IN THE SUPREME COURT OF FLORIDA

CASE NO. 77,736

DOUGLAS ESCOBAR,

Appellant,

v.

THE STATE OF FLORIDA,

Appellee.

****

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

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INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

DOUGLAS ESCOBAR was the Defendant, DENNIS ESCOBAR was the co-defendant and the STATE OF FLORIDA was the prosecution in the Circuit Court of the Eleventh Judicial Circuit of Florida. The parties will be referred to by name or as Defendant, Co-defendant and State.

The following symbols will be used:

"R"	Record on Appeal inclusive of transcript
"SR"	Supplemental Record on Appeal
"3RD DCA R"	Record on Appeal submitted to the Third District Court of Appeal
"App."	Defendant's Appendix
"HT"	Hearing transcript of evidentiary hearings conducted by Special Master appointed by the Florida Supreme Court

STATEMENT OF THE CASE

Brothers, DOUGLAS and DENNIS ESCOBAR were charged by Indictment with the offenses of first degree murder, grand theft and possession of a firearm during the commission of a felony. (R. 1-3).

Defense counsel raised concerns over the Defendant's competency (R. 533) and the Court conducted a competency hearing and determined the Defendant competent to stand trial. (R. 662-663).

The Defendant filed a Motion to Suppress Statements/Confessions of the Defendant (R. 31-33) which was denied (R. 1228-1229).

The Defendant filed a Motion to Sever his trial from his co-defendant (R. 34-36) which was granted (R. 1253-1254). The State subsequently filed a Motion for Rejoinder or Reconsolidation of Cases (R. 124-130) which was granted over defense objection. (R. 131).

The State filed a Notice of Intent to Rely on "Williams Rule" evidence which was by denied by the Court (R. 99-100). The District Court of Appeal, Third District reversed the trial court and ordered the "Williams Rule" evidence admitted. State v. Escobar, 570 So.2d 1343 (Fla. 3d DCA 1990).

Jury selection commenced on October 28, 1990 and a jury was empaneled and sworn on December 20, 1990. (R. 4140, 4156). Trial commenced on January 7, 1991 (R. 4204). On January 16, 1991 the jury returned a verdict of guilty against both Defendants for first degree murder, grand theft and possession of a firearm in the commission of a felony. (R. 6052-6054).

On January 31, 1991 the jury, by a vote of eleven to one recommended that both Defendants receive a death sentence. (R. 6422-6423).

On February 22, 1991 the trial Judge issued a sentencing order sentencing both Defendants to death in the electric chair. (R. 231-250).

DOUGLAS ESCOBAR filed a Motion for New Trial (R. 194-196) which was denied on February 27, 1991. (R. 6484).

This appeal follows.

STATEMENT OF THE FACTS

On the evening of March 30, 1988, City of Miami police officer Victor Estefan was shot and killed during a routine traffic stop. Before he died, Estefan stated that the perpetrators were driving a small grey vehicle and that the shooter was a short Latin male with bushy hair who was the passenger in the car (R. 4547-48, 4572-78). Estefan also stated that there was damage to the right rear of the subject car and that three shots were fired (R. 4572-78). The owner of the duplex in front of which Estefan was shot heard two cars pulling up, doors opening and closing, voices, shouting, a scuffle and gunshots (R. 4630-36). There were no eyewitnesses and no suspects were found on the night of the murder.

Approximately one month after the murder, on April 27, 1988, California Highway Patrol officers Grant Kell and Ray Koenig saw a suspicious car weaving in and out of its lane at about 2:30 in the morning (R. 4895-97). The driver was DENNIS ESCOBAR and the front seat passenger was Defendant, DOUGLAS ESCOBAR (R. 4903-07). After being pulled over, the Defendant, DOUGLAS ESCOBAR, got out of the car and attempted to shoot at the officers, but his gun never fired (R. 4910-11). The co-defendant, DENNIS ESCOBAR, wrestled and fought with one of the officers to the ground, (R. 4929-33). During the confrontation, DOUGLAS and DENNIS ESCOBAR were shot and wounded, but neither officer was shot. DENNIS and DOUGLAS ESCOBAR were tried and convicted of the attempted first-degree murders of the California police officers (R. 6201-6210).

A second passenger in the car on the night of the California incident told California police that the Defendants were involved in a Miami police shooting. Miami detectives George Morin and Bruce Roberson flew to California on April 29th to investigate this lead (R. 920-21). The detectives interviewed DOUGLAS ESCOBAR while he was in the intensive care ward of a California hospital in critical condition recovering from surgery and under heavy medication (R. 1123-25). DOUGLAS told Detective

Morin about the stolen Mazda and about the .357 magnum that was in the car (R. 933). DOUGLAS told him how he tried to evade a police car that was following him (R. 934-37). Detective Morin recounted that DOUGLAS admitted telling his brother to "shoot him" as he saw Officer Estefan out of his car with his gun drawn at DENNIS (R. 934). Detective Morin later described DOUGLAS' statement somewhat differently when he testified that DOUGLAS stated that he told DENNIS as he saw the police car pull up behind him, "if he [Officer Estefan] gets out, shoot him" (R. 5210). DENNIS got out of the Mazda and fired three or four shots at Officer Estefan (R. 4458, 4572-78, 5263-68). DOUGLAS further told the Detective Morin how he and DENNIS disposed of the murder weapon in a canal (R. 936). After their conviction in California, DOUGLAS and DENNIS ESCOBAR were indicted for the first-degree murder of Officer Estefan, as principals acting in concert as part of a common plan or scheme (R. 1-4) and were tried jointly.

A stolen grey Mazda with damage to the right rear was impounded on May 2, 1988 (R. 4511-13). DENNIS' wife testified that she was with DOUGLAS when the car was stolen (R. 5027-31). The car license registration for the Mazda was found in her bedroom (R. 5038-39). Two fingerprints removed from the sunscreen of the grey Mazda matched the prints of DOUGLAS ESCOBAR (R. 4772-85, 5636).

DENNIS' wife testified that DENNIS came home acting very nervous on the night of the murder and that he had been drinking (R. 5025-27). She told how she went with DENNIS and DOUGLAS to dispose of the gun and described the location (R. 5036-38). A gun was never found.

Two months prior to the murder of Officer Estefan, DOUGLAS showed Jose Bonilla the gun he carried, told Jose that he had come from California after robbing a bank, and told Jose that he knew he was wanted by the F.B.I. and that he would shoot anyone who stopped him (R. 5003-7). Two months prior to the murder, DOUGLAS also told Douglas Saballos that

he was wanted in California for several holdups, that he wouldn't be taken alive, and boasted about being the "Bandit of El Camino Real" (R. 4819-21). Another friend of the Defendant, Ramon Arguello, testified at trial that the Defendant once put a pistol to his chest and threatened to kill him. (R. 5122).

DOUGLAS and DENNIS ESCOBAR were found guilty of the first-degree murder of Officer Estefan and the jury recommended a sentence of death by an 11-1 vote (R. 220, 6422-23). During the penalty phase, the Defendant, DOUGLAS ESCOBAR, presented three witnesses: (1) a former lawyer who had represented him years earlier on D.U.I. matters in California until he failed to appear for a hearing who said he was a "gentleman" (R. 6212, 6221, 6226), (2) his eleven-year-old son who said he was a good father (R. 6232-35), and (3) his father who had abandoned him as a child, had abused his mother in his presence and had not seen him for many years (R. 6236-43). Four witnesses who knew the Defendant and his family well, who had arrived from Nicaragua at 10:30 the evening before the penalty phase, and who proffered testimony relevant to mitigation, were not permitted to testify because of discovery violations argued by the State (R. 6195). At the conclusion of the penalty phase, the trial judge issued an order imposing the death penalty on the defendants, DOUGLAS and DENNIS ESCOBAR (R. 231-250).

SUMMARY OF ARGUMENT

I. The trial court erred in denying the Defendant's Motion to Suppress Statements, Confessions and Admissions where the statements were involuntarily made while the Defendant was in a critical medical condition and on large doses of morphine, and where the police officer failed to complete the Miranda warnings.

II. The Defendant was denied his right to effective assistance of counsel where a court-appointed attorney jointly represented the Defendant and the co-defendant for purposes of an interlocutory appeal where there were conflicting arguments concerning the issue on appeal as well as conflicting versions of the events that occurred with respect to the case below. Error was fundamental where the attorney failed to raise arguments beneficial to the Defendant, and submitted a brief minimizing the culpability of the co-defendant while enhancing the culpability of the Defendant.

III. The Third District Court of Appeal erred in ruling admissible evidence of collateral crimes [prior outstanding warrants, a statement to a neighbor almost two months prior to the shooting that if stopped by police he would shoot it out, and evidence of a California confrontation with police one month subsequent to the murder] where the evidence was not relevant to the central issue of identity, where the similar fact evidence was not strikingly similar and shared no unique characteristics, where the evidence became the featured theme of the prosecution, and where the trial judge implicitly found that the prejudicial effect of the evidence outweighed the probative value.

IV. The trial court erred in admitting photographs and sketches of the defendants' collateral crimes where the extensive testimony about the California incident was as graphic and detailed in this case as at the trial for that incident, and where the inordinate emphasis on the separate and unrelated crime inflamed the jury such that any probative value was substantially outweighed by the prejudicial effect.

V. The trial court erred in admitting non-noticed, non-approved Williams Rule evidence of the Defendant's being known as the "Bandit of Camino Real" and the Defendant's previous act of putting a pistol to a friend's chest threatening to kill him, where the evidence was not relevant to prove a material fact at issue and was relevant solely to prove bad character or propensity to commit the crime charged.

VI. The trial Judge conducted certain off-the-record or *ex parte* communications with the prosecutor regarding the State's Motion for Rejoinder or Reconsolidation which prejudices Defendant's rights to a complete record on appeal.

VII. The trial court erred in granting the State's motion for rejoinder or consolidation of the defendants where the hearsay statements of the defendants did not interlock on significant material facts and were not sufficiently reliable to satisfy Confrontation Clause requirements.

VIII. The trial court's refusal to allow the Defendant to cross-examine the State's expert witness at a competency hearing to show bias and prejudice violated Defendant's constitutional right to fully confront witnesses and was error.

IX. The trial court erred during jury selection in refusing to conduct a Neil inquiry into the State's nine challenges targeted against minority prospective jurors, and in misconstruing and misapplying the requirements of Neil and Slappy.

X. The trial court erred in changing the jury selection process after jury selection was almost complete where the new procedure unduly restricted the Defendant's use of challenges which he entitled to and relied upon.

XI. The evidence was insufficient to prove premeditated first-degree murder as to the Defendant where the co-defendant was the shooter, where the facts of the case suggest a spontaneous decision to commit the

crime during a routine traffic stop, and where the only evidence of the Defendant's participation was two conflicting "admissions" recounted by the detective of how the Defendant told his brother to shoot the officer.

XII. The cumulative effect of the foregoing errors requires reversal.

XIII. Defendant's rights to due process of law were violated where the trial Judge conducted an *ex parte* meeting with the prosecutor alone in the Judge's chambers on the day prior to pronouncement of the death sentence and the Judge presented the prosecutor, and the prosecutor reviewed, the Order sentencing Defendants to death.

XIV. The trial court erred in refusing to give a timely requested limiting instruction to the jury that they should not consider duplicative ("doubling") aggravating factors arising out of the same aspect of the offense.

XV. The trial court erred in excluding the testimony of four witnesses who had arrived from Nicaragua on the evening prior to the penalty phase without conducting a Richardson inquiry or seeking to rectify any possible prejudice short of the exclusion.

XVI. Where the State's extensive use of similar fact evidence during the guilt phase may have affected the jury's determination in the penalty phase, the Defendant is entitled to a new sentencing proceeding.

XVII. Death is not warranted under a proportionality review.

POINTS ON APPEAL

GUILT PHASE

I.

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS STATEMENTS, CONFESSIONS AND ADMISSIONS WHERE THE STATEMENTS WERE INVOLUNTARILY MADE WHILE THE DEFENDANT WAS IN A CRITICAL MEDICAL CONDITION AND ON LARGE DOSES OF MORPHINE, AND WHERE THE POLICE OFFICER FAILED TO COMPLETE THE MIRANDA WARNINGS.

II.

THE DEFENDANT WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHERE A COURT-APPOINTED ATTORNEY JOINTLY REPRESENTED THE DEFENDANT AND THE CO-DEFENDANT FOR PURPOSES OF AN INTERLOCUTORY APPEAL WHERE THERE WERE CONFLICTING ARGUMENTS CONCERNING THE ISSUE ON APPEAL AS WELL AS CONFLICTING VERSIONS OF THE EVENTS THAT OCCURRED WITH RESPECT TO THE CASE BELOW. ERROR WAS FUNDAMENTAL WHERE THE ATTORNEY FAILED TO RAISE ARGUMENTS BENEFICIAL TO THE DEFENDANT, AND SUBMITTED A BRIEF MINIMIZING THE CULPABILITY OF THE CO-DEFENDANT WHILE ENHANCING THE CULPABILITY OF THE DEFENDANT.

III.

THE THIRD DISTRICT COURT OF APPEAL ERRED IN RULING ADMISSIBLE EVIDENCE OF COLLATERAL CRIMES [PRIOR OUTSTANDING WARRANTS, A STATEMENT TO A NEIGHBOR ALMOST TWO MONTHS PRIOR TO THE SHOOTING THAT IF STOPPED BY POLICE HE WOULD SHOOT IT OUT, AND EVIDENCE OF A CALIFORNIA CONFRONTATION WITH POLICE ONE MONTH SUBSEQUENT TO THE MURDER] WHERE THE EVIDENCE WAS NOT RELEVANT TO THE CENTRAL ISSUE OF IDENTITY, WHERE THE SIMILAR FACT EVIDENCE WAS NOT STRIKINGLY SIMILAR AND SHARED NO UNIQUE CHARACTERISTICS, WHERE THE EVIDENCE BECAME THE FEATURED THEME OF THE PROSECUTION, AND WHERE THE TRIAL JUDGE IMPLICITLY FOUND THAT THE PREJUDICIAL EFFECT OF THE EVIDENCE OUTWEIGHED THE PROBATIVE VALUE.

IV.

THE TRIAL COURT ERRED IN ADMITTING PHOTOGRAPHS AND SKETCHES OF THE DEFENDANTS' COLLATERAL CRIMES WHERE THE EXTENSIVE TESTIMONY ABOUT THE CALIFORNIA INCIDENT WAS AS GRAPHIC AND DETAILED IN THIS CASE AS AT THE TRIAL FOR THAT INCIDENT, AND WHERE THE INORDINATE EMPHASIS ON THE SEPARATE AND UNRELATED CRIME INFLAMED THE JURY SUCH THAT ANY PROBATIVE VALUE WAS SUBSTANTIALLY OUTWEIGHED BY THE PREJUDICIAL EFFECT.

V.

THE TRIAL COURT ERRED IN ADMITTING NON-NOTICED, NON-APPROVED WILLIAMS RULE EVIDENCE OF THE DEFENDANT'S BEING KNOWN AS THE "BANDIT OF CAMINO REAL" AND THE DEFENDANT'S PREVIOUS ACT OF PUTTING A PISTOL TO A FRIEND'S CHEST THREATENING TO KILL HIM, WHERE THE EVIDENCE WAS NOT RELEVANT TO PROVE A MATERIAL FACT AT ISSUE AND WAS RELEVANT SOLELY TO PROVE BAD CHARACTER OR PROPENSITY TO COMMIT THE CRIME CHARGED.

VI.

THE TRIAL JUDGE CONDUCTED CERTAIN OFF-THE-RECORD OR *EX PARTE* COMMUNICATIONS WITH THE PROSECUTOR REGARDING THE STATE'S MOTION FOR REJOINDER OR RECONSOLIDATION WHICH PREJUDICES DEFENDANT'S RIGHTS TO A COMPLETE RECORD ON APPEAL.

VII.

THE TRIAL COURT ERRED IN GRANTING THE STATE'S MOTION FOR REJOINDER OR CONSOLIDATION OF THE DEFENDANTS WHERE THE HEARSAY STATEMENTS OF THE DEFENDANTS DID NOT INTERLOCK ON SIGNIFICANT MATERIAL FACTS AND WERE NOT SUFFICIENTLY RELIABLE TO SATISFY CONFRONTATION CLAUSE REQUIREMENTS.

VIII.

THE TRIAL COURT'S REFUSAL TO ALLOW THE DEFENDANT TO CROSS-EXAMINE THE STATE'S EXPERT WITNESS AT A COMPETENCY HEARING TO SHOW BIAS AND PREJUDICE VIOLATED DEFENDANT'S CONSTITUTIONAL RIGHT TO FULLY CONFRONT WITNESSES AND WAS ERROR.

IX.

THE TRIAL COURT ERRED DURING JURY SELECTION IN REFUSING TO CONDUCT A NEIL INQUIRY INTO THE STATE'S NINE CHALLENGES TARGETED AGAINST MINORITY PROSPECTIVE JURORS, AND IN MISCONSTRUING AND MISAPPLYING THE REQUIREMENTS OF NEIL AND SLAPPY.

X.

THE TRIAL COURT ERRED IN CHANGING THE JURY SELECTION PROCESS AFTER JURY SELECTION WAS ALMOST COMPLETE WHERE THE NEW PROCEDURE UNDULY RESTRICTED THE DEFENDANT'S USE OF CHALLENGES WHICH HE ENTITLED TO AND RELIED UPON.

XI.

THE EVIDENCE WAS INSUFFICIENT TO PROVE PREMEDITATED FIRST-DEGREE MURDER AS TO THE DEFENDANT WHERE THE CO-DEFENDANT WAS THE SHOOTER, WHERE THE FACTS OF THE CASE SUGGEST A SPONTANEOUS DECISION TO COMMIT THE CRIME DURING A ROUTINE TRAFFIC STOP, AND WHERE THE ONLY EVIDENCE OF THE DEFENDANT'S PARTICIPATION WAS TWO CONFLICTING "ADMISSIONS" RECOUNTED BY THE DETECTIVE OF HOW THE DEFENDANT TOLD HIS BROTHER TO SHOOT THE OFFICER.

XII.

THE CUMULATIVE EFFECT OF THE FOREGOING ERRORS REQUIRES REVERSAL.

PENALTY PHASE

XIII.

DEFENDANT'S RIGHTS TO DUE PROCESS OF LAW WERE VIOLATED WHERE THE TRIAL JUDGE CONDUCTED AN *EX PARTE* MEETING WITH THE PROSECUTOR ALONE IN THE JUDGE'S CHAMBERS ON THE DAY PRIOR TO PRONOUNCEMENT OF THE DEATH SENTENCE AND THE JUDGE PRESENTED THE PROSECUTOR, AND THE PROSECUTOR REVIEWED, THE ORDER SENTENCING DEFENDANTS TO DEATH.

XIV.

THE TRIAL COURT ERRED IN REFUSING TO GIVE A TIMELY REQUESTED LIMITING INSTRUCTION TO THE JURY THAT THEY SHOULD NOT CONSIDER DUPLICATIVE ("DOUBLING") AGGRAVATING FACTORS ARISING OUT OF THE SAME ASPECT OF THE OFFENSE.

XV.

THE TRIAL COURT ERRED IN EXCLUDING THE TESTIMONY OF FOUR WITNESSES WHO HAD ARRIVED FROM NICARAGUA ON THE EVENING PRIOR TO THE PENALTY PHASE WITHOUT CONDUCTING A RICHARDSON INQUIRY OR SEEKING TO RECTIFY ANY POSSIBLE PREJUDICE SHORT OF THE EXCLUSION.

XVI.

WHERE THE STATE'S EXTENSIVE USE OF SIMILAR FACT EVIDENCE DURING THE GUILT PHASE MAY HAVE AFFECTED THE JURY'S DETERMINATION IN THE PENALTY PHASE, THE DEFENDANT IS ENTITLED TO A NEW SENTENCING PROCEEDING.

XVII.

DEATH IS NOT WARRANTED UNDER A PROPORTIONALITY REVIEW.

GUILT PHASE:

POINT I

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO SUPPRESS STATEMENTS, CONFESSIONS, AND ADMISSIONS WHICH WERE INVOLUNTARY AND MADE WHILE DEFENDANT WAS IN A CRITICAL MEDICAL CONDITION AND ON LARGE DOSES OF MORPHINE IN VIOLATION OF THE 5TH, 6TH, AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE §9 OF THE FLORIDA CONSTITUTION.

On April 27, 1988, the Defendant, DOUGLAS ESCOBAR, was brought to Twin Cities Community Hospital in Templeton, California, suffering from two gunshot wounds. (R. 1123). One gunshot wound went through his left chest, through the diaphragm into his abdomen damaging his stomach, liver, small bowel and kidney. (R. 1123-1124). The other was a gunshot wound to his left forearm that tore a muscle. (R. 1123).

Within an hour of admission, Defendant was taken to the operating room where under general anesthesia an exploratory laparotomy repairing damage to his diaphragm, liver, stomach and small intestine was performed. (R. 1124). With the assistance of urology, Defendant's left kidney was removed. (R. 1124). An orthopedic surgeon repaired the injury to Defendant's left mid forearm. (R. 1124).

After surgery, Defendant was admitted to the intensive care unit. (R. 1124). Defendant had a very complicated post operative course, according to treating physician Dr. John Henry, as he had major injuries which required a lot of antibiotics, intensive respiratory therapy, pain medications, and after he had been there his second or third day, he was going through delirium tremens. (R. 1124). This caused Defendant to be very disoriented, irrational and required sedation by valium (R. 1125).

From an hour or two after Defendant was out of surgery, Dr. Henry prescribed morphinesulfate (R. 1125). The prescription was significant in that Defendant required the morphine every hour or two. (R. 1125). Defendant was given a "great deal" of morphine according to Dr. Henry. (R. 1125).

Defendant gave four separate statements to police which the defense sought to suppress (R. 30-31). These were statements made on April 30, 1988, at approximately noon and 6:00 p.m. at Twin Cities Community Hospital; April 28, 1988, to Officer Gimple of the California Corrections Department; and May 3, 1988, at the California Men's Colony. (R. 1197-1198).

As to the first statement of April 28, 1988, John Gimple testified he was a corrections officer for California assigned to guard Defendant, whom he claims was "doing fairly well" and was on an IV. (R. 878-879). Gimple's shift began at 3:00 p.m. on April 27, 1988. (R. 879). According to Gimple, at 9:03 p.m. on the 27th, a nurse entered Defendant's room (R. 879-882). Gimple testified that the Defendant was being verbally abusive to most of the staff, and a nurse told him "You put yourself here, you shouldn't shoot people." (R. 881). Defendant responded, "I know I have no excuse." (R. 881). Gimple read Defendant Miranda[1] warnings at that time. (R. 881). Defendant allegedly told Gimple he understood his rights. (R. 884). Defendant was complaining of pain at the time, but did not appear to be under the influence of any medication. (R. 885). Defendant would fall asleep, and then Gimple would wake him up. (R. 886). They would talk a while. (R. 886). Defendant would make some "spontaneous statement" every now and then. (R. 886).

The statements Defendant allegedly made to Gimple were:

> At 5:50 a.m. on the 28th, I killed a policeman in Miami. California was looking for me. So I went to Florida. I was driving with no license. They pulled me over and drew their gun on me, start to shoot. So, I killed an officer. (R. 886).

Defendant also told Gimple he went to a car rental store and had just taken the car he was driving. (R. 887). After impeachment on cross-examination, Gimple admitted that at the time Defendant made the

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[1]Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

statement to him, Gimple thought he was confessing to what had occurred in California and not Miami. (R. 897). Defendant did not make the statement until approximately eight hours after he was Mirandized and during which time he would sleep and complain that he needed a pain shot. (R. 902).

As to his medical condition at the time, Dr. Henry testified that on April 28 - 29, 1988, the major problems were infection, blood loss and pain. (R. 1126). All during this time, Defendant was receiving antibiotics, intensive respiratory therapy and pain medication. (R. 1126).

Morphine doses began at 9:00 a.m., on April 27, 1988. (R. 1069). Defendant received additional morphine at 9:40 a.m., 10:40 a.m. and it continued at regular intervals over the next several days every hour or so. (R. 1070). Defendant was also receiving antibiotics intravenously and tylenol. (R. 1071-1072). On April 28, 1988, the nurses notes indicated decreased breath sounds. (R. 1072-1073). When morphine is administered at frequent intervals there is a half life, so that one-half of the medication previously administered remains in the patient's system when the next dose is given. (R. 1074). Dr. Henry noted that the Defendant may have had momentary lapses of medical conditions that would appear to the non-medical person as being good, but his overall condition, because of his injury and alcohol withdrawal were very poor (R. 1128).

Defendant was alleged to have given a second statement to Detectives Morin and Roberson of the City of Miami Police Department at noon on April 30, 1988. (R. 920-1032). At that time, Defendant was in a bed within the emergency ward. (R. 922). Detective Morin testified Defendant had oxygen and an oxygen tube in his nose. (R. 922). There was medical equipment around him. (R. 922). According to Detective Morin, the Defendant did not complain of pain, but was sucking on a piece

of ice due to dry lips. (R. 923). He read Defendant his rights and Defendant indicated he understood them. (R. 924). The interview lasted forty five minutes (R. 925).

Detective Morin told Defendant that police had absolutely no doubt whatsoever that he was involved in the murder of the Miami Police Officer. (R. 926). Police told him they had spoken to other people and had evidence that positively linked him to the murder in Miami. (R. 926). They advised him they had the car used in the murder and that they located a fingerprint of his in the gas cap of the car even though he attempted to remove all of his prints. (R. 926). Police "were very assertive with him and very assertive to the fact relating to him that we know he was involved in that murder and we could prove it." (R. 926).

Police were not telling Defendant the truth. (R. 927). The car was not in their possession and there was no fingerprint found. (R. 927).

Defendant told police he is not a killer. (R. 928). He said he was only a car thief. (R. 928). In response to this interrogation Defendant told police he had taken the car to a car wash the day after the shooting. (R. 930). He blamed the American system for his problems. (R. 931-932). He had to steal and sell drugs to feed his family. (R. 932). He told police he obtained the car, a gray Mazda, which he described. (R. 933). He told police that he and his brother were both in the car and had a .357 revolver with them. (R. 933). Defendant stated he bought the gun off the street. (R. 933). He also knew that he was wanted in California. (R. 933). He described how the shooting occurred (R. 934-937). Police asked if he would be willing to give a taped statement, but he said he was tired and wanted to rest. (R. 937). He told them he would give them a taped statement if they returned at 6:00 p.m. (R. 937).

Dr. Henry testified that on April 30, 1988 Defendant was becoming more disoriented and irrational. (R. 1126). His medical condition was

very poor. (R. 1127). It was Dr. Henry's unrebutted medical testimony as treating physician, that at 12:00 noon (the time of the police interview) based upon Defendant's medical condition and the amount of narcotics he had prescribed, as to the Miranda warnings:

> . . . I don't think he could understand. He might appear to understand. But in medicine you can't sign, like in my case an operative permit or do any legal business while you are under the influence of narcotics. You are not sure what the patient's understanding is . . . (R. 1128).

As of April 30, 1988, Defendant had been receiving morphine at least twelve times a day for three to four days. (R. 1129). Dr. Henry also explained that with regard to Defendant's ability to understand on April 30, 1988:

> He might have appeared to be understanding but the usual actions of the morphine that he was receiving could really affect him particularly his recall and he might have been agreeing with what was being said at the time but I doubt if you talk to him that he has any recall of what happened. (R. 1129-1130).

Dr. Henry testified that on April 30, 1988, at 12:00 noon based on his medical condition, within a reasonable degree of medical certainty, that Defendant could not have cognizably waived and understood the right to have an attorney present, nor the right to remain silent, nor that if he wished to have an attorney present and could not afford one, that one would be appointed. (R. 1130-1131). He does not believe that Defendant could make a waiver of his rights rationally "with all that morphine on board." (R. 1144-1145).

Additionally, on April 30, 1988, Defendant had a vacuum tube, called a chest thoracostomy tube, coming out of his chest, a catheter tube in his penis or bladder, a urine pack hanging on the side of the bed, oxygen in his nostrils, IV tubes in his arms, and was near death, in a critical state. (R. 1146-1147).

Dr. Elizabeth Weatherford, the expert witness called by the defense,

testified that on April 30, 1988, at 12:00 noon, that she does not believe, given the medical records of Defendant, on the basis of the medications he received and his very poor critical medical condition, and deteriorating physical condition, that Defendant had the mental capacity to understand the right to remain silent and that anything he said could be used against him. (R. 1093). Defendant's medical condition deteriorated throughout that day. (R. 1094). Dr. Weatherford testified that the Defendant, or anyone who received massive doses of narcotic mind altering medications that he received, would not be fully in control of their mental faculties and could be open to suggestion. (R. 1094). Additionally, the narcotics coupled with his deteriorating physical medical condition, critical, plus the fact he was developing severe pneumonia, and complications from the arterial blood oxygen which was dropping drastically throughout the day and night of April 30, 1988, would have prohibited Defendant's brain from functioning adequately due to lack of oxygen. (R. 1095-1096).

By 6:00 p.m. that same day, April 30, 1988, when he was interviewed, according to Dr. Henry's medical notes, Defendant "was beginning to express bizarre material and act in an overtly bizarre manner." (R. 1094). He would have been susceptible to suggestion, easily manipulated and not fully in control of his mental faculties. (R. 1094). Dr. Weatherford based her conclusion that Defendant could not comprehend the Miranda warnings on the "extremely large doses of narcotic medication that he was given" and "the very, very, poor, poor medical condition that he was in," the fact that he was developing pneumonia and complications from the blood oxygen level dropping drastically throughout the day. (R. 1095).

Dr. Weatherford testified that on April 30, 1988, Defendant could not think clearly, would be demonstrating poor judgment, sleeping off and on and carrying on conversations through drowsiness. (R. 1086-1088).

By the night of April 30, 1988, Defendant got worse and worse and a hospital physician's notes indicated he was talking incoherently and thrashing in his bed. (R. 1089). By ten minutes after midnight on May 1, 1988, he was having obvious hallucinations and was unable to control his own actions. (R. 1089).

At 6:00 p.m. on April 30, 1988, Detectives Morin and Roberson returned to the hospital. (R. 941). They started to Mirandize Defendant but "we never completed (Mirandizing) however," (R. 941). Detective Morin testified:

> We started reading Mr. Escobar his Miranda rights with the tape recorder was running and at one point he started waiving his hands and he said that he didn't think he wanted to give this statement and we stopped the tape recorder. (R. 941-942).

They got about halfway through the rights and the rights were not continued. (R. 942). After they turned off the tape, Defendant agreed to talk to Detective Morin, but he was not Mirandized. (R. 942-943).

Defendant then told police that it was hard to tell on himself. (R. 944). He asked about a reward, wanting to know if he could get it for his wife and kids. (R. 944). He told police he knew he was guilty. (R. 945). Police told him it was impossible to get the reward money for his family. (R. 945). Defendant then asked about how much time he would get and where he would serve his time if convicted both in California and Florida. (R. 945).

According to Detective Morin:

> Detective Roberson explained to him that if he was found guilty of in California (sic) he would then be tried in Florida and should he be found guilty in Florida that more than likely his sentence would be served in Florida and he told Detective Roberson that he wanted this, if he was to serve his time in Florida that he wanted his wife and his child to come to Florida, not to say (sic) in San Luis. (R. 945, emphasis supplied).

Police did not mention that Defendant could be sentenced to death - an important omission. The police continued interviewing the Defendant

and asked him various questions about the Estefan murder. (R. 946-949). This interview lasted about an hour (R. 947). The earlier noon-time interview lasted about 45 minutes (R. 948). When Detectives Morin and Roberson left, other officers from California were waiting to interview Defendant. (R. 949) They interviewed Defendant for a little over an hour. (R. 949). When the California Police left, Detectives Morin and Roberson returned to ask two more questions, as to where he was coming from on the day of the shooting and what clothing he wore. (R. 950).

Finally, on May 3, 1988, at 9:30 a.m., at the California Men's Colony, Detective Morin accompanied by prosecutor, Michael Band, met with the Defendant in the medical ward. (R. 951). He appeared to be in worse condition than when Detective Morin saw Defendant on April 30, 1988. (R. 952). He Mirandized Defendant. (R. 952). Detective Morin questioned the Defendant about the disposal of the gun. (R. 953). Defendant told Police that he was not familiar with Miami but he said they walked up to the canal where they were right in the area of the restaurant. That was alongside the road within the Indian reservation. (R. 953). They did not ask any other questions. (R. 953).

Another statement was made on July 12, 1989, at Cockran Prison in California. However, the State conceded that the July 12, 1989, statements were in violation of Michigan v. Mosley[2] and that the State would not use these statements. (R. 1197).

The earlier statements should have been suppressed as the State did not show that Defendant made the statements freely, voluntarily or with cognitive understanding. In that regard, the defense presented uncontroverted medical testimony that Defendant could not have understood the Miranda warnings on April 28, 1988, or April 30, 1988, at noon or 6:00 p.m. Additionally, at 6:00 p.m., Defendant waived his hands at the detectives to stop them from taping a statement and they never completed

[2]Michigan v. Mosley, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975).

the Miranda warnings (even if he could have understood them). (R. 941-942).

As to the April 28, 1988, statement, Defendant was Mirandized at 9:20 p.m., but did not give a statement until 5:50 a.m. between which time he would doze off and on and complain of pain. (R. 1024). Officer Gimple had not Mirandized Defendant again at 5:50 a.m.

The May 3, 1988, statement only dealt with the gun and was fruit of the poisonous tree, as police would not have known about Defendant's alleged involvement but for the prior invalid confessions.

The statements obtained by police were obtained in violation of the privilege against self-incrimination guaranteed by the Fifth and Sixth Amendments to the United States Constitution and the due process clause of the Fourteenth Amendment as interpreted in Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). See also Article I, Section 9 of the Florida Constitution.

The statements made by the Defendant were involuntary and unintelligently given. Mincey v. Arizona, 437 U.S. 385, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978). In order for a confession to be admissible in evidence, it must be shown that the confession or statement was voluntarily made. Brewer v. State, 386 So.2d 232 (Fla. 1980).

To be free and voluntary, the statement or confession must not be extracted by any sort of threats or violence, "nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence." Id. at 235; Bram v. United States, 168 U.S. 532, 542-543, 18 S.Ct. 183, 187, 42 L.Ed. 568 (1897).

The confession should be suppressed if the declarations of those present are calculated to delude the prisoner as to his true position. Brewer at 236. See also Taylor v. State, 596 So.2d 957 (Fla. 1992); and Frazier v. State, 107 So.2d 16 (Fla. 1958). The burden is on the State to show that Defendant's statements were voluntary. Brewer at 236. In

the case at bar, police led Defendant to believe that he would "serve time". They did not tell him he could be sentenced to death. This was definitely calculated to delude Defendant as to his true position. They also lied to him, which alone is not a basis for suppression but coupled with all the other items is relevant.

The United States Supreme Court has held that:

> "Any questioning by police officers which in fact produces a confession which is not the product of a free intellect renders that confession inadmissible."

Townsend v. Sain, 372 U.S. 293, 308, 83 S.Ct. 745, 754, 9 L.Ed.2d 770 (1963). (emphasis in original).

In the case at bar, there was a factual basis, an unrebutted expert (California Hospital attending physician) medical testimony for the trial court to conclude that Defendant's medical and mental condition prevented him from effectively waiving his rights (at those times when rights were in fact, administered). As this Honorable Court noted in DeConingh v. State, 433 So.2d 501 (Fla. 1983), cert. denied 465 U.S. 1005, 104 S.Ct. 995, 79 L.Ed.2d 228 (1984).

> "Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences."

DeConingh at 503 citing Brady v. United States, 397 U.S. 742, 748, 90 S.Ct. 1463, 1468, 25 L.Ed.2d 747 (1970). In DeConingh, this court noted that a hospitalized subject under the influence of narcotics may not be able to fully appreciate the significance of his admissions.

The first statement of April 28, 1988, was made over an entire night of morphine, pain and dozing. It was not until some 8 hours after he was Mirandized that Defendant gave a statement.

The statements of April 30, 1988, at noon and 6:00 p.m. were obtained by lies, deception, and false statements as to penalty by

police, given to a critically ill man hallucinating on morphine. At 6:00 p.m., in addition, police were interrupted during Miranda warnings by Defendant waiving his arms indicating he did not wish to speak to them, yet they continued on without completing the Miranda warnings or clarifying whether Defendant might want an attorney present. Long v. State, 517 So.2d 664 (Fla. 1988). In James v. State, 223 So.2d 52 (Fla. 4th DCA 1969) the court reversed a conviction where the interrogating officer gave the defendant incomplete Miranda warnings and the defendant's statements were introduced at trial.

Lastly, the May 3, 1988, statement was the fruit of the poisonous tree and therefore inadmissible. Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); Betancourt v. State, 224 So.2d 378 (Fla. 3d DCA, 1969); French v. State, 198 So.2d 668 (Fla. 3d DCA, 1967).

Defendant's statements should have been suppressed. This cause should be reversed and remanded for a new trial.

POINT II

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT HIS FUNDAMENTAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHERE A COURT APPOINTED ATTORNEY JOINTLY REPRESENTED THE DEFENDANT AND THE CO-DEFENDANT FOR PURPOSES OF AN INTERLOCUTORY APPEAL DESPITE THE DEFENDANT'S OBJECTIONS, AN ACTUAL CONFLICT OF INTEREST AND PREJUDICE TO THE DEFENDANT.

On May 24, 1990, the trial court appointed attorney, John Lipinski, to represent the Defendant, DOUGLAS ESCOBAR, regarding a response to the State's interlocutory appeal concerning the admissibility of collateral crimes evidence and a statement made by DOUGLAS to his neighbor one month prior to the charged offense. (R. 1271). However, on May 22, 1990, the trial court had already granted the co-defendant, DENNIS ESCOBAR's, request that Mr. Lipinski assist him throughout the course of the trial proceedings. (R. 876).

The Defendant's trial counsel raised objections about the potential conflict of interest (R. 1270) since the Defendant and the co-defendant had conflicting arguments concerning the issue on appeal (R. 1271) as well as conflicting versions of the events that occurred with respect to the case below.[3] The trial court nevertheless appointed Mr. Lipinski to represent both defendants for the purposes of the interlocutory appeal, stating that it did not recognize a conflict of interest between the defendants' arguments (R. 1271).

A thorough review of Mr. Lipinski's response to the State's Petition for Certiorari and Initial Brief demonstrates that Mr. Lipinski's undivided loyalty in representing the co-defendant, DENNIS ESCOBAR, throughout the course of the interlocutory appeal and pre-trial proceedings prevented him from effectively representing the Defendant, DOUGLAS, on the issue of inadmissibility of DOUGLAS's collateral crimes. The Answer Brief filed on behalf of DENNIS and DOUGLAS ESCOBAR was stricken by the Third District Court of Appeal as legally insufficient. (App. 15). The District Court demanded that Mr. Lipinski file a new brief. In his new brief, Mr. Lipinski failed to argue the

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[3]This conflict of interest was demonstrated throughout the trial where Dennis' trial counsel tried to establish Douglas' violent nature through the admission of Douglas' collateral crimes in order to prove that it was Douglas, not Dennis, who was responsible for the offenses charged. (R. 4956-74, 5122-26) At trial, both Douglas and Dennis accused each other of being solely responsible for the murder of Officer Estefan. (R. 4238-9, 5783, 5799-5822).

During Dennis' opening statements, Dennis' trial counsel accused Douglas of lying about Dennis' involvement in the incident at hand (R. 4264) and denied Dennis' involvement in the charged offense. (R. 4249). In addition, Dennis' trial counsel established Douglas' bad character and propensity towards committing violent acts by predisposing the jury to prejudicial collateral crimes evidence with respect to the fact that Douglas had prior outstanding California arrest warrants at the time of the charged offense, and that it was Douglas who had the gun and shot at California authorities one month after the charged offense. (R. 4250). In another instance, Dennis' trial counsel questioned State witness, Ramon Arguello, during cross-examination, whether it was true that Douglas put a pistol to Arguello's chest and threatened to kill him. (R. 5123). Trial counsel for Dennis also exposed Douglas' bad character and past criminal acts upon cross-examining Detective Morin of the Miami Police Department. (R. 5361).

Similarly, during Douglas' opening statement, Douglas' trial counsel accused Dennis of shooting Officer Estefan (R. 4238) and explained that the evidence would establish that Douglas was not a participant in the charged offense (R. 4237) and that Douglas tried to prevent Dennis from shooting Officer Estefan. (R. 4238-39).

inadmissibility of DOUGLAS' collateral crimes and limited the points raised on appeal solely to the inadmissibility of DOUGLAS' statement one month before the murder of Officer Estefan. (App. 22). The primary argument Mr. Lipinski raised in the brief was that DOUGLAS' statement severely prejudiced DENNIS. (App. 23-24).

Mr. Lipinski prepared the defendants' brief in an effort to minimize the culpability of DENNIS at the cost of enhancing the culpability of DOUGLAS. Even though Mr. Lipinski argued that it would be error for evidence of prior offenses to be admitted, he expressly limited his argument to DOUGLAS' statement to his ex-neighbor, Jose Bonilla, and failed to argue the inadmissibility of prior arrest warrants or evidence of prior offenses other than the offenses mentioned in DOUGLAS' statements to his neighbor. (App. 16-27). Mr. Lipinski also failed to address the relevancy of DOUGLAS' California shootout that occurred one month after the charged offense. During the trial proceedings DENNIS' trial counsel exploited both the California shootout and prior offenses (R. 5123) committed by DOUGLAS (R. 4250) to prove DOUGLAS' violent nature.

In Holloway v. Arkansas, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978), the United States Supreme Court held that denying separate representation when a defendant has objected to joint representation, where a risk of conflicting interests exists, is reversible error. The Defendant, DOUGLAS ESCOBAR, objected to the joint representation (R. 1270) and the risk of conflicting interest was clearly apparent. The Sixth Amendment guarantee of effective legal counsel as interpreted by Holloway requires a reversal of the Defendant's conviction under circumstances where he objected to joint representation and he was placed at risk of conflicting interests.

Notwithstanding the Defendant's preservation of error by raising objections to the trial judge, it is fundamental error to be jointly

represented with a co-defendant where there is actual conflict of interests or prejudice is shown. Foster v. State, 387 So.2d 344 (Fla. 1980). See also Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942). In Foster, the Court held that a strong probability of a conflict of interest exists where two defendants charged with the same offense are jointly represented, and the court's action in making the joint appointment and allowing the joint representation to continue was reversible error where actual conflict of interest or prejudice to the defendant is shown. Foster, at 345. See also Belton v. State, 217 So.2d 97 (Fla. 1968).

This Court also addressed the issue of joint representation of co-defendants in Barclay v. Wainwright, 444 So.2d 956 (Fla. 1984), and found that appellate counsel had an actual conflict of interest in representing co-defendants where the attorney failed to make a plausible argument which benefitted one of the co-defendants. The Court held that an actual conflict of interest renders judicial proceedings fundamentally unfair. Id. at 958. As in Barclay, in the case at bar Mr. Lipinski's allegiance to the co-defendant prevented him from advancing critical and beneficial arguments on behalf of the Defendant, DOUGLAS ESCOBAR, and the Defendant in essence had no appellate representation at all.

A conflict of interest is present whenever one defendant stands to gain significantly by counsel advancing probative evidence or advancing plausible arguments that are damaging to the case of a co-defendant whom counsel is also representing. Turnquest v. Wainwright, 651 F.2d 333 (5th Cir. 1981). The Florida Supreme Court has stated:

> . . . joint representation of conflicting interests is suspect because of what it tends to prevent the attorney from doing . . . generally speaking, a conflict may also prevent an attorney from . . . arguing . . . the relative involvement and culpability of his clients in order to minimize the culpability of one by emphasizing that of another.

Main v. State, 557 So.2d 947, 948 (Fla. 1st DCA 1990) {quoting Holloway v. Arkansas, 435 U.S. 489, 490; 98 S.Ct. 1181, 1182}.

At the time Mr. Lipinski filed the defendants' brief, the trial court had granted a severance of the Defendants and ordered separate trials. In an effort to exclude DOUGLAS' statement and prior offenses from DENNIS' trial, Mr. Lipinski argued that it was DOUGLAS that was wanted by the California authorities, not DENNIS, (App. 25) and that DOUGLAS ESCOBAR's statement was extremely prejudicial to DENNIS ESCOBAR. (App. 25). By advancing these arguments in support of DENNIS, Mr. Lipinski ineffectively represented DOUGLAS by failing to raise pertinent arguments on behalf of DOUGLAS and by emphasizing that DOUGLAS was responsible for the collateral crimes, not his brother, DENNIS.

Mr. Lipinski's representation of the Defendant and the co-defendant was prejudicial to the Defendant and his brief was a one-sided attempt to persuade the Third District that the Defendant's statement and prior offenses should be inadmissible solely against DENNIS ESCOBAR. Mr. Lipinski was part of DENNIS' defense team which during the trial used evidence of DOUGLAS' collateral crimes and prior offenses in an effort to prove that DOUGLAS was involved in the charged offense. (R. 4250, 5123, 5361).

The Defendant, DOUGLAS ESCOBAR, was deprived of his Sixth Amendment right to effective assistance of counsel when the trial court appointed Mr. Lipinski to represent both defendants despite the existence of a risk of conflicting interests. The Defendant's Sixth Amendment rights were again violated when during the course of the joint representation the risk of conflict of interests was transformed into actual, apparent and prejudicial conflict of interests.

POINT III

THE THIRD DISTRICT COURT OF APPEAL ERRED IN RULING EVIDENCE OF COLLATERAL CRIMES ADMISSIBLE TO ESTABLISH MOTIVE AND CONSCIOUSNESS OF GUILT WHERE SUCH EVIDENCE WAS NOT RELEVANT TO THE CENTRAL ISSUE OF IDENTITY, WHERE THE SIMILAR FACT EVIDENCE WAS NOT STRIKINGLY SIMILAR AND SHARED NO UNIQUE CHARACTERISTICS, WHERE THIS EVIDENCE BECAME THE FEATURED THEME OF THE STATE'S PROSECUTION, AND WHERE THE PROBATIVE VALUE OF THIS EVIDENCE WAS SUBSTANTIALLY OUTWEIGHED BY ITS PREJUDICIAL EFFECT.

On May 10, 1990, the State filed a notice of intent to offer evidence of other crimes, wrongs, or acts pursuant to Section 90.404(2), Florida Statutes (1987).[4] Specifically, the State sought to introduce (1) evidence of two prior California warrants outstanding against Douglas Escobar at the time of the Estefan shooting for robbery and for flight to avoid prosecution; (2) a statement made by Douglas Escobar to his neighbor Angel Bonilla in early 1988 prior to the Estefan shooting; and (3) evidence that the Escobars engaged in a shoot-out with California Police one month after the Estefan shooting. The Defendants moved to exclude this evidence as irrelevant and prejudicial. (R. 707-728).

At a pre-trial hearing on May 21, 1990, the State argued (1) that the defendants' violent resistance of arrest in California, committed approximately one month after the Estefan killing, was admissible to establish the defendant's consciousness of guilt, motive and intent to commit the charged offense. (R. 708-714); (2) that Defendant's statement to an ex-neighbor that the F.B.I. was looking for him, and that he would engage in a shootout if stopped, and (3) Defendant's prior California arrest warrants, were admissible to prove motive for the co-defendant's

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[4] Fla. Stat. Section 90.404(2) provides:
(a) Similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity.

shooting of Officer Estefan. (R. 713-714). The State argued that the California violent resistance to arrest should be admitted because it rebutted the Defendant's claims to police that he was not a "cop killer." (R. 714-716). The defendants objected and argued that they had already been tried and convicted for the various crimes in California, and that the California incident would become the feature theme of the State's case and was only being introduced to show the defendants' bad character and propensity to commit the charged offense. (R. 718, 719). The defendants further argued that any probative value would be greatly outweighed by the prejudicial effect of such evidence. (R. 718).

On May 24, 1990, the judge issued a written order denying the State's Motion to admit evidence of defendants' collateral crimes. (R. 99-100). On June 15, 1990, the State sought review of the Order by the Third District Court of Appeal and on September 11, 1990, the Third District reversed the trial court's ruling and allowed the State to introduce evidence of the defendants' collateral crimes at defendants' trial. See State v. Escobar, 570 So.2d 1343 (Fla. 3d DCA 1990).

The Third District concluded that: (1) Douglas Escobar's statement to neighbor, Jose Bonilla, that Douglas "carried a gun, and if the police stopped him he was going to shoot it out with him because there was no way he was going to go back to jail" was relevant and admissible to establish defendants' motive for murder, Id. at 1344; (2) Douglas' statement was also admissible as an admission against interest, Id. at 1345; (3) the evidence of the California shoot-out (use of deadly force to avoid arrest) is probative of defendants' mental state and relevant to establish Douglas' involvement in the murder and, therefore, admissible, Id. at 1345; and (4) evidence that outstanding warrants existed against Douglas Escobar at the time of the Estefan shooting is relevant to show the defendants' motive and intent for the Estefan murder, Id. at 1346.

The Third District erred in reversing the trial court's ruling and allowing evidence of defendants' collateral crimes which did not fall within "Williams Rule"[5] evidence and was inadmissible under Fla. Stat. 90.404(2). Where the probative value of this evidence was minimal and was greatly outweighed by the substantial prejudicial effect, and where this evidence was ultimately admitted, and in fact became the featured evidence of the State's case, the error is harmful and reversible.

The Defendant's statement to a neighbor a month before the charged offense was irrelevant and inadmissible to establish motive and, under the circumstances, was inadmissible as an admission against interest.

The Third District erred in concluding that the Defendant's statement to Jose Bonilla that Douglas "carried a gun, and if the police stopped him he was going to shoot it out with him because there was no way he was going to go back to jail," was relevant and admissible to establish defendants' motive for the murder. The Third District relied on this court's ruling in Jackson v. State, 498 So.2d 406 (Fla. 1986), that the appellant's statement that "she wasn't going back to jail" was relevant and admissible to prove appellant's motive for killing a police officer. The Third District misapplied the ruling in Jackson where the statement made by the appellant in Jackson was made immediately after shooting a police officer and was clearly an admission and explanation of why she committed the offense minutes earlier. In the case at bar, the Defendant's statement was made at least one month prior to the charged offense (R. 712-713) and bore no relationship to any particular event. The Defendant's statement in the present case was much like the statement of a defendant who had boasted of being a "thoroughbred killer" from Detroit in the earlier and unrelated case of Jackson v. State, 451

[5]Williams v. State, 110 So.2d 654 (Fla.), cert. denied, 361 U.S. 847, 80 S.Ct. 102, 4 L.Ed.2d 86 (1959).

So.2d 458 (Fla. 1984). In Jackson, the Court held that the boastful statement made prior to the charged offense had no relevance except as to the character and propensity of the defendant to commit the murder charged, and had no probative value and was therefore inadmissible. Interestingly, the Third District in Arsis v. State, 581 So.2d 935 (Fla. 3d DCA 1991), a year after its Escobar decision, held that it was reversible error to admit evidence that a defendant told his accomplices, prior to the charged offenses including robbery, that he "robbed taxicabs for a living."[6] As in Jackson and Arsis, the Defendant's statement in the case at bar lacked specificity and was not timely related to the charged offense. The probative value, if any, was minimal and was substantially outweighed by the prejudicial impact.

The Third District also erred in ruling that the Defendant's statement to Bonilla was admissible as an admission against interest under Fla. Stat. §90.803 (18) since both defendants were charged as joint actors with a common plan or scheme. Escobar, at 1345. The relevant portions of Fla. Stat. §90.803(18)(e) provide for admission into evidence if:

> A statement that is offered against a party and is a statement by a person who was a co-conspirator of the party during the course, and in furtherance of the conspiracy. . . . a conspiracy and each member's participation in it must be established by independent evidence, either before the introduction of any evidence or before evidence is admitted under this paragraph.

The record is devoid of any evidence whatsoever that at the time the Defendant made the statement to Bonilla, he was acting in concert with the co-defendant. The co-defendant was not present with the Defendant when the Defendant made the statement to Bonilla. No evidence was introduced to prove that the Defendant and co-defendant had made any prior arrangement or engaged in a common scheme to shoot a Miami police

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[6] *Arsis* made no reference to *Escobar* and, as a matter of fact, no appellate court has ever cited to the *Escobar* decision.

officer if stopped for a traffic infraction. Without a factually sufficient predicate showing concerted action at the time the alleged statement was made, Defendant's statement should have been ruled inadmissible as an admission against interest. This is especially so where the State alleged that it was Dennis, the co-defendant, and not Douglas, the Defendant, who shot the victim. See Gueits v. State, 566 So.2d 829 (Fla. 4th DCA 1990); and State v. Edwards, 536 So.2d 288, 294 (Fla. 1st DCA 1988).

Evidence of the shoot-out with the California Highway Patrol committed one month subsequent to the charged offense was not relevant to show Defendant's consciousness of guilt or to establish the Defendant's involvement in the charged offense.

The Third District held that evidence of the defendants' involvement in a California shoot-out[7] on April 27, 1988 (approximately one month after the March 30, 1988 Miami shooting of Officer Estefan) was admissible as relevant to establish the defendants' consciousness of guilt and involvement in the charged offense. Escobar at 1345.

In Merritt v. State, 523 So.2d 573 (Fla. 1988), the Florida Supreme Court held that flight evidence is admissible as relevant to the defendant's consciousness of guilt only where there is sufficient evidence that the defendant fled to avoid prosecution of the charged offense. Id., at 574. See Straight v. State, 397 So.2d 903, 908 (Fla. 1981), cert. denied, 454 U.S. 1022, 102 S.Ct. 556, 70 L.Ed. 2d 418 (1981). In Merritt, the defendant escaped custody while serving time on an unrelated conviction eight months after he was informed that he was

[7]Since the Third District described the California incident of April 27, 1988 as a "shoot-out", the Defendants use the same descriptive phrase in this Brief to avoid confusion. The term "shoot-out" however may be a misnomer in that it implies the Escobars and the police were both actually shooting at one another; in fact, the uncontroverted evidence at trial established that the Defendant attempted to shoot at a California police officer and his gun jammed without any shots being fired, (R. 4911) the co-defendant did not have a gun, (R. 4969-4970) and the California police then shot both Defendants. (R. 4913, 4935).

a suspect in a murder investigation. Merritt was subsequently tried and convicted of the murder. On appeal, this Court held evidence of the escape inadmissible where the inference that the defendant escaped to avoid prosecution for murder was pure speculation. Id., at 475.

In the present case, it is more likely that the Defendant engaged in the California shoot-out because of his knowledge of outstanding warrants in California and not because of the Miami incident since there is no evidence that the Defendant had any knowledge that he was wanted for the Miami shooting at the time he engaged in the shoot-out in California. The probative value of flight evidence is severely weakened where the suspect(s) are unaware that they are the suspects of a criminal investigation for a particular crime. United States v. Beahm, 664 F.2d 414, 419-420, (4th Cir. 1981).

Moreover, the State's position throughout the defendants' trial was that the defendants shot and killed Officer Estefan during a traffic stop to avoid arrest on the California warrants; why then does the State suggest that the very next traffic stop and use of force to escape arrest was to avoid arrest in the Estefan murder rather than for the California arrest warrants? No evidence was introduced to show that it was more likely that the California shoot-out occurred because the defendants were attempting to avoid arrest for Estefan's murder rather than for the outstanding California warrants.

In ruling that evidence of the California shoot-out is relevant to consciousness of guilt, the Third District relied on Straight, supra and Perez v. State, 539 So.2d 600 (Fla. 3d DCA 1989). However, in both Straight and Perez, the courts did not address how much time elapsed between the "flight" and the charged offense. As in Merritt, the lapsed time, among other circumstances, is clearly relevant to determine whether consciousness of guilt can be inferred. This exact issue was addressed in United States v. Myers, 550 F.2d 1036 (5th Cir. 1977) which held that

evidence was insufficient to warrant giving instruction on flight as showing consciousness of guilt where the defendant purportedly attempted to flee on two occasions subsequent to the robbery (one in Florida approximately three weeks after the robbery and one in California approximately two months after the robbery). The Court found that the evidence did not demonstrate intentional flight "immediately after the commission of a crime or after [accusation] of a crime." Id. at 1050. The Court also found that where there were two robberies involved (one in Florida and one in Pennsylvania), it was impossible to say whether the California flight resulted from feelings of guilt attributable to the Florida and Pennsylvania robberies or from consciousness of guilt about the Pennsylvania robbery alone, and therefore no inference that he was guilty of the Florida robbery was possible. Id. at 1050.

In the case at bar, the traffic stop in California occurred one month after the charged offense in Florida and there is no evidence that the confrontation in California occurred as a result of any other reason than the outstanding warrants in California.

The Third District failed to apply the strict standard of relevancy in ruling admissible similar fact evidence which was not strikingly similar to the charged offense and shared no unique characteristics which set it apart from other similar offenses.

The Williams Rule imposes a two-prong test. After meeting the first prong, that the evidence is relevant and not intended solely to demonstrate criminal propensity, the second requirement for admissibility is that the two crimes must share some unique feature suggesting the same perpetrator. State v. Savino, 567 So.2d 892, 894 (Fla. 1990); State v. Smith, 586 So.2d 1237 (Fla. 2nd DCA 1991). To meet the strict standard of relevance and admissibility prescribed by Fla. Stat. Sec. 90.404(2), the charged offense and the collateral offense "must be not only strikingly similar, but they must also share some unique characteristics

or combination of characteristics which sets them apart from other offenses." Heuring v. State, 513 So.2d 122, 124 (Fla. 1987). This Court in Heuring set forth the relevancy standard to be applied:

> "Similar fact evidence that the defendant committed a collateral offense is inherently prejudicial. Introduction of such evidence creates the risk that a conviction will be based on the defendant's bad character or propensity to commit crimes, rather than on proof that he committed the charged offense. (citations omitted) Such evidence is, therefore, inadmissible if solely relevant to bad character or propensity to commit the crime. (citations omitted) To minimize the risk of wrongful conviction, the similar fact evidence must meet a strict standard of relevance. The charged and collateral offenses must be not only strikingly similar, but they must also share some unique characteristics which sets them apart from other offenses."

Id. at 124.

Continuing, the Court, citing from People v. Hatson, 69 Cal.2d 233, 444 P.2d 91, 70 Cal.Rptr. 419 (1968), stated that even where the offense charged and the collateral offense share certain marks of similarity, these marks may also be shared equally by other acts or offenses that may be committed by persons other than the defendant, and thus the marks of similarity between the charged and the collateral offense sought to be admitted must operate logically to set these two offenses well apart from all other crimes of the same general variety that may have been committed by someone other than the defendant. Heuring, at 124. This "striking similarity requirement" applies even when identity is not an issue. Edmond v. State, 521 So.2d 269, (Fla. 2d DCA 1988).

In the case at bar, evidence of Defendant's collateral crimes was not strikingly similar to the charged offense; nor were there any unique characteristics that would indicate that the Defendant and the co-defendant were the perpetrators. The California confrontation, however, was not strikingly similar to the charged offense in the case at bar which occurred in Florida. In the charged offense in Florida there were two suspects, one police officer, and the co-defendant, DENNIS ESCOBAR,

was alleged by the State to be the triggerman and in possession of the gun (R. 4231). In the California incident, there were three suspects, two police officers, and the Defendant, DOUGLAS ESCOBAR, was the triggerman in possession of the gun who attempted to shoot at police (R. 4907). The police officers in California were not shot by the defendants (R. 4889-4974), but in the charged offense the police officer was shot and killed (R. 4231). The alleged shooter in the case at bar, DENNIS ESCOBAR, made no attempt to shoot at the police officers in California, but rather struggled to obtain a baton from one of the police officers and then engaged in a heated struggle on the ground (R. 4929-4930). In the California case, there was no evidence that the Defendant, DOUGLAS ESCOBAR, encouraged his brother, DENNIS, to participate in the confrontation, even though in the case at bar DOUGLAS was alleged to have told DENNIS "shoot him" if he gets out of the car (R. 5210). In both the California case and the case at bar, there were no "unique characteristics" which would set these crimes apart from the general variety of crimes involving the use of a handgun in an attempt to avoid lawful arrest and resisting arrest with violence.

Evidence that the defendant has committed a similar crime, or one equally heinous, will frequently prompt more ready belief by the jury that he might have committed the one with which he is charged, thereby predisposing the mind of the juror to believe the prisoner guilty. Keen v. State, 504 So.2d 396 (Fla. 1987). In the case at bar, there can be no doubt that evidence of the California confrontation prompted a more ready belief by the jury that the defendants committed the crime charged. The admission of this evidence without meeting the required standard of "strikingly similar" characteristics was harmful and reversible error.

Even if the collateral crimes evidence was admissible, use of this evidence constituted reversible error where the State made the California incident the featured theme of its prosecution.

Even if the collateral crimes evidence in the case at bar was relevant and admissible, it is reversible error to allow evidence of this nature to be given undue emphasis by the State and made the focal point of the trial. State v. Lee, 531 So.2d 133 (Fla. 1988); Ashley v. State, 265 So.2d 685 (Fla. 1972); Matthews v. State, 366 So.2d 170 (Fla. 3d DCA 1979); Travers v. State, 578 So.2d 793 (Fla. 1st DCA 1991); Mattera v. State, 409 So.2d 257 (Fla. 4th DCA 1982).

It is evident from the record that the State's extensive utilization of the evidence of the California incident in the case at bar was to emphasize the defendants' involvement in this other crime, thereby implicating the defendants with a criminal propensity. The State's case in chief focused on the defendants' collateral crimes as a feature theme and not just an incident.[8] Evidence of the California incident was emphasized during the State's opening remarks, on each day of the six day trial as to the guilt phase, and during closing argument by the State.[9]

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[8]State Witness, California Trooper Grant Kell acknowledged that his testimony regarding the California offense provided to the Miami jury was just as graphic and detailed as provided at Defendants' California trial. (R. 4954-4955).

[9]The prosecution's overemphasis of defendants' collateral crimes began with the first State witness, Lieutenant Amoroso, from the San Jose, California Police Department. Amoroso testified solely about collateral crimes committed by the Defendant. Amoroso stated that the Defendant had committed some felony crimes, and that on October 27, 1987, she had obtained a warrant for his arrest. (R. 4275). Five times she stated that the Defendant was a wanted person. (R. 4275, 4277). In addition, she testified that an unlawful flight to avoid prosecution warrant was issued on the Defendant (R. 4278). On the second day, Sergeant Bohan testified about the California incident (R. 4590 - 4600). On the third day of trial, the State's witness, Douglas Saballos, testified that the Defendant was wanted in California, that the Defendant bragged about being known as the "Bandit of Camino Real" because of his "chain" of hold-ups, and that the Defendant was involved in the California shoot-out (R. 4810-69).

The predominant testimony on the third day of trial was from Trooper Grant Kell, a California officer who testified exclusively about the California incident. Trooper Kell described in graphic detail the California shootout between authorities and the defendants which occurred approximately one month after the charged offense. (R. 4889-4999). The California incident was further highlighted during Trooper Kell's testimony when the State admitted into evidence an assortment of photographs and sketches portraying the scene and surrounding area where the shooting incident took place (R. 4901, 4902, 4917); a photograph of the weapon found on the Defendant (R. 4945); and a photograph of the injuries sustained by one of the troopers at the scene during the course of the California incident. (R. 4975). Kell also testified that during the Defendant's trial for the California shootout, the Defendant told Trooper Kell, during a recess, that

Prior to commencement of the trial, the defendants argued that the California incident would become the feature theme of the State's case and was only being introduced to show the defendants' bad character and propensity to commit the charged offense (R. 718, 719). After hearing argument on this issue by both the defendants and the State, the trial judge ruled this Williams Rule evidence inadmissible (R. 99-100), but this order was later reversed by the Third District Court of Appeal. See State v. Escobar, 570 So.2d 1343 (Fla. 3d DCA 1990). The trial judge was nevertheless concerned that this evidence would become the focus of the case and cautioned the State (R. 4983-84). Despite this caution, it is apparent from the record that the defendants' collateral crimes became the feature theme of the State's prosecution. The State relied on so much Williams Rule evidence that at one point in the trial, the judge jokingly asked the State whether its next witness was a "Williams Rule witness or a regular witness or irregular witness" (R. 5101). At a later point in the trial, in addressing the State's request for admission of certain testimony, the trial judge remarked, "What is the relevance other than to show additional bad character for which we have already done that with all the stuff that we have from California" (R. 5458).

The record in the case at bar demonstrates clearly that the Williams

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he had no hard feelings indicating the injuries the Defendant sustained during the shootout. (R. 4952).

On the fourth day of trial, State witness Jose Bonilla testified that the Defendant told him that he was wanted in California for robbing a bank (R. 5003-4) and that the F.B.I. was looking for him (R. 5005). On the fifth day of trial, another State witness, Ramon Arguello, testified that the Defendant had previously put a pistol to Arguello's chest and threatened to kill him. (R. 5122). Later on the fifth day, Detective Morin's testimony was replete with references to the California incident (R. 5163-69, 5174-75, 5208, 5219, 5223, 5229, 5231, 5392). On the sixth and last day of trial, California Highway Patrol Sergeant Finale and California officer Ray Koenig testified at length and in great detail about the California shoot-out (R. 5505-50, 5568-5616).

In its opening argument, the State asked the jurors to pay close attention to the details of the California incident since this was a "crucial strand" of the proof of the State's case (R. 4213-18). In its closing argument, the State further emphasized the importance of the California incident as demonstrating that the defendants were "evil men" and "that's what is so important about the California episode." (R. 5843-4) and the State repeatedly referred to the California incident and other collateral crimes throughout the closing argument (R. 5858-59,5862, 5866, 5868-70, 5873, 5882-83, 5908, 5948, 5910-15, 5953-57).

Rule evidence was used as the focus of the State's prosecution to emphasize the bad character of the defendants and their propensity to commit crimes. The admission of this evidence was severely prejudicial to the defendants and is reversible error.[10]

The Third District erred in reversing the trial court's order which disallowed the William's Rule evidence where the trial court considered, and the Third District failed to consider, the probative value of the evidence versus the prejudicial effect.

In addition to arguing that the Williams Rule evidence was inadmissible, irrelevant, and was only being introduced to show the defendants' bad character, the Defendant further argued that any probative value of this evidence would be greatly outweighed by the prejudicial effect of such evidence (R. 718). Taking into account all of these arguments, the trial court issued an order denying the admissibility of the Williams Rule evidence (R. 99-100). The Third District reversed this order, but addressed only the relevancy of the evidence. State v. Escobar, 570 So.2d 1343 (Fla. 3d DCA 1990). However, even when relevant, such evidence nevertheless may be inadmissible under Fla. Stat. Sec. 90.403 "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence." See Turtle v. State, 600 So.2d 1214 (Fla. 1st DCA 1992); State v. Zenobia, 614 So.2d 1139 (Fla. 4th DCA 1993).

Having heard all of the arguments by the State and the defendants, and having reviewed applicable case law (R. 99-100), the trial judge implicitly considered that the probative value of the evidence was substantially outweighed by the prejudicial effect when he denied the admissibility of the Williams Rule evidence. Prior to opening statements

[10]Points IV and V of this Brief similarly address improperly admitted evidence of "similar" crimes and should be considered in tandem with this issue.

at trial, counsel for the co-defendant brought to the court's attention that the Third District ruling addressed only relevancy and that there was still an issue of probative value versus prejudicial effect (R. 4193). The trial court responded:

> As I understand they [the Third District] 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, 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 re-argue the situation at this time. I am going to do exactly what the Third District told me to do, allow the evidence in, period. [emphasis supplied] (R. 4194).

The defendants objected to the admission of all of the Williams Rule evidence (R. 707-728, 4193-4194, 4215, 4269-4270, 4971-4974, 4981-4987, 5023-5024, 5126, 5681, 5836). Notwithstanding the objections, all of this evidence was admitted and in fact became the focus of the State's prosecution.

The trial court had an obligation to apply a strict standard of relevancy and determine whether the prejudicial impact of the defendants' collateral crimes substantially outweighed the probative value of the evidence, especially so where the Defendants were charged with first degree murder and faced a sentence of death. In applying this balancing test, the court necessarily exercises its discretion. State v. McClain, 525 So.2d 420 (Fla. 1988). The same item of evidence may be admissible in one case and not in the other, depending upon the relation of that item to the other evidence. Id. at 422. A broad discretion rests with the trial court to determine whether the probative value of the evidence sought to be admitted is substantially outweighed by any of the reasons enumerated in the statute [Fla. Stat. Sec. 90.403]. Id.; Lewis v. State, 570 So.2d 412 (Fla. 1st DCA 1990). Where the trial court has weighed probative value against confusion of issues, unfair prejudice, misleading

the jury, or needless presentation of cumulative evidence, the decision to admit or exclude evidence will not be disturbed on appeal absent a showing of abuse of discretion. Jent v. State, 408 So.2d 1024 (Fla. 1981), cert. denied, 457 U.S. 1111, 102 S.Ct. 2916, 73 L.Ed.2d 1322 (1982); Mikenas v. State, 367 So.2d 606 (Fla. 1979); State v. Wright, 473 So.2d 268 (Fla. 1st DCA 1985); Kemp v. State, 464 So.2d 1238 (Fla. 1st DCA 1985).

The trial court did not abuse its discretion in denying admission of the Williams Rule evidence where the trial court considered the arguments of the State and the defendants, and applicable case law, and implicitly applied a balancing test in reaching its determination that the evidence was inadmissible. The record supports the concerns of the trial court that the Williams Rule evidence would be used as a focal point of the State's prosecution and, in its totality, shows that the prejudicial impact of this evidence outweighed its probative value. The Third District's reversal of the trial court's order that the Williams Rule evidence of collateral crimes should be inadmissible, and the subsequent admission of this evidence, was harmful error and this cause should be reversed for a new trial excluding the prejudicial evidence.

POINT IV

THE TRIAL COURT ERRED IN ADMITTING PHOTOGRAPHS AND SKETCHES OF DEFENDANTS' COLLATERAL CRIMES THAT OCCURRED APPROXIMATELY ONE MONTH AFTER THE CHARGED OFFENSE WHERE SUCH EVIDENCE OVEREMPHASIZED AND HIGHLIGHTED A CRIME FOR WHICH DEFENDANTS HAD ALREADY BEEN TRIED AND CONVICTED AND THE PREJUDICE TO THE DEFENDANTS SUBSTANTIALLY OUTWEIGHED THE PROBATIVE VALUE THAT SUCH EVIDENCE SERVED.

On January 9, 1991, the State called California State Trooper Grant Kell as a witness to testify solely about the California shoot-out he was involved in with the defendants on April 27, 1987, approximately one month after the charged crime for which the defendants were on trial in the present case. (R. 4887). The trial court instructed the jury that

Trooper Kell's testimony was to be considered for the limited purposes of (1) proving consciousness of guilt as to both defendants, and (2) identity of the Defendant, DOUGLAS ESCOBAR. (R. 4890). The co-defendant and the Defendant, by adoption, objected to the admissibility of this testimony. (R. 4890). [The Defendant adopted all objections made by the co-defendant. (R. 2186-2188)].

The California incident became the featured theme of the State's prosecution to emphasize the bad character of the Defendants and their propensity to commit crimes. (See Point III, at pages 34-37, supra).

The testimony Trooper Kell provided in court "here" was just as graphic and detailed as the testimony he provided at Defendant's California trial. (R. 4954-4955). The State highlighted Kell's graphic testimony describing the California incident by admitting an assortment of photographs and sketches into evidence representing a day-time view of the positioning of the defendant's vehicle with that of the California Troopers' vehicle and empty casings from bullets Trooper Kell shot at the defendants' vehicle on the night of the California shoot-out (Exhibit 55 R. 4901); a night time view of the same scene (Exhibit 56, R. 4902); a sketch portraying the manner in which the California incident ended on April 27, 1988, i.e., the location of the defendants, the vehicles, and trees and bushes in the area (Exhibit 57, R. 4916-4917); a photograph of a semi-automatic pistol found on the Defendant on the night of the California incident (Exhibit 58, R. 4947-4948); a closeup photograph of the Defendant's semi-automatic pistol with a projectile jammed into it (Exhibit 59, R. 4948-4949); and a photograph of the actual injuries sustained by Officer Koenig, Trooper Kell's partner, during the course of the California incident. (Exhibit 60 R. 4974-4975).

Florida Statute Section 90.403 provides in pertinent part:

> Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury or needless presentation of cumulative evidence.

In Bryan v. State, 533 So.2d 744 (Fla. 1988), cert. denied, 490 U.S. 1028, 109 S.Ct. 1765, 104 L.Ed.2d 200 (1989) the Florida Supreme Court relied on this statute in ruling that although a photograph of defendant with a sawed-off shotgun committing a bank robbery was relevant to possession of the murder weapon prior to the crime for which he was on trial, the probative value of the photograph was substantially outweighed by the danger of unfair prejudice. Id. at 747.

In the present case, although evidence of the defendants' shoot-out with California authorities was ruled admissible for the limited purpose to prove both defendants' consciousness of guilt and identity of the Defendant, the trial court erred in permitting the State to overzealously emphasize, through photographs and sketches, a crime for which the defendants had already been tried and convicted. As in Bryan, the photographs and sketches admitted here added little to the evidence but unfair prejudice. The inordinate emphasis on this separate and unrelated crime was severely prejudicial because it created the danger of unfair prejudice and confusion of the issues. The extensive and detailed description of the unrelated crime coupled with improper use of photographs and sketches was used to create an unwarranted correlation between the unrelated crimes in the jury's mind, and went far beyond the limited purposes for which it was elicited. The overwhelming exposure and concentrated analysis of Defendants' collateral crimes through the use of photographs and sketches so inflamed the minds of the jurors that any probative value was substantially outweighed by the extreme prejudice to the defendants. This Court has recently reversed a conviction where photographs of a separate violent crime were admitted into evidence over defense objection. Elledge v. State, 613 So.2d 434 (Fla. 1993), *Also see*, Duncan v. State, 619 So.2d 279, 284 (Kogan, J., dissenting). This cause should be reversed and remanded for a new trial where, as in Elledge and Duncan, inflammatory evidence of a separate and unrelated

crime confused the issues and prejudiced the jury thus depriving the Defendant of his fundamental right to a fair and impartial trial.

POINT V

THE TRIAL COURT ERRED IN ADMITTING EVIDENCE THAT THE DEFENDANT WAS THE "BANDIT OF CAMINO REAL", AND OTHER NON-NOTICED AND NON-APPROVED EVIDENCE OF COLLATERAL CRIMES WHERE THE EVIDENCE WAS NOT RELEVANT TO PROVE A MATERIAL FACT AT ISSUE AND WAS RELEVANT SOLELY TO PROVE BAD CHARACTER OR PROPENSITY TO COMMIT THE CRIME CHARGED.

During the trial of the defendants the State introduced Williams Rule evidence of collateral crimes pursuant to a notice of intent filed by the State (App. 2) and a ruling by the Third District Court of Appeals [State v. Escobar, 570 So.2d 1343 (Fla. 3d DCA 1990)] that this evidence was relevant and admissible. In addition to this approved Williams Rule evidence, however, the trial court allowed into evidence a substantial amount of non-approved, non-noticed evidence of collateral crimes which was not relevant to any material fact in issue and was solely relevant to show the Defendant's bad character and propensity to commit crime.

During the trial, State witness Douglas Saballos testified that the Defendant informed him that he was wanted by the authorities in California (R. 4819-4821). Saballos also stated that the Defendant bragged about being known as the "Bandit of Camino Real" because of his "chain" of holdups (R. 4820). The Defendant objected to this testimony (R. 4809).

State witness Ramon Arguello testified that the Defendant had previously put a pistol to Arguello's chest and threatened to kill him (R. 5122). The Defendant's objection to this testimony was overruled (R. 5122) and the Defendant moved for a mistrial stating that the co-defendant's use of non-approved Williams Rule evidence was totally improper and irrelevant (R. 5126). This motion for a mistrial was denied

(R. 5126).

Fla. Stat. Section 90.404(2)(a) provides that similar fact evidence of other crimes is admissible to prove a material fact in issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake. None of the non-approved Williams Rule evidence in the case at bar had any relevancy to the acceptable grounds enumerated in the statute. This evidence added nothing to the State's case other than to unnecessarily prejudice the Defendant. Where evidence has no relevancy except as to the character and propensity of the defendant to commit the crime, it must be excluded. Jackson v. State, 451 So.2d 458 (Fla. 1984); Conley v. State, 599 So.2d 236 (Fla. 4th DCA 1992); Delgado v. State, 573 So.2d 83 (Fla. 2nd DCA 1990).

In Delgado, the defendant's girlfriend testified that she and the defendant were involved in illegal drug activity and that the defendant boasted to her earlier in the day on the day of the murder that he had killed ten men. In reversing Delgado's conviction for first-degree murder, the court found that the State failed to prove that Delgado had in fact committed any prior killings and the statement should have been excluded. Id. at 85. The court further found that the trial court erred in admitting evidence of Delgado's involvement in illegal drug activity. Id. at 85. As in Delgado, in the case at bar admitting evidence that the Defendant was the "El Camino Bandit," and that he had threatened to kill someone with a gun was reversible error. The Defendant's alleged threat to kill Arguello was wholly irrelevant to the killing of Officer Estefan during a routine traffic stop. The jury undoubtedly considered this evidence as proof of bad character and propensity to commit crimes such as the crime charged.

The admission of this non-approved prejudicial Williams Rule evidence changed the focus of the trial from guilt or innocence to an examination of the Defendant's bad character and alleged propensity to

commit the crime charged. The error was harmful and reversible where the Defendant was deprived of his fundamental right to a fair and impartial trial.

POINT VI

THE TRIAL COURT DEPRIVED THE DEFENDANT OF DUE PROCESS OF HIS RIGHTS IN OBTAINING A COMPLETE RECORD ON APPEAL WHERE THE TRIAL JUDGE ASKED THE STATE TO PREPARE AND FILE A MOTION FOR REJOINDER OR CONSOLIDATION IN AN *EX PARTE* COMMUNICATION WITH THE PROSECUTOR OR IN AN OFF-THE RECORD HEARING WITHOUT COUNSEL FOR BOTH DEFENDANTS PRESENT.

The Defendant and co-defendant were indicted jointly on charges of first degree murder (R.1-3). The Defendant filed a Motion for Severance alleging that the State would introduce into evidence at trial confessions made by the co-defendant which were inadmissible against the Defendant (R.34). The trial court granted Defendant's Motion for Severance on May 24, 1990 (T.1253-1254). On September 19, 1990 a hearing was held to review and report the status of the case (R.1350-1356). During that hearing the following colloquy ensued between the trial judge and the State:

Trial Court: You still haven't got me what I asked you to get me last week. [emphasis supplied] (R.1353)

Mr. Mendelson: Judge, I'll have that to you today. I have prepared a Motion for Rejoinder or Consolidation with a cover letter explaining as you indicated and I think Mr. Cohn and Mr. Carter are aware of that. We just need a hearing on that motion. [emphasis supplied] (R.1353)

Later, the same afternoon, the State filed a Motion for Rejoinder or Consolidation (R.124-130), which the trial court granted (R.131).

The only hearing on record immediately preceding the September 19, 1990 hearing was held on August 27, 1990 (R.1344-1349), more than three weeks prior to the trial judge's statement that, "you still haven't got me what I asked you to get me last week" (R.1353). Nothing in the record of the August 27, 1990 hearing indicates that the State was asked to prepare or submit a motion, and no such discussion took place on the record between the court, the State and trial counsel for the Defendant

and co-defendant during that hearing or at any other time on the record.

The trial judge's specific remark to the State about its failure to provide the trial judge what he asked the State to provide the previous week, and the State's immediate reply to this comment that the Motion for Rejoinder or Consolidation had been prepared, and the State's filing of that Motion just hours later, evidences that some communication transpired between the State and the trial judge on the subject of the Motion to Consolidate. Appellate counsel for Defendant, DOUGLAS ESCOBAR, exhaustively reviewed the record and conferred with trial counsel to determine why the trial court would reverse its initial position and ask the State to file a motion to the detriment of the Defendant. In the absence of any evidence in the record that would shed light on this issue, Appellate counsel for DOUGLAS ESCOBAR filed with this Court a Motion to Remand to Reconstruct the Record, Appoint a Master or Referee to Conduct an Evidentiary Hearing, Motion to Supplement the Record and Motion for Extension of Time (App. 28-35). This Court granted the motion for remand to reconstruct the record (App. 40-41).

On January 11, 1993 this Court issued an Order appointing a Special Master to conduct an evidentiary hearing at which the prosecutor, defense counsel, and trial judge should testify and be subject to cross-examination regarding the off-the-record or *ex parte* communications surrounding the reversal of the trial judge's order of severance and granting of the State's motion to consolidate trials (App. 43-45). On March 31, 1993, this Court granted Appellant DOUGLAS ESCOBAR'S Motion to Clarify Order Appointing Master (App. 47-50) and ordered that the Master conduct an evidentiary hearing at which he would carefully consider all of the testimony, credibility and demeanor of the witnesses, and render factual findings and appropriate recommendations (App. 55). Evidentiary hearings in this cause were held on April 16, 1993 and on May 28, 1993 (HT. 1-190). The following relevant testimony was given:

Prosecutor Michael Band (assistant trial prosecutor) testified that he had no real independent recollection of the remarks or events surrounding the September 19, 1990 hearing (HT. 25-26). Mr. Band testified that during the course of September, "either in the hallway, deposition, or sometime -arranging trips, for instance" - he probably had a conversation with defense counsel relating to the filing of the motion for rejoinder (HT. 28). Mr. Band did not have any independent recollection of approaching the trial judge and indicating to him the State was going to file a motion (HT. 28). Mr. Band testified that throughout the summer of 1990 informal meetings for status reports on the case took place in the judge's chambers with all counsel present but without a reporter (HT. 41-42). Mr. Band testified that he, Mr. Galanter (counsel for DOUGLAS ESCOBAR) or Mr. Cohn (co-counsel for DOUGLAS ESCOBAR) or Mr. Carter (co-counsel for DENNIS ESCOBAR) would routinely meet with the judge in chambers during his break to discuss travel and scheduling matters (HT. 43-44).

Prosector Paul Mendelson (prosecutor in charge of legal issues and with whom the September 19, 1990 dialogue with the judge occurred) testified that he did not recall ever advising defense counsel prior to September 19, 1990 that the State would seek rejoinder and did not specifically recall any meeting during the period between September 1-19, 1990 (HT. 49). Mr. Mendelson had no specific recollection of what the judge was asking him for (HT. 53) or what the words "explaining, as you indicated" meant (HT. 56).

Judge Shapiro testified that he had no direct recollection of when he may have seen Mr. Mendelson in order to ask him for something (HT. 88). Judge Shapiro had some vague recollection that on occasion, after a hearing, all the attorneys would go back to chambers and discuss matters such as scheduling problems and how discovery was coming along (HT. 89). Although he had no specific recollection, Judge Shapiro

speculated that either Mr. Mendelson or Mr. Band and other attorneys were in his chambers a week or two or three prior to the September 19, 1990 hearing and mention may have been made of a rejoinder, and that he ruled on the rejoinder in the presence of all the parties and probably said, "get me a copy of that." (HT. 90). Judge Shapiro did not recall whether he had spoken with someone the week prior to the hearing, but testified it was very possible that he had spoken alone with Mr. Galanter or Mr. Cohn (co-counsel for DOUGLAS ESCOBAR) with the concurrence of the State regarding costs for an investigator, a psychiatrist, or whatever (HT. 92).

Mr. Carter (trial counsel for DENNIS ESCOBAR) testified that he recalled the September 19, 1990 hearing, but did not recall being present for any conferences or meetings with Judge Shapiro and any of the assistant state attorneys the previous week (HT. 103-4). Mr. Carter recalled frequent informal meetings with the judge in his chambers without a court reporter, but did not recall if any meetings were held in September, 1990 (HT. 107). Mr. Carter had no recollection of what the judge and prosecutor were talking about at the September 19, 1990 hearing, but his testimony was unequivocal that prior to that date he was unaware that there was going to be a motion to rejoin the defendants and that there had been no prior discussions on that issue (HT. 111).

Mr. Cohn (co-trial counsel for DOUGLAS ESCOBAR) testified that he did not remember having any conversations with any of the assistant State attorneys prior to the September 19, 1990 hearing regarding the motion for rejoinder and was not paying attention to the dialogue between the prosecutor and the judge at that hearing (HT. 113). Mr. Cohn recollected that whenever they talked about the case there was a court reporter present and that if a hearing was ever adjourned to chambers to discuss procedural matters or otherwise, it was because the case was already on the calendar and docketed (HT. 117).

Mr. Galanter (co-trial counsel for DOUGLAS ESCOBAR) testified that he did not know what the judge was referring to when he said, "you still haven't gotten me what you promised last week" (HT. 125). Mr. Galanter recalled being advised by Mr. Mendelson that he was going to move to have the case rejoined (HT. 126), but did not recall ever discussing the rejoinder issue with the prosecutors and the judge prior to the September 19, 1990 hearing (HT. 129). Mr. Galanter testified that there were a lot of ad hoc conversations or meetings involving himself, the court and the prosecutors concerning travel and expenses, and that he didn't recall a court reporter being present at those meetings (HT. 134).

The Special Master found (1) that no witness testified to any recollection of any form of *ex parte* communication as it related to the issue of rejoinder, and (2) that Mr. Galanter recalled talking with Prosecutor Mendelson about the State's intention to file a Motion for Rejoinder, and believed the subject may have been raised during one of the frequent meetings with the trial judge, attended by attorneys for both sides. The Special Master concluded that no evidence was presented to support a claim that an improper communication took place concerning the motion for rejoinder of the defendants, other than the September 19, 1990 hearing transcript and that there is no evidence or factual basis to support the claim that there was any form of *ex parte* communication which preceded the September 19, 1990 hearing (App. 83-84).

The Special Master's effort to reconstruct the record was essentially fruitless since no party had any independent recollection of discussion regarding the issue of rejoinder in the presence of the trial judge, the prosecutors and all defense counsel prior to the September 19, 1990 hearing. The only evidence of such discussion was the transcribed dialogue between the trial judge and Prosecutor Mendelson on September 19, 1990 where the judge specifically asked the prosecutor to get him what he had asked for a week earlier, as was explained. (R. 1353). This

discussion regarding rejoinder, including the scope and content, and the role the judge played in requesting this motion to the detriment of the defendants, is not a part of the original record and cannot be reconstructed. This Court and the defendants can now only speculate, as did several witnesses called at the evidentiary hearing, that the discussion took place at an off-the-record meeting between the judge, the prosecutor, and trial counsel for DOUGLAS ESCOBAR, or that it was an improper *ex parte* communication between the prosecutor and the trial judge. Arthur Carter, trial counsel for DENNIS ESCOBAR was unequivocal in his testimony that he had not been present at a meeting prior to September 19, 1990 where a discussion took place about the issue of rejoinder, and so we are certain that at least one party was excluded from discussion regarding this substantial and important issue. (HT. 111). Since the case had not been consolidated at the time of the September 19, 1990 hearing, it was clearly detrimental to the rights of the defendants to engage in any discussion about a substantial issue outside the presence of independent counsel for each of the defendants. The only other certainty established at the evidentiary hearings is that the trial judge, prosecutors, and defense counsel routinely engaged in informal off-the record meetings.

This Court in Rose v. State, 601 So.2d 1181 (Fla. 1992), was expressly concerned about the judicial practice of requesting one party to prepare a proposed order for consideration which request was not made in the presence of both parties. The Rose court was concerned with the insidious result of *ex parte* communications, regardless of actual prejudice, and stated that the impartiality of the trial judge must be beyond question. Id. at 1183. In the case at bar, the trial judge engaged in discussion regarding the issue of rejoinder and requested that the State submit a motion and/or order for rejoinder of the defendants, and the evidence shows that this request was made outside the presence

of counsel for at least one defendant, and possibly both. Even if this discussion took place at a routine off-the-record conversation about procedural concerns such as scheduling matters, the subject matter of the discussion was sensitive, critical, and substantive rather than procedural, and such a conversation was not proper if it excluded one of the parties. In his concurring opinion in Rose, Justice Harding expressly concluded that there were few, if any, administrative matters which would require or justify an *ex parte* communication with a judge. Rose at 1184. Justice Harding further opined that even in setting a case, if all parties are not involved in setting the case it will be assumed that there was an *ex parte* communication with the judge. Id. at 1184. "*Ex parte* communications with a judge, even when related to such matters as scheduling, can often damage the perception of fairness and should be avoided where at all possible." Id. at 1184. The facts of this case clearly involve the kind of *ex parte* communication frowned upon and prohibited under Rose.

As a result of the trial judge engaging in a discussion about the issue of rejoinder off the record, possibly *ex parte* with the prosecutor or possibly at a routine scheduling meeting, the defendant has been deprived of his right to due process and effective assistance of counsel which entitles him to a complete record on appeal. Lipman v. State, 428 So.2d 733 (Fla. 1st DCA 1983); Loucks v. State, 471 So.2d 131 (Fla. 4th DCA 1985). This is especially true in a capital case which involves a unique need for reliability under the Eighth Amendment and Article I, Section 17, and involves a broader scope of appellate review. Delap v. State, 350 So.2d 462 (Fla. 1977).

Since the recollection of the parties does not allow a complete and accurate reconstruction of the record, the defendant will not be able to avail himself of a complete record on appeal. The appearance of unfairness in this case is great. The extent of prejudice suffered by

the defendant as a result of the trial judge's request to the State for a motion for consolidation or rejoinder will never be known absent a complete and accurate record. This cause should be reversed and remanded with instructions that a new and impartial trial be held.

POINT VII

THE TRIAL COURT ERRED IN GRANTING THE STATE'S MOTION FOR REJOINDER OR CONSOLIDATION OF DEFENDANTS WHERE THE INADMISSIBLE HEARSAY STATEMENTS OF THE CO-DEFENDANT WERE NOT SUFFICIENTLY RELIABLE TO SATISFY THE REQUIREMENTS OF THE SIXTH AMENDMENT CONFRONTATION CLAUSE.

The Defendant filed a Motion to Sever his trial from his co-defendant on May 14, 1990, pursuant to Fla.R.Crim.P. 3.152(b), on the basis that the Defendant expected the State to introduce into evidence at trial certain statements, admissions and confessions of the co-defendant making reference to the defendant's participation in the crimes charged. (R. 34). In response to the Defendant's Motion for Severance, the State announced that it had no objection to the severance (R. 1253) and the trial court granted the severance to ensure that nothing would be carried over from one defendant to the other in front of the jury (R. 1253-54).

Four months later, on September 19, 1990, the State filed a Motion for Rejoinder or Consolidation of Defendants (R. 124-130). In its motion, the State acknowledged that the court's earlier ruling granting the motion for severance was correct (R. 124), but argued that a statutory change which was to become effective on October 1, 1990, in Fla. Stat. Section 90.804(2)(c), Hearsay exceptions, declarant unavailable, now permitted the consolidation of the trials of the Defendant and the co-defendant. (R. 125). Fla. Stat. Section 90.804(2)(c) (1989) as in effect at the time the offenses were committed that are the subject of this case read as follows:

(2) Hearsay exceptions. - The following are not excluded

under s. 90.802, provided that the declarant is unavailable as a witness:

> (c) Statement against interest . . . A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is inadmissible, unless corroborating circumstances show the trustworthiness of the statement. A statement or confession which is offered against the accused in a criminal action, and which is made by a codefendant or other person implicating both himself and the accused, is not within the exception. [emphasis supplied]

The amendment to this statute which became effective October 1, 1990, deleted in its entirety the last sentence of paragraph (c) of the former statute (emphasis supplied above), leaving intact the remaining portion of the statute.

In granting the State's Motion for Consolidation, the trial court ruled that "based on the change in the law it will not be error of any court to try the two defendants and to admit the confessions." (R. 1370). The trial court rejected defendant's argument that the application of the revised statute was a violation of the constitutional prohibition against *ex post facto* laws, ruling the change "procedural" rather than "substantive" (R. 1361) even though acknowledging that "it goes to the substance" (R. 1361) and "it may have some substantive right that may be affected." (R. 1362).

The Co-Defendant's Statements did not Interlock on Significant Material Facts and were not Sufficiently Reliable to Satisfy the Requirements of the Sixth Amendment Confrontation Clause

Notwithstanding the possible *ex post facto* violation in admitting the co-defendant's confession, the trial court erred in concluding that the co-defendant's confession interlocked with the Defendant's statements. The trial court accepted the State's argument in its Motion for Consolidation that the interlocking nature of the confessions established that they are sufficiently reliable to withstand a Confrontation Clause objection, and are sufficiently trustworthy to be

admissible as statements against interest. (R. 125).

The admission of the co-defendant's confession implicating the Defendant, DOUGLAS ESCOBAR, in the joint murder trial was critical to the State in making its case against the Defendant. Since there were no eyewitnesses to the murder, the only evidence of the Defendant's involvement in the charged offense was from the separate statements of the Defendant and co-defendant. Although the State is correct that the defendants' confessions in this case interlock on some details (R. 128), the statements are not similar with respect to significant details and were not sufficiently reliable to satisfy the requirements of the Sixth Amendment Confrontation Clause as required in Bruton v. United States, 391 U.S. 124, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968).

In Bruton, Id., the United States Supreme Court held that a defendant was deprived of his rights under the Confrontation Clause when his co-defendant's incriminating confession was introduced at their joint trials, even where the jury was instructed to consider that confession only against the co-defendant. The Supreme Court noted that not only are these incriminations devastating to the defendant, but their credibility is inevitably suspect, given the motivation to shift blame onto others. Bruton, Id. at 136, 88 S.Ct. at 1628 (1968).

In Cruz v. New York, 481 U.S. 186, 107a S.Ct. 1714, 95 L.Ed.2d 162 (1987), the Supreme Court, following Bruton, held that it was a violation of the Confrontation Clause and error to admit the co-defendant's confession to both his friend and police officers, incriminating the defendant, even though the defendant's own confession to the same friend was admitted against him. The court further stated, however, that the defendant's confession could be considered at trial in assessing whether his co-defendant's statements were supported by a sufficient "indicia of reliability" to be directly admissible against him and may be considered on appeal in assessing whether any Confrontation Clause violation was

harmless. Cruz, Id. at 194, 107 S.Ct. 1719 (1987).

The Florida Supreme Court has addressed the issue of admissibility of interlocking confessions in a joint trial. See, Puiatti v. State, 521 So.2d 1106 (Fla. 1988); Glock v. Dugger, 537 So.2d 99 (Fla. 1989); Grossman v. State, 525 So.2d 833 (Fla. 1988); and Roundtree v. State, 546 So.2d 1042 (Fla. 1989). In Roundtree and Grossman the court found that it was error to admit the interlocking confessions of the co-defendant pursuant to the decisions in Cruz v. New York, 481 U.S. 186, 107 S.Ct. 1714, 95 L.Ed.2d 162 (1987), and in Lee v. Illinois, 476 U.S. 530, 106 S.Ct. 2056, 90 L.Ed.2d 514 (1986), although in Grossman error was harmless and in Roundtree error was reversible. In Puiatti and Glock (co-defendants at trial), the Florida Supreme Court distinguished Cruz, and found that error, if any, was harmless where the defendants not only entered into separate interlocking confessions, but they also subsequently entered into a joint confession resolving all prior inconsistencies. Glock, at 102; Puiatti, at 1108. The significant factor which the Florida Supreme Court applied in Glock and Puiatti, as in Cruz v. New York, was the "indicia of reliability." In Glock and Puiatti all prior inconsistencies were resolved by joint confession thus preventing the co-defendants from having to defend against each other at trial in addition to defending against the State.

In the case at bar, there was no indicia of reliability where there were many inconsistencies which were never resolved by joint confession. The Defendant, DOUGLAS ESCOBAR, while recovering from surgery and on heavy doses of pain medication (R. 1125), was overheard to say "I killed an officer" (R. 886). DOUGLAS later said to Detective Morin, the victim's fellow comrade for fourteen years (R. 5128), "I am not a killer . . . only a car thief" (R. 927-928). According to two conflicting versions offered by Detective Morin, DOUGLAS stated (1) the policeman got out of the car with his gun in his hand pointed at DENNIS when DOUGLAS

said "shoot him" (R. 934), and (2) when the policeman pulled up behind their car DOUGLAS said "if he gets out, shoot him" (R. 5210). The co-defendant, DENNIS ESCOBAR, refused to speak with the detectives on two occasions (R. 5179, 5238) and agreed to speak with the detectives only after Detective Morin told DENNIS that DOUGLAS had given a statement that DOUGLAS told DENNIS to shoot the police officer (R. 5241). DENNIS then gave the statement that he and his wife were home alone when DOUGLAS came into the house and told them he had just shot a policeman (R. 5241). DENNIS later adopted the version offered to him by Detective Morin that DOUGLAS told DENNIS "if he gets out, shoot him" (R. 5266). Even at trial Detective Morin acknowledged that he believed there was conflict between versions of how the gun was disposed of (R. 5271).

The facts in Roundtree v. State, 546 So.2d 1042 (Fla. 1989), are similar to the facts in the case at bar. In Roundtree, the Court ordered a remand to the trial court for a new trial in which the defendant and co-defendant would be tried separately where the confessions of the co-defendants interlocked on many details, but the discrepancies between the two confessions were significant. Id, at 1046. In Roundtree, there were no witnesses to the murder and the only evidence of Roundtree's participation (other than Roundtree's confession) was from the co-defendant's confession. In Roundtree the Court stated:

> When discrepancies involve material issues such as the roles played by the defendants and whether the crime was premeditated, a co-defendant's confession is not rendered reliable just because it happens to contain facts that interlock with the facts of defendant's statement.

Id. at 1046. As in Roundtree, the various statements of the Defendant and the co-defendant in the case at bar happen to interlock on details such as how they spent the day together on the day of the murder and how they participated in the theft of a car, but the material issues such as the roles played by the defendants in the murder and whether the crime was premeditated or spontaneous are neither interlocking nor reliable.

In Grossman v. State, 525 So.2d 833 (Fla. 1988), the Florida Supreme Court found the trial court erred in admitting the co-defendant's statement in a joint trial, but held that error was harmless under the facts and circumstances of the case. In Grossman, the co-defendants had recounted the details of the killing, individually and collectively, to two witnesses, and individually to a policeman and a jailmate, and the statements interlocked with each other and were fully consistent in all significant aspects. Id. at 838. Also in Grossman, the joint statements of the co-defendants given in each other's presence would have been admissible against both as admissions against penal interest and there was a substantial amount of physical corroborating evidence. Id. at 836,839. The admission of the non-testifying co-defendant's statements in the case at bar was clearly prejudicial error where the statements were not interlocking on critical details and were wholly unreliable. This error cannot be deemed harmless where there were no joint statements, where the individual statements were inconsistent in material aspects, where there were no eyewitnesses, and where there was no physical corroborating evidence which would show who the shooter was.

The trial court's error in the case at bar in granting the State's Motion for Rejoinder or Consolidation of Defendants was substantial, harmful, prejudicial and reversible error[11] and this cause should be remanded to the trial court for retrial of the Defendant in a separate trial.

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[11]The error is compounded by the off-the-record or ex-parte discussions which may have occurred between the trial judge and the prosecutor regarding the Motion for Rejoinder in this cause. See Issue VI, at pp. 44-51 of this brief.

POINT VIII

THE TRIAL COURT'S REFUSAL TO ALLOW CERTAIN CROSS-EXAMINATION OF THE STATE'S EXPERT WITNESS IS HARMFUL ERROR AND VIOLATES DEFENDANT'S RIGHT OF CONFRONTATION OF WITNESSES UNDER THE SIXTH AND FOURTEENTH AMENDMENTS WHERE THE TESTIMONY SOUGHT TO BE ELICITED WAS RELEVANT TO SHOW BIAS OR PREJUDICE ON THE PART OF THE WITNESS.

At issue prior to trial was the question of Appellant's competency and thus his ability to stand trial. A competency hearing was conducted by the trial court on March 2, 1990. (R. 532-662). Defendant presented two witnesses during the competency hearing whose expert testimony concluded that the Defendant was incompetent. (R. 603, 637). The State presented two witnesses whose expert testimony concluded that Appellant was competent and thus capable of standing trial. (R. 544, 578). During the cross-examination of the State's expert witness, Dr. Lloyd Miller, Defendant posed the following question: "When is the last time you ever found anyone incompetent in a court of law?" (R. 592).

The trial court sustained the objection to this question by the prosecutor (R. 592) and at the conclusion of the competency hearing determined that the Defendant was competent and fit to stand trial (R. 661-662).

It is a well-established principle of law that "a party may elicit facts tending to show bias, motive, prejudice or interest of a witness, a right that is particularly important in criminal cases. . ." Hair v. State, 428 So.2d 760 (Fla. 3d DCA 1983); Brown v. State, 424 So.2d 950 (Fla. 1st DCA 1983). Cross-examination is the traditional and constitutionally-guaranteed method of exposing possible biases, prejudices and ulterior motives of a witness as they may relate to the issues or personalities in the case at hand. Wooten v. State, 464 So.2d 640 (Fla. 3d DCA 1985); see Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). Bias of a witness is a proper subject of cross-examination as tending to discredit the witness and to affect the weight

of his testimony. Davis v. Alaska, Id.; Lee v. State, 422 So.2d 928 (Fla. 3d DCA 1982).

This principal has been codified in Florida, in Section 90.608, Florida Statutes (1990), which, in pertinent part, provides:

> (1) Any party, including the party calling the witness, may attack the credibility of a witness by:
>
> (b) Showing that the witness is biased.

Section 90.608(1)(b) has been construed to permit the presentation of evidence to show bias or motive. Hair v. State, 428 So.2d 760 (Fla. 3d DCA 1983); Gelabert v. State, 407 So.2d 1007 (Fla. 5th DCA 1981).

A defendant in a criminal case is normally accorded a wide range in the cross-examination of prosecution witnesses. Lutherman v. State, 348 So.2d 624 (Fla. 3d DCA 1977). This court in Wallace v. State, 41 Fla. 547 26 So.713 (1899) held that:

> "For the purpose of discrediting a witness, a wide range of cross-examination is permitted, as a matter of right, in regard to his motives, interest, or animus, as connected with the cause or the parties thereto. . ."

The testimony sought to be elicited in the case at bar by the Defendant/Appellant was clearly relevant to the possible bias or prejudice of the witness. It was obvious from counsel's question that he was laying a foundation to impeach the credibility of the expert witness. The question in the case at bar is not unlike the question the Florida Supreme Court addressed in Bonaparte v. State, 65 Fla. 287, 61 So. 633 (Fla. 1913). In Bonaparte, a deputy sheriff, as a witness for the State, denied discrimination in his selection of an all-white jury panel to hear the case against a black defendant. On cross-examination, defense counsel propounded this question; "You have stated that you have been a deputy sheriff for eight years, now state whether or not you have selected any colored men as jurors in this court or any of the courts of this county during this time?" This question was discarded by the trial

court but was found by the Florida Supreme Court to be legitimate cross-examination. The question, if answered in the negative, would have been a strong impeachment of the truth of the deputy sheriff's denial of discrimination, just as in the case at bar, testimony that the expert witness had never found anyone incompetent in a court of law would have been strong impeachment.[12]

Denial of the full right of cross-examination of a principal State witness has been held to be harmful error. Coxwell v. State, 361 So.2d 148 (Fla. 1978). Simmons v. Wainright, 271 So.2d 464 (Fla. 1st DCA 1973); Kirkland v. State, 185 So.2d 5 (Fla. 2nd DCA 1966).

Denial of effective cross-examination violates Defendant's right to confrontation guaranteed by the Sixth and Fourteenth Amendments and is constitutional error requiring reversal unless error is harmless beyond a reasonable doubt. See Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974); Hannah v. State, 432 So.2d 631 (Fla. 3d DCA 1983); Moreno v. State, 418 So.2d 1223 (Fla. 3d DCA 1982); In the case at bar, where the potential punishment is death, and where the testimony of the expert witnesses was so evenly divided between the State and defense experts, it is clearly not harmless error to deny the defendant the latitude of cross-examination necessary to show bias and prejudice on the part of an essential State expert witness.

POINT IX

THE TRIAL COURT ERRED DURING JURY SELECTION IN REFUSING TO CONDUCT A NEIL INQUIRY INTO THE STATE'S SEVEN CHALLENGES TARGETED AGAINST MINORITY MEMBERS.

During jury selection, the State exercised nine peremptory challenges to exclude minorities from serving as potential jurors and alternate jurors. Despite the co-defendant's repeated requests for a

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[12]Dr. Lloyd Miller is a forensic psychologist who has performed competency examinations and evaluations for more than 10 years and had testified on numerous occasions in front of the trial judge. (R. 567).

Neil[13] Inquiry (R. 3950, 4123, 4135, 4144, 4150, 4153-54), at no time whatsoever did the trial court request a racially neutral explanation from the State as to why it struck eight black people and one Oriental person from the panel. The Defendant assisted the co-defendant in arguing for a Neil inquiry (R. 4030-31, 4040-41), and had previously announced that he would adopt all of the co-defendant's motions and objections (R. 2186).

After the State exercised its fifth challenge, the co-defendant requested that the State provide a race-neutral explanation as to why three of its first five strikes were used to excuse potential black jurors, Mr. Bacon, Mr. Carlos, and Ms. Fitzpatrick. (R. 3950). The co-defendant advised the court that he believed the State was trying to find some reason to excuse these potential black jurors especially in light of the types of questions the prosecutor asked these prospective jurors during voir dire. (R. 3951). Despite the co-defendant's timely objection and explanation on the record as to why he believed the State did not exercise its challenges for race neutral reasons, the trial court denied the co-defendant's request for a Neil Inquiry[14] (R. 3952).

In total, the co-defendant requested race-neutral explanations for the State's excusal of potential jurors and alternate jurors on seven separate occasions relating respectively to six potential black jurors and one potential Oriental juror. (R. 3927, 3934, 3950, 4123-4, 4135, 4144, 4150, 4153-4).

The trial court, however, denied each and every one of the co-defendant's seven requests. As a result, the State struck the following potential black jurors and black alternate jurors without providing a race-neutral explanation: Mr. Bacon (R. 3927); Mr. Westbrook (R. 3934);

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[13]Neil v. State, 457 So.2d 481 (Fla. 1984)

[14]It is noteworthy that in contrast, the trial court, upon the State's request, demanded race-neutral reasons from the co-defendant after he exercised his fifth challenge. (R. 3955).

Ms. Fitzpatrick (R. 3950); Mr. Roberson (R. 4123); Ms. Jeanty (R. 4135); Ms. Rogers (R. 4144); Ms. Scott (R. 4150); and Ms. Campus (R. 4153-54). In addition, the State excluded the only potential Oriental juror, Ms. Yamamoto. (R. 4124).

The Defendant asserts that the primary purposes for the State's challenges was to excuse all minorities from the panel. The State may contend that because it also challenged three Anglos/Whites from the panel, it did not systematically discriminate against minorities. A careful review of its three "other" strikes will, however, evidence the State's discriminatory conduct.

The State exercised a total of ten peremptory challenges in this case, seven of which were directed to minorities as described above. It is important to note that the Record will reflect that two of the three remaining challenges exercised by the State were solely utilized to remedy apparent reversible error in the trial court's refusing to allow the co-defendant to use its peremptory strikes to remove the same two jurors! Initially, the State accepted Robert Baer as a juror (R. 4119). The co-defendant moved to peremptorily strike Baer (a White juror) and the court conducted a Neil Inquiry and thereafter denied the co-defendant's strike. Moments later, the State, in an obvious attempt to avoid judicial error, peremptorily struck Mr. Baer as a juror.

In addition, the State initially accepted Ms. Goodgame. (R. 4130). However, because the trial court incorrectly ruled that the co-defendant's excusal of Ms. Goodgame was not race-neutral,[15] the State excused Ms. Goodgame. (R. 4133).

[15]The co-defendant explained to the court that Ms. Goodgame had a predisposition to convict and vote for a sentence of death based on her statement during voir dire (R. 3040, 3043-5) that she feared that the co-defendant would get out one day. (R. 4131).

The prosecution stated:

> "The State frankly has some concern on the appellate record of the reason stated by Mr. Carter specifically when he made a court challenge.
>
> I am concerned enough that we would ask that there not be a rejection of the reasons given by Mr. Carter solely because of the appellate 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 that life doesn't mean life.
>
> I believe that could be argued as a proper race-neutral reason in the case related and could be seen by the Court as a valid reason for a peremptory challenge." (emphasis added).

(R. 4132).

The court declared that it was not going to change its ruling, and the State excused Ms. Goodgame (R. 4133) because it recognized the legitimate race-neutral reason behind the co-defendant's peremptory challenge and wanted to prevent reversible error by the trial court.

Further, the prosecution surprisingly acknowledged that there had been instances in the past and in the present case where the State had exercised peremptory challenges in order to make it appear that its motives for exercising other peremptory challenges was not improper. (R. 4003-4). Thus, despite the fact that the trial court had notice of the potential improper motives behind the State's peremptory challenges, all of the co-defendant's requests for a reasonable explanation as to State's peremptory challenges were still denied.

The trial court misconstrued and misapplied the requirements established by Neil v. State and State v. Slappy.

In State v. Slappy, 522 So.2d 18 (Fla. 1988), the Court held that when determining whether peremptory challenges have been used solely on the basis of race, the issue is not whether several jurors have been excused because of their race, but whether any juror has been so excused independent of any other.

In the instant case the trial judge misconstrued the law as applied to Neil/Slappy inquiries[16] when he stated:

> "It is improper to excuse as a group certain minorities. (R. 3968). . . I have to make inquiries, I have to ask questions when it appears on the surface that everybody that is being struck from one side or the other belongs from one class or one group of people." (R. 3969).

Whenever the co-defendant requested a Neil inquiry (R. 3950, R. 4123, R. 4124, R. 4135, R. 4144, R. 4150, R. 4153-54), the trial judge failed to consider each one of the State's strikes independently. As a result of the court's incorrect application of the law, all seven of the co-defendant's requests for Neil inquiries were denied.

Noting how the nature of a peremptory challenge makes it uniquely suited to mask discriminatory motives, the Florida Supreme Court has provided broad leeway in allowing parties to make a prima facie showing that a "likelihood" of discrimination exists. Slappy, 522 So.2d 18, 22 (Fla. 1988).

> "Any doubt as to whether the complaining party has met its initial burden should be resolved in that party's favor. If we are to err at all, it must be in the way least likely to allow discrimination."

Slappy, Id. at 22. *Also see,* Blackshear v. State, 521 So.2d 1083 (Fla. 1988) (reversal of conviction where trial court ruled Defendant had not met initial burden of showing likelihood of impermissible discrimination where State used eight of ten strikes to exclude Blacks from Jury); and Hall v. Daee, 602 So.2d 512 (Fla. 1992) (party's exercise of four out of five peremptory challenges to strike Blacks from jury is highly suggestive of a racial motive and an inquiry should be conducted).

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[16]The trial court was subsequently reversed in two separate cases for its failure to properly construe and apply the requirements of Neil v. State and State v. Slappy. See Hall v. Daee, 602 So.2d 512 (Fla. 1992); and Smith v. State, 574 So.2d 1195 (Fla. 3d DCA 1991) aff'd on other grounds sub nom., State v. Washington, 594 So.2d 291 (Fla. 1992).

In the instant case, the trial court was unreasonably restrictive in its refusal to conduct a Neil inquiry. No absolute pattern as to the systematic exclusion of a group of one race need be established before the court can inquire as to why a party struck potential jurors.

Subsequently, during selection of the alternate juror, the trial judge revealed his misunderstanding of the law as applied to Neil-Slappy inquiries where he made an offhanded remark when the State excused Mr. Brewer, a potential Caucasian juror. The judge said, "Appears to be by my observation, a white male." (R. 4145). The only possible reason for this comment[17] was to demonstrate that the State had not solely struck potential black jurors, and therefore, was not subject to a Neil inquiry.

Elimination of every member of a minority creates a strong likelihood the strikes were racially motivated which shifts the burden to the State to provide race-neutral justification for the strike(s).

In Reynolds v. State, 576 So.2d 1300 (Fla. 1991) the Court held that where only one member of a particular minority is a potential juror on a panel, the elimination of that member creates a "strong likelihood", in itself, that the strike(s) were because of race which shifts the burden to the State to provide race-neutral justification for its strike(s), once the Defendant has made its Neil objection. The Court held that failure to justify the excusal by neutral, reasonable and non-pretexual reasons is reversible error. The Court noted that the sole purpose for ordering the State to justify its use of peremptory challenges was to apply the principle of accountability to peremptory challenges. Our system of government, the Florida Supreme Court stated,

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[17]The Judge had not previously remarked on the race of any of the State's strikes.

"is premised on the belief that every public officer and employee should be accountable and should not lie entirely beyond the reach of public questioning." Reynolds at 1302.

In the instant case, the State excused Ms. Yamamoto, the only Oriental, from the panel. (R. 4124). The co-defendant timely objected and the trial court incorrectly denied the co-defendant's Neil inquiry (R. 4124) stating:

> "No prima facie showing has been shown as to Orientals." (R. 4125).

The trial court's denial of the co-defendant's request for a Neil inquiry upon the State's excusal of Ms. Yamamoto clearly violated the principles of accountability and the opportunity to question public officers established to prevent prosecutorial discrimination in jury selection. Reynolds., Id. at 1301.[18]

In State v. Slappy, 522 So.2d 18 (Fla. 1988), the Florida Supreme Court, quoting the principle that was expressed in Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1722, 90 L.Ed.2d 69 (1986), stated:

> "a single invidiously discriminatory governmental act is not immunized by the absence of such discrimination in the making of other comparable decisions."

Slappy, id. at 21.

In the instant case, the record indicates that the State excused some Caucasian potential jurors from the panel. The trial Judge, in effect, immunized the State from Neil inquiries because he saw no absolute pattern by the State as to the exclusion of jurors solely on the basis of race. The fact that the court was forewarned that, in the

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[18]The law has subsequently evolved to require a *Neil* inquiry be conducted whenever an objection is raised that a peremptory challenge is being used in a racially discriminatory manner. *State v. Johans,* 613 So.2d 1319 (Fla. 1993). *Johans,* is not applicable to our case, however, as it applies prospectively only. *Johans,* Id. at 1321.

appear that its motives for exercising other challenges were not improper (R. 4004) compounded with the trial court's failure to consider each one of the State's peremptory challenges, independent of any other, where the co-defendant timely requested numerous Neil inquiries, deprived the defendants of a fair and impartial trial as required by Article I, Section 16 of the Florida Constitution and the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States.

POINT X

THE TRIAL COURT ERRED WHEN IT CHANGED THE JURY SELECTION PROCESS AFTER JURY SELECTION WAS ALMOST COMPLETED AND WHERE THE NEW PROCEDURE UNDULY RESTRICTED DEFENDANT'S USE OF CHALLENGES WHICH HE WAS ENTITLED TO AND RELIED UPON.

Jury selection commenced on October 28, 1990. On December 10, 1990, the State and Defendants tendered their original panel of 12 jurors and a Pre-trial Hearing was held concerning, among other things, the method to be used in selecting alternate jurors. (R. 4059). The trial court explained to counsel that in selecting the alternate jurors, each of the Defendants was allowed one challenge while the State was allowed two challenges. (R. 4060). If all of the parties accepted someone as an alternate juror and then one of the first twelve jurors was challenged, the accepted alternate juror would move up to become a juror. (R. 4061).

Once the trial court confirmed the Defendant's understanding of the jury selection procedure chosen, defense counsel asked the judge whether, in the event one of the original twelve jurors became ill prior to being sworn, a rejected alternate juror would be considered for service on the twelve person panel.

(R. 4061-62). The following discussion ensued:

Galanter: What happens if someone is challenged peremptory as an alternate and one of the . . .

Court: You're making a problem where there is no problem.

Galanter: I just want to know what the procedure is.

Court: There is no problem. Once a person is now on the panel, that person is on the panel as if they have been on the panel.

Galanter: My question, what if an alternate is excused?

Court: Excused from what?

Galanter: Like Ms. Berry is to me. If I challenge Ms. Berry peremptory.

Court: Correct.

Galanter: And then one of the parties of the original twelve gets sick, does Ms. Berry take that place or is she gone forever?

Court: Don't make it more difficult. The first alternate who we select to sit as the first alternate is the one who moves up. If you have struck her, she is no longer in consideration. [emphasis supplied]

(R. 4061-62)

Immediately, upon the conclusion of the trial judge's explanation as to the court's jury selection procedures and in reliance thereon, the Defendant excused Ms. Berry (R. 4063). The next day (prior to the jury being sworn), the judge granted the State's request to excuse for cause one of the jurors from the original twelve. This left one vacancy on the jury panel. (R. 4096). The court selected Ms. Berry to fill the vacancy, despite the Defendant having excused her as an alternate on the prior day. The Judge stated,

> We are going to go back through Ms. Berry . . . we are going to call her as the 12th juror. I will give each attorney if they want to select her, we'll go as if we hadn't bothered yesterday with regard to the first alternate. Then once we get to number 12, we'll move forward. (R. 4098).

The judge stated that he was changing the selection method with regard to the alternate jurors because the method he initially selected gave everyone six extra challenges. (R. 4099). Instead, he discarded the six challenges and determined that the alternate juror selection would not be dealt with until the panel had been selected and sworn. (R. 4100). Only after the trial court changed its method of jury selection,

and discarded six peremptory challenges thus placing an alternate juror who the Defendant had already excused (R. 4062) back on the jury panel (R. 4098), did the Defendant accept Ms. Berry on the jury panel. (R. 4100).

In changing the selection process midstream, without any notice, the trial court unduly limited the Defendants exercise of peremptory challenges. Error in restricting exercise of peremptory challenges results in automatic reversal. United States v. Turner, 558 F.2d 538 (9th Cir. 1977). The defendant need not show that he was prejudiced by the error. Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed. 2d 759 (1965).

The method chosen by the Court for empaneling a jury must not unduly restrict the Defendant's use of his challenges and, whatever may be the method chosen, the Defendant must be given adequate notice of the system to be used. Turner at 538; See also United States v. Sams, 470 F.2d 751 (5th Cir. 1972).

In United States v. Sams, supra at 755, the court found reversible error where the jury selection method chosen by the trial court seriously limited the defendant in making challenges to which he was entitled where the Defendant was misled at the time he refrained from making additional challenges. In the instant case, the Defendant was misled by the trial court where the trial court instructed counsel on one method and employed a different method when selecting alternate jurors to fill vacancies on the original twelve juror panel. (R. 4098).

According to the trial court's initial instructions, the fourth alternate juror should have filled the twelfth vacancy due to the fact that the first, second and third alternate jurors were struck. (R. 4063). However, because the trial court changed its jury selection method and started the alternate juror selection process from scratch,

the Defendant's use of peremptory challenges was unduly restricted and his jury selection strategy was severely disrupted.

It is clear from the record that the Defendant relied on the trial court's instructions when he excused Ms. Berry. (R. 4062). The Defendant's acceptance of Ms. Berry as a juror, only after the judge changed the jury selection method, compounded with the trial court's disregard of six peremptory challenges (R. 4099), demonstrates that the defendant was unduly limited in the use of his challenges.

In United States v. Turner, 558 F.2d 538 (9th Cir. 1977), the court held that ambiguous exchanges that led to misunderstandings between the Court and counsel about the trial court's jury selection methods became automatic reversible error when defendant was not given adequate notice of the system to be used and his use of peremptories was restricted. Id. at 538. Similarly, in United States v. Ricks, 776 F.2d 461, 462 (4th Cir. 1985) the court held that the impairment of the right to peremptory strikes is reversible error per se and that the defendants' right was effectively, albeit inadvertently, denied. Id, at 461. In Ricks, the trial court did not unequivocally state that the jury would be selected from the top of the list, yet the appellate court held that it was not unreasonable for defendants' counsel to interpret the court's remarks to mean that the jury would be selected largely or substantially from the top of the list. Id. at 460. The case at bar is even more compelling where the trial judge clearly stated how the jury selection would proceed, and then during the process itself disregarded his own prior instructions and changed the selection process midstream without notice. This new method was a total deviation from the trial court's original plan. Under the new jury selection method, the trial court limited Defendant's peremptory challenges (R. 4099) and selected Ms. Berry to fill the juror vacancy after she had already been excused (R. 4098) pursuant to the Defendant's peremptory challenge.

Due to the trial court's sudden change in the jury selection process and its failure to provide adequate notice to counsel, the trial court violated the Defendant's right to have a fair opportunity to make an intelligent judgment as to the exercise of peremptory challenges. See Eastern Airlines, Inc., v. Gellert, 438 So.2d 930 (Fla. 3d DCA 1983) *disapproved on other grounds*, Ter Keurst v. Miami Elevator Co., 486 So.2d 547 (Fla. 1986). This infringement of the Defendant's rights is clearly reversible error.

POINT XI

THE EVIDENCE WAS INSUFFICIENT TO PROVE PREMEDITATION, AND HENCE FIRST DEGREE MURDER, AS AGAINST THE DEFENDANT WHERE THE STATE ARGUED AND THE FACTS DEMONSTRATE THAT THE CO-DEFENDANT WAS THE SHOOTER, WHERE THE CIRCUMSTANCES OF THE CASE SUGGEST A SPONTANEOUS DECISION TO COMMIT THE CRIME, AND WHERE THE ONLY EVIDENCE OF DEFENDANT'S PARTICIPATION WAS AN ALLEGED STATEMENT TO THE CO-DEFENDANT TO "SHOOT HIM" [THE VICTIM].

Officer Estefan, the victim, was shot during a routine traffic stop. The State argued at trial that the Defendant was the driver of the vehicle and that the co-defendant was the passenger who got out of the vehicle and shot the victim. (R. 4231). Although there was no eye-witness to the murder, the State presented evidence of the dying declarations of the victim, together with various statements of the Defendant and the co-defendant, which supports the conclusion that the co-defendant was the passenger and the shooter. (R. 4458; 4572-8; 5263-8).

The Defendant and the co-defendant were indicted jointly for the first-degree murder of the victim on the basis that they were acting in concert as principals and as part of a common plan or scheme from a premeditated design to effect the death of the victim. (R. 1-4). The State concluded that the Defendant was a principal, even though he was not the shooter, because Defendant made a statement to a neighbor months before the shooting that if the police ever tried to put him in jail he

was going to shoot it out with them because there was no way he was going to jail (R. 5005; 5016) and because the Defendant allegedly told the co-defendant to shoot the victim after they were stopped by the victim during a routine traffic stop. (R. 5210).[19]

No evidence was presented that the Defendant and co-defendant engaged in a common plan or scheme to kill the victim. Assuming that Defendant's statement to a neighbor months prior to the shooting (R. 5005; 5016) that he would shoot it out with police if stopped was properly admitted (see pp. 10-20 of this Brief for argument that this evidence was inadmissible),[20] this statement does not show any common criminal plan between the Defendant and the co-defendant to shoot and kill a police officer, particularly the victim in this case. This statement was made by the Defendant to a neighbor and was not alleged nor proven to have been discussed jointly by the Defendant and co-defendant at any time. Further, since the co-defendant was the shooter, the prior statement of the Defendant that he would shoot it out with police was no indication that the co-defendant shared this same frame of mind or common plan when he, not the Defendant, shot the victim.

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[19]Evidence of the Defendant's oral admission to a single police Detective, that he told the co-defendant to shoot was somewhat conflicting; Detective Morin initially testified that Douglas admitted that when the policeman (Estefan) got out of his car with his gun in his hand pointed at Dennis, Douglas said "shoot him" (R. 934) but later Detective Morin testified that Douglas told him that when the officer pulled up behind their car Douglas said "if he gets old, shoot him" (R. 5210).

[20]Since the only evidence of the Defendant's participation in the shooting was his statement to the co-defendant to shoot the victim, the source of this evidence must be carefully scrutinized. Defendant's admission that he told the co-defendant to shoot the victim came during an interview with police officers only three days after major surgery at a time when Defendant was listed in extremely critical condition (R. 1147), was suffering delirium tremens as a result of alcohol withdrawal (R. 1124-1125), had been receiving extremely large doses of morphine at regular intervals for three to four days (R. 1095; 1129), and had a chest thoracostomy tube coming out of his chest, a catheter tube in his penis, oxygen in his nostrils and I.V. tubes in his arms (R. 1146-1147). There was unrebutted medical testimony that the "usual actions of the morphine that he was receiving could really affect him, particularly his recall, and he might have been agreeing with what was being said at the time" (R. 1129-1130) and that the Defendant would have been "susceptible to suggestion, easily manipulated and not fully in control of his mental faculties." (R. 1094).

The circumstances of the case itself suggest a spontaneous decision by the co-defendant to shoot the victim. The State does not claim that either the Defendant or the co-defendant knew in advance that a police officer, or the victim in particular, would stop their vehicle at the precise time and location involved, and the evidence does not show that the Defendant and co-defendant had some mutual pre-conceived plan to murder any police officer that might stop them or the victim in particular. The co-defendant's shooting of the victim was an unplanned spontaneous reaction to the ill-fated routine traffic stop by the victim.

This Court has previously addressed the issue of sufficient evidence of premeditation for first degree murder in a case where two principals were involved in a shooting, but where the State did not prove which principal did the actual shooting and based its case on the theory that one of the principals had shot the victim and the other helped. In Hall v. State, 403 So.2d 1319 (Fla. 1981), this Court found that evidence was insufficient to prove premeditation and, hence, first degree murder, where there was no evidence, other than conjecture, of premeditation. Id. at 1320. In Hall, the victim, a deputy sheriff, drove into a parking lot behind the store where the two assailants' conduct had aroused suspicion. The only direct evidence of what occurred next was provided by a woman and her daughter who saw the two assailants approach the deputy. Id. at 1320. No one saw the deputy shot. This Court found that the facts were sufficient to demonstrate that the two men engaged in a common criminal scheme and as such each was a principal to the death, notwithstanding that the State did not prove which of the two men fired on the deputy. Id. at 1820. This Court found, however, that the evidence was not sufficient to prove premeditation beyond a reasonable doubt where the evidence of the defendants' homicidal intent was subject to conflicting interpretations, one that either of the defendants seized the deputy's gun intending to kill him, took aim, and fired, and the

other that one or both of the defendants struggled with the deputy and pulled the trigger without intending to kill. Id. at 1321.

It is well established that premeditation is the essential element which distinguishes first degree murder from second degree murder. Wilson v. State, 493 So.2d 1019 (Fla. 1986). Premeditation may be proven by circumstantial evidence. Cochran v. State, 547 So.2d 928 (Fla. 1989). Cochran also says however, "where the element of premeditation is sought to be established by circumstantial evidence, the evidence relied upon by the State must be inconsistent with every other reasonable inference." Id., at 930. See also Hoefert v. State, 617 So.2d 1046 (Fla. 1993); Hall v. State, 403 So.2d 1319 (Fla. 1981); Smith v. State, 568 So.2d 965 (Fla. 1st DCA 1990); and Tien Wang v. State, 426 So.2d 1004 (Fla. 3d DCA 1983), rev. denied, 434 So.2d 889 (Fla. 1983). Where the State's proof fails to exclude a reasonable hypothesis that the homicide occurred other than by premeditated design, a verdict of first degree murder cannot be sustained. Hall v. State, 403 So.2d 1319 (Fla. 1981); Jenkins v. State, 120 Fla. 26, 161 So. 840 (1935); Tien Wang v. State, 426 So.2d 1004 (Fla. 3d DCA 1983), rev. denied, 434 So.2d 889 (Fla. 1983).

In the case at bar, the State's proof failed to exclude a reasonable hypothesis that the homicide occurred other than by premeditated design. The evidence below suggests a spontaneous reaction by the co-defendant to a routine traffic stop rather than a common criminal scheme or premeditated design to shoot and kill the officer. There was no evidence that the Defendant had ever discussed the killing of a police officer with his brother, the co-defendant, or that the Defendant had any knowledge of his brother's willingness, ability or intent, if any, to commit the murder. There was no eye witness to the shooting, and no direct, substantial or competent evidence about the precise chain of events that transpired between the co-defendant and the victim after the co-defendant left the automobile and approached the victim. The

statements of the defendants, if properly admitted, conveyed only the vague description that the co-defendant exited the car and shot the victim. (R. 5210).

When the State relies upon purely circumstantial evidence to convict an accused, such evidence must not only be consistent with defendant's guilt but it must also be inconsistent with any reasonable hypothesis of innocence. Davis v. State, 90 So.2d 629, 631-32 (Fla. 1956). The record in the case at bar is replete with evidence suggesting a possible struggle between the co-defendant and the victim. The medical examiner testified that at least one of the fatal shots was fired from a distance of less than three feet. (R. 4311). The bullets also entered the victim's body at a downward slope (R. 4334) which was inconsistent with the mere shooting from a distance since the victim was 6 feet 3 inches tall (R. 4297). While the State's version of the shooting was consistent with medical testimony (R. 4338), numerous other versions would also have been consistent (R. 4369, 4372-79). One of the State's witnesses who owned a duplex at the scene of the shooting testified that he heard voices, shouting, a scuffle and gun shots. (R. 4630-4634). Another of the State's witnesses, the roommate of the co-defendant, testified that the co-defendant returned home on the evening of the shooting with blood on his pants and a small wound on the back of his head (R. 5106-7). All of this evidence, when considered together, suggests a strong and reasonable exculpatory hypothesis as to premeditation, even absent a reasonable hypothesis of innocence as to the homicide. There is a reasonable exculpatory hypothesis as to premeditation and the Defendant should have been convicted of second degree murder rather than premeditated first degree murder.

POINT XII

DOUGLAS ESCOBAR'S CONVICTION MUST BE REVERSED DUE TO THE CUMULATIVE EFFECT OF THE CUMULATIVE ERRORS.

Should this Honorable Court find that the issues raised by DOUGLAS ESCOBAR, or those issues which Defendant adopts from the co-defendant, DENNIS ESCOBAR's Brief, constitute harmless error, the Defendant would tender that the cumulative effect of the cumulative errors renders Defendant's conviction questionable and entitles the Defendant to a new trial. See Jones v. State, 569 So.2d 1234 (Fla. 1990); and Lusk v. State, 531 So.2d 1377 (Fla. 2nd DCA 1988).

PENALTY PHASE:

POINT XIII

THE TRIAL COURT ENGAGED IN AN IMPROPER EX-PARTE COMMUNICATION WHERE PRIOR TO THE ENTRY OF THE ORDER IMPOSING DEATH IN OPEN COURT THE TRIAL JUDGE CALLED THE PROSECUTOR TO THE JUDGE'S OFFICE, WHERE THE TRIAL JUDGE MET WITH THE PROSECUTOR ALONE IN HIS CHAMBERS FOR A QUARTER OF AN HOUR, THE PROSECUTOR READ THE ENTIRE SENTENCING ORDER ALONE IN THE PRESENCE OF THE TRIAL JUDGE, AND THE PROSECUTOR SAID "LOOK'S GOOD TO ME" PRIOR TO LEAVING THE CHAMBERS AND RETURNING THE PROPOSED ORDER.

During evidentiary proceedings ordered by this Court to investigate the Defendant's claim of an improper ex-parte communication with regard to the State's Motion for Rejoinder, Paul Mendelson, the prosecutor with the legal division of the State Attorney's Office in charge of all legal matters arising in the case below (HT. 46), admitted that he had met alone with the trial judge prior to the entry of the unrelated order imposing death. (HT. 60).

Prosecutor Mendelson testified that after conclusion of the evidentiary portion of the death penalty stage he recalled receiving a telephone call from someone to come down to the trial judge's chambers. (HT. 59-60). Mr. Mendelson was not sure exactly when the trial judge rendered the order imposing death, but it was soon after the meeting and

he speculated it might have been the next day. (HT. 67). Mr. Mendelson did not know why he was being called to the judge's chambers and did not contact the lead trial prosecutor or the assistant trial prosecutor to join him. (HT. 60). When he arrived at the Judge's office, Mr. Mendelson was waved into the judge's chambers by the assistant or secretary. (HT. 60). Mr. Mendelson saw the judge sitting at his word processor and the judge handed him something he had been working on at his word processor. (HT. 60-61). The document was an order[21] imposing the death penalty on the defendants, DENNIS and DOUGLAS ESCOBAR. (HT. 61). Mr. Mendelson did not recall what, if anything, was said to him by the trial judge when he was handed the order (HT. 61), but assumed something was said (HT. 63). Mr. Mendelson recalled that the order was lengthy, but did not know if he was basing his recollection on the actual order that was entered in the case or what the judge showed him. (HT. 64). Mr. Mendelson estimated that he spent approximately a quarter of an hour reviewing the death order. (HT. 65). Mr. Mendelson reviewed the order in the judge's chambers and did not take it with him when he left the chambers. (HT. 64). Mr. Mendelson did not know if the order was meant to be taken with him. (HT. 65). Mr. Mendelson returned the order to the judge and had no recollection of saying anything other than "looks good to me." (App. 79). Mr. Mendelson had no recollection advising anyone that he had seen that order. (HT. 67, 69).

The trial judge, Judge Shapiro, testified that when he had completed the order on his word processor, he asked his judicial assistant to call Prosecutor Mendelson, Mr. Galanter (trial counsel for DOUGLAS ESCOBAR) and Mr. Carter (trial counsel for DENNIS ESCOBAR) to advise them that they could pick up a copy of the order or it would be mailed to them.

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[21]The "order" referred to throughout the evidentiary proceeding was actually <u>two</u> orders, the death sentence for DOUGLAS ESCOBAR and the death sentence for DENNIS ESCOBAR, consisting of twenty legal-size pages each, differing in substance only as to the penalty phase for each defendant. (R. 231-250; R. 256-275 of DENNIS ESCOBAR's Record on Appeal).

(HT. 93). Judge Shapiro recalled that he was in the process of printing out copies of the orders from his word processor when Mr. Mendelson arrived at his chambers. (HT. 94). Judge Shapiro testified that he did not recall Mr. Mendelson reviewing the order in his presence or Mr. Mendelson handing back his copy. (HT. 94). Judge Shapiro claimed he did not recall asking for Mr. Mendelson's opinion or Mr. Mendelson advising him that the order looked good to him. (HT. 100). Judge Shapiro testified that there was no dialogue of substance about the order and that he did not have any conversation about the merits of the order, the quality of it, or recommendation for change. (HT. 99-100). Judge Shapiro testified further that he could not recall whether prosecutor Mendelson visited him to review the order before or after pronouncing the death sentence in open court[22] because he had no recollection of reading or pronouncing the death sentence. (HT. 95-96). Judge Shapiro acknowledged that Defendants' death sentences were the only death sentences he had ever imposed. (HT. 96).

The senior trial attorney and lead prosecutor, Mr. Laeser, testified he first learned of the meeting between the trial judge and Mr. Mendelson while preparing for depositions in anticipation of the Supreme Court ordered evidentiary hearing regarding possible ex-parte communications[23] (HT. 84) and the co-trial prosecutor, Mr. Band, similarly first learned of this meeting only two days before the evidentiary hearing (HT. 38).

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[22]The Special Master, appointed by the Supreme Court, commented at the conclusion of the April 16, 1993 evidentiary hearing:

> (C)andidly, I am concerned about a number of things that the trial court said. To not recall the only time he sentenced somebody to death in open court, I find difficult. Being a Judge and having tried death cases, I mean, I recall vividly the thought process of considering the imposition of such a sentence. (HT. 141).

[23]Lead trial prosecutor Abe Laeser also represented the State at the evidentiary hearings, and instructed prosecutor Paul Mendelson not to answer questions at Mendelson's deposition which would reveal the private meeting between the Judge and Mendelson. (App. 56-57). It was only after Special Master, Jeffrey Streitfeld ordered Mendelson to answer certified questions (App. 67-68) that the State disclosed that such a meeting occurred. (App. 76-80).

Mr. Yale Galanter (lead defense counsel for DOUGLAS ESCOBAR) testified he did not learn that the Judge had decided to impose death sentences until the sentences were announced in open court. (HT. 129). Mr. Galanter testified that he was not advised that the order was ready to be picked up and reviewed, or was being mailed, prior to the order being announced in open court. (HT. 130). Mr. Galanter testified that he never received a telephone call or message from the Judge's staff or anybody else advising that a copy of the order was available prior to announcement in court. (HT. 130). Mr. Galanter advised he did not learn until the evidentiary hearing that Mr. Mendelson had seen a copy of the order at least a day before it was pronounced in open court. (HT. 131).

Mr. Lee Cohn (co-counsel for DOUGLAS ESCOBAR) testified at the evidentiary hearing of April 16, 1993 that he first learned that the Judge had decided to impose the death penalty when it was pronounced in open court, and that he had no recollection of receiving a telephone call or any kind of communication that there was an order ready in advance of the hearing to be picked up and reviewed. (HT. 118). At a subsequent supplemental evidentiary hearing about five weeks later, on May 28, 1993, Mr. Cohn testified that his memory had been refreshed, and that he now recalled someone in his office received a call from the judge's office about 2:00 or 3:00 p.m. (on the day prior to pronouncement of the death sentence) asking if he wanted to come over and see an order. (HT. 155). Mr. Cohn remembered that he had something to do that evening and didn't want to get in his car and go over to the Courthouse at 4:00 or 4:30 p.m. (HT. 156). Mr. Cohn advised that between the two evidentiary hearings he attempted to specifically refresh the memory of Mr. Galanter, but Mr. Galanter's memory was not refreshed. (HT. 166).

Mr. Carter (defense counsel for DENNIS ESCOBAR) testified that he first learned of the sentence of death when the judge pronounced sentence

in open court. (HT. 108). Mr. Carter testified he did not receive a call from the judge's office prior to the pronouncement of sentence advising that there was an order waiting to be reviewed or picked up. (HT. 108). Mr. Carter did not receive a copy of the pronouncement by mail and was not aware that Mr. Mendelson had seen the order prior to pronouncement (HT. 108).

After conducting the evidentiary hearings, the Special Master entered an order (App. 85-87) with the following factual findings: (1) the trial judge, on the day prior to announcement and entry of the sentence in open court, attempted to notify all counsel of the availability of the sentencing order at the office of the trial judge; (2) Prosecutor Paul Mendelson went to Judge Shapiro's office and was directed by the trial judge into the Judge's office area; Judge Shapiro, while alone in the office with Mr. Mendelson, presented Mr. Mendelson a copy of the proposed sentencing order; Mr. Mendelson read the entire sentencing order alone in the presence of the trial judge and did not recommend any changes or modifications; Mr. Mendelson left his copy in the Judge's chambers; no words were exchanged, but Mendelson said "looks good to me"; (3) no other counsel viewed the sentencing order prior to its entry; Mendelson did not inform either prosecutors Band or Laeser, or any defense counsel, that he had reviewed the order; and (4) defense attorney Cohn recalled that Judge Shapiro had notified his office of the existence and availability of the sentencing order on the day prior to the imposition of sentence but that Cohn had decided against travelling to the Judge's chambers to obtain a copy. (App. 87). At the conclusion of his findings of fact, the Special Master recommended that the Supreme Court conclude that, as a matter of law, there were no improper *ex parte* communications in this case since (1) "(t)here was no communication between the trial judge and prosecutor Mendelson; i.e., no dialogue or interaction which would constitute a violation of Judicial Canon 3A(4)"

(App. 87); and (2) "(t)here was no possible prejudice to any party pursuant to Rose v. State, 601 So. 2d 1181 (Fla. 1992), and Spencer v. State, 615 So.2d 688 (Fla. 1993), since there was no substantive communication, alteration or modification of the sentencing order." (R. App. 87).

Given the undisputed testimony in this case, the Special Master erroneously concluded that there was no improper *ex parte* communication between the prosecution and the trial court. This Court has addressed a claim of improper *ex parte* communication in a case where there was no dialogue or interaction between the judge and the party. In In re Dekle, 308 So.2d 5 (Fla. 1975), an appellate judge of this Court was faced with disciplinary proceedings when he received a memorandum of law from an attorney representing one party, thinking it was a copy of a duly filed amicus, and left it upon his cluttered desk unopened and unread for three months. Id. at 6. The memo was later opened, reviewed and delivered to the judge's research aide as a worksheet for the dissent drafting process. At the evidentiary hearing, it was conceded by the Judicial Qualifications Commission that the *ex parte* memo had no effect on the judge's vote in the case and that the opinion in final form was based only on the briefs and record filed. Id. at 8. There was no evidence that the judge personally profited or was bribed, that the memo changed the judge's mind about the case or that it was materially different from properly filed briefs, and there was no showing of corrupt motive or deliberate or intentional wrong. Id. at 11. This Court, nonetheless, found the judge "guilty of obtuseness and raw ineptness in the matter which cannot be condoned or go uncondemned." This Court went on to note that:

> The Judicial Qualifications Commission speaking for itself, the bench, the bar, and the public are understandably and properly concerned about any conduct which may affect the confidence of the people in the court or of any of its members. It understandably expects a higher standard of conduct

> from the judges of this state than of anyone else connected with the judicial system. . . .Continued effort to attain those goals must be utilized.

Id. at 11. In Dekle, as the Special Master found in the present case, there was no dialogue or interaction and no evidence of improper motive on the part of the judge, yet this Court was concerned about the conduct which may affect the confidence of the people in the court or any of its members. In Dekle, this Court found that "despite the judge's protestations, the very nature of the affair smacks of the appearance of evil damaging to the State's judiciary at its top echelon." Id. at 11.

The Special Master in the case at bar concluded that there was no *ex parte* communication in violation of the principles of Rose and Spencer since there was no possible prejudice to any party and there was no substantive communication, alteration or modification of the sentencing order. (App. 87). This Court, in Rose v. State, 601 So.2d 1181 (Fla. 1992), however stated that it was not concerned with whether an *ex parte* communication actually prejudices one party at the expense of the other. Id. at 1183. This Court further noted in Rose that the most insidious result of *ex parte* communications is their effect on the appearance of the impartiality of the tribunal, and the impartiality of the trial judge must be beyond question. Id. at 1183. The Special Master in this case completely ignored the important reason for the prohibition against *ex parte* communications: to protect the appearance of impartiality and integrity on the part of the trial judge.

In this case, it is undisputed that the prosecutor and the trial judge were alone in chambers at the very moment the judge was at his word processor working on the preparation of, or printing of, the sentencing order and that the prosecutor reviewed the order alone in the judge's presence for a quarter of an hour and left the proposed order with the judge. The Special Master erroneously concluded that there was no dialogue or interaction, even though testimony revealed both dialogue and

interaction. The precise content of the dialogue or interaction was recalled by neither the prosecutor[24] nor the judge, although both the prosecutor and the judge recall that the meeting and the interaction occurred. The Special Master found that there was no substantive communication, alteration or modification of the sentencing order, even though clearly there was an opportunity for substantive communication and alteration to the sentencing order. Of all the parties and counsel at attendance at the pronouncement of the death sentence, only two people, the trial judge and the prosecutor in charge of reviewing legal issues, knew in advance of the pronouncement of the order what the contents of the order were. Even in the absence of any improper motive on the part of the trial judge or the prosecutor, the appearance of improper conduct surrounding the entry of the most severe penalty which can be imposed under law is egregious and damaging to the State's judiciary. The total disregard for the defendants' fundamental rights to due process of law as guaranteed by the 14th Amendment to the United States Constitution and the appearance of great impropriety require that the sentencing order in this cause be vacated and this cause remanded for new sentencing proceedings before a different Judge.

POINT XIV

THE TRIAL COURT ERRED IN ALLOWING THE JURY TO CONSIDER DUPLICATIVE "DOUBLING" AND "TRIPLING" AGGRAVATING FACTORS ARISING FROM THE SAME ASPECT OF THE OFFENSE WHERE DEFENSE COUNSEL MADE TIMELY AND EXPLICIT OBJECTIONS AND WHERE THE TRIAL COURT REFUSED TO GIVE LIMITING INSTRUCTIONS TO THE JURY AS REQUESTED BY DEFENSE COUNSEL.

During the proceedings relating to jury instructions, the State requested the jury instruction that the crime for which the Defendant was to be sentenced was for the purpose of avoiding or preventing lawful

[24]Mr. Mendelson testified "I assume (the Judge) probably said something when he gave me an order, but I don't recall what it was. I really don't." (HT. 63).

arrest or preventing the escape from custody (R. 6319). Counsel for the co-defendant objected on the basis that allowing this instruction, if permitting the instruction on hindering the lawful exercise of any governmental function, would constitute a doubling of aggravating circumstances (R. 6319). The trial court allowed the instruction for avoiding or preventing lawful arrest based on its interpretation of Suarez v. State, 481 So.2d 1201 (Fla. 1985), cert. denied, 476 U.S. 1178 (1986). The Defendant, DOUGLAS ESCOBAR, joined in this objection (R. 6322).

The State next requested the jury instruction that the crime disrupted or hindered the lawful exercise of any governmental function or enforcement of law (R. 6321). The trial court also granted this instruction based on its interpretation of Suarez, over the "doubling" objection made by counsel for the co-defendant and joined in by the Defendant (R. 6322).

The State then requested the jury instruction that the victim of the crime for which the Defendant was to be sentenced was a law enforcement officer engaged in the performance of the officer's official duties (R. 6325). Counsel for the co-defendant objected that by adding this instruction there is "not only doubling but a tripling of the preventing lawful arrest instruction along with obstruction of governmental function and now performing official duty" (R. 6326). The Defendant joined in the objection (R. 6326) and the trial court granted the instruction (R. 6326).

Since the State was requesting the duplicative jury instructions regarding preventing lawful arrest, obstruction of governmental function, and performing official duty, the Defendant requested that the following special limiting instructions be given:

Instruction Number 6

> The State may not rely upon a single aspect of the offense to establish more than a single aggravating circumstance. Therefore, if you find that two or more of the aggravating circumstances are supported by a single aspect of the offense, you may only consider that as supporting a single aggravating circumstance. Provence v. State, 337 So.2d 783 (Fla. 1976). (R. 202)

Instruction Number 9

> A fact which you consider as the basis for finding one aggravating circumstance may not also be considered by you as the basis for finding another aggravating circumstance. You may consider the same fact in aggravation only once, and never more than once, even though it may come with the definition of more than a single aggravating circumstance which I have read to you. Provence v. State, 337 So.2d 783 (Fla. 1976). (R. 205)

The Defendant argued that the limiting instruction should be given because otherwise the jury might make its recommendation of life or death based on improper evaluation of the evidence and improper doubling (R. 6159). The State argued that the language in the standard instructions was sufficient to prevent "doubled" consideration of the aggravating factors by the jury (R. 6160). The trial court agreed with the State and denied the Defendant's request for the limiting instructions, Number 6 (R. 6159) and Number 9 (R. 6162).

In Suarez v. State, 481 So.2d 1201 (Fla. 1985), cert. denied, 476 U.S. 1178 (1986), this Court held that a jury should be instructed on all aggravating factors supported by the evidence. The court stated:

> The jury instructions simply give the jurors a list of arguably relevant aggravating factors from which to choose in making their assessment as to whether death was the proper sentence in light of any mitigating factors presented in the case. The judge, on the other hand, must set out the factors he finds both in aggravation and in mitigation, and it is this sentencing order which is subject to review vis-a-vis doubling.

Id. at 1209.

As noted by this Court, however, in Castro v. State, 597 So.2d 259 (Fla. 1992), Suarez "did not involve a limiting instruction, but only the question of whether in that case it was reversible error when the jury was instructed on both aggravating factors." Castro, at 261. This Court in Castro specifically held that it was error for the trial judge to refuse the limiting instruction where the defense counsel objected to the jury's being instructed on both aggravating factors and also requested that a special instruction be given. Id. at 261. See also Patten v. State, 598 So.2d 60 (Fla. 1992). In the case at bar, the Defendant objected to the jury instructions on all three "tripling" factors [preventing lawful arrest (R. 6322), obstruction of governmental function (R. 6322), and performing official duty (R. 6326)], and specially requested limiting instructions (R. 202, 205) to prevent improper consideration of these factors by the jury (R. 6160) which limiting instructions were denied by the trial court (R. 6159, 6162). Ultimately, the trial court read the jury five instructions on statutory aggravating factors, at least three of which were these duplicitous "tripling" factors (R. 6417).

Notwithstanding that three or more of the factors were duplicitous, the State in its final argument urged that the jury could find all five aggravating factors (R. 6377-6378). The State enumerated and explained each factor at length (R. 6372-6375) without any hint to the jury that any fact which they considered as the basis for finding one aggravating circumstance should not and could not also be considered as the basis for finding another aggravating circumstance.

By authorizing the jury to attribute weight to three statutory aggravating factors which are really but one, without cautionary limiting instructions, the scales were strongly tipped in favor of the death penalty. In the absence of specific findings by the jury other than the generic recommendation of death in this case by 11-1 (R. 220, 6422-6423),

it is impossible for the State to show that the additional weight the jurors may have afforded the improper duplicitous statutory aggravating factors did not contribute to the death recommendation. In light of the trial court's error in refusing to grant the requested limiting instructions, this cause should be remanded to the trial court for a new sentencing proceeding consistent with Castro v. State, supra.

POINT XV

THE TRIAL COURT ERRED IN REFUSING TO ADMIT THE TESTIMONY OF FOUR INDIVIDUALS WHO ARRIVED FROM OUT OF THE COUNTRY ON THE EVENING BEFORE THE PENALTY PHASE OF THE TRIAL WITHOUT FIRST CONDUCTING A RICHARDSON INQUIRY TO DETERMINE PREJUDICE, IF ANY, TO THE STATE AND WITHOUT EXPLORING ANY MANNER IN WHICH TO RECTIFY ANY POSSIBLE PREJUDICE SHORT OF THE EXCLUSION, AND THE EXCLUSION OF TESTIMONY FURTHER VIOLATED DEFENDANT'S RIGHTS, UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION TO PRESENT MITIGATING EVIDENCE.

The penalty phase of the trial of the Defendant, DOUGLAS ESCOBAR, and the co-defendant, DENNIS ESCOBAR, was conducted two weeks after the conclusion of the guilt phase (R. 6200-6424). On the afternoon before the beginning of the penalty phase, counsel for the co-defendant advised the State that additional witnesses would be arriving from out of the country [Nicaragua] at 10:30 that evening (R. 6110). The trial court stated that it would "(b)e very difficult to have them before we start our proceeding at 9:00 tomorrow morning" (R. 6110). Counsel for the co-defendant advised the trial court that to the extent possible he would make these witnesses known and available to the State prior to the 9:00 a.m. hearing (R. 6111), but he didn't know if the witnesses would arrive (R. 6125). The State complained of discovery violations (R. 6120-26) and argued that "no matter what type of Richardson inquiry we have at this point, the State is forced upon the proverbial guitar" (R. 6121). The trial court acknowledged that some of the witnesses were coming from out of the country and the court would have to deal with them as best it could (R. 6125). The trial court pronounced that the following morning

if the defense called a witness that the State had not had the opportunity to speak with, he would make the necessary ruling at that time whether or not he would allow that testimony (R. 6125).

The following morning, counsel for the co-defendant, DENNIS ESCOBAR, wished to use the four witnesses that had arrived in the country the evening before (R. 6195). The following colloquy ensued between the trial court and counsel for the co-defendant:

> Court: You have had all this time, continued the matter, witnesses coming in 10:30, well beyond what I could require the State to do with regard to prepare insofar as these witnesses are concerned. If you wish to proffer you may proffer. They will not be permitted to testify.
>
> Counsel: You realize how suddenly you set this penalty phase insofar as Dennis Escobar.
>
> . . .
>
> 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 4:00 in the afternoon. Witnesses coming in at 10:30 last night. They are not going to testify, simple as that.

(R. 6195).

Counsel for the co-defendant, DENNIS ESCOBAR, out of the jury's presence tendered a proffer of the excluded witnesses anticipated testimony:[25]

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[25]The co-defendant proffered the following testimony:

Carlos Cruz, Your Honor, will offer to the jury information that Dennis' childhood, known him since he was a little kid. Also information as to his background and I am trying to show some deprivation in background, physical and mental abuse by his stepfather. Mr. Cruz would be instrumental in giving us that kind of testimony.

Oliva Cruz, the wife of Carlos Cruz, also known Dennis Escobar since she was a little kid. She would offer testimony similar to that, not identical to that which would be given by Mr. Cruz. Testimony also goes to Dennis' service in the army of the Sandinistas during the Somoza regime as to both armies. Her testimony would go to what she personally knows about that childhood, the kind of kid that he was at that time and what factors in his background during the time he was coming up may have traumatized him because of the actions around home.

Sonia Blanco. Ms. Blanco is also member of the family from Nicaragua. Testimony primarily would go to the effect of Dennis' childhood, his

After the proffer by counsel for the co-defendant, counsel for the Defendant, DOUGLAS ESCOBAR, requested an opportunity to speak to the four witnesses. (R. 6200). The trial court denied this request (R. 6200). The jury was then brought in and the proceedings commenced without a Richardson inquiry, or further inquiry of any kind, or any attempt to remedy the situation short of total exclusion of the testimony (R. 6200).

After the State concluded its presentation of evidence in the penalty phase, the Defendant began his presentation (R. 6210). Three witnesses were called to testify on behalf of the Defendant. The first witness was an attorney who testified that he had represented DOUGLAS on some traffic matters in California in 1984 or 1985 (R. 6212), that DOUGLAS was a gentleman (R. 6221), and that he had not seen or spoken to DOUGLAS since he failed to appear for sentencing at a D.U.I. matter (R. 6226). The second witness, Douglas Escobar, Jr., the son of the Defendant, testified that he was eleven years old, that his father was a good father, and that he missed him (R. 6232-35). The third witness, Douglas Escobar, Sr., the father of the Defendant, testified that he had last seen DOUGLAS about ten years ago (R. 6236), that he remained with DOUGLAS' mother for about five years (R. 6237), that he drank excessively and regularly abused his wife (R. 6239-40), that DOUGLAS witnessed this abuse when he was four or five years old (R. 6240), that DOUGLAS, while a child, witnessed an incident where he beat up and shot at his wife who

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upbringing, deprivation and struggle of the family to try to raise him under those particular conditions and factors which may have affected him in being a quote, unquote, law-abiding citizen because of that particular deprivation.

Ophelia Perlios, would testify on behalf of Dennis Escobar. She's both familiar with Dennis insofar as his activity with the Sandinistas and Somoza. Also known him since he was a little kid. Offer testimony reference to his background, upbringing, deprivation, may have some reason affected Dennis, cause him to be where he is right now. (R. 6198-6199).

had just given birth to a baby girl (R. 6242), and that as a result of this incident Douglas' father abandoned his family and had very little contact with them since that time (R. 6242-43).

At the conclusion of the Defendant's presentation of witnesses, the trial judge questioned DOUGLAS about his understanding of the proceedings (R. 6253). The judge asked DOUGLAS if there were any other witnesses he wanted to call on his behalf (R. 6254) and DOUGLAS replied that he wanted to call the four witnesses, who were relatives of his, that weren't allowed to testify that morning. (R. 6254). Counsel for DOUGLAS advised the trial court that DOUGLAS had asked him to interview these people, but he had not had an opportunity to do so (R. 6255). When the judge questioned counsel for DOUGLAS about why he did not have these names earlier than on that day, counsel for DOUGLAS offered the explanation that he did not know their whereabouts, that his client was less articulate than the co-defendant, less able to communicate, and when DOUGLAS saw the witnesses in the courtroom he recognized them and wanted counsel to speak to them (R. 6255). The trial judge again refused to allowed the presentation of these four witnesses and did not conduct a Richardson inquiry, and did not attempt to remedy the situation short of exclusion of the testimony (R. 6256).

In Richardson v. State, 246 So.2d 771 (Fla. 1971), the Florida Supreme Court held that a trial court's discretion with respect to a claimed discovery violation is properly exercised "only after the court has made an adequate inquiry into all of the surrounding circumstances," and this inquiry at the very least must resolve:

> whether the violation was inadvertent or wilful, whether the violation was trivial or substantial, and most importantly, what effect, if any, did it have upon the ability of the defendant to properly prepare for trial.

Richardson v. State, 246 So.2d at 775. [emphasis supplied.] Richardson's requirements have been extended and made equally applicable to discovery

violations committed by the defense. See Smith v. State, 372 So.2d 86 (Fla. 1979); Bradford v. State, 278 So.2d 624 (Fla. 1973); and Streeter v. State, 323 So.2d 16 (Fla. 3d DCA 1975).

The trial court's inquiry in the present case was clearly inadequate under Richardson. The court excluded the testimony of the four witnesses solely on the basis of a discovery violation, but made no inquiry as to whether the violation was inadvertent or wilful. The record further demonstrates that there was no "wilful" discovery violation by the Defendant or the co-defendant. Counsel for the Defendant did not even become aware of the existence of the four witnesses until the same time these witnesses became known to the State and the trial court (R. 6200). The trial court knew that the co-defendant was attempting to obtain witnesses from out of the country, and that the co-defendant, even on the afternoon preceding the penalty phase, was uncertain whether these witnesses would actually arrive to testify (R. 6125). Judicial notice should be taken of the indisputable fact that the home country of these witnesses, Nicaragua, was a country involved in heavy political turmoil at the time of the proceeding. The travel visas and entrance papers required, (R. 6084-6085) and the distance and expense of travel (R. 6084-6085), created a tremendous burden for the defense witnesses. These four witnesses, nevertheless, appeared and were ready to offer testimony relevant to the penalty phase of the trial of the Defendant and the co-defendant (R. 6195). Although it is within the judge's discretion to exclude witnesses, that most severe sanction should never be imposed except in the most extreme cases, such as when the violation is purposeful, prejudicial and with intent to thwart justice. Patterson v. State, 419 So.2d 1120, 1122 (Fla. 4th DCA 1982). There was no showing in the case at bar that the discovery violation was purposeful, prejudicial or with the intent to thwart justice.

The trial court also made no inquiry to the State as to the prejudice in allowing the testimony of these four witnesses. To impose sanctions "a trial judge must do more than simply ascertain that a discovery rule has been violated . . . the inquiry must involve a determination of whether the violation resulted in substantial prejudice to the opposing party." Fedd v. State, 461 So.2d 1384, 1385 (Fla. 1st DCA 1984). Since the trial court in the case at bar never inquired into what prejudice, if any, would be suffered by the State, it never made nor could make a determination that the prejudice would be substantial to the State. In Hampton v. State, 18 Fla.L.Weekly 1988 (Fla. 2d DCA September 8, 1993) it was held to be reversible error to exclude from testifying a defense witness not named on witness list where the court failed to inquire, and the State failed to indicate, how the State had been prejudiced. Assuming, *arguendo,* that there might have been prejudice to the State, the sanction imposed by the trial court was disproportionate to the nature of any violation. As noted in Wilcox v. State, 367 So.2d 1020, 1023 (Fla. 1979), "prejudice may be averted through the simple expedient of a recess to permit the questioning or deposition of witnesses . . ." Thus, it is an abuse of discretion for a trial judge to "invoke the severe sanction of prohibiting the defense from calling . . . witnesses instead of granting a recess and allowing the prosecutor to interview the witnesses and satisfy himself as to whether the prosecution would be prejudiced by the witnesses being allowed to testify." Streeter v. State, 323 So.2d at 17; see also O'Brien v. State, 454 So.2d 675, 677 (Fla. 5th DCA 1984).

In the case at bar, the co-defendant specifically offered to make the witnesses available after their arrival in the country and before the hearing scheduled for 9:00 a.m. the following morning (R. 6110). Counsel for the Defendant, DOUGLAS ESCOBAR, requested repeatedly during the proceedings that he be allowed an opportunity to speak with and interview

these witnesses as to possible important and relevant testimony (R. 6200, 6255), and that these witnesses be allowed to testify (R. 6254). The trial judge could easily have granted a short recess to allow these witnesses to be interviewed and deposed to determine prejudice, but rather said, "they are not going to testify, simple as that" (R. 6195). The trial judge failed to consider any other manner to rectify the possible prejudice, even though the four witnesses had traveled from a foreign country at great hardship and expense, and even though the matter was quite literally one of life or death.

This Court has repeatedly held that the error in failing to follow Richardson procedures is not subject to harmless error analysis and is per se reversible. Brown v. State, 515 So.2d 211 (Fla. 1987); State v. Hall, 509 So.2d 1093 (Fla. 1987); Smith v. State, 500 So.2d 125 (Fla. 1986); Zeigler v. State, 402 So.2d 365 (Fla. 1981), cert. denied, 455 U.S. 1035, 102 S. Ct. 1739, 72 L.Ed.2d 153 (1982); Cooper v. State; 377 So.2d 1153 (Fla. 1979); and Wilcox v. State, 367 So.2d 1020 (Fla. 1979). Even if harmless error analysis were to be applied, the exclusion here was no doubt harmful. The witnesses who testified on behalf of the Defendant, DOUGLAS ESCOBAR, consisted of an eleven year old son (R. 6232-6235), a lawyer who had some years earlier represented the Defendant on traffic matters and could only testify that the Defendant was a "gentleman" (R. 6221), and a father who had not seen the Defendant for more than ten years and had abandoned the family when the Defendant was four or five years old (R. 6236-6240). The very witnesses who were excluded were the only prospective witnesses who could offer testimony relevant to the Defendant's childhood and background after the Defendant reached five years of age. Without the testimony of the four witnesses, the sentencing jury heard no testimony relating to the Defendants' background and life after the Defendant reached five years of age until after he reached adulthood.

In McCleskey v. Kemp, 481 U.S. 279, 305-306, 107 S.Ct. 1756, 1774-1775, 95 L.Ed.2d 262 (1987) the Court noted that according to the Eighth Amendment of the U.S. Constitution, "States cannot limit the sentencer's consideration of any relevant circumstances that could cause it to decline to impose the (death) penalty." The Supreme Court again reiterated this position in Payne v. Tennessee, _____ U.S. ____, 111 S.Ct. 2597, 2607, 115 L.Ed.2d 720 (1991) when it stated ". . . virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances . . ."

In Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), and Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), the Court concluded that the Eighth and Fourteenth Amendments require that a jury may not be precluded from considering, *as a matter of law*, any relevant mitigating evidence. The trial court's ruling, in the case at bar, excluding the four witnesses from testifying as to the Defendants' childhood traumatization as well as their service in the Sandinista military[26] and the war's effects on the Defendants, *as a matter of law*, prevented the jury from considering relevant mitigating evidence.[27]

Since the trial court's failure to conduct a Richardson inquiry cannot be remedied by an isolated evidentiary hearing, see Smith v. State, 372 So.2d 86 (Fla. 1979), and since the exclusion of witnesses who

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[26]Military service is a recognized valid nonstatutory mitigating circumstance. See Campbell v. State, 571 So.2d 415 (Fla. 1990).

[27]Even the prosecutor, Abe Laeser, during final argument to the Judge, commented on the relevancy and importance of hearing testimony about the Defendants' participation in the Sandinista struggle:

> I was interested in listening to Dennis Escobar's father-in-law. Perhaps he has hit upon what the triggering event was that changed their lives when he talked about the fact that they went and fought for several years on behalf of the Sandinistas.
> I don't think it matters on whose behalf they fought. There is something about war that perhaps changes men. But it changed these men in a way that they went from being students to a life of crime by their own description, by their own actions. They abandoned whatever their moral code had been up until that point. (R. 6450).

could testify as to relevant mitigating circumstances violates the Eighth and Fourteenth Amendments as interpreted by Eddings, supra and Lockett, supra, this cause should be remanded for a new sentencing proceeding before a newly empaneled sentencing jury.

POINT XVI

THE DEFENDANT IS ENTITLED TO A NEW SENTENCING PROCEEDING BEFORE A JURY WHERE THE STATE'S EXTENSIVE USE OF SIMILAR FACT EVIDENCE DURING THE GUILT PHASE MAY HAVE AFFECTED THE PENALTY PHASE.

As described in Issues III, IV and V, the State utilized extensive similar fact evidence of other crimes during the guilt phase of the trial. Should this Court find that admission of the similar fact evidence was harmless as to Defendant's conviction, Defendant asserts that the error cannot be considered harmless in regards to his death sentence. As this Court carefully noted in Lawrence v. State, 614 So.2d 1092 (Fla. 1993), it is appropriate to vacate a death sentence and impanel a new penalty proceeding before a new jury where similar fact evidence of other crimes is admitted during the guilt phase and deemed harmless as to one's conviction where such evidence may have, however, improperly influenced the jury during the penalty phase. In the present case, the State tendered substantial and tremendous similar fact evidence of other crimes including testimony regarding a violent confrontation with California police. This evidence became the highlight of the trial (see detailed description in Issues III and IV) and the State cannot show beyond a reasonable doubt that the similar fact evidence of other crimes did not affect the penalty phase. This cause should be remanded for a new penalty proceeding before a new jury.

POINT XVII

UNDER A PROPORTIONALITY REVIEW OF THIS CASE, A DEATH SENTENCE IS NOT WARRANTED

As part of its review of death sentences, this court in recent years has shown an increasing willingness to reduce death sentences to life imprisonment even when the jury has recommended death. It has done so under its obligation to review capital sentences to ensure that the sentence in a particular case is fairly deserved when compared with other cases involving similar facts.

As this Court noted in Fitzpatrick v. State, 527 So.2d 809 (Fla. 1988), any review of the proportionality of the death penalty in a particular case must begin with the premise that death is different. In State v. Dixon, 283 So.2d 1 (Fla. 1973), cert.denied sub nom., Hunter v. Florida, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974), this Court upheld Florida's amended capital punishment statute, stating that:

> Death is a unique punishment in its finality and in its total rejection of the possibility of rehabilitation. It is proper, therefore, that the Legislature has chosen to reserve its application to only the most aggravated and unmitigated of most serious crimes.

Id. at 7 (emphasis supplied). This Court has described the proportionality review it conducts in every death case as follows:

> Because death is a unique punishment, it is necessary in each case to engage in a thoughtful, deliberate proportionality review to consider the totality of circumstances in a case, and to compare it with other capital cases. It is not a comparison between the number of aggravating and mitigating circumstances. (emphasis supplied).

Porter v. State, 564 So.2d 1060, 1064 (Fla. 1990), cert. denied, 498 U.S. 1110, 111 S.Ct. 1024, 112 L.Ed.2d 1106 (1991). Accord, Hudson v. State, 538 So.2d at 831 (Fla. 1989); Menendez v. State, 419 So.2d 312 (Fla. 1982). Proportionality review is a unique and highly serious function of this Court, the purpose of which is to foster uniformity in death-penalty law. Tillman v. State, 591 So.2d 167 (Fla. 1991).

In the case at bar, there was evidence that the Defendant and co-defendant had been visiting numerous bars and drinking all day (R. 240; R. 763; 5027; 5260-5261) and that Defendant had a drinking problem (R. 5124-5125). This Court has reduced death sentences where there was evidence the defendant had been drinking when he committed the murder. Ross v. State, 474 So.2d 1170 (Fla. 1985); Caruthers v. State, 465 So.2d 496 (Fla. 1985). In Ross, this Court approved the trial court's finding that Ross killed his wife in an especially heinous, atrocious, and cruel manner. The court, however, also said the trial court had given insufficient consideration to the conflicting evidence of Ross' drunkenness on the night of the murder. Ross had no significant prior record, and he had not reflected for a long time on committing the murder. In the case at bar, the Defendant had been drinking all day, the circumstances of an unexpected routine traffic stop did not allow for reflection on committing the murder, and the spontaneous shooting was not found to have been committed in an especially heinous, atrocious or cruel manner.

In simple felony-murder situations where the defendant has been drinking, this Court has shown a willingness to reduce the sentence of death to life in prison. Rembert v. State, 445 So.2d 337 (Fla. 1984). In Rembert, Rembert entered a bait and tackle shop after drinking for part of the day, hit the elderly victim once or twice on the head and stole a small amount of money. This Court reduced the death sentence to life. The present case was not even a felony murder.

Even where the defendant had not been drinking and the murder was a simple felony murder, this Court has reduced the death sentence. Lloyd v. State, 524 So.2d 396 (Fla. 1988). In Lloyd, Lloyd entered a home where a woman and her five year old son lived. He demanded money from her and then shot her two times while her son watched. This Court approved only the aggravating factor that Lloyd committed this murder

during the course of an attempted robbery. In mitigation, Lloyd had no significant prior record. After comparing Lloyd's sentence to other cases, this Court reduced Lloyd's sentence of death to life in prison. The case at bar is certainly no more aggravated and unmitigated than the felony murder in Lloyd.

Murders committed during the heat of passion also tend not to be worthy of death. Kampff v. State, 371 So.2d 1007 (Fla. 1979); Wilson v. State, 493 So.2d 1019 (Fla. 1986); Smalley v. State, 546 So.2d 720 (Fla. 1989). In Wilson, Wilson killed his father and a neighbor. Even though the trial court properly found the murder to have been especially heinous, atrocious and cruel, and Wilson had a prior conviction for a violent felony, this Court reduced the death sentence to life in prison where the trial court failed to give proper consideration that the murder had occurred during a heated family argument which had suddenly erupted. In the case at bar, the shooting occurred in a moment of panic and fear of apprehension. This emotion is not unlike the heat of passion that suddenly erupts in a heated argument causing loss of rational thought. The Defendant below should not be treated more harshly than Wilson where the shooting was during the heat of passion and was not especially heinous, atrocious and cruel.

In the case at bar, the trial court found and considered two aggravating circumstances in support of the death penalty: (1) the previous conviction of a violent felony, (R. 246-248) and (2) that the victim of the murder was a law enforcement officer engaged in the lawful performance of his official duties. (R. 247-248). The previous conviction of a violent felony was the result of a flight and violent confrontation with police officers in California one month after Officer Estefan's death (R. 246-247). The trial court found that a single

nonstatutory mitigating factor (of the defendant's family's broken home)[28] (R. 248). This Court, however, is not bound by a comparison of the number of aggravating circumstances with the number of mitigating circumstances, Porter v. State, 564 So.2d 1060, 1064 (Fla. 1990), and must look to the totality of circumstances in the case.[29] Tillman v. State, 591 So.2d 167 (Fla. 1992).

In looking at the totality of circumstances in this case, the evidence shows that the defendant, DOUGLAS ESCOBAR, was the driver of a car during a routine traffic stop. The defendant's brother, DENNIS ESCOBAR, was the passenger who ultimately shot and killed the police officer during a brief struggle and confrontation. DOUGLAS ESCOBAR'S sole participation in the murder was his alleged statement to his brother "if he [the police officer] gets out, shoot him." (R. 5210). The statement was made during a moment of panic in the heat of pursuit by the police officer the defendant was trying to evade. (R. 5209-5210). There was evidence that the brothers had been visiting bars and drinking all day. (R. 240; 763; 5027; 5260-5261). There was evidence of a struggle between the co-defendant and the police officer just prior to the shots. (R. 4630-4634). Conspicuously absent was any evidence that the murder had been committed in an especially heinous, atrocious and cruel manner.

While the killing of the police officer in this case was senseless and outrageous, the totality of the circumstances do not demonstrate that this murder lies beyond the norm of the hundreds of capital felonies this Court has reviewed since the 1970s. Under this Court's proportionality

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[28]The trial court's sentencing order notes that the evidence established that Defendant's father was a very heavy drinker, had many arguments with his wife and Defendant witnessed, at the age of five, an incident where Defendant's father was drunk, took out a gun and shot at his wife. Defendant's father thereafter abandoned his family. (R. 245).

[29]This court is however precluded from performing a comprehensive review of the totality of circumstances because of the trial court's erroneous exclusion of other relevant non-statutory mitigating evidence (proffered testimony regarding Defendants' participation in Nicaragua civil war, and the effects war had on Defendants' behavior; see Issue XV, at pp. 86-94 of this Brief).

review power, the death sentence should be reduced to a sentence of life in prison where the circumstances of this murder do not rise to the level of the most aggravated and unmitigated of most serious crimes.

CONCLUSION

Based upon the foregoing, the Defendant requests that this Court reverse his conviction and sentence of death and remand the case to the trial court for a new trial and new sentencing or, in the alternative, remand the case for a new sentencing hearing before a new sentencing jury or, in the alternative, remand the case for a new sentencing hearing before the Judge or a different Judge.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served upon Ralph Barreira, Assistant Attorney General, Office of the Attorney General, 401 N.W. 2nd Avenue, Suite N921, P.O. Box 013241, Miami, Florida 33101, and John Lipinski, Esquire, 1455 N.W. 14 Street, Miami, Florida 33125 by U.S. mail this 23rd day of November 1993.

By: _____
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