces of evidence if it goes in. [TR 13599]
>
> * * *
>
> There is just no sense in tampering with something that is so important for the state to get in, so important for the defense to keep out. [TR 13599-13600]

The trial court instructed the jury that the evidence was admitted only as it related to the issue of intent. [TR 13777-79] It denied the defendant's motion for mistrial. [TR 13890]

The impact of the "DeCarlo incident" evidence cannot be overstated. At least one court has described uncharged misconduct

testimony as "the most prejudicial evidence imaginable against an accused." People v. Smallwood, 42 Cal.3d 415, 722 P.2d 197, 228 Cal.Rptr. 913 (1986). The evidence is so prejudicial that it can "usually sink the defense without [a] trace." Elliott, "The Young Person's Guide to Similar Fact Evidence I," 1983 Crim.L.Rev. 284. Uncharged misconduct testimony stigmatizes the defendant and can predispose the jury to convict. A National Science Foundation-sponsored study found that the type of testimony most consistently rated highly prejudicial was "evidence suggesting [other] immoral conduct by the defendant." Teitelbaum, Sutton - Barbere & Johnson, "Evaluating the prejudicial effect of

evidence: Can judges identify the impact of improper evidence on juries?" 1983 Wis.L.Rev. 1147, 1162.

It is generally accepted that evidence in criminal trials must be "strictly relevant to the particular offense charged." Williams v. New York, 337 U.S. 241 (1949). The admission of irrelevant facts that have a prejudicial tendency is fatal to a conviction, even though there was sufficient relevant evidence to sustain the verdict. Williams v. United States, 168 U.S. 382 (1897); Hall v. United States, 150 U.S. 76 (1893); United States v. Allison, 474 F.2d 286 (5th Cir. 1973).

It has been repeatedly held, as in Green v. State, 190 So.2d 42 (Fla. 2d DCA 1966), that evidence of another offense wholly independent of the case being tried must be excluded if it has no direct bearing and proof of the instant case, and where its only offense even though the offenses are similar or of a like nature.

It is fundamental that immaterial questions should be excluded on proper objection. Eatman v. State, 48 Fla. 21, 37 So. 576 (Fla. 1904). In other words, evidence on collateral issues having no bearing on the defendant's guilt should be excluded. Tully v. State, 69 Fla. 662, 68 So. 934 (Fla. 1915). Evidence is only admissible which proves, or tends to prove a fact material to the issues sought to be proved. Strickland v. State, 122 Fla. 384, 165 So. 289 (Fla. 1936).

Not only may the prosecutor not adduce every description of evidence which according to the prosecutor's theory may be supposed to elucidate the matter in dispute, but each person charged with the commission of an offense must be tried on evidence legally tending to show his guilt or innocence. Simmons v. Wainwright, 271 So.2d 464 (Fla. 1st DCA 1973); Thomas v. State, 202 So.2d 883 (Fla. 3d DCA 1967). In short, the test of admissibility is relevancy and the test of inadmissibility is lack of relevancy. Williams v. State, 110 So.2d 654 (Fla. 1959); B.A.A. v. State, 333 So.2d 552 (Fla. 3d DCA 1976).

In Ziegler v. State, 404 So.2d 861 (Fla. 1st DCA 1981), the state introduced in a second-degree prosecution evidence of a separate, subsequent incident in which the defendant had shot and killed another victim, resulting in his conviction for second-degree

murder. Despite the fact that both victims were black women and both were shot with a handgun, the trial court reversed the defendant's conviction and sentence finding that the absence of significant similarities to render the evidence logically probative of any fact in issue rendered the second offense evidence not relevant for any purpose other than to show criminal propensity. The Court noted, as this Court should here, that even if the collateral crime evidence were relevant, it became an impermissible feature of the trial in the case, citing Davis v. State, 276 So.2d 846 (Fla. 2d DCA 1973) aff'd, State v. Davis, 290 So.2d 30 (Fla. 1974).

Here, the mere fact that the DeCarlo incident involved a police officer did not establish the requisite relevance. In Bolden v. State, 543 So.2d 423 (Fla. 5th DCA 1989), the Court found that the state's introduction of evidence at trial, over the defense's objection, that he battered another police officer a year before had the purpose of showing propensity, contrary to the provisions of Section 90.404(2)(a), Florida Statutes (1987) and Williams v. State, 110 So.2d 654 (Fla. 1959). As the Court reasoned:

> The trial court stated that the testimony was admitted to establish identity or the absence of mistake or accident. These were not material issues at trial. On appeal, the state argues that the testimony was admissible to show a "pattern of conduct" by Bolden. That is exactly why the evidence was inadmissible. Reversal is required pursuant to Straight v. State, 397 So.2d 903, 908 (Fla. 1981), cert. denied 454 U.S. 1022, 102 S.Ct. 556, 70 L.Ed.2d 418 (1981). [Id. at 423]

Similarly in Edmond v. State, 521 So.2d 269 (Fla. 2d DCA 1988) the defendant was convicted of attempted sexual battery. The state introduced a collateral episode of sexual assault. Both crimes began as a social contact, force was used in each instance, including Edmond's hands around the victim's throat, and both offenses occurred in the early morning hours. Noting other significant differences, the Court held:

> Before evidence of a collateral offense can be legally admissible, "the points of similarity must have some special character or be so unusual as to point to the defendant." Drake v. State, 400 So.2d 1217, 1219 (Fla. 1981). "To minimize the risk of a wrongful conviction, the similar fact evidence must meet a strict standard of relevance. The charged and collateral offenses must be not only strikingly similar, but they must also share some

> unique characteristic or combination of characteristics which sets them apart from other offenses." Heuring v. State, 513 So.2d 122 (Fla. 1987). This requirement of striking similarity applies even when identity is not an issue. Id. at 270.

This reasoning applies here, as well.

Although acknowledging that the evidence "does carry very significant damage", the trial court denied the defendant's objection and allowed evidence of the DeCarlo incident to come before the jury. [TR 13752] The unfair prejudice of that decision was exacerbated by additional, related errors:

A.

> The Trial Court Erred and Compounded the Unfair Prejudice of the "DeCarlo Incident" by Failing to Grant the Defendant a Continuance to Investigate it.

Having only deposed DeCarlo as of May 23, 1990, the defense requested a continuance to investigate the incident and contact the various witnesses to the altercation. [TR 13753] DeCarlo was not disclosed to the defense until April 2, 1990. [TR 13754] His name, supplied after the commencement of jury selection, was one of over 100 people listed by the state as rebuttal witnesses. [TR 13758] The trial court denied the defendant's motion for continuance [TR 13761], just as it had denied the defendant's motion for continuance when the defense was first served with the 106 witness list on April 2, 1990. [TR 13765]

It is fundamental that the right to the effective assistance of counsel includes the right to a reasonable period of time for the preparation of a defense. Solomon v. State, 138 So.2d 79 (Fla. 1st DCA 1962); McCray v. State, 181 So.2d 729 (Fla. 1st DCA 1966). This Court pronounced in Christie v. State, 94 Fla. 469, 114 So. 450, 451 (Fla. 1927):

> Our country is committed to the doctrine that no matter what the crime one may be charged with, he is entitled to a fair and impartial trial by a jury of his peers. Such a trial contemplates counsel to look after his defense, compulsory attendance of witnesses, if need be, and a reasonable time, in the light of all the prevailing circumstances to investigate, properly prepare, and present his defense. When less than this is given, the spirit and purpose of the law is defeated.

The Supreme Court of the United States has similarly announced that where expedience and due process conflict, the former must give way:

> The matter of continuance is traditionally within the discretion of the trial judge, and it is not every denial of a request for more time that violates due process even if the party fails to offer evidence or is compelled to defend without counsel. [Cite omitted]. Contrariwise, a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality. [Cite omitted]. There are no mechanical tests for deciding when a denial off a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied. Ungar v. Sarafite, 376 U.S. 575, 84 S.Ct. 841, 849-850 (1964).

As Mr. Justice Ellis observed in Coker v. State, 82 Fla. 5, 89 So.22 (Fla. 1921) cited more recently in French v. State, 161 So.2d 879 (Fla. 1st DCA 1964):

> Justice requires, and it is the universal rule, observed in all courts of this country, it is most sincerely to be hoped, that reasonable time is afforded to all persons accused of crime in which to prepare for their defense. A judicial trial becomes a farce, a mere burlesque, and in serious cases a most gruesome one at that, when a person is hurried into a trial upon an indictment charging him with a high crime, without permitting him the privilege of examining the charge and time for preparing his defense. It is unnecessary to dwell upon the seriousness of such an error; it strikes at the root and base of constitutional liberties; it makes for a deprivation of liberty or life without due process of law; it destroys confidence in the institutions of free America and brings our very government into disrepute. 89 So. at 222. [Emphasis added].

Here, the failure of the trial court to exclude from the jury's consideration the enormously inflammatory "DeCarlo incident" was error in and of itself. Its further failure to afford the defendant any reasonable opportunity to prepare for and defend against such testimony raised the error to one of constitutional dimensions implicating the defendant's right to due process of law, compulsory process, and the right to a fundamentally fair trial.

B.

The Trial Court Erred in Preventing the Defendant's Presentation of Rebuttal Evidence to the DeCarlo Incident.

Although denying the defendant's motion for continuance in order to investigate the DeCarlo incident, the trial court advised the defense to send an investigator to locate rebuttal witnesses to the incident. The court promised to allow the defense to present such testimony:

> ...I will permit you to call these witnesses, number one.
>
> * * *
>
> If you tell me that you have got these witnesses, and you need to talk to them, I will give you the time to talk to your witnesses.
>
> * * *
>
> I will give you that time [to interview a witness].
>
> * * *
>
> [TR 13766-67]

At the conclusion of the state's rebuttal case, defense counsel informed the court that the presence of the defendant's crucial rebuttal witness to the DeCarlo incident, Terry Hickson, could not be obtained that day but could be on the morrow. [TR 14191] Counsel proffered that Hickson would testify that Street was severely beaten by the police officers who started the fight and that Street was not the aggressor. [TR 14195] She would further have testified that Street never attempted to take DeCarlo's firearm and that DeCarlo had used racial slurs against Street. [TR 14197]

Despite having recognized the profoundly influential nature of the DeCarlo testimony and having exercised its discretion to allow the defendant to present surrebuttal testimony concerning the DeCarlo incident, the Court excluded Hickson for reasons which can only be attributed to judicial efficiency and economy:

> The Court: That is not enough. It is too late now, ... [TR 14205-06]

Despite defense counsel's promise to have the witness brought to court the following morning, the trial court sustained the state's objection to the offer of Hickson's testimony. [TR 14207, 14215]

The following morning, defense counsel addressed the court, reporting that he had personally traveled to Palm Beach, interviewed Hickson, and Hickson had said she had seen the whole incident, that Street had never threatened any police officers, never exposed himself or pulled his pants down as DeCarlo testified, and did not strike the first blow. Counsel proffered that the police started pushing Street and started striking him. Street never tried to pull any officers' gun away and never even cussed at the officers. The policeman referred to Street as a "nasty nigger" and struck Street with an object in their hands even when Street was on the ground, handcuffed. [TR 16615] The trial court perfunctorily denied the defendant's motion for leave to bring Hickson in for a live proffer of her testimony and for deposition.

The decision of the trial court thereby denied the defendant both the right of compulsory process and the right to present evidence and a defense guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

The Declaration of Rights, Section 16, of the Florida Constitution provides that

> In all criminal prosecutions the accused shall...have the right to compulsory process for witnesses....

As early as 1936, the Supreme Court of Florida declared that the trial court was under an affirmative duty to implement an accused's right to compulsory process. State ex rel. Brown v. Dewell, 123 Fla. 785, 167 So. 687 (1936). The Court held:

> The right of a defendant in a criminal case to compulsory process for witnesses in his behalf means something more than the barren and sterile issuance of a paper by which the witness is made to appear....
>
> The constitutional right to compulsory process as guaranteed by Section 11 of the Declaration of Rights means not only the issuance and service of a subpoena by which a defense witness is made to appear, but includes the judicial enforcement of that process....
> It therefore follows that when the defendant in a criminal case claims his constitutional right to compulsory process for his witnesses, as guaranteed to him by Section 11 of the

> Declaration of Rights, the intent of the Constitution is that the trial court is under a bounden duty to enforce that right for defendant's benefit, as far as in law the same can be enforced. 167 So. at 163. (Emphasis by the court).

The Sixth Amendment of the United States Constitution states that

> In all criminal prosecutions, the accused shall enjoy the right...to have compulsory process for obtaining witnesses in his favor....

In holding that a defendant's right to compulsory process was applicable to the states, the Supreme Court of the United States declared in Washington v. State of Texas, 388 U.S. 14, 19 (1967):

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Here, the trial court failed to properly exercise its discretion and thus failed to fulfill its duty to secure the defendant's constitutional right to compulsory process. Shepard v. State, 108 So.2d 494 (1959). The defendant was denied his right to confront and refute crucial prosecution evidence and was denied his right to present a defense, a right which is fundamental to his right to compulsory process and due process of law. Washington v. State, 388 U.S. 14 (1967). Reversal is compelled.

POINT II

THE TRIAL COURT ERRED IN UNDULY RESTRICTING THE DEFENDANT'S PRESENTATION OF EVIDENCE RELATIVE TO HIS DEFENSE OF COCAINE INTOXICATION/PSYCHOSIS THEREBY DENYING HIM DUE PROCESS OF LAW, THE RIGHT TO PRESENT EVIDENCE, AND THE RIGHT TO PRESENT A DEFENSE GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The only significant issue in this trial related to the defendant's capacity to form the requisite specific intent and premeditation required to be proved by the state in order to support the defendant's convictions for the life and capital felonies with which he was charged. The defense had nothing to do with legal insanity or knowing right from wrong. [TR 13258] One of the facets of cocaine intoxication involved the phenomenon of toxic psychosis or, as specifically related to Street's use of cocaine, cocaine psychosis. Cocaine psychosis is a break with reality under the influence of the drug. [TR 13227]

To explain this phenomenon and the effect of even small amounts of cocaine under certain circumstances, and the loss of reality perception incident to the phenomenon, the defendant solicited the testimony of addictionologist Jules Trop, M.D. [TR 13163 et seq.] The trial court's unduly harsh restriction of this defense witness and its suppression of his crucial defense testimony rendered the defendant's receipt of a fair trial by a fully informed jury impossible.

Doctor Trop proffered that cocaine psychosis was an end stage of cocaine intoxication characterized by extreme paranoia and irrational fear. [TR 13420] Typically, a person suffering from cocaine psychosis would appear lucid and normal one moment and then act in a bizarre or inappropriate fashion a moment later. [TR 13421] Such behavior as a result of cocaine abuse constituted the defendant's defense. Nevertheless, the trial court sustained the state's objections to questions involving toxic psychosis as it related to Street's state of mind and the effect of the phenomenon on premeditation. [TR 13423] Trop would have testified that Street did not have the mental capacity to form the intent to rob or the premeditation to kill. [TR 13428-29]

As defense counsel explained:

> It is our position that our defense is cocaine intoxication. Cocaine psychosis is a manifestation of cocaine intoxication.
>
> * * *
>
> But this goes to the very part of our defense. If we cannot prove our defense, we might as well not be here. [TR 13257]

Ultimately, after much debate [TR 13223-13271] the Court sustained the state's objection to the cocaine psychosis testimony apparently it remained unable, semantically, to accept the distinction between legal insanity and the unrelated cocaine intoxication phenomenon. It directed the defendant to avoid reference to toxic psychosis and restricted Trop's testimony to cocaine intoxication:

> If you keep saying that cocaine psychosis or toxic psychosis is a form of cocaine intoxication and you are defending on cocaine intoxication, then keep your semantics on the words "cocaine intoxication," and stay away from "toxic psychosis" because even though you are casually dismissing it as just a semantic allusion, it is not.
>
> It carries with it substantial definitions, substantial meanings that go with those definitions or are those definitions.
>
> And worse yet, it shifted the burden of proof. It is not enough to take your word for it.
>
> * * *
>
> I do not care what Mr. Godwin and Mr. Koch say. That goes to insanity.
>
> The burden at that time is transferred to the State to prove beyond a reasonable doubt that the defendant was not insane.
>
> * * *
>
> I am going to have to sustain the State's objection. I am sustaining the State's objection.
>
> The proffer is in the record. The proper resolution of the error of the Court, if any, will be in an appellate form (sic); but that is the ruling. [TR 13271-13272]

In addition, subsequently, the defendant was forbidden from asking, even in the context of cocaine intoxication, whether Street had the mental capacity at the time of the

shootings to premeditate the homicides of Boles and Strzalkowski. [TR 13327-28] Despite the fact that Dr. Trop had been qualified as an expert addictionologist, the trial court sustained the state's objection and ruled his testimony inadmissible for lack of qualification. [TR 13328-13333] The defendant objected [TR 13333] and moved for a mistrial which the trial court denied. [TR 13342-43]

It should be noted that the first offer of evidence regarding cocaine psychosis came from the state through the testimony of Officer Eric Rossman. In fact, prosecutor Ridge directly elicited

Rossman's training "in spotting the signs of cocaine use or cocaine psychosis" in order to demonstrate through Rossman that Street was not in such a state. [TR 9931-9934] Prosecution witness officer Gregory Mentzer responded to questions on cross-examination related to cocaine psychosis. [TR 10793, 95] The prosecutor, objecting because the witness's answer was interrupted expressly stated, "I don't mind going into this area. In fact, I encourage it, Judge." [TR 10793]

In In Re Oliver, 333 U.S. 257 (1948), the Supreme Court of the United States described the right to present a defense as an essential ingredient of due process of law:

> A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense--a right to his day in court basic to our system of jurisprudence. 333 U.S. at 273.

This Court, as well, has recognized the fundamental nature of an accused's right to be heard. In Deel v. State, 131 Fla. 362, 179 So. 894, 898-899 (1973), this Court stated:

> The provisions of the Constitution that in all criminal prosecutions the accused shall have stated particular rights include an express specific command that the accused "shall be heard by himself, or counsel, or both." These specific provisions are in addition to the rights secured by the general organic requirements of due process of law and equal protection of the laws; and all such organic guarantees and commands are designed to secure an accused a fair trial in every aspect of a criminal prosecution in the name of the State. The absolute command of the Constitution that, "in all criminal prosecutions, the accused***shall be heard by himself, or counsel, or both," is more than a right secured to an accused. It is mandatory *organic rule of procedure in all criminal prosecutions in all courts* of this State.

In Alexander v. State, 288 So.2d 538 (Fla. 3rd DCA 1974), the

court expressed the rule:

> The right of a defendant to cross-examine witnesses and his right to present evidence in opposition to or in explanation of adverse evidence are essential to a fair hearing and due process of law.

The courts have long recognized that a defendant charged with a serious crime should be able to produce evidence material to his case. Wilson v. State, 220 So.2d 426, 427 (Fla. 3rd DCA 1969).

The crucial importance of the right to defend oneself is indisputable. As the court held in Horton v. State, 170 So.2d 470, 474 (Fla. 1st DCA 1964):

> "In our jurisprudence there are no rights more essential to a fair hearing or due process of law than the right to cross-examine witnesses and the right to present evidence in opposition to or in explanation of adverse evidence."

Indeed, the courts have consistently condemned any restriction of the defendant's right to present evidence relative to his or her defense. Jones v. State, 289 So.2d 725 (Fla. 1974) (psychiatric testimony in insanity case); Norman v. State, 156 So.2d 186 (Fla. 3rd DCA 1963) (character evidence).

In Fouts v. State, 374 So.2d 22 (Fla. 2d DCA 1979), the Court reversed the conviction of an escaped defendant who asserted a voluntary intoxication by LSD defense. While acknowledging that there was no reason to distinguish between intoxication from alcohol and intoxication from drugs, and recognizing that the trial court implicitly recognized the applicability of the defense asserted when he instructed the jury that appellant's voluntary drug intoxication could be considered by them in determining whether the state had proved appellant's requisite intent, it held the exclusion of an expert witness in the field of psychiatry with substantial clinical experience regarding LSD, to be error. The Court reasoned:

> Dr. Afield's testimony was proffered by the defense in support of appellant's argument that he was under the influence of LSD at the time he left prison. Appellant asserts that Dr. Afield's testimony was so important to his case that its erroneous exclusion could not be considered harmless error. He cites this Court's decision in Godorov v. State, 365 So.2d 423 (Fla. 2d DCA 1978) as establishing the rule that when a defense witness

> is precluded from testifying as to a matter which is the heart of the defendant's case, such error is harmful. We agree with appellant that the trial judge committed reversible error in refusing to allow Dr.Afield's testimony in this case. [Id. at 26]

Dr. Afield, given an hypothetical question, would have testified that the conduct of the person in the question was consistent with the reaction of someone who was undergoing LSD induced psychosis, and that he was sure of this within reasonable scientific certainty. The Court concluded, therefore:

> Clearly, Dr. Afield's testimony was crucial to the defense. While the effects of alcohol may be commonly known, the assistance of an expert would ordinarily be necessary for a jury to understand the effects of LSD. We hold that Dr. Afield's testimony was relevant and proper and should not have been excluded. [Id. at 28]

In accord, Cirack v. State, 201 So.2d 706 (Fla. 1967).

The trial court hamstrung the defendant for no good reason except its fear of the semantic implications of Dr. Trop's testimony. Any such possible implications or shifting of the burden of proof of which the trial court expressed concern could have been easily avoided by appropriate clarifying instruction. ("The defendant has not asserted the defense legal insanity. Therefore, any testimony you receive concerning the term "cocaine psychosis" should be considered by you only in description of the defendant's state of mind relative to his ability to form specific intent and premeditation.") The trial court's wholesale exclusion of such crucial testimony unfairly restricted the defendant in the presentation of his case and emasculated his defense. Reversal is compelled.

POINT III

THE DEFENDANT'S TRIAL WAS FUNDAMENTALLY CORRUPTED BY THE CONTAMINATION AND MISCONDUCT OF THE JURY, THEREBY DENYING THE DEFENDANT DUE PROCESS OF LAW BY A FAIR AND IMPARTIAL JURY AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A.

The Trial Court Did Nothing and Made No Inquiry Regarding a Sleeping Juror.

At 8:00 p.m. on July 18, 1990, after nearly four months of trial, defense counsel requested the Court to recess and to make inquiry of the jurors regarding their ability to continue, noting that their attention had "dozed off a couple of times." [TR 16551, 554] The state's representation that no jurors had slept, nodded, or dozed off was expressly repudiated by the trial court which clarified the record:

> The Court: ...Defense was making a motion for a mistrial and they cited among the defense's argument that there was an observation made by Mr. Koch that Mr. Ballance (phonetic) had closed his eyes. And the prosecutor responded that he observed the jury and that Mr. Ballance had his eyes closed. I do not want to deceive the record. Personally, I observe Mr. Balance with his eyes closed. [TR 16560]

Defense counsel renewed his request to make an inquiry of the jury expressing his belief that it was "of the utmost importance." The trial court denied the defendant's request. That was error. A new trial may be granted on the ground that a juror slept during the taking of testimony or was in other ways inattentive during the trial, if prejudice results. While it is incumbent on the party who discovers or has knowledge of the fact of a juror's inattentiveness to call it to the court's attention at the time, Cf., United States v. Curry, 471 F2d 419, 422 (5th Cir. 1973), here defense counsel did so. While it is the complaining party's burden to demonstrate prejudice, here the trial court precluded such a showing by failing to conduct the requested inquiry.

Trial court's are virtually immune from criticism when they, in the exercise of sound discretion, substitute an alternate juror for a regular juror who has become unable or

disqualified to perform his duties. United States v. Dominguez, 615 F2d 1093, 1095 (5th Cir. 1980). Specifically, judges are given authority to replace regular jurors observed sleeping during a trial. United States v. Cohen, 530 F2d 43 (5th Cir. 1976) cert. denied 429 U.S. 855, 97 S.Ct. 149, 50 L.Ed.2d. 130. At least one trial court avoided criticism when it dismissed a juror observed sleeping even in the absence of the consent of the defendant. Orosz v. State, 389 So.2d 1199 (Fla. 1st DCA 1980). This is due to the recognition of the trial court's paramount duty:

> A trial court has the duty to insure that a defendant receives a fair and impartial trial and that jurors are attentive to the evidence presented. The conduct of jurors is the responsibility of the Court and the Court is allowed discretion in dealing with any problems that arise.

389 So.2d at 1200; Walker v. State, 330 So.2d 110 (Fla. 3d DCA 1976). Thus, the circumstances here are different from those in Mirabel v. State, 182 So.2d 289 (Fla. 2d DCA 1986) where, after determining that a juror appeared to be sleeping while the Court was instructing the jury, the Court went back and repeated the instructions given during the period while the juror's eyes were closed.

Here, the trial court foreclosed the possibility of any remedial action by refusing to make inquiry. This prevented the trial court from conscientiously exercising its discretion and, therefore, constituted an abuse of discretion for which reversal is appropriate.

B.

The Process Which Has Brought Charles Street to the Death Penalty Was Fundamentally Corrupted by the Contamination of the Jury by Improper Outside Influence.

After the lunch break on July 17, 1990, during the jury's receipt of the government's rebuttal evidence, the trial court made a startling announcement. A female alternate juror had appeared so visibly upset that the bailiff asked her what was wrong when she refused to answer, a "regular" juror standing nearby explained that a few minutes earlier a

policeman walked passed and said, "Guilty." According to the bailiff, three jurors were involved. [TR 13956]

Upon inquiry by the Court, juror Coletta Brown explained that two men, passing the jury prior to entering the Metro-Dade Corrections Room on the third floor of the Justice Building, said "Guilty, guilty, is guilty." Although the men were in plain clothes, they carried walkie-talkies. [TR 13958-60] Contrary to the Court's instruction to report any such incident, Brown "didn't want to start anything." [TR 13961] All the jurors were present and approximately fourteen or fifteen inches away from the men. [TR 13962] The men were looking at the jurors, who were wearing their juror badges. [TR 13963] Brown expressed the belief that the comment was intentionally directed to her as a juror. [TR 13966]

Juror David Perez confirmed Brown's account and Brown's impression that only one of the two men actually spoke. [TR 13968] Although he did not see the men leave, he believed they approached an office "related to policemen." [TR 13969] (Metro-Dade Liaison Room 310) [TR 14021] Perez did not report the incident because he did not give it much importance. [TR 13973] Juror Jerry Waver did not hear the comment directly but noticed the look on some of the other jurors' faces and was told about it by juror Brown who he described as nervous. [TR 13979] Juror Lloyd Harrison initially denied the occurrence of any lunch time incident but ultimately admitted having heard someone say, "Guilty." [TR 13982-83] He discussed the matter with juror Perez.

The bailiff explained that juror Waver identified the speaker as a police officer. [TR 13987]

When asked for a show of hands, none of the other jurors acknowledged any incident. [TR 13989] Defense counsel expressly requested that the trial court make more specific inquiry of the jurors to determine the extent and effect of their contamination. This, the defense argued, was particularly important since even the four jurors who ultimately acknowledged the contact were so nervous and upset that they defied the trial court's daily instruction to reveal such an occurrence. [TR 13991-92] The trial court

ultimately declined to do so, expressing not only its outrage but the erroneous priority that "the idea is to try to save the jury, and in addition, to get to the root of the problem and see if there is damage." [TR 13997]

In Ferrante v. State, 524 So.2d 742 (Fla. 4th DCA 1988) the Court reversed the defendant's conviction for the failure of the trial court to poll jurors regarding their exposure to news articles. The Court in Kruz v. State, 483 So.2d 1383 (Fla. 4th DCA 1986) found reversible error in the trial court's refusal to poll the jury to determine their exposure to two prejudicial media reports. Polling contemplates individual inquiry.

Instead, the Court here merely instructed the jury:

> There may have been an improper attempt by a person, at the present time unknown to the Court to make a comment to the jury about a possible verdict in this case.
>
> * * *
>
> If any of you have been exposed directly or indirectly to such a comment, you are instructed that it is an improper comment and unethical and illegal, and you are instructed to totally and completely disregard that comment.
>
> * * *
>
> I also add that if you should learn about it, and I doubt that you will, but if you do from whatever source, you are to report it immediately to the bailiff; and although those jurors who did not report it to the bailiff immediately were well-intentioned, I want you to know that the Court is not pleased with your failure to report these matters. [TR 14013-14]

The Court took Brown and Perez to the scene of the incident and they were questioned further. [TR 14015-14029]

Ultimately, the Court asked jurors Perez, Brown, Harrison, and Waver whether the incident would affect their ability to be fair and impartial. Each of the jurors answered in the negative. [TR 14039-42] The defendant moved for a mistrial which the trial court denied. [TR 14043]

One of the most fundamental precepts of criminal law is that a defendant in a criminal case is entitled to be tried by jurors who "determine the facts submitted to them solely on the evidence offered in open court, unbiased and uninfluenced by anything they

may have seen or heard outside of the actual trial of the case". Mattox v. United States, 146 U.S. 140 (1892); Briggs v. United States, 221 F.2d 636, 638 (6th Cir. 1955).

Where a jury is exposed to impermissible extrajudicial influence, the rule to be applied in such a case is that stated by the court in United States v. Marx, 485 F.2d 1179, 1184 (10th Cir. 1973):

> Generally, the law in this area is settled; if there is the slightest possibility that harm could have resulted from the jury's viewing of unadmitted evidence, then reversal is mandatory. Dallago v. United States, 138 U.S. App. D.C. 276, 427 F.2d 546 (D.C. Cir. 1969); United States v. Adams, 385 F.2d 548 (2d Cir. 1967).

In United States v. Polizzi, 500 F.2d 856 (9th Cir. 1974), the possibility of juror bias against the defendant arose from newspaper publicity about the case printed during trial. The court found:

> When the possibility of prejudice from publicity arises during trial, the trial court has "the affirmative duty ... to take positive action to ascertain the existence of improper influences on the jurors' deliberative qualifications and to take whatever steps are necessary to diminish or eradicate such improprieties." Silverthorne v. United States, 400 F.2d 627, 643 (9th Cir. 1978) [other citations omitted]. The better practice, if there is a clear chance of prejudice, is for the court to interrogate each juror in camera about the possibly prejudicial publicity.

Here, the trial court suffered the same obligation. Its refusal to interrogate each juror about the possibly prejudicial contact by apparent law enforcement officers chanting "Guilty" to them constituted error. Because the trial court failed to take positive action to ascertain the existence of improper influences on the jurors' deliberative qualifications and to take whatever steps were necessary to diminish or eradicate such improprieties, the trial of this defendant suffered such a fundamental corruption that its result cannot be permitted to stand.

The circumstances here are not unlike those presented in Russ v. State, 95 So.2d 594 (Fla. 1957) where a juror stated, in the presence of the other jurors, that he could never accept a recommendation of mercy because he had personal knowledge that the defendant had severely beaten and threatened to kill the victim on numerous occasions. Here, whether the offending persons were law enforcement officers or not, they appeared

to be from the jurors' point-of-view and the proclamation of "Guilty" they heard could most surely be considered an expression of personal knowledge on the part of the speaker. In Johnson v. State, 27 Fla. 245, 9 So.208 (1891), the influence upon the jury was not nearly so sinister as that here where it involved the jurors' receipt of instructions from their own perusal of law books rather than exclusively from the trial judge. Reversal was nonetheless compelled as it is here.

This Court's comprehensive analysis of the trial court's responsibility regarding unauthorized materials in a jury room during deliberations in State v. Hamilton, 16 FLW S129 (Fla. January 17, 1991) is instructive. In adopting the test formulated by the Fifth and Eleventh Circuit Court of Appeals, this Court noted not only that jurors are allowed to testify about "overt acts which might have prejudicially affected the jury in reaching their own verdict" [Section 90.607(2)(b), Fla.Stat.Ann. (1987) and other citations omitted] but held that an evidentiary hearing is necessary unless an unreasonable allegation of juror misconduct is made. [Id. at S131, S132]

Here, there can be no claim that the allegation of improper jury contamination is unreasonable. Here, contrary to Hamilton and all of the cases cited therein, the corruption of the jury process was deliberate, sinister, and criminal. An impartial jury, selected and kept free from all outside or improper influences, is necessary to a fair and impartial trial. Owens v. State, 68 Fla.154, 67 So.39 (1914)

Citing Paz v. United States, 462 F.2d 740, 745 (5th Cir. 1972) this Court concluded that:

> [D]efendants are entitled to a new trial unless it can be said that there is no reasonable possibility that the [unauthorized] books affected the verdict. [Id. at S131]

The burden of proof is the state's under the standard of State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). Here the state did not, and could not, meet its burden of proof where the trial court steadfastly refused to make individual inquiry of any but four of the jurors exposed to the insidious comment involved here.

The defense renewed its motion for mistrial the following day in further consideration of the fact that this was a police officer homicide case involving inherently prejudicial charges, the jury was exposed to the influence of uniformed police officers entering and sitting in on the trial on a daily basis for the preceding sixteen weeks of trial, and the influence upon the jury was imposed by law enforcement officers thereby creating sufficient intimidation of the jurors to cause their silence about the incident. That intimidation, notwithstanding the jury's denial, could have had no other effect but to have unfairly and perversely effected the jury's verdict. [TR 16279-83, 16288-90] The trial court denied the defendant's motion. [TR 16296] Alternatively, the defense moved to excuse juror Perez and alternate jurors Waver and Brown. The trial court denied that request. [TR 16306] As a final alternative, the defense renewed its previously filed motion to exclude uniformed police officers from the courtroom. [TR 16306] The trial court reserved ruling. [TR 16308]

At the very beginning of trial, the defense complained of the presence of uniformed officers sitting as spectators in the courtroom, reminding the trial court that in jury selection the jurors had said they would feel pressured by the presence of uniformed officers in the courtroom. [TR 9835] The trial court denied all relief and refused to order off-duty officers to spectate in plain clothes. [TR 9836] Shortly thereafter, when additional uniformed police officers entered the courtroom and the jurors appeared to be attentive to them, the defendant renewed its objection. [TR 9858-60] The defense asked the Court to direct the officers not to sit in groups and/or that they sit outside the direct line of view of the jury. [TR 9860] The trial court took no action, deferring to the discretion of the director of the Public Safety Department. [TR 9865-68] Later, the defense complained of audible responses from the spectators section in which the relatives of the victims were sitting including a uniformed Metro police officer. [TR 10169] The Court acknowledged the propriety of the defendant's complaint and gave a general admonition to the entire spectator section of the courtroom. [TR 10172] The Court denied the defendant's motion for mistrial. [TR 10176]

Here, the contamination and corruption of the jury by improper influences was, and remained, a substantial issue throughout the trial. The fact that law enforcement officers were victims heightened the trial court's responsibility to insure a jury verdict uninfluenced by factors outside the evidentiary process. In light of the sustained intimidation of the jury throughout this trial by law enforcement community, the deliberate, intentional, and criminal molestation of the jury by law enforcement officers demanded more action than the trial court took. For the trial court's failure to conduct individual inquiry and its refusal to grant a mistrial, Charles Street should receive a new, fair trial.

POINT IV

THE TRIAL COURT ERRED IN FAILING TO TAKE ANY REMEDIAL ACTION AND IN FAILING TO GRANT A RICHARDSON HEARING UPON THE STATE'S OFFER OF HIGHLY PREJUDICIAL TESTIMONY ABOUT WHICH THE DEFENDANT HAD NO PRIOR KNOWLEDGE AND HAD, IN FACT, BEEN AFFIRMATIVELY MISLED TO BELIEVE DID NOT EXIST, THEREBY DENYING THE DEFENDANT DUE PROCESS OF LAW AND A FAIR TRIAL GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The state recalled officer Steven Anderson to testify that, after the defendant's arrest, he had gone to the Broward County Jail where he saw the defendant. Anderson testified that the defendant stood, looked out through a cell door, extended his arm behind his back, glared at Anderson, and exhibited a smirk. [TR 10489] He did not appear frightened in any way of police officer Anderson. [TR 10490]

Prior to the admission of such testimony, the defendant protested that, despite having deposed Anderson, the defense remained utterly unaware of such testimony. [TR 10470-10473] The defendant moved to exclude the testimony, which motion the Court denied. The defendant moved for a Richardson inquiry which the Court also denied. The Court also refused the defendant's request for a proffer. [TR 10473] The defense explained that after taking Anderson's deposition, in which he mentioned nothing of such testimony, defense counsel asked him whether he did anything else in the case and he

responded, "I can't think of anything." Then he remembered another, unrelated matter, but mentioned nothing whatsoever about his contact with or observations of the defendant in the holding cell. [TR 10483-85]

The trial court correctly observed:

> It is obviously (sic) from this deposition that he has been misled. The defense was misled. [TR 10485]

Despite the defendant's complaint that such evidence of the defendant's conduct came as a complete surprise and, as an expression of an attitude of hostility towards a police officer constituted a non-verbal communication which had never been disclosed by the state in discovery, the trial court nevertheless overruled the defense's objection. [TR 10484-88] The trial court also denied the defendant's motion for mistrial. [TR 10488]

In light of the state's discovery violation, following defense counsel's objection, it was incumbent upon the trial court to conduct a full inquiry into the surrounding circumstances, including determinations as to whether the violation was inadvertent or willful, whether it was trivial or substantial, "and most importantly, what effect, if any, it had upon the defendant's ability to prepare for trial." Wilcox v. State, 367 So.2d 1020, 1022 (Fla. 1979); Accord, Richardson v. State, 246 So.2d 771 (Fla. 1971); Cumbie v. State, 345 So.2d 1061 (Fla. 1977); Kilpatrick v. State, 376 So.2d 386 (Fla. 1979). If the court finds that no prejudice has accrued to the defendant, the circumstances establishing non-prejudice must affirmatively appear on the face of the record. Richardson, supra, at 775. The burden rests upon the prosecution to demonstrate before the trial court the absence of prejudice. Cumbie, supra, at 1062. While the trial court has discretion to determine whether noncompliance with the discovery rule results in harm or prejudice to an accused, that discretion can be properly exercised only after the court has made this inquiry. Wilcox, supra, at 1022. Failure of the trial court to conduct the prescribed inquiry constitutes reversible error as a matter of law; the error cannot be cured by subsequent appellate inquiry. Cumbie, supra, at 1062; Smith v. State, 372 So.2d 86 (Fla. 1979).

The testimony of which the defendant complained and of which he had no prior notice was crucial--it tended to directly contradict his claim of paranoia and police officer

phobia while supporting the state's theory that the shootings were incited by the defendant's own hostility towards law enforcement. At the very least, the trial court's refusal to conduct a Richardson inquiry constituted error. More fundamentally, the defendant's inability to prepare for such testimony due to the state's failure to reveal it implicates the defendant's constitutional right to due process and a fair trial.

POINT V

THE TRIAL COURT ERRED IN FAILING TO GRANT THE DEFENDANT'S MOTION FOR MISTRIAL AFTER THE PROSECUTOR IMPROPERLY COMMENTED DURING CLOSING ARGUMENT ON THE DEFENDANT'S DEMEANOR OFF THE WITNESS STAND, THEREBY DENYING THE DEFENDANT A FAIR TRIAL AND DUE PROCESS OF LAW GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

During his closing argument, the prosecutor told the jury that to return a verdict for anything less than first degree murder would be tantamount to "cooperating with" evil. [TR 14537] He referred to Street's "little killings" [TR 14390], called him an executioner [TR 14488], and referred to the victims as having been "assassinated." [TR 14473] Equally offensive, however, was the prosecutor's exploitation of the defendant's demeanor when he turned to Street, walked over to him, pointed at him, and commented on his grin, coming at a time when the prosecutor was describing to the jury two homicides the defendant committed. [TR 14387; 14561-62]

Comments on a defendant's demeanor off the witness stand are clearly improper. Pope v. Wainwright, 496 So.2d 798 (Fla. 1986), cert. denied, 480 U.S. 951, 107 S.Ct. 1613, 94 L.Ed.2d 801, (error not subject to review absent objection and motion for mistrial); see e.g., U.S. v. Pearson, 746 F.2d 787 (11th Cir. 1984), (defendant's behavior off witness stand is not evidence subject to comment by prosecutor during closing argument); United States v. Wright, 489 F.2d 1181 (D.C. Cir. 1973), (improper for prosecutor to comment on defendant's courtroom behavior off witness stand); Williams v.

State, 550 So.2d 28 (Fla. 3rd DCA 1989), (prosecutor's final argument commenting on defendant's laughing and snickering during trial was improper but harmless error).

The state's appeal to the jury's prejudice and indignation at the defendant's apparent lack of concern and remorse was improper. In effect, the prosecutor exploited non-record evidence of the lack of remorse during trial. This Court has repeatedly stated that lack of remorse has no place in the consideration by a capital jury. Robinson v. State, 520 So.2d 1, 6 (Fla. 1988); Pope v. State, 441 So.2d 1073, 1078 (Fla. 1983); McCampbell v. State, 421 So.2d 1072, 1075 (Fla. 1982). This Court emphatically held in Pope that lack of remorse should have no place in the consideration of aggravating factors. Id. at 1078. Most recently, in Jones v. State, 15 FLW S469, 471 (Fla. Sept. 13, 1990) this Court found error in the prosecutor's impermissible question to the jury, "Did you see any remorse?" Such is precisely the same as the prosecutor's comment here asking the jury to infer from the defendant's apparent "grin" a similar lack of remorse.

Here, there is no way for the State to establish that the prosecutor's offending comment, especially in light of his theme of character assassination, did not contribute to the jury's verdict. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

The trial court denied the defendant's motion for mistrial and clearly erred when it declared the conduct of the prosecutor to have constituted "proper comment." [TR 14563]

The conduct of the prosecutor during closing argument was improper and calculated to deprive the defendant of the fair trial to which he was entitled. The failure of the trial court to recognize that impropriety and its failure to grant the defendant relief constituted reversible error.

POINT VI

THE TRIAL COURT ERRED IN FAILING TO GRANT A MISTRIAL UPON THE STATE'S FAILURE TO SUBSTANTIATE THE DEFENDANT'S CONFESSION IT DESCRIBED TO THE JURY IN OPENING STATEMENT, THEREBY DENYING THE DEFENDANT A FAIR TRIAL, DUE PROCESS OF LAW, AND THE RIGHT OF CROSS-EXAMINATION GUARANTEED BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In opening statement, the state described to the jury a confession purportedly made by the defendant immediately following the shootings. As the prosecutor revealed:

> What I am going to try to do is to explain to you what might have happened, because I doubt very much if we will ever know what did happen.
>
> The defendant himself at some point tells the police that he took the gun from one officer, knowing that the other one was still armed and knew that that was the one he was going to have to shoot first. [TR 9166-67]

The state never introduced this statement into evidence. As the prosecutor conceded, "As the case was going on, I made it an affirmative decision not to present that evidence." [TR 14259] The state's only position in opposition to the defendant's motion for mistrial was that the error was harmless because the proof, and even the defendant himself, established that Street had committed the shootings. [TR 14261-72] The trial court, although chastising the state for the dangerousness of its tactics [TR 14261, 70] apparently agreed. [TR 14272]

Both the state and the trial court were mistaken. A prosecutor may not even insinuate impeaching facts, the proof of which is non-existant. Smith v. State, 414 So.2d 7 (Fla. 3d DCA 1982). The confession offered to the jury by the prosecutor directly refuted his only defense. It offered extra-judicial knowledge of the defendant's admission that he took a gun from one officer knowing that the other officer was armed and thereby knew, i.e., had a premeditated intent, to shoot the second officer first. In fact, there existed no direct evidence of the defendant's state of mind which remained the most important, if not only, issue in this case. Evidence that the defendant admitted his state of mind would have

been the most compelling evidence imaginable. Instead, for what the state lacked in evidence, it made up in unsubstantiated argument to the jury.

POINT VII

THE TRIAL COURT ERRED IN FAILING TO DECLARE DEFENSE WITNESS ANNMARIE RUCCO HOSTILE AND IN FAILING TO PERMIT THE DEFENDANT TO IMPEACH HER BY HER PRIOR INCONSISTENT STATEMENT, THEREBY DENYING THE DEFENDANT DUE PROCESS OF LAW AND A FAIR TRIAL GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Throughout the defense case, the defendant sought to establish his symptoms of intoxication immediately prior to the shootings of which he was accused. In prior testimony, defense witness AnnMarie Rucco described the defendant as "staggering around as if he was drunk", consistent with the defense theory of intoxication. At trial, however, her testimony was substantially different and described the defendant's conduct as normal, thereby not only disappointing the defendant but presenting evidence to the jury directly favorable to the state. The defendant's request of the trial court that the witness be declared hostile and that he be permitted to put her prior statement before the jury should have been granted. Because it was not, the defendant suffered an unfairness, implicating the very essence of his defense, which can only be corrected by the grant of a new, fair trial.

In a statement made to the police two days after the shootings, Rucco testified:

> Q: And what happened?
>
> A: A black male was running along the railroad tracks.
>
> A: What else was the black male doing on the railroad tracks?
>
> A: He was staggering around as if he was drunk, and he was waving his arms around.
>
> Q: You previously told me he was stumbling and staggering on the railroad tracks because this was possibly due to the railroad ties, and he couldn't run because of them. Would that be possible also?
>
> A: Yes. [TR 12616-17]

In her subsequent deposition testimony on June 28, 1989 to the defense, she adopted her prior police statement as true and accurate. [TR 12618, 12632]

At trial, Rucco testified as follows:

> Q: Based on your observations of the person, from what you saw of him as he is running, stopping, pausing, whatever condition you saw with respect to his balance, can you say if he looked to you like he might have been drunk or not?
>
> A: No.
>
> Q: You can't say?
>
> A: (Witness shakes head.) [TR 12600]
>
> * * *
>
> Q: When he stopped and looked around, did you ever see him sway, or lose his balance, or stagger at all?
>
> A: No. [TR 12606-07]
>
> * * *
>
> Q: He stood up straight and he looked fairly stable?
>
> A: Yes.
>
> Q: He did not look like he was having any problems as he kept his balance as he stood on the railroad tracks?
>
> A: No. [TR 12607]
>
> * * *
>
> Q: Did you ever see him stumble?
>
> A: No.
>
> Q: Did you ever see him pause?
>
> A: No.
>
> * * *
>
> Q: He is running, and he is running in a perfectly normal manner, isn't he?
>
> A: Yes. [TR 12611]
>
> * * *
>
> Q: Absolutely nothing wrong with the manner in which he is running, is that right?

A: Right. [TR 12612]

As a result of his own witness's ambush and the inconsistency of her testimony, the defendant asked the trial court to declare her adverse or a court witness [TR 12615] and allow Rucco's prior statement to be brought out in front of the jury. [TR 12632] The defendant reduced his request to writing and later at trial renewed his request. [TR 12821-12835] The trial court consistently denied the defendant's motions.

It should be noted that effective October 1, 1990, approximately three months after the issue arose in this case, Florida Statute Section 90.608 was amended radically to permit any party, including the party calling the witness, to attack that witness's credibility by the introduction of inconsistent statements or otherwise. Laws 1990, c.90-174, Section 1, eff. Oct. 1, 1990. Even under the law as it existed at the time, the trial court nevertheless erred.

A trial court may be granted substantial discretion regarding whether to call a witness as a court's witness on the motion of a party on the ground that the witness has become uncooperative, because the moving party does not wish to vouch for the credibility of the witness, or because the party previously calling the witness has been surprised at trial by the testimony given. McCloud v. State, 335 So.2d 257 (Fla. 1976); Enmund v. State, 399 So.2d 1362 (Fla. 1981), Lowe v. State, 130 Fla. 835, 178 So.872 (1937). At least prior to October 1, 1990, a witness could not be impeached by prior inconsistent statements merely because the witness failed to provide the testimony of the party calling him desired or expected. However, it has long been the law that if the witness becomes adverse by providing testimony that is actually harmful to the interests of the party calling him, then impeachment by prior inconsistent statements is permissible. Brumbley v. State, 453 So.2d 381 (Fla. 1984) and cases cited therein.

Here, there can be no serious doubt that Rucco's testimony was not only undesirable, it was actually harmful, if not devastating, to the defendant's case. Allowing the defendant to impeach Rucco with her prior inconsistent statements would, at least, have operated to ameliorate the damage done. Without that opportunity, the defense was

actually perceived by this jury as having presented among the most devastating evidence of the defendant's lack of intoxication and, therefore, criminal state of mind. Such unfairness compels the grant of a new, fair trial.

POINT VIII

THE COURT ERRED AT THE PENALTY PHASE OF THE TRIAL IN REFUSING THE REPEATED REQUESTS OF DEFENSE COUNSEL TO CHARGE THE JURY THAT SHOULD IT IMPOSE TWO LIFE SENTENCES DEFENDANT COULD SERVE A MANDATORY LIFE SENTENCE OF 50 YEARS.

Whether the court below should have charged the jury that if it voted to recommend the imposition of two life sentences upon him----in lieu of recommending the death penalty----Defendant Charles Street could be required to serve a mandatory life sentence of 50 years was one of the most bitterly debated issues at the penalty phase of this capital punishment case. Defense was insistent that the jurors needed to be told by the court that the 50 year minimum mandatory sentence was a possibility and the prosecutor was equally insistent that there was no necessity under the law for the court to so instruct the jury (T-8/6/90-69,70).

As will be discussed at many points in the penalty phase arguments of this brief, this contention on the part of the prosecutor was one of very many instances where the lead prosecutor in this case demeaned the role of the advisory jury to both the jury and the court in contravention of both the meaning and the spirit of Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2644, 86 L.Ed 2d 231 (1985).

To be sure the lead prosecutor came up with several arguments to support its position in the matter but they were all, succinctly stated, disingenuous in the extreme. The first such argument was that the jury should not be so charged because, "(I)t is not part of the mitigating circumstances, either statutory or non-statutory" (T-8/6/90-72,73). State then immediately thereafter argued since it would be the court----and not the jury----that would actually decide between death and life for Defendant, the fact that Defendant could be sentenced to consecutive life sentences----and thus to a 50 year mandatory sentence----the jury had no need to have this information. Said the prosecutor in this regard:

"The sentence portion is strictly up to the court." (T-8/6/90-75)

When one considers the thrust of these prosecutorial arguments, it is simply that the lead prosecutor----subjectively although very possibly unintentionally----demeans the important role of the advisory jury to himself. This truth bubbled to the surface time and time again during the sentencing phase of this case.

The recommendation of the advisory jury is----or it should be----a very vital, important part of the death-life sentencing process, and the trial court is required to give great deference to the jury's recommendation, especially if the jury recommends life.

It therefore logically follows a priori that in order to render the very important decision which is to be given great deference by the judge, the advisory jury needs to have presented to it all relevant matters but non unfairly prejudicial. Fla.Stat. 921.141.

What we are talking about here is literally a life or death recommendation and what could have been more relevant in Defense counsel's armament than having the Court tell the jury that it is the law that if it voted to recommend two life sentences, the court could impose the two mandatory 25 years consecutively with the result that the Defendant could not be released from prison for at least 50 years and thus the death penalty should not be imposed.

The proof of the pudding here as to the extreme importance of this issue, etc., is that the lead prosecutor in fact argued to the jury during his closing argument:

> "The defense attorney is going to say to you: Put him back in prison. So that perhaps twenty-five years from now, should any of us still be alive, we can read about what his life has been like once he got out." (T-8/9/90-30)

During all of the continuing argument on this matter, Defense finally did manage to eke out a minor victory in being allowed to argue the possible consecutive 50 year mandatory sentence but even here it had to do so under the court's constraint that it not be overdone.

But this did not by a long shot balance the matter out for the jury was instructed that the alternative to imposing death would be a life sentence with a mandatory 25 years thereof required to be served while there was no instruction of law to the jury that a mandatory 50 year sentence could be imposed. To be sure the jury was instructed about the

fact that Defendant was being charged with two separate counts of first degree murder but that clearly did not suffice to inform the jurors that such could result in Defendant's receiving life with 50 years mandatory. And, in this regard, the law is clear that a lawyer's argument to a jury as to what the law is not as persuasive as the act of the judge in telling that jury what the law is Taylor v. Kentucky, 436 U.S. 478, 98 S.Ct. 1930, 56 L.Ed 2d 468 (1978).

POINT IX

THE DEFENDANT WAS DENIED A FAIR SENTENCING TRIAL BY THE DELIBERATE ACTIONS OF THE PROSECUTOR IN TRYING TO CONVINCE THE JURORS TO VOTE DEATH SO THAT DEFENDANT WOULD BE INCAPACITATED FROM BEING ABLE TO COMMIT ANY OTHER CRIMES.

There can be no question about it, the lead prosecutor in this case worked long and hard to predispose the jurors to vote death for the purpose of "incapacitating" Defendant from being able to commit any further crimes.

During cross-examination of the Defense's social worker, Ms. Alonso, the lead prosecutor admitted that he was attempting to elicit testimony from her that Defendant had eight prior criminal convictions, when the only ones he was contending were applicable under the involved AC, to-wit: 921.141(5)(b) were the 1977 and 1980 convictions (T-8/7/90-20). Further, the said prosecutor thereafter asked Alonso whether she interviewed Defendant with respect to his criminal history, which question she never answered because a Defense objection to it was sustained but, of course, the question itself made the point the lead prosecutor wanted made (T-8/7/90-225,227). And despite the sustained objection, the said prosecutor again included in a question to Alonso a reference to the general past crimes of Defendant (T-8/7/90-227).

Then during his cross-examination of Defense's neuropsychologist witness, Dr. Eisenstein, the following occurred:

> "Q. (By Mr. Laeser) From every scientific measurement that you are aware of, he will continue to make impaired decisions in the future, is that true?
> Mr. Godwin: I am going to object.
> The Court: Overruled.
> The Witness: The only way to scientifically prove that is to re-evaluate and reassess an individual at another given point in time.
> By Mr. Laeser:

Q. Doctor, based upon your testing, isn't it your expectation that five years, ten years, 25 years from now, the defendant is still going to make impaired decisions?
A. Yes, it is.
Q. In fact, you are aware of three or four prior episodes in his life, based upon your conversations with the defendant, is that true?
A. That is correct.
Q. It is clear from your discussions with him and your testing that he did not have the ability to learn from the error of those earlier decisions?
A. That is correct.
Q. In fact, as a result of that, he continued to make bad choices?
A. That is correct.
Q. In all likelihood, he will continue for the rest of his life not to learn how not to make bad choices?
Mr. Godwin: Objection.
The Court: Overruled." (T-8/8/90-78[2])

Defense counsel objected that State was attempting to inject "a future dangerousness" issue into the case when Defense had not put on any evidence that Defendant could be rehabilitated, and then the following occurred:

"Mr. Laeser: Certainly with experience, I am aware that I am not allowed to put on that kind of testimony, but he willfully and deliberately and I must say with the Court's blessing, is allowed to go into questions regarding future dangerousness.
The Court: The Court has not given any blessing involved in this.
Mr. Godwin: The Court would not give us a sidebar when we asked for one in the middle of this highly prejudicial and improper line of questioning.
The Court: Your motion is denied. You have made your record." (T-8/8/90-79)

Thereafter Defense moved for a mistrial because of State's having injected the "future dangerousness" argument into the case and, in this regard, Defense further argued that its having raised Defendant's brain dysfunction as a non-statutory MC did not open the door to the "future dangerousness" issue. The motion for a mistrial was denied (T-8/8/90-92,93).

During his penalty phase closing argument the lead prosecutor argued, in pertinent part, that the society has a right to defend itself (T-8/9/90-24); that Defendant would be in prison for 25 years (T-8/9/90); that Defendant had already had his need taken care of (by society) while in jail and should this be allowed to continue (T-8/9/90-26); that Defendant didn't learn by his mistakes (T-8/9/90-29,30); that in between the 1980 criminal conviction and the involved 1988 homicides Defendant was out of jail for an entire 10 days before he took lives (T-8/9/90-29,30); that "this person has always dealt with hurting other people"

(T-8/9/90-32); and that Defense wants "you" to believe that the fact that he won't get better is a reason to justify not imposing the death penalty but that "I submit to you, if anything, it is a reason to say to yourselves..." (at this point a defense objection was sustained and asked to make a motion which the court deferred until "the appropriate time") (T-8/9/90-40,41).

Concededly, these prosecutorial questions and arguments standing alone might not make the case that the lead prosecutor was inviting and indeed, urging the jurors to vote death so that Defendant would be permanently eliminated and thus not available to commit any more crimes, but taken together, along with the whole tenor of the prosecution in the penalty phase, there just can be no question but that the lead prosecutor was attempting to guide the jurors' thinking in this regard.

There is no grant of authority in the Constitution of the State of Florida authorizing the legislature to provide for any crimes to be punishable by death for the purpose of incapacitating a person charged with capital murder so that he can't do it again.

Further, there is nothing in the statutory laws of this State providing that a person can be given the death penalty for capital murder as an incapacitating penalty. And, in addition to the absence of any state constitutional or statutory grant of authority for executions to be carried out to incapacitate the offender, coupled with the fact that historically the death penalty is considered to be appropriate for only two purposes, as punishment for the offender and as a deterrent to others (see Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed 2d 859, reh.den. 429 U.S. 875, 97 S.Ct. 198, 50 L.Ed 2d 158 (1976), it was unfair in the extreme for State to have made this argument, and the fact that such argument was allowed to be made denied him both the due process of law under the Fifth and Fourteenth Amendments to the U.S. Constitution and under Art. I, Sect. 9, Constitution of the State of Florida.

In no sense can capital punishment be justified as necessary to isolate the offender from society. People v. Anderson, 6 Cal. 3d 628, 100 Cal. Rptr. 152, 493 P.2d 880,896 (1972) cert. den., 406 U.S. 958, 92 S.Ct. 2060, 32 L.Ed 2d 344.

POINT X

THE COURT ERRED IN THE PENALTY PHASE TRIAL BEFORE THE ADVISORY JURY IN RULING THAT THE PROSECUTOR COULD QUESTION OFFICER BRYANT, WHO WAS THE STATE'S WITNESS, AS TO THE DETAILS OF DEFENDANT'S 1980 CRIMINAL CASE, AS TO THREE QUESTIONS BRYANT ASKED DEFENDANT AND AS TO DEFENDANT'S ANSWERS THERETO BUT THAT DEFENSE COULD NOT BRING OUT BEFORE THE JURY THAT DEFENDANT HAD REFUSED TO SIGN THE MIRANDA RIGHTS WAIVER FORM WHEN THAT REFUSAL WAS THE BASIS OF DEFENSE'S MOTION FOR THE SUPPRESSION OF SUCH EVIDENCE UPON GROUNDS THAT THE NON-SIGNING OF THE WAIVER CARD CONSTITUTED A REFUSAL OF DEFENDANT TO WAIVE HIS MIRANDA RIGHTS.

The matter of the three questions propounded to Defendant by Bryant, as an alleged follow up to the purported voluntary statements Defendant made to him was but one of numerous disputes in the penalty phase trial of this case (before the advisory jury) concerning how much beyond the naked showing of the two past violent crime convictions the State could go as part of its proof with respect to AC #5(b), to-wit: "The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person."

In this regard, Bryant testified that after he read Defendant the Miranda rights Defendant "sort of spontaneously" told him that he didn't know what "I", i.e., Bryant, was talking about; that all of the witnesses "I alluded to" (when did he allude to them?) "were just lying on him", and that he did not know "what was going on with that guy", i.e., Mr. Nubee, the shooting victim (outside the presence of jury at T-8/6/90-209,210; in the presence of the jury at T-8/7/90-90).

The Defendant's alleged answers----or response----to these three questions----which Bryant contended was part of a continual conversation----allegedly were that he, i.e., Defendant, insofar as he could see, saw Nubee fighting with himself and that he shot himself; that Nubee was clowning around with the gun and that he probably shot himself; and that (in response to the question as to whether he was involved in the beating of Russell Harrell) do "(Y)ou mean the police shooter?" (T-8/7/90-93,94).

Defendant's major argument for the suppression or exclusion of the three questions and answers thereto was that by Defendant's act of refusing to sign the Miranda rights

waiver card, Defendant had indicated his desire to not waive the Miranda rights (T-8/6/90-236,237).

After initially ruling that Defendant's answers to the questions were inadmissible (T-8/6/90-236) it then changed its mind and ruled to the contrary (T-8/7/90-3). And then really nailing the coffin lid on the Defense on this issue, the court further ruled:

> "....there is to be no testimony whatsoever that he refused to sign the card, just that he made the statement" (T-8/7/90-3,4).

And indeed there was no evidence adduced before the jury that the Defendant refused to sign the waiver card (T-8/7/90-86-89; 96-106). And to add insult to injury, the prosecutor elicited testimony from Bryant that in addition to the verbal statement of Defendant, it appeared to him from Defendant's demeanor and body language that he appeared to understand his rights (T-8/7/90-87).

In determining what weight where a confession is found to be voluntary, the accused is entitled to have testimony concerning the admissibility of the confession before the jury in order that the jury can determine how much weight should be accorded the confession. Calloway v. Wainwright, 409 F.2d 59 (1968), cert.den. 395 U.S. 909, 89 S.Ct. 1752, 23 L.Ed 2d 222.

The Calloway case, which arose from the Florida court system, relied upon two Florida Supreme Court decisions in the above-described holding, to-wit: Graham v. State, 91 So.2d 662 (Fla.1956) and Bates v. State, 78 Fla. 672, 84 So. 373 (1919).

In Graham, this Court made essentially the same statement as had the court of appeals in Calloway, and in Bates this Court said:

> "After the evidence is admitted, the defendant is entitled to have the evidence in regard to the manner in which it was obtained given anew to the jury, not that the jury may pass upon its admissibility, but for the purpose of enabling them to judge what weight and value should be given to it as evidence...."

The Defendant was deprived of that right here with reference to a prior criminal conviction case being presented to the jury allegedly in support of the applicability of AC 5(b) and this was especially harmful to him because of the grandiose detail the prosecutor was allowed to go into with respect to the most minute detail detrimental to Defendant

involved in the 1980 criminal case. If all the bad came in, why should something that might have helped him have been kept out? Answer----It shouldn't have been.

POINT XI

THE LEAD PROSECUTOR'S QUOTING AND ARGUING FROM THE BIBLE DURING HIS PENALTY PHASE CLOSING ARGUMENT TO THE JURY RENDERED THE SENTENCING HEARING FUNDAMENTALLY UNFAIR AND CONSTITUTIONALLY INTOLERABLE.

The lead prosecutor in this case began his sermon to the jury with the following Biblical reference:

> "You will go back and deliberate on an issue about which men have philosophized throughout all of their lives; the simple issue of life and death. All so simple.
> The taking of a life is excusable under some circumstances.
> Men fight wars. People are allowed to defend themselves and their homes from attack.
> And although deaths that may be caused in those circumstances are not a crime, and I submit to you that in some cases, in some very rare cases, society also has a very special right.
> Society has a right to say as a unit, as a community, as a civilization, we have a right to defend ourselves.
> Also, from the very words, we have the right to punish the worst criminals who commit the worst crimes.
> This is not a concept that grew up in the legislature one day, where a lot of people sat down and decided what kind of laws they wanted to pass.
> These are laws that people have passed for themselves for thousands of years. It has been in their faiths, in their religions.
> A lot of people much, much wise than I could ever hope to be wrote down words thousands of years ago on just how to handle situations like this.
> The Sixth Commandment----and if you will allow me to be a little bit provincial----in the language that I learned it in, it said (quotation in Hebrew), which is 'be true,' and it said that 'thou must not murder'; it making a distinction between murder and other killings.
> Regardless of whether you are a religious person, or follow no religion, the words are the same and they mean the same to all men.
> All they that take the sword, they must perish by the sword." (Emphasis added) (T-8/9/90-23-25).

> "Mr. Laeser: I will tell you what you should do. The phrase should be: Condemn the sin, oh yes, and punish the sinner. Punish the person who breaks the laws, the laws of our society, the laws of our state; yes, and the moral laws, the moral compassion that man has with man not to take another person's life by way of murder.
> Punish that law also.
> In First Corinthians there is a sentence that says: 'It all be sin.'
> Especially this type of sin." (T-8/9/90-57,58).

Thereafter the said prosecutor argued to the jury:

> "Do you know why I hold up these pictures? Do you know why I have held them up for months?

> To let you know one very simple thing. These people were alive before the defendant did what he did, and I cannot do this, I cannot hug them and I cannot do anything else.
> I can only ask you jurors for justice for them, and in a sense, I think I am also asking for a just result for the defendant for what he did because people commit certain crimes and they should be punished for what they did.
> That is justice as well.
> This is not a concept that I thought of this month on the way to work. It has been written down for thousands of years.
> I am going to say it in other words that I could never have thought of myself, but these are the words that should make the difference: 'Be not deceived, for God is not. Whatsoever a man sows, so that much shall he also reap." (Emphasis added)(T-8/9/90-62)

In Meade v. State, 431 So.2d 1031 (Fla. 4th DCA 1983), the defendant's conviction for manslaughter was reversed solely based upon the prosecutor's having told the jurors during closing argument:

> "There, ladies and gentlemen, is a man who forgot the fifth commandment, which was codified in the laws of Florida against murder: Thou shalt not kill."

In its reversing decision, the court in Meade stated:

> "Appellee cites Paramore v. State, 229 So.2d 855 (Fla.1969), as authority to show that reading of passages from the Bible and making reference to principles of divine law as illustrations are not proscribed. How far the facts in Paramore parallel those in the instant case is not clear. However, it is clear that the State in the present case did not confine itself to quoting the Bible or referring to principles of divine law. The excess appellant points out here is that by identifying the Florida statute on murder with the Fifth Commandment, the State could have conveyed to the jury that all killing is against the law, when in fact under certain circumstances killing is excused. The remarks preceding and following the sentence singled out by appellant seem intended to inflame the jury and to appeal to its sympathy for decedent and his kin.
> It is unlikely that a precise parallel to the offending comment here can be found, although a prosecutorial statement that comes close to the statement to which objection was made here occurs in Harper v. State, 411 So.2d 235 (Fla. 3d DCA 1982):
> 'In the Bible it says to take a life is to take mankind and to save a life is to save mankind and all [Harper] did was kill a wino and he is sorry and so is [Smith's] wife and three children. They are sorry too.'
> Id. at 236. The Harper court found this appeal for jury sympathy prejudicial:
> 'It is the responsibility of the prosecutor to seek justice, not merely to convict. That responsibility will be more nearly met when the jury is permitted to reach a verdict on the merits without counsel indulging in appeals to sympathy, bias, passion or prejudice.' Id. at 237."

And, of equal importance, it isn't just that this prosecutor's biblical arguing and quoting constituted impermissible appeals to sympathy, passion, etc., such argument in the instant case by the involved prosecutor was nothing less that an attempt on his part to

cause the jurors to believe that they are governed by what such prosecutor was contending is the law of God as well as by what the judge would tell them is the law of Florida. And while concededly quoting and arguing from the Bible is not reversible per se, it is reversible if it makes the sentencing process fundamentally unfair and this death-sentenced Defendant urges upon this Court that such was the case at his sentencing trial.

POINT XII

THE DEFENDANT WAS DENIED A FUNDAMENTALLY FAIR PENALTY PHASE ADVISORY TRIAL BECAUSE THE EXTENT TO WHICH THE TRIAL JUDGE ALLOWED THE PROSECUTOR TO GO INTO (AND BEYOND) THE AGGRAVATING CIRCUMSTANCE THAT THE DEFENDANT WAS PREVIOUSLY CONVICTED OF A FELONY INVOLVING THE USE OR THREAT OF VIOLENCE TO A PERSON WAS SO GREAT THAT THE APPLICATION OF THAT AGGRAVATING CIRCUMSTANCE TO THE SENTENCING PROCESS IN THIS CASE WAS NOT SUFFICIENTLY LIMITED SO AS TO PROVIDE A PRINCIPLED, OBJECTIVE BASIS FOR DETERMINING THE PRESENCE OF THAT CIRCUMSTANCE IN SOME CASES AND THEIR ABSENCE IN OTHERS AND RESULTING IN SUCH UNFAIR PREJUDICE TO THE DEFENDANT THAT HE WAS DENIED BOTH THE DUE PROCESS OF LAW AND A FAIR SENTENCING TRIAL.

With the exception of the testimony of social worker Alonso as to the poverty level childhood of Defendant and of the testimony of neuropsychologist Dr. Hyman Eisenstein as to the diminished mental capacity of Defendant, etc., what the sentencing advisory trial in this was all about was every last conceivable detail which was in any way related to Defendant's alleged prior violent felonies of 1977 and 1980 and, in addition, of other crimes not included within any statutory aggravating circumstance.

What it was not about was the fact that he was previously convicted of committing those felonies, despite the fact that that is what the involved aggravating circumstance, i.e., Fla. Stat. 921.141(5)(b) recites the said aggravating circumstance is applicable for being "previously convicted."

Early on in the pretrial hearings the court heard Defense's motion to suppress any hearsay testimony by Detective Calvin Bryant relative to Defendant's 1980 case. It is almost ironic that the prosecution raised the argument at that point that Defense should be precluded from raising any issues about this previous case because he had pleaded guilty to it when it, i.e., the prosecutor, full well intended a parading of a truck load of unfairly

prejudicial evidence before the jury through the medium of this aggravating circumstance (T-8/3/90-45-47; 8/6/90-9-14).

Defense subsequently argued its motion to suppress or exclude any testimony by Detective Bryant as to what Defendant told him in connection with the 1980 crime (T-8/6/90-37-43).

Thereafter the lead prosecutor told the court within the presence of the jury:

> "Mr. Laeser: Concerning proof of prior convictions, the law limits the State in several ways that I want to point out to you. One of them is that we can only prove to you the fact that the defendant has already been convicted of felonies involving use or threat of violence to some person through a capital felony---." (Emphasis added)(T-8/6/90-93,94)

A defense objection that what this language clearly conveyed to the jurors was that he had prior convictions other than the two prior violent felony convictions was denied, but the cat was now out of the bag in this regard (T-8/6/90-94).

Then the State brought on before the jury former Boynton Beach Police Officer Frere to testify as to the details of the Defendant's prior alleged violent crime occurring on August 30, 1977. He testified as to the alleged traffic violations Defendant committed allegedly causing him to stop Defendant's car (T-8/6/90-109-113). He said Defendant screamed at "a cracker" and that Defendant threatened to get he and his family (T-8/6/90-119-125). He testified that Frere told him he was not going back to jail and, thus the jury then knew that Defendant had committed some crime before 1977 (T-8/6/90-126-128). He testified that Defendant made some more threats and spit on him on the way to the police station where he made more death threats using an obscenity in the process and calling him "a punk" (T-8/6/90-109-118).

Frere further testified that Defendant was placed under arrest for obstructing a police officer; that he hadn't attempted to take him into custody until a back up officer arrived because he felt threatened by Defendant and another man who was with Defendant; that when the back up arrived they had a violent struggle in order to get him under control and that Defendant kicked and head butted them; that two traffic charges were placed against

him, plus battery on a police officer and resisting arrest. Further, a "pick up" was issued for the additional charge of attempted coercion of a public official (T-8/6/90-118-133).

Regarding Detective Bryant and his testimony concerning the 1980 crime, following an evidentiary hearing he was allowed to testify as to the alleged spontaneous statement and the three questions and answers (all having to do with the 1980 crime) as is above described in the Statement of the Case and the Facts and in the argument as to Point II, supra. Defendant's objection to his being allowed to be called as a State witness was denied as was Defendant's motion to his being allowed to give hearsay testimony as to what the various witnesses and persons involved in the 1980 crime told him (T-8/7/90-39-49).

Thereafter Detective Bryant testified as to what Mr. Atler and Mr. Alexander told him about what they saw at the Florida Bar. He further told the jurors what Mrs. Nubee had told him about the group of black men threatening her husband and the husband being pistol whipped by two of the black males and with "the gunshot" being thereafter fired (T-8/7/90-71-75). Bryant testified as to events occurring before the day of the August 30, 1977, incident (T-8/7/90-71-75). He testified as to what Nubee told him, to-wit: that Defendant had pointed a gun at his wife and shot him one time (T-8/7/90-87).

And finally certified copies of the prior criminal charges documenting convictions were introduced (T-8/7/90-120-126).

Thereafter when the lead prosecutor cross-examined Ms. Alonso he asked her how many times Defendant had been convicted of a crime and in response to a Defense objection thereto argued that this was relevant information as to the credibility of Defendant which had been made an issue because Alonso had been allowed to testify as to what Defendant told her (T-8/7/90-180-184).

Subsequently in argument before the court as to why it wanted to bring before the jury (through cross-examination of Alonso) the number of times Defendant had previously been convicted of a crime, State conceded that there was no specific mitigating circumstance it wanted to rebut and that, rather, the relevance of this information went to the credibility of the Defendant (T-8/7/90-200).

Thereafter, after Alonso was voir dired as to the Defendant's past offenses, the court ruled State could ask her in front of the jury whether Defendant had been convicted in 1973 "for a criminal crime" (T-8/7/90-212-221). Then in front of the jury State brought out from Alonso that Defendant had been convicted of a felony crime in 1973 (T-8/7/90-223).

At a later point the lead prosecutor blurted out another question to Alonso about the Defendant's past crimes without specifying therein that this question was limited to the 1977 and 1980 crimes being relied upon as an aggravating circumstances (T-8/7/90-227).

And in his closing argument the lead prosecutor went into the alleged details of the 1980 crimes (T-8/9/90-31-32).

Section (1) of 921.141 provides, in pertinent part:

> "In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida." (Emphasis added)

It is the Defendant's contention that the above-quoted and above-underlined language does not confer upon the court at a death case penalty phase trial the total and unbridled power and discretion to allow the prosecutor to present to the jury any evidence it deems to be relevant and probative without regard as to whether such evidence singly or cumulatively is unfairly prejudicial.

Fla. Stat. 90.403, of course, makes inadmissible relevant evidence if its probative value is substantively outweighed "by the charger of unfair prejudice, confusion of the issues, misleading the jury, or needless presentation of cumulative evidence". And, of course, the admission of unfairly prejudicial evidence in a criminal trial can deny both due process and the right to a fair trial under the 5th, 6th and 14th Amendments and the counterpart provisions of the state constitution, and this Defendant respectfully asserts, especially so in a capital case.

Arguably, the above-quoted language of Section (1) of Fla. Stat. 921.141 could be reasonably interpreted to allow the prosecutor to go beyond just showing the prior violent crimes convictions and bring before the jury some of the pertinent particulars of the crimes for which the convictions were secured, but even if that is so, what happened in this case went far beyond that with all sorts of evidence and/or information getting before the jury that it had no right to know about because it had nothing to do with aggravating circumstance being relied upon by the prosecution, i.e., AC 5(b).

To be sure State had all sorts of evidentiary reasons and excuses to justify putting before this jury everything it possibly could to make him look as awful as possible, just as it attempted to do and did at the guilt phase trial through the Williams case rule, but the fact of the matter is that it just cries out from the penalty phase transcripts that the lead prosecutor was consciously or otherwise just playing the role of God's avenging angel and that his obligation to render justice to this Defendant, while vigorously prosecuting him, was simply not a responsibility that he deemed to be his.

And, further, much of the evidence and information that the State got before this jury about Defendant's past crimes, etc., wasn't relevant in the first place.

In Gregg v. Georgia, 428 U.S. 153 (1972), the court interpreted the mandate of Furman v. Georgia, 408 U.S. 238 (1972), to impose severe and narrow limits on any discretions involved in imposing the death sentence. Said the Court in Gregg:

> "Because of the uniqueness of the death penalty, Furman, held that it could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner..... Where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."

This Defendant respectfully urges upon the Court that the discretion imposed upon the court below in this case was abused in the extreme by its handling of the evidence and information allowed to come before this jury with reference to crimes and other things Defendant allegedly had committed and/or done in the past and that the court for whatever reason----probably because it got bogged down in individual evidence law matters----lost the

overview of what a shamefully unfair and overzealous prosecution attempted----and succeeded----in doing.

In Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed 2d 235 (1983), the Court said that an aggravating circumstance can be so vague, or arbitrarily applied, that it would:

> "Fail to adequately so channel the sentencing decision patterns of juries with the result that a pattern of arbitrary and capricious sentencing like that found unconstitutional in Furman could occur." Zant, 462 U.S. at 877, 103 S.Ct. at 2769.

And in Godfrey v. Georgia, 446 U.S. 420, 428 (1980), the Court held that capital sentencing discretion can be suitably directed and limited only if aggravating circumstances are sufficiently limited in their application to provide a principled, objective basis for determining the presence of the circumstances in some cases and their absence in others.

Aggravating circumstances 5(b), as it was applied in this case provided anything but a principled, objective basis for determining the presence of the circumstances in some cases and their absence in others.

Because Defendant Charles Street's rights were so flagrantly trampled upon with reference to the misuse of this aggravating circumstance that the Court should, without regard to the many other deficiencies in this case, strike down the death penalty imposed upon him without the slightest hesitation.

POINT XIII

DEFENDANT WAS DENIED A FAIR TRIAL BY THE ACTIONS OF THE PROSECUTOR IN REPEATEDLY MAKING REFERENCE TO THE FACT THAT HE WAS DRIVING "CADILLAC" AUTOMOBILES AT THE TIME OF THE OCCURRENCE OF DEFENDANT'S PAST CRIMES.

It popped up time and time again during the penalty phase trial before the advisory jury, "it" being the alleged fact that the Defendant was driving Cadillacs at the time of his involvement in the two past violent crimes, i.e., the one's occurring in 1977 and 1980.

During the direct testimony of former police officer Frere, said officer testified that he saw a Cadillac going at a high speed (T-8/6/90-111,112).

On redirect examination the prosecutor again brought up the matter that the Defendant had been driving a Cadillac and Defense's motion for a mistrial based upon its contention that this was the third time State had brought the matter up and that Defendant's driving a Cadillac had nothing to do with any of the aggravating circumstances, was denied (T-8/6/90-179,180).

Subsequently during argument when Defense contended that State had made a point of bringing out before the jury on two occasions that Defendant had been driving a Cadillac, State's response was that it had not said "it was his Cadillac", but that Defendant had been seen driving around on two separate occasions "in a brand new Cadillac....a 1980 red and white El Dorado and a 1978 Seville" and that it, i.e., State, had wanted to question Alonso how Defendant's driving around in Cadillacs squared with his allegedly having lived in poverty. The prosecutor further admitted that he wanted to show that Defendant was involved in a drug organization and that one of the ways he got compensated therefor was that "he got a new Cadillac when he was not in custody" (T-8/7/90-259-265). Defense's motion for a mistrial because of the State's "Cadillac" reference was denied. Thereafter Defense requested that State not be allowed to make any further reference to the Cadillac, and argued that this issue was not a legitimate rebuttal argument to the Defense's contended for mitigating circumstance that Defendant and his family lived in poverty during his childhood and up to his time in high school, since the Cadillacs weren't driven until Defendant was in his 20's and 30's. In connection with this argument, State conceded that his cross examination of Alonso had gone beyond what she had testified to on direct examination. The court ruled that State could only bring out the Cadillacs matter if it established that Defendant owned the Cadillacs (T-8/7/90-265-278).

Then there was further discussion regarding the Cadillacs issue during the course of which the court said to the prosecutor that after having thought about the matter overnight,

> "I am concerned that there has been an unfair allusion by the State....You asked the question looking for a reply on a rebuttal to so-called poverty. It was asked with an intent to create the impression that he had the kind of finances to have these two cars.

Mr. Laeser: That is a fair inference because of the evidence that was already before the jury. (T-8/8/90-98)

The court offered to make corrected statements to the jury if the Defense so desired (T-8/8/90-96,97).

The prosecution's admitted intent to get the Cadillacs matter before the jury was one of several instances in this penalty phase trial of State bringing before the jury evidence or information concerning de facto non-statutory aggravating circumstances in contravention of this Court's holding in Elledge v. State, 346 So.2d 998 (1977). Without conceding that the prosecution in a death penalty case sentencing trial should even be allowed to present evidence to rebut the claimed mitigating circumstances, this Defendant submits that in this case on this issue it cries out from the rafters that the injection of the Cadillacs issue into this sentencing trial as alleged rebuttal evidence is but another totally phoney excuse for State to get anything it possibly could before the jury that would assist it in securing a death recommendation and that this Court should do as the lower court finally recognized----at least impliedly----that it should do and that is declare the advisory sentence of this Defendant null and void.

POINT XIV

FLORIDA'S DEATH PENALTY LAW AND/OR THE APPLICATION OF IT IN THIS CASE VIOLATES BOTH THE FEDERAL AND STATE CONSTITUTIONAL GUARANTEES AGAINST EXCESSIVE AND CRUEL AND UNUSUAL PUNISHMENT AND REQUIRING THAT ALL PERSONS BE ACCORDED THE DUE PROCESS OF THE LAW IN THAT SUCH LAW FAILS TO PROVIDE GUIDANCE AS TO THE PURPOSES FOR WHICH THE DEATH PENALTY MAY BE IMPOSED.

Search though one may do, there is nothing in the Florida Constitution or in the State's statutory law setting forth the reasons for which the death penalty may be imposed. It is this Defendant's contention that the fact that the applicable statutes, i.e., 775.082, 921.141, et seq., set forth the crimes for which the death penalty may be imposed, along with a list of statutory aggravating circumstances, statutory mitigating circumstances, along with the capital case defendant's right to introduce evidence of non-statutory mitigating circumstances, does not provide the necessary guidance, or a sufficiency of guidance, to insure that those who recommend the death penalty, i.e., the jury, and to he or she who

makes the ultimate trial level decision as whether to enter a judgment of death or one of life, the judge.

Although the U.S. Supreme Court has not required the states to follow any particular statutory approach to capital punishment, it has imposed two requirements. First, the state's capital sentencing process or scheme must channel the sentencers' discretion to "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder" Zant v. Stephens, 462 U.S. 862, 877 (1983).

There was either no such narrowing here or a constitutionally deficient amount of narrowing because no law, and thus no instruction of law, was given to the jury, the judge, and, yes, to the prosecutors, with the result that when it came to the societal reasons for which they could seek or urge or vote the death penalty, they did not know what all of such reasons are, creating a situation that is akin (and with great reluctance undersigned counsel quotes the Bible but because this quotation does not portend to contain the law of God and because it is so appropo of what these writers are trying to convey, they will do so, their objection in this brief to the prosecutor's misuse of biblical quotations to the contrary notwithstanding) to the situation spoken of at Judges 21:25.

> "In those days there was no king in Israel....and every man did what was right in his own eyes."

And thus it may have been in this case that the jury bought the lead prosecutor's argument or perhaps, more appropriately stated, his guiding suggestion, that in the final analysis the jury should vote death to resolve that once and for all that Charles Street would never again engage in criminal activity. And this is such an appealing argument. It's so easy to solve the Charles Street problem. No more pain for his (future) victims, no more expense for society, no more expensive trials. No more expense to keep him alive. Folks, it's the ultimate solution. Just do it an then the rest of us can go on living our lives.

But there's one big flaw in this position, it is not at all clear that under the law in this country and in this state, that it is a legitimate purpose of capital punishing to kill someone to incapacitate them from committing future crimes.

In Gregg v. Georgia, supra, in headnote 28 thereof, the U.S. Supreme Court speaks of "retribution and deterrence" as legitimate purposes for the imposition of the death penalty.

In People v. Anderson, supra, the court held that in no sense could capital punishment be justified to isolate the offender from society, and as the citation of that decision reflects, the U.S. Supreme Court let it stand without considering it.

In Smith v. Estelle, 602 F.2d 694, 707 (1979), the court recited that the U.S. Supreme Court had in Gregg declared retribution and deterrence to be legitimate reasons for executing.

On the other hand and concededly, in Spaziano v. Florida, 488 U.S.477, 104 S.Ct. 3154, 82 L.Ed 2d 340 (1984), the high court said that although executing for incapacitating reasons had never been embraced as a sufficient justification for capital punishment, it is a legislative consideration as to whether it would be allowed. It is interesting to note that in this regard the high court in Spaziano cited its own decision in its earlier holding in Jurek v. Texas, 428 U.S. 262, 96 So.Ct. 2950, 49 L.Ed 2d 929 (1976), but the issue in Jurek was not the constitutional efficacy of incapacitating executions; rather the death procedure in Texas was there upheld with that procedure including a provision that permitted the capital sentencers to consider as one of three questions: whether there was a probability that Defendant will commit criminal acts of violence that would constitute a continuing threat to society.

But there is no such guiding provision in Florida law and it is this Defendant's contention that he therefore had the death sentence recommended against him and ordered imposed upon him under a constitutionally and fundamentally infirm procedure because the reason, or one of the reasons therefor, may have been a reason ~~countenanced~~ NOT by law.

He prays the Court to examine Florida's death penalty procedure and that if it concurs that this insufficiency therein exists, and if it agrees that such insufficiency denied this Defendant a fundamentally fair sentencing trial and hearing thereafter, it strike down the death penalty imposed upon him.

If the death sentence can be imposed to incapacitate the Defendant, those involved need to know this so----and this very much includes the prosecutor's office which is the magistrate of first instance in deciding whether the death penalty will be sought. And of equal importance, those involved in the process need to know if that is not a legitimate reason for executing someone. Until this is done, no capital case defendant in this state can receive a trial suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action. Gregg v. Georgia, supra.

POINT XV

THE DEFENDANT WAS DENIED A FUNDAMENTALLY FAIR SENTENCING ADVISORY TRIAL BOTH BEFORE AND AFTER THE SENTENCING PROCESS, AND INSOFAR AS IT INVOLVES THE ROLE OF THE ADVISORY JURY AND THE ROLE OF THE JUDGE BY THE REPEATED INSTANCES OF THE PROSECUTION DEMEANING THE ROLE OF THE JURY.

There were many continuing instances of the demeaning of the role of the advisory jury during the protracted voir dire examination in this case some such mistakes being committed by the prosecution and some by the court and some being to individual prospective jurors and some to panels of prospective jurors (T-4/16/90-11-15,25,26,72,187,188; 4/18/90-27, 195; 4/19/90-26,27,33,34,37,38,45; and 5/7/90-44-53 [Note: These are just some of such instances of the Caldwell-Tedder violations]).

As is argued in greater detail under another point herein, from early on in the pre-sentencing advisory trial hearing the prosecution argued that the jury need not and should not be instructed that if Defendant was given life sentences he could be required to serve a minimum mandatory 50 years (T-8/6/90-69,70; 8/6/90-72,73).

In connection with this argument the prosecutor told the court that "the sentencing portion" was strictly up to the court and that "there is a lot of information that this Court has or will ultimately have the jury will not" (T-8/6/90-75). The court, of course, agreed that the jury had no role in whether the life sentences would be consecutive or concurrent (T-8/6/90-79,80).

The court's opening instruction told the jurors that the final decision that would be imposed rested solely with the court (T-8/6/90-81).

In its opening statement the prosecutor told the court that "the....(J)udge makes the final decision but your recommendation has importance to this court....(Y)our recommendation is sort of the advice of the community...." (At this point, a defense objection was sustained)(T-8/6/90-87). And, as is indicated in the Statement of the Case and the Facts, the Caldwell-Tedder violations were a constant situation during the penalty phase of the trial with the prosecution and the court demeaning the role of the jury to the jury and with the prosection demeaning the role of the jury to the court, which was just as reprehensible as doing the demeaning to the jury. If, in fact, the jury got demeaned to the point it didn't think its role really as important, it could simply pass the buck to the court which may have made the ultimate difference in how this jury voted, and if the court didn't really think the jury's role was important, it couldn't have helped but convey this thought to prospective jurors, etc., in such a long trial. It was a round robin bad scene affair and the Defense urges this Court to grant this Defendant appropriate relief under Caldwell, supra, and Tedder v. State, 322 So.2d 908 (1975).

POINT XVI

THE IMPOSITION OF THE DEATH PENALTY UPON CHARLES STREET IS VIOLATIVE OF THE CRUEL AND UNUSUAL PUNISHMENT AND THE DUE PROCESS PROVISIONS OF THE U.S. CONSTITUTION AND OF THE CONSTITUTION OF THE STATE OF FLORIDA, IN PERTINENT PART, BECAUSE THE INFLICTION OF THIS EXTREME UNCTION UPON THIS BLACK MAN WHO WAS RAISED IN POVERTY AS ONE OF 12 CHILDREN OF PARENTS WHO WORKED AS SHARECROPPERS, WHO ONLY HAD A MINIMAL AMOUNT OF EDUCATION BECAUSE HE HAD TO HELP DO THE FARM WORK, WHO VERY PROBABLY AS A RESULT OF THIS BACKGROUND IS OF DIMINISHED MENTAL CAPACITY, AND WHO AT THE TIME OF AND BEFORE THE KILLINGS OF THE TWO POLICE OFFICERS WAS LITERALLY OUT OF HIS MIND BECAUSE OF BEING UNDER THE INFLUENCE OF DRUGS, WHEN BUT FOR THE ABOVE-DESCRIBED CIRCUMSTANCES OF BEING RAISED IN POVERTY AND OF THE EDUCATIONAL DEPRIVATION AND BUT FOR THE EXISTENCE OF THE INDESCRIBABLY AWFUL ILLS OF OUR SOCIETY, THESE TWO KILLINGS WOULD PROBABLY NEVER HAVE OCCURRED.

There's a saying that was vogue several years ago that if it works, why fix it. Well that saying very definitely is not applicable to present day society in America which is suffering from so many ills that it is like a swarm of locusts has descended upon us. During the Depression era President Roosevelt spoke of a nation as being one third ill housed, ill

fed, and ill clad, and while the percentage of our population that suffers these deficiencies today is probably not one third of all of us, the fact of the matter is that there has been an underclass existing in America for as long as either one of undersigned counsel can remember, consisting largely of black, hispanic and those who ethnicity is other than Caucasian, and its persistence in continuing to exist among us has taken on a life of its own.

And even today, it is not the problems of the underclass (as distinguished from the problems caused by the underclass) that disturb most Americans; rather, it is that the level of economic misery has now risen above the underclass and has now become a raging storm tearing at middle America to such an extent that the reelection of a president of almost unequaled popularity just a few months ago is in serious jeopardy.

But to paraphrase the song lines from a recent play about Evita Peron, "Don't cry for me, Argentina", no one, or not enough, have cried because of what was happening (or not happening) in America to those in the underclass, or did anything meaningful enough to make a difference, so long as times were good for most Americans. And paradoxically, no one cries even today about the misery those at the bottom have to exist in, because they are too busy berating the "theys" and "them" for causing the recession and all the results thereof affecting the lives and life styles of persons who, along with those at the top of the heap, have nonchalantly ignored the problems of those at the bottom for almost forever.

Charles Street is as an identifiable a member of America's underclass as anyone could possibly be. He is black; he was raised in abject rural poverty including being underfed and underclad; he is substantially uneducated and unquestionably undereducated; and, yes, he got into criminal trouble on several occasions before the occurrences of the events in this case. Was this because he was hostile? The prosecution would have us believe so, because it injected into the penalty phase trial its contention that Street fits into the categorization of one with an Anti-Social Personality during the cross-examination of social worker Alonso, which she had said nothing about during her direct examination. Picking up on this issue initiated by the State, and under an assumption made for purposes of this part of the

argument herein only, if Charles Street has an Anti-Social Personality why does he have it? Is it because he was born into the underclass? Is it because he was educationally and culturally deprived? And where did he get the cocaine from he was on at the time of the two homicides? Were there any persons at a higher status of our society that had anything to do with that cocaine, or are there any persons who live well in America from profits for drugs pumped into the Liberty City's of America? And how much of the profits of peddling of drugs have gotten into the pockets of those in official positions? Would Charles Street have gotten involved in the 1980 shooting of Mr. Nubee if the gun nuts in this country had not been so successful that there are more of these God-awful instruments of death at loose throughout our country than in all the rest of the World put together? And what about the violence shown around the clock on television, which is only different in degree how the cowboys and Indians violence and the cops-versus-the-bad-guys violence, which has been the motion picture industry's stock in trade, and which are so recognized and accepted as vintage America, that these violent old movies constitute a significant part of the films shown on Pat Robertson's Family Network and on its nearest competitor, The Disney Channel. The fact of the matter is that we all grew up in a violent society and as is the case with people, as a society grows older, it grows more so.

But it is definitely not the point of this argument that the elimination of the Death Penalty in Florida, or generally throughout the United States, would eliminate or even seriously put a dent in what ails the country, but rather that neither will the retention of the death penalty contribute one iota to finding solutions to America's problems. And because this is undeniably so, it is therefore cruel, unusual, and unequally and totally unfair to execute persons from America's underclass in numbers all out of proportion with respect to the fact that this portion of the population numbers probably no more than twenty percent of the total population, when in all probability had the involved murderers been able to live their lives, prior to killing someone, on a more level playing field, most of those murders would never had occurred. And, of course, if we stop executing those from the underclass,

we've got to stop executing everybody else under equal protection principles but that's okay too, because we shouldn't be executing anyone anyhow----period!

Further, Defense counsel would like to make it clear----lest there's any confusion or doubt about it----that there is no intendment whatsoever in the argument under this point to justify or excuse the act of one person killing another. That is a given. But, rather, that society should not be guilty of the same offense when it serves no useful purpose.

With all due respect to those justices of this Court who have, or will have held to the contrary, the death penalty should not be imposed upon Charles Street because the imposition of that penalty violates his above-described rights under the Eighth and Fourteenth Amendments to the U.S. Constitution (and, as well, Sections 9 and 16 of Article I of the Constitution of the State of Florida).

It is hard to conceive of a penalty that is more cruel and unusual than the death penalty, and Florida's practice of publicly executing condemned persons, i.e., with witnesses being present, is barbaric in the extreme smacking of the caliber of justice handed down under the so-called fundamentalist Islamic law.

If the Legislature of the State of Florida were to pass a law providing that all persons convicted three times or more of armed robbery would have their favored hand (i.e., the right hand of right-handed persons and the left hand of left-handed persons) cut off as the penalty, there is not a court in the land which would not swiftly hold such penalty to be constitutionally prohibited as a prohibited cruel and unusual punishment, a denial of constitutional due process, etc.

But far lesser penalties than the cutting off of a hand have been held to be cruel and unusual punishment. The confinement of a prisoner in a cell six feet by eight feet, four inches in dimension, which had no interior source of light, which was not cleaned regularly, and which contained no means to enable a prisoner therein to clean himself, was held to constitute cruel and unusual punishment. Jordan v. Fitzharris, 257 F.Supp. 674, 680 (D.C. Cal.).

Similarly, it was held that the confinement of inmates of a state prison in barracks unfit for human habitation, and in conditions which threatened their physical health and safety, and deprived them of basic hygiene and medical treatment by reason of gross deficiencies in plant equipment and medical staff, constituted cruel and unusual punishment. Gates v. Collier, 501 F.2d 1291, 1303 (5th Cir. 1974).

Cruel an unusual punishment is conduct that is foul, inhuman, and violative of basic concepts of decency; punishment which is barbaric and shocking to the conscience; or physical or mental abuse or corporal punishment of such bare, inhuman, and barbaric proportions as to shock the court's sensibilities. Mayberry v. Robinson, 427 F.Supp. 297, 310.

The killing of a human being is all of the forms of conduct listed in the above paragraph hereof and much more. It is final. It takes away the most precious possession a living creature has, the right to remain alive.

It is the contention of this Defendant that the infliction of the death penalty by organized society is absolutely wrong, and that contemporary values or standards of decency rationally have nothing to do with whether that retributive act of killing is cruel and unusual. The old adage about everything being relative is also wrong, because there are some absolutes when it comes to some forms of conduct being either right or wrong and, in this regard, it is absolutely wrong for one human being, or for a society of human beings, to kill another human being.

At long last this Court should rise to the occasion and declare the Death Penalty to be legally (and constitutionally) wrong because it is, in fact, absolutely morally wrong, and because it is the most cruel and the most unusual punishment that can be inflicted upon a human being. This Court should declare this barbaric and totally inhumane penalty henceforth verboten and unacceptable in a society that truly strives to be a moral and just one, and it should do so without regard to whether such decision would comport with "contemporary standards" or "majority will", which has been the justification since time immemorial as to what punishments are acceptable and what punishments are not. As a

result of such convoluted thinking, human societies have at various times in history approved----or tolerated----punishments including amputating body parts, including hands, feet, upper lip, nose, ears, and genitals; flogging and enslavement; being chained to a bench pulling the heavy oar of a galley ship; the gouging out of one or both eyes; the cutting out of the tongue; being tortured with red hot tongs; the "seriatim infliction of torture" with red hot pincers; being dragged through the streets by a horse; and the infliction of death in the following manners, to-wit: being beheaded, being stoned, hanging, burning at the stake, drowning, being thrown into an abyss, drawn and quartered, being dragged by a wild bull, being hung upside down with a live wolf, hanging in the sun in a cage, suspended from a leaning tower, and being stamped to death by horses. (See Arthur W. Campbell, Law of Sentencing [1978]).

Undersigned counsel would respectfully suggest that what the Bill of Rights is all about, and what this Court is all about----at least in part----is to insure that individual persons, or groups of persons smaller in size than the majority of persons in the society, are to protected from the actions of the majority of the society when those actions become tyrannical and/or violate basic fundamental human rights. The members of this Court---- unlike the Governor and the members of the Cabinet as the head of the Executive Branch of our state government, and unlike the members of the House and Senate constituting the Legislative Branch----do not serve in a representative capacity.

In Marbury v. Madison, 1 Cir. (5 U.S.) 137, 170 (1803), Chief Justice Marshall stated:

> "The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion. Questions in their nature political; or which are, by the constitution and laws, submitted to the executive can never be made in this court." (Emphasis added)

What Justice Marshall said of the United States Supreme Court is fully and equally applicable to this Court. Regardless of what the United States Supreme Court and the supreme courts of other states have or have not done with respect to capital punishment, this Court should exercise its moral imperative and do what should have been done long

before now and abolish capital punishment. This Court should be the real leader and not like the so-called leader who, while running behind a mob through the streets of Paris during France's revolutionary period, was heard to cry out, "(W)here are they going? I'm their leader."

Abolish capital punishment, Honorable Justices of the Supreme Court of Florida, and remove an immoral stain on Florida that has been allowed to exist for far too long. You have it within your power to finally close the door on our State's engaging in such an inhuman practice.

And, finally, undersigned counsel would respectfully say to the Court----paraphrasing what Governor Chiles has told the Legislature----that a dying friend of his told him----it's not how long we're here that really matters, but whether we make a difference while we are here.

Make a difference!

CONCLUSION

WHEREFORE, based upon the foregoing arguments and authorities, the defendant, CHARLES STREET, through counsel, respectfully prays this Court to reverse his convictions and sentences, to grant him a new, fair trial, and to at least vacate his sentences of death.

Respectfully submitted,

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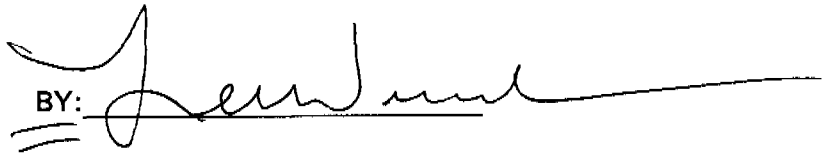
BY: 

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief of Appellant was mailed to the Office of the Attorney General, 401 N.W. 2nd Avenue, Suite N-921, Miami, Florida 33128, this 9th day of February, 1992.

BY: