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IN THE SUPREME COURT OF FLORIDA

CASE NO. 77,735

DENNIS JAVIER ESCOBAR,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

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

Amended INITIAL BRIEF OF APPELLANT

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INTRODUCTION

The appellant was the defendant and the appellee the prosecution, State of Florida, in the lower court. The parties will be referred to as they stood in the trial court. The record on appeal will be referred to by the letter "R". All emphasis is added unless otherwise indicated. The supplemental record on appeal will be referred to by the letters "SR".

STATEMENT OF THE CASE

Dennis and Douglas Escobar were charged by indictment (R. 1) with the offenses of first degree murder, grand theft and possession of a firearm during the commission of a felony. Additionally, the defendant Dennis Escobar was charged with the offense of possession of a firearm by a convicted felon. (R. 3).

The defendant, Dennis Escobar, filed a motion for severance based upon the inappropriate courtroom behavior of his brother, Douglas. (R. 42).

The defendant, Dennis Escobar, filed a motion in limine to prohibit the introduction of "Williams Rule" evidence. (R. 44).

Dennis Escobar filed a motion to exclude photographs of the deceased. (R. 52).

Dennis Escobar filed a motion to suppress confessions and admissions. (R. 56).

Dennis Escobar filed a motion to redact statements of co-defendant (Douglas Escobar). (R. 58).

Dennis Escobar filed an (additional) motion to sever. (R. 59).

Following a hearing, the trial court entered an order denying state's motion to allow Williams Rule testimony. (R. 64).

The state appealed this order (R. 66) and the District Court of Appeals, Third District, reversed the order of the trial court.

Upon remand from the District Court, the trial court, upon the state's motion, entered an order granting motion for rejoinder or consolidation of defendants. (R. 91).

The defendants, Douglas and Dennis proceeded to trial wherein a jury convicted Dennis Escobar of first degree murder (R. 234),

grand theft of a motor vehicle (R. 235), and possession of a firearm in the commission of a felony. (R. 236).

Following his conviction, Dennis Escobar filed a motion for severance to sever his sentencing hearing from that of his brother, Douglas. (R. 245). This motion was denied.

Dennis Escobar filed a motion for continuance (R. 246) to continue the sentencing hearing.

Dennis Escobar filed a motion for a new trial (R 248) which was denied.

The advisory jury by a vote of 11 to 1 recommended the death penalty for Dennis Escobar. (R. 251).

By means of a sentencing order (R. 256), the defendant Dennis Escobar was sentenced to "death in the electric chair." (R. 274).

This appeal follows.

STATEMENT OF THE FACTS

In the lower court, the following proceedings occurred:

On March 2, 1990, a competency hearing was held as to the competency of defendant Douglas Escobar to stand trial. Despite the testimony of Doctors Marina (R. 596) and Marquit (R. 628) that Douglas was incompetent to stand trial, the trial court ruled:

> While the doctors disagree on their conclusions, the Court concludes that the defendant, Douglas Escobar is competent to proceed to trial and makes that finding. (R. 662).

This cause again came before the court on May 21, 1990. At that hearing:

The court denied the defendants' motion to declare §921.141 unconstitutional. (R. 683, 685).

The court heard Dennis' motion in limine as to "Williams Rule Evidence". (R. 708). After hearing the argument of counsel (R. 708-728), the court deferred ruling on the motion. (R. 728).

The court next turned to the defendants' motion to suppress statements. (R. 728). On that motion:

Detective Morin testified that he was the co-lead investigator who flew to California to interview the defendants. (R. 738). He met Dennis on April 29. (R. 739). He didn't check to see whether Dennis had an attorney. (R. 793). He did not speak to a doctor or nurse regarding Dennis' condition prior to questioning Dennis. (R. 783). He was not aware of what medication Dennis may have taken. (R. 783). Dennis was in the medical wing recovering from gunshot wounds to his hand, wherein he had lost part of his fingers (R. 746), and lower body. (R. 741). There was various medical equipment set up around Dennis' bed. (R. 746). Morin spoke to Dennis in Spanish. (R. 741). Dennis had an IV tube in his arm. (R. 797). Morin read Dennis his "Miranda" rights. (R. 743). Dennis refused to speak to Morin. (R. 748). Morin lied to Dennis about having spoken to Douglas Escobar. (R. 749). When Morin read Dennis his "rights", Morin didn't ascertain what type of medication Dennis had been taking, didn't ascertain if Dennis could read or write, didn't explain to Dennis the meaning of each individual "right" and Dennis didn't initial each right individually. (R. 779). Dennis told Morin that he would speak to Morin "Monday." (R. 750).

On May 2, 1988, Morin returned to speak to Dennis Escobar. Morin again read Dennis his "rights." (R. 752). Morin again did not speak to a doctor or nurse regarding Dennis' condition prior

to questioning. (R. 783). Morin again read Dennis his "rights". Detective Roberson who didn't understand Spanish was also present. (R. 783). Dennis stated that California had "tricked" a statement "out of him" and, thus, did not want his statement recorded. (R. 756). At that point Dennis refused to speak and Detective Morin left. (R. 757). At the prison gate, Morin received a call that Dennis had changed his mind and wished to speak to Morin. Morin returned. Morin told Dennis what Fatima and Douglas Escobar had stated. (R. 758). Dennis made a statement which Morin told Dennis that he didn't believe and again Morin left. (R. 759). Again, just before departing the prison, Morin was told that Dennis wished to speak to him. (R. 760). Dennis then gave Morin a statement. (R. 761). Dennis refused to give a taped or written statement (R. 764), stating that if he gave a signed or taped statement, he would have no defense at trial. (R. 765).

Morin returned to question Dennis on May 3, 1989. (R. 767).

Morin returned again to question Dennis on July 14, 1989. (R. 770). Dennis refused to talk about the case. (R. 771).

Morin recalled that Dennis had a problem signing the rights waiver form because his fingers had been shot off. (R. 796). Morin made no attempt(s) to find out if Dennis was represented by counsel. (R. 793-794).

Sergeant Roman Finale testified to interviewing Dennis in the hospital ward on April 29, 1988 as to the California shooting case. (R. 801). Dennis had an IV and bandages for his wounds. (R. 801). Dennis was in "bad condition" having lost part of his fingers and feeling pain in his hand, heel and leg. (R. 802). At that time

Dennis had told Detective Morin that he (Dennis) didn't want to talk about the Miami case. (R. 806). Sergeant Finale didn't know what was being administered to Dennis through the IV. (R. 810). Finale did not see Detective Morin use a "Miranda card" to advise Dennis Escobar of his "Miranda rights." (R. 818).

Officer Palma of the California Department of Corrections worked in the institution where Dennis was. (R. 821). He did not know what type of medication Dennis was taking or the dosage or times. it was administered. (R. 827).

Detective Roberson went to California with Detective Morin. (R. 829). He doesn't speak Spanish. (R. 832). He doesn't know what Morin's conversation with Dennis was. (R. 837). Dennis searched him for a tape recorder. (R. 839). Morin read the "Miranda rights" to Dennis from a card. (R. 832). Dennis did not have an IV. (R. 840). He never saw a nurse during any conversation that he and Morin had with Dennis. (R. 841). At one point, a Detective Palma came in to translate from English to Spanish a statement allegedly made by Douglas Escobar. (R. 841).

The defendant, Dennis Escobar, testified on his own behalf. (R. 843). On April 29, 1989, he was in a hospital bed. (R. 845). Until the hearing, he never saw the "rights waiver", nor did he sign it. (R. 845).

The second time the detectives came to see him, he was told that his wife had been detained and had told the police "everything." (R. 847). Dennis Escobar was told that if he did not give a statement and plead guilty, that his wife would "get" five years and his children would be taken away from her. (R. 847). At

first the police refused to allow him to call his wife (R. 847) but allowed the call after Dennis said he was guilty. (R. 847-848).

Dennis said he was guilty due to the pressure the police put on his wife and family. (R. 849). He was told that if he accepted guilt, that nothing would happen to his family. (R. 856). Dennis did not know about the California "problem" (crimes) that his brother Douglas had because Dennis had just gotten out of prison (R. 857) and was not aware that the police were looking for Douglas. (R. 857).

The trial court denied Dennis Escobar's motion to suppress. (R. 865).

The trial court announced its ruling that evidence as to the California case was inadmissible as " Williams Rule" evidence. (R. 1229).

The state announced it had "no objection to the severance". (R. 1253). The trial court stated:

> Believe me this case is going to take a long time to try. I don't want to do it twice but if I think the only way it could be fair to you, to both of you that I do it twice, I am going to make sure that I am fair to both of you and I try it twice. (R. 1281)

Following the state's appeal to the Third District Court of Appeals (which held that the "California case" was admissible as "Williams Rule" evidence), the case came on for hearing upon the state's motion for rejoinder. (R. 1360). Following argument by counsel, the trial court granted "the motion for rejoinder of consolidation." (R. 1370).

The jury selection in this cause was also hotly contested.

The defense objected to the excusal of jurors who did not believe in the death penalty. (R.1412,1560, 1596, 1712, 1818, 1923. 1986).

Additionally:

a) Mr. Riscigno, who could follow the court's jury instructions and could vote death "if the evidence warranted it" was excused over defense objection. (R. 1833 .

b) Andrea Cole testified that people in the potential jury pool saw a newspaper article about the case and conversed about the article. (R. 1871 . A defense request to ask Ms. Cole about which potential jurors spoke about the article (case) was denied. (R. 1873. Arthur Jacobson testified that he read a lengthy story about the case (R. 1891 and shared the article with others in the jury pool on the seventh floor. (R. 1893 .

c) A motion to excuse Isabel Santa because she was predisposed towards the death penalty in a case where a police officer was the victim was denied. (R. 1943-1947 .

d) The prosecution stated:

> I don't want any juror who doesn't want to be here in a case of this sort. (R. 2026).

e) The trial court stated:

> You have a motion to recuse me from this point? I will be more than happy right this moment. (R. 2093 and,
>
> The ground rules are the rules that I set as I go along. (R. 2093).

f) Dennis Escobar's motion to sever the grand theft charge was denied. (R. 2176-2179).

g) Dennis' and Douglas' renewed motion to sever was denied.

(R. 2183).

h) The Court denied the motion to strike potential juror Covas for cause (R. 2226) even after she stated she would be prejudiced (R. 2218, 2192, 2196, 2197), knew Dennis and Douglas were serving terms of life imprisonment in California (R. 2212), had already decided the defendants were guilty (R. 2213), would rather not have served on the jury (R. 2215) and believed that when a grand jury returns an indictment there is a "probability of that party being guilty." (R. 2345).

i) Dennis Escobar again moved for a severance;

> I am asking for a severance again. All or part of my motion in the beginning dealt with the conduct of the co-defendant in the California trial. I am now witnessing some of the very same things. Maybe the court missed it but Mr. Smiley, the gentleman with the Kentucky beard and the red sitting there, Douglas has on at least two occasions given him the bam, bam (indicating).
>
> I am sitting there looking at this stuff. I don't think Dennis can get a fair trial with that kind of action. If Mr. Smiley saw this I am sure other jurors saw it also. It is prejudicial to Dennis and I am asking for a severance at this particular point. (R. 2623).

j) Dennis Escobar again moved for a severance. (R. 2993).

k) The defense requested additional jury challenges:

> MR. CARTER: One second before bring another juror in, Your Honor at this time I would like to put the court on notice that for each juror you have excused for cause over my objection Dennis Escobar is entitled under the state of the law as to ten challenges.
>
> I am requesting in advance so the court can give it some thought, one additional challenge for every one that you have excused for cause over Dennis' objection
>
> MR. GALANTER: And judge I specifically join

in that request. (R. 3253).

1) Ms. Jacobowitz stated that, as to voting for the death penalty:

> My answer is yes I could vote but I am predisposed to vote for life imprisonment. (R. 3656). and,
>
> Yes, I am willing to follow the law. (R. 3656). and,
>
> That she could recommend the death penalty in an appropriate case:
>
> I think I could be obligated to do so. I wouldn't be happy with it, but I would do it. (R. 3661). and,
>
> All I can tell you, Mr. Laeser, is that I would follow the law. (R. 3664).

Over defense objection, Ms. Jacobowitz was excused for cause, the court stating:

> The Court believes that under the Randolph case that she is not qualified to serve as a juror and based upon that belief of this court and the observances of the court, over the defense objections I am going to excuse her for cause. (R. 3681).

The state was later allowed, over objection, to use a preemptory challenge to excuse Ms. Jacobowitz. (R. 3923).

m) The defense inquired as to the reasons for the excusal of black jurors:

> At this time Your Honor, I would like to call attention to the Court that State has exercised five peremptory challenges. One against Mr. Arthur Bacon who is a black male. One against Mr. Carlos who is a, Carlos Westmore, who is a black male. Another against Ms. Fitzpatrick who is a black female. (R. 3950).

The court denied the defense request. (R. 3952).

n) The defense then sought to exercise a peremptory challenge

against Noreen Virgin, a white female. (R. 3953). The state objected. (R. 3954). The court ruled that the defense had to give reasons for its challenges. (R. 3955). The defense moved to strike the panel as "not representative of the community" (R. 3955) which was denied. (R. 3956).

The trial court then required reasons for the defense strikes:

> Prima facie showing that has been made of all the strikes that you have made. They were all against members of the jury of one particular race. I believe that is a prima facie showing on its face as to the strikes. Okay, they have complied with that burden.
>
> And I am asking you at this time please give me race neutral reasons why you struck Ms. Morris.
>
> MR. CARTER: My explanation is with that after conferring with Dennis Escobar, who's trial this is, he doesn't want her on the jury. That is all I can do is follow my clients desires. (R. 3960-1).
> and,
>
> MR. CARTER: Let the record reflect I have conferred with my client Dennis Escobar. We are going, he tells me he does not want those three people to try him on the particular case and in conformity with my client, who's trial this is, who's reasons I must respect according to the last case I read that I cannot, even if I wanted to excuse someone if he wanted to stay or keep someone. That case is about four months old, and I am following my client's wishes. irrespective of how I may feel.
>
> THE COURT: I don't believe that the cases would allow the tail to way the dog, and the client can not do what a lawyer cannot do and in so far as violate the case law as it exists is in the State of Florida, specifically those cases beginning with the Neil decision.
>
> At this time the Court is going to find that the reasons given A.L.S. for Patricia Jorgensen, that Mr. Dennis Escobar doesn't want Ms. Jane Morris on the jury, that Mr. Dennis Escobar doesn't want Noreen Virgin on the jury are not race neutral reasons.

The Court will not accept them and will not allow peremptory challenges for those three individuals. Those three individuals, because those are the only reasons given are reinstated to the jury as far as the Court is concerned. (R. 3962-3).

o) Dennis Escobar wished to excuse juror Santin. (R. 3945). The court refused to allow the challenge to Ms. Santin. (R. 3948).

p) Mr. Dennis Escobar, with regards to his challenges stated:

> Before talking, conferring with my attorney I'd like to state that the reason for which I took the same decisions with these people is not because of race related matter. But by coincidence those are the same persons with whom he does not agree to keep on the panel.
>
> I do not agree to keep them either. For instance, with Ms. Santin, or Ms. Santin is a lady who I see her as a plastic lady, very superficial. I don't like that type of person that she presents. And so far I have the same motives with the others. (R. 3972-3).

q) The state argued that Hispanics were not a separate ethnic group for purposes of jury selection:

> MR. LASER: Just to assist counsel. I think my reading of all the cases says that Hispanic or Latin is not a cognizable group for purposes of racial breakdown. (R.3973-4).

r) Dennis Escobar stated:

> Well, I think that it is unjust to pressure me to accepting a jury which I am not, which I do not agree on. I have my intuition. And my way of deciding according to the way the person answered the questions. And I have my right to be able to choose the jury I have a right to pick a jury.
>
> According to my own decisions because my life is a stake. So therefore, I ask you Your Honor please, allow me to choose according to the way which is more convenient to me to do so. In order to obtain a just jury. (R.3974). and,
>
> I understand everything that you have said. But I maintain myself in the, refusing the fact that I do no wish to accept the elimination of

these three jurors from my panel.

THE COURT: Okay.

MR. DENNIS ESCOBAR: Besides I am classified here as a white male in jail so therefore I don't see any reasons as to why my, as to why you might think that you, I am challenging these jurors on basis of being white, of the white race. (R.3975-6).

s) As to Dennis Escobar's racial status, the court noted:

I have no problem Mr. Escobar is a white male. He is a Latin. I have no problems with that. I note that, it is on the record a few times and we will put it on again so the appellate court could review it. (R. 3973).

t) As to Dennis Escobar's challenges, the court noted:

I am note allowing the challenges other than I believe Mr. Smiley, who we previously excluded. I am not going to allow the challenges that Mr. Escobar indicated both himself and through Mr. Carter that he wished of those four individuals. (R. 3980).

u) As to distinct racial groups, the court noted:

Because if we end up in a situation where all Latins are being struck I recognize that the Courts have indicated to white or black, not Latins are to be included in that group. For the record I am putting this on, who knows what case is coming out of the Supreme Court tomorrow. (R.3981).

v) Dennis moved to strike Mrs. Carpenter;

The motives I give is I see her a little racist, as someone that would discriminate against hispanics. Therefore, I have, I am afraid that if she were to become a member of the jury panel she'd become, she would have, be prejudiced against me as a Latin. (R.3982-3).

The court denied the challenge. (R. 3984).

w) Dennis moved to strike Carlos Miguel Diaz. "A Latin and white male." (R.3985). The court required an explanation. (R. 3985). Dennis Escobar replied:

Okay, that Mr. Diaz who's job is to be a collector, bill collector, that would have contact with lots of people and due to the fact that this case has this so much publicity I believe that he might have heard different comments about it that could have biased, could bias him against me. (R. (R. 3985-6).

The court ruled:

The Court does not believe that the reasons given are supported in the record, and of course the record will reflect whatever Mr. Diaz indicated. The Court does not find there is a race neutral reason and based upon the previous rulings of this Court that all strikes sought to be exercised by Mr. Dennis Escobar were of white members of the white race. I am going to deny his request to strike this individual and ordered that Mr. Diaz remain on the panel. (R. 3986-7.

x) Dennis again moved for a severance and to strike the panel (R. 3988), his counsel stating:

I may be able to find a panel composed of all black people and that that way it will satisfy the courts wherever they may be. It seems unlikely I am going to find one here.

There may be a panel where I wouldn't have to strike any white people. There may be none. (R. 3988-).

y) In considering the question of Dennis' jury challenge, the Court stated:

It just seems somewhat improper that a defendant, who in this instance, Mr. Escobar who is white Latin male has a problem when he says to the Court I want to strike a Latin from the jury and because of the case law, I have to make a finding that he can't strike a Latin from the jury. And that's in essence what I am saying.

And then I believe that is probably what the law is pretty much in that area. But I can't perceive that's what was intended when Neil was originally passed down by the Supreme Court back several years ago, 1984. I don't know if I want to be the person to perhaps carve out exceptions, but I may end up having to be in this situation. (R. 3997). and,

And if I was to sit here and say that I would place the rights of the community and the rights of potential jurors to sit of a jury, above the rights of a defendant to participate in selection of a jury, which in essence I am almost saying in this case, I think that's wrong. I think we have gone the exact opposite of where we were before Neil was decided. (R. 4003).

z) Even the state acknowledged the problem with the jury selection in this case:

> I can't say to the court that makes complete and utter sense and that might not fly in some way in the face of a basic concept that every defendant has a right to sort of pick the jury of people who is going to try his case to the extent that he's capable of doing that. But on the other hand, we go by a system of laws. (R. 4004).

aa) Dennis' counsel commented:

> Something I want to make perfectly clear. I think side tracked the issue. The Court is aware I put forth challenges against some white persons quote unquote, then made an attempt to excuse Ms. Santin who was Latin and that person was suddenly classified as white. I couldn't, I can('t) get Latins off the jury. Now there is no intent on my part to exercise my challenge in a racial manner.
>
> THE COURT: I don't think that's the case, Mr. Carter. (R. 4005-6).

Dennis' counsel then went on the give "at least 75 factors that I take into consideration when I am picking a juror." (R. 4006-9).

bb) the court commented:

> It's a situation that the appellate courts are going to have to review. They are going to have to take the bull by the horn at some point and recognize that something has to be done, something has to be done in this instance. We have gone from a very perceived problem on the one hand to the other hand where we now can't select a jury. (R. 4010).

cc) As to its reasons for selecting jurors, the state

commented:

> I know on some of them (jurors) I find a balance there that I can live with and some of them I find a balance I can't live with. And frankly, also no way that I can ever articulate that on the record if the Court would ask me to qualify for some of these jurors why I would want them off the jury. (R4011-12 and,
>
> I think it's now become a test to some extent and as I said before, I think it's a test that we are stuck with at least as I read the case law. I would love to be able to sort of send a wire up to seven Supreme Court justices saying listen, there is some decent lawyers in this case who know what they are doing, they understand the issues, they understand their respective feelings, just let us go ahead and use our peremptory as we see fit and we'll end up with a decent jury.
>
> I think ultimately that's not what the case law allows. I think the case law says if I transgress, the court has a right to inquire of me and refuse me to allow to take certain peremptory challenges. I think conversely has the same right against defense counsel. (R.4012).

dd) The court considered the dilemma:

> THE COURT: How can I justify to myself, the appellate court and to Mr. Escobar when he says to me Judge, I am a Latin, that's the first Latin that I ask be struck, I don't want her on for this reason. How can I justify saying you have to keep her on the jury?
>
> MR. LAESER: Because Latins are not a group. 40 percent of our community, not cognizable. For purpose of analysis, if they were Guatemalan, different from Nicaraguan, Cuban different from Venezuelan or are they all supposed to categorically be called Latin. Trust me there are some vast differences from some of those groups.
>
> And how do I break it down. Is Ms. Santin really being challenged because she's Cuban as opposed to being central American. I don't have any way of knowing it. So the appellate court says caucasian no matter how her last name ends, as is Ms. Benitez who is from Puerto Rico and some of the others who are from different places. All caucasian unless they are black.

I don't know with all due difference, I don't know how black you have to be. Ms. Benitez is literally, I am putting quotes around it, dark enough to be considered black and if I challenge her, somebody is going to say obvious Latin surname, that she has some black racial characteristics and therefore, you're challenging her because she's black and that's the reason you're doing it.

I have no way of knowing what the appellate court means. I know when I read it, Latins are not cognizable group. So far cognizable group as I understand them are blacks and everybody else. And to the extent that may or may not offer me any assistance, those are the rules that I started jury selection on November 28 and those are the rules that I expected to go through the entire course of the trial. (R. 4013-14).

ee) As to challenges already made, the prosecution commented:

Little of each. I appreciate Mr. Galanter's suggestion. I think however, my personal feelings are if we can evaluate some seven challenges or attempted challenges now by Mr. Carter, people being Smiley, Carpenter, Morris, Jorgensen, Santin and Diaz, that I think with all respect to Mr. Galanter, that the time has both come and gone when the Court should have conducted that inquiry. (R. 4019).

ff) Apparently unsure as to its disallowance of peremptory defense challenges, the court "went back" to again address the reason for defense strikes. (R. 4021).

The defense then began to articulate reasons why it struck the various jurors. (R. 4026).

gg) Dennis Escobar then sought to strike Ms. Virgin, both for cause, then by means of a peremptory challenge. (R. 4044-45). The court denied Dennis' peremptory challenge even though it noted; as to jury selection:

I don't say I agree with the process and where it's gone. (R. 4048).

hh) The defense sought to challenge Ms. Jorgensen. (R. 4058).

The court disallowed the challenge. (R. 4058).

ii) The court then received a note that:

> A juror, Holly Glasier and the phone number and her number is here, was riding on a train with Noreen Virgin on December the 7th.
>
> Ms. Virgin told Ms. Glasier that Ms. Holley told her that, I guess told Ms. Virgin that someone in her family was one of the persons killed by Officer Lozano. Ms. Holey is the young woman engaged to be married. She wanted to speak with you. Told her I would see you got the message. (R. 4063-64).

Ms. Holley was questioned by the court and counsel. (R. 4079).

Over defense objection, Ms. Holley was excused for cause. (R. 4096).

jj) After Ms. Holley was excused, the court stated:

> So what I am going to do is Mr. Badell now is the 11th person, Mr. Smiley was the one after him, Mr. Carter had excused Mr. Smiley. But what I am going to do now is go back and reinstate the other people that we had and go forward from there to get the 12th juror. Once we get the 12th juror tentatively, then we'll decide how we are going to handle the situation with regard to the selection of the alternates because I have had some second consideration on that. (R.4097).

kk) Shortly thereafter, the court stated:

> Let me take you several steps back. In reflecting on this, everybody has got six extra challenges because of the method which I set up. I am not allowing that. I am changing my method insofar as the alternates. We are not going to have 16 challenges, 16 challenges and 32 challenges. I am not doing that anymore.
>
> So what I intend to do so everybody understand this, we are going to get our 12. I am going to have all these people come back next week and we will decide on our day and then we are going to have all the jurors in the other room if you want to except the 12 you have, so be it. Bring them

in and swear them before we go to first alternate.

When they come in here if you want to strike other people, you can strike them. The second that everybody tenders as to 12, that's when that second they are going to get sworn in, those 12. Next moment after we finish with the 12, then we'll start on the alternates.

Everybody still has same number of challenges, 10, 10 and 20. Everybody will still have the same challenges insofar as the alternates except we won't concern ourselves with the alternate until the panel has been selected and sworn. (R.4099).

ll) After that announcement Dennis' counsel stated:

Subject to making the record clear as to my objection to Jorgensen, Benitez, Sosa, Diaz and Virgin, Court having not allowed me to pre'em on those. I am again asking for pre'em. Court denied it. I am forced to accept the juror.

THE COURT: My ruling that I previously made is the ruling that I will continue with and based upon that, then I assume you tender. (R.4100-01).

mm) On December 20, 1990 Dennis moved to strike "Alina Sosa and Jorgensen, Noreen Virgin and Carlos Diaz from the panel" (R. 4114-15) to which the court stated:

THE COURT: I previously ruled that we would not allow the strike for the reason that were previously stated on those.

Unless you have some additional reasons and not the same ones over again, then my ruling will stand.

MR. CARTER: I would move to strike the entire panel, Your Honor, meaning that Mr. Escobar could not get a jury of his choice even if he wanted to from the exercise of peremptory challenge. We have not been allowed to strike a Latin male nor a Latin female, the white male nor a white female. Still have six challenges left. (R. 4115).

The defense motion was denied. (R. 4116).

The defense stated that "In all good conscious, I cannot

accept the panel." (R. 4118).

nn) At the potential juror Baer, Dennis moved to challenge him (R. 4119), his challenge was disallowed (R. 4120) but then the prosecution was allowed to excuse Mr. Baer. (R. 4120).

oo) As to potential juror Picciotto, Dennis sought to excuse this juror, the court required a reason, and counsel stated:

> During the course of the examination by the State of Florida Mr. Picciotto spent 90 percent of his time smiling with Mr. Laeser when he was talking and I think that his answers to Mr. Laeser's questions were of a nature that is not conducive to being a "good juror" insofar as the defense is concerned. (R.4120-21).

The court did "not find that that is a race neutral reason as required. The court will not permit that strike." (R. 4121).

Then, <u>without</u> objection and <u>without</u> having to give a reason, Douglas Escobar was allowed to strike Mr. Picciotto! (R.4121).

pp) Dennis' counsel then sought to strike Ms. Glasier (R. 4121):

> THE COURT: Based on my previous ruling, will you give me a reason for striking Ms. Glasier?
>
> MR. CARTER: The reason is the same that I gave to the Court, the same as Mr. Picciotto's.
>
> THE COURT: The Court finds that that is not a race neutral reason and the Court will deny the request to strike her peremptory. I will not permit that strike. (R. 4122).

qq) The court next permitted <u>Douglas</u> Escobar's counsel to "strike Patricia Ann Jorgensen". (R. 4122).

rr) The state then struck Mr. Roberson. (R.4123). Dennis' counsel requested "an explanation from the State as to why Mr. Roberson --" to which the court replied "It's not required." (R.

4123).

ss) Dennis then "wishes to renew his challenge to Sosa and Virgin" to which the court replied "same rulings as I previously made (R. 4123).

Then, the co-defendant, Douglas Escobar was allowed to "strike Ms. Virgin." (R. 4124).

tt) The State then sought to excuse Mr. Yamamoto. (R. 4124). Dennis requested "a racial neutral explanation as to the striking of Ms. Yamamoto". (R. 4124). To which the court relied:

> No the prima facie showing has been shown to orientals. This will be the only one I am not going to require any explanation of. (R4125).

uu) Dennis then sought to "strike Ms. Sosa and Glasier" to which the court replied:

> Same rulings, I briefly made. (R. 4126).

vv) Dennis sought to excuse Ms. Doddel for cause. (R. 4127). The court allowed him to exercise a peremptory challenge (R. 4128):

> In this instance, I feel that based on the reasons that you have given and the fact that she did exercise hostility or some hostility towards you, that is certainly a very valid race neutral reason and I will allow the striking of Ms. Doddel peremptorily. (R. 4128).

ww) The number of strikes used was then considered:

> THE COURT: I think you have --
>
> MR. CARTER: Four.
>
> MR. GALANTER: He was four. Abe has 12.
>
> MR. LAESER: More than enough. (R. 4123).

xx) Dennis then sought to excuse Ms. Judy Goodgame:

MR. CARTER: I move to excuse Ms. Judy Goodgame for cause.

The main reason being according to my notes, she had a problem with the death penalty and life in prison and she expressed a fear of the defendant getting out one day and in my opinion this shows a predisposition to, number one. get a conviction and somebody else now may or may not reflect, but I recall that she had a fear of the defendant getting out.

THE COURT: I am going to deny the motion to excuse her for cause.

MR. CARTER: I would like to exercise a peremptory on Ms. Goodgame, your Honor.

THE COURT: Do you have any other reason other than what you have stated for the reason for cause that you wish to enunciate as to why you would want to excuse her peremptorily?

MR. CARTER: Other than my psychological profile, Your Honor.

THE COURT: The Court does not find that these are race neutral reasons and will not allow a striking of Ms. Goodgame. (R. 4131).

At this point, the state expressed a reservation about the denial of Dennis' challenge and asked "that there not be a rejection of the reasons given by Mr. Carter solely because of the appellant record and that the peremptory be accepted on Ms. Goodgame specifically referring back to what he said about Ms. Goodgame being concerned that the defendant might get out and life doesn't mean life." (R. 4132).

The court remained adamant:

My ruling stands. I am not going to strike her. (R. 4132).

The state then excused Ms. Goodgame. (R. 4132).

yy) When Douglas Escobar sought to excuse Alex Badell:

MR. LAESER: Your Honor, the only point I would make, and I don't know if my notes are accurate, I believe Mr. Galanter has now used eight excusals.

With the exception of Ms. Berry they have all been --

THE COURT: Seven.

MR. LAESER: They have all been caucasians roughly between the age of 20 and 50.

I don't know if the Court feels that there is a pattern or met a pattern based upon the jury selection, but I want to point that out to the Court.

THE COURT: I'm not going to make that finding at this time. (R. 4134)

When the state sought to excuse Ms. Bleudeige Jeanty as a juror (R. 4117):

MR. CARTER: Your Honor, please, I would request at this time and ask the Court to inquire of Mr. Laeser the reason for striking Ms. Jeanty, Bleudeige Jeanty, and if I'm not mistaken, it might be their fourth or fifth black, if I'm not mistaken. At this time I think I see a pattern.

THE COURT: Let me go through this here. What I have here as to the racial breakdown of the State's strikes, there has been nine strikes by the State. This will be the tenth.

Mr. Bacon (phonetic) is black. Ms. Fitzpatrick (phonetic) is black.

MR. LAESER: Mr. Westmore (phonetic) and Mr. Roberson and Ms. Jeanty.

MR. CARTER: My count was right, five our of a nine.

THE COURT: Mr. Westmore is black. Ms. Carrage (phonetic) is white. Mr. Baer is white. Mr. Roberson is black. Ms. Yamamoto is oriental. Ms. Goodgame is white, and Ms. Jeanty is black.

I see no pattern of striking only blacks, and I will refuse to make an inquiry at this time.

MR. CARTER: If the Court please, its 55.5 percent of the strikes have been black.

MR. LAESER: I am sorry. I didn't --

THE COURT: There was an Oriental.

MR. CARTER: I want the record to reflect that 55.5 percent at this particular juncture have been all black. (R. 4135-36).

aaa) As to Mr. Grabosky:

MR. CARTER: One moment, Your Honor, please.

Under the rights of my client, we move to strike Mr. Grabosky.

THE COURT: Are you moving to strike him for cause, peremptorily or what?

MR. CARTER: Peremptorily, Your Honor.

THE COURT: Could you gave me your reasons, please.

MR. CARTER: Other than my psychological profile with regard to my client, I don't have one.

THE COURT: I don't think any one of those are race neutral reasons. I will deny the position to strike Mr. Grabosky peremptorily. (R. 4136).

bbb) Douglas Escobar was permitted by the court to strike Carlos Diaz. (R. 4137). (See, R. 3985-87).

ccc) As to the selection of the alternate jurors:

1. Dennis moved to excuse Mr. Louis Doucette for cause (R. 4142) which motion was denied. (R. 4142). Dennis requested a peremptory challenge to which the court stated:

> I feel that I am in the same position that I was in the other portion of the process, in that I am required to continue following the same pattern as I did then, requesting reasons after having made findings that the only strikes at that item had been made against white jurors and I am going to find at this time that the reasons given are not race neutral reasons.

I am going to deny the request, Mr. Carter, to excuse Mr. Doucette peremptorily and unless anybody else wishes to exercise a challenge, he will be alternate number one. (R. 4143).

At that time, the co-defendant, Douglas Escobar was permitted to strike Mr. Doucette. (R. 4144).

2) The next potential alternate was Ms. Clotelia Rogers. (R. 4144). The state sought to "excuse her peremptory" (R. 4144) to which Dennis' counsel replied:

> I would like the record to reflect that Ms. Rogers is a black female and the State's first strike is an alternate black female.
>
> THE COURT: Mr. Carter's powers of observation is Ms. Clotelia Rogers is a black female.
>
> MR. CARTER: For race neutral explanation --
>
> THE COURT: I am not going to require one.
>
> MR. CARTER: Very good, Your Honor. (R. 4144).

3) The court refused to allow Dennis to strike for cause the sister of a police officer. (R. 4148), but did allow a peremptory challenge. (R. 4149).

4) The next potential alternate was Ms. Scott (R. 4131) to whom the state responded:

> As to Ms. Scott the state would move to excuse Ms. Scott.
>
> THE COURT: Are you asking for a cause or peremptorily or what?
>
> MR. LAESER: Peremptorily. I don't think there is a sufficient basis for a cause excusal, and I think just parenthetically she also mentioned a nephew and someone else that are police officers and she is a black woman.
>
> THE COURT: Yes, black female.

MR. CARTER: I would request an inquiry of the basis of striking Ms. Scott.

THE COURT: I am not going to make an inquiry out of it. (R. 4150).

5) As to Ms. Olga Campus as an alternate juror:

THE COURT: Our next person is Ms. Olga Campus. Will the State accept Ms. Campus?

MR. LAESER: The State will move to peremptorily excuse Ms. Campus as well.

MR. CARTER: Defendant Escobar make the same objection, same request.

The notation is that Campus is also a black female.

THE COURT: I don't think there is any prima facie showing made of a striking of a group, and I am going to deny the request to make an inquiry. (R. 4153-54

ddd) After the jurors were sworn and left, the state requested that the juror questionnaire be made a part of the record as "obviously, there may be some litigation concerning voir dire and I think we need this for any appellate review" (R. 4172), to which Dennis' counsel responded:

MR. CARTER: If the Court makes that a part of the record, I would like to submit to the Court my psychological juror profile.

It's written out. It's not something that I dreamed up.

THE COURT: We discussed this in detail. I had no difficulty in what you are trying to do, and in all years back, that is the way all of us selected jurors. The Supreme Court told us that we can't use our common sense anymore, and we have to follow some other dictates in selecting a jury. (R. 4173).

After allowing the state's request to be made part of the record, the court commented:

With regard to Mr. Carter's request, I think that is slightly different. These were not court documents that were made available to the respective counsel, these were reasons and some of them absolutely perfect logical reasons that Mr. Carter gave to the Court as to why he selects and doesn't select jurors in the case, but I do not feel that they should be made a part of the exhibit.

You did enunciate those things on the record, so they certainly are in the court record --

MR. CARTER: Thank you.

THE COURT: -- verbally. (R. 4147).

When court resumed on January 7, 1993, Dennis' counsel commented:

MR. CARTER: Renewal all previous motions that I made during the course of voir dire, and one other motion which has to do with the Williams Rule I know that the Third District has decided the issue to some extent.

We still have a problem. The Third District Court ruling, they speak only as I understand, to relevancy. They do not go to the prejudicial or probative issues of the evidence itself.

I think the Williams Rule is a two or three-prong test in that respect and the Court still may find to see fit that even though the evidence -- the question is a probative value in this particular situation.

THE COURT: As I understand they disagree with my ruling with regard to the admissibility. I indicated that the evidence that the state sought to introduce was not admissible under the theory which they wish to introduce. The Third District disagreed.

I am not going to readdress the issue. Perhaps if it comes to that, then the Supreme Court will address it and will decide whether the Third District was correct or I was correct. I really don't wish to reargue the situation at this time. I am going to do exactly what the Third District told me to do, allow the evidence in, period. (R. 4193-94.

In the state's opening statement, it prominently mentioned the California incident, and linked it to this case by stating:

> As they pulled that car over, virtually the same episode occurs again. (R.4215).

During Douglas Escobar's opening statement, his counsel commented:

> The other thing that I want you to keep in mind is that sometimes even though we can try and prevent our brother's actions, we are truly not our brother's keeper and my client should not be convicted of a first degree murder just because his brother killed a police officer, because in this case, Douglas, although he tried to be, could not be his brother's keeper.
>
> Thank you. (R.4238-39

Counsel requested a sidebar at which:

> MR. CARTER: I am surprised and I will object to Mr. Galanter's statement which says that Dennis is the shooter.
>
> Now at this time I am going to renew my motion for a severance at this particular point and/or a mistrial.
>
> THE COURT: Okay. Renewed motion for severance and motion for mistrial is denied.
>
> MR. GALANTER: I have a statement I would like to make for the record also.
>
> In light of the fact that the court has denied our motion on a pretrial motion to suppress, our defense, of course, is entirely consistent with what we argued at the motion to suppress, we feel we are forced into this defense by virtue of the Court's ruling. (R. 4239-40

Dennis also requested a continuing objection to all of the Williams Rule evidence. (R. 4269).

Lt. Adonna Amoroso, the state's first witness, was a San Jose, California police officer who testified to obtaining "an arrest

warrant for Douglas Escobar (R. 4275) and attempting to locate Douglas to serve the warrant. (R. 4277).

Dr. Roger Mittleman was the medical examiner (R. 4288) who examined Victor Estefan's body. He testified to three bullet wounds. (R. 4323, 4337, 4355). Pictures of these wounds were objected to. (R. 4329, 4345 He testified to two of the bullet wounds being the cause of death. (R. 4367 He was unable to state the position of Officer Estefan when he was shot. (R. 4378). The wounds were consistent with Officer Estefan being shot while walking away. (R. 4376).

Antonio Mujar testified to coming home and seeing a police car parked at an angle with its interior lights on. (R. 4385). He approached the police car and found Officer Estefan who told him to call for help. (R. 4389). Officer Estefan had an object in his hand which Mujar presumed to be a gun. (R. 4395).

Walter Stephaniak who maintained 911 and dispatch tapes (R. 4412, played a tape of March 30, 1988 (R. 4421) which gave the license number of a prior "wrecker stop" by Officer Estefan. (R. 4422).

Two truck driver Jimmy Morejon testified that Officer called him to tow a car. (R. 4433). While at the "tow site" Officer Estefan saw a car go by without its lights on and left to follow the car. (R. 4436

Officer Juan Inastralia saw Officer Estefan at the "tow site". (R. 4440). He later responded to the scene to find Estefan on the ground near his police car. (R 4447). He asked Officer Estefan for a description and believes Estefan replied "small grey vehicle"

(R.4453) and "short white male". (R.4458). Estefan did not say two men were involved. (R.4458 Officer Inastralia then set up a perimeter for a man "on foot" as he believed the "shooter" left on foot (R. 4463) as did Mr. Mujar. (R. 4464). It was his voice on the 911 tape requesting help. (R.4451).

Officer Raul Cairo was at a restaurant near the scene. (R. 4466). On his radio, he heard Estefan request help. (R4467). He heard three shots in rapid succession (R.4469) and responded to the scene. No car passed him going the other direction. (R. 4471). Officer Estefan had drawn his weapon. (R.4474). Officer Estefan told him "short Latin male." (R.4475).

Jael Hernando lived near the scene. (R. 4489). She heard 5 shots in the front of her house. (R.4491, 4496). When she went out, she saw police and fire rescue. (R.4492).

Jael's husband, Jose, also heard five shots in front of the house. (R. 4498). He additionally heard a car door slam and a car zoom off after the shots were fired. (R. 4499-4500

Victor Pennefeld was a tow truck operator who towed a car, on April 27, 1988, from an apartment building at the request of the manager. (R. 4512). The car was a grey Mazda 626 with damage to the rear quarter panel. (R. 4513-14

Officer Raimundo Martinez testified to responding to the scene and finding a gun one foot from Officer Estefan which he then gave to Detective Castillo. (R. 4521-24

Detective Castillo testified that he obtained Officer Estefan's gun (R.4529) and put out over the police radio a description which Officer Estefan gave to Commissioner Plummer. (R.

4533).

Detective Beatty responded to the scene. He spoke to Officer Estefan who told him that he was shot a couple of times (R. 4546), that the "passenger in a small grey car shot him" (R. 4547), that Estefan said a "short Latin guy" with bushy hair and a guabera shirt" (R. 4548), that the car had backed out and maybe hit the police car before fleeing (R. 4548) east (R. 4548). Estefan gave no description of the driver, no description of an automobile tag or make or model. Estefan gave no details of the shooting. (R. 4555). Detective Beatty had arrived from the east but saw no car. (R. 4559). Upon information that people had run towards a cemetery, the cemetery was searched and a woman was found. (R. 4564).

City Commissioner J. L. Plummer testified that he heard of the shooting over a police radio, recognized Estefan's voice (R 4568) and came to the scene. He went with Officer Estefan to the hospital in an ambulance. (R. 4571). On the way, Estefan told him "traffic, no lights" and a passenger shot him. (R. 4574). The shooter was young (R. 4588), a white Latin male, short, stocky, bushy hair with a white shirt (R. 4575), with no facial hair. (R. 4576). Estefan didn't see the driver. (R. 4575). The car was small and grey. Estefan couldn't give a tag number. When the car fled east, it received damage to the right rear ("I did it"). (R. 4576). Estefan stated there were three shots. (R. 4578).

Sergeant Bohan testified that he went to a towing company to inspect a Mazda with damage to the right rear quarter panel 28 days after the shooting when leads were becoming dead ends. (R. 4594,

4595-4601).

Lieutenant Bonowitz of Miami Fire Rescue stated that Officer Estefan said he was shot twice. (R. 4615).

Gary Keller lived in a duplex near the scene. (R. 4627). He heard a car pull up with its lights on, then another car pull in behind it. (R. 4631). The headlights came in through his window. (R. 4632). The car stopped, he heard car doors slamming, then voices. (R. 4633). Keller heard 2 or 3 distinct voices shouting. (R. 4643). Keller heard a scuffle which could have been a fight involving two people. (R. 4634, 4661-62, 4644, 4652). He then heard three gunshots, then a pause, then another gunshot. (R. 4653). He then heard voices and one car with an automatic transmission drive away. (R. 4635-36). He did not hear a car crash. (R. 4660). The whole incident lasted 1 1/2 - 2 minutes. (R. 4649). The police came seconds after the shots. (R. 4659).

Wayne Parker, who worked for Pioneer Mazda in March and April, 1988) (R. 4667), reported a Mazda 626 stolen on April 13, 1988 when he found the car was not on the lot. (R. 4668). He had last seen the car in March, 1988. (R. 4676). The car had a 5-speed transmission. (R. 4672). He doesn't know when or how the car vanished. (R. 4672).

Miami Police Identification Technician Natalie Jones took custody of Officer Estefan's clothes (R. 4684) and took projectiles, a tube of blood and metal fragments to the evidence locker. (R. 4685).

Miami Crime Scene Technician William Delancy testified to making sketches of the scene. (R. 4701).

Miami Crime Scene Search Technician Raphael Garcia came to the scene, took measurements (R. 4715), found bullet fragments (R. 4721), evidence of blood splatter (R. 4750) and damage to the left rear bumper of Officer Estefan's car. (R. 4761). He also took photos of tire impressions. (R. 4768). Technician Garcia also stated that there was a round in the chamber of Officer Estefan's gun," when you slide back, it will feed a round into the chamber." (R. 4740). Officer Estefan's key card was found out. (R. 4758). Officer Estefan's police car had its trunk open. (R. 4737

On May 6, 1988, Technician Garcia processed a Mazda 626 and found latent fingerprints around the sunroof. (R. 4775). He processed a latent print from the silver metal frame flap of the sunroof. (R. 4780).

Eddy, Cos, who manages a condominium had found a Mazda near his building and had it towed. (R. 4800).

Lucia Teresa Alonso testified that she had applied for an automobile license tag but had never received it. (R. 4304).

Douglas Saballos testified that his brother Gilberto introduced him to Douglas Escobar around Christmas, 1987 at a time when Douglas' hair was bushy. (R. 4817). In March 1988 Douglas introduced him to Dennis Escobar. (R. 4818). Douglas and Dennis had a grey Mazda. (R. 4826).

One day he had been drinking with Douglas and Dennis when Douglas told him:

> Well, he told me that he was wanted, first of all, in California for a series or for certain things and that he wasn't going to be taken back, that he was, you know willing to get to break anybody that would try to stop him. (R. 4820).

Later, Douglas showed Douglas Saballos a weapon (R. 4820), and stated that his business was the hold up business. (R. 4821).

After Officer Estefan was shot, Douglas and Dennis came to his house and asked for his brother Gilberto's address and telephone number in California. (R. 4823).

Later, Gilberto called him from California, stated Douglas and Dennis Escobar were with him and that they had told him that they had killed Officer Estefan. (R. 4826).

Douglas Seballos testified that he kept his brother informed as to the progress of the Estefan investigation in Miami. (R.4849-4852).

Crime Scene Technician Sylvia Romans testified to photographing Officer Esteban in the morgue. (R. 4873).

Officer Steven Smigelski testified that Officer Estefan kept his police car neat and clean. (R. 4881).

Prior to Trooper Kell's testimony, Dennis Escobar registered an objection. (R. 4890).

Trooper Kell of the California Highway Patrol had been on patrol with Officer Koenig on April 27, 1988 when he noticed a car weaving in the lane. (R. 4896 He pulled the car over. (R. 4899). Koenig went the driver's side and Dennis Escobar exited. (R. 4904). The passenger door opened and Douglas exited with a gun. (R. 4907). He saw Douglas point the gun at Officer Koenig. (R. 4909). He yelled a warning to Koenig and drew his weapon. (R. 4910). Douglas' gun wouldn't fire. (R. 4911). Kell yelled for Douglas to drop the gun at him (Kell). He shot Douglas and Douglas fell off of the road into a "bush area". (R.4913). He searched

for Douglas. He heard Koenig call for help. (R. 4924). He saw Dennis on top of Koenig on the ground. (R.4931). He yelled at Dennis and Dennis ran. (R. 4935). He fired at Dennis as Dennis ran. (R.4970). He never saw Dennis strike Koenig. He told Dennis to stop and Dennis dropped Koenig's baton and stopped. (R.4969).

Dennis Escobar moved for a mistrial and severance when Dennis' photo was shown to Trooper Kell. (R.4945).

Dennis again moved for a mistrial and severance when a photograph of Officer Koenig depicting his injuries was introduced into evidence. (R. 4973).

The testimony of Jose Bonilla was objected to. (R.4996).

Bonilla testified that in February, 1988 Douglas told him that Douglas had robbed a bank in California and people were looking for him. (R. 5003 Douglas showed Bonilla a pistol and stated that if he were stopped by the police he would shoot whoever stopped him. (R. 5005). Bonilla testified:

> He told me that before he would to go jail, if he had to do that, he would kill someone. (R. 5016).

At the conclusion of Bonilla's testimony, Douglas' counsel objected to the improper rehabilitation of Bonilla as Dennis moved for a mistrial and severance as "none of those things were admissible against Dennis, I don't think he could get a fair trial. (R. 5023).

Fatima Escobar, Dennis' wife, testified that she was with Douglas and Dennis when Dennis got a grey car from a car lot. (R. 5024-5031). She had seen Douglas show a gun to Dennis. (R. 5034 After Officer Estefan's shooting, she was along with Douglas and

Dennis when the gun was thrown away. (R. 5036). Douglas and Dennis then went to California. (R. 5038).

Miami Detective David Cadavid took Fatima's statement. (R. 5049). She showed him where the car was left and was taken. (R. 5001-02). He found a car registration at her apartment. (R. 5059).

Technician Evans took photos of and items from Fatima's house. (R. 5072-73).

Sergeant Travis of Miami Underwater Recovery testified to attempting to locate the gun with negative results. (R. 5080, 5082 5085).

Ramon Arguello who lived with Douglas in March 1988 (R. 5103) testified to seeing Douglas and Dennis the night of March 30, 1988. (R. 5106). Dennis had a bleeding head (R. 5108) and drops of blood on his pants. (R. 5106). Douglas had a gun. (R. 5107). Douglas said Dennis had been hit in a restaurant. (R. 5108). The next day, Douglas said he and Dennis were going to work in Texas and the brothers left. (R. 5110).

Over objection (R. 5126), Detective Morin testified consistent with his testimony at the motion to suppress to statements obtained from Douglas (R. 5198, 5205) and Dennis. (R. 5235, 5260).

During Morin's testimony, it was determined that his notes had not been provided to the defense. (R5102). Dennis' motion for mistrial was denied (R. 5197) as was his motion for severance. (R. 5249).

During Morin's testimony as to what Douglas said concerning Dennis' participation in the incident, Dennis' objection was

overruled. (R. 5209-10).

Over objection, Detective Morin was allowed to testify:

> Q: Today, is there any doubt in your mind as to who the individual was that shot with a firearm Victor Estefan?
>
> A: No.
>
> Q: Is that person Dennis Escobar?
>
> MR. CARTER: Objection.
>
> THE COURT: Overruled.
>
> THE WITNESS: Absolutely. (R. 5401).

As to obtaining Douglas' statement:

a) before seeing Douglas, the detectives made a previous decision to try to overwhelm Douglas with information so he'd believe they knew all about Dennis and Douglas participation. (R. 5299-).

b) they falsely told Douglas that Dennis had given a statement to them. (R. 5188).

c) the detectives falsely told Douglas his fingerprint was found on the gas cap of the Mazda. (R. 5190).

d) the detectives falsely told Douglas that Dennis stated that Douglas had shot Officer Estefan. (R 5191).

e) they knew Douglas had been shot several times. (R 5303).

f) before speaking to Douglas, the detectives didn't speak to his doctor. (R 5305).

g) before questioning, they didn't speak to Douglas about his mediation. Now, Morin believes Douglas was taking morphine at the time. (R 5310).

In obtaining a statement from Dennis:

a) the detectives falsely told Dennis that Douglas and Fatima had given statements. (R. 5238).

b) On four separate occasions, the detectives

attempted to get Dennis to cooperate and he refused. (R. 5329).

Detective Morin testified that there was an emotional factor in Officer Estefan's death (R.5294) and that police were feeling pressure to make an arrest. (R.5296).

Over repeated objection, Detective Roberson remained in the courtroom during Detective Morin's testimony. (R. 5154, 5160, 5250, 5331).

Sherry Lemon was a nurse at the California hospital. (R. 5406). She was a friend of Trooper Kell and Koenig. (R. 5418). Prior to the police interview, she gave morphine to Douglas. (R. 5410, 5445, 5421). She knew the police were coming to obtain a confession. (R. 5418). Previously, Douglas had had hallucinations in the hospital. (R. 5423). Nurse Lemon gave Douglas morphine after the police left. (R. 5424). Later that evening, Douglas was given valium. (R. 5447), and about four hours after his "confession", Douglas was hallucinating. (R. 5446).

Nurse Lemon was asked:

> Q: Would you allow a person to sign an implied consent form while they were on morphine?
>
> A: No. (R. 5435

Yadira Mendoza lived with Gilberto Saballos in California and testified to seeing Dennis and Douglas there (R. 5455) and seeing Gilberto Saballos leave with Douglas. (R. 5460).

William Fogerty inspected the bumpers of the recovered Mazda and Officer Estefan's police car (R. 5479) and gave his opinion that there had been an impact between the Mazda and police car. (R. 5493).

Over objection, his notes were admitted into evidence. (R. 5503).

Sergeant Finale of the California Highway Patrol, who investigated the California shooting, testified that initially Dennis denied involvement in the Miami incident (R. 5514) but he asked if he and Detective Morin could come back. (R. 5514).

When interviewing Douglas, Douglas was in pain and gasping. (R. 5529). He interviewed Douglas because he believed Douglas might not survive his wounds. (R. 5530).

Firearms Identification Technician Hart examined submitted projectiles and determined they were .38 caliber (R. 5558) and came from a minimum of 3 bullets. (R. 5561).

Even though the state has previously intended to call a single witness as to the California shooting incident (R. 4984), Officer Koenig of the California Highway Patrol was called to testify (R. 5567) and gave substantially the same testimony as Trooper Kell. (R. 5567-5611).

Dennis renewed his motion for severance basing his "argument on the fact that there were certain crimes testified to as to Douglas Escobar in which Dennis Escobar was not a party" and citing "the case of David Hernandez versus state, 15 Florida Law Weekly D2848." The motion was denied. (R. 5618).

Latent Fingerprint Examiner Guillermo Martin testified that fingerprints taken from the metal wind deflector on the sunroof of the recovered Mazda (R. 5630, -32) matched those of Douglas. (R. 5635).

The defense objected to the prosecution's videotape of the

"reenactment" of the automobile accident (R. 5662) without success (R. 5663).

Detective Roberson testified to being present when the "recreation" was made. (R. 5664-67).

The state rested.

The defense moved for a judgment of acquittal (R. 5678) and renewed its motions for severance and mistrial. (R. 5680-01, 5688).

After a prosecution request to do a colloquy of Douglas, the court stated:

> Well, he may change his mind overnight so I don't want to unnecessarily go through it now, although maybe if he didn't get the medication he's in a state where he can understand it. (R. 5689).

The defense also called into question Douglas' competency (R. 5691) because "he doesn't communicate" and "it's like talking to the wall." (R. 5692).

During Douglas' initial closing argument:

> Douglas' counsel accused Dennis of the crime. (R. 5768, 5795, 5789, 5783, 5793

In Dennis' initial closing he didn't attack Douglas. (R. 5829).

During its closing argument, the prosecution:

> a) consistently mentioned the California shooting incident. (R. 5825, 5840, 5844, 5850, 5851, 5852, 5868, 5869, 5870 5891, 5892, 5893, 5894, 5895, 5896, 5897, 5935, 5814, 5915, 5953 5936, 5937, 5938, 5954, 5955, 5956 5843, 5858, 5862
>
> b) argues that the defense attorney's job was "to try to shift the blame away from their client to the other client and that's what they both did." (R. 5852). and,

In this case you don't have to have that type of analysis. You can use your common sense to put the pieces together and come up with the obvious, and I submit, the obvious conclusion about what happened. If it wasn't so obvious there wouldn't be two defense attorneys behind me trying to point the finger at the other guy's client. (R. 5877).

c) argues that as to an attorney's responsibility" it is clearly not our job to put somebody on the witness stand who is a known liar or a known felon or something else. (R. 5882.

d) mentions Douglas' crimes pending before the Estefan shooting. (R. 5882, 5908).

e) "testifies" that:

They have conversations and Douglas Escobar and Dennis Escobar have these conversations just as obviously as Douglas Escobar has had them with these other witnesses who testified on the witness stand about the fact that he knows he's wanted in California, and that is an important motivating factor for why people took the actions that they did. (R. 5882).

f) states that the detectives "don't tell him (Dennis) lies". (R. 5923). and,

admits that the detectives told Douglas things which weren't true. (R. 5926, 5630).

g) infers that, in the California incident Dennis would have killed Officer Koenig:

He was doing his utmost with whatever was available to him, be it a gun or PR 24 or his feet or his teeth or his knees or anything else, to take that gun away from that police officer -- and I'm not even going to finish the sentence. You'll have to guess what he might have done. (R. 5955).

h) implies that a not guilty verdict will perpetuate evil:

I don't want any of you jurors to go back there and cooperate with evil, to help, evil, to help perpetuate evil. If you're true to your hearts, if you're true to the facts in this case, your verdict is one that will battle against evil. (R. 5965).

i) implies that a guilty verdict is their conscience:

All you have to do is go back there and vote your conscience about what you know happened that night. And if you do, I believe that your verdicts will be guilty as charged of first degree murder. (R. 5966).

In his final closing, Douglas' counsel argued:

Dennis Escobar was the person who shot and killed Victor Estefan on March 30, 1988. Don't have any doubt about that. I stand here as a defense lawyer and I tell you that occurred." (R. 5968). and,

"the case against Dennis in terms of first degree murder is extremely strong and you don't have to be a genius to figure that out. You have one lawyer telling you he was there, you have his confession, he was there. I shot the cop. I did it. That's as strong as it gets." (R. 5969). and,

I tried to show you what I believed to be the truth. (R.5970). and,

. . . I too, as an officer of the Court and someone who's worked in the court system for many, many years, believe that truth and honesty is the best policy. You can't fly in the face of what the evidence is and the evidence in this case is crystal clear. (R. 5970). and,

I have truly tried to be as sincere as I possibly could with the evidence that has been presented in this case and my client was not framed. Everything I ever told you occurred. (R. 5975. and,

. . . I do have the utmost respect for these two lead detectives and I don't doubt anything they said in this courtroom. I really don't. I'm in complete agreement with Mr. Laeser on that. (R. 5976).

and, vouched for Detective Morin's credibility:

This is a police officer who is as honest and respectable as can be. (R.5977).

In Dennis' final closing to the jury, his counsel stated:

These cases are extremely difficult and you were selected to do a certain job. I won't stand here and tell you that I know that Douglas Escobar fired those shots. I wouldn't do that because I'd be lying. I wasn't there. I wouldn't tell you that all the evidence points towards Douglas Escobar firing those shots. That may not be absolutely accurate. But I will tell you that all the actions and the evidence is inconsistent with Dennis Escobar firing those shots. (R. 5993).

Also, during Dennis' argument the state's objection to his counsel's belief "they're still investigating that crime" was sustained. (R. 6003).

Following Dennis and Douglas convictions, their motions for severed sentencing phases were denied. (R. 6083). The defense also requested a continuance of the penalty phase. (R. 6084). The court announced that it would limit certain aspects of the defense arguments in the penalty phase. (R. 6129-6139).

At the penalty phase, the court would not let some defense witnesses who arrived in town the night before to testify:

THE COURT: Mr. Carter, you throughout this trial, you have been trying to run it. I am going to run it from now on. I continued this case at your request because you wanted to bring people in. I felt that was absolutely reasonable request on your part. I said list the witnesses. Yesterday, you give them a list at four o'clock in the afternoon. Witnesses coming in at 10:30 last night. They are not going to testify, simple as that. (R. 6195).

The defense then proffered the testimony of the witnesses who were not allowed to testify. (R. 6197-6199).

In its case, the prosecution presented:

California investigator Chris Rogers testified that he had sat through the California court proceedings (R. 6203) that Dennis and Douglas were convicted on two counts of attempted first degree

murder (R. 6204-05), that the defendants were sentenced to life imprisonment plus life imprisonment, consecutively (R. 6207), and that in theory the defendants may never be released from prison for the California crimes. (R. 6207).

Douglas had as a witness Richard Pointer, a California attorney who had represented Douglas in California. (R. 6212).

Douglas Escobar, Jr. testified. (R. 6232).

Douglas father, Dennis Raul Escobar testified. (R. 6236). He testified to alcoholism, beating Douglas' mother, shooting at Douglas' mother and abandoning his family. (R. 6234-6242).

In Dennis' penalty phase, Dennis was not allowed to call Carlos Cruz or Olivia Cruz. (R. 6256).

Psychiatrist Michael Rose testified that Dennis was a structured person, not an impulsive aggressive person (R. 6266), that he's not apt to act alone or be an aggressive type individual in the future. (R 6274-75).

Angela Blanco, Dennis' mother testified that Dennis was present when her husband beat her (R. 6277) and that when she remarried, Dennis' stepfather abused the children. (R. 6279).

Bertha Escobar, Dennis' sister, testified that the father left the family. (R. 6288).

Fatima Escobar, Dennis' wife, testified on his behalf. (R. 6292).

Dennis' father, Dennis Escobar, testified that he believed his actions were the cause of the way Dennis and Douglas grew up. (R. 6305).

Denise Escobar, Dennis' daughter, testified that she loved and

missed Dennis. (R. 6312).

Robin Wakerly, who had been a bailiff in California. (R. 6335) testified that when Dennis and his attorney were going to the jury room in California, as Wakerly got his keys to open the door, Dennis put his hands on Wakerly's gun. (R.6356). He "put" Dennis up against the wall and other security came. (R. 6358).

During its penalty phase argument, the prosecution stated:

> Do they not get in effect a free crime if they receive no more punishment? (R.6373). and,
>
> If you think those actions deserve yet another life rather than the other recommendation that is death, then I suggest to you we can forget about what happened here. (R.6373).

and, states one factor is applicable to Douglas but not Dennis:

> The next aggravating factor, the crime for which the defendant is to be sentenced was a homicide and was committed in a cold calculated and premeditated manner without any pretense of moral or legal justification. This aggravating factor applies not to Dennis but to Douglas Escobar. Why? He wanted, he was going to kill a copy. Not Victor Estefan. Any cop. Any cop who tried to stop him was going to get killed. (R. 6375-76). and,
>
> He (Dennis) didn't do anything. He did something. He murdered this police officer. The death penalty is a message sent to certain members of our society --
>
> MR. CARTER: Objection
>
> THE COURT: Sustained.
>
> MR. BAND: -- who choose not to follow --
>
> MR. CARTER: Objection. Objection, move to strike the entire thing.
>
> THE COURT: Denied. Go ahead.
>
> MR. BAND: Who violated. Penalty is only for first degree murder, no other crime. No rape, no child abuse, nothing else but first degree murder.

(R. 6383-84 and,

> And I suggest that Victor Estefan's life had purpose, had meaning and had value. The community cannot condone nor permit nor allow this type of behavior. We cannot allow people --
>
> MR. CARTER: Objection.
>
> THE COURT: Overruled.
>
> MR. BAND: We cannot allow people who commit first degree murder, we cannot allow people like that to go unpunished. (R. 6384). and,
>
> It makes no sense given the punishment these two individuals have already received for the attempted murder of two police officers, two consecutive life sentences to say this life has no meaning, give them another life. They are not cats, they don't have nine lives. (R. 6385). and,
>
> Your role is that of an advisory board to the Court. You supply the Court with the conscious of the community.
>
> MR. CARTER: Objection.
>
> THE COURT: Overruled. (R. 6387). and,
>
> You represent a fair and representative cross section of our society. Male, female, black, white, <u>Hispanic</u>. (R. 6388). and,
>
> The defendants knew what the proper recommendation for this crime was. That is the imposition of the death penalty. (R. 6388). and,
>
> The decision you render speaks not just for yourself but speaks for the community. (R. 6389).

Douglas' counsel argued:

> The sobering human truth is that Douglas, the driver of that 626 Mazda back in March of '88 did not himself shoot Victor Estefan. Dennis did. Nearly everyone agrees with that. (R. 6407).

Dennis' counsel argued:

> Contrary to what you may have heard a bit earlier from counsel that Dennis did this and Dennis did that, I am not going to say that Dennis did anything. I wasn't there. You weren't there.

Until this day, operate upon a reasonable doubt as to whether or not crime was committed. (R.6408).

Following the jury's recommendation of death, Douglas' wife testified that:

> He's (Douglas) not well. After his time in California, his mind is not well. I don't know why they never mention that. But his mind is not the same as before. And please, one can not be that harsh with a person who is not in his, who does not have his complete mind, faculties. (R.6431).

Douglas' mother testified:

> With all my respect, sir, my son Douglas, after he was operated on, eh changed his way of being. This personality was not the same anymore. When I was here last year, he doesn't even know that I was here. At that time he knew that it was me but afterwards he didn't know that I had visited him. (R. 6434).

Douglas' sister testified:

> My brother, Douglas, after the operation he had in California, sometimes he would recognize me, sometimes he would not. Sometimes, he would tell me the right things and other times things that did not make sense. (R.6437).

The prosecution presented its argument for the death penalty. (R. 6446-56

Douglas' counsel argued:

> In this case, you know, the government had it. They had the facts, they had the law. They have the type of people who fit the perspective of what the death penalty was meant for. (R.6461).

The trial court imposed the death penalty.

This appeal follows.

POINTS ON APPEAL

I

WHETHER THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO SEVER?

II

WHETHER THE TRIAL COURT ERRED IN NOT ALLOWING THE DEFENDANT TO EXERCISE HIS PEREMPTORY CHALLENGES?

III

WHETHER THE TRIAL COURT ERRED IN EXCLUDING A PROSPECTIVE JUROR FROM JURY SERVICE ON THE BASIS THAT SHE COULD NOT FOLLOW THE LAW AND RENDER AN IMPARTIAL DECISION WHICH DETERMINATION VIOLATED THE DOCTRINE OF WITHERSPOON v. ILLINOIS AND RELATED CASES?

IV

THE TRIAL COURT ERRED IN ADMITTING IRRELEVANT GRUESOME PHOTOGRAPHS OF VICTIM SHOWING ENTRY OF WOUNDS, EXIT THE WOUNDS, AND CAUSE OF DEATH WHERE THE ONLY ISSUE IN DISPUTE WAS THE IDENTITY OF THE BODY AND THE GRUESOMENESS OF THE PORTRAYAL DISTRACTED THE JURY FROM A FAIR AND UNIMPASSIONED CONSIDERATION OF THE EVIDENCE?

V

WHETHER THE TRIAL COURT ERRED IN RULING THAT DOCUMENTS FROM A FORMER EMPLOYEE OF AN AUTOMOBILE DEALERSHIP CONCERNING THE THEFT OF ONE OF THE DEALERSHIP'S AUTOMOBILES ARE ADMISSIBLE AS BUSINESS RECORDS PURSUANT TO FLA. STAT. 90.803(6), (BUSINESS RECORDS EXCEPTION), WHERE NO PREDICATE WAS LAID AND NO INQUIRY MADE TO ASSURE THE TRUSTWORTHINESS OF THE DOCUMENTS, AND THE PROBATIVE VALUE OF THE DOCUMENTS WAS SUBSTANTIALLY OUTWEIGHED BY THE PREJUDICE TO THE DEFENDANT?

VI

WHETHER THE TRIAL COURT ERRED IN ADMITTING IRRELEVANT, INFLAMMATORY AND PREJUDICIAL EVIDENCE OF THE VICTIM'S GOOD CHARACTER DURING THE GUILT PHASE OF THE TRIAL?

VII

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VIII

WHETHER THE DEFENDANT WAS DENIED A FAIR TRIAL DUE TO THE IMPROPER CLOSING ARGUMENTS OF THE PROSECUTION?

IX

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X

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XI

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XII

WHETHER THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS?

XIII

WHETHER THE TRIAL COURT ERRED IN IMPOSING THE DEATH PENALTY AS TO DENNIS ESCOBAR?

XIV

WHETHER THE TRIAL COURT ERRED BY DENYING DEFENDANT'S MOTION TO DECLARE FLA. STAT. 921.141 UNCONSTITUTIONAL PURSUANT TO THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AND ARTICLE I, SECTION 9, 16, 17, AND 22 OF THE FLORIDA CONSTITUTION WHERE THE PENALTY STATUTE IS VAGUE, OVERBROAD, AND UNRELIABLE CRUEL AND UNUSUAL PUNISHMENT THAT VIOLATED THE DEFENDANT'S DUE PROCESS RIGHTS?

SUMMARY OF ARGUMENT

The trial court erred in denying the defendant's numerous motions to sever on the basis of co-defendant inculpatory

statement, co-defendant incompetency, antagonistic defenses and excludable (as to defendant) evidence.

The trial court erred in not allowing the defendant to exercise his peremptory challenges, at times without an objection from the prosecution.

The trial court erred in excusing a potential juror who stated that she would follow the law as to the imposition of the death penalty.

The trial court erred in admitting gruesome and irrelevant photos of the deceased.

The trial court erred in admitting documents under the "business records exemption" in the absence of a proper predicate.

The trial court erred in admitting prejudicial and irrelevant evidence as to the deceased's good character during the guilt phase.

The trial court erred in allowing the opinion evidence of Detective Morin that Dennis Escobar shot Officer Estefan.

The prosecution's improper comments during the argument portions of both the guilt and penalty phases denied the defendant a fair trial.

The trial court erred in instructing the jury as to flight.

The trial court erred in refusing to instruct the jury as to third degree murder when evidence existed to support such an instruction.

The evidence was insufficient, beyond a reasonable doubt, to prove premeditation, an indispensable element of first degree murder.

The trial court erred in finding that the defendant freely, knowingly and voluntarily made an inculpatory statement.

The trial court erred in sentencing Dennis Escobar to death.

The trial court erred in finding Florida Statute §921.141 constitutional.

ARGUMENT

I

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTIONS TO SEVER.

The record reflects that several times during the lower court proceedings the defendant sought to sever his trial from that of Douglas, but that, each time, his efforts were thwarted even though the trial court had, at one time stated:

> Believe me this case is going to take a long time to try. I don't want to do it twice but if I think the only way it could be fair to you, to both of you that I do it twice, I am going to try to make sure that I am fair to both of you and I try it twice. (R. 1281).

A. Co-Defendant's Inculpatory Statement.

The statement of co-defendant Douglas Escobar was introduced against this defendant at the time of trial. Douglas' statement was that the defendant shot Officer Estefan. Douglas did not testify at trial so the defendant was deprived of any opportunity to question Douglas as to the veracity of this powerful piece of inculpatory evidence. The defendant submits that the denial of his motion for severance (R. 59) and the admission of Douglas' inculpatory statement (as to defendant) when Douglas was not available to be cross-examined as to that statement was reversible

error. See, Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968); Bryant v. State, 565 So. 2d 1298 (Fla. 1990); Roundtree v. State, 546 So. 2d 1043 (Fla. 1989).

B. Courtroom Behavior of Douglas.

Prior to trial the defendant filed a motion to sever based on the inappropriate behavior of his brother, Douglas. (R. 42).

During jury selection, Dennis again moved for a severance:

> I am asking for a severance again. All or part of my motion in the beginning dealt with the conduct of the co-defendant in the California trial. I am now witnessing some of the very same things. Maybe the court missed it but Mr. Smiley, the gentleman with the Kentucky beard and the red sitting there, Douglas has on at least two occasions given him the bam, bam (indicating).
>
> I am sitting there looking at this stuff. I don't think Dennis can get a fair trial with that kind of action. If Mr. Smiley saw this I am sure other jurors saw it also. It is prejudicial to Dennis and I am asking for a severance at this particular point. (R. 2623). and,

When the state rested, the prosecution requested a colloquy of Douglas, to which the court replied:

> Well, he may change his mind overnight so I don't want to unnecessarily go through it now, although maybe if he didn't get the medication he's in a state where he can understand it. (R 5689).

Then, the defense also called into question Douglas' competency (R. 5691) because "he doesn't communicate" and "it's like talking to the wall." (R. 5692).

The record reveals the horrifying specter that Dennis Escobar went to trial with an incompetent who actually antagonized the jury! The defendant submits that it was error to fail to sever the trial of these defendants.

C. Antagonistic Defenses.

From Douglas' opening statement (R. 4238-39 through Douglas' argument during the penalty phase (R. 6407), Douglas prosecuted Dennis Escobar for the murder of Officer Estefan. See, defendant's Statement of the Facts, p. 30-53).

Where the defense or interests of two or more jointly informed against are antagonistic, a severance should be granted and its denial is error, warranting a reversal. See, Suarez et al. v. State, 115 So. 519 (Fla. 1928). See, also, Crum v. State, 398 So. 2d 810 (Fla. 1981); Thomas v. State, 297 So. 2d 850 (Fla. 4th DCA 1974); United States v. Gonzalez, 804 F.2d 691 (11th Cir. 1986).

From opening bell to final argument, Douglas was a second prosecutor. Under the facts of this case, the failure to sever the defendants and allow the jury to consider guilt and penalty individually, as to each particular human being who stood before them to be judged, was error.

D. "California" Evidence.

Initially, the trial court ruled evidence as to California crimes inadmissible. A portion of this evidence was as to offenses which Douglas alone was alleged to have committed. Even though the Third District Court of Appeals ruled this evidence to be admissible, the defendant submits that evidence as to "California" crimes would have been inadmissible in a severed trial as Dennis was not involved in the "California" crimes (robberies) from which Douglas was allegedly a fugitive.

Additionally, the alleged motive for the instant shooting was Douglas' determination to avoid arrest for the California

robberies. Jose Bonilla testified that in February, 1988 Douglas told him that he (Douglas) had robbed a bank in California and people were looking for him. (R.5003). Douglas showed Bonilla a pistol and stated that if he were stopped by the police he would shoot whoever stopped him. (R. 5005). Bonilla testified:

> He told me that before he would go to jail, if he had to do that, he would kill someone. (R. 5016).

At the conclusion of Bonilla's testimony Dennis moved for a mistrial and severance as "none of those things were admissible against Dennis, I don't think he could get a fair trial."

Bonilla's testimony provided the "motive" for the killing of Officer Estefan. Bonilla did not testify that Dennis was either present or agreed with Douglas' statement. If Dennis were tried separately, Bonilla's devastating testimony would not have been admissible against him. Failing to sever Dennis' trial was error.

Rule 3.152, Fla. R. Crim. P. provides, in pertinent part:

> (b) Severance of Defendants
>
> 1) On motion of the State or a defendant, the court shall order a severance of defendants and separates trials.
>
> (ii) During trial, only with the defendant's consent and upon a showing that such order is necessary to achieve a fair determination of the guilt or innocence of one or more defendants.

The defendant submits that in a capital case, where the state seeks the ultimate penalty, the ultimate caution should be exercised. It was not in this case. If it had been, Dennis' trial would have been severed. For the above reasons and authorities, Dennis submits that the failure to sever his trial was error.

II

THE TRIAL COURT ERRED IN NOT ALLOWING THE DEFENDANT TO EXERCISE HIS PEREMPTORY CHALLENGES.

As set forth in his Statement of the Facts (p. 8-29), the jury selection in this case was hotly contested and submittedly rotten with error.

There came a point during jury selection, that the defense found itself excluded from using peremptory challenges. (R. 3955). In setting forth his reasons for striking certain jurors, Dennis' counsel then listed factors which he takes into consideration in picking a juror. (R. 4006-09 . The trial court's intrusion into the defense's use of its peremptory challenges finally came to a point where:

> We have not been allowed to strike a Latin male nor a Latin female, the white male nor a white female. (R. 4115).

The court's system of restricting Dennis Escobar's use of his peremptory challenges finally arrived at a point where:

1) As to potential juror Baer, Dennis moved to challenge him (R. 4119), his challenge was disallowed (R. 4120) but then the prosecution was allowed to excuse Mr. Baer. (R. 4120).

2) Dennis Escobar was not allowed to excuse potential juror Picciotto, but, <u>without</u> objection and <u>without</u> having to give a reason, Douglas was allowed to strike potential juror Piccotto. (R. 4121).

3) Dennis was not allowed to strike potential juror Jorgensen (R. 4100-01 & 4114-15, but Douglas, without reason, was allowed to strike her. (R. 4122).

4) Dennis sought to challenge juror Virgin, was not allowed, then Douglas was allowed to strike Ms. Virgin. (R. 4124).

5) Dennis sought to excuse Ms. Goodgame (R. 4131), was refused, then the state was allowed to strike Ms. Goodgame. (R. 4132).

6) Dennis' counsel requested that his psychological profile for selecting jurors be made part of the record for this Court's review. (R. 4173). His request was denied. (R. 4174).

It is apparent from the record that the rules imposed by the trial court with respect to peremptory challenges were different from Dennis than they were for the State or Douglas. How else can the State explain why Dennis' peremptory challenges were disallowed while the State or Douglas were allowed, <u>without reasons</u>, to exercise peremptory challenges <u>on the same jurors</u>!

A trial judge has no authority to infringe upon a party's right to challenge any juror, either peremptorily or for cause, prior to the time the jury is sworn. See, <u>Gilliam v. State</u>, 514 So. 2d 1098 (Fla. 1987). Under the Federal Constitution and the Constitution of the State of Florida, a criminal defendant is guaranteed the right to a trial by an impartial jury. Securing an impartial jury is accomplished, in part, by the use of the peremptory challenge, which allows both the prosecution and the defense to excuse potential jurors without explanation. See, <u>State v. Alen</u>, 616 So. 2d 452 (Fla. 1993). When a defendant seeks to exercise a peremptory challenge, but is not allowed to do so, the trial court must rule whether the defendant's reasons for exercising a peremptory challenge to excuse a prospective juror

were race-neutral, reasonable and supported by the record. See, Perez v. State, 584 So. 2d 213 (Fla. 3d DCA 1991).

In Elliott v. State, 591 So. 2d 981 (Fla. 1st DCA 1991), the Court found error in the trial court's refusal of the defendant's peremptory strikes as to white male jurors and stated:

> However, we must agree with appellant that more likely than not, where the peremptory challenges are being used to strike members of the majority race, the state, as the objecting or complaining party, carries an enormous burden to establish invidious racial motivation. (p. 986).

In McLain v. State, 596 So. 2d 800 (Fla. 1st DCA 1992), the Court reversed a defendant's conviction where the trial judge improperly disallowed the defendant's use of peremptory challenges, stating:

> However, we note that the "initial presumption is that peremptories will be exercised in a nondiscriminating manner." Neil, 457 So. 2d at 486. A Neil inquiry shall be instituted only upon a demonstration on the record that the challenged jurors are members of a distinct racial group and a strong likelihood they have been challenged solely because of their race. In the absence of that demonstration and a corresponding finding by the trial judge of a substantial likelihood of racial discrimination, "no inquiry may be made of the person exercising the questioned peremptories." Id. Further, as recognized in Elliott, when peremptory challenges are being used to strike members of the majority race, a heavy burden to establish invidious racial motivation accompanies racial motivation accompanies any attempt to deny, pursuant to Neil, the striking party's right to exercise its peremptory challenges.
>
> In the instant case, our scrutiny of the record reveals no apparent basis for the trial judge's sua sponte institution of the initial Neil inquiry into the defense's exercise of the six peremptory challenges. Therefore, we must conclude that the defendant was improperly denied, under the guise of Neil, its right to exercise peremptory challenges in a presumptively nondiscriminatory

> manner. Consequently, this cause is reversed and remanded for a new trial. (p. 801).

In Williams v. State, 18 Fla. L. Weekly D1421 (Fla. 1st DCA 1993), the defendant argued that "the trial court improperly directed his counsel, sua sponte without any objection being made by the state, to state racially neutral reasons for his challenge of their jurors." In reversing, the Court stated:

> Moreover, the trial court erred in requiring defense counsel to show good cause for challenging these jurors rather than determining whether these jurors were being excused solely for reasons of their race, which is the only basis for finding a Neil violation. (p. 1422-1423).

See, also, Wimberly v. State, 599 So. 2d 715 (Fla. 3d DCA 1992).

Dennis Escobar was on trial for his life. It was imperative that he be allowed to exercise his peremptory challenges to the fullest extent allowed by the law when his very life was "on the line." On this record, he was denied that right, and for that reason his convictions must be reversed.

III

THE TRIAL COURT ERRED IN EXCLUDING A PROSPECTIVE JUROR FROM JURY SERVICE ON THE BASIS THAT SHE COULD NOT FOLLOW THE LAW AND RENDER AN IMPARTIAL DECISION WHICH DETERMINATION VIOLATED THE DOCTRINE OF WITHERSPOON V. ILLINOIS AND RELATED CASES.

Juror Rogers was improperly excused for cause, over defense objection (R. 1710), based upon the trial court's "reasonable doubt as to whether she could follow the law and render an impartial decision." (R. 1712). The record clearly reflects that Juror Rogers would have performed her duties as a juror in accordance with her instructions and oath, and would have considered the facts impartially and conscientiously applied the law as charged by the

court.

The standard for determining whether a juror is qualified to sit on a capital case in which death is a possible penalty, is whether the juror's view on the death penalty would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." Darden v. Wainwright, 744 U.S. 165, 106 S.Ct. 2464 (1986); Wainwright v. Wiff, 469 U.S. 412, 105 S.Ct. 844 (1985); Adams v. Texas, 448 U.S. 38, 100 S.Ct. 2521 (1980). See also Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770 (1968).

The standard applies to jurors who show bias both for and against the death penalty. Randolph v. State, 562 So. 2d 331 (Fla. 1990); Hill v. State, 477 So. 2d 533 (Fla. 1985). A single improper exclusion of a juror is reversible error per se. Gray v. Mississippi, 481 U.S. 648, 107 S.Ct. 2045 (1987).

Juror Rogers stated that she held a personal opinion against the imposition of the death penalty. (R. 1698). Prospective jurors may not be excluded for cause "simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." Lockhart v. McCree, 476 U.S. 162, 176 (1986); Witherspoon v. Illinois, 391 U.S. 510, 522 (1968); Randolph v. State, 562 So. 2d 331 (Fla. 1990). Prospective jurors who believe the death penalty is unjust may serve as jurors and cannot be excluded for cause because of that belief. Randolph, at 335. However, if that belief prevents them from applying the law and discharging their sworn duty, the trial court is obligated to excuse them for cause. Id. at 335.

For the Witherspoon exclusion to be valid, the State must show that Juror Rogers' view on capital punishment would "prevent or substantially impair the performance of her duties as a juror in accordance with her instructions and her oath." To the contrary, the record is clear that Juror Rogers unequivocally indicated that she could follow the law and the trial judge's instructions and under certain circumstances recommend the death penalty. The following are pertinent portions of the colloquy among Juror Rogers, the trial judge, the prosecutor and the defense counsel:

> COURT: Would this belief you have (against death penalty) affect you in the determination of the defendant's guilt or innocence?
>
> JUROR ROGERS: Not the guilt or innocence. (R. 1698).

As to whether Juror Rogers could follow the trial court's instructions, the following colloquy occurred:

> COURT: Would your views prevent or substantially interfere with your ability to carry out your instructions and your duties in this type of case?
>
> JUROR ROGERS: I guess so, yeah.
>
> COURT: You think it would?
>
> JUROR ROGERS: Yeah.
>
> COURT: If I were to instruct you that you should consider certain facts and you should consider whether to recommend life or death, you do not feel you can follow my instructions, is that how I am understanding you?
>
> JUROR ROGERS: I guess I could follow your instructions. I'd have a really hard time. I would like to go the other way. (R. 1698).

Later, upon questioning by defense counsel, Juror Rogers gave the following unequivocal response:

GALANTER: . . . do you feel knowing you're against the death penalty you would have any problems at all following your duties as a juror.

JUROR ROGERS: No, I don't. (R. 1707).

Witherspoon is not a ground for challenging any prospective juror, but rather a limitation on the State's powers to exclude. If prospective jurors are barred from jury service because of their views about capital punishment on "any broader basis" than inability to follow the law or abide by their oaths, the death sentence cannot be carried out. Adams v. Texas, 448 U.S. 38, 102 S.Ct. 2525 (1980). Juror Rogers assured the trial court that she could follow her duties as a juror. As for her ability to set aside her personal beliefs and impose the death penalty, her position never vacillated. The following colloquy demonstrates that she repeatedly asserted that she could recommend the death penalty under certain circumstances:

COURT: Would you under any circumstances be able to recommend to me that I impose the death penalty?

JUROR ROGERS: I was just thinking maybe the case that I heard changed my mind or something, maybe, I don't know.

COURT: So the question boils down, under any circumstances that you can figure out, could you recommend to me that I pose the death penalty?

JUROR ROGERS: Yeah. Okay.

COURT: You think you could?

JUROR ROGERS: It's, it's possible.

COURT: Make that recommendation.

JUROR ROGERS: I don't know.

COURT: Could you under any circumstances recommend to me that I should impose a death penalty? And

if you say no, it is okay. I do not have a problem with you saying no, but I need you to tell me that you can yes and you can say no.

JUROR ROGERS: I guess I can say yes if that's the case that was brought to me and maybe feel like yes, yeah. I guess I can be convinced.

COURT: You could figure in certain circumstances --

JUROR ROGERS: Sure.

COURT: -- to recommend to me that I impose the death penalty?

JUROR ROGERS: I suppose, yes.

COURT: Yes?

JUROR ROGERS: Yes.

LAESER: ". . . do you think in your own mind that there's going to be evidence that we will be able to present to convince you, yourself, Ms. Rogers, to say judge, I recommend the death penalty"? (R. 1699-1700).

Again later:

JUROR ROGERS: I'm not sure I understand the question itself, but yeah, I think I can be convinced, I guess.

While the record reveals that Juror Rogers would have difficulty in recommending the death penalty and would be inclined to do so only when "unbelievably worthy of it" (R. 1703), taken in context this difficulty does not render her unable to make such a recommendation. Neither nervousness, emotional involvement, nor inability to deny or confirm any effect whatsoever is equivalent to an unwillingness or an inability on the part of a juror to follow the court's instructions and obey his oaths, regardless of his feelings about the death penalty. Adams v. Texas, at 52. Under Witherspoon, neither a deep reluctance to assess the death penalty,

short of an absolute refusal to do so, nor a belief that it should be assessed only in an extreme set of circumstances is a ground for exclusion of a prospective juror for cause. O'Bryan v. Estelle, 714 F.2d 365 (5th Cir. 1983).

It is evident that Juror Rogers was not so irrevocably opposed to capital punishment as to frustrate the State's legitimate efforts to administer its constitutionally valid death penalty. The court in Davis v. Georgia, 429 U.S. 122, 97 S.Ct. 399 (1976), established a per se rule requiring the vacation of a death sentence imposed by a jury from which a potential juror, who has conscientious scruples against the death penalty but who nevertheless under Witherspoon is eligible to serve, has been erroneously excluded for cause. Id. at 123-134. The case at bar provides a clear example of an erroneously applied Witherspoon standard and requires vacation of the death sentence in accordance with the principles of Davis.

IV

THE TRIAL COURT ERRED IN ADMITTING IRRELEVANT GRUESOME PHOTOGRAPHS OF VICTIM SHOWING ENTRY OF WOUNDS, EXIT OF WOUNDS, AND CAUSE OF DEATH WHERE THE ONLY ISSUE IN DISPUTE WAS THE IDENTITY OF THE BODY AND THE GRUESOMENESS OF THE PORTRAYAL DISTRACTED THE JURY FROM A FAIR AND UNIMPASSIONED CONSIDERATION OF THE EVIDENCE.

During the May 21, 1990, pretrial hearing, the court acknowledged that there would probably be a "great majority" of objectionable photographs. (R. 699-700). The trial judge asked that defense counsel and the State determine what photographs were in dispute and submit those photographs to the court. (R. 700). During the trial, the judge inspected each photograph when it was

marked into evidence and then made his ruling at that time. (R. 4305).

The test for the admissibility of gruesome photographs is whether the photographs are relevant. And if relevant, photographs will still be excluded when the gruesomeness of the portrayal is so inflammatory as to create undue prejudice in the minds of the jury and distract them from a fair and unimpassioned consideration of the evidence. Czubak v. State, 570 So. 2d 928 (Fla. 1990). See also Nixon v. State, 572 So. 2d 1342, 1343 (Fla. 1990); Leach v. State, 132 So.2d 329, 331-332 (Fla. 1961), cert. denied. 368 U.S. 1005, 82 S.Ct. 636, 7 L.Ed. 2d 543 (1962).

In the case at hand, the only relevant purpose for the photographs of the victim was to identify the body. The Defendant did not contest the manner of the wounds, nor the cause of the victim's death. Therefore, any photograph that could be used to identify the body should suffice. The Defendant willingly allowed six (6) photographs of the victim (Exhibits 2, (R. 4321); 4, (R. 4331); 5, (R. 4334); 11, (R. 4371); 12, (R. 4372); and 13, (R. 4375) to be admitted into evidence without objection. These photographs were more than sufficient to provide the trier of fact with evidence as to the identity of the body. However, three additional photographs admitted into evidence [Exhibits 6, (R. 4347-4350); 9, (R. 4366); and 10, (R. 4368)] were so gruesome that any probative value as to the identity of the victim's body was outweighed by their prejudicial influence on the jury. Nixon v. State, 572 So. 2d 1343 (Fla. 1990).

Furthermore, less prejudicial methods existed to identify the

body without shocking the jury. For example, the Defendant objected to the admission of Exhibit 6 and argued that only half of the photograph should be admissible. The other half was totally irrelevant to any issue disputed and could easily have been separated. (R. 4348 The Defendant argued:

> What the court should be aware of is when we deposed Dr. Mittleman (medical examiner), we voiced our objection. He had absolutely no problem with chopping both of these photographs which, you know, although it wasn't a court order, but by agreement of the parties, that is what we agreed to do because half of the photograph is totally irrelevant. The half of the photograph is admissible, but its the second half, the material that we don't need. It's very easy to cut. (R. 4348).

The judge acknowledged that the pictures were unpleasant to look at (R. 4348) but admitted the irrelevant portion into evidence despite its gruesome portrayal of the victim's body. (R. 4348).

In State v. Smith, 573 So. 2d 306 (Fla. 1990), the Florida Supreme Court held that it was error to show an eye witness in a murder prosecution irrelevant gruesome photographs of the victim's body where the victim's body had already been identified and the only issue contested at trial was the Defendant's reason for killing the victim. The Court further held that such evidence was cumulative and unfairly prejudicial. Id. at 313.

Similarly, in the case at hand, there was no reason for the court to admit the whole photograph in Exhibit 6, where cutting it down to include only the relevant portion would have eliminated the highly inflammatory and prejudicial portion.

Exhibits 9 and 10 were also improperly admitted into evidence. The defense argued:

I object. They are gruesome and have no evidentiary value at all. We are not challenging the fact of what was the entry, what was the exit wound. We are not challenging the cause of death. They are trying to admit it to inflame the jury. I mean, the man's guts are hanging out all over the place. (R. 4363).

The court, noting the fullness of the wounds, nevertheless admitted the evidence and asked the jury to be prepared for the graphic details of some of the photographs. (R. 4364) This cautionary instruction was of nominal effect. The photographs' gruesome portrayal of the victim's body and the highly inflammatory influence it had on the minds of the jury could not be suppressed by the judge's mere forewarning of what to expect.

Even if the gruesome photographs (Exhibits 6, 9, and 10) were relevant, which clearly they were not, other nonprejudicial methods existed to eliminate the irrelevant portions of the highly prejudicial photographs. The trial court erred in refusing to use less prejudicial methods to admit evidence where the same could easily have been accomplished. The shocking influence that such prejudicial gruesome photographs had on the minds of the jury outweighed any probative value that these photographs might have had. See, also, United States v. Soundingsides, 820 F.2d 1232 (10th Cir. 1987).

In addition, the admission of such gruesome, irrelevant photographs, compounded with the admission of irrelevant evidence of the victim's good character,[1] (R. 4348, 4351, 4547) imposed a

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[1]State witness, Jimmy Morejon, testified during the guilt stage that the victim was a sweet, one-of-a-kind officer who was understanding with everyone. (R. 4348). Mr. Morejon also testified as to specific instances to show victim's good character. (R.

highly prejudicial and constitutionally unacceptable risk that the jury's verdict for death was determined in an arbitrary and capricious manner.

V

THE TRIAL COURT ERRED IN RULING THAT DOCUMENTS FROM A FORMER EMPLOYEE OF AN AUTOMOBILE DEALERSHIP CONCERNING THE THEFT OF ONE OF THE DEALERSHIP'S AUTOMOBILES ARE ADMISSIBLE AS BUSINESS RECORDS PURSUANT TO FLA. STAT. 90.803(6), (BUSINESS RECORDS EXCEPTION), WHERE NO PREDICATE WAS LAID AND NO INQUIRY MADE TO ASSURE THE TRUSTWORTHINESS OF THE DOCUMENTS, AND THE PROBATIVE VALUE OF THE DOCUMENTS WAS SUBSTANTIALLY OUTWEIGHED BY THE PREJUDICE TO THE DEFENDANT.

On January 8, 1991, the State called to the stand Wayne Parker, a former automobile sales manager for Pioneer Mazda in March and April of 1988. (R. 4685) Parker testified that on April 13, 1988, he reported to police that a four door sedan, steel gray 1988 Mazda 616 LX with a sunroof and five speed transmission was stolen from the Pioneer Mazda dealership. (R. 4686-87) Parker stated that the Mazda probably arrived on his dealership lot ground late January or early February, 1988 (R. 4689) but that it wasn't until April 13, 1988, after Parker prepared the paperwork for a dealer trade and an employee from another Mazda dealership came to Parker's dealership to pick up the automobile, that he became aware that the Mazda was missing. (R. 4688-89) Parker testified that he filed an insurance report with respect to the stolen Mazda and retained a copy of the insurance claims document

4351). State witness, Officer Martinez, testified during the guilt stage that the victim was a jovial, nonaggressive officer. (R. 4547).

in his files. (R.4691).

The State admitted the insurance claim documents into evidence as State Exhibit #26 and the Defendant objected arguing that the documents were inadmissible hearsay being offered to prove that the Mazda was, in fact, stolen. In addition, the Defendant argued that these documents were extremely prejudicial and had minimal probative value due to the fact that there was absolutely no evidence whatsoever establishing when the automobile was stolen or who had stolen it. (R.4692). The co-defendant argued that not only was the document hearsay, not subject to any exception, but that the value of the stolen Mazda represented in the document was very prejudicial. (R.4692-93). The trial court denied both defendants' objections and admitted the documents into evidence. (R. 4693).

Florida Statute Section 90.801(c) defines hearsay as:

> A statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

Hearsay evidence is inadmissible unless the evidence falls within one of the exceptions as provided by statute. Fla. Stat. §90.802. Among the exceptions to the hearsay rule is the <u>Business Records Exception</u>, Fla. Stat. §90.803(6), which provides:

> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnosis made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity and if it was the regular practice of that business activity to make such memorandum, report, record, or date compilation, all as shown by the testimony of the custodian or other qualified witness, unless the

> sources of information or other circumstances show lack of trustworthiness.

Fla. Stat. 90.803(6).

In National Car Rental System, Inc. v. Holland, 269 So. 2d 407 (Fla. 4th DCA 1972), the court analyzed the application of the business records exception and stated:

> The probability of trustworthiness, which is the basic justification for permitting business records into evidence as an exception to the hearsay rule, can be satisfactorily assured only if the trial court requires as a predicate that (1) the custodian or other qualified witness testify to its identity and the mode of its preparation and (2) it is further shown that the entry was made in the regular course of business at or near the time of the act, condition or event of which it purports to be a records and finally (3) the court is satisfied that the sources of information, method and time of preparation were such as to justify its admission.

In National, no predicate or inquiry was made beyond the witness stating that the certificate at issue was part of his business records which he kept in the regular course of his business. The court found that the certificate was not properly admitted and was not within the business records exception. Id, at 413.

Similarly, in the case at bar, the State failed to provide sufficient facts to establish that insurance claims documents and other paperwork concerning the stolen Mazda were admissible under the business records exception, Fla. Stat. 90.803(6). No evidence was admitted indicating the time or date the insurance report documents and other paperwork were filed or created. Further, Parker neither testified to the identity of the documents that the State admitted into evidence nor to the manner of preparation in

order to assure the trustworthiness of the documents. The evidence failed to establish whether it was part of Parker's job responsibilities at Pioneer Mazda to fill out the paperwork with respect to stolen vehicles or whether the documents admitted into evidence, as State Exhibit 26, were kept in the course of a regularly conducted business activity. The record provides only that the documents were kept on file so as not to overlook the stolen vehicle at some future time. (R. 4691). The State failed to provide any witness to testify to the documents identity and mode of preparation of the documents and this subject was not even discussed during the State's direct examination of Parker.

In order to prove a fact of evidence of usual business practices, it must first be established that the witness is either in charge of the activity constituting the usual business practice or is well enough acquainted with the activity to give testimony. Specialty Linings, Inc., v. B.F. Goodrich Co., 532 So. 2d 1121 (Fla. 2d DCA 1988). [quoting Alexander v. Allstate Insurance Co., 388 So. 2d 592, 593 (Fla. 5th DCA 1980)]. See, also, N.L.R.B. v. First Termite Control Co., Inc., 646 F.2d 424 (9th Cir. 1981).

In the case at bar, Parker testified that he was employed as a new automobile sales manager for Pioneer Mazda when he reported the Mazda 626 stolen on April 13, 1988. However, there was no evidence to even suggest what services Parker performed in his position. There is no evidence of the variety of departments and managers that were part of Pioneer Mazda. Nor does the evidence establish the typical job routine and responsibilities of any new automobile sales manager. The facts are too insufficient to assure the trustworthiness of the documents to justify admission as

evidence in defendants' trial as a business records exception. This is especially so where, as in the present case, the State fails "to meet the strict requirements for admissibility under the 'business records' exception, on which the State relied". House v. State, 614 So. 2d 677 (Fla. 1st DCA 1993).

The documents admitted into evidence were severely prejudicial to the defendants, having only minimal probative value. Not only was there a lack of certainty as to when the stolen Mazda came onto the Pioneer Mazda dealership lot, but there was no evidence whatsoever indicating when the vehicle was stolen or who had stolen it.

The inadmissibility of the documents under the business exception rule, together with Parker's testimony concerning lack of knowledge about when the Mazda was stolen or who had stolen it provided the court with no evidence linking the defendants to the grand theft charge. The prejudice to the Defendant by admitting into evidence State Exhibit 26 substantially outweighed any probative value that such evidence might have served and, as a result, it was prejudicial error for such documents to be admitted into evidence.

VI

THE TRIAL COURT ERRED IN ADMITTING IRRELEVANT, INFLAMMATORY AND PREJUDICIAL EVIDENCE OF THE VICTIM'S GOOD CHARACTER DURING THE GUILT PHASE OF THE TRIAL.

Mr. Jimmy Morejon, a tow truck operator, was called as a State witness during the guilt stage of the trial. (R.4448). Mr. Morejon knew the victim for many years and was with him immediately prior to his death. Mr. Morejon testified about the victim's good character and personality. (R. 4448). He stated that the victim was a one-of-

a-kind officer who was sweet and very understanding. (R. 4448). Mr. Morejon also testified about specific instances that proved the victim's good character and warm hearted personality. (R. 4451). Immediately prior to the victim's death, Mr. Morejon met Officer Estefan and two young teenagers. He testified that Officer Estefan directed Mr. Morejon to tow the teenagers' car home due to their driving without a license. (R. 4451). He then testified that Officer Estefan had the choice of either arresting the teenagers and towing their automobile to the City pound or towing their automobile to the teenagers' home. (R. 4451). When the prosecutor asked Mr. Morejon why he was brought to the scene, he testified, "they didn't have a driver's license and what he wanted to do is for me to tow the car. He wasn't going to arrest them or anything. He just wanted the car towed home." (R. 4451). The prosecutor then elicited testimony to show that it costs three times more to tow a car to the City pound but Officer Estefan made the decision to have it towed to the teenager's home instead. (R. 4451). Police Officer Raimundo Martinez was also called as a State witness. (R. 4535). Officer Martinez testified that he was surprised when he saw the victim, Officer Estefan, was shot because Officer Estefan was a jovial, happy, nonaggressive officer (R. 4538).

At the conclusion of Officer Martinez' testimony, and out of the jury's presence, the trial judge, on his own initiative, rebuked and scolded the State for its efforts to extract character evidence of the slain officer:

> THE COURT: One thing I would like to bring out. The character of the officer is not in issue here. Please do not bring out from these other witnesses here that he was a nice police officer , that he helped little old ladies cross the street. That is not the question here. (R. 4554).

Nevertheless, on direct examination of State witness, Lt. Mark Bonowitz, the State elicited testimony that Officer Estefan, an accident investigator, was very "concerned" about people injured in accidents. (R. 4631).

Thereafter the State called Officer Steven Smigelski who testified that Officer Estefan trained him in the accident investigation unit. (R 4898). Officer Smigelski testified:

> Victor was a perfectionist when it came to his job. That included everything. His work always would be turned in on time, neat, rarely any errors in his work and he lived that way also. (R 4899).

The court sustained a defense objection to this line of testimony and overruled the State's suggestion that it was admissible evidence of habit. (R. 4902). The State then excused the witness without having brought out any relevant or material evidence. (R. 4902). All of the foregoing occurred during the guilt stage of the trial.

Although admission of victim impact evidence is not <u>per se</u> inadmissible, <u>see</u> <u>Payne v. Tennessee</u>, ___ U.S. ___, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991), the evidence <u>must</u> be relevant to a material fact in issue. <u>Burns v. State</u>, 609 So. 2d 600 (Fla. 1992). This testimony was not relevant to any material issue in the case and was in violation of Fla. Stat. 90.404(1)(b) 1 and 2.

Fla. Stat. 90.404(1)(b) 1 and 2 provides that:

> Evidence of a person's character or a trait of his character is <u>inadmissible</u> to prove that he acted in conformity with it on a particular occasion, except:
>
> (b) <u>Character of Victim</u>
>
> 1. . . . evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the trait; or
>
> 2. Evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the

aggressor.

When character is introduced only as circumstantial evidence of conduct, there is too much danger of surprise, prejudice and distraction from the issues. Pino v. Koelber, 389 So. 2d 1191 (Fla. 2d DCA 1980). In the case at bar, the character evidence of the victim, introduced by Mr. Morejon and Officer Martinez, was not relevant to any issue in the case. Although the Defendant was charged with first degree murder, the defense never alleged that the victim was violent. Nor did the defense assert that the victim was the aggressor or that the Defendant acted in self defense. The only possible purpose the State could have for introducing this testimony was to attempt to prejudice the jury against the Defendant. This evidence improperly diverted the jury's attention away from the Defendant, created a sympathetic appeal to the victim, and distracted the jury from fair and unimpassioned consideration of the evidence.

The testimony that the victim was a sweet, one-of-a-kind officer (R. 4448) and of the victim's consideration to teenagers in having their car towed home rather than to the pound (R. 4451) was admitted without objection by defense counsel. (R. 4448-51). The testimony that the victim was a jovial, non-aggressive officer was objected to, but withdrawn, because the trial court refused to allow defense counsel the opportunity to state his legal basis out of the jury's presence. (R. 4547 ; 4554-56). Any objection to this evidence, however, is irrelevant where the statements of the victim's good character were highly prejudicial to a fair and impartial trial and where no retraction would have destroyed their sinister influence. See Singer v. State, 109 So. 2d 7 (Fla. 1959);

and Akin v. State, 86 Fla. 564, 98 So. 609 (Fla. 1923).

Where irrelevant character evidence is admitted, the primary concern is the prejudicial impact on the defendant. Error is harmless only "if it can be said beyond a reasonable doubt that the verdict could not have been affected by the error." Czubak v. State, 570 So. 2d 925, 928 (Fla. 1990); Ciccarelli v. State, 531 So. 2d 129, 132 (Fla. 1988). The error in the case at bar cannot be deemed harmless where the public pressure to convict "cop killers" was great and the emphasis on the good character of the victim was used improperly to elicit sympathy and obtain a conviction. The irrelevant evidence of the victim's character in the case at bar was harmful and prejudicial and this cause should be remanded for a fair and impartial trial.

VII

THE TRIAL COURT ERRED IN ALLOWING INTO EVIDENCE THE OPINION TESTIMONY OF DETECTIVE MORIN AS TO WHO MURDERED VICTOR ESTEFAN.

Over objection, Detective Morin was allowed to testify:

> Q: Today, is there any doubt in your mind as to who the individual was that shot with a firearm Victor Estefan?
>
> A: No.
>
> Q: Is that person Dennis Escobar?
>
> MR. CARTER: Objection.
>
> THE COURT: Overruled.
>
> THE WITNESS: Absolutely. (R.5401).

There were no eyewitnesses to the shooting. Douglas Escobar's fingerprint was found on the metal flap from which point he may have shot Officer Estefan. There was no argument or indication that Officer Estefan's shooting was in self-defense, excusable or

justifiable. Therefore, the man who shot Officer Estefan, in essence, committed murder. The defendant submits that it was reversible error for this detective who admitted there was an emotional factor in Officer Estefan's death (R. 5294) to intrude into the jury's job and state who committed murder.

In the case of Mills v. State, 367 So. 2d 1068 (Fla. 2d DCA 1979), the Court, in reversing a defendant's conviction stated:

> The trial court erred in overruling defense counsel's objection. A nonexpert witness may not express opinions or conclusions reaches an ultimate issue in the case (citation omitted). Here the state attorney's question clearly called for an opinion and the witness gave one. Moreover, the answer dealt directly with the ultimate issue of whether appellant had acted in self-defense. (p. 1069).

See, also, Farley v. State, 324 So. 2d 662 (Fla. 1975); Spradley v. State, 442 So. 2d 1039 (Fla. 2d DCA 1983); Gianfrancesco v. State, 570 So. 2d 337 (Fla. 4th DCA 1990); Reyes v. State, 580 So. 2d 309 (Fla. 3d DCA 1991).

The state improperly allowed Morin through his "experience" and testimony to become a "13th juror" to "aid" the jury in reach a determination. The state went too far and created reversible error.

VIII

THE DEFENDANT WAS DENIED A FAIR TRIAL DUE TO THE IMPROPER CLOSING ARGUMENTS OF THE PROSECUTION.

As set forth in his Statement of the Facts (pp. 45-46), the prosecution uttered several comments during closing argument which the defense submits were both improper and reversible error.

GUILT PHASE

Dennis Escobar would first submit that it was error for the prosecutor to comment that the defense attorney's job was "to try

to shift the blame away from their client to the other client and that's what they both did" (R. 5852) and "if it wasn't so obvious there wouldn't be two defense attorneys behind me trying to point the finger at the other guy's client." (R.5877). Dennis Escobar did not testify that Douglas Escobar committed the crime nor did Dennis' attorney so argue to the jury. The fact that these defendants were tried together was purely due to the efforts of the state. The state asked for rejoinder after the trials were severed. Dennis Escobar sought to have his trial severed from that of Douglas at every turn (see, argument, denial of severance). It was both improper and prejudicial for the state to put defense counsel in such a position and then (falsely as to Dennis' counsel) accuse them of improper slyness or deviousness. See, Adams v. State, 192 So. 2d 762 (Fla. 1966); Alvarez v. State, 574 So. 2d 1119 (Fla. 3d DCA 1991); Jenkins v. State, 563 So. 2d 791 (Fla. 1st DCA 1990); Fuller v. State, 540 So. 2d 182 (Fla. 5th DCA 1989); Redish v. State, 525 So. 2d 928 (Fla. 1st DCA 1988). By not confining his argument to the facts of the case, the prosecutor committed reversible error.

The prosecution next argued that "it is clearly not our job to put somebody on the witness stand who is a known liar or a known felon or something else." (R. 5882). The prosecutor's job is not to vouch for the credibility of his witnesses or his case during closing argument. See, Riley v. State, 560 So. 2d 279 (Fla. 3d DCA 1990); Garrette v. State, 501 So. 2d 1376 (Fla. 1st DCA 1987); Duque v. State, 460 So. 2d 416 (Fla. 2d DCA 1984); Cummings v. State, 412 So. 2d 436 (Fla. 4th DCA 1982); McGuire v. State, 411 So. 2d 939 (Fla. 4th DCA 1982). By not confining his argument to

the facts of the case, the prosecutor committed reversible error.

The prosecutor then decided to testify during closing argument:

> They have conversations and Douglas and Dennis Escobar have these conversations just as obviously as Douglas Escobar has had them with these other witnesses who testified on the witness stand about the fact that he knows He's wanted in California, and that is an important motivating factor for why people took the actions that they did. (R.5882).

The state's comment was improper in that the prosecutor essentially "testified" to a conversation between Douglas and Dennis.

The defendant submits that it is error for a prosecutor to comment on a matter outside the record. See, Crayton v. State, 536 So. 2d 399 (Fla. 5th DCA 1989). In this case, there is no evidence that such a conversation between Douglas and Dennis actually happened.

In the case of State v. Smith, 573 So. 2d 306 (Fla. 1990), the Court considered a case in which the state also "testified"/ presented evidence about what a defendant did not say (testified to) and, in reversing, stated:

> Moving on the other portions of the trial, Smith argues that the trial court violated his constitutional right to silence by allowing the prosecutor to introduce evidence about what Smith did not say when he made a spontaneous statement at the scene of the killing, and then allowing the state to argue these points in its summation. We agree. (p. 316).

In the case of Bain v. State, 552 So. 2d 283 (Fla. 4th DCA 1989), this Court, in reversing a defendant's conviction, in a similar situation, stated:

> We perceived a substantial risk that the jury might infer, from the unanswered question and the imaginary scenario, that the state was implying

> that a conversation had occurred as indicated. The question and the argument were improper and prejudicial. They drew the juror's attention to the defendant's exercise of his right to remain silent and his failure to testify, not to mention misleading the jury with respect to what might have been said. It was therefore error to deny a mistrial (citations omitted). (p. 284).

In Shorter v. State, 532 So. 2d 1110 (Fla. 3d DCA 1988), the Court stated in reversing:

> First, we conclude that the prosecuting attorney was guilty of improper conduct in his suggestion made during final argument to the jury that the defendant's sister had previously attacked the homicide victim with a knife; there was utterly no evidence adduced below to support this suggestion. The trial court, in our view, erred in allowing the prosecuting attorney to make this argument. (citations omitted). (p. 1111).

As in the above cases, the prosecutor erred in arguing testimony/evidence that didn't exist in the record. By not confining his argument to the facts of the case, the prosecutor committed reversible error.

The prosecutor next tried to imply that Dennis Escobar would have murdered Officer Koenig:

> He was doing his utmost with whatever was available to him, be it a gun or PR24 or his feet or his teeth or his knees or anything else, to take that gun away from that police officer -- and I'm not even going to finish the sentence. You'll have to guess what he might have done. (R.5955).

Dennis Escobar was not on trial for anything that occurred in California. The California incident was not supposed to be a feature of this trial. Not only did the state improperly make it a focus of the trial (see, collateral crime issue) but, here, only to inflame the jury, the prosecution alluded to a potential crime that never occurred!

In Gleason v. State, 591 So. 2d 279 (Fla. 5th DCA 1991), the

Court, in a similar situation reversed a defendant's conviction due to improper prosecutorial argument, stating:

> The clear implication is that the accused has committed other crimes and possibly was about to commit murder to silence the witness. These indefensible comments are fundamentally unfair and cause reversal. (p. 279).

See, also, Arsis v. State, 581 So. 2d 935 (Fla. 3d DCA 1991); Gonzalez v. State, 588 So. 2d 314 (Fla. 3d DCA 1991); Harmon v. State, 394 So. 2d 121 (Fla. 1st DCA 1980). By not confining his argument to the facts of the case, the prosecutor committed reversible error.

The prosecutor next argued that a not guilty verdict will perpetuate evil:

> I don't want any of you jurors to go back there and cooperate with evil, to help, evil, to help perpetuate evil. If you're true to your hearts, if you're true to the facts in this case, your verdict is one that will battle against evil. (R. 5965).

The jury's function was to consider the facts of the case, not to worry whether the prosecutor would consider them to be a co-conspirator of "evil". The comment was improper and prejudicial. See, Valez v. State, 613 So. 2d 916 (Fla. 4th DCA 1993); Bouchard v. State, 556 So. 2d 1215 (Fla. 2d DCA 1990); Salazar-Rodriquez v. State, 436 So. 2d 269 (Fla. 3d DCA 1983); Hines v. State, 425 So. 2d 589 (Fla. 3d DCA 1982); McMillian v. State, 409 So. 2d 197 (Fla. 3d DCA 1982); Chavez v. State, 215 So. 2d 750 (Fla. 2d DCA 1968). By not confining his argument to the facts of the case, the prosecutor committed reversible error.

The prosecutor next implies that a guilty verdict is the jury's "conscience":

> All you have to do is go back there and note

> your conscience about what you know happened that night. And if you do, I believe that your verdicts will be guilty as charged of first degree murder. (R. 5966).

The prosecution's "grab" at the jury's "conscience" was improper. A jury is supposed to note the facts, not what a prosecutor believes is it's "conscience"! Every prosecutor always believes every jury's "conscience" says "guilty." Otherwise, the prosecution is in "bad faith." This plea for a verdict was both improper and prejudicial. See, Williams v. State, 593 So. 2d 1189 (Fla. 3d DCA 1992); Reed v. State, 333 So. 2d 524 (Fla. 1st DCA 1976). By not confining his argument to the facts of the case, the prosecutor committed reversible error.

PENALTY PHASE

The prosecution's comments which Dennis Escobar contends were improper are set forth in his Statement of the Facts. (p. 50-52).

The several remarks of the prosecutor during the penalty phase were similar to those which this Court has previously found to be reversible error. See, Taylor v. State, 583 So. 2d 323 (Fla. 1991); Jones v. State, 569 So. 2d 1234 (Fla. 1990); Rhodes v. State, 547 So. 2d 1201 (Fla. 1989); Garron v. State, 528 So. 2d 353 (Fla. 1988). In reliance upon those previous authorities of this Honorable Court, Dennis Escobar would submit that he must be afforded a new sentencing hearing.

In summation, Dennis Escobar would state that the various comments of the prosecution were such as to deny him a fair trial and require a reversal and remand for appropriate proceedings. See, also, Ryan v. State, 457 So. 2d 1084 (Fla. 4th DCA 1984).

IX

THE TRIAL COURT ERRED IN GIVING, OVER DEFENDANT'S OBJECTION, A JURY INSTRUCTION AS TO FLIGHT.

The record reflects both that the defendant objected to the trial court's giving a jury instruction as to flight (R. 5726) and that such instruction was given. The defendant submits that giving such instruction was error.

In Keys v. State, 606 So. 2d 669 (Fla. 1st DCA 1992), the court, in reversing a defendant's conviction stated:

> The Florida Supreme Court recently ruled that flight instruction may no longer be given. The Court stated:
>
> In reconsidering the flight instruction, we can think of no valid policy reason why a trial judge should be permitted to comment on evidence of flight as opposed to any other evidence adduced at trial. Indeed the instruction has long been eliminated from the Florida Standard Jury Instruction in Criminal Cases, apparently in an effort to eliminate "language which might be construed as a comment on the evidence." Fenelon v. State, 594 So. 2d 292 (Fla. 1992). Our decision in this case follows that decision as mandated in Smith v. State, 598 So. 2d 1063 (Fla. 1992). See also Viniegra v. State, 604 So. 2d 863 (Fla. 3d DCA 1992); Bryant v. State, 602 So. 2d 966 (Fla. 3d DCA 1992). Thus, on this stated ground alone, we hold that the giving of the flight instruction requires remand for a new trial.

As in Keys, supra, the giving of the flight instruction in this case, over objection requires remand for a new trial.

X

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S REQUEST FOR A JURY INSTRUCTION AS TO THIRD DEGREE MURDER.

The defendant was charged in the instant case with the crime of grand theft (R. 1) of a motor vehicle.

The defendant sought to sever the charge of grand theft. (R. 2156-2159). That count was not severed.

At the jury instruction conference, the defendant requested an instruction on third degree murder. (R. 5694). When asked what crimes would apply, the defense responded:

> One, the alleged crime of grand theft auto, which may not be in the schedule, grand theft auto. The other one, unlawful flight to avoid prosecution. The other one, if the State wants an instruction on flight, escape. They're going to ask for something on flight. (R.5695).

The Court reasoned as to this requested instruction:

> There is no question but that the theft as testified to in this case was committed at a prior time, but the fact that they were in possession of this vehicle and the only thing they are being tried for now could be grand theft, the evidence that has been presented certainly made a prima facie case at this point that they had been stopped in that vehicle for grand theft even though it was weeks later. So, and in their minds, if in fact they had committed the grand theft, they knew they committed the grand theft and that could have been conceivably why, you know, some of these actions took place. (R. 5702-03).

The court denied the request. (R5702-03).

The record reflects that the crime of grand theft was charged, that the state refused to allow it to be severed out, that the state's theory was that the defendants killed Officer Estefan because they did not want to be caught and arrested in a stolen car. The state presented evidence that an argument (R. 4642) and a scuffle (R. 4634,, 4661-62) preceded the shooting.

The state itself injected the grand theft, occurring weeks before, as being the reason for the shooting. The state's evidence was of a struggle, because of the stolen car, which resulted in the shooting. By its very reluctance to sever the grand theft, the state has emphasized its importance and role in the instant shooting.

In Green v. State, 475 So. 2d 235 (Fla. 1985), this Court

held:

> Under these rules, as noted by the Second District Court of Appeal in Williams, a defendant charged with first-degree premeditated murder is entitled to an instruction on the lesser included offense of third-degree felony murder if there is evidence to support such charge. (p. 237).

See, also, Herrington v. State, 538 So. 2d 850 (Fla. 1989); Jackson v. State, 622 So. 2d 182 (Fla. 1st DCA 1993); Garcia v. State, 574 So. 2d 240 (Fla. 1st DCA 1991); Johnson v. State, 423 So. 2d 614 (Fla. 1st DCA 1982).

The state's witness testified to an argument and a scuffle. The state specifically presented evidence as to the car being stolen. (R.4667-4677). The state even presented evidence as to a stolen license tag. (R. 4804)! The defendant submits that in this case the crime of grand theft was charged, was not severed, and evidence concerning it and its being the catalyst for the shooting constantly and consistently was presented by the state as its "theory of the case". In this case, on these facts, it was error not to instruct the jury as to third degree murder.

XI

THE EVIDENCE WAS INSUFFICIENT TO PROVE PREMEDITATION, AN INDISPENSABLE ELEMENT OF FIRST DEGREE MURDER.

There were no eyewitnesses who testified to the shooting. All the evidence presented indicates that the shooting was a spontaneous event. There is no evidence to show that Dennis Escobar planned to shoot Officer Estefan or any police officer in this case. The state's "theory" is that Douglas told Dennis to shoot Officer Estefan and Dennis shot Office Estefan. According to the state, there was little or not time between Douglas' request and Dennis' act.

In Wilson v. State, 493 So. 2d 1019 (Fla. 1986), this Court considered the question of premeditation and stated:

> Premeditation is the essential element which distinguishes first-degree murder from second-degree murder (citation omitted). Premeditation is more than a mere intent to kill; it is a fully formed conscious intent to kill. This purpose to kill may be formed a moment before the act but must exist for a sufficient length of time to permit reflection as to the nature of the act to be committed and the probable result of that act (citations omitted). (p. 1021).

In Sireci v. State, 399 So. 2d 964 (Fla. 1981), this Court stated:

> Evidence from which premeditation may be inferred includes such matters as the nature of the weapon used, the presence or absence of adequate provocation, previous difficulties between the parties, the manner in which the homicide was committed and manner of the wounds inflicted. It must exist for such time before the homicide as will enable the accused to be conscious of the nature of the deed he is about to commit and the probable result to flow from it insofar as the life of his victim is concerned. (citation omitted). (p. 967).

In this case, the weapon was a firearm, impersonal and spontaneous.

In this case there were no previous difficulties between Dennis and Officer Estefan.

In this case the manner in which the homicide was committed were three quick gunshots.

In this case the nature and manner of the wounds inflicted were gunshot wounds. They were not immediately fatal or shown to have been so specifically inflicted that death was specifically intended.

Additionally, the state's own evidence, the testimony of Gary Keller, indicates that the wounds may have been inflicted as the

result of a scuffle which could have been a fight. (R. 4634 , 4661-62 , 4644 , 4652). This evidence from the closest witness to an eyewitness the state could find indicates the wounds may have been inflicted during a scuffle, a fight between Officer Estefan and one of the defendants (as did the testimony of Ramon Arguello that Dennis had a bleeding head (R.5108)). Such a scenario would indicate second degree rather than first degree murder and preclude a finding of premeditation.

When the state requests the ultimate penalty, its evidence must be concrete certain to support such a penalty. In this case, the state's evidence of premeditation does not rise to that lofty level sufficient to be the basis to kill Dennis Escobar. His conviction should be reduced to second degree murder or reversed for a new trial.

XII

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS.

The defendant would respectfully adopt the facts as set forth at p. 4-8 in his Statement of the Facts.

These facts reveal a defendant who was in the hospital, had several gunshot wounds, had lost part of his fingers (R. 747), had an IV tube in his arm and was receiving unknown medication. (R. 979). Several times the defendant refused to give a statement to the detectives. The defendant refused to give a written or taped statement.

The detectives testified that they "lied" to the defendant to coerce him into making a statement.

The defendant testified that the detectives pressured him by stating his wife would be arrested and his children taken from her

if he did not give a statement. (R. 847).

The state cannot establish guilt through statements obtained as a result of psychological coercion. See, Lynumn v. Illinois, 372 U.S. 528, 83 S.Ct. 917, 9 L.Ed.2d 922 (1963); Burch v. State, 343 So. 2d 831 (Fla. 1977). A coerced confession offends due process of law. See, Rogers v. Richmond, 365 U.S. 534, 81 S.Ct. 735, 5 L.Ed.2d 760 (1961). To be admissible, a statement must be voluntary. It cannot be the product of threats violence of improper influence. See, Brooks v. Florida, 389 U.S. 413, 88 S.Ct. 541, 19 L.Ed.2d 643 (1967). A statement should be excluded if the attending circumstances are calculated to delude the accused as to his true position or to exert an improper or undue influence over his mind. See, Oyarzo v. State, 257 So. 2d 108 (Fla. 2d DCA 1972).

In this case, the circumstances of defendant's hospitalization are such to cause extreme doubt as to his ability to withstand the coercive police techniques practiced upon him. It is undisputed he did not initially speak to the police and, indeed, told them to go. See, Jarriel v. State, 317 So. 2d 141 (Fla. 4th DCA 1975).

Within the context of these facts, the appellant submits that it is not clearly shown that he freely, knowingly and voluntarily made the statement that resulted in his being sentenced to death.

The trial court erred in denying Dennis Escobar's motion to suppress.

XIII

THE TRIAL COURT ERRED IN IMPOSING THE DEATH PENALTY AS TO DENNIS ESCOBAR.

Because this is a capital case, this Honorable Court must conduct a proportionality review of the ultimate sentence that was imposed in an effort to foster uniformity in death-penalty law.

See, Tillman v. State, 591 So. 2d 167 (Fla. 1991). Dennis Escobar respectfully submits that pursuant to such a proportionality review, his sentence of death is not warranted.

The evidence submitted by the state shows that on the date of the shooting, Douglas and Dennis Escobar had frequented bars and been drinking. By the evening hours of that day, a combination of alcohol consumed and natural fatigue served to render them each in somewhat less than a "clear-headed" state of mind.

Douglas was Dennis Escobar's older brother. There is and always has been a natural tendency for an older sibling to "give orders" and a younger sibling to listen. Such a natural tendency would certainly be increased by a combination of fatigue and alcohol which might elevate unthinking reflex over reasoned, reflective action.

The record does not reflect any intent on Dennis Escobar's part of kill anyone, let alone a police officer. This records shows no evidence of prior agreement or conspiracy to kill anyone, let alone Officer Estefan in particular.

Dennis Escobar was not wanted for any crime. There were no outstanding warrants for him to avoid. According to the state's "theory" he was not even driving the car. At most, he was a mere passenger in a stolen car whose theft could not be traced to him by Officer Estefan. He had nothing to fear from the traffic stop but a brief detention, at most. There was no reason for Dennis Escobar to shoot Officer Estefan.

The state's "theory" was that Douglas directed Dennis to shoot Officer Estefan and the facts indicated, in a light favorable to the state, that Dennis, under the influence of alcohol and fatigue,

reflexively, but tragically obeyed his older brother and fired the shots that subsequently proved fatal.

The facts show that these shots were fired quickly without prolonged deliberation, consideration, or careful aim. The state's evidence, particularly the testimony of Mr. Keller, reveal that these shots may have been fired during a struggle, a spontaneous act (more indicative of second degree rather than first degree murder (see, argument - Lack of Premeditation).

In rendering its death sentence, the trial court stated:

> This court specifically finds that the defendant, Dennis Escobar, has been previously convicted of a violent felony, the attempted first degree murders involving California Highway Patrol Troopers Grant Kell and Ray Koenig. This aggravating circumstance was proven beyond a reasonable doubt. (R. 272). and,
>
> This Court specifically finds that the victim of the murder committed by Dennis Escobar was a law enforcement officer engaged in the lawful performance of the officer's official duties. Specifically, Officer Victor Estefan was a duly certified police officer of the City of Miami who was engaged in upholding traffic laws at the time the murder took place. This aggravating circumstance was proven beyond a reasonable doubt.
>
> In summation of the aggravating circumstances, this court considered two in reaching its conclusions and decision: (1) the previous conviction of a violent felony, and (2) that the victim of the murder was a law enforcement officer engaged in the lawful performance of his official duties. (R. 272-273). and,
>
> Angela Blanco, Dennis' mother, gave testimony of the family's broken home as did Dennis Escobar, Sr., the defendant's father. The court finds that this nonstatutory mitigating factor was established by the greater mitigating factor was established by the greater weight of the evidence. (R. 273).

At the time of Officer Estefan's shooting Dennis Escobar had <u>not</u> "been previously convicted of a violent felony, the attempted first degree murders involving California Highway Patrol troopers

Grant Kell and Ray Koenig." Dennis Escobar was convicted of those crimes after Officer Estefan was shot. Dennis Escobar respectfully submits that whether he lives or dies should not depend on what case is prosecuted first. If that were true, prosecutors could by their charging and prosecutorial powers manipulate this factor so that this aggravating circumstance might often/always appear, even though it was not present when the crime was committed. It is the person who shot Officer Estefan whose fate is to be decided. That Dennis Escobar had not been convicted of a violent felony in California.

There is no question that the murder of a police officer is a tragic occurrence. The needless and untimely loss of any life is a tragic occurrence. If Dennis Escobar is to die solely because a police officer was killed, it is respectfully submitted that such reasoning would unduly elevate the death of a police officer over those of "ordinary citizens" to an extent that is not contemplated or intended by a proper determination of the aggravating factors in a death case.

The trial court found that Dennis Escobar comes from a dysfunctional family, a broken home. The lack of an early introduction to the discipline of proper authority was perhaps what caused him to reflexively obey the command of Douglas Escobar to "shoot the police officer." In any event, there was abundant evidence as to this mitigating factor.

In the case of Kramer v. State, 187 Fla. L. Weekly S266 (Fla. 1993), this Court considered a proportionality argument and stated:

> Finally, Kramer argues a variety of other penalty phase issues, the most significant of which is that death is not proportional here. In Tillman v. State, 591 So. 2d 167 (Fla. 1991), we explained

> that the purpose of the doctrine of proportionality is to prevent the imposition of "unusual" punishments contrary to article I, section 17 of the Florida Constitution, among other reasons. While the existence and number of aggravating or mitigating factors do not in themselves prohibit or require a finding that death is nonproportional, see id. at 168-69, we nevertheless are required to weigh the nature and quality of those factors as compared with other similar reported death appeals. Id.
>
> In this case, the trial court found two aggravating factors: prior violent felony conviction, and the fact that the murder was heinous, atrocious, or cruel. The first of these factors clearly exists. We assume arguendo that the second exists.
>
> The factors establishing alcoholism, mental stress, severe loss of emotional control, and potential for productive functioning in the structured environment of prison are dispositive here. While substantial competent evidence supports a jury finding of premeditation here, the case goes little beyond that point. The evidence in its worst light suggests nothing more than a spontaneous fight, occurring for no discernible reason, between a disturbed alcoholic and a man who was legally drunk. This case hardly lies beyond the norm of the hundreds of capital felonies this Court has reviewed since the 1970s. See Teffeteller v. State, 439 So. 2d 840, 846 (Fla. 1983), cert. denied, 465 U.S. 1074, 104 S.Ct. 1430, 79 L.Ed.2d 754 (1984). Our law reserves the death penalty only for the most aggravated and least mitigated murders, of which this clearly is not one. Accordingly death is not a proportional penalty here. (p. S. 267).

This was not an ambush. This was not an assassination. This was a spontaneous, tragic event that took a life. Dennis Escobar respectfully submits that a proportionality review of this case must result in a reduction of his sentence to life imprisonment without possibility of parole for twenty-five years. See, also, Rembert v. State, 445 So. 2d 337 (Fla. 1984); Lloyd v. State, 524 So. 2d 396 (Fla. 1988); Wilson v. State, 493 So. 2d 1019 (Fla. 1986).

XIV

THE TRIAL COURT ERRED BY DENYING DEFENDANT'S MOTION TO DECLARE FLA. STAT. 921.141 UNCONSTITUTIONAL PURSUANT TO THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AND ARTICLE I, SECTION 9, 16, 17, AND 22 OF THE FLORIDA CONSTITUTION WHERE THE PENALTY STATUTE IS VAGUE, OVERBROAD, AND UNRELIABLE CRUEL AND UNUSUAL PUNISHMENT THAT VIOLATED THE DEFENDANT'S DUE PROCESS RIGHTS.

A. Fla. Stat. 921.141 Is Unconstitutional On Its Face In Violation Of The Eighth And Fourteenth Amendments Of The United States Constitution And Article I, Sections 9 and 17 Of The Florida Constitution Because It Is Cruel And Unusual Punishment, Serving No Useful Purpose, And It Is Determined In An Inconsistent And Arbitrary Manner.

Fla. Stat. 921.141 is unconstitutional on its face because the death penalty is cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Articles I, Sections 9 and 17 of the Florida Constitution. Proffitt v. Florida, 428 U.S. 242 (1976) dissenting opinions of Justices Brennan and Marshall).

Fla. Stat. 921.141 is unconstitutional on its face because it allows for excessive and disproportionate penalties to be imposed upon persons who have not intentionally and deliberately taken the life of another, in violation of the Eighth and Fourteenth Amendments to the United States Constitution. Lockett v. Ohio, 438 U.S. 586, 621 (1978), (White, J., concurring in part, dissenting in part, and concurring in the judgment).

The State of Florida is unable to justify the death penalty as the least restrictive means available to further its compelling goals where a fundamental right, human life, is involved, as required under Row v. Wade, 410 U.S. 113 (1973). Studies indicate that the death penalty is not an effective deterrent to murder, therefore, it serves no useful purpose.

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution requires that harsh punishments be fairly and evenhandedly imposed. Skinner v. Oklahoma, 316 U.S. 539 (1942). However, an abundance of cases have indicated that both judges and juries have neglected to be fair and evenhanded, as required by both the United States and Florida Supreme Courts, when determining a sentence of death. Studies have shown the race of the victim to be a paramount consideration when judges and juries determine death sentences. This has resulted in a pattern of arbitrary and capricious decision making like that found in Furman v. Georgia, 408 U.S. 238 (1972).

In Florida, death sentences have been imposed irregularly and inconsistently due to arbitrary jury attitudes and sentencing recommendations, uneven and inconsistent prosecutorial practice in seeking or not seeking the death penalty and divergent sentencing policies of trial judges. As a result, the absence of a rational standard has led to death sentences that are no more deserving of capital punishment than many other cases in which sentences of imprisonment are imposed.

Therefore, due to the unreliable procedures used in determining a death sentence, and based on the cruel and unusual nature of such a harsh sentence, Fla. Stat. 921.141 violates the Fifth, Eight and Fourteenth Amendments to the United States Constitution and Articles I, Sections 2, 9 and 17 of the Florida Constitution.

B. The Trial Court Erred In Denying The Defendant's Motion To Declare Fla. Stat. 921.141 Unconstitutional Pursuant To The Eighth And Fourteenth Amendments To The United State's Constitution And Article I, Sections 9 And 17 Of The Florida Constitution Where The Aggravating And mitigating circumstances Enumerated In Fla. Stat. 921.141

And Used By The Trial Court In Determining Whether To Impose A Sentence Of Death Were Impermissibly Vague And Overbroad.

In the present case, the trial court considered two aggravating circumstances when reaching its decision: (1) the previous conviction of a violent felony, and (2) that the victim of the capital felony was a law enforcement officer engaged in the performance of his official duties.

The previous conviction of a violent felony, listed as aggravating circumstance (b) in Fla. Stat. 921.141 suffers from overbreadth in that the circumstances surrounding the felony and when it occurred are not mandatorily considered.

For example, Fla. Stat. 921.141(b) does not distinguish between the date the previous conviction occurred and the date of the conviction when considering a prior violent felony an aggravating circumstance. In the present case, the previous conviction that the trial court considered when applying aggravating circumstance (B) occurred subsequent to the charged offense. Therefore, it was incorrect for the trial court to consider a felony that occurred after the charged offense when determining the severity of punishment for the charged offense.

Similarly, the second aggravating circumstance the trial court considered, listed as (j) in Fla. Stat. 921.141, does not mandatorily consider the circumstances of the homicide. It unconstitutionally alienates one occupation and considers the murder of a person in this field as a mandatory aggravating circumstance. Furthermore, Fla. Stat. 921.141(j) is vague and overbroad in that there is no indication whether the law enforcement officer must be engaged in lawful performance of his

official duties as the trial court incorrectly stated. The Statute only specifies that the law enforcement officer was engaged in the performance of his official duties. The failure to distinguish between lawful performance and unlawful performance of official duties compounded with the failure to mandatorily consider the circumstances surrounding the felony establishes the overbreadth and unconstitutionality of the Statute.

Fla. Stat. is also unconstitutional on its face in that it is violative of the mandate of the United States Supreme Court as expressed in Lockett v. Ohio, 438 U.S. 586 (1978), which requires that the defendant be allowed to present all evidence relevant to the mitigation of sentence. The limiting adjectives employed in the enumerated mitigating factors unconstitutionally limit the jury and the judge in consideration of relevant mitigating evidence.

In the present case, the trial court only considered one out of the three mitigating factors argued by the defendant, stating that the other two were not nonstatutory mitigating factors (R. 248).

Although the Florida legislature limited mitigating circumstances in promulgatory Fla. Stat. 921.141 in order to comply with the ruling in Furman v. Georgia, 408 U.S. 238 (1972) that unbridled jury discretion to impose or recommend a death sentence was constitutionally prohibited, that limitation led the court in Lockett v. Ohio, 438 U.S. 586 (1978) to hold a Ohio Statute limiting mitigating circumstances unconstitutional as violative of the Eighth and Fourteenth Amendments to the United States Constitution. Noting that the Ohio legislature limited the mitigating circumstances in response to Furman, id., the plurality

held:

> "There is no perfect procedure for deciding in which cases governmental authority should be used to impose death. But a Statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commends of the Eighth and Fourteenth Amendments . . . The limited range of mitigating circumstances which may be considered by the sentencer under the Ohio Statute is incompatible with the Eight and Fourteenth Amendment. To meet constitutional requirements, a death penalty statute must not preclude consideration of relevant mitigating factors".

Quite clearly, the Florida legislature has precluded consideration of relevant mitigating circumstances by limiting defendants to those circumstances listed in Fla. Stat. 921.141(6)(A-g).

Thus, the Florida death penalty statute (Fla. Stat. 921.141) suffers from the same constitutional infirmities as the Ohio Statute and should be declared unconstitutional and invalid vacating death as a possible punishment in this case.

C. Fla. Stat. 921.141 Is Unconstitutional Because It Encourages Unwarranted Death Sentences Due To A Tripartite System That Relieves Full Responsibility In Any Single Entity For Imposing The Death Penalty.

Florida has a "tripartite" death penalty procedure. Fla. Stat. 921.141(2) sets forth the guidelines for "advisory" death sentences by a jury. Fla. Stat. 921.141(3) establishes the procedure by which the sitting judge makes findings in a death penalty case and gives the sitting judge the power to override the jury's "advisory" sentence. Fla. Stat. 921.141(4) provides for mandatory review of all death sentences by the Florida Supreme

Court. In this Tripartite system, none of the three participating entities is given full responsibility for imposing the death penalty. Thus each entity is relieved of its sense of awesome responsibility for imposing the death penalty. This system encourages unwarranted death sentences in violation of Caldwell v. Mississippi, 472 U.S. 320 (1985).

D. Fla. Stat. 921.141 Is Unconstitutional On Its Face In Violation Of The Sixth, Eighth And Fourteenth Amendments To The United States Constitution and Article I, Sections 9, 16 and 17 Of The Florida Constitution Where The State Is Not Required To Give Notice To Defense Counsel As To What Aggravating Circumstances It Intends To Rely; And Where No Requirement Exists To Instruct The Jury That To Return A Recommendation Of Death, They Must Be Convinced Beyond Every Reasonable Doubt That The Aggravating Circumstances Outweigh Any Mitigating Circumstances; And Where Jury Recommendation Need Not Be Unanimous And The Jury Is Not Required To Provide Its Specific Sentencing Findings To The Trial Judge; And Where The Trial Judge Is Permitted To Find That Aggravating Circumstances Outweigh Any Mitigating Circumstances Despite A Jury Recommendation Of Life Imprisonment.

Fla. Stat. 921.141 is unconstitutional on its face because the State is not required to give defendants notice, or to specifically allege in any pleading, the aggravating circumstances it intends to prove to justify the imposition of the death penalty. Without formal notice of what specific aggravating circumstances the State intends to rely upon is to deny the defendant effective assistance of counsel and serves to foster unreliable and disproportionate imposition of the death penalty in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9, 16 and 17 of the Florida Constitution.

Furthermore, Florida has no requirement pursuant to statute, Rules of Criminal Procedures or Standard Jury Instructions for the court to instruct the jury that in order to return a recommendation

of death, the jury must be convinced beyond every reasonable doubt that the aggravating circumstances outweighed any mitigating circumstances. The failure to require such an instruction serves to foster unreliable and arbitrary imposition of the death penalty in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9, 16 and 17 of the Florida Constitution.

In addition, the fact that the jury recommendation need not be unanimous establishes the unconstitutionality of Fla. Stat. 921.141 in violation of Article I, Sections 9, 16 and 22 of the Florida Constitution, and the Sixth and Fourteenth Amendments to the United States Constitution.

The Florida death penalty is also unconstitutional because the jury is not required to provide its specific sentencing findings to the trial court, thus assuring that the jury findings coincide with findings of the trial court. Therefore, the proportionality and reliability requisites of the Eighth Amendment and Due Process Clause of the Fourteenth Amendment to the United States Constitution and Article I, Section 9, 16, 17 and 22 of the Florida Constitution are violated by this practice.

Finally, Fla. Stat. 921.141 unconstitutionally permits the trial judge to find that aggravating circumstances outweigh mitigating circumstances despite a jury recommendation of life imprisonment. The collateral estoppel concept of the prohibition against double jeopardy prevents the trial court from considering the issue of whether certain aggravating circumstances exist or outweigh any mitigating circumstances. Since Fla. Stat. 921.141 permits factual findings to be twice litigated and twice decided

it invites unreliability and disproportionality and as such, violates the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9, 16, 17 and 22 of the Florida Constitution.

In conclusion, the defense contends that the trial court erred by denying the Defendant's Motion to Declare Fla. Stat. 921.141 unconstitutional on its face as well as applied to the facts of his case in that facts in the record, as well as the relevant caselaw and statutes establish that the Death Penalty Statute is vague, overboard and unreliable cruel and unusual punishment that violated the Defendant's due process rights.

CONCLUSION

Based on the above facts, arguments and authorities, the appellant submits that his convictions and sentences must be reversed and this case remanded for appropriate proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to the Office of Attorney General, Criminal Division, P. O. Box 013241, Miami, Florida 33102, and to Ronald S. Lowy, Esquire, Counsel for Douglas Escobar, 420 Lincoln Road, Penthouse 7, Miami Beach, Florida 33139-3017, this 23rd day of May, 1996.

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