IN THE SUPREME COURT
OF FLORIDA

CASE NO.: 77,843

MICHAEL ALLEN GRIFFIN,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

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INTRODUCTION

This is a direct appeal by the Defendant, MICHAEL ALLEN GRIFFIN, from an adjudication of guilt and sentence of death entered following a jury trial before the Honorable Arthur Snyder, Circuit Judge, Eleventh Judicial Circuit, Dade County, Florida. The Appellant was the Defendant in the trial court and the Appellee, the State of Florida, was the Plaintiff. The parties will be referred to as "the Defendant" and "the State" in this brief. The Symbol (R) will refer to the Clerk's Record on Appeal which includes the entire transcript of proceedings in the trial court.

All emphasis is in the original unless otherwise noted.

STATEMENT OF THE CASE AND FACTS

The Defendant was charged by grand jury indictment on May 2, 1990, with the First Degree Murder of Joseph Martin, A Law Enforcement Officer; Armed Burglary; two (2) counts of Grand Theft; Aggravated Assault of Juan Crespo, A Law Enforcement Officer; Petit Theft; and Possession of A Firearm By A Convicted Felon, these acts occurring on April 27, 1990. (R. 1-4A).[1]

On November 26, 1990, the Defendant filed a Motion To Suppress Statements (R. 80-81). An evidentiary hearing was held on the motion on December 6, 1990 (R. 650-913). The state called one witness, Detective Ramesh Nyberg (R. 661-705). The detective testified that he responded at approximately 5:30 A.M. to the location where the Defendant had been arrested (R. 622). He was instructed by Sergeant Green to obtain a statement from the Defendant (R. 663-664).

When he first observed the Defendant, the Defendant was seated in the back of a patrol car, handcuffed (R. 663-665). The detective noted that the Defendant had smeared blood and scratch marks on him, and seemed upset. He also saw a bandage on the Defendant's arm (R. 665 - 694). The detective also noticed blood on the backseat of the car, and saw that the wound on Defendant's arm was oozing (R. 62).

The detective removed the Defendant from the police car in

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[1]On December 6, 1990, on ore tenus motion of the Defendant, the Court severed Count VII, the charge of Possession of a Firearm By A Convicted Felon (R. 656-657). That same day, the State filed an Information charging the Defendant with the Attempted First Degree Murder of Officer Crespo. (R. 5). On December 13, 1990, the State announced a nolle prosse of Count V of the Indictment (the aggravated assault charge) because that charge had now been superseded by the information (R. 934).

order to have other officers obtain hand swabs. As he did this, the Defendant groaned, indicating to the detective that he was in pain. (R. 692). The Defendant told the detective that his back was hurting (R. 672). Photographs of the Defendant, depicting his injuries, were introduced into evidence (R. 89-114).

After returning the Defendant to the patrol car, the detective advised him of his rights and proceeded to question him (R. 667-674). Following this conversation, the Defendant was taken to the Emergency Room at Jackson Memorial Hospital. Based on the detective's own estimates, he was with the Defendant for approximately 1 hour and 15 minutes before he took him to the hospital. (R. 622, 676). The detective admitted the delay in transporting the Defendant even though he knew the Defendant was suffering from a gunshot wound. (R. 695-697). The detective also acknowledged that he did not want the Defendant going to a hospital and getting medical treatment that would prevent him (the detective) from obtaining a statement -- in particular, the detective was concerned about the Defendant receiving medication at the hospital which would have prevented him from giving an admissible statement to him (R. 678, 700).

The Defendant testified that his injuries occurred from contact with both an unknown number of unidentified police officers and police dogs. (R. 709). Specifically, the Defendant stated that several officers kicked him in the face, ribs, and back while he was on the ground, for a period of about 10 to 15 minutes (R. 70-73). He also stated that he lost consciousness during the beating (R. 73).

The Defendant argued that the detective wilfully and

deliberately had medical attention withheld from the Defendant, and taken in totality with the police misconduct (the beating of the Defendant), the Defendant's statements were not freely and voluntarily make. (R. 730-732). The court denied the Motion To Suppress, noting "as a matter of law" that a Defendant's injuries do not affect the voluntariness of a statement (R. 735-736).

Following four days of jury selection, the trial commenced on January 31, 1991 (R. 15, 2304). The actual taking of testimony began on February 1, 1991, the state calling Richard Marshall as its first witness (R. 2405). He testified that he was in Miami visiting and had rented a white Chrysler LeBaron (R. 2406). He stayed at a hotel on Collins Avenue; before going to bed, he placed his wallet and car keys on the dresser (R. 2409-2410). When he awoke in the morning, he saw the front door to his room open (R. 2411). The Defendant objected and requested a sidebar (R. 2411).

The Defendant argued that the state was attempting to introduce evidence of the Defendant burglarizing the hotel room, a crime not charged in the indictment, and irrelevant to the issue of whether the car was stolen for purposes of charging the Defendant with grand theft. The state agreed to not go further into evidence of the burglary, and the court declined to rule at this point on a request by the Defendant for a curative instruction. (R. 2412-2413). The state then asked Mr. Marshall if the keys to the car were missing that morning when he awoke. The Defendant objected and informed the court that he had a motion (R. 2413); the objection was overruled (R. 2413).

The Defendant moved for a mistrial, noting that the court had overruled his request for a curative instruction, and stated that

the burglary of the hotel was evidence of an uncharged criminal act which, moreover, the state had never given the required "Williams Rule" notice to the Defendant of its intent to use such evidence (R. 2415-2417). The court now agreed to give a curative instruction as to Mr. Marshall and as to Charles Pasco, the next witness (R. 2414-2417). The court then read to the jury the standard jury instruction regarding Williams Rule evidence. (R. 2418-2419).

Charles Pasco testified that early on the morning of April 26, 1990, two men ran up to him and his girlfriend in his driveway, one man carrying a shotgun, and was ordered to get down (R. 2421-2425). Mr. Pasco went on to describe in detail the circumstances of the robbery, and also testified that a firearm, a .357 magnum pistol, was taken by the men (R. 2426-2432). The Defendant moved for a mistrial on the grounds that the state was making this uncharged criminal activity a feature of the case. The motion was denied (R. 2433-2434).

Following the testimony of a corrections officer, the Court gave the jury a curative instruction regarding Mr. Marshall's testimony, stating:

> "In relation to the testimony of a Richard Marshall, you remember Mr. Marshall? He's the fellow from New York who came down here and he had his white LeBaron convertible stolen?
>
> I want to instruct you that notwithstanding all that you heard, there was more in there than you should have heard. The only things that you should consider regarding Mr. Marshall's testimony is that he had lawful possession of that motor vehicle and that he did not give the defendants, either individually or collectively, permission to

use that vehicle, okay?

(R. 2472-2473).

The state called Nicholas Tarallo (R. 2474). He testified that the Defendant and Co-Defendant came to his apartment on April 26, 1990 driving a blue Cadillac (R. 2479). The three of them then went out but now went in a white LeBaron, the change of vehicles taking place at another apartment complex (R. 2479-2480). A shotgun was also brought into the LeBaron (R. 2481).

Tarallo then went on to describe the events leading up to the robbery in which Charles Pasco's .357 magnum was stolen. (R. 2484-2488). On the way back to Miami, Tarallo said that Defendant made the following statements: that if they were pulled over by the police, that he (the Defendant) would get out and shoot and that he (Tarallo) should drive away; and that he (the Defendant) was not going back to jail (R. 2489). Back in Miami, the men parked the white LeBaron, and drove the blue Cadillac back to Tarallo's house (R. 2490-2491).

Later that day, the three men went out driving again. According to Tarallo, there was plan to go "jacking," to rob someone (R. 2494-2495). They headed north into Ft. Lauderdale, and then Pompano (R. 2496). At the Defendant's request, Tarallo, who was driving, pulled off the road into the parking lot of a condominium; Tarallo testified that the Defendant told him to do this because "it looked easy to get into that apartment." (R. 2496-2497).

The Defendant objected and, at sidebar, complained that the state was again bringing out "90.404" evidence for which no notice had been given to the defense, and further argued that the evidence

itself was nevertheless inadmissible as it only showed the Defendant's propensity to plan and attempt to commit criminal acts (R. 2497-2498). The Defendant then moved for mistrial (R. 2497-2498). The motion was denied. (R. 2499).

Tarallo then testified that later that night, the Defendant stated they should go to the Holiday Inn Newport because he had "got paid there five hundred times" (R. 2499). The Defendant objected, arguing that the state was making the Williams Rule evidence a feature of the trial. The court again denied (actually overruled) the Defendant's objection (R. 2500-2501).

Tarallo described how the Defendant and Samuel Velez, his other Co-Defendant, burglarized the room at the Holiday Inn while he remained downstairs. (R. 2501-2506). As soon as the Co-Defendants re-entered the vehicle, they began to distribute money and the other items taken in the burglary (R. 2506). Tarallo drove away from the hotel, eventually turning onto back streets (R. 2508-510). Eventually, they passed a police car which turned around and started following their car (R. 2511).

At this point, the Defendant told Tarallo to go, to leave the area. The Defendant was "real nervous." (R. 2512). The Defendant continued to tell him to drive, to go fast; when he tried to pull over, the Defendant said he (the Defendant) was not going to go back to jail. The Defendant told him to drive (R. 2512).

Tarallo tried again to pull over; this time, the Defendant put Tarallo's foot back on the gas, made him go back into the roadway, and told him not to pull over (R. 2513).

Tarallo then pulled the car over a third time, put the car in park, and began to exit the car. He then heard the Defendant

firing a gun. (R. 2513-2514). The shooting began about 10 to 15 minutes after they left the Holiday Inn (R. 2547). Tarallo also testified that right before the shooting occurred, the Defendant was frightened and nervous. (R. 2535).

Prior to trial proceedings beginning on February 5, 1991 -- the third day of testimony -- the Defendant filed a Motion to Dismiss And (Renewed) Motion For Mistrial relating to the objections previously raised regarding Williams Rule evidence (R. 2828; R. 409-419). The Court denied the motion to dismiss or to declare a mistrial, stating that "the factual matters referred to in the motion as Williams Rule evidence are not Williams Rule evidence." The court further stated these same factual matters "are not in any way material to the facts of this case." (R. 2938-2939; R. 419).

Officer Juan Crespo testified and corroborated Tarallo's testimony about the LeBaron slowing down and speeding up (R. 3020-3026).

Prior to trial proceedings commencing on February 6, 1991, a Motion For Mistrial was made by the Co-Defendant, Samuel Velez. In giving grounds for the motion, Velez' counsel stated that one of the prosecutors assigned to the case made a comment, during a discussion of jury instructions and applicable Florida law, that the state would object to certain instructions being read to the Velez jury even though supported by the law. Velez' attorney then said that this prosecutor stated, "We would rather risk a reversal than risk an acquittal." (R 3098-3099).

The Defendant joined in the Motion For Mistrial, albeit on different grounds, specifically: that this prosecutor's comment

showed that the state's strategy was to introduce as much damaging evidence as possible, notwithstanding its inadmissibility, in a conscious effort to risk reversal rather than acquittal. (R. 3099-3100). The motion was denied (R. 3102).

Criminalist Thomas Quirk, a firearms examiner, testified as to the projectiles and casings found at the scene (R. 3105-3201). He testified that the crime scene was consistent with the .357 pistol being fired quickly, and that stress would affect a person's ability to control a weapon while firing (R. 3193-3194, 3196-3197).

After calling a deputy medical examiner, the state rested (R. 3235; R. 46). The Defendant renewed all prior motions, specifically those for mistrial, and also moved for a judgment of acquittal. (R. 3236-3238; R. 46). The court denied all motions except the motion for judgment of acquittal as to Count IV, the car theft, on which it deferred ruling (R. 3238; R. 46). The Defendant then rested (R. 3238; R. 46) and renewed the motions previously made at the close of the state's case (R. 3243; R.46-47).

Following deliberations over a two-day period, the jury returned its verdict on February 8, 1991, finding the Defendant guilty as charged as to all counts (R. 3429-3431; R. 59; R. 515-520). The court adjudicated the Defendant guilty as to all counts, and set the penalty phase proceedings for February 13, 1991 (R. 3432-3434); 489-491; R. 59).

On February 11, 1991, the Defendant filed a Motion To Impanel A New Jury For Sentencing, arguing that the guilt phase jury had been irreparably tainted by hearing so much evidence of uncharged criminal activity, evidence which would be inadmissible at a penalty phase (R. 554-555). The court denied the motion the next

day (R. 554), and again denied it when renewed on February 13, 1991. (R. 3635).

One of the seven (7) witnesses called by the defense was Randy Gage (R. 3690). Before he testified, the state objected to the defense being allowed to introduce as an exhibit a newspaper article written by Gage, a freelance writer, who also happened to know the Defendant from several years earlier (R. 3692-3698). The court over defense objections refused to allow the witness to read any of the article into evidence. (R. 3688-3689).[2]

The next defense witness was Al Fuentes, an investigator who assisted in the preparation of the defense, particularly for the penalty phase (R. 3706). The state objected to Mr. Fuentes being allowed to testify to specific statements made to him by the Defendant indicating remorse, arguing that it would be self-serving and exculpatory. (R. 3706-3708). The court agreed, overruling the argument by the Defendant that statements made by the Defendant showing remorse are admissible in a penalty phase. (R. 3707-3710). Defense counsel left the court to instruct his defense witnesses of the court's ruling (R. 3711).

Mr. Fuentes then testified that he had become very close to the Defendant, visiting him 4 to 5 times while the case was pending and speaking with him on the phone 3 times a week (he had given the Defendant his home number). Mr. Fuentes felt he had become pretty close to the Defendant (R. 3718).

After all the defense witnesses had testified, the Defendant proffered on the record that two other defense witnesses, Brenda

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[2]For record and appellate purposes, the article was marked as a defense exhibit (R. 3689; R. 558, 562-563).

Waters, the Defendant's special education teacher, and Mario Montero, his foster father, would also have testified to verbal statements made, and letters written by, the Defendant, in which he showed remorse.[3]

The jury returned an advisory sentence recommending, by a vote of 10-2, the death penalty (R. 3836-3838; R. 612-613). Sentencing was set for March 7, 1991 (R. 3839; R. 67).

On March 7, 1991, the court entered its sentencing order, finding that the aggravating circumstances outweighed the mitigating circumstances, and therefore a death sentence was appropriate (R. 497-513; R. 3862-3883). Specifically, the court found the state had proved the existence of four (4) aggravating circumstances: that the Defendant had previously been convicted of a felony involving violence (the attempted murder of Officer Crespo; 2) that the capital felony was committed while the Defendant was engaged in the commission of a burglary[4]; 3) that the capital offense was committed for the purpose of avoiding or preventing a lawful arrest; and 4) that the capital offense was committed in a cold, calculated, and premeditated manner.[5]

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[3]Again, as with the article written by Mr. Gage, the Defendant had the depositions of two witnesses marked as defense exhibits for record and appellate purposes (R. 3771; R.565-609).

[4]The court found that the burglary, though technically complete, was not legally complete (R. 504).

[5]The court also found the existence of two (2) aggravating circumstances which it did not consider: 1) that the capital felony was committed to hinder the lawful exercise of any government function; and 2) that the victim of the capital offense was a law enforcement officer who was engaged in the performance of his duties (R. 507-509). The court felt that consideration of these circumstances would result in an impermissible "doubling effect", in violation of the rule of law set forth in Bello v. State, 547 So.2d 914 (Fla. 1988) (R. 509)

The court found that the defense had established one statutory mitigating circumstance, age (the Defendant was 20 years old at the time the offense was committed), and the following non-statutory mitigating circumstances: 1) his showing of remorse; 2) his traumatic childhood; and 3) his learning disability. The court sentenced the Defendant to death on Count I; as to Count II, life imprisonment; Count III, five years' imprisonment; Count IV, five years' imprisonment; and Count V, life imprisonment, all sentences to run concurrent (R. 3882-3883; R. 492-496). The court suspended entry of sentence as to the misdemeanor charge (R. 3882).

Notice of Appeal was timely filed on April 8, 1991. This appeal follows.

SUMMARY OF ARGUMENT

Two arguments are raised regarding the trial phase: 1) The state engaged in prosecutorial overkill by systematically introducing evidence of uncharged criminal activity by the Defendant, violating both the prohibition against making such evidence a feature of the case and rules of relevancy; 2) the court erred in denying the Defendant's Motion To Suppress statements made to Detective Nyberg where the evidence showed that the officer delayed taking the Defendant, who was in obvious pain, to the hospital for medical treatment until after he had obtained a statement from him.

As to the penalty phase, 3) the court should have allowed a new jury to be impaneled for the penalty phase as a curative measure to insure that all the evidence admitted in the guilt phase of other criminal activity -- and which would be inadmissible in the penalty phase -- would not infect the fact-finding process in that phase; 4) the court erred in limiting the defense's ability to present evidence of mitigating circumstances by not allowing several witnesses to testify regarding statements made by the Defendant showing remorse and by refusing to allow the Defendant to introduce a newspaper article written by one of the defense witnesses in which he related evidence showing the Defendant's good character; 5) the court incorrectly found that the state had found the aggravating circumstance of the capital offense occurring while the Defendant was committing a felony, a burglary, where the evidence showed that the burglary was legally complete; and 6) the court incorrectly found the existence of the aggravated circumstance of the capital offense being committed in a cold,

calculated, and premeditated manner, where opinions of the Supreme Court of Florida show that this particular circumstance does not apply to the facts presented in the instant case.

GUILT PHASE ARGUMENT

I.

THE TRIAL COURT ERRED IN OVERRULING THE DEFENDANT'S OBJECTION TO, AND IN DENYING THE DEFENDANT'S MOTIONS FOR MISTRIAL BASED ON, THE STATE'S INTRODUCTION OF EVIDENCE OF UNCHARGED CRIMINAL ACTIVITY, WHERE THE STATE DID NOT COMPLY WITH THE PROCEDURAL REQUIREMENTS OF SECTION 90.404(B), FLORIDA STATUTES, AND WHERE, IN ANY EVENT, SUCH EVIDENCE BECAME A FEATURE OF THE CASE OR WAS IRRELEVANT, THEREBY DENYING THE DEFENDANT'S RIGHT TO DUE PROCESS AND TRIAL BY IMPARTIAL JURY AS GUARANTEED HIM BY THE FLORIDA AND UNITED STATES CONSTITUTIONS.

> "4-3.8. Special Responsibilities of a Prosecutor.
>
> Comment: A prosecutor has the responsibility of a minister of justice and not simply that of an advocate."

Rules Regulating The Florida Bar (1987).

In Snowden v. State, 537 So.2d 1383 (Fla. 3d DCA 1989), the Third District analyzed at length the propriety of prosecutorial use of so-called "Williams Rule" evidence in a criminal trial. The court concerned itself with two aspects of the rule: first, the evidentiary basis for allowing evidence of other crimes, conduct, and acts of a defendant; and second, a critical limitation on such evidence, that it may be not become a "feature" of the trial. The court noted that:

> The sanctioned use of similar fact evidence to establish a fact or facts in issue in a criminal prosecution continues to be fraught with the danger of convicting a person not for the crime charged, but for his criminal propensities or bad character. The concern is that "the jury... may infer that the defendant is an evil person inclined to violate the law."

Snowden, at 1384 (citation omitted).

The court went on to state that "Williams Rule" evidence becomes a "feature instead of an incident" of a trial where it can be said that evidence so overwhelmed evidence of the crime charged as to be considered an impermissible attack on the character of the accused. Id. at 1385. Where a review of the trial record indicates such circumstances, appellate courts have reversed convictions based on such evidence. See, e.g. Matthews v. State, 366 So.2d 170 (Fla. 3d DCA 1979); Macklin v. State, 395 So.2d 1219 (Fla. 3d DCA 1981); Smith v. State, 344 So.2d 915, 917 (Fla. 1st DCA 1977), and cases cited therein.

In the case at bar, the State spent practically an entire day of trial eliciting evidence of numerous acts of criminal behavior on the part of the Defendant, none of which were charged in the indictment:

1) The nighttime burglary of an occupied hotel room (testimony of Richard Marshall);

2) The armed home invasion robbery of two individuals and an armed burglary of a dwelling (testimony of Charles Pasco);

3) Possession of a second stolen motor vehicle (testimony of Nicholas Tarallo);

4) The attempted burglary of a dwelling (testimony of Nicholas Tarallo);

5) The attempted theft of property from that dwelling (testimony of Nicholas Tarallo); and

6) A statement by the Defendant regarding his commission of 500 other burglaries of and/or thefts from a hotel (testimony of Nicholas Tarallo).

At no time was the Defendant charged with burglary of any premises in the possession of Richard Marshall, nor did the State, prior to trial, give notice to the Defendant pursuant to Section

90.404(2)(b), Florida Statutes, that it intended to introduce any so-called "Williams Rule" evidence relating to the circumstances under which the white LeBaron was stolen. Notwithstanding this, the State was allowed, over defense objection and Motion for Mistrial, to elicit testimony from Richard Marshall indicating that the keys to the Chrysler were stolen from his locked motel room during the night while he was asleep in that room.

While the possession of the stolen LeBaron is clearly relevant (the Defendant being charged with Grand Theft), the fact that the theft was facilitated by a burglary of an occupied motel room is not. In fact, the witness, being asleep when the burglary occurred, could not even identify what person or persons entered his motel room to take his car keys -- yet the state was allowed to elicit this testimony, intimating to the jury that the Defendant stole those keys and had a propensity to commit motel burglaries.

Charles Pasco testified over defense objections to an armed "home invasion" robbery of both himself and his girlfriend, Marcia Krystoff. He stated that during this robbery, one of the two assailants held a shotgun to the back of his skull. A pistol was stolen, which the State later showed to be the handgun used by the Defendant to kill Officer Martin and to shoot at Officer Crespo.

While the Defendant admits that his possession of the murder weapon is relevant, how he obtained that weapon is not. Whether found in the street, or stolen, or purchased, it is the possession and use of the firearm that is relevant. Introducing evidence of the Defendant committing another violent offense to obtain that weapon can only be considered evidence of criminal propensity, and such evidence is not admissible under Florida law.

As if the state had not clearly made other criminal acts a feature of this case, it then elicited testimony from Nicholas Tarallo that the blue Cadillac used by the Defendants was a stolen car; that the Defendant stopped this car while driving in Pompano, identified a building as "looking easy to break into" and then leading his co-Defendants to the rear of the building; and finally, eliciting from Tarallo that the Defendant made a statement about having committed 500 burglaries at the Newport Holiday Inn.

None of the criminal activity discussed above -- the theft or possession of a second stolen car, the attempted burglary of a dwelling and theft from therein, and the "500" prior burglaries and/or thefts at the Newport Holiday Inn -- was ever the subject of formal criminal charges against the Defendant.

Moreover, the State never notified the Defendant of its intent to introduce the evidence testified to by Nicholas Tarallo as "Williams Rule" evidence prior to trial. Notwithstanding timely objections and motions for mistrial made by the Defendant during Mr. Tarallo's testimony, the court allowed the State to adduce all this evidence of prior criminal acts, and in the process allowed the state to make this evidence a feature of the trial, rather than a minor part of it, in contravention of the rule announced in Williams v. State, 117 So.2d 473 (Fla. 1960).

But the examination of the trial record does not end here. The Defendant argued to the trial court repeatedly that the state was intentionally "loading up" the trial with evidence of uncharged criminal activity by the Defendant as a trial strategy -- to infect the jury with the idea that the Defendant was "an evil person inclined to violate the law." Snowden, supra at 1384. There is

evidence in the record to support the Defendant's contention that the state was deliberately introducing as many criminal acts of the Defendant as possible -- relevant or not -- and that this was being done in an effort to "insure" conviction of a "cop killer".

On February 6, 1991, a Motion For Mistrial was made by the Co-Defendant, Samuel Velez. In giving grounds for the motion, Velez' counsel stated that one of the prosecutors assigned to the case made a comment, during a discussion of jury instructions and applicable Florida law, that the state would object to certain instructions being read to the Velez jury even though supported by the law. Velez' attorney then said that this prosecutor stated, "We would rather risk a reversal that risk an acquittal." (R. 3098-3099).

The Defendant joined in the Motion For Mistrial, stating that this prosecutor's comment showed that the state's strategy was to introduce as much damaging evidence as possible, notwithstanding its inadmissibility, in a conscious effort to risk reversal rather than acquittal.

If in fact this was the state's strategy, then the Defendant's rights to due process and a fair trial were violated.

But, ironically enough, in a case such as this -- where the evidence of guilt is significant, and arguably overwhelming -- it would appear that the state's strategy would work to its benefit, and the Defendant's rights would not be protected.

It is clear that appeals from convictions in murder cases are subject to a "harmless error" analysis, i.e., that a conviction will not be reversed unless there is a reasonable possibility that the error complained of affected the verdict. State v. DiGuilio,

491 So.2d 1129 (Fla. 1986); Craig v. State, 510 So.2d 857 (Fla. 1987). It naturally follows that the stronger the state's case -- the closer its evidence comes to being "overwhelming" -- the less likely an appellate court will find that the complained-of error affected the verdict.

Justice England, in discussing the propriety of a prosecutor's excessive use of gruesome and inflammatory (albeit relevant) photographs in a homicide case, expressed his concerns about application of a "harmless error" test:

> I reject any contention that errors of this type can be overcome when an appellate court finds ample other evidence in the entire record to demonstrate that a particular defendant has committed the crimes with which he or she was charged. That formula is too simple. If that were the rule of law, there would be no reason to limit the bounds of permissible evidence.

Funchess v. State, 341 So.2d 762, 764 (Fla. 1977) (England, J., concurring) (emphasis added).

Yet, on at least three occasions, this Court has allowed convictions for First-Degree Murder to be affirmed through application of the "harmless error" rule, notwithstanding findings in each instance that the State had improperly introduced "Williams Rule" evidence. See Craig v. State, supra at 864; Henderson v. State, 463 So.2d 196, 200 (Fla. 1985); Straight v. State, 397 So.2d 903, 908-09 (Fla. 1981).

To allow a prosecutor to willfully and deliberately infect a trial with inadmissible evidence, secure in the knowledge that the strength of their prosecution will "save" a conviction through the workings of the "harmless error" rule, poisons the integrity of the judicial process. The Third District Court of Appeal has expressly

rebuked another prosecutor in the Eleventh Circuit for use of such a trial tactic. Molina v. State, 447 So.2d 253 (Fla. 3d DCA 1983). As Justice Pearson noted in his concurring opinion:

> Merely because error can be rendered harmless because of other evidence, it is error nonetheless. Although a conviction in a strong case may be affirmed on a harmless error theory, that is not an invitation to prosecutors to commit the error and does not in any way affect their obligation to avoid deliberately eliciting inadmissible testimony in order to further tip the scales against the defendant.

Id. at 255 (emphasis added).

In the case at bar, the prejudice to the Defendant pervaded the entire trial.[6] The volume of inadmissible evidence, coupled with the admissible "Williams Rule" evidence which became a feature of this case, served only to inflame the jury and made a fair and impartial verdict an impossibility.

This Court must draw a line of permissible conduct by a prosecutor in cases like the one at bar -- the state cannot be permitted to abuse the use of Williams Rule evidence as it did here. This Court should follow its decision in Robinson v. State, 487 So.2d 1040, 1042 (Fla. 1986):

> Hearing about other alleged crimes could damn a defendant in the jury's eyes and be excessively prejudicial. We find the state went too far in this instance.

The improper use of Williams Rule evidence, and the introduction of irrelevant, highly inflammatory evidence, violated the Defendant's rights to trial by impartial jury, due process, and

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[6]The state's trial tactics resulted in the jury hearing evidence which would have been inadmissible in the penalty phase. See Penalty Phase Argument, infra.

equal protection of the laws, as guaranteed him by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, and Article I, Section 9 and 16 of the Florida Constitution.

The Defendant's convictions should be reversed.

II.

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS STATEMENTS WHERE THE EVIDENCE ESTABLISHED THAT THE POLICE DELIBERATELY PREVENTED THE DEFENDANT FROM RECEIVING NECESSARY MEDICAL TREATMENT UNTIL AFTER THEIR INTERROGATION WAS COMPLETED, IN VIOLATION OF THE DEFENDANT'S RIGHT TO DUE PROCESS AND EQUAL PROTECTIONS OF THE LAWS AS GUARANTEED BY THE FLORIDA AND UNITED STATE CONSTITUTIONS.

The unrebutted testimony of both Detective Nyberg and the Defendant established the following: that the Defendant had been severely beaten by police during and after his arrest; that the detective saw blood all over the Defendant, and saw that the wound on his arm -- a gunshot wound -- was oozing; that the detective realized that the Defendant was in pain; that the detective deliberately delayed taking the Defendant to a hospital for more than one hour because he wanted to try to obtain a statement from him. The detective's misconduct -- withholding necessary medical treatment from the Defendant in order to facilitate an interrogation -- coupled with the obvious physical distress of the Defendant before and during the interrogation, render the Defendant's statements to the police involuntary, and the trial court erred in denying the Defendant's Motion To Suppress.[7]

The law is clear that a Defendant's confession in order to be admissible, must be voluntary, the product of a free will, free of

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[7]The Defendant recognizes that the state did not introduce his custodial statements into evidence. However, should this Court grant a new trial based on Point I, supra, the lower court's ruling denying the Motion To Suppress would stand as "law of the case." Accordingly, the Defendant raises this point on appeal to reverse the lower court ruling so that at a new trial, his statements may not be utilized at all by the state. Harris v. New York, 401 U.S. 222 (1971).

coercive elements. Schneckloth v. Bustamonte, 412 U.S. 218 (1973); Davis v. North Carolina, 384 U.S. 737 (1966); see also United States v. Brown, 557 F.2d 541 (6th Cir. 1977), and cases cited herein. Courts have necessarily adopted a "totality of the circumstances" test to determine the voluntariness of a confession. Culombe v. Connecticut, 367 U.S. 602 (1961).

The United State Supreme Court has, on several occasions, invalidated confessions obtained while the Defendant was in physical pain or discomfort: Wan v. United States, 266 U.S. 1 (1924) (Defendant suffering from influenza and a chronic stomach condition); Reck v. Pate, 367 U.S. 433 (1961) (Defendant complaining of stomach pains; Defendant also vomited and was frequently ill while in police custody); Mincey v. Arizona, 437 U.S. 385 (1978) (Defendant in hospital, severely depressed, in great pain); Leyra v. Denno, 347 U.S. 556 (1954) (Defendant suffering from painful sinus condition).

Another factor looked at by the United States Supreme Court in determining voluntariness is whether the Defendant was deprived by the police of food, water, sleep or medication. See, e.g. Clewis v. Texas, 386 U.S. 707 (1967), and Greenwald v. Wisconsin, 390 U.S. 519 (1968).

In the case at bar, the Defendant clearly was in great physical pain, having suffered a gunshot wound before his arrest and being the recipient of a group beating after his arrest. He was clearly deprived of necessary medical treatment for more than an hour -- for no reason other than the detective's desire to question him before medical treatment (and medications) would make that impossible.

The conduct of the police cannot be condoned. Based on the above, the totality of circumstances show the Defendant's statements to be made involuntarily, and they must be suppressed. Lego v. Twomey, 404 U.S. 477 (1972).

PENALTY PHASE ARGUMENT

III.

THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING THE DEFENDANT'S MOTION TO IMPANEL A NEW JURY FOR SENTENCING WHERE THE GUILT PHASE JURY HAD HEARD SUBSTANTIAL EVIDENCE OF UNCHARGED CRIMINAL ACTIVITY WHICH WOULD HAVE BEEN INADMISSIBLE IN THE PENALTY PHASE AND THE DEFENDANT'S RIGHT TO AN IMPARTIAL SENTENCING RECOMMENDATION WAS PREJUDICED, THEREBY DENYING HIM HIS RIGHT TO TRIAL BY IMPARTIAL JURY AS GUARANTEED HIM BY THE UNITED STATES AND FLORIDA CONSTITUTIONS.

The Defendant, in an effort to counter the highly improper and prejudicial "overkill" of the state's case-in-chief, moved the Court to impanel a new jury for the penalty phase. The Defendant's motion was based on one ground: that the sentencing jury had been tainted by the state's intensive introduction of evidence of prior criminal activity by the Defendant, much of which would not have been admissible at the sentencing phase. The Court should have granted the defense request, and by failing to do so, denied the Defendant due process in the penalty phase of the trial as guaranteed him by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 9 of the Florida Constitution.

A trial court has the statutory authority to impanel a jury for sentencing purposes only. Section 921.141 (1), Florida Statutes; Herman v. State, 396 So.2d 222, 228 (Fla. 4th DCA 1981).[8]

The Court has held that evidence of uncharged criminal

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[8]In fact, the impaneling of a jury specifically for a penalty phase is often done: every time a court orders a defendant to be re-sentenced in a capital case, the trial court must of necessity impanel a new jury.

activity, or crimes for which no conviction has been obtained, is inadmissible in a penalty phase. Garron v. State, 528 So.2d 353, 358 (Fla. 1988); Robinson v. State, supra. In Garron, a new trial was ordered; in Robinson, a new penalty phase.

The jury in this case, having heard overwhelming evidence of uncharged criminal activity by the Defendant during the guilt phase, could not possibly have ignored it and disregarded it while reaching their decision in the penalty phase. The bottom line is the same: unduly prejudicial evidence was placed before the jury.

The State should not benefit from "...improperly do[ing] by one method something which it cannot do by another". Robinson v. State, supra at 1042.

The admission of the evidence at trial violated Defendant's right to a fair and impartial jury, as guaranteed him by Article I, Section 16 of the Florida Constitution and the Sixth and Fourteenth Amendments to the United States Constitution and accordingly, the Defendant is entitled to be re-sentenced before a new jury.

IV.

THE TRIAL COURT ERRED IN RESTRICTING THE DEFENDANT'S INTRODUCTION OF MITIGATING EVIDENCE, THEREBY DENYING HIM HIS RIGHT TO DUE PROCESS AS GUARANTEED HIM BY THE UNITED STATES AND FLORIDA CONSTITUTIONS.

During the penalty phase, the state made extensive efforts to limit the mitigating evidence the Defendant sought to introduce in his behalf. The Court upheld the state's objections, and in the process denied the Defendant his right to due process as guaranteed him by Article I, Section 9 of the Florida Constitution and the Fifth and Fourteenth Amendments to the United States Constitutions.

A. THE TRIAL COURT ERRED IN PREVENTING THE DEFENDANT FROM ELICITING FROM SEVERAL PENALTY PHASE WITNESSES EVIDENCE OF HIS REMORSE, A NON-STATUTORY MITIGATING CIRCUMSTANCE.

"The state may not bar relevant mitigating evidence from being presented and considered during the penalty phase of a capital trial". Hitchcock v. State, 578 So.2d 685 (Fla. 1991), citing Saffle v. Parks, 494 U.S. 484 (1990).

The Defendant sought to introduce statements made by him to several witnesses indicating his remorse. The state strongly objected, saying that such statements were self-serving hearsay, and the trial court agreed.

First, the Defendant has the absolute right to introduce at a penalty phase evidence of non-statutory mitigating circumstances. Lockett v. Ohio, 438 U.S. 586 (1973). Second, this Court has held that remorse is a proper non-statutory mitigating circumstance. Smalley v. State, 546 So.2d 720 (Fla. 1989). Third, it has been

recognized by this Court that a defendant or the state can present evidence at a penalty phase which might have been barred at trial because "a narrow interpretation of the rules of evidence is not to be enforced". (emphasis added). Hodges v. State, 595 So.2d 929, 933 (Fla. 1992) and cases cited therein; accord, Hitchcock, supra at 690.

Obviously, statements of remorse are, potentially, self-serving. But so is most, if not all, of the evidence presented by a Defendant in mitigation. As to the issue of hearsay: even if the trial court were to apply a strict evidentiary standard, the Defendant's statements of remorse would clearly be admissible under Section 90.801(3), Florida Statutes, as evidence of his then existing state of mind or emotion.

The jury was deprived of an opportunity to hear the amount and depth of remorse felt by the Defendant because the state made erroneous legal arguments to the trial court. Such conduct by both the state and the court's subsequent ruling violated the Defendant's right to due process in the penalty phase proceedings, and a new sentencing must be held.

B. THE TRIAL COURT ERRED IN PREVENTING THE DEFENDANT FROM INTRODUCING A NEWSPAPER ARTICLE WRITTEN BY A WITNESS WHO TESTIFIED DURING THE PENALTY PHASE.

Similarly, applying the rules of admissibility of evidence as stated in Hodges and Hitchcock, the court abused its discretion in not allowing the defense to introduce the newspaper article written about the Defendant by a defense witness, Randy Gage. Clearly, the article was relevant in that it showed evidence of the Defendant's character and also would have aided the finder of fact, the jury,

in determining a proper sentence for the Defendant.

It is true that the witness was able, in a different, less articulate manner, to relate some of the article's contents to the jury. However, the Defendant should have been allowed to have some or all of the article read into evidence, as it would have been more effectively presented in that fashion.

V.

THE TRIAL COURT ERRED IN FINDING AS AN AGGRAVATING FACTOR THAT THE HOMICIDE WAS COMMITTED WHILE THE DEFENDANT WAS IN THE COMMISSION OF A FELONY, TO-WIT: BURGLARY, WHERE THE EVIDENCE SHOWED THAT THE BURGLARY WAS TECHNICALLY AND LEGALLY COMPLETE.

The trial court found that the state had proved that the capital offense was committed while the Defendant was engaged in the commission of a felony, the burglary of the hotel room at the Holiday Inn. The Court, in its sentencing order, relied heavily on the state's theory of the case, that the Defendants were still involved in the commission of the burglary because they had not yet reached the "safe" car, the blue Cadillac. Such reliance is misplaced, and this aggravating circumstance should not have been considered by the trial court.

The Defendant, the state, and the trial court were in agreement that the burglary of the Holiday Inn was "technically" complete by the time the Defendants were all once again in the LeBaron. The court, however, in determining whether the Defendants were still, for sentencing purposes, involved in the perpetration of the burglary, held that they were. Citing to Parker v. State, 570 So.2d 1048 (Fla. 1st DCA 1990), the trial court held that the Defendants had not yet reached a "place of temporary safety", which Parker found to be a major consideration in determining whether the felony had ended.

The record shows that the Defendants, once back in the LeBaron, immediately began to divide up to the property taken in the burglary. Co-Defendant Velez engaged in phone conversation with his girlfriend. The Defendants did not leave the scene at a

high rate of speed, nor was there any evidence adduced at trial to show that the Defendants felt that it was necessary to return to the other car, the blue Cadillac, to be "temporarily safe." In short, the Defendant's actions indicate that the white LeBaron was, in the minds of the Defendants, a safe haven -- at least temporarily, until they could drive to, for example, Tarallo's apartment, or the blue Cadillac.

Under the facts of this case, it is clear that the Defendants had completed the burglary, technically and legally. The court misapplied the holding in Parker, and as a result, improperly found that the capital felony occurred during the commission of the burglary.

Accordingly, consideration of this aggravating circumstance was error, and the Defendant is entitled to a new sentencing hearing.

VI.

THE TRIAL COURT ERRED IN FINDING AS AN AGGRAVATING FACTOR THAT THE HOMICIDE WAS COMMITTED IN A COLD, CALCULATING AND PREMEDITATED MANNER, WHERE THE EVIDENCE DID NOT SHOW HEIGHTENED PREMEDITATION OR PLANNING AS CONTEMPLATED UNDER THE STATUTE.

The trial court found as an aggravating circumstance that the capital felony was committed in a cold, calculated and premeditated manner, without any pretense of moral or legal justification. This finding was based largely on Defendant's statements that he "wasn't going back to jail", and that he "would shoot at police to prevent his going back to jail". The court found these statements to show heightened premeditation, calculation and planning. However, a review of the relevant case law shows that the court erroneously found this aggravating circumstance to exist.

In Rogers v. State, 511 So.2d 526, 553 (Fla. 1987), this Court explained that in order to find the existence of this circumstance, there must be evidence of a careful plan or prearranged design to kill someone; simple premeditation is insufficient to prove this aggravating circumstance.

Similarly, in Nibert v. State, 508 So.2d 1 (Fla. 1987), this Court, citing Preston v. State, 444 So.2d 939 (Fla. 1984), stated that this aggravating circumstance should be found where there is evidence of a particularly lengthy, methodic, or involved series of atrocious events or a substantial period of reflection and thought by a Defendant. Nibert, supra, at 4, and cases cited therein. The type of cases where this aggravating circumstance has been found to exist typically involve execution and contract murders. Rutherford v. State, 545 So.2d 853 (Fla. 1989).

The evidence at trial shows that in the period of time immediately preceding the shooting, the Defendant's actions were more consistent with an individual attempting to avoid a confrontation rather than force one. The testimony of Officer Crespo and Nicholas Tarallo was unrebutted, that the Defendant was pushing the accelerator and ordering Tarallo to drive away from the police. The decision to shoot was made within a matter of seconds as opposed to the highly calculated and heightened premeditation required under the statute. Nibert, supra.

Accordingly, the court erred in finding that this aggravating circumstance existed.

* * *

The court, having erroneously found two aggravating circumstances to exist, could not have properly weighed the aggravating and mitigating circumstances, and accordingly, the Defendant is entitled to a new sentencing hearing. Schafer v. State, 537 So.2d 988 (Fla. 1989).

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, reverse his sentence of death for imposition of a life sentence, 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 before the judge.

Respectfully submitted,

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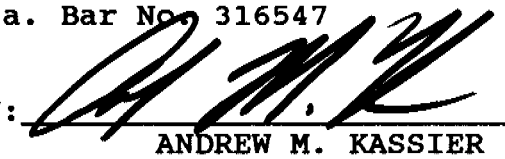
BY: 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to The Office of the Attorney General, Criminal Division, P.O. Box 013241, Miami, Florida, 33101, this 2d day of MARCH, 1993.

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