IN THE SUPREME COURT OF FLORIDA

GEORGE JAMES TREPAL,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 77,667

ON APPEAL FROM THE CIRCUIT COURT
OF THE TENTH JUDICIAL CIRCUIT
IN AND FOR POLK COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

OFFICE OF THE ATTORNEY GENERAL
2002 North Lois Avenue, Suite 700
Westwood Center
Tampa, Florida 33607-2366
(813) 873-4739
Attorney for Appellee

RONALD N. TOWARD, ESQUIRE
Post Office Box 226
Bartow, Florida 33830
(813) 533-0507
Florida Bar Number 258105
Attorney for Appellant

TOPICAL INDEX TO BRIEF

TOPICAL INDEX TO BRIEF
(CONTINUED)

TABLE OF CITATIONS

TABLE OF CITATIONS
(CONTINUED)

TABLE OF CITATIONS
(CONTINUED)

TABLE OF CITATIONS
(CONTINUED)

TABLE OF CITATIONS
(CONTINUED)

TABLE OF CITATIONS
(CONTINUED)

TABLE OF CITATIONS
(CONTINUED)

TABLE OF CITATIONS
(CONTINUED)

PRELIMINARY STATEMENT

References to the record on appeal shall be designated by (R-XX), with the XX representing the page of the record cited as numbered by the Clerk of Court. References to exhibits are designated by (Ex. #), with the # representing the exhibit as numbered at the trial of this cause, by the Clerk of Court.

STATEMENT OF THE CASE

On April 5, 1990, a fifteen count indictment was filed in the Circuit Court of the Tenth Judicial Circuit in and for Polk County, Florida, wherein Appellant, GEORGE JAMES TREPAL, was charged with the following offenses:

Count I: The first degree, premeditated death of Peggy Carr, effected through the use of poison, to wit: thallium;

Count II: The attempted first degree, premeditated death of Arlie Duane Dubberly effected through the use of poison, to wit: thallium;

Count III: The attempted first degree, premeditated death of Parealyn Travis Carr effected through the use of poison, to wit: thallium;

Count IV: The attempted first degree, premeditated death of Parealyn (Pye) Carr effected through the use of poison, to wit: thallium;

Count V: The attempted first degree, premeditated death of Kasey Bell effected through the use of poison, to wit: thallium;

Count VI: The attempted first degree, premeditated death of Gelena Bell effected through the use of poison, to wit: thallium;

Count VII: The attempted first degree, premeditated death of Tammy Carr effected through the use of poison, to wit: thallium;

Count VIII: The poisoning of food or drink with thallium with the intent to kill or injure another person, to wit: Peggy Carr;

Count IX: The poisoning of food or drink with thallium with the intent to kill or injure another person, to wit: Arlie Duane Dubberly;

Count X: The poisoning of food or drink with thallium with the intent to kill or injure another person, to wit: Parealyn Travis Carr;

Count XI: The poisoning of food or drink with thallium with the intent to kill or injure another person, to wit: Parealyn (Pye) Carr;

Count XII: The poisoning of food or drink with thallium with the intent to kill or injure another person, to wit: Kasey Bell;

Count XIII: The poisoning of food or drink with thallium with the intent to kill or injure another person, to wit: Gelena Bell;

Count XIV: The poisoning of food or drink with thallium with the intent to kill or injure another person, to wit: Tammy Carr;

Count XV: The contamination of a consumer product, to wit: soft drinks, with thallium (R4415-4423).

On May 1, 1990, Appellant filed a Motion to Dismiss wherein he contended that the indictment failed to set forth sufficient facts upon which to predicate the enumerated charges (R-4565). Appellant's motion was denied (R-4566). However, it was discovered that the first count of the indictment incorrectly stated the timeframe for the offense of first degree murder as to Peggy Carr. Accordingly, the matter was resubmitted to the grand jury and, on May 10, 1990, an amended indictment was returned against Appellant (R4584-4592).

On August 2, 1990, Appellant filed a motion to suppress certain evidence, to wit: a small brown bottle and the contents thereof, referred to throughout the remainder of the litigation as "Q-206" (R4637-4639). An amended motion to suppress was filed on August 17, 1990. The motion addressed the same item of evidence, to wit: Q-206, and alleged that the evidence should be suppressed because it was seized

without a warrant from a closed drawer in an old chest of drawers located in the detached garage of Appellant's home (R4666-4670).

Appellant's amended motion to suppress came on to be heard on the 27th day of August, 1990, before the Honorable Dennis P. Maloney (R-4765). Special Agent Susan Goreck was called on behalf of Appellant while Detective Ernest Mincey was called by the State (R-4777; R-4831). Following completion of the testimony, the trial court took the motion under advisement (R-4878). On September 7, 1990, a written order was filed wherein the trial court denied Appellant's motion to suppress (R5087-5090).

Trial by jury commenced on January 7, 1991, the Honorable Dennis P. Maloney presiding (R-3). At the conclusion of the State's case, Appellant moved for the entry of a Judgment of Acquittal (R-4076). The motion addressed two alternate interpretations of the evidence against Appellant. First, Appellant argued that the evidence was purely circumstantial and did not exclude every reasonable hypothesis of innocence (R-4076). Specifically, Appellant maintained that it would be necessary to pyramid inferences in order for the jury to render a conviction (R4078-4080). Second, Appellant argued that the evidence failed to establish the element of premeditation (R-4094). That is, even if the evidence

was legally sufficient to establish that Appellant was the individual who placed the thallium in the soft drink bottles, the evidence was legally insufficient to establish that he had done so with the intent of causing death (R4094-4098). The evidence would thereby support a conviction for second degree murder or manslaughter, but would not support a conviction for first degree murder.

Appellant's motion was considered and denied (R-4121). Appellant then rested without presenting any further evidence (R-4122). His renewed Motion for Judgment of Acquittal was also denied (R-4122). On February 5, 1991, the jury returned verdicts of guilty as to all counts of the amended indictment (R5475-5490). Penalty phase was conducted on February 7, 1991 (R-4367). By a vote of nine to three, the jury recommended a sentence of death (R-4409). On March 6, 1991, the trial judge imposed the following sentences:

Count 1:	Death
Counts 2 through 15:	Thirty years in prison as to each count, the sentences being structured so as to result in a ninety year, concurrent sentence (R5554-5555).

Written findings in support of the imposition of the death penalty were filed by the trial judge on March 6, 1991 (R5549-5556). The trial court determined that three statutory aggravating circumstances were proven beyond any reasonable doubt, to wit:

1. The defendant was previously convicted of another capital felony or a felony involving the use or threat of violence to the person.

2. The defendant knowingly created a great risk of death to many persons.

3. The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification (R5549-5550).

The court found one statutory and four nonstatutory mitigating factors, to wit:

1. The defendant has no significant history of prior criminal activity.

2. The defendant's personal life has been characterized by good and loving relationships. He has always been obedient to his parents and has been part of a happy marriage for over ten years.

3. The defendant is an intelligent man who has shared his expertise with others through various articles.

4. The defendant's adjustment to the prison system in 1975 was exceptional and he freely participated in programs designed to assist other inmates.

5. The defendant's nature is shy, quiet, polite, and amiable. He is generous to others and behaved respectfully. Numerous friends supported him throughout the proceedings and are convinced that an injustice has been done in this case (R5551-5553).

Notice of Appeal was filed on March 22, 1991 (R5559-5560).

The Office of the Public Defender was appointed to represent Appellant for appeal purposes on March 4, 1991 (R-5533). Undersigned counsel was subsequently appointed by Court Order dated July 23, 1991 (R-5571).

STATEMENT OF THE FACTS

Parealyn "Pye" Carr and Margaret Smith were married in 1967 (R-3585). Until their divorce in 1986, they lived at 2690 Alturas Road, Alturas, Polk County, Florida (R-3586). Pye Carr met Peggy Dubberly in 1987 and married her in March of 1988 (R-1978). Following their marriage, they moved into Pye Carr's home in Alturas, Florida (R-1680). Pye's son, Travis, and Peggy's son, Duane Dubberly, also lived in the house (R-1586).

In the early 1980's, Appellant, GEORGE TREPAL, and his wife, Dr. Diana Carr, purchased the property adjoining Pye Carr's property from Leland Young (R-3682). Dr. Carr was not related to the Pye Carr family. The Trepal home was at least 70 years old, and a garage located on the property was at least 40 years old (R-3685). The homes were located in orange groves and were essentially isolated (Ex. #6).

In March of 1988, Pye Carr converted a garage located on his property into an apartment (R-1721; R-3622). The apartment was located almost directly between the Trepal and Carr residences, and the Carr homestead was surrounded by a chain link fence (Ex. #10; R-3862). The garage apartment was occupied continuously by Pye Carr's two daughters, Gelena Shiver and Tammy Reed, and by his granddaughter, Kasey Bell (R-1613). In addition, Gelena's ex-husband, Ron Chester, also resided in the apartment between June and September of 1988 (R-3648). The occupants of the apartment used the "main" house (R-3657).

The State sought to introduce evidence throughout the trial that the relationship between the Trepal family and the Carr family was volatile. In fact, most of the incidents were innocuous. They involved situations where Appellant and his wife would become upset because their cats were being chased by the Carr dogs or when the Carr children would ride their three-wheelers on the Trepal property (R-3670). There was no evidence of any confrontations over these events. Rather, only two confrontations between the families were documented, but the State produced ten witnesses to testify to the same two events (R-3576; 3593; 3597; 3600; 3639; 3648; 3658; 3661; 3664; 3671).

One of the arguments did not involve Appellant, but occurred between Peggy Carr and Diana Carr when Diana complained about Peggy's children playing their music too loudly (R-3597). The second incident occurred between Appellant and Pye Carr. On this occasion, Pye, his son, and some friends were working on a car. They were playing a "party" tape that contained obscene jokes and language. It was being played loudly and Appellant complained to Pye about the volume of the tape (R-3593; R-3671). After this discussion, Appellant became angry and disconnected the hose that supplied water from Appellant's well to the Carr household (R-3671)[1].

---

[1]Interestingly, this testimony directly contradicts Pye Carr's previous testimony that it was Appellant's well that was inoperable and that Appellant was receiving his water from the Carr well (R1708-1710). The State emphasized this fact in an effort to suggest that Appellant's apparent lack of concern over the source of his water somehow meant that he knew where the poison that affected the Carr family came from.

In June of 1988, Pye Carr received a letter in the mail that was postmarked June 14, 1988 (R-1718). The letter stated:

> You and all your so-called
> family have two weeks to
> move out of Florida forever
> or else you will all die.
> This is no joke (R-1595).

The origin of the note was never determined, but the State attempted to link Appellant to the note because of a similarity in language of the note to statements that Appellant made to Detective Mincey (R-2077). Investigation by the FBI failed to find any stamps, paper, cutting utensils, typewriters, or any other object or evidence that demonstrated a nexus between Appellant and the note (R3768-3771).

During the week of October 16, 1988, Pye Carr took a week of his vacation from his employment as a mining superintendent at Estech (R1681-1682). Both Travis Carr and Duane Dubberly were with Pye around the house that week because both of them had dropped out of school (R-1685). They were working on various projects and had been given the assignment of painting the apartment (R-1985). Also present around the house were Gelena Shiver who worked the 8 a.m. to 5 p.m. shift at Kaplan Industries, Peggy Carr, who worked from 6 a.m. to 2 p.m. at Nicholas Restaurant, and Tammy Reed, who worked at Polk General Hospital from 8 a.m. to 4 p.m. (R-1631).

On Thursday, October 20, 1988, Pye Carr left Alturas with three of his friends for a hunting trip in South

Carolina (R1682-1683). Travis and Duane remained behind in order to finish their assignment of painting the apartment (R-1685). The other individuals in the extended household went about their affairs as usual. With the exception of 20 to 30 minutes on Thursday, October 20, 1988, and 20 to 30 minutes on Friday, October 21, 1988, the Carr home was never unattended. On those two occasions, Travis and Duane went to Nicholson Supply to purchase paint (R-3165; R-1593), Also during this week, Appellant spent the majority of time at his office in Winter Haven, Florida, preparing for a computer convention in Orlando, Florida (R-3287).

On Saturday, October 23, 1988, Peggy Carr began to manifest symptoms of an unknown illness (R-1654). She was admitted to Bartow Memorial Hospital the following day and remained there until Thursday, October 27, 1988 (R-1797). She was discharged and returned home where her condition failed to improve (R-1806). Both Travis and Duane also started to exhibit symptoms similar to those experienced by Peggy Carr (R-1805). On October 30, 1988, Peggy was transported by ambulance to Winter Haven Hospital (R-1869). Pursuant to medical advice, both Travis and Duane were transported to the hospital the same evening and admitted (R-1834).

Dr. T. Richard Hostler, a specialist in neurology, treated the Carr family upon their arrival at Winter Haven Hospital (R-1820; R-1834). Dr. Hostler immediately suspected

thallium poisoning and Hostler testified that any trained neurologist would have considered thallium poisoning based upon the symptoms exhibited by Peggy (R-1843). Within 24 hours, the presence of thallium was confirmed (R-1828).

Peggy Carr's condition progressively deteriorated. She lapsed into a coma within a week of her entry into Winter Haven Hospital (R-1829). She remained on life support systems until March 3, 1989, when the systems were disconnected (R-1837). Travis and Duane remained in the hospital pending their recuperation and discharge (R1835-1837). Subsequent tests revealed the presence of thallium in the systems of Gelena Shiver, Kasey Bell, Pye Carr, and Timothy Pacetti (R-3320).

Following the discovery that various members of the Carr family were exposed to thallium, numerous agencies became involved in the search for the source of the element (R-1920; R-1982). Robert Tiller of HRS began taking numerous samples of substances from the Carr home for the purpose of analyzing them (R-1934). He also took 36 to 40 swabs from areas inside both the home and the apartment (R-1933; R-1949).

On November 23, 1988, while visiting the Carr home for the fourth time, Carlton Layne of EPA suggested to Mr. Tiller that one or two of the empty Coke bottles located throughout the house be tested for residue (R-1994).

The Coke bottles had been observed by Mr. Tiller on his first visit to the residence, but Pye Carr had told him that the family only drank Pepsi (R-1942). The full Coke bottles were located under the counter on the floor (R-1945).

On December 2, 1988, Detective Mincey learned from Dr. George Coppinger of HRS that thallium had been found in the washings taken from the Coke bottles and in a swab taken from under the sink in the apartment (R-2055; R-2037). Based upon this discovery, the investigation became criminal in nature at that time (R-2055). Detective Mincey returned to Pye's residence to secure the remaining, full Coke bottles and the pieces of the Coke bottle that he had broken (R-2059). These bottles were located on the floor under a counter behind a garbage can. It was a family understanding that this location was a "hiding" place used to keep things from the children (R-1599; R-1729).

Information concerning the Coke bottles was limited. The lot numbers reflected where and when the bottles were produced, but tracing them through the stream of commerce was impossible (R3129-3132). The only information available concerning the source of the Coke bottles was Travis' recollection that he had purchased them from the Circle K store in Alturas one or two days before getting sick (R-1624). When this particular piece of information did not fit into the scenario adopted by the authorities, the police attempted to convince Travis that he had not made such a purchase (R-1625).

An examination of the Tampa bottling plant and the method used to package the bottles suggested that it would be impossible for eight randomly laced bottles to end up in the same eight-pack of Cokes (R3115-3118). However, due to the lack of security or controls on the transportation of the bottles, the prospect that the bottles had been tampered with after they left the bottling plant was never excluded (R-3037).

Trial and error testing performed by Coca-Cola personnel sought to identify the particular thallium compound used in the bottles. It was learned that thallium one nitrate, thallium phosphate, thallium sulfate, and thallium maleanate could all be placed in solution and then put into the bottles without altering the appearance of the product (R-3405; R-3426). However, thallium III nitrate caused the Coke to turn brown and produced a precipitant (R-3406). Subsequent scientific analysis showed the presence of the nitrate ion (R-3557).

On December 22, 1988, Detective Mincey and FBI Agent Brad Brekke were conducting interviews in the Alturas area when they observed Appellant working near his garage/ workshop (R-2073). They identified themselves and asked if they could speak to Appellant. He invited them into his home, but immediately was classified as unusual because he carried the piece of wood on which he was working into the home with him (R-2075). Appellant was considered to be

acting nervously and it was noted that he made a "clucking" sound when he talked (R-2079). When asked why anyone would want to poison the Carr family, Appellant allegedly responded that perhaps someone wanted them to move out of their residence (R-2077). Detective Mincey considered this response to be similar to the threatening note of June, 1988 (R-2077). From that moment forward, Appellant was considered to be responsible for the poisoning and the investigation focused on him to the virtual exclusion of all other possibilities (R3011-3024).

In order to get closer to Appellant in an effort to obtain incriminating information, Special Agent Susan Goreck of the Polk County Sheriff's Office was used in an undercover capacity. She learned that the Mensa Society was sponsoring a "Mensa Murder Weekend" in April, 1988. She wrote to Appellant's wife with a request that she be permitted to attend the function (R-3213). These weekends were sponsored by the Mensa Society and consisted of various scenarios involving murder. The participants assumed roles in the scenarios and then would attempt to solve the crimes based upon clues that were available (R-3221).

Under the guise of Sherry Guinn, Goreck assumed the role of an innocent bystander at the April function (R3214-3215). She met and befriended Appellant and learned that he researched the background material for the weekend's activities, which had been written by his wife (R3224-3225). She also learned

that Appellant planned to sell his house in Alturas and move either to Virginia or Sebring, Florida (R-3231).

Based on this additional information, Goreck met Appellant at his home on April 19, 1989, under the pretense that she was interested in buying the property (R-3232). Goreck continued to develop this relationship by meeting with Appellant and taking him on a picnic (R3241-3242). On December 7, 1989, Goreck sent money orders to Appellant for the purpose of renting the Alturas home (R-3248). Through a conversation with Appellant on December 12, 1989, Goreck learned that Appellant and his wife had moved to Sebring, that she could move into the Alturas house, but that her occupancy of the home was limited due to some additional work that Appellant had to do in the upstairs bedroom (R-3248).

Following the conversation with Appellant, Goreck and a search team went to Appellant's Alturas home. They took swabbings from the home and searched the area for anything of an evidentiary nature (R-3249). During the course of the search, a small brown bottle (Q-206) was found in the closed drawer of a workbench located in the garage (R-3898). The bottle was literally part of a rat's nest (R-3900). The bottle was seized and sent to the FBI laboratory where the powder contained therein was determined to be thallium one nitrate (R-3565). Numerous other items were seized from the garage and held by a waste disposal firm pending analysis (R-3730).

Following Appellant's arrest in April, 1989, search warrants were obtained for both his Alturas residence and his Sebring residence (R-3730; R-3784). Among the items seized from the Sebring house were numerous chemistry books and equipment. There were also several items relating to poisons (R-3785; R-3795; R-3818). Various records of both Appellant and Dr. Carr were seized in an effort to demonstrate that either of them had procured thallium. None of the documents reflected that they had obtained thallium from any source (R3763-3764).

After the discovery of the thallium one nitrate in Q-206, Appellant was charged with the poisoning episodes. At trial, the State introduced a plethora of photographs depicting Appellant's books, home, and equipment (R-3785). Several of the books which referenced thallium were also introduced into evidence (R-3789; R-3791; R-3792). Evidence of the other toxic chemicals found in Appellant's home also was introduced (R3877-3887). However, there was no evidence that Appellant had obtained thallium from any source even assuming, arguendo, that the thallium in Q-206 belonged to him.

To overcome this gap in evidence, Richard Broughton and David Warren were called to testify. During a proffered statement, Broughton testified that he was a DEA agent assigned to North Carolina between 1979 and 1981 (R-3460). He testified that Appellant was a chemist in an amphetamine

lab (R-3463). He further testified that thallium III nitrate is used in the production of P-2-P, which, in turn, is used in the production of amphetamines (R-3463). In the production of P-2-P for use in making amphetamines, the thallium III nitrate filters out and becomes thallium one nitrate (R-3464). David Warren testified in the proffer that he was responsible for obtaining the chemicals to manufacture the amphetamines and that Appellant was the chemist (R-3458).

Over objection, both Warren and Broughton were permitted to testify (R-3472). During testimony before the jury, Broughton not only stated that Appellant was the chemist for the amphetamine operation, but he gratuitously added that Appellant was the MASTERMIND behind the operation (R-3480). He acknowledged that thallium is not required to produce P-2-P and that the use of the thallium based process was rare (R-3483; R-3485). David Warren testified that he actually obtained P-2-P in its completed form for use in the production of amphetamines (R-3483). He never indicated that he obtained thallium, or any other precursors to P-2-P, or that the particular P-2-P used in their lab was thallium based.

Following completion of closing argument, the jury returned verdicts of guilty as to all counts (R5475-5490).

SUMMARY OF ARGUMENT

ISSUE #1

The trial court erred in failing to grant Appellant's Motion for Judgment of Acquittal. The evidence in the case sub judice was entirely circumstantial. The circumstantial evidence failed to exclude every reasonable hypothesis of innocence not only in regard to the Appellant's perpetration of the crime, but in regard to the establishment of the element of premeditation. Accordingly, the trial court should have either granted a Judgment of Acquittal and discharged Appellant, or, in the alternative, reduced the charges to second degree murder and attempted second degree murder.

ISSUE #2

A crucial element of evidence, Q-206, was seized from a chest of drawers in Appellant's garage without the benefit of a warrant. This seizure was improper under both federal and state constitutional law as well as state statutory law. Appellant had not abandoned his home nor had he given consent for law enforcement officials to conduct a warrantless, general search of his entire property, including buildings that stood separately from his residence. In addition, after securing Q-206, the State failed to obtain a warrant in order to test the material contained therein. This constituted a second and separate violation of Appellant's

constitutional rights. The court erred in failing to grant Appellant's Motion to Suppress, item Q-206, and the contents therein.

ISSUE #3

The trial court erred in permitting the introduction into evidence of numerous attacks on Appellant's character. The evidence was not presented in conformity with Section 90.404(2), Florida Statutes. The evidence did not address any acts similar to the instant case, but rather was presented to impugn Appellant's character. This error was exacerbated by the prosecutor's continued comment on Appellant's character during the course of closing argument. The totality of the erroneously admitted testimony, together with the implications drawn therefrom, deprived Appellant of a fair and impartial jury and a fair trial.

ISSUE #4

Presentation of testimony regarding the death of the victim in the instant cause failed to establish that Appellant caused her death. Specifically, no evidence was presented which distinguished the cause of death between the actions of the treating neurosurgeon and Appellant. Furthermore, the jury was not instructed regarding the meaning of "cause of death" and, therefore, could not reasonably reach the conclusion that Appellant was responsible for the death in the case sub judice.

ISSUE #5

The waiver of an instruction on maximum and minimum penalties is personal to an accused. Such a waiver may

not be exercised by counsel for the accused. The trial court in the case sub judice erred in failing to obtain a personal waiver of the instruction regarding maximum and minimum penalties. Accordingly, the case should be remanded for a new trial.

ISSUE #6

While the giving of an instruction on circumstantial evidence is discretionary, an abuse of that discretion may occur in cases involving purely circumstantial evidence. In light of the fact that the case sub judice consisted wholly of circumstantial evidence and was, of course, a capital case, the refusal of the trial judge to instruct the jury regarding circumstantial evidence constituted an abuse of discretion.

ISSUE #7

Imposition of the death penalty in this case is improper in light of the fact that the aggravating circumstances cited by the trial court to justify imposition of said sentence were not proven beyond and to the exclusion of every reasonable doubt. In addition, the aggravating circumstances did not outweigh the mitigating circumstances. Imposition of the death penalty in the instant cause is nonproportional to the imposition of death/life sentences in other cases.

ISSUE #1

DID THE TRIAL COURT ERR IN FAILING TO GRANT APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL?

At the close of the State's case, and again when the defense rested, Appellant moved for the entry of a Judgment of Acquittal (R-4076; R-4122). The Motion addressed both the sufficiency of the evidence as it related to proof that Appellant was the perpetrator of the offenses and the sufficiency of the evidence as it related to the issue of premeditation (R-4085; R-4097). Both aspects of Appellant's Motion were denied on each occasion (R-4121; R-4122).[1]

The evidence in the case sub judice is purely circumstantial. Most of the testimony dealt with Appellant's eccentricity and the subjective observations of law enforcement officials rather than concrete matters tending to establish guilt. In essence, the evidence against Appellant consisted of the testimony of numerous witnesses as to two or three conflicts between the Trepal household and the Carr household (which was intended to establish motive), the finding of the valium in a bottle in a rat's nest in a set of drawers that were at least 40 years old (the bottle and contents being unidentified as to origin or age), and testimony that Appellant's interest in

---

[1]Phrasiology of the argument in this section focuses on the conviction for First Degree Murder, but is equally applicable to all charges for which Appellant was convicted.

chemistry included the area of toxic substances, and that the research of which was reflected in the Mensa mystery weekend scenarios (R-3593; R-3900; R-3766; R-3222).

Principles governing the granting of a Motion for Judgment of Acquittal have been expressed in many ways and in numerous cases. It is axiomatic that the evidence must be sufficient to establish the defendant's guilt beyond and to the exclusion of every reasonable doubt. Tibbs v. State, 397 So.2d 1120 (Fla. 1981). Where the evidence against the accused is circumstantial in nature, it must be viewed with particular scrutiny. Grover v. State, 581 So.2d 1379 (Fla. 4th DCA 1991). In Davis v. State, 90 So.2d 629 (Fla. 1956), this Honorable Court wrote:

> Evidence which furnishes nothing stronger than a suspicion, even though it would tend to justify the suspicion that the defendant committed the crime, it is not sufficient to sustain conviction. It is the actual exclusion of the hypothesis of innocence which clothes circumstantial evidence with the force of proof sufficient to convict. Davis, pgs. 631-632.

Accordingly, a conviction based on circumstantial evidence may not be sustained if it does not exclude every reasonable hypothesis of innocence. State v. Law, 559 So.2d 187 (Fla. 1990); Peavy v. State, 442 So.2d 220 (Fla. 1983); Peek v. State, 395 So.2d 442 (Fla. 1990); and McArthur v. State, 351 So.2d 972 (Fla. 1977).

In the instant case, the State sought to demonstrate that Appellant placed poison in Coca Cola bottles and then placed the bottles in the home of the victims in order to kill them. This act was supposed to be retribution against the family for behavior that irritated Appellant.

No one actually observed Appellant in possession of the Coke bottles, in possession of the thallium one nitrate, in the process of lacing the Cokes with the poison, or in the process of placing the bottles in the Carr residence. Appellant's fingerprints were not discovered on any of the instrumentalities of this crime (R-3272; R3933-3936). Accordingly, there was no "direct" evidence that Appellant did any act in the perpetration of this offense. In order to obtain a conviction, it was incumbent upon the State to conclusively establish a series of facts that led to the conclusion that Appellant, and no one else, carried out the act of poisoning and that he did so not with the intent of scaring or hurting the victims, but rather with the intent of causing their deaths.

To obtain Appellant's conviction, the State attempted to show:

a. That Appellant disliked the Carr family.

b. That Appellant had a background in chemistry.

c. That Appellant had knowledge of poisons.

d. That Appellant knew of the poisonous propensities of Thallium one nitrate.

e. That Appellant obtained Thallium one nitrate through a process that he became familiar with while he was involved in the production of amphetamines in North Carolina in the 1970s.

f. That Q-206 belonged to Appellant.

g. That Appellant knew that Q-206 contained the Thallium one nitrate.

h. That Appellant used the contents of Q-206 to poison the Coca Cola bottles.

i. That Appellant poisoned the Coca Cola bottles not with the intent to make the victims sick or to scare them, but to effect their deaths.

j. That Appellant surreptitiously placed the bottles in the Carr household.

k. That Appellant's actions were reflected in the Mensa mystery weekend scenarios conducted subsequent to the death of Peggy Carr.

Initially it could be argued that the sheer multitude of assumptions that must be drawn from the evidence to reach a conviction make it too remote in logic to be sustained. Such a pyramiding of inferences is improper and must not be permitted to result in a conviction. In Chaudoin v. State, 362 So.2d 398 (Fla. 2d DCA 1978), the

Court of Appeal for the Second District reversed the defendant's conviction for second degree murder. In so doing, it concluded:

> To find appellant guilty, an impermissible succession of inferences would be necessary. First, it would have to be inferred that appellant remained in the vicinity outside the bar after the fight. Second, that inference would have to be used to support the further inference that appellant's purpose in remaining was to participate in the shooting and that he acted in furtherance of that purpose by some word or deed. Circumstantial evidence is not sufficient when it requires the pyramiding of assumption upon assumption in order to arrive at the conclusion necessary for a conviction. Gustine v. State, 86 Fla. 24, 97 So. 207 (1923). Chaudoin, pg. 402.

The same prohibition against pyramiding inferences has been recognized in numerous other cases. Weeks v. State, 492 So.2d 719 (Fla. 1st DCA 1986); G. C. v. State, 407 So.2d 639 (Fla. 3d DCA 1981). However, an examination of these particular inferences upon which the State relied demonstrates that they were not proven as against Appellant to the degree of moral certainty necessary to sustain a conviction. Where the evidence is lacking to support the inferences upon which the State builds its case, then the conviction cannot be permitted to stand.

Initially, the State sought to demonstrate that Appellant disliked the Carr family. In so doing, testimony was elicited

that Appellant had arguments with his neighbors about loud music and that he reported them to the County for failing to obtain a building permit when they converted their garage into an apartment (R-3576; R-3623). This testimony hardly was sufficient to demonstrate animosity strong enough to take a life and, accordingly, the State sought to attribute the threatening note of June, 1988, to Appellant.[2] Even this item of circumstantial evidence does not bear on Appellant's guilt as it was never connected to him by any competent evidence. Appellant's fingerprints were not found on the note and none of Appellant's paper, stamps, typewriters, scissors, stationery, or even white-out was in any way linked to the note (R3763-3771; R-3936; R-3999).

The State then sought to demonstrate that Appellant had specific knowledge regarding the amount of Thallium necessary to effect death. A ledger that consisted of some pages copied from a book at Central Piedmont Community College was introduced into evidence (R-3918). While this ledger contained information regarding Thallium, and while Appellant's palmprint was on it, expert examination did not determine that it was Appellant's handwriting in the ledger (R-3942; R-3993). Therefore, there was no evidence

---

[2]The error of introducing the threatening note is discussed in Issue #3, infra.

presented by the State that Appellant had read the ledger or otherwise knew the specific poisonous propensities of Thallium one nitrate as may have been set forth therein.

The State could present no evidence to demonstrate how Appellant came into possession of the Thallium despite a detailed search of his financial records, the flight records of his wife's airplane, and the records of Thallium producers nationwide (R-3763; R-3764; R-3297, 3300, 3304, 3307). In order to fill this void, the State introduced the testimony of David Warren and Richard Broughton. They testified that Appellant was involved, i.e. was the "master-mind" of, an amphetamine lab (R-3480). Warren testified that he procured the chemicals, including P-2-P in its final form, to produce the amphetamines (R-3487). Broughton testified that one way to produce P-2-P was through the use of Thallium three nitrate, although this was a rare procedure and not the only way to produce P-2-P (R3483-3485). According to a paper called the Tetrahedron Letters, the byproduct of the preparation of P-2-P through the use of Thallium three nitrate is Thallium one nitrate (R-3468).[3]

This evidence is so speculative as to fall short of even being circumstantial. To be of any probative value, the jury would have to conclude that not only was the

---

[3]The error of introducing this testimony is also discussed in Issue #3, infra.

Thallium three nitrate process used in the production of P-2-P, but that Appellant knew the process. They would also have to conclude that the Tetrahedron Letters was an authoritative source regarding the production of P-2-P and amphetamines. An unsubstantiated inference or assumption would have to be made that Appellant used the process to obtain the Thallium one nitrate in Q-206, and then that he used the product in Q-206 to poison the Cokes. There were no facts presented upon which any of these conclusions could be based.

It must be noted that Warren testified that he obtained the P-2-P in its final form (R-3488). That is, he did not obtain the chemicals necessary to produce P-2-P, which may or may not have included Thallium three nitrate, but rather obtained the P-2-P in its final form. Accordingly, there was no indication that Appellant used P-2-P that was made with Thallium three nitrate, nor that he was the one responsible for making the P-2-P and, therefore, would have been aware of the chemical process involved. In addition, there was a great deal of testimony regarding the controls on Thallium. Regardless of whether Appellant was knowledgeable regarding the chemical process to obtain Thallium one nitrate, even by the State's own theory he would have had to have first obtained Thallium three nitrate. Yet, there was no evidence that Thallium of any kind came into the hands of any individual in 1988. Notably, none

of the evidence introduced by the State in an effort to convict Appellant explained how Thallium came to be located under the kitchen sink of the Carr apartment (R-2037).

There was no evidence that Q-206 belonged to Appellant. It must be inferred that this bottle belonged to Appellant to place him in possession of Thallium. Such an inference may not be made absent facts which simply do not exist in the instant case. Q-206 was found in an old chest of drawers among a rat's nest (R-3900). The chest of drawers had been in the garage for at least 40 years and the garage was always left open (R3687-3689). There were no fingerprints on Q-206 and the contents were not readily identifiable upon mere observation (R-3272; R-4066). In addition, it could not be established that the Thallium in Q-206 was the Thallium found in the Coke bottles (R-4074). Accordingly, the record is devoid of any evidence that Q-206 belonged to Appellant, that Appellant knew that the substance in Q-206 was Thallium, or that the substance in Q-206 was used in the Coke bottles.

Evidence concerning the manner in which the Thallium was placed in the Cokes and then placed in the Carr household was equally speculative and failed to point to Appellant as the perpetrator of the offenses. Screwdrivers seized from Appellant following his arrest fit the "class characteristics" of the flat-headed type of instrument

used to remove the bottle caps, but none fit the "individual characteristics" of the pry marks (R-3982). There was no evidence regarding the manner in which the caps were repositioned on the bottles (R-3982). That fact, in conjunction with the fact that a bottle capper was never recovered from Appellant, made the testimony of Augustus Adams that he saw a bottle capper in Appellant's garage in 1982 irrelevant, but nonetheless prejudicial (R-3778; R-3631). The testimony of Augustus Adams provided the opportunity for the jury to make a quantum leap from not having any evidence to suggest how Appellant may have recapped the bottles to concluding that he did so with a bottle capper that left no marks and was last seen six years before the incident.

The State also failed to provide any plausible method by which Appellant could have surreptitiously placed the Cokes in the Carr household. Testimony established that during the week of October 17, 1988, Pye Carr was on vacation and Dwayne and Travis were both home because they had dropped out of school (R1682-1685). The boys were working on the apartment which was located almost directly between Appellant's house and the Carr house (Exhibit #10). In addition, the Carr home was surrounded by a chain link fence (R-3862). The work hours of the remaining members of the family put additional

people at the house by early afternoon and throughout the night (R-1631). The only times available to Appellant to "plant" Thallium laced Cokes in the Carr household would have been the 15 to 30 minute intervals on Thursday, October 20, 1988, and Friday, October 21, 1988, that the boys spent getting additional paint for the apartment (R-1598; R-3165). This was during a time when Appellant was spending additional time at his office in Winter Haven preparing for a computer convention (R-3287).

The State made the unsubstantiated assumption that Appellant simply left the poisoned Cokes on the Carr doorstep. However, it is inconceivable that he could have done so given the fact that Travis recalled purchasing the Cokes at the Circle K (R-1624). Detective Mincey's attempt to minimize this testimony was yet another example of how law enforcement molded the evidence to fit their conclusion that Appellant was the party responsible for this act. This is evident because:

1. Travis did not testify that he did not remember whether he had purchased the Cokes. Rather, he testified that law enforcement attempted to convince him that he was wrong about that crucial fact (R-1625); and,

2. Regardless of Travis' recollection, Agent Brekke developed an independent witness that saw either Travis or Dwayne purchase the Cokes (R-3186).

This would have required Appellant to enter the Carr home, remove the bottles, lace them with Thallium, and replace them, all within one of the 15 to 30 minute "windows" previously mentioned. In addition, the bottles were placed under a specific counter in a "secret" family hiding place. It was a family understanding that the children did not touch items that were located in this particular area, a fact that Appellant would have no way of knowing (R-1729).

Three specific circumstances demonstrate the inconclusive nature of the circumstantial evidence in the case sub judice and readily illustrate why the conviction must be reversed. First, Detective Mincey stated that he never developed evidence that demonstrated that Pye Carr did not commit the crime (R-3007). This theory could answer numerous questions regarding the presence of Thallium in the apartment and the unexplainable disparity in Thallium dosage between Peggy Carr and the other members of the family, particularly Travis and Dwayne (R-3321; R-1835). It would also explain why Pye Carr telephoned home from the South Carolina hunting trip to check on Travis, who Pye said was exhibiting symptoms of the flu, when Travis never exhibited any symptoms until after Peggy went to the Winter Haven Hospital (R-1655).

Second, Detective Mincey never eliminated the possibility that the bottles were tampered with in the stream of

commerce (R-3037). No evidence, such as fingerprint evidence, was ever adduced to suggest that Appellant came into contact with the Coke bottles or the Thallium bottle. There was no way to trace the bottles through the stream of commerce after they left the bottling plant (R-3126).

Finally, even if the circumstantial evidence establishes a strong possibility of guilt, it is still insufficient to sustain a conviction if it is consistent with a reasonable hypothesis of innocence. In particular, the evidence must be of a conclusive nature and tendency, leading to a reasonable and moral certainty that the accused and no one else committed the offense. Hall v. State, 90 Fla. 719, 107 So. 246 (1925); Owen v. State, 432 So.2d 579 (Fla. 2d DCA 1983); Davis v. State, supra. If the evidence could equally demonstrate the guilt of some other person, then every reasonable hypothesis of innocence has not been excluded and the granting of a Motion for Judgment of Acquittal is appropriate.

In the instant case, in order to obtain a conviction against some other person, it would take nothing more than the transposition of Dr. Diane Carr, Appellant's wife, on to the indictment in lieu of the name of Appellant. Each aspect of the testimony could have been introduced against Dr. Carr with the same arguments applied. She had violent disagreements with the Carr family (R-3597). She was aware

of the effects of Thallium through both her library of books and the fact that she had a Master of Science in Clinical Pathology (R-3579). She was an avid reader of murder mysteries and brought the book The Pale Horse to the attention of the authorities (R-3270). All of the literature that was attributed to Appellant was equally accessible to Dr. Carr. She would have been equally aware of the "oddities" of addressing a letter to "Bartow" rather than to "Alturas" if she was responsible for the threatening note. In fact, Dr. Carr was a more likely suspect in regard to the writing of the threatening note as well as in the perpetration of the events surrounding the poisoning of the Carr family because it was Dr. Carr, not Appellant, that wrote the MENSA murder mystery scenarios which involved threatening notes and the poisoning of victims (R-3222). Finally, it even could be considered more likely that Dr. Carr committed the crime because, as a physician, she had access to Thallium which is used in diagnostic testing for heart disease (R-1767).

Clearly, if the circumstantial evidence can so easily be transferred from one person to another, then it has failed to establish that the accused, and no one else committed the crime. Under that circumstance, a reasonable hypothesis of innocence exists, to wit: the alternate person who fits the evidentiary scheme is actually the

perpetrator of the criminal act. Cox v. State, 555 So.2d 352 (Fla. 1990).

Section 924.34, Florida Statutes, states:

> When the Appellate Court determines that the evidence does not prove the offense for which the defendant was found guilty but does establish his guilt of a lesser statutory degree of the offense or a lesser offense necessarily included in the offense charged, the Appellate Court shall reverse the judgment and direct the trial court to enter the judgment for the lesser degree of the offense or for the lesser included offense.

The instant prosecution was based on a theory of premeditation. None of the charges set forth in the indictment supported a theory of felony murder. Section 782.04(1)(a)2, Florida Statutes. Accordingly, it was incumbent upon the State to prove that Appellant had the premeditated intent to effect death rather than just scare or make the victims sick.

In another recent case dealing with the two reasonable hypothesis rule, the Court stated that "where the element of premeditation is sought to be established by circumstantial evidence, the evidence relied upon by the State must be inconsistent with every other reasonable inference." Cochran v. State, 547 So.2d 928 (Fla. 1989). The Court went on to say that the familiar standard of substantial, competent evidence is applicable in such cases. Cochran

reiterates the rules that have been discussed heretofore in this issue.

In Tien Wang v. State, 426 So.2d 1004 (Fla. 3d DCA 1983), the Court, citing numerous other cases, reiterated the definition of premeditation:

> Premeditation is a fully formed conscious purpose to kill, which exists in the mind of the perpetrator for a sufficient length of time to permit of reflection, in pursuit of which an act of killing ensues;. Premeditation does not have to be contemplated for a particular period of time for the act, and may occur a moment before the act. . . It must exist for such time before the homicide as will enable the accused to be conscious of the nature of the deed he is about to commit and the probable result to flow from it insofar as the life of his victim is concerned. Tien Wang, pg. 1005.

The Court indicated that premeditation is more than simply an attempt to commit a homicide and, therefore, more than just an intention to kill must be proved to sustain a first degree murder conviction, Tien Wang, pg. 1005.

The ruling in Tien Wang and the cases cited therein, is in direct accord with the Florida Standard Jury Instruction regarding premeditation. The Florida Standard Jury Instruction for murder - first degree, Section 782.041(1)(a), Florida Statutes, defines kiling with premeditation as follows:

> "Killing with premeditation" is killing after consciously deciding to do so. The decision must be present in the mind at the time of the killing . . .

> the premeditated intent to kill must be formed before the killing.

In contrast, the Florida Standard Jury Instruction for murder - second degree, Section 782.04(2), Florida Statutes, dictates that an accused is guilty of second degree murder if there was an unlawful kiling of a victim by an act imminently dangerous to another and evincing a depraved mind regardless of human life. The definition contained in the Standard Jury Instruction is as follows:

> An act is one "imminently dangerous to another and evincing a depraved mind regardless of human life" if it is an act or series of acts that:
>
> 1. A person of ordinary judgment would know is reasonably certain to kill or to do serious bodily injury to another, and
>
> 2. Is done from ill will, hatred, spite or an evil intent, and
>
> 3. Is of such a nature that the act itself indicates an indifference to human life.

Assuming, arguendo, that the evidence is sufficient to establish that Appellant was the perpetrator of the poisoning, the evidence is insufficient to establish that he did so with the clear and conscious intent to effect the death of any individual. Rather, the evidence established that the acts were done out of hatred, ill will, or spite, and were perpetrated in an imminently dangerous manner, evincing a depraved mind regardless of human life.

Testimony regarding the amount of Thallium necessary to effect death varied. Dr. Coppinger testified that the average lethal dose of Thallium would be 14 milligrams per kilogram (2.2 pounds) of body weight (R-3080). Dr. Melamud testified that the amount would vary from 6 to 40 milligrams of Thallium per kilogram of body weight (R-3915). The record lacks evidence that would be necessary to evaluate the effect of specific amounts of Thallium on the body. In particular, there was no testimony regarding the rate that Thallium is absorbed into the system, the rate that it is purged from the body, or the correlation of the Thallium measured in the urine to that retained by the body. There was no testimony regarding whether the amounts testified to by Dr. Coppinger and Dr. Melamud would have to be consumed at one time, or whether the levels of Thallium would accumulate over a period of time. There were no facts introduced regarding the specific size or tolerance of any individual in the Carr household or any individual named as a victim in the indictment.

Based upon a selected weight of 115 pounds, and an average of 23 milligrams per kilogram of body weight, 1,150 milligrams of Thallium would constitute a lethal dose. This is consistent with Dr. Coppinger's conclusion that it would take as much as one and one-half grams of Thallium to effect death (R-3080). There was no evidence regarding the amount of Thallium in the empty

Coke bottles. If a formula existed to convert the "washing" measurements into volume measurements, it was not presented at trial. If the washings represented the relative amounts of Thallium in the empty bottles, then there was a 600 percent differential in the levels within those bottles. Even within those bottles that were full, there was a 226 percent differential with the maximum content of Thallium being less than one gram to one and one-half grams necessary to cause death, even if consumed in its entirety.

The absence of facts concerning the amount of Thallium in the empty bottles is only one consideration that the trial Court overlooked in denying Appellant's Motion for Judgment of Acquittal. The evidence presented by the State failed to establish knowledge on the part of Appellant as to how much Thallium was necessary to effect death. It failed to establish that any of the bottles, particularly the ones that were consumed, contained a lethal level of Thallium. Finally, there was absolutely no evidence presented to establish that Appellant knew anyone other than Peggy and Pye Carr actually resided in the house and that anyone else would be exposed to the Cokes. This is particularly true in regard to those counts of the indictment that applied to individuals who did not live in the "main house", i.e. Counts V, VI, VII, XII, XIII, and XIV (R4415-4423).

To withstand Appellant's Motion for Judgment of Acquittal,

the State must introduce as to each element of the offense charged sufficient evidence to sustain a guilty verdict. Downer v. State, 375 So.2d 840 (Fla. 1979). Accordingly, when attempting to establish premeditation by circumstantial evidence, the evidence relied upon by the State must be inconsistent with every other reasonable inference that could be drawn. Cochran, supra; Wilson v. State, 493 So.2d 1019 (Fla. 1986).

The trial Court erred in the instant cause in failing to grant Appellant's Motion for Judgment of Acquittal because the circumstantial evidence presented by the State failed to exclude every reasonable hypothesis of innocence, not only in regard to the commission of the offenses charged, but also in regard to the element of premeditation necessary to sustain a conviction for first degree murder and/or attempted first degree murder. Accordingly, the cause should be remanded with directions to grant Appellant's Motion for Judgment of Acquittal.

ISSUE #2

DID THE TRIAL COURT ERR IN DENYING APPELLANT'S MOTION TO SUPPRESS?

Appellant's Amended Motion to Suppress came on to be heard on August 27, 1990, before the Honorable Dennis P. Maloney, Circuit Judge (R-4765). The basic contention of Appellant was that the brown bottle, Q-206, was seized without a warrant and that the seizure did not fall within one of the recognized exceptions to the warrant requirement (R-4770). The State responded that the issue was one of standing, i.e. Appellant had abandoned the residence and this permitted law enforcement, under the guise of renter, Sherry Guinn, to search the entire curtilage and any structures thereon (R-4770).

Special Agent Susan Goreck was called on behalf of Appellant (R-4777). She testified that she first became involved in the investigation in January of 1989, and that she primarily served in an undercover capacity (R-4777). Under the persona of Sherry Guinn, her role was to befriend Appellant, gain his confidence, and thereby obtain incriminating evidence (R-4778).

Through careful orchestration, Goreck met Appellant in April, 1989, at a "murder mystery weekend" sponsored by the Mensa Society (R-4779). She learned that Appellant was

considering the possibility of moving from Alturas and expressed an interest in purchasing his house in order to gain access to his property (R-4780). Over the next eight months, Goreck maintained contact with Appellant and cultivated her relationship with him (R-4780; R3241-3242). She developed a scenario of going through a divorce from an abusive, hostile husband (R-3239). On two occasions, she created situations wherein the abusive husband verbally attacked her in Appellant's presence (R-3239; R-3245). As part of the divorce proceedings, the fictitious husband was to provide Goreck with a residence (R-3239).

On November 7, 1989, Goreck learned that Appellant had moved to Sebring. She obtained his address and telephone number and contacted him in regard to the Alturas house (R-4785). Goreck advised Appellant that she was dissatisfied with her condominium in Winter Haven, Florida, and wished to move to Alturas (R-4786). Appellant offered to allow Goreck to stay at the home for payment of part of the utilities. Goreck insisted on paying customary rent (R-4788).

Clearly, the agreement between Goreck and Appellant was not a commercial venture (R-4788). Appellant permitted Goreck to stay at his home as a good will gesture to her, not out of a need or desire to rent the residence (R-4788).

While Goreck never revealed any details, it is readily apparent from the video tape of the January 25, 1990, meeting between Goreck and Appellant that there was a great deal more to her scenario than just finding a place to live (R-3733). In the subject meeting, Goreck continually made reference to the fact that she was afraid that some person or persons would find her:

> GORECK: . . .and I know I'm being paranoid, and I know they don't have the money to follow me around or anything (R-3740).
>
> . . .
>
> GORECK: I just don't want to take any chances and I don't want to get involved in this because if my name keeps coming up - - - Richard's bound to find me (R-3741).
>
> . . .
>
> GORECK: See, I don't want them to know. That's why I gave them the Naples phone number and address.
>
> TREPAL: Right.
>
> GORECK: Where Sam is, o.k.?
>
> TREPAL: Right.
>
> GORECK: So you know if they do question you, don't give them the Winter Haven one, o.k.? (R-3750).
>
> . . .
>
> GORECK: And not since then, which is great,

> but I just didn't want it to start again. I don't want the aggravation. That's where I stand (R-3753).

On December 5, 1989, Goreck reinitiated contact with Appellant regarding his Alturas home (R-4789). She advised Appellant that she would only be there until Christmas and Appellant indicated that she could only reside in certain areas of the house because of repairs that were required in the upstairs bedroom (R4789-4790). Appellant indicated to Goreck that he was still cleaning out the garage "slowly" and that he would be back to complete the repair of the house (R-4791). No discussion was had regarding Goreck's right to use the garage (R-4794). The only statement Appellant made that remotely reflected a limitation on his ability to return to the house was that he would knock before entering rather than just "dropping in" on Goreck (R4794-4795). This was a matter of courtesy rather than a relinquishment of legal rights.

Goreck engaged in the "rental" merely as a ruse to gain access to the property (R-4796). She never moved into the property or exercised dominion and control over it (R-4795). On December 12, 1989, she led a search team, without a warrant, through Appellant's home and through the detached garage (R4796-4799). This was on the very day that Goreck had spoken to Appellant and Appellant had informed her that he had returned to his home, but

that he had not completed any painting because his "painter friend" had not shown up (R-4792). The search team had a difficult time opening the garage doors and entering therein (R4799-4800). During the search, Agent Brekke found Q-206 in the closed, upper drawer of a chest of drawers in the garage (R-4802).

The State's position in regard to Appellant's Motion was that he lacked standing to challenge the seizure because he had abandoned the Alturas property. To support this position, the State offered testimony that Appellant never gave Goreck specific instructions regarding the garage or its contents and that the realtor was not restricted in showing the property to prospective buyers (R-4821; R-4825). Appellant also asked the previous owner, Leland Young, to keep an eye on the home (R4834-4835).

The Fourth Amendment to the Constitution of the United States provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Article I, Section 12 of the Constitution of the State of Florida reads:

> Search and seizures. The right of the people to be secure in their persons,

> houses, papers, and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of the evidence to be obtained. This right shall be construed in conformity with the Fourth Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the Fourth Amendment to the United States Constitution.

Protection from governmental intrusion into our homes and effects is the bulwark of our constitution and the cornerstone of our freedoms as Americans. In the instant case, the State sought to circumvent those protections by resorting to deceit. It sought to artificially create an exception to the warrant requirement when, in fact, no exception existed.

In Johnson v. United States, 333 U.S. 10, 92 L.Ed 436, 68 S.Ct. 367, Mr. Justice Jackson wrote:

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence.

> Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the amendment to a nullity and leave the peoples homes secure only in the discretion of police officers . . . when the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent. Johnson, U.S. pg. 13-14.

It is axiomatic that the Fourth Amendment protects people, not places. That which a person views as his own and private may be protected even if in an area accessible to the public. Katz v. United States, 389 U.S. 347, 19 L.Ed.2d 576, 88 S.Ct. 507 (1967); Rakas v. Illinois, 439 U.S. 128, 59 L.Ed.2d 387, 99 S.Ct. 1035 (1978). This protection is not limited to the claimant's home. Rather, if a person has either a reasonable expectation of privacy or a possessory interest in the property, then he is afforded protection against a search and seizure. United States v. Jacobsen, 466 U.S. 109, 104 S.Ct. 1652, 80 L.Ed.2d 85 (1984); Horton v. California, _ _ _ U.S. _ _ _, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990). Although ownership is not a "talisman" for invocation of the Fourth Amendment, it is

the "bright star by which Courts are guided" when applying Fourth Amendment jurisprudence. United States v. Freire, 710 F.2d 1515 (11th Cir. 1983).

So careful are the safeguards against governmental invasion of a person's home that the principles espoused in the Fourth Amendment have been adopted by the Florida Constitution and codified under Florida law. Article I, Section 12, Constitution of the State of Florida; Section 933.04, Florida Statutes; Section 933.18, Florida Statutes. A search of a suspect's property without first resorting to an impartial magistrate and thereby obtaining a warrant is per se unreasonable. Only a few, well delineated exceptions exist to the warrant requirement. Horton v. California, supra; Mincey v. Arizona, 437 U.S. 385, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978).

One of the recognized exceptions to the warrant requirement is when the search is predicated upon the free, voluntary, and knowing consent of the person vested with the proprietary interest or expectation of privacy. Schneckloth v. Bustamonte, 412 U.S. 218, 98 S.Ct. 2041, 36 L.Ed.2d 854 (1973). However, consent to mere presence is not tantamount to consent to engage in a search or seizure. Where entry onto the defendant's property is obtained by stealth or ruse, then the consent is qualified, i.e. it does not extend to the unknown purpose of a search

and seizure. Any seizure made under such pretext violates the Fourth Amendment and the product thereof should be suppressed. Gouled v. United States, 255 U.S. 298, 41 S.Ct. 261, 65 L.Ed. 647 (1921).

In the case sub judice, Goreck obtained access to Appellant's home through deceit. She advised that she wanted to "rent" the house because she was dissatisfied with her previously rented condominium (R-4786). In fact, her statements to Appellant regarding her intentions indicated that this was something less than a rental. For example, she stated that she anticipated being out of Appellant's home by Christmas, a mere 12 days of residency (R-4789). Appellant and Goreck discussed using an air mattress for a bed (R-4795). Clearly, the tacit agreement between Goreck and Appellant regarding Goreck's occupancy of Appellant's home was extremely limited both in time and scope.

Nevertheless, Goreck believed that her occupancy of the home gave her free reign to conduct an extensive and thorough search without a warrant (even to the extent of taking swabbings) of not only the residence structure, but the out buildings as well (R-4804; R-4809). Her assumption was that she had made "legal entry" into the home and, therefore, had full access to everything on the property (R4796-4797).

To the contrary, the communication between Appellant and Goreck, and the actions of Appellant, indicated that he neither gave consent to Goreck to enter the garage nor did he abandon the property. Appellant owned the home with his wife (R-4830). He maintained a key to the residence, although he did not attach great worry to locking the home (R-4790). He limited Goreck's area of use within the house and, had he so desired, could have expelled her from the home entirely (R-4789). He explained that he would return to the house to effect repairs on the home and to finish cleaning out the garage (R4790-4791). The fact that Appellant arranged for Leland Young to watch over the house on a daily basis does not reflect an abandonment of the property (R4834-4835). Quite to the contrary, it reflects a specific intent to maintain control of and knowledge about the property and its contents. One who abandons property does not make provisions for its care.

The facts taken as a whole show that Appellant was interested only in accommodating a supposed friend, who was going to sleep in the house on an air mattress for approximately 12 days. The fact that Appellant and his wife had offered to let Goreck stay there simply by paying for the utilities also indicates that Goreck's use of the house was to be short, temporary, and limited in scope.

No authority was granted to her to use the garage which had the doors wedged shut (R4793-4794; R4799-4800). This, in turn, mandates a conclusion that Appellant retained control of the premises and a privacy interest in the property.

Even if the "rental" had been legitimate, the fact that property has been rented to another does not necessarily deprive the owner of his expectation of privacy. State v. Suco, 521 So.2d 1100 (Fla. 1988); Wilson v. Health and Hospital Corporation of Marion County, 620 F.2d 1201 (1980). Suco involved the warrantless general search of a home owned by Suco and leased to his co-defendant, Jorge and Isabel Betancur. After Mrs. Betancur invited authorities into her home, a large quantity of cocaine was discovered. Suco sought to suppress the narcotics on the basis of a violation of his Fourth Amendment privileges. The State contended that since Suco had orally leased the home to his co-defendants, the home was not his within the meaning of the Fourth Amendment and that, therefore, he lacked standing.

Evidence presented at the suppression hearing indicated that Suco had a significant right to access to the premises notwithstanding the oral lease. He " . . . did not reside at the house, (but) he retained a key for the purpose of entering the premises to collect rent, to maintain the

premises, and to make repairs when necessary. There were no stated restrictions to his right of entry." Suco, pg. 1101. Accordingly, Suco was determined to have standing to challenge the search and the order granting suppression was affirmed.

Wilson involved rental apartments which were inspected by a health officer without warrant. In opposing the landlord's suit for damages based upon a warrantless, administrative search of his premises which violated the Fourth Amendment, the State argued that the properties were "open and completely unsecured" and that members of the public could have discovered the alleged violation by trespassing on the property. In rejecting this argument, the Court noted that there was no requirement in the law that " . . . the owner of property take affirmative steps to proclaim his expectation of privacy. One does not have to post signs prohibiting trespass or keep his doors closed and locked . . . to maintain in full effectiveness an expectation of privacy." Wilson, pg. 1212. The Court then concluded that in the absence of an affirmative showing that the owner had abandoned his expectation of privacy, the mere ownership of the property, without more, was sufficient to create an inference of an expectation of privacy. Once the expectation of privacy is established, vis a vis, the garage in the instant case, then any warrantless search or seizure conducted therein is per se unreasonable under the Federal Constitution, State Constitution, and State statutory law.

Of course, the illegitimacy of the "rental" of Appellant's home cannot be ignored. The arrangement between Appellant and Goreck was a fraud upon Appellant conducted in order to obtain access to his home. Access was obtained through stealth and guile because law enforcement knew that there was insufficient probable cause to support the issuance of a search warrant (R-4804). Therefore, their actions were taken with the deliberate intent of obviating the need for a search warrant and circumventing the requirements of Section 933, Florida Statutes.

When entry is obtained by governmental stealth, any subsequent search made in secret violates the Fourth Amendment. Gouled v. United States, supra. In Gouled, the defendant and others were charged with being parties to a conspiracy to defraud the United States Army. After Gouled became a suspect, the Army sent an intelligence agent who had been a business acquaintance of Gouled to pretend to make a "friendly" call on Gouled. After gaining admission to Gouled's office pursuant to the renewed friendship ruse, the agent waited until Gouled left the office and then surreptitiously seized and carried away several documents which he delivered to the United States Attorney. The documents were used to obtain a conviction. The Court, ruling that the search and seizure had violated the Fourth Amendment, reasoned:

> The prohibition of the Fourth Amendment is against all unreasonable searches

> and seizures; and if for a government officer to obtain entrance to a man's house or office by force or by an illegal threat or show of force, amounting to coercion, and then to search for and seize his private papers, would be an unreasonable and therefore a prohibited search and seizure, as it certainly would be, it is impossible to successfully contend that a like search and seizure would be a reasonable one if only admission were obtained by stealth instead of by force or coercion. The security and privacy of the home or office and of the papers of the owner would be as much invaded, and the search and seizure would be as much against his will in the one case as in the other; and it must therefore be regarded as equally in violation of his constitutional rights.
>
> Without discussing them, we cannot doubt that such decisions as there are in conflict with this conclusion are unsound and that, whether entrance to the home or office of a person suspected of a crime be obtained by a representative of any branch or subdivision of the government of the United States by stealth, or through social acquaintance, or in the guise of a business call, and whether the owner be present or not when he enters, any search and seizure subsequently and secretly made in his absence falls within the scope of the prohibition of the Fourth Amendment. Gouled, supra.

Gouled clearly stands for the proposition that any secret search made after obtaining access by government stealth or guile is unconstitutional. This proposition is in direct accord with the principle that in order for a warrantless search to be valid based upon "consent", the consent must

be freely, voluntarily, and knowingly given. Schneckloth v. Bustamonte, supra. It is inconceivable that a consent to search could be freely, voluntarily, and knowingly given if it was obtained by ruse, stealth, or guile. In fact, the very nature of the act is to prevent the targeted individual from becoming knowledgeable as to the actual motive of the law enforcement officer.

Assuming, arguendo, that Goreck had legal access to Appellant's property; assuming that the access gave her the right to call in other officers for a general search of the house and garage; and assuming that Goreck's invitation somehow gave Brekke the right to open the drawer and bring the bottle into "plain view", the State still did not have the right to seize the bottle and transport it away for a further search in the form of a laboratory analysis. This is because any valid warrantless search of incriminating evidence requires that the officer have "a lawful right of access to the object itself." Horton v. California, supra.

This requirement is based on judicial recognition of the distinction between "search" and "seizure" as used in the Fourth Amendment. Specifically, "seizure" initiates a factor other than the expectation of privacy, to wit: the property interests of the individual.

In United States v. Jacobsen, supra, the Court stated:

> The first clause of the Fourth Amendment provides that the "right of the people to be secure in their persons,

> houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ." This text protects two types of expectations, one involving "searches", the other "seizures". A "search" occurs when an expectation of privacy that society is prepared to consider reasonable is infringed. A "seizure" of property occurs when there is some meaningful interference with an individual's possessory interest in that property.
>
> . . .
>
> Even when government agents may lawfully seize . . . a package to prevent loss or destruction of suspected contraband, the Fourth Amendment requires that they obtain a warrant before examining the contents of such a package. Such a warrantless search could not be characterized as reasonable simply because, after the official invasion of the privacy occurred, the contraband is discovered . . .

In Horton v. California, supra, the Court reaffirmed this concept:

> The right to security in person and property protected by the Fourth Amendment may be invaded in quite different ways by searches and seizures. A search compromises the individual interest in privacy; a seizure deprives the individual of dominion over his or her person or property. The "plain view" doctrine is often considered an exception to the general rule that warrantless searches are presumptively unreasonable, but this characterization overlooks the important difference between searches and seizures. If an article is already in plain view, neither its observation nor its

> seizure would involve any invasion of privacy. A seizure of the article, however, would obviously invade the owner's possessory interest. If "plain view" justifies an exception from an otherwise applicable warrant requirement, therefore, it must be an exception that is addressed to the concerns that are implicated by seizures rather than by searches. (citations ommitted).

In Walter v. United States, 447 U.S. 649, 100 S.Ct. 2395, 65 L.Ed.2d 410 (1980), twelve large cartons were shipped by Greyhound bus to Leggs, Inc., in Georgia. The cartons were mistakenly delivered to L'eggs Products, Inc. Employees of the latter company opened the boxes and discovered individual boxes of 8 millimeter movie film, each of which bore a homosexual characterization and a description of the film. The FBI was summoned.

The FBI transported the films and viewed them on a government projector without making any effort to obtain a warrant. In considering the issue of whether the Fourth Amendment required the FBI agents to obtain a warrant before viewing the films, the Court first observed that the FBI lawfully acquired possession of the films because the persons who opened the boxes were not government agents. The Court recognized that the obvious purpose for viewing the films was to determine whether their owner was guilty of a federal offense; that the labels gave the FBI probable cause to believe that the films were obscene; that the labels were not sufficient to support conviction,

however; and that a search of the contents of the film was necessary to obtain the evidence which was to be used at trial. The Court, referring to the viewing of the films, stated:

> It was a search; there was no warrant. The owner had not consented; and there were no exigent circumstances.
>
> . . .
>
> The fact that FBI agents were lawfully in possession of the boxes of film did not give them authority to search their contents . . . An officer's authority to possess a package is distinct from his authority to examine its contents . . .
>
> . . .
>
> Since that examination had uncovered the labels, and since the labels established probable cause to believe the films were obscene, the government argues that the limited private search justified an unlimited official search. That argument must fail, whether we view the official search as an expansion of the private search or as an independent search supported by its own probable cause.
>
> When an official search is properly authorized -- whether by consent or by the issuance of a valid warrant -- the scope of the search is limited by the terms of its authorization. Consent to search a garage would not implicity authorize a search of an adjoining house; a warrant to search for a stolen refrigerator would not authorize the opening of desk drawers. Because "indiscriminate searches and seizure conducted under the authority of general

> warrants were the immediate evils that motivated the framing and adoption of the Fourth Amendment", Payton v. New York, 445 U.S. 573, 583, 63 L.Ed.2d 639, 100 S.Ct. 1371, that amendment requires that the scope of every authorized search be particularly described.
>
> . . .
>
> Prior to the government's screening, one could only draw inferences about what was on the film. Projection of the films is a significant expansion of the search that had been conducted previously by a private party and therefore must be characterized as a separate search. That separate search was not supported by any exigency, or by a warrant even though one could have easily been obtained.

A case analogous to the case at bar is State v. Von Bulow, 475 A.2d 995, 487 ALR 4th 455, cert. den. 83 L.Ed.2d 162, 105 S.Ct. 233 (RI 1984). In that matter, Claus Von Bulow was accused of the attempted murder of his wife, Martha Von Bulow. Mrs. Von Bulow unexpectedly went into a coma on the morning of December 27, 1979, from which she ultimately recovered. Blood tests showed an unsually low blood sugar level.

Soon after that episode, a maid discovered a "black bag" in a closet in the Von Bulow's New York apartment. It contained three small vials, one containing powder, another liquid, and the other pills. She returned the bag to where she found it. In November, 1980, the maid saw the black bag again, this time in the defendant's

bedroom. In addition to the three vials, it now contained a syringe and a vial marked "insulin". She called Mrs. Von Bulow's son into the room and disclosed the bag to him. When the maid next saw the bag at the Von Bulow's New Port, Rhode Island home, the contents were the same.

On December 22, 1980, Mrs. Von Bulow again lapsed into a coma. Suspicious of Mr. Von Bulow, Mrs. Von Bulow's son, Alex, and a private investigator, both of whom were private citizens, searched the defendant's closet, found the black bag, and turned it, together with its contents, over to the Rhode Island State Police. Eventually, still without a warrant, a police lieutenant removed the items from the bag from the evidence room and sent them to the State toxicologist for testing. The results of the tests were instrumental in obtaining an indictment and conviction of the defendant.

One issue on appeal is whether the trial Court erred by failing to exclude the results of the test on the contents of the black bag. The Rhode Island Supreme Court first noted that searches by private citizens, such as the one made by Mrs. Von Bulow's son, Alex, did not violate the Fourth Amendment. This led to the conclusion that the State legally came into possession of the black bag and its contents. The Court concluded, however, that sending the items to the State laboratory for testing without a warrant violated the Fourth Amendment. In

reaching that conclusion, the Court wrote:

> The mandate of United States v. Jacobsen is that field tests conducted under factual circumstances similar to those present in that case do not constitute a significant expansion of a lawful private search. The chemical testing that defendant here challenges occurred, not in the field immediately following a lawful private search, but rather in the state toxicology laboratory one week after its delivery to the State Police. The pills tested by the State in this case were not even in transit -- they were totally at rest in State Police hands, having been inventoried and locked in the State Police evidence room one week prior to their warrantless testing.
>
> Secondly, the actual chemical tests performed by the state toxicology laboratory were substantially more extensive than that executed by the agent in Jacobsen. In the present case, the tests performed upon certain contents of the black bag clearly could reveal more than just whether these substances were contraband. Indeed, these tests positively identified the exact chemical composition of a myriad of substances whose identities were previously unknown to the State. This is not a case in which the tests involved could only reveal one fact and "no other arguably private fact". United States v. Jacobsen, ___ U.S. at ___, 104 S.Ct. at 1662.
>
> The third major difference between the case at bar and United States v. Jacobsen, ___ U.S. ___, 104 S.Ct. 1652, 80 L.Ed. 85, is that, in Jacobsen, there was a virtual certainty

> that the substances tested contained contraband and nothing else. Id. The evidence in this appeal demonstrates that of all the substances tested by the State Police, only one could not have been purchased with a doctor's prescription in a pharmacy in the condition in which it was found. Additionally, most, if not all, of the substances tested here were found in standard medicine bottles and vials. They were clearly not discovered in such a condition -- for example, inside four zip-lock glassine bags placed inside a ten inch tube of silver tape in a cardboard box wrapped in brown paper -- as would make it a virtual certainty "that (they) contained nothing but contraband."
>
> A fourth distinction between Jacobsen and the case at bar lies in the fact that in Jacobsen the field test represented a genuine law-enforcement technique employed to restrict the possession of a Cogressionally condemned substance -- cocaine . . . Unlike Jacobsen, the present case presents no exigent circumstances to legitimize the employment by the state police of a warrantless law enforcement technique. Nor does it clearly involve the possession of illegal substances. There is no evidence in the record to indicate that the State Police knew that these substances were unlawfully in the possession of defendant prior to the time that they were delivered to the State Police. Von Bulow, pg. 488 (citations omitted).

The Court then emphasized that the fact the experienced police officer did not recognize what was in the vials and had to send them off for analysis made the intrusion into the defendant's privacy by the laboratory analysis even greater.

> The State therefore did intrude upon a further expectation of defendant's privacy. The extent of the State's intrusion is significant because, without it, the initial view of the objects tested produced only an inference of criminal conduct by the defendant. In this case, as in Walter, the State exceeded the scope of the private search by employing chemical or mechanical means to reveal the hidden nature of these objects. This governmental activity represents a significant expansion of the private search because it positively identified the unknown composition of the pills delivered to the State Police. This additional investigation, being "necessary in order to obtain the evidence which was to be used at trial" . . . was an independent search subject to the Fourth Amendment.
>
> Since we hold that the State's subsequent chemical analysis of certain contents of the black bag was a significant expansion of the private search and that there were no exceptions to the warrant requirement, defendant's conviction must be reversed. In a case in which "the authorities have not relied on what is in effect a private search . . .(they) presumptively violate the Fourth Amendment if they act without a warrant." The State may not significantly expand the scope of a private search unless it obtains a warrant. Von Bulow, pg. 492. (citations omitted).

The principle involved in the case sub judice is precisely the same as in Von Bulow. Even when the initial entry (or search) is lawful, it cannot be expanded by sending seized items, the contents or composition of which are

unknown, to a government laboratory for anaylysis without first obtaining an appropriate warrant. The laboratory analysis represents an additional search which violates both the privacy rights and the property rights of Appellant.

Governmental intrusion is not limited solely to the constraints of the Fourth Amendment or Article I, Section 12, supra. Article I, Section 23 of the Florida Constitution states:

> Every natural person has the right to be left alone and free from governmental intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law.

This constitutional provision provides protections much broader in scope than the protections provided under the Federal Constitution. In Winfield v. Division of Pari-Mutuel Wagering, Department of Business Regulations, 477 So.2d 544 (Fla. 1985), the Court wrote:

> The citizens of Florida opted for more protection from governmental intrusion when they approved Article 1, Section 23, of the Florida Constitution. This amendment is an independent, freestanding constitutional provision which declares the fundamental right to privacy. Article 1, Section 23, was intentionally phrased in strong terms. The drafters of the amendment rejected the use of the words "unreasonable" or

> "unwarranted" before the phrase "governmental intrusion" in order to make the privacy right as strong as possible. Since the people of this state exercised their prerogative and enacted an amendment to the Florida Constitution which expressly and succinctly provides for a strong right of privacy not found in the United States Constitution, it can only be concluded that the right is much broader in scope than that of the Federal Constitution. Winfield, pg. 548.

Thus, the actions of law enforcement in the instant cause should be examined not only in the context of the requirements of the Fourth Amendment to the United States Constitution, Article I, Section 12, of the Florida Constitution, and state statutory provisions, but also in the context of the stricter requirements of Florida's right to privacy. An application of those traditional and historical protections clearly indicates that governmental intrusion in the instant case was improper and that Appellant's Motion to Suppress should have been granted.

ISSUE #3

DID THE TRIAL COURT ERR IN PERMITTING THE INTRODUCTION OF NUMEROUS ITEMS OF TESTIMONY PURSUANT TO SECTION 90.404(2), FLORIDA STATUTES?

Prior to trial, the State filed three Notices of Intent to Prove Evidence of Other Crimes, Wrongs, and Acts (R-4675; R-4762; R-4925). These Notices were filed pursuant to Section 90.404(2), Florida Statutes, which provides:

> Similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but is inadmissible when the evidence is relevant solely to prove bad character or propensity.

The evidence sought to be introduced pursuant to the "Williams Rule" notices, as well as testimony introduced at trial without the benefit of pretrial notice, included:

a. Testimony that Appellant expressed knowledge concerning the poisonous nature of some "red berries" (R-3242).

b. Testimony that Appellant expressed verbal threats regarding the neighbors' children (R-3639).

c. Testimony that Appellant was the "mastermind" of an amphetamine lab, that P-2-P was used in the production of amphetamines and, that one way to produce P-2-P is through the use of Thallium three nitrate which produces the by-product of Thallium one nitrate (R3479-3481).

d. Testimony that Appellant deliberately was placed in "hostile" confrontation situations in order to observe his reactions (R-3239; R-3246).

e. Testimony that Appellant selected "Coke" over two other soft drinks while on one of the picnics with Detective Goreck and that Appellant always drank Coke (R-3242).

f. Testimony that the scenarios in the MENSA mystery weekends included threatening notes and homicides by poisoning (R3222-3226).

g. Testimony regarding the threatening note of June, 1988 (R-1594).

Much of the testimony was objected to by Appellant via a Motion in Limine (R-4905). Other objections to the challenged testimony occurred at trial (R-3241; R-1595). All of the evidence was admitted by the trial judge.

As a general rule, evidence is admissible if it is relevant. Section 90.402, Florida Statutes. Evidence is relevant if it tends to prove or disprove a material fact, i.e. if it is probative. Section 90.401, Florida Statutes. Accordingly, even before determining whether particular evidence is admissible or inadmissible under other restrictions, it must first be determined whether the evidence is probative. If the evidence tends to prove or disprove a material fact, then the limiting provisions of the evidentiary code must be examined in order to determine if the evidence is otherwise competent.

In regard to the case sub judice, two important provisions of Florida's evidence code must be considered: Section 90.403 and Section 90.404, Florida Statutes. Section 90.403 provides that even relevant evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice. Section 90.404, Florida Statutes, codifies the ruling enunciated in Williams v. State, 110 So.2d 654 (Fla. 1959), and permits the introduction of "similar fact" evidence for the limited purpose set forth in the statute. The same section specifically prohibits the introduction of evidence relevant solely to prove bad character or propensity.

It is widely recognized that "Williams Rule" evidence carries with it a high potential for misuse and a high likelihood that the accused will be deprived of a fair trial if the "similar acts" evidence is admitted improperly. Such evidence prompts the jury to more readily believe that the accused committed the crime and disposes them to convict. The improper introduction of such evidence must be presumed to be harmful error. Bricker v. State, 462 So.2d 556 (Fla. 3d DCA 1985).

In order to be admissible, the collaterral act must be so similar to the alleged crime as to constitute a "fingerprint" of the current charge. State v. Savino, 567 So.2d 892 (Fla. 1990). The uniqueness of the prior act

must be such that it would tend to establish that the defendant committed the crime charged independent of an identification of the defendant by the collaterral crime victim. Green v. State, 427 So.2d 1036 (Fla. 3d DCA 1983). Obviously, in order for any of the foregoing considerations to even be relevant, the defendant must be positively connected to the collaterral act. State v. Norris, 168 So.2d 541 (Fla. 1964); Elkin v. State, 531 So.2d 219 (Fla. 3d DCA 1988).

There is no doubt that members of the Carr family were victims of Thallium poisoning and that the substance was contained in Coca Cola bottles located in their home. Laboratory tests established the substance to be Thallium nitrate although it could not be determined whether the substance was Thallium one nitrate or Thallium three nitrate (R-3559). Experiments conducted by the Coca Cola company indicated that the substance was much more likely to be Thallium one nitrate, which mixed with Coca Cola, rather than Thallium three nitrate, which formed a muddy precipitant in the soft drink (R3406-3407).

Exhibit Q-206, the bottle seized from the garage of the premises occupied by Appellant and his wife, was laboratory tested and found to contain Thallium one nitrate (R3561-2562). Q-206, which bore no fingerprints, was the most crucial link in the chain of circumstantial evidence

at trial (R-3939). The State used Q-206 to direct their evidence toward Appellant, and away from Dr. Diana Carr, Pye Carr, or other unknown persons who might have tampered with the Cokes in the stream of commerce. The vehicle used for introducing this evidence was the hearsay testimony concerning the chemical steps in the laboratory production of amphetamines. This testimony was erroneously admitted against Appellant in regard to his 1970's involvement with an amphetamine lab (R-3479).

The intent of the testimony was to provide an explanation of how Appellant could have come into possession of Thallium one nitrate when all other testimony established that the element was strictly controlled. As mentioned previously, it also tended to point to Appellant and away from other suspects in the case. In fact, the testimony also gave the prosecution the opportunity to portray Appellant as a criminal and as a man of bad character. This was illustrated by Agent Broughton's gratuitous testimony that Appellant was the "mastermind" of the lab (R-3480). Broughton had carefully avoided such testimony during the proffer when it would have been subject to an objection outside the presence of the jury.

Agent Broughton's testimony was the subject of extensive objection and argument on hearsay grounds (R3439-3445; R3450-3457; R3469-3474; R-3480). The testimony also resulted in a Motion for Mistrial (R-3486; R3497-3498). Relevant

portions of Agent Broughton's testimony were as follows:

> A: Thallium three nitrate is used in the production of phenyl-II-propanone, which phenyl-II-propanone is an immediate precursor used in the manufacture of both methamphetamine and amphetamine.
>
> . . .
>
> A: A chemical process takes place in which the Thallium three nitrate reacts with a styrene solution to form the phenyl-III-propanone. A sediment forms in the bottom of the vessel where this reaction is taking place, and that's Thallium one nitrate. And it is removed from the phenyl-II-propanone, and the phenyl-II-propanone is then used to manufacture amphetamine, and the Thallium one nitrate is disposed of. (R3480-3481).

This evidence was then used to bootstrap in the testimony of David Warren, a convicted felon, that during the 1970's he was involved with Appellant in the production of methamphetamine (R3475-3489). It must be noted that Warren gave no testimony regarding the use of Thallium, but to the contrary stated that he provided P-2-P in its final form to Appellant (R-3488).

Prior to the testimony of Agent Broughton, a proffer of his testimony was made to the Court to determine admissibility (R3459-3470). Broughton stated that he had been with the Drug Enforcement Agency for 20 years and had been involved in the investigation of "some" methamphetamine labs (R-3459; R-3461). His education consisted of a degree in geography and included law enforcement training schools

(R3460-3461). Broughton testified that he "knows" what chemicals and processes are used to manufacture drugs because he possessed a DEA handbook that contained this information (R3461-3462).

Agent Broughton had no training in chemistry (R-3466). He never performed the process that he described nor had he ever witnessed the process of using Thallium to produce P-2-P which, in turn, was used to produce methamphetamine (R-3485). Broughton's awareness of Thallium came after he had been contacted by Polk County law enforcement regarding his 1975 arrest of Appellant for methamphetamine production (R-3467). Thereafter, he checked his DEA handbook and computer and determined that Thallium can be a by-product of a particular method of methamphetamine production (R-3468). However, such a process was uncommon, unusual, or rare (R-3469; R-3485). In turn, the DEA's source for this information apparently came from a book or magazine entitled the "Tetrahedron Letters" (R-3442; R-3468).

The DEA handbook itself was excluded from evidence (R-3472). This was proper in that hearsay documents are inadmissible on direct examination to bolster the testimony of even a qualified "expert" witness. For example, the Florida Drivers License Handbook is inadmissible hearsay. Sikes v. Seaboard Coastline Railroad Company, 429 So.2d 1216 (Fla. 1st DCA 1983), rev. den., 440 So.2d 353 (Fla. 1983).

Rice v. Clement, 184 So.2d 678 (Fla. 4th DCA 1966). R. Carlson, Collision Course in Expert Testimony; Limitations on Affirmative Introduction of Underlying Data, 36 U. Fla. L. Rev. 234 (1984). By contrast, such documents may be used in cross-examination of the expert witness if they are determined to be authoritative sources. Section 90.706, Florida Statutes.

Despite the exclusion of the DEA handbook, the testimony of Agent Broughton, and through him that of David Warren, were held to be admissible (R-3472). Essentially, the Agent was permitted to simply parrot the DEA handbook for the jury without any basis or personal experience. Florida recognizes that the fundamental rule of evidence is personal knowledge. Section 90.604, Florida Statutes. An exception is made for the testimony of experts, persons who are qualified by knowledge, skill, expertise, or training. Section 90.702, Florida Statutes. The trial Court never specifically ruled that Agent Broughton was an "expert" nor ever defined his area of expertise. Rather, the Court focused on the DEA handbook, referring to it as an "inorganic cookbook" (R-3442). The Court further noted that:

> THE COURT: Well, you can bake a cake a couple of ways. And if I give you a recipe for baking a cake and you know all about baking cakes you can read the thing and say, yeah, that's right, or that's wrong. You don't need to be a chemist (R-3443).

The Court's preference for this homespun analogy was not lost on the agent or the prosecutor who repeatedly asserted that testifying that Thallium one nitrate is a possible by-product of methamphetamine production is no different than a baker testifying that baking soda is used as an ingredient of a cake (R-3466; R-3471; R-3483). Even though it was mimicked by Agent Broughton and the prosecutor, the analogy fails for two reasons. First, most bakers have baked cakes before and are not merely testifying from what they have read in a book. Second, the issue in the instant case was precisely what does happen in the chemical reaction, i.e. what does the baking soda do, and therefore required the testimony of an expert.

The Court below completely misperceived the law governing expert testimony. This case required a chemist, not a law enforcement officer acquainted only with the final product. For example, a consulting engineer who is qualified as an expert in the storage of combustionable materials is not qualified to testify as to the effects of phosphoric acid leakage when he has not conducted tests with phosphoric acid. United Technologies Communications Company v. Industrial Risk Insurors, 501 So.2d 46 (Fla. 3d DCA 1987). In United Technologies, as well as numerous other cases reviewed therein, the "expert" witness was required to have special knowledge or skills about the very subject of his testimony.

To adopt the reasoning of the trial Court would make every police officer a ballistics expert, every drug agent a chemist, and every ambulance driver a serologist. Familiarity with a given subject such as methamphetamines could not have reasonably made Agent Broughton an expert regarding the manufacturing process, and the chemical reactions that occur therein, particularly when he had never seen that process and was only relying upon his handbook and the computer information contained therein. The handbook and computer information were not subject to cross-examination and Appellant was deprived of his right to confront the most damaging link in the circumstantial chain that was fastened about him. The total result of this testimony was the introduction of an inadmissible DEA handbook through Agent Broughton. A witness, even if actually qualified as an expert, "may not serve mainly as a conduit for the presentation of inadmissible evidence." Smithson v. V. N. S. Realty, Inc., 536 So.2d 260 (Fla. 3d DCA 1988).

In addition to the foregoing reasons regarding the error of admitting testimony by Agent Broughton and David Warren, the evidence regarding Appellant's involvement in the methamphetamine lab did not fit the "fingerprint" requirements of Savino, supra. In fact, it does not need detailed argument to illustrate the dissimilarities between the production of an illicit drug and first degree murder.

There is no pervasive similarity between the crimes charged and the collaterral crime so as to warrant introduction of the Williams Rule evidence. The introduction of such evidence, absent a special characteristic, is error. Edmond v. State, 521 So.2d 269 (Fla. 2d DCA 1988).

In addition, this Court, in State v. Norris, supra, made it absolutely clear that a collaterral occurrence is not admissible unless a clear connection can be shown between the collaterral occurrence and the defendant. In Norris, the defendant was charged with first degree murder of one Merrill by administering arsenic oxide. The trial judge permitted testimony regarding the arsenic content found in the exhumed bodies of the defendant's late husband and of one of her former business and social associates. Both had died approximately ten years before the trial. The defendant objected on the grounds that there was no showing that she had administered arsenic to her deceased husband and her former business associate, asserting that the relevancy of similar fact evidence to prove a fact in issue depends upon proof which connects the defendant with the collaterral occurrence.

This Court endorsed the principle that: "Evidence of a collaterral crime is inadmissible unless accompanied by evidence connecting the defendant therewith". This Court wrote:

> Instead of deviating from Williams v. State, supra, the District Court

> followed the rule there announced. It merely prescribed a related requirement that in order for the evidence to be admissible there must be proof of a connection between the defendant and the collaterral occurrences. In this respect mere suspicion is insufficient. The proof should be clear and convincing. Norris, pg. 543.

In Eberhardt v. State, 550 So.2d 102 (Fla. 1st DCA 1989), the trial court admitted testimony concerning a burglary the preceding night at the premises defendant was charged with burglarizing. There was no evidence connecting defendant to the earlier burglary. The court held that the evidence was not relevant and reversed.

The testimony of neither Broughton nor Warren ever established that Appellant manufactured P-2-P. In fact, the testimony showed that Appellant purchased his P-2-P from Warren (R-3487). Further, Thallium is not a necessary ingredient in or component of P-2-P. Other substances can be used. Accordingly, it cannot be inferred from the testimony that Thallium was used to manufacture P-2-P, that Appellant used Thallium to manufacture P-2-P, or that he manufactured P-2-P at all. There is no nexus between Appellant and the fact that Thallium can be used to make P-2-P. Accordingly, it was error to admit such testimony because its admission created in the minds of the jury an impression that the defendant had bad character and a propensity to commit crimes.

The same analogy applies to the threatening note of June, 1988. Obviously, the State introduced the note and attempted to relate it to Appellant in an effort to show that animosity existed between the two households. However, there was absolutely no concrete or "direct" evidence to create the nexus or "connexity" between Appellant and the note. The only effort made to show a link between Appellant and the threatening note was testimony regarding dissimilarity between the note and the Mensa mystery weekend scenario. However, while such evidence would have been extremely speculative in nature, it was factually incorrect. Testimony established that the scenarios were written by Dr. Diana Carr, not Appellant (R-3222). Accordingly, there was no evidence to link the threatening note to Appellant and, in light of the circumstantial nature of the case, such evidence should have been excluded. Norris, supra.

The remaining testimony offered by law enforcement and others did not even rise to the level of probative evidence, but was designed to impugn the character of Appellant and cast disparaging inferences on him regarding the specific facts of this incident. For example, the fact that Appellant's drink of choice was Coca Cola is not probative of any issue (R-3242). However, since the crime involved the lacing of Coca Cola, such evidence was prejudicial without being probative. The evidence concerning Appellant's statement that "red berries" were poisonous falls in the

same category (R-3242). There is no correlation between this statement and the instant offense. Therefore, the testimony again was not probative, but was prejudicial because the instant case involves poisons.

The law is well settled that the prosecutor may not impugn the character of the accused unless he has placed his character in issue. Lewis v. State, 377 So.2d 640 (Fla. 1979); Bates v. State, 422 So.2d 1033 (Fla. 3d DCA 1982). Testimony that Appellant made verbal threats concerning the neighbors' children six years before the instant offense was an unprecedented attack on Appellant's character and not remotely related to the "Williams Rule" exceptions. Likewise, Goreck's testimony that Appellant shunned any type of hostile confrontation was a patent attempt to show that Appellant was "the type" of person who would use poison rather than violence. It was a direct attempt to prove bad character and propensity even though Appellant never placed his character in issue.

These matters were not lost on the prosecutor during closing argument. Appellant was categorized as " . . . the most diabolical man you will ever see face to face in your life." (R4181-4182). Each aspect of missing evidence was attributed to Appellant. "Mr. Trepal's prints are not on anything, because he was trying to outsmart the police and he was trying very hard." (R-4188). Even Appellant's character as it relates to his response to Goreck when he

was told by Goreck that the police were looking for him in regard to the Carr poisoning was used against him. "But what happened on this video tape down in Sebring? Mr. Trepal sits and stares at these cars for minute upon minute upon minute upon minute. . . . they know they did it." (R4197-4198).

How does anyone know how they would react if they received information that they were a suspect in a murder case? The prosecutor referred to Appellant as a "packrat" who kept stuff for years. He then used this characterization to suggest that the bottle capping device observed by Mr. Adams six years prior to Peggy Carr's death had been disposed of by Appellant in an effort to destroy any evidence connecting him to the crime (R-4198).

"Mr. Trepal drinks cokes. . . . but Mr. Trepal just by coincidence drinks Coca Cola." (R4205-4206). "This was a man who was the mastermind behind a methamphetamine lab." (R-4207). "Mr. Trepal never blows up, throws any punches, hits anybody. Isn't that odd? Isn't that odd that the crime we're talking about is a poisoning, a surreptitious nonconfrontational crime? And every time this man is confronted, when he is confronted in the situations that Susan Goreck sets him up in he runs away. Just a coincidence, I guess." (R-4216). " . . . I don't know that he didn't do it on Wednesday before the last blow up or Tuesday. I don't know when Mr. Trepal chose to put this poison in these

peoples' house. I just know that he had the motive, the knowledge, the opportunity, and the intent and did it." (R-4223). "He couldn't look at the person who trusted him. He couldn't look at the person who believed in him and talk about this poisoning." (R-4227). "Ladies and gentlemen, that man poisoned the Pye Carr family . . ." (R-4232).

The foregoing comments, all made by the prosecutor during closing argument, amply illustrate the degree to which the prosecutor relied upon and disparaged Appellant's character. The comments were based upon testimony improperly admitted at trial. The error was exacerbated by the prosecutor's character assasination of Appellant and by the prosecutor's constant personal observations as to Appellant's guilt. While the record reflects that objections were made when the evidence was presented, objections were not made during closing argument. The only explanation for the failure to object is that the defense was so stunned by the prosecutor's impropriety as to be unable to stand up.

Each of the items of testimony discussed constituted sufficient harmful errors to require reversal under State v. DiGuillio, 491 So.2d 1129 (Fla. 1986). Their cumulative affect was to not only deprive Appellant of a fair trial, but to make him the object of a prosecution that was no less poisoned than the Coca Cola bottles.

ISSUE #4

DID THE TRIAL COURT ERR IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL WHEN THERE WAS NO SUBSTANTIAL COMPETENT EVIDENCE BY WHICH THE JURY COULD CONCLUDE BEYOND A REASONABLE DOUBT THAT APPELLANT CAUSED THE DEATH OF PEGGY CARR AND WHERE THE TRIAL COURT FAILED TO PROPERLY INSTRUCT THE JURY AS TO THE LEGAL MEANING OF "CAUSE OF DEATH"?

If the conviction of Appellant for the murder of Peggy Carr is to be sustained, the record must contain competent, substantial evidence that establishes beyond a reasonable doubt that Appellant caused her death. The record is devoid of such evidence in the case sub judice.

Dr. T. Richard Hostler, Peggy Carr's treating neurologist, testified that on March 3, 1989, he caused the removal of life support systems from Mrs. Carr (R-1837). At that time, she was in a "chronic vegetative state" with "no possibility of recovery" (R-1837). Her breathing was artificially maintained by a ventilator (R-1838). Shortly after the ventilator was disconnected, Mrs. Carr's breathing ceased (R-1838).

The record contains no proof that, at the time the ventilator was disconnected, Mrs. Carr was "brain dead". Dr. Hostler opined that she "probably" was dead (R-1838). This statement is subject to both interpretation and to question (R-1837). Testimony regarding "probabilities" does not establish proof beyond and to the exclusion of every reasonable doubt.

Florida Statutes do not provide a statutory definition of "death" per se. Therefore, the common law must be followed. Section 775.01, Florida Statutes (1991). The common law definition of death, as well as the lay understanding of the word, means the permanent cessation of all vital functions, including the circulatory system, respiratory system, and brain activity. Black's Law Dictionary 400 (6th Ed. 1990); Webster's New World Dictionary of the American Language (2d College Ed. 1982). This standard is recognized in Florida pursuant to the "brain death statute":

> 382.009 Recognition of brain death under certain circumstances. --
>
> (1) For legal and medical purposes, where respiratory and circulatory functions are maintained by artificial means of support so as to preclude a determination that these functions have ceased, the occurrence of death may be determined where there is the irreversible cessation of the functioning of the entire brain, including the brain stem, determined in accordance with this section.
>
> (2) Determination of death pursuant to this section shall be made in accordance with currently accepted reasonable medical standards by two physicians licensed under Chapter 458 or Chapter 459. One physician shall be the treating physician, and the other physician shall be a board eligible or board certified neurologist, neuro-surgeon, internist,

> pediatrician, surgeon, or anesthesiologist. Section 382.009, Florida Statutes (1991).

This statute does not provide that one whose functions are artificially maintained is dead. Rather, it implies the opposite, that is, that one who is artifically maintained is not legally dead unless the brain is dead.

This conclusion is consistent with the common law. One who is maintained by a respirator in a vegetative state is not legally dead. People v. Mitchell, 132 Cal. App. 3d 389, 183 Cal. Rptr. 166, (Cal. App. 4th 1982); Matter of Quinlan, 137 NJ Super. 227, 348 A.2d 801 (1975), modified, 70 NJ 10, 355 A.2d 647 (1976), cert. den. sub. nom., Garger v. New Jersey, 429 U.S. 922, 97 S.Ct. 319, 50 L.Ed.2d 289 (1976).

Under the common law standard, Peggy Carr was alive at the time Dr. Hostler took his action. His speculation that she was "probably" brain dead is legally insufficient to establish her death and legally insufficient to prove that Appellant was the cause of her death.

In addition, the record fails to establish that Dr. Hostler followed the procedures set forth in Section 382.009(2), supra. He testified that, " . . . it was decided through discussion with several physicians as well as counsel at our hospital that it was acceptable both legally and morally to disconnect her from the ventilator at that time, and that was carried out." (R-1838). Even if convincing proof existed that Peggy Carr had been in

fact "brain dead", a failure to follow the statutory procedures potentially renders Dr. Hostler, not Appellant, criminally liable for the death of Mrs. Carr. Griffith v. State, 548 So.2d 244 (Fla. 3d DCA 1989).

There was simply no evidence produced at trial by which a jury could conclude beyond a reasonable doubt that Mrs. Carr was legally "dead" at the time the ventilator was removed, nor was there any evidence that the statutory procedures were followed before there was removal of the ventilator. Moreover, the jury did not have the opportunity to make such a determination because no instructions on the definition of death or causality were given by the trial judge.

The fact that such an instruction was not requested by the defense at the trial level was not dispositive of the issue. The failure to give a complete and accurate instruction on the definition of a crime constitutes fundamental error which is preserved for review even in the absence of an objection. Hernandez v. State, 575 So.2d 1321 (Fla. 4th DCA 1991); Carter v. State, 469 So.2d 191 (Fla. 2d DCA 1985); Williams v. State, 400 So.2d 542 (Fla. 3d DCA 1981), cert. den., 459 U.S. 1149, 103 S.Ct. 793, 74 L.Ed.2d 998 (1983). The inherent responsibility of the trial court to fully and accurately advise the jury of the elements of the offense should be particularly compelling when the defendant is faced with the death penalty.

In light of the foregoing, the State failed to carry its burden of proof beyond and to the exclusion of every reasonable doubt. The trial Court should have granted the Motion for Judgment of Acquittal in regard to the first degree murder of Peggy Carr. In the alternative, the trial Court erred in failing to instruct the jury as to the legal meaning of "cause of death". The conviction should be reversed and remanded with appropriate instructions.

ISSUE #5

DID THE TRIAL COURT COMMIT FUNDAMENTAL ERROR BY FAILING TO CHARGE THE JURY ON THE MAXIMUM AND MINIMUM PENALTIES FOR THE OFFENSE OF FIRST DEGREE MURDER?

If convicted at trial on the charge of first degree murder, Appellant faced one of two possible sentences, death or imprisonment for life without the possibility of parole for 25 years. Section 775.082(1), Florida Statutes. In the guilt phase of the trial, the Court did not charge the jury as to these maximum and minimum penalties. The reason for this admission was because defense counsel, at the charge conference, specifically waived the instruction on the maximum and minimum penalties (R4025-4027).

Prior to 1984, Rule 3.390(a), Florida Rules of Criminal Procedure, provided that, in any criminal case, " . . . upon request of either the State or the defendant, the judge shall include in said charge the maximum and minimum sentence which may be imposed . . ." Tascano v. State, 393 So.2d 540 (Fla. 1980). Accordingly, if either side had requested the instruction, it was mandatory that the jury be advised of the maximum and minimum sentence for the offense or offenses charged.

In 1984, this Court amended Section 3.390(a), Florida Rules of Criminal Procedure, and deleted the requirement of a "request" and restricted the maximum and minimum sentences instruction to capital cases. Specifically, the rule stated:

> (a) The presiding judge shall charge the jury only upon the law of the case at the conclusion of argument of counsel. Except in capital cases, the judge shall not instruct the jury on the sentence which may be imposed for the offense for which the accused is on trial. The Florida Bar Re: Amendment to Rules - Criminal Procedure, 462 So.2d 386 (Fla. 1984).

The amended rule does not specify whether the exception for capital cases is discretionary or mandatory. Appellant maintains that this Court intended that a maximum/minimum penalty instruction be mandatory in all capital cases. Otherwise, the "at the request of" language would never have been deleted from the rule.

Further, even if such an instruction was waivable, that right of waiver must be held to be personal to the accused and not subject to exercise by defense counsel. This Court has previously recognized that, in capital cases, the accused has personal rights which cannot be abandoned by counsel without the defendant's express and informed consent. Harris v. State, 438 So.2d 787 (Fla. 1983), cert. den., 466 U.S. 963, 104 S.Ct. 2181, 80 L.Ed.2d 563 (1984).

In Harris, this Court held that in capital cases, counsel cannot waive the defendant's right to have the jury instructed on lesser included offenses. It held that " . . . there must be an express waiver of the right to these instructions by the defendant, and the record must reflect that it was knowingly and intelligently made." Harris, pg. 797 (emphasis in original). This informed, personal decision of the

defendant must be of record. Mack v. State, 537 So.2d 109 (Fla. 1989).

The rationale of Harris, supra, was explained in Jones v. State, 484 So.2d 577 (Fla. 1986), which restricted the Harris rule of personal waiver to capital cases. In Jones, the Court said of Harris, that:

> The Harris holding was, in part, based upon the United States Supreme Court's decision of Beck v. Alabama, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980). In Beck, the Court struck down as violative of due process an Alabama statute prohibiting a judge in a capital case from instructing a jury on lesser included offenses. Citing the "significant constitutional difference between the death penalty and lesser punishments," 447 U.S. at 637, 100 S.Ct. at 2389, the Court reasoned that the failure to give the jury the "third option" -- of convicting on an appropriate lesser included offense, as opposed to either conviction or acquittal, impermissibly enhanced the risk of an unwarranted conviction.
>
> In the absence of a "third option," a conviction might signal a jury's belief that the defendant had committed some serious crime deserving of punishment, while an acquittal could reflect a hesitancy to impose the ultimate sanction of death. Such possibilities, the Court held "introduce a level of uncertainty and unreliability into the factfinding process that cannot be tolerated in a capital case." 447 U.S. at 643, 100 S.Ct. at 2392. Jones, pg. 579.

Likewise, due process requires that the jury in the guilt phase of a capital case be charged that it will have a "third option" in the sentencing phase, i.e. life imprisonment without the possibility of parole for 25 years. Unless so charged, a jury could believe that the "life" option which would be available to it after a guilty verdict was not a term with a minimum, mandatory provision, but a "life" term translatable into a minimal period of incarceration due to gain time, prison overcrowding, and other factors that are regularly editorialized by those favoring the construction of more prisons and lengthy terms of incarceration. A juror confronted by a heinous crime, but vacillating on the question of guilt or innocence in a case based wholely on circumstantial evidence, might lean toward a guilty verdict for the "probably" guilty defendant if that juror believed that conviction would subject the defendant to an "easy" life term.

As the Supreme Court said in Beck v. Alabama, supra, and this Court recognized in Harris, supra, due process in a capital case requires that there be no uncertainties which might influence the verdict.

In 1984, shortly after its opinion in Harris, supra, this Court, by amendment to the Rules of Criminal Procedure, wisely required that jurors in capital cases not entertain uncertainties as to the penalty. Such due process rights

to be free of jury uncertainty may not and should not be permitted to be waived by defense counsel without the informed consent of the accused on the record. In the instant cause, defense counsel's exercise of a right that is personal to the defendant constituted fundamental error and requires that the matter be remanded for a new trial.

ISSUE #6

DID THE COURT BELOW ABUSE ITS DISCRETION IN REFUSING TO GIVE APPELLANT'S REQUESTED CIRCUMSTANTIAL EVIDENCE INSTRUCTION BECAUSE, BY MISSTATEMENT, THE TRIAL COURT DID NOT AFFORD APPELLANT THE FULL PROTECTIONS OF THE REASONABLE DOUBT INSTRUCTION?

During charge conference, defense counsel requested a circumstantial evidence instruction which the Court refused (R-4017). The authority for such refusal was the 1981 determination by this Court that a circumstantial evidence instruction is "unnecessary" but discretionary when a proper instruction on circumstantial evidence is given. At that time, this Court said:

> We note that the Criminal Law Section of The Florida Bar approved the instructions as proposed except for the elimination of the instruction on circumstantial evidence. We find that the circumstantial evidence instruction is unnecessary. The special treatment afforded circumstantial evidence has previously been eliminated in our civil standard jury instructions and in the Federal Court. Holland v. United States, 348 U.S. 121, 75 S.Ct. 127, 99 L.Ed. 150 (1954). The Criminal Law Section's criticism of this deletion rests upon the assumption that an instruction on reasonable doubt is inadequate and that an accompanying instruction on circumstantial evidence is necessary. The United States Supreme Court has not only

rejected this view, but has gone even further, stating"

> The better rule is that where the jury is properly instructed on the standards for reasonable doubt, such an additional instruction on circumstantial evidence is confusing and incorrect. . . . Id. at 139-40 75 S.Ct. at 139 (1954).

> The elimination of the current standard instruction on circumstantial evidence does not totally prohibit such an instruction if a trial judge, in his or her discretion, feels that such is necessary under the peculiar facts of a specific case. However, the giving of the proposed instructions on reasonable doubt and burden of proof, in our opinion, renders an instruction of circumstantial evidence unnecessary. Matter of Use by Trial Courts of the Standard Jury Instructions in Criminal Cases, 431 So.2d 594 (Fla. 1981).

The foregoing analysis recognized that a circumstantial evidence instruction is discretionary. Appellant submits that for every situation where discretion may be exercised, there is some factual situation where there is an abuse of that discretion. Appellant further submits that the exercise of discretion should be subject to the most extreme scrutiny in a capital case.

Such discretion is abused when the evidence, as here, is wholly and substantially circumstantial and a proper instruction on reasonable doubt is not given. It is this requirement that underlaid the decision in Holland v. United States, supra, and it is this requirement which

has guided all jurisdictions which have likewise found the circumstantial evidence instruction to be unncesssary. As noted by one comprehensive comment on the subject:

> State courts practicing under Holland have expressed nearly universal concern as to the adequacy of the reasonable doubt instruction which is used to replace the cautionary instruction on circumstantial evidence. Upon abrogating the cautionary instruction, both federal and state courts have been very careful to insure that the reasonable doubt standard is fully developed within the context of the instruction. Note, Abrogating the Cautionary Instruction in Criminal Prosecutions, Relying Substantially on Circumstantial Evidence, 11 Law & Water L. Rev. 623, 628-629 (1976). See Hankins v. State, 646 SW2d 191, 36 ALR4th 1003, 1031 (Tex. Cr. App. 1981) (Onion, P.J. dissenting).

One assumes that this Court shared such concerns in 1981 in that it believed that trial courts would give proper reasonable doubt instructions as set out in the Florida Standard Jury Instructions in criminal cases. However, that did not occur below.

In the words of the trial judge, "I do not read these things (standard instructions) verbatim." (R-4268). Thus, Standard Jury Instruction 2.03 was not followed. The jury was informed that the presumption of innocence "stays with the defendant as to each material allegation of the charges

contained in the indictment until the presumption is overcome by the evidence." (R-4285). Lacking are the required words, "overcome by the evidence to the exclusion of and beyond a reasonable doubt."

Shortly thereafter, the jury was incorrectly instructed that a verdict of not guilty "should" be returned if there is a reasonable doubt (R-4286). When advised that the proper requirement is "must", the Court replied that it would not reinstruct the jury (R-4300).

In a circumstantial capital case, the defendant deserves every protection against wrongful conviction. The circumstantial evidence instruction was abrogated with the expectation that full and correct instructions on reasonable doubt would be given to the jury. The record established that such expectation was not fulfilled in the instant case and Appellant's conviction on all counts should therefore be reversed.

ISSUE #7

DID THE TRIAL COURT ERR IN IMPOSING A SENTENCE OF DEATH?

In imposing the sentence of death, the trial court determined that there existed three aggravating circumstances, to wit:

1. The defendant was previously convicted of another capital felony or a felony involving the use or threat of violence to the person. Section 921.141(5)(b), Florida Statutes.

2. The defendant knowingly created a great risk of death to many persons. Section 921.141(5)(c), Florida Statutes.

3. The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. Section 921.141(5)(i), Florida Statutes. (R5549-5551). In order for the aggravating circumstances to be sustained, they must be proven beyond any reasonable doubt. Hamilton v. State, 547 So.2d 630 (Fla. 1989); Atkins v. State, 452 So.2d 529 (Fla. 1984).

The trial court found one statutory mitigating circumstance and an unspecified number of nonstatutory mitigating circumstances. Specifically, the trial court found that, as a statutory mitigating circumstance, the defendant has no significant history of prior criminal activity.

Section 921.141(6)(a), Florida Statutes (R-5551). Among the unenumerated nonstatutory circumstances, the court noted that Appellant was raised in a middle class environment and regressed through a relatively normal and happy childhood. He loved his parents and his parents loved him. However, through his childhood, he was shy and introverted, although obedient to his parents. His marriage of ten years was in tact and appeared to be happy. Further, the court noted that Appellant was an intelligent man, having obtained a degree from the University of South Carolina. During the time that Appellant was in the federal prison system, he responded well to prison programs and maintained an above average institutional adjustment. While incarcerated, he was active in the educational department of the institution and taught courses in chemistry and mathematics to other inmates. The court classified Appellant as shy, quiet, and eccentric. The court further noted that he was polite, amiable and well-mannered. He is kind and generous and makes friends easily. Many of his friends stood by his side throughout the trial and, even in light of a conviction, continued to maintain that an injustice had been done (R-5553).

The application of the first cited aggravating circumstance to the instant case is inappropriate. The aggravating circumstance was based upon the same incident

as resulted in Peggy Carr's death rather than any previous criminal activity. The language of the circumstance in cases thereunder require that there be a personal interaction of a violent nature between the defendant and the person that is the victim of the collateral felony. Each and all of the cases examining this circumstance rely upon the violent, interpersonal contact of the defendant and victim. Dolinsky v. State, 576 So.2d 271 (Fla. 1991); Johnson v. State, 438 So.2d 774 (Fla. 1983), cert. den., 465 U.S. 1051, 104 S.Ct. 1329, 79 L.Ed.2d 724 (1984). Such contact is absent in the instant case.

The case that best elucidates the principle espoused by Appellant is Lewis v. State, 398 So.2d 432 (Fla. 1981). In Lewis, the appellant shot and killed the victim, Richards. At the time of the shooting, two other people were in the bedroom with Richards watching television. The trial court sentenced Lewis to death and cited as one of the aggravating circumstances that Lewis had previous convictions of felonies involving violence. In rejecting this circumstance, this Court wrote:

> This subsection refers to life threatening crimes in which the perpetrator comes in direct contact with a human victim. See Ford v. State, 374 So.2d 496 (Fla. 1979), cert. den., 445 U.S. 972, 100 S.Ct. 1666, 64 L.Ed.2d 249 (1980). We therefore disapprove this finding. Lewis, pg. 438. (emphasis supplied).

There was no direct contact between Appellant and any other human victim in this case and, accordingly the aggravating circumstance is not proven beyond a reasonable doubt by the facts.

The trial court further found that the crime created a great risk of death to many persons (emphasis supplied). It is clear, again from the wording of the circumstance, that the act must create a great risk, not a possible risk or even a probable risk. In Kampff v. State, 371 So.2d 1007 (Fla. 1979), this Court concluded:

> "Great risk" means not a mere possibility, but a likelihood or high probability. Kampff, pg. 1009.

Numerous cases apposite to the instant case have rejected this circumstance due to the failure to establish that a "great risk" existed that many others would suffer death. In King v. State, 514 So.2d 354 (Fla. 1987), cert. den., 487 U.S. 1241, 108 S.Ct. 2916, 101 L.Ed.2d 947 (1988), defendant, King, was convicted and sentenced to death for the murder of an elderly woman, robbery, arson, escape, and attempted murder of a prison counselor. The arson was of the homicide victim's home and, as certainly would be anticipated, resulted in the arrival of firefighters to combat the blaze. The trial court concluded that, " . . . he (King) should have reasonably foreseen that the blaze would pose a great risk to the neighbors, as well as firefighters and the police who responded to the call." King, pg. 360.

Citing Kampff, supra, and White v. State, 403 So.2d 331 (Fla. 1981), cert. den., 463 U.S. 1229, 103 S.Ct. 3571, 77 L.Ed.2d 1412 (1983), this Court rejected the circumstance as being mere speculation as to what might have occurred to the neighbors, firefighters, and police. This conclusion was reached in the face of evidence that two firefighters were injured and the fire caused "considerable" damage to the home. King, pg. 360.

In White, supra, the defendant and his co-defendants were in the process of robbing the victim, Miss Wooden, when the owner of the home and five of his friends arrived. White and his accomplices bound each of them. Later, Miss Wooden's boyfriend also arrived and, as those victims before him, was bound. After the possibility occurred that one of the perpetrators may have been seen (each used a mask to conceal his identity), all eight persons were shot in the head. Two of the victims survived.

The trial court, in finding the "great risk" circumstance, stated:

> What would have happened had additional neighbors, delivery people, or other friends appeared in the house for a visit can only be the subject of conjecture. Suffice it to say, that a total of six people were killed and two seriously wounded during the perpetration of this robbery. White, pg. 337.

This circumstance was rejected on the basis that:

> . . . a person may not be condemned for what might have occurred. The attempt to predict future conduct cannot be used as a basis to sustain an aggravating circumstance. White, pg. 337 (emphasis in original, citations ommitted).

More recently, the same circumstance was rejected in Hallman v. State, 560 So.2d 223 (Fla. 1990). Hallman robbed a bank during which shots were exchanged with a security guard through the windows of a cab that was intended to be used as a getaway car. The guard was killed. The trial court, in finding that a "great risk" was created by defendant's actions, noted that there were numerous people in the bank, five people outside of the bank, and passers by on U.S. 98, any one of which could have been struck by a stray bullet. This Court reversed Hallman's death sentence and rejected the "great risk" aggravating circumstance, agreeing with Hallman's contention that, "at most . . . there was only the chance that a bystander would be struck by a stray shot, and that such a danger is insufficient to support the aggravating circumstance." Hallman, pg. 227.

The trial court engaged in the same type of speculation and relied on facts unsupported by the record in the instant case. Initially, the court noted that "several persons regularly visited the household as guests." (R-5550). This observation is pure speculation regarding the presence of such persons and their consumption of Coca Cola. It is

precisely the type of possibility rejected in regard to neighbors arriving in White, supra, and in regard to firefighters/policemen in King, supra.

The court below further wrote, "the quantitative analysis of . . . the washings from the empty bottles proved that each of the seven bottles contained a potentially lethal dose of poison." (R-5550). This conclusion was absolutely unsupported by the record because there was no evidence adduced at trial by which the volume of content of Thallium in the empty bottles could be extrapolated through the use of the washing measurements. Even the full bottles of Coke, of which there were only three, did not necessarily contain quantities of Thallium which would have produced a "great risk" of death when the amounts to be consumed, the size of the person, and the individual effect of the Thallium on a person consuming it were all matters of speculation. Accordingly, the "great risk of death" aspect of this aggravating circumstance was not proven.

The great risk of death must be to many persons. As discussed previously, the trial court improperly included potential visitors in the group of persons that could qualify as "many". The trial court noted that " . . . seven persons resided in the Carr household" (R-5550). This statement is unsupported by the record. The facts demonstrated that four persons resided in the Carr home

and that three persons resided in the detached apartment (R-1586). Therefore, only four persons might be considered to be exposed to the Coca Colas. Even under that circumstance, only the two adults in the household had free access to the Cokes because they were located in a restricted place, a place the "kids" were not permitted (R-1599). Based on a purely numerical consideration, this circumstance does not apply. Bello v. State, 547 So.2d 914 (Fla. 1989).

A consideration of "many" may not be viewed in a vacuum. It must be considered in the context of the existence of a "great risk of death". In this regard, the instant case is unique in that as the number of people who consumed the Coke increases, the likelihood or probability of death decreases. This is because only a limited amount of Coca Cola existed, and a particular quantity of it must be consumed to cause a great risk of death. The more people among whom it is divided, the less the likelihood that a sufficiently large quantity would be consumed to cause death. The court erred in finding this aggravating circumstance.

The application of the two foregoing aggravating circumstances also represents impermissible "doubling". Maxwell v. State, 443 So.2d 967 (Fla. 1983); Provence v. State, 337 So.2d 783 (Fla. 1976), cert. den., 431 U.S. 969, 97 S.Ct. 2929, 53 L.Ed.2d 1065 (1977). The same people that were the victims of the "previous" felonies

were the same people that were referred to in the "many persons" that were exposed to great risk of death.

Lucas v. State, 490 So.2d 943 (Fla. 1986), and White, supra, were cited frequently for the proposition that three (Lucas) people did not qualify as "many" under Section 921.141(5)(c), Florida Statutes. Lucas, pg. 946. However, both also clearly indicate that the "persons" who are the victims of the contemporaneous violent crime may not serve as the same "persons" who were subjected to great risk of death. In White, supra, this Court stated, " . . . we disagree with the trial court's suggestion that this aggravating circumstance may be sustained based on what in fact occurred -- the murder of six individuals." White, pg. 337. In Lucas, supra, this Court stated, "There has never been any evidence that Lucas' conduct endangered more than the three people directly involved." Lucas, pg. 946 (emphasis supplied). The court's reliance on these factors constituted impermissible doubling.

The court erred in finding as an aggravating circumstance the fact that the homicide was cold, calculated, and premeditated, without any pretense of moral or legal justification. This factor must be proven beyond a reasonable doubt and must demonstrate more than just the premeditation element of first degree murder. Jent v. State, 408 So.2d 1024 (Fla. 1981), cert. den., 457 U.S. 1111, 102 S.Ct. 2916, 73 L.Ed.2d 1322 (1982). There must also be an absence of any pretense of moral or legal justification.

In Banda v. State, 536 So.2d 221 (Fla. 1988), this Court stated:

> We conclude that, under the capital sentencing law of Florida, a "pretense of justification" is any claim or justification or excuse that, though insufficient to reduce the degree of homicide, nevertheless rebuts the otherwise cold and calculating nature of the homicide. Banda, pg. 225.

A definition of "pretense", using Webster's Third New International Dictionary, 1797 (1981), was cited for its definition of pretense as "something alleged or believed on slight grounds; an unwanted assumption . . ." Banda, pg. 225.

Appellant heretofore has addressed the issue of premeditated intent to kill as it reflects upon the amount of Thallium in the bottles and the possibility that the actions were intended to hurt or scare the Carr family. While this argument may not have been accepted at the trial level in regard to the degree of offense, (Appellant certainly does not abandon his argument in Issue #1 that the case should never have reached the jury), in light of Jent, supra, and its progeny, the prospect of causing death must be even clearer. Under the possibilities discussed, supra, the elevated intent above and beyond the required intent for premeditated, first degree murder, was not demonstrated.

Even assuming that the intent to cause death was present, the State's evidence strongly suggested that Appellant had a "pretense" of justification for his

actions, i.e. the continued harrassment, mental anguish, and emotional strain caused by the actions of the Carr family. The State sought to portray Appellant as ultrasensitive, "unusual", or "strange". The Court, in its sentencing announcement, noted that the Appellant was eccentric (R-5553). If this protrayal was valid for purposes of obtaining a conviction, it must also be valid to demonstrate that Appellant acted on the pretense of eliminating this unbearable irritant from his life. Certainly, while an average person would not resort to such an extreme, that would not preclude demonstration of the fact that Appellant had an "unwarranted assumption" that his actions were justified, a "claim of justification or excuse" albeit insufficient to reduce the degree of homicide.

In State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. den., 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974), this Court noted that the death penalty was reserved by the legislature for "only the most aggravated and unmitigated of first degree murder cases." Dixon, pg. 7. Part of this Court's function in capital cases is to review the case in light of other decisions and determine whether the punishment is too great. In this case, the court found three aggravating circumstances, one statutory mitigating circumstance, and an unspecified number of nonstatutory mitigating circumstances (R5549-5553). In toto, the nonstatutory mitigating circumstances set forth the fact that Appellant is a shy, quiet, generous, and kind individual. His life to the point of this incident was

characterized by kindness and generosity toward his fellow man. The friends that he developed through the course of his life were steadfast. Appellant even sought the best in difficult times, i.e. he assisted his fellow inmates during his incarceration.

There have been numerous much more aggravated murders in which the defendant was sentenced to life. In Holsworth v. State, 522 So.2d 348 (Fla. 1988), for example, the defendant burglarized the mobile home of a mother and her daughter, Holsworth stabbed both, killing the daughter. Three years prior to that incident, Holsworth had attacked another woman in her mobile home during the early morning hours. Although the trial court found three aggravating circumstances, including the fact that the homicide was heinous, atrocious, and cruel, and found no mitigating circumstances, this Court found that Holsworth's conduct was affected by drugs and alcohol, and that the jury might have believed other mitigating circumstances present. Of course, the significant difference between Holsworth, supra, and the instant case is that the jury recommended life imprisonment in the Holsworth case.

Although the jurors recommended death in the instant case, the recommendation was much more likely the result of the prosecutor's portrayal of Appellant as " . . . the most diabolical man you will ever see face to face in your life" (R4181-4182). The prosecutor's perpetual attack on

Appellant's character was nothing less than an effort to portray him as the equivalent to the fictional character of Dr. Hanibal Lechter. With this impression in mind, and in consideration of the fact that the jury did not render specific findings regarding the existence of aggravating circumstances, it is much more likely that their recommendation was based upon emotion rather than fact.

While the court stated that "it is my job to reweigh the evidence in light of all the circumstances", the trial court did not perceive the significance of Appellant's peaceful existence with his fellow man and the contributions that he had made to those around him (R-5553). These attributes, and the sure likelihood that they would continue should Appellant's sentence of death be reduced to life imprisonment without the possibility of parole for 25 years, make Appellant's sentence of death disproportionate under the facts of this case. Appellant's sentence should be reduced to life in prison.

CONCLUSION

Based upon the foregoing reasons and authority, Appellant, GEORGE J. TREPAL, respectfully requests this Honorable Court to grant a Judgment of Acquittal as to all charges, or to reverse his conviction and remand for a new trial for second degree murder or manslaughter because the State failed to prove that the homicide in the instant case was premeditated. If the Court does not grant this relief, Appellant requests this Honorable Court reverse and remand for a new trial based upon other errors discussed in this brief. As a lesser alternative, Appellant would request this Honorable Court to vacate the sentence of death and remand for the imposition of a life sentence or, if none of the above are granted, to award him a new penalty trial before a jury newly empaneled for that purpose.

RESPECTFULLY SUBMITTED this 6th day of January, 1992.

RONALD N. TOWARD, ESQUIRE
Post Office Box 226
Bartow, Florida 33830
(813) 533-0507
Florida Bar Number 258105
Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Initial Brief of Appellant has been furnished to the Office of the Attorney General, 2002 North Lois Avenue, Suite 700, Westwood Center, Tampa, Florida 33607-2366, by regular U.S. mail, this 16th day of January, 1992.

RONALD N. TOWARD, ESQUIRE
Post Office Box 226
Bartow, Florida 33830
(813) 533-0507
Florida Bar Number 258105
Attorney for Appellant