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

REPLY BRIEF OF APPELLANT

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STATEMENT OF THE CASE AND FACTS

The appellant, CHARLES STREET, respectfully reasserts and adopts herein the Statement of the Case and the Statement of the Facts as presented in his initial brief of appellant.

ARGUMENT

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.

Nowhere in its brief does the State deny that the "DeCarlo incident" showed Street's violent criminal propensity. Indeed, on this record it cannot. As the trial court noted, the evidence was "extremely important, one of the most telling pieces of evidence", and "extremely prejudicial to the defense" (TR-13598-13599). Any doubt about the purpose or effect of the "DeCarlo incident" evidence is laid to rest by what the State said its purpose was:

> "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 behaviour, but something in the defendant himself." (TR-13580)

Never has the concept of "propensity" been better expressed.

There can be no legitimate question but that a substantial risk existed that the jury would accept the State's invitation to condemn the defendant for his propensity, i.e., "an inmate inclination;

tendency; bent." American Heritage Dictionary of the English Language (1969). That risk in this case, on this record, is too great to permit the defendant's convictions and death sentence to stand.

A.

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

The most unfair aspect of the entire DeCarlo matter is the fact that the trial court, while permitting the State to present its devastating evidence, refused the defense the opportunity to do anything about it. All the defense wanted was a 24 hour recess to secure the presence of Terri Hickson, a neutral, lay, unbiased eye-witness, who would have absolutely refuted DeCarlo's account. Under the circumstances here, where defense counsel had traveled to Palm Beach County and spoken to Hickson to confirm her crucial exculpatory testimony, the trial court's imposition of the harshest and least favored remedy of exclusion, constituted an abuse of discretion and reversible error.

The State cavalierly contends that "the presentation of Hickson's testimony would not have affected the verdict" while acknowledging that her testimony would have been that Street was beaten by DeCarlo and antagonized by racial slurs (Appellee brief at p. 56). It suggests that because the proffer of Hickson's testimony did not include rebuttal of DeCarlo's testimony that Street was not intoxicated, that her testimony was therefore rendered useless. Of course, that is not true.

Whether intoxicated or not, the defense's opportunity to establish that the circumstances of Street's fight with DeCarlo, whether Street was intoxicated or not, were so different from the case at bar as to

render the entire incident wholly irrelevant could not have been more important to the defendant's receipt of a fair trial. The trial court's exclusion of the defendant's rebuttal testimony, especially after it had previously promised the opportunity to present such evidence, denied the defendant due process of law and compulsory process. Furthermore, the prosecution, during closing argument, unabashedly exploited the defendant's failure to present evidence in rebuttal of DeCarlo's testimony:

> And Lord knows what that business was about with DeCarlos. When the defense attorney wrote the words on the blackboard, it said that DeCarlos said that.
> And he had evidence of it. Evidence of it. I have evidence.
> Have you seen any evidence?
> Have you seen somebody get on that witness stand that that is really what took place? (TR-14309)
>
> * * *
>
> You see in the 1980 incident DeCarlos, we have got almost the identical exact pattern. And that is crucial, because DeCarlos said he wasn't intoxicated then. (TR-14384)
>
> * * *
>
> I don't know how (Street) got (hurt in the DeCarlo incident). Nobody has testified how he got that. Nobody has testified what the eight police officers looked like afterwards, either.
> Mr. Koch: We have a motion to make (TR-14502-14503)
>
> * * *
>
> And that is not just there for effect. That is meant to tell everybody that (defense counsel) really believes that there is some evidence of this. And he is screaming when I objected.
> "We have evidence, we have evidence."
> (DeCarlo) calls (Street) a dirty, mother fucking nigger.
>
> * * *
>
> "I've got evidence, I've got evidence. I will bring in evidence."
> You haven't heard any evidence.
> You know what should happen at the end of this case after the verdict is over? Defense counsel should go to Mr. DeCarlos' office and say, "I really apologize to you for doing this." (TR-14518)

* * *

> I'm telling you that that is what the Judge is going to instruct you. There is no evidence presented that DeCarlos said any of those awful, terrible things. You should absolutely disregard that. Put it out of your mind. (TR-14524-14525)

The State constantly made the "DeCarlo incident" a "feature" of this case and, particularly, in its closing argument used it to establish similarity (in the absence of the defendant's rebuttal testimony) and Street's criminal intent (TR-14309, 14502-14503, 14507, 14512, 14514, 14518, 14522-14525).

In addition, the trial court's refusal to grant the defendant's motion for leave to bring in Hickson for a live proffer of her testimony also constituted error. A trial court should not refuse to allow proffered testimony to be read into the record outside of the presence of the jury in order to insure a defendant full and effective appellate review. Francis v. State, 308 So.2d 174 (Fla. 1st DCA 1975). The refusal of a Court to permit a proffer is reversible error. Piccirrillo v. State, 329 So.2d 46 (Fla. 1st DCA 1976). The defendant's written proffer, however, establishes how vitally important this available testimony was and how unfair was its exclusion (See, Appendix A, attached hereto).

More important, however, is the fact that the defendant was denied the opportunity to defend himself, especially under the circumstances presented here. The State's list of over 100 people was not filed or disclosed to the defense till April 2, 1990, after the commencement of jury selection (TR-13754, 13758). Defense counsel labored, throughout the jury selection process, to take as many depositions, at night, after trial, of those witnesses as they could. The trial court, meanwhile, consistently pressed the State to limit the number of

witnesses it called and the defense necessarily prioritized the taking of those depositions consistent with their apparent importance. They had no forewarning of the significance of the DeCarlo testimony. The State had filed no "Williams Rule" notice relying, instead, to save DeCarlo for rebuttal. Indeed, DeCarlo was not deposed until May 23, 1990, after the commencement of the trial. In short, the defendant did everything he reasonably could, under the circumstances, to prepare for his capital trial and there was no excuse for the trial court's refusal to grant the defendant relief relative to defense witness Hickson.

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 is basic to our system of jurisprudence. (333 U.S. at 273)

To deny a defendant an opportunity to present competent proof of his defense constitutes a violation of a fair trial and of due process. Henderson v. Fisher, 631 F.2d 1115 (3d Cir. 1980). A criminal defendant has a constitutional right to testify in his own behalf under the Fifth, Sixth, and Fourteenth Amendments. Alicea v. Gagnon, 675 F.2d 913 (7th Cir. 1982).

It is a basic concern of American criminal jurisprudence that a defendant be convicted on nothing less than the full truth. United States v. Figurski, 545 F.2d 389 (4th Cir. 1976). Despite the Court's discretion to terminate redundancies or unproductive inquiries, both the prosecution and the defendant must be afforded their fair opportunity to present their evidence. United States v. Ajimura, 446 F.Supp. 1120 (D.C. Hawaii 1978). All competent evidence tending toward

the ascertainment of truth should be produced and the Court must take such action as will tend to bring such evidence before it. United States v. Youngblood, 379 F.2d 365 (2d Cir. 1967). A trial judge is properly interested in seeing that all salient facts are presented to the jury to bring about a just result. United States v. Clarke, 220 F.Supp. 905 (D.C. Pa. 1963).

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 (1937), 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 designated to secure to 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 a mandatory organic rule of procedure in all criminal prosecutions in all courts of this State.

Street's conviction must be reversed and a new trial granted.

B.

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

Street faulted the trial court, in light of its decision to allow introduction of the "DeCarlo incident", for failing to grant him a continuance to investigate the eight year old incident. The State argues on appeal that defense counsel were remiss in failing to

investigate the incident earlier because they "had been given three months to 'investigate this matter'". This ingenuous argument ignores the fact that the trial court failed to rule on the issue until July 16, 1990, and the defendant requested the continuance the same day. Defense counsel cannot be faulted for failing to seek relief from a ruling prior to its entry.

The most that the State can say is that the defendant "should have" anticipated the "possibility" that the trial court might admit such evidence. As a practical matter, such a position is untenable. The resources of the Public Defendant's Office, which represented Street, are sorely limited and must be used as effectively as possible, especially in the defense of a capital case. The "DeCarlo incident" did not even constitute a prior conviction. It was merely an alleged "bad act." If every prior bad act of every indigent defendat had to be thoroughly investigated by the Office of the Public Defender prior to trial and prior to a ruling rendering such evidence admisible, the burden would be unreasonable and enormous and surely deny indigent criminal defendants both due process of law and effective counsel. Here, the trial court erred in failing to grant the defendant's motion for continuance.

C.

The State Failed to Establish the Relevance of the "DeCarlo Incident" Which, Even If Relevant, Suffered an Unfair Prejudicial Effect Which so Far Outweighed its Probative Value that it Should Have Been Excluded Under Any Circumstances.

Moreover, as a matter of predicate, the State failed to establish the relevance of "DeCarlo incident" relative to Street's intent. If the State offered the "DeCarlo incident" to show that Street acted the same

way when he was intoxicated as wehen he was sober, it needed to establish that Street was not under the influence or suffering cocaine intoxication at the time of the "DeCarlo incident." It failed to do so here which rendered the relevancy of the "DeCarlo incident" evidence entirely sepculative. The fact that the defendant was innately disposed to fight with police officers constitutes precisely the kind of "propensity" evidence which the statute condemns. Holden v. State, 543 So.2d 423 (Fla. 5th DCA 1989). Accordingly, having failed to establish the essential prerequisite, the offending evidence presented to this jury had no relevance, established only propensity, and hsould have be en excluded. Florida Statute Sect. 90.404(2)(a)(1987); Williams v. State, 110 So.2d 654 (Fla. 1959), cert. denied 361 U.S. 847, 80 S.Ct. 102, 4 L.Ed.2d 86 (1959), and its progeny.

If this Court accepts the State's contention that the "DeCarlo incident" was somehow relevant, however, the Court's inquiry does not end. Such evidence, because of its great potential to torpedo the defendant's receipt of a fair trial, must be determined to enjoy probative value which outweighs its potential for unfair prejudice. Judge Sharp, concurring in part and dissenting in part, in Anderson v. State, 14 FLW 1622 (Fla. 5th DCA July 6, 1989), withdrawn 549 So.2d 807, expressed the rationale of the rule particularly well:

> The only thing such "similar fact evidence" really proves, or "corroborates" is that the defendant is possessed of an innate base or depraved character, nature, or propensity that makes him willing or inclined to commit a certain type of ... wrongful act. This is the very type of evidence that is intended to be excluded by the basic rule excluding relevant but unfairly prejudicial evidence as that rule is condified in Section 90.403, Florida Statutes. (Id. at 1623)

The same reasoning and conclusion apply here. The "DeCarlo incident" as

well as the defendant's bad character became features of this prosecution when, in fact, they should have enjoyed no weight in the fact-finding process at all. Despite the State's denial of this on appeal, its consistent efforts to portray the defendant as a violent convicted criminal (as detailed at pp. 23-25) cannot be denied. Nor can the State deny the fact that it exploited the "DeCarlo incident" to the fullest in its closing argument (TR-15501-15525).

Accordingly, for all the reasons expressed in the appellant's initial brief, Florida Statute Section 90.403, if not Section 90.404, compels reversal of his convictions and sentence of death.

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 State took the position at trial, and reasserts it here, that "in the absence of legal insanity, testimony about Street's state of mind at the time of the murders was inadmissible under Chestnut v. State, 538 So.2c 820 (1989)." (Appellee brief at pp. 57-58). More recently, however, in Bunney v. State, 603 So.2d 1270 (Fla. 1992), this Court explained its decision in Chestnut. It is this Court's later decision which should control the resolution of this issue involving the trial court's exclusion of Dr. Trop's testimony relative to the effects of the defendant's chronic cocaine abuse on Street's state of mind and the effect of the end result of that abuse, cocaine psychosis, on premeditation. The issue was a narrow and specific one directly related to the extreme condition of drug intoxication. In Bunney, this

Court described the difference between such testimony and that involving "wide-ranging evidence of diminished mental capacity:

> In Chestnut, the defendant sought to introduce wide-ranging evidence of diminished mental capacity (e.g., low intelligence, seizure disorder following head trauma, diminished cognitive functioning and verbal skills, passive and dependent personality, and exaggerated need for affection) to establish that he lacked the requisite mental state for premeditate first-degree murder. Based on strong policy concerns, this Court rejected the diminished capacity defense. In its analysis, the Court noted the distinction between evidence of commonly understood conditions such as intoxication or epilepsy, on the one hand, and evidence of relatively esoteric conditions, such as general mental impairment, on the other.

As this Court explained further:

> Unlike the notion of partial or relative insanity, conditions such as intoxication, medication, epilepsy, infancy, or senility are, in varying degrees, susceptible to quantifiation or objective demonstration, and to delay understanding.

This Court in both Chestnut and Bunney, recognized that:

> Exposure to the effects of age and intoxicants upon state of mind is a part of common human experience which fact finders can understand and apply; indeed, they would apply them even if the State did not tell them they could. The esoterics of psychiatry are not within the ordinary ken. (603 So.2d at 1272)

Here, the term "cocaine psychosis" threw the State and trial court off. It was merely a term of art used to describe the residual effects of chronic cocaine abuse. The concept was a simple one which formed the crux of the defense in this case. Its exclusion rendered the defendant's trial unfair and constituted reversible error.

Clearly, where a specific or particular intent is an essential or constitutent element of an offense, the ability of an accused to entertain a specific intent at the time of the offense is relevant.

Garner v. State, 28 Fla. 113, 9 So. 835 (1891); Gurganus v. State, 451 So.2d 817 (Fla. 1984). As the Gurganus Court opined:

> When specific intent is an element of the crime charged, evidence of voluntary intoxication, or for that matter evidence of any condition relating to the accused's ability to form a specific intent, is relevant .... .(Gurganus at 822-823; emphasis added)

Further, both the Model Penal Code and the American Bar Association Standards for Criminal Justice support the defendant's prayer for relief here:

> Section 4.02(1) reads: "Evidence that the defendant suffered from a mental disease or defect is admissible whenever it is relevant to prove that the defendant did or did not have a state of mind which is an element of the offense.
>
> * * *
>
> Standard 7-6.2 states: Evidence, including expert testimony, concerning the defendant's mental condition at the time of the alleged offense which tends to show the defendant did or did not have the mental state required for the offense charged should be admissible.

The exclusion of all relevant, competent evidence of the defendant's mental state at the time of the crime, all of which was crucial to the issue of specific intent and the defendant's defense, denied due process and constituted reversible error.

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.

The State principally claims that defense counsel waived the issue

of the sleeping juror by they're failure to request a mistrial. No matter how defense counsel may have expressed their concerns, and despite the fact the State does not appreciate their prayer for relief, it is obvious from this record that the trial court suffered no such confusion and considered the defendant's request as one for a mistrial:

> 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. (TR-16560)

There is no question that counsl has a duty to call a juror's inattentiveness to the Court's attention when first noticed. United States v. Curry, 471 F.2d 419 (5th Cir. 1973). Counsel may not permit juror misconduct or inattentiveness to go unnoticed and thereby sew a defect into the trial and later claim its benefit. (Id.) Trial counsel here, however, thoroughly fulfilled their duty. The juror's inattention was brought immediately to the trial court's attention and the trial court acknowledged the relief the defendant sought.

The error claimed here is that the trial court, having been alerted to and having acknowledged the problem with a sleeping juror, did nothing. 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.

Walker v. State, 330 So.2d 110 (Fla. 3d DCA), cert. denied, 341 So.2d 1087 (Fla. 1976); Orosz v. State, 389 So.2d 1199, 1200 (Fla. 1st DCA 1980); Whitehead v. State, 446 So.2d 194 (Fla. 4th DCA 1984).

It is perfectly proper for a trial court, in the exercise of its sound discretion, to substitute an alternate juror for a regular juror who has become unable or disqualified to perform his duties. Orosz,

supra; United States v. Dominquez, 615 F.2d 1093, 1095 (5th Cir. 1980). It is also permissible for a trial court to refuse to question a juror who allegedly falls asleep where the record reflects that the Court's remarks demonstrate that the Court has observed the juror in question and has concluded that the juror was not in fact asleep. United States v. Holder, 652 F.2d 449, 451 (5th Cir. 1981). It is, however, not permissible for the trial court under the circumstances demonstrated here to do nothing. The trial court's failure to even make inquiry constituted reversible error.

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.

The State contends that the appellant "mistakenly refers to the outsiders as 'apparent law enforcement officers', (where) there was no indication that the two men were police officers" (Appellee brief at p. 62). It argues that "appellant can produce no record support for his supposition that the men were in any way connected to law enforcement....". (Id.) To the contrary, juror Brown explained that the two men passed the jury prior to entering the Metro-Dade corrections room carrying walkie-talkies (TR-13958-13960). Juror Perez confirmed Brown's account and believed the men approached an office "related to policeman" (TR-969). The bailiff testified that juror Waver identified the man who said, "Guilty", as a police officer (TR-13987).

Finally, the State argues that "given the isolated nature of the incident, the corrective action taken by the trial court, and the statements of the jurors that they were not influenced, there is no reasonable possibility that the single utterance of 'guilty' affected

the verdict" (Appellee brief at p. 66). It is hard, however, to imagine a more insidious intrusion into the impartial fact-finding mission of a jury in a criminal case than the expression by an outside authoritative, presumably law enforcement figure, expressing at least the threat, if not a threat, that the accused is "guilty." 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 past and said, "Guilty" (TR-13956). Such a traumatic and corrupt event, whether isolated or not, regardless of any corrective action taken by the the trial court, and not withstanding the jurors' denial of improper influence, in this case where law enforcement officers were the victims and the defendant has been sentenced to death, constituted a deliberate, intentional, intimidation of the jury for which relief must be granted. If reversal is mandatory when "there is the slightest possibility that harm could have resulted from the jury's viewing of unadmitted evidence", Cf., United States v. Marx, 485 F.2d 1179, 1184 (10th Cir. 1973), then reversal is all the more compelled here.

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 misconstrues this issue in two regards. First, relying on Bush v. State, 461 So.2d 936 (Fla. 1984), the State argues "that a witness' testimonial discrepancy is not a discovery violation and does

not support a motion for a Richardson inquiry" (Appellee brief at p. 67). We are not claiming here the State's obligation to reveal testimonial discrepancies as Bush described. Rather, the defendant here complains about the State's failure to disclose material evidence offered through the testimony of Officer Steven Anderson that the defendant had looked through his cell door, extended his arm behind his back, glared at Anderson and exhibited a smirk (TR-10489). This failure to reveal the existence of such evidence although given in deposition ample opportunity to do so.

Second, the State argues that Officer Anderson's observations were not written or recorded statements within the meaning of Fla.R.Crim.P. 3.220(b) relating to the statements of prosecution witnesses. The defendant argued, correctly, that Anderson's testimony described a non-verbal communication by the defendant which was discoverable under Rule 3.220(c), not (b). Indeed, there is no question that the prosecution used the defendant's conduct as a communication of contempt and lack of fear (TR-10490).

The effect of the State recalling Anderson to offer surprised testimony (about which the trial court acknowledged the defendant had been misled [TR-10485]), had precisely the same effect as the State calling an unrevealed rebuttal witness. Under such circumstances, State v. Richardson, 246 So.2d 771 (Fla.1971), even in the absence of timely objection, requires reversal on a per se basis for the failure of the trial court to fulfill the Richardson requirement. Lee v. State, 538 So.2d 63 (Fla. 2d DCA 1989). Here, the trial court overruled the defendant's objection, denied his motion for mistrial, and failed to conduct any Richardson inquiry at all. That constituted reversible

error.

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 AN DUE PROCESS OF LAW GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Appellant Street respectfully relies upon the arguments and authorities advanced in his initial brief of appellant.

POINT VI

THE TRIAL COURT ERRED IN FAILING TO GRANT A MISTRIAL UPON THE STATE'S FAILURE TO SUBSTANTIATE THE DEFENDANT'S CONFESION 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.

The State argues against reversal because of the prosecutor's "good faith" and the harmless error doctrine. Neither are sufficient to rationalize the misconduct of the State or ameliorate the prejudice unfairly suffered by him.

If the prosecutor made his opening statement in good faith then he surely lost some of that good faith as the trial progressed and he decided, for the tactical advantage of the State, not to introduce into evidence the crucial, incriminating evidence he described to the jury in his opening statement. Nevertheless, and more important, the prosecutor's purported good faith is immaterial. It makes Street's execution no more palatable.

Moreover, the State's argument that the defense's presentation of the substance of the confession dissipated the error misapprehends the

significance of this issue. The confession offered to the jury by the prosecutor directly refuted the defendant's 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 comparison, the testimony elicited by the defense was designed to establish Street's irrational, delusional, paranoid belief that the officers were going to kill him. As such, the defendant's cross-examination of State witness Dr. Mutter was designed to accomplish precisely the opposite of what the prosecutor successfully accomplished in his opening statement. The fact that defense counsel failed is the best evidence that this error is not harmless.

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.

Appellant Street respectfully relies upon the arguments and authorities advanced in his initial brief of appellant.

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.

The Attorney General cites State v. DiGuilio, 491 So.2d 1129 (Fla.1986), as authority for the proposition that there is no reasonable possibility that the failure of the judge to instruct the

jury that if Street was given a life recommendation on both capital murder cases he could receive a 50 year minimum mandatory provision in his sentences if they were run consecutively, could have affected the jury's recommending death.

This is not what State v. DiGuilio stands for; rather it changed the law from holding that any prosecutorial comment on the defendant's remaining silent is per se reversible error to making it a matter that is to be reviewed on appeal by harmless error analysis. In DiGuilio, this Court relies upon its earlier holding in State v. Murray, 443 So.2d 955 (Fla.1984), in which other case it adopts for Florida's appellate court system the harmless error analysis rule enunciated in United States v. Hastings, 461 U.S. 499, 103 S.Ct. 1974, 76 L.Ed 2d 96 (1983), which is that where there is found to be federal constitutional error in state court appellate proceedings, the court must review such error to determine if it is harmless beyond a reasonable doubt. Under such analysis procedure the first question to be decided is whether the refusal to give the requested instruction was error and it is the Defendant's contention that it is since the matter of the possible mandatory period of incarceration (in the event that life was recommended by the jury) was discussed by the judge in his instructions to the jury, and while the judge mentioned twice that the number of years Defendant would have to serve without parole on each count would be twenty-five years, he never said anything at all about the mandatory incarceration periods being either concurrent or consecutive, and it was critical to Defense's fight for the Defendant's life for the court to have told the jurors that Defendant could be sentenced to a 50-year minimum mandatory sentence if life was the sentence on each count.

After all the only decision the jurors had to make with respect to each count was whether to recommend life or death and to be fully apprised of the law in this regard, these lay people needed to have the judge specifically tell them that under the law consecutive sentences could be imposed.

The holding of this Court in the case cited by the Attorney General, i.e., King v. Dugger, 555 So.2d 355 (Fla.1990), is not applicable to the question involved here because in King there was only one first degree murder conviction and thus there was no concurrent-consecutive factor.

If this Court agrees that this omission in the court's instruction was error then under DiGuilio, supra, and Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed 2d 705 (1967), it must next determine whether such error was harmless beyond a reasonable doubt and, in this regard, the burden to show that it was harmless beyond a reasonable doubt "remain(s) on the state" (DiGuilio at p. 1139). And, finally, Defense would add that if the judge had instructed the jury as to the possible 50 year sentence, then the court's charge would have included at least one sentence talking about something in the nature of a mitigating circumstance. One wonders what this jury thought about the fact that the court charged it as to seven aggravating circumstances but as to no mitigating circumstances.

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.

In the main it is the Attorney General's argument under this point

that the bringing out of the alleged future dangerousness of Defendant during the evidentiary phase of the sentencing advisory trial was simply within bounds cross-examination of Defense witnesses neuropsychologist Seymour Eisenstein and social worker Cecelia Alfonso. Accepting arguendo the validity of this argument, Defense poses the question as to how then does the Attorney General explain the fact that in his closing argument the lead prosecutor told the jury: "this person has always dealt with hurting other people" (T-8/9/90-32); that in between the 1980 criminal conviction and the involved 1988 homicide Defendant was out of jail for only 10 days before he took lives (T-8/9/90-29, 30); that the society has a right to defend itself (T-8/9/90-24); etc.

Was this simply the arguing of evidence brought out on State cross-examination? Is this what the Attorney General wants this Court to believe? Or is what is involved here, a not so thinly veiled prosecutorial effort to get before the jurors the non-statutory aggravating circumstance of the necessity to permanently eliminate from this earth the Defendant so he can never hurt or kill anyone again? If the sun rises in the east, there can be no question but that the said lead prosecutor was touting this jury to recommend the preemptive execution of Defendant and paraphrasing what the late Adlai Stevenson said, "It's time that the Attorney General start talking sense to this Court" and stop playing with smoke, mirrors and words.

If a state limits the factors which may be weighed in the determination to statutory aggravating factors, then only those factors may be argued and emphasized to the jury. Zant v. Stephens, 462 U.S. 862, 77 L.Ed 2d 235, 103 S.Ct. 2733 (1983); Barclay v. Florida, 463

U.S. 939, 954, 77 L.Ed 2d 1134, 103 S.Ct. 3418 (1983); California v. Ramos, 463 U.S. 992, 998-999, 77 L.Ed 2d 1171, 103 S.Ct. 3446 (1983); and Brooks v. Kemp, 762 F.2d 1383, 1408 (11th Cir.,en banc, 1985). And where a state utilizes the concept of aggravating circumstances and mitigating circumstances in its death penalty sentencing statutory scheme, aggravating circumstances are limited by the statute. Proffitt v. Florida, 418 U.S. 242, 49 L.Ed 2d 912, 96 S.Ct. 2960 (1976).

Without conceding the constitutionality of an aggravating circumstance of preemptive execution as a means of dealing with murderers with future dangerous propensities, if the state attorneys of Florida want to be able to add this to the statute as an aggravating circumstance, they would undoubtedly find strong support in Tallahassee's legislative halls, but until this is done, the law enforcers should themselves obey the law.

It was simply unconscionable that the lead prosecutor told this jury that it should recommend that Charles Street be executed as a means of preventing him from hurting or killing persons in the future when there is no such aggravating circumstance.

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 Attorney General raises three arguments in support of its contention under this point that no reversible error was committed by the actions of the lead prosecutor in quoting from the Bible in his final argument to the jury, which can be summarized as follows:

(1) State's argument in this regard was invited response;

(2) All but one of State's instances of arguing from the Bible, etc., were not contemporaneously objected to by Defense counsel; and

(3) State's quoting from and arguing from or about the Bible was acceptable conduct and not reversible error.

The Attorney General's contention that the Bible quoting of State was an invited response because Defense counsel told the jurors, "you will have a unique opportunity to condemn what has happened, to condemn the sin but not condemn the sinner," falls pathetically short of being anywhere near persuasive, both because it was a sole comment and because it was not attributed to the Bible. There is no disputing the status of the law that under the "invited reply" doctrine a prosecutor's otherwise improper argument may be excused if it constitutes an appropriate response to misconduct by the Defense but, succinctly stated, this Appellant respectfully contends that the prosecutorial Bible thumping went far beyond being an appropriate invited response. See United States v. Robinson, 485 U.S. 25, 99 L.Ed 2d 23, 108 S.Ct. 864 (1988).

Regarding the Attorney General's no contemporaneous objections argument, save one, the Defendant asserts that no contemporaneous objections were necessary because the State Bible arguing was fundamentally erroneous. In this regard, in a criminal appeal an appellate court will always consider fundamental error that is apparent in the record even though objection was not made to it in the lower court, Wyche v. State, 178 So.2d 875 (Fla. 4th DCA 1965). It is Defendant's contention that the Bible quoting, etc., is fundamental error because it goes to the very foundation of this case. Brown v.

State, 366 So.2d 787 (Fla. 1st DCA 1978).

And, finally, getting to the heart of the matter, i.e., Attorney General's argument that the quoting from and arguing from the Bible was perfectly acceptable prosecutorial conduct, is just not any longer----- if it ever really was-----a valid argument. First, in this regard, the holding of this Court in Paramore v. State, 229 So.2d 855 (Fla. 1969), that, "(t)he reading of passages from the Bible is not ground for reversal," should not be held as precedentially governing because the case was decided before the Supreme Court of the United States turned the world of capital punishment upsidedown in Furman v. Georgia, 408 U.S. 238 (1972). Furman is recognized as standing for several propositions and one of them is that the U.S. Constitution is not violated by state statutes which provide for the non-mandatory imposition of the death penalty for murder if proper standards are provided for determining when that penalty should be imposed. See Anno., Gardner v. Florida, Supreme Court's Views on Constitutionality of Death Penalty and Procedures Under Which Imposed, 51 L.Ed 2d 886.

Further, in this regard, for the guilty verdicts, etc., in this case to be allowed to stand in the face of the Biblical arguing is to permit a prosecutorial procedure in a capital case which would, in effect, have Florida going in the opposite direction from the course first charted in Furman and later specified in Zant v. Stephens, 462 U.S. 862, 77 L.Ed 2d 235, 103 S.Ct. 2733 (1983), which course is that the state's capital sentencing scheme must channel the sentencer's discretion to "genuinely narrow the class of persons eligible for the death penalty...." (Zant v. Stephens at p. 877 of 462 U.S. 862). This concept of narrowing was further amplified in Godfrey v. Georgia, 446

U.S. 420, 64 L.Ed 2d 398, 100 S.Ct. 1759 (1980), where the Court held that 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.

For the prosecutor to be allowed to argue that a convicted murderer should be executed because such punishment is according to the law of God is clearly not part of a narrowing process and, in fact, it amounts to nothing less than the prosecutor arguing a non-statutory aggravating circumstance in violation of the clear holding in Proffitt v. Florida, 428 U.S. 242, 49 L.Ed 2d 912, 96 S.Ct. 2960 (1976), that there is----or should not be----any such thing as a non-statutory aggravating circumstance.

Unlike the situation in Florida, the court of last resort in a state which also imposes the death penalty----Pennsylvania----has dealt with the constitutional propriety of the prosecution in a capital case raising a Biblical argument in favor of the death penalty being imposed. In that case, Commonwealth v. Chambers, 599 A.2d 630, 528 Pa. 558 (1991), cert. den. 112 U.S. 2290, 119 L.Ed 2d 214, 112 S.Ct. 2290, USLW 3798, the Supreme Court of Pennsylvania recited, in very pertinent part (at p. 644 of 599 A.2d), to-wit:

> "In the past we have narrowly tolerated references to the Bible and have characterized such references as on the limits of 'oratorical flair' and have cautioned that such references are a dangerous practice which we strongly discourage. Commonwealth v. Henry, 524 Pa. 135, 569 A.2d 929 (1990); Commonwealth v. Whitney, 511 Pa. 232, 512 A.2d 1152 (1986). We now admonish all prosecutors that reliance in any manner upon the Bible or any other religious writing in support of the imposition of a penalty of death, is reversible error per se and may subject violators to

> disciplinary action.
> Here, the prosecutor argued, 'As the Bible says, 'and the murderer shall be put to death.' This reference is substantially different than the references tolerated in Henry and Whitney where the prosecutor allegorically likened the Defendant to the Prince of Darkness mentioned in the Bible to establish that he was an evil person.
> More than allegorical reference, this argument by the prosecutor advocates to the jury that an independent source of law exists for the conclusion that the death penalty is the appropriate punishment for Appellant. By arguing that the Bible dogmatically commands that 'the murderer shall be put to death," the prosecutor interjected religious law as an additional factor for the jury's consideration which neither flows from the evidence or any legitimate inference to be drawn therefrom. We believe that such an argument is a deliberate attempt to destroy the objectivity and impartiality of the jury which cannot be cured and which we will not countenance. Our courts are not ecclesiastical courts and, therefore, there is no reason to refer to religious rules or commandments to support the imposition of a death penalty. Our Legislature has enacted a Death Penalty Statute which carefully categorizes all the factors that a jury should consider in determining whether the death penalty is an appropriate punishment and, if a penalty of death is meted out by a jury, it must be because the jury was satisfied that the substantive law of the Commonwealth requires its imposition, not because of some other source of law.
> Because the prosecutor's argument in favor of the death penalty reached outside of the evidence of the case and the law of this Commonwealth, we are not conviced that the penalty was not the produce of passion, prejudice or an arbitrary factor and, therefore, pursuant to our Death Penalty Statute, we must vacate the sentence of death and remand this matter for a new sentencing hearing. 42 Pa. C.S. Sect. 9711(h)(4). (Emphasis added)

Further, in the Chambers case, it is noteworthy that in the one-justice concurring and dissenting opinion, it is recited that the Biblical quoting and arguing was "the isolated comment of the prosecutor" made as "the last sentence in a brief closing" (P. 644 of 599 A.2d).

The lead prosecutor's Bible arguing in his closing argument in the instant case was far from being just an isolated comment; in fact, it was a central theme if not the central theme of a capital case prosecutor who took on the mantle of God's holy avenging angel. He had no right to do this and, more importantly, he had a duty to not do it. It is not the duty of a state attorney merely to secure convictions, it is also his duty, as an officer of the court to see that justice is done. Smith v. State, 95 So.2d 528 (Fla. 1957). To the same effect (by analagizing the role of a federal prosecutor to a state prosecutor) is the holding in Berger v. United States, 295 U.S. 78, 79 L.Ed 2d 1314, 55 S.Ct. 629 (1935).

Further, for the Attorney General to contend that this prosecutorial misconduct is nullified because in his final summation the arguing defense counsel also quoted and argued from the Bible is a chronological basackwards argument without any merit whatsoever.

POINTS XII AND X

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.

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.

(NOTE: These two points are being argued together here because of their interrelationship.)

The court charged the jurors that it could consider seven statutory aggravating circumstances, which are embodied in subsections 6(b)(d)(e)(g)(h)(i) and (j) of F.S. 921.141. All of these subsections except one deal in one way or another with events surrounding the murders for which Defendant was convicted in the instant cause, the one exception being the aggravating circumstance embodied in subsection 6(b), to-wit: "The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to some person."

In support of 6(b) State placed its reliance at sentencing on "Street's violent felony convictions for battery on a law enforcement officer and attempted first degree murder" (AGB-87). These were the prior convictions concerning which State had introduced in evidence certified copies thereof, which prior offenses occurred, respectively, in 1977 and 1980 (T-8/7/90; 120-126).

State's sins here were two: (1) It went way beyond the bounds of reasonableness and got before this jury evidence of peripheral events surrounding these 1977 and 1980 crimes, which evidence was either not relevant or, alternatively, was so unfairly prejudicial that such prejudice outweighed any relevance. The peripheral evidence concerning

the 1977 crime included Officer Frere's testifying that Defendant committed traffic infractions; Defendant called him a "cracker", Defendant told him he was not going back to jail (which was unfairly prejudicial both because of a similar State contention in the instant case and because it told the jurors of some unspecified crime before 1977), etc. (T-8/6/90-109-118).

With the 1980 crime, State adduced testimony from Detective Bryant which went so far afield as to include his opinion that Defendant's body language evidenced to the detective that Defendant understood his rights (T-8/7/90-87).

But even more reprehensible was that State backdoored into evidence that Defendant had been convicted of other crimes, and that, specifically, that he had been convicted of a felony in 1973 (T-8/7/91-212-223). It is noteworthy that the Attorney General has made no response whatsoever to the Defense's challenging in this appeal of the admission of evidence of other crimes and of the 1973 crime. Further, in this regard, it appears that the case cited by the Attorney General under Point X, i.e, Waterhouse v. State, 596 So.2d 1008, 1016 (1992), refers only to the admissibility of details of prior violent felonies relied upon by the prosecutor as part of aggravating circumstance 6(b).

With reference to this 1980 crime, after the court denied Defense's contention that State should be prohibited from adducing testimony from Detective Bryant as to three inculpatory answers Defendant made to him because Defendant had refused to sign a Miranda Rights waiver, it then concomitantly ruled that Defense could not bring out before the jury that Defendant had refused to sign the Miranda Waiver, which ruling flies right in the face of Calloway v. Wainwright,

409 F.2d 59 (1968), cert. den. 395 U.S. 909, and its progeny. If as the statute, i.e., F.S. 921.141(1), says, "(a)ny such evidence which the court deems to have probative value, regardless of its admissibility under the exclusionary rules of evidence...." can be received in evidence, why, then, should the evidence of Defendant's refusal to sign the rights waiver have not been heard by the advisory jury.

And, finally, Footnote 7 on page 82 of the Attorney General's brief should be disregarded in its entirety because the Attorney General did not see fit to raise its complaint therein in a cross-appeal.

POINT XIII

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

Other than another volley of its technical objections, the Attorney General's only substantive arguments here are that State was entitled to bring out about the Cadillacs and in order to be able to fully cross examine the Defense's social worker and that the evidence of the Cadillacs was relevant because Defense was arguing Defendant's impoverished background as a mitigating circumstance. Succinctly responding to these two arguments, neither of them has any merit whatsoever. The truth is that this Cadillacs business was just one more of the many irrelevant and/or unfairly prejudicial arguments fired from the State Attorney's shotgun.

POINTS XIV AND XVI

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.

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.

(NOTE: These two points are being argued together here because of their interrelationship.)

Here again the Attorney General asserts a technical defense in contending that Defendant cannot challenge the constitutionality of the death penalty statutes in Florida "because he neglected to raise this argument at trial and is thereby foreclosed from raising it on appeal" (AGB-89). Castor v. State, 365 So.2d 701 (Fla.1978), does indeed set forth the general proposition that a contemporaneous objection is generally a prerequisite to raising the matter on appeal "....to apprise the trial judge of the putative error and to preserve the issue for intelligent review on appeal" (Castor at p. 703).

However, in the instance of raising as an issue the unconstitutionality of Florida's death penalty law, since----as the

Attorney General has pointed out----this Court has many times ruled such law constitutional, the trial court was without authority to consider the issue and thus the only place where it could be effectively raised in the first instance is before this Court. Hoffman v. Jones, 280 So.2d 431 (Fla.1973). Therefore, to have to raise this issue in the trial court would be a useless act and the law should not require useless acts. Defense would suggest that an old maxim of equity is applicable to this issue in this criminal case, to-wit:

> "....equity regards the substance rather than the form of things, looks to the substance and not to the shadow, to the spirit and not to the letter; that it seeks justice rather than technicality, truth rather than evasion, common sense rather than quibbling." (from Coleman v. Coleman, 191 So.2d 460 (Fla.1st DCA 1966)

For the reasons stated in the arguments under these two points in the initial brief Defendant Charles Street reasserts:

(1) That Florida's Death Penalty law is unconstitutional in that it would inflict cruel and unusual punishment upon him in violation of the Eighth and Fourteenth Amendments to the U.S. Constitution and under Article I, Sections 9 and 16, Florida Constitution, and

(2) Florida's death penalty law is unconstitutional under the above-quoted federal and state constitutional provisions as that law has and is being applied to him. Westwood Lake, Inc. v. Dade County, 264 So.2d 7 (Fla.1972).

POINT XV

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

Defense specified in detail in its initial brief argument on this

point how the role of the advisory jury was demeaned and for whatever the reason the Attorney General has declined to explain why and how it contends such is not reversible error, limiting his argument to the citing of three decisions. Therefore Defense stands on its initial brief argument.

POINT XVII

THE DEFENDANT WAS SUBJECTED TO CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND HE WAS DENIED THE DUE PROCESS OF LAW IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION BY THE SENTENCING ADVISORY JURY HAVING BEEN CHARGED TO CONSIDER THE APPLICABILITY OF THE HEINOUS, ATROCIOUS AND CRUEL AGGRAVATING CIRCUMSTANCES AS SET FORTH IN THE FLORIDA DEATH PENALTY TRIAL PROCEDURE STATUTE, I.E., 921.141(2).

The "Heinous, Atrocious and Cruel" statutory aggravating circumstance is like a Phoenix arising from the ashes. Its legally indistinguishable predecessor was declared dead by the U.S. Supreme Court in Espinosa v. Florida, 505 U.S.____, 120 L.Ed 2d 854, 112 S.Ct. _____ (1992), and this Court has acknowledged the efficacy of such declaration of unconstitutionality in Johnson v. State, 608 So.2d 4 (Fla.1992). The Attorney General's office in the instant cause seeks to keep the Phoenix alive by contending that Street's counsel are barred from[1] raising the matter here because "Street failed to preserve the objection."

Street respectfully suggests to this Court that under the unusual circumstance pertaining here, i.e, the trial of this case being held before the U.S. Supreme Court made its ruling in Espinosa (and before

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[1] The said predecessor version of this aggravating circumstance was "especially wicked, evil, atrocious or cruel" See Espinosa at p. 585 of 120 L.Ed 2d.

this appeal), it is not a prerequisite to this matter being raised on appellate review for a trial objection to have been made to the HAC instruction.

At 3 Fla. Jur. 2d 364 (Appellate Review, Section 301, What Constitutes), the following pertinent language appears:

> "....where a case was submitted to a jury under a comparative negligence statute which was held unconstitutional (in another action) by the Supreme Court after the jury verdict but before the appeal was heard, the reviewing court should have remanded the cause with directions for a new trial, notwithstanding the fact that the parties had not themselves attacked the constitutionality of the statute at the trial level. The Supreme Court stated that the reviewing court was in error in having refused to consider the changed state of the law on the ground that the statute's validity had not been challenged below, saying instead that the reviewing court was bound, on appeal, to apply the law as it existed at the time of the appeal."

The case referred to above is Florida v. East Coast Railroad Co. v. Rouse, 194 So.2d 260 (Fla.1966), and at the conclusion of the opinion the Court stated:

> "In this cause, between trial, judgment and appeal, there was a charge in law which affected the result and, in consequence, certiorari must be granted, the decision under review quashed without prejudice and the cause remanded with directions to remand for a new trial. It is so ordered."

All of the decisions cited by the Attorney General were handed down before Espinosa, specifically including Sochor v. Florida, 504 U.S.____, 119 L.Ed 2d 326, _____S.Ct.____, (1992), and it is noteworthy to the Attorney General's reliance in Sochor that Justice Scalia wrote in Espinosa that for the reasons he stated in the Sochor opinion, he was dissenting in Espinosa.

The holding in Espinosa is clear and unambiguous in holding that whenever and wherever the HAC aggravating circumstance is injected into

a Florida death penalty case and the death sentence is imposed, a new penalty phase trial must be ordered. While the Court in Espinosa doesn't use the words "per se" it clearly is saying that the introduction of the unconstitutionally vague HAC aggravating circumstance into a death penalty trial is automatically reversible error, and Defendant Street respectfully asserts such to be the law, the holding of this Court in Johnson v. State, supra, to the contrary notwithstanding.

To cover all the potentially involved bases, Defense would add that unlike in Johnson the lead prosecutor in this case dwelt at length in his final argument as to how the HAC aggravating circumstance applied to Street (T-8/9/91-35-38).

And as is pointed out by none other than the Attorney General's office in its argument under this point, the court in its sentencing order fully considered the evidence of the applicability of HAC aggravating circumstance to each of the victims and concluded that it didn't apply to Officer Strzalkowski but that it did to Officer Boles.

It therefore cannot be logically said that the charging of the advisory jury to consider the HAC aggravating circumstance was harmless error beyond a reasonable doubt. State v. DiGuilio, supra; Chapman v. California, supra. Further, even though the court found the HAC instruction to be not applicable to the killing of Strzalkowsky, under Espinosa the death sentence imposed upon Street for the killing of Strzalkowski is just as constitutionally infirm as is the death penalty imposed upon Street for the killing of Officer Boles because the jury considered it as to Strzalkowski.

CONCLUSION

For the foregoing reasons, the Defendant, Charles Street, again prays the Court to reverse the trial court's sentence of death and to substitute in its place a sentence of life subject to the provisions of the involved statutes, or to grant him such other relief it deems necessary under the circumstances.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy hereof was mailed this 14th day of April, 1993, to the Office of the Attorney General, State of Florida, 401 N.W. 2nd Avenue, Miami, Florida.

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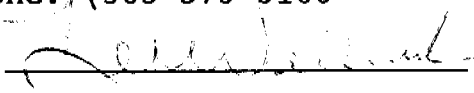
By: 

APPENDIX

A. Written Proffer R: Terri Hickson

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

CRIMINAL DIVISION

CASE NO.: 88-41297

JUDGE: ALFONSO SEPE

THE STATE OF FLORIDA,
Plaintiff,

vs.

CHARLES HARRY STREET,
Defendant.
_____/

PROFFER RE: TERRI HICKSON

The Accused, through counsel, files this proffer in support of the defense Motion to Call Additional Witnesses relating to the rebuttal testimony of Richard DeCarlo as follows:

1. On July 19, 1990, counsel personally interviewed Terri Hickson in Palm Beach County, Florida.

2. Ms. Hickson told counsel that she witnessed the incident of June 17, 1980, involving the Accused and several police officers.

Ms. Hickson said the police officers struck and beat the Accused with their hands and with an object.

Ms. Hickson said the police officers repeatedly referred to the Accused as a "nigger".

Ms. Hickson said after the police officers handcuffed the Accused, they; continued to beat him.

Ms. Hickson said the Accused never exposed himself to the police officers and that he never attempted to grab or touch any firearm in the possession of any police officer.

3. Ms. Hickson said she is willing and available to testify about this matter.

I HEREBY CERTIFY that a true and correct copy of the foregoing was hand-delivered to the Office of the State Attorney, 1351 N.W. 12th Street, Miami, Florida, this July 23, 1990.

Respectfully submitted,

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Eleventh Judicial Circuit
of Florida
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By: Robert Godwin
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