087 appeals

FILED
SID J. WHITE
NOV 4 1991
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

3

THE SUPREME COURT OF FLORIDA

DONNIE DEMONT PHILLIPS,

Appellant,

v. Case No. 78,730

STATE OF FLORIDA,

Appellee.

_____/

INITIAL BRIEF OF APPELLANT

An Appeal from the District Court of Appeal,
First District of Florida

JOHN C. HARRISON
JOHN C. HARRISON, P.A.
P.O. BOX 873
12 OLD FERRY RD.
SHALIMAR, FL 32579
(904)651-0354
FLORIDA BAR #187949

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES
CASES

OTHER

PRELIMINARY STATEMENT

DONNIE DEMONT PHILLIPS was the **Defendant** in the trial **court** and will be referred to in this brief as "Appellant", "Defendant", or by **his** proper **name.** Reference to the record on appeal will be by **use** of the **symbol** "R" followed by the appropriate volume and **page** number in parentheses.

STATEMENT OF TEE CASE AND THE FACTS

The Appellant was arrested on May 12, 1989 on an open count of murder, robbery and kidnapping. (R-V5-765). The public defender was appointed to represent the Appellant on the morning of May 13, 1989. (R-V5-768). However, the public defender never undertook the representation of Appellant because he had already been appointed to represent the co-defendant, Ricky Corbett. Mr. Bishop, an attorney with the public defender's office, so advised Appellant on the morning of May 13, 1989. He told Appellant he couldn't represent him so he couldn't help him. (R-V8-1169-1170). On May 15, 1989, the trial court entered an order granting the public defender's motion to withdraw. David Thomas was appointed to represent Appellant. (R-V5-769). An Indictment was returned on June 2, 1989 charging Appellant with first degree murder, kidnapping, robbery with a firearm and possession of a firearm during the commission of a felony. (R-V5-786).

After Indictment and prior to trial there were numerous motions filed and argued. Most are not relevant to this appeal. Some are relevant to the appeal. Specifically, Appellant filed a motion in limine to preclude as evidence at trial any photographs of the victim that would be prejudicial. (R-V6-973). Appellant filed a motion to suppress statements alleging that certain statements made by Appellant were obtained in violation of his privilege against self-incrimination and his right to counsel. (R-V6-975-978). The state filed a motion regarding certain statements

made by the co-defendant, Ricky Corbett. (R-V6-987). The public defender filed a motion to quash the trial subpoena served on the co-defendant, Ricky Corbett, which had been issued by Appellant's counsel. (R-V6-997). The court entered an order quashing said subpoena on November 2, 1989, (R-V6-999).

Prior to jury selection on November 27, 1989 the court heard the Appellant's motion to suppress statements. The motion was denied, (R-V8-1165-1172). After some discussion the court withheld ruling on Appellant's motion in limine regarding photographs of the victim until such time as that came up at trial. (R-V8-1172-1173). The court did not rule on the state's motion in limine regarding the co-defendant's statements until during the trial, The court ruled adversely to Appellant at the time witness Terry Poston testified. (R-V2-304-306).

On November 27, 1989 the case proceeded to voir dire and jury selection. Appellant's counsel objected to the prosecutor using three peremptory challenges on three black jurors. Appellant's counsel noted that his client was black and the victim was white. Appellant's counsel objected that there was not a reason to justify exclusion of the black prospective jurors from the jury and that there was a racial basis by the prosecutor in attempting to stack the jury with all whites, (R-V9-1451). The court denied Appellant's objection. (R-V9-1457). The result was an all white jury. (R-V9-1457).

The case proceeded to trial after opening statements and preliminary instructions.

Glenn Scott Hardy testified that he was a security guard at the Sandestin Beach Resort. He was working the front gate and had the visitor logs for May 5, 1989. He logged a brown Ford vehicle, tag number BBW 52F, at 7:13 A.M. on May 5, 1989. He identified Appellant as one of two black males in the vehicle. His log indicated they went to the personnel office at Sandestin at 8:39 A.M. (R-V1-36-44).

Grady Sutton testified that he is the housekeeper at Sandestin Beach Resort. He knows both Appellant and the co-defendant, Ricky Corbett. He saw the Appellant on the morning of May 5, 1989 sitting in a brown Ford vehicle in the parking lot of a restaurant on the Resort property. He did not see Ricky Corbett. He further testified that Corbett had previously worked at the restaurant as a dishwasher but had been fired. (R-V1-45-51).

Robert Cuspid testified that he drove by the King Bee liquor store on the morning of May 5, 1989 about 10:30 A.M. He saw a dark colored, relatively small car there but could not say how or where the vehicle was parked or if it was running. He saw no one. He came back by sometime after 11:00 A.M. and saw police cars there (R-V1-52-58).

Rick Sutton testified that he is an investigator and evidence custodian with the Walton County Sheriff's Department. He identified many of the State exhibits as follows: #1-cash register tape from King Bee liquor store, #2-latent fingerprints lifts from inside of store, #3-latent fingerprint lifts from within the vehicle, #4-inked fingerprints of Ricky Corbett, W5-inked

fingerprints of Appellant, #6-bullet projectile collected during autopsy of victim, #7-bullet projectile recovered at location where body was found, #8-standard of carpet taken from vehicle, #9-also carpet standards, #10-plastic jug recovered from area in Washington County filled with water and clothes when recovered, #21A through 21F - photos of scene where #10 was recovered, #11 - bag containing clothes that were in the jug (panties, bra, blouse and denim skirt), #11A and 11B-series of slides of fabric standards, #14-envelope containing dental records of the victim, #22-pair of tennis shoes from victim, #18A through 181-photos of scene at King Bee liquor store, #20A through 20E-photos of scene where body was located, #19A through 19D-photos of road(s) on route to where the body was located, #20F-photos of the body.

Officer Sutton also testified as to the location of the King Bee liquor store and the location of the scene where the body was found. Be drew a diagram of highway 20 and where Cow Ford road was in relation to highway 20 as well as the trail coming off of Cow Ford road, On cross examination he described the area where the car would have to stop and where the body was located in relation to that area. He described the type of terrain in the area **of** the body as wet, almost boggy. He further testified that if a person was in the area of the trail off Cow Ford road, he would not be able to ***see*** what was going on where the body was located because of the vegetation and the drop-off in the terrain. Officer Sutton also testified that a pair of shoes were also recovered in the same area where the plastic jug with clothes was recovered, (R-V1-60-

110).

During the testimony of Officer Sutton the State attempted to introduce photos of the body. Appellant's counsel objected to the inflammatory and gruesome nature of the photos without probative value. Over defense objection the court allowed the state to introduce one of the photos. (R-V1-82-86).

Betty Hardy testified that the victim, Sherry Lynn Dailey, was her daughter, On May 5, 1989 she took the victim to work at the King Bee liquor store at 8:00 A.M. She described what the victim was wearing and identified certain clothing from State's exhibit #11 as clothing that the victim was wearing that morning. She testified that Dr, John K. Moore was her daughter's dentist when they lived in Louisiana. Over defense objection she identified a photo of her daughter and same was introduced into evidence as State's exhibit #12 (R-V1-110-120).

Michelle Clark testified that the co-defendant, Ricky Corbett, is her half-brother. She also knows Appellant. She saw both on the morning of May 5, 1989 at her home north of Ebro. She identified the vehicle in photos (State's exhibits 13A and 13B) as the vehicle in which she saw them. She testified that Corbett was acting normal and that for him normal is crazy. (R-V1-121-125).

Lilly Mae Miller testified that she was traveling west toward Freeport on highway 20 on the morning of May 5, 1989. She did not know the time, She testified that she met a vehicle traveling in the opposite direction which made a turn to the left in front of her. She had to stop her vehicle. The other vehicle whipped

around right in front of her and back onto the highway traveling east. She identified the vehicle she saw as the vehicle depicted in State's exhibits #13A and 13B. She further testified that there were two black males in the front seat of the vehicle and a girl in the back seat. She identified the photo (State's exhibit #12) as the girl she saw. (R-V1-125-135).

Henry McCormick testified that he went to the King Bee liquor store on the morning of May 5, 1989 at about 10:45 P.M. He could not find anyone. He called the Sheriff's office. Joe Campbell, Sr. was at the store when he arrived, There were no vehicles there, The cash register drawer was open and he observed a yellow lemon bottle sitting on the counter. He testified that a purse behind the counter was easily visible. (R-V1-135-146).

Judy Nobles testified that she is the manager/cashier of the King Bee liquor store. The victim worked on May 5, 1989 beginning at 8:00 A.M. She was called to the store at about 11:00 A.M. and determined that $112.00 was missing from the cash register, She identified the victim's purse in photos and testified that it had money in it, There was other money kept in desk drawer in back room (over $2,000.00). It was still there. She identified the cash register tape and testified regarding amounts of last purchases shown and price of certain items, i.e. cigarettes and lemon juice bottle. (R-V1-146-170).

Emil Avenaruis, a crime lab technician with the Florida Department of Law Enforcement testified for the purpose of identifying exhibits. (R-V1-171-182).

Tim Crenshaw testified that he is the Chief Correctional officer with the Walton County Sheriff's Department. He identified the fingerprint cards of both Appellant and Ricky Corbett. (R-Vl-183-187).

Dr. Edmund Richard Kielman testified that he is an Assistant Medical Examiner for the First Judicial Circuit. Be was qualified as an expert in the area of forensic pathology. On May 11, 1989 he went to the location of the body. He described the scene and what he did there. The autopsy was done the next day. He testified there were two gun shot wounds to the left hand. On the right hand the body was missing the ring finger. His opinion was that it was cut off with a knife. On the body in the abdomen area the skin was cut with a knife and a flap of skin was removed. there was one bullet wound in the skull with entry just over the left ear. This bullet was recovered, There was a fourth bullet wound through the roof of the mouth into the brain case. Be testified that the cause of death was brain death as a result of gun shot wounds. The only item of clothing on the body was a pair of tennis shoes. On cross examination Dr. Reilman testified that the body was lying in swampy land. He testified that the missing finger could have been removed days after her death, The victim's fingernails were intact and none were broken. There were detailed questions and answers describing rigor mortis. Also regarding Dr. Kielman's opinion as to the wound to the abdomen area. He admitted that he had changed his opinion since the deposition. At the deposition it was his opinion that the wound(s) were caused by

maggots and such. He admitted that the decomposition of the body made it extremely difficult to reach an opinion about those wounds and what caused them. He further testified that he would not be surprised for the assailant not to have any blood splatters or other evidence on him or his clothing. (R-V1-187-201) and (R-V2-220-197).

Dr. Kent Brown testified that he is a dentist. He went to the morgue and compared dental records to the body's lower jaw and the upper maxilla. He made a definite identification of Sherry Lynne Dailey (Sherry Lynne Hardy). (R-V2-213-217).

Dr. John Moore, Jr. testified that he is a dentist in Harvey, Louisiana. Be identified the dental records from his office as being those of Sherry Lynne Hardy. (R-V2-217-220).

Tony Christopher Phillips testified that he was the brother of Appellant and they lived in their mother's home. He also knew the co-defendant, Ricky Corbett. On May 5, 1989 and before then, there was a .38 special pistol in their home with five snub nosed bullets. It was kept in the bathroom. Prior to May 5th he last saw the gun on May 4th at the house. He next saw the gun on Saturday night in the bathroom on the shelf. He did not see any bullets. On Sunday he asked Appellant where the bullets were and was told that they should be in the bathroom on the shelf. (R-V2-298-303).

Terry Allen Poston testified that on May 8th Ricky Corbett took him to the scene and showed him the body of the victim. The court would not allow Appellant's counsel to inquire as to why

Corbett took him there. He testified that William Scholfied and Tommy Watson were with them, but stayed in the car. Corbett was driving and it was his idea to go out there. He testified that they had been drinking and smoking marijuana. He testified that he did not know Appellant and had never seen Appellant and Corbett together. When Corbett drove him to the body location Corbett was driving a brown Ford Tempo that belonged to Corbett's girlfriend, Corbett acted normal that day but he acted nervous after they left the body. He further testified that he told police about this three days later. He waited because he was scared and afraid of Corbett. If Corbett thought he was going to turn him in he might kill him. (R-V2-307-321).

Prior to Poston's testimony Appellant's counsel again argued that Corbett's statements to Poston were an exception to the hearsay rule and were crucial to his client's defense. Appellant's counsel argued that his whole case centered around the circumstances his client was faced with. He wanted the jury to understand about Corbett and exactly the type of person that was in the car holding the gun on his client. The court would not allow Appellant's counsel to question Poston about the statements Corbett made to him and granted the state's motion in limine in that regard. (R-V2-304-306). More than once in his testimony the court admonished Poston to not testify to what Corbett said,

Janice M, Johnson testified that she was employed with EDLE and certified in the area of crime scene analysis. She investigated the scene of the King Bee liquor store and identified

several exhibits from the scene. She further testified that she investigated the scene where the body was located and identified several exhibits from the scene. She also attended the autopsy and recovered several evidentiary items from the autopsy. (R-V2-321-358).

Laura Rousseau testified that she was employed with FDLE and that she analyzes crime scenes. She assisted in the investigation of the scene where the body was found and testified regarding several exhibits. She examined and processed the vehicle involved and removed the tires from same. The tires from this vehicle did not match tires that left impressions at the scene of the body. In processing the vehicle she was specifically looking for body fluids and blood. She found no evidence of those in the vehicle. (R-V2-358-376).

Charles Richards testified that he is a latent print examiner with FDLE. He processed the liquor store for latent prints. The palm print of Ricky Corbett was on the counter. Be was unable to match any other prints in the store. He also compared latent prints from the vehicle. He identified Appellant's prints on the rearview mirror and Ricky Corbett's palm print on the right outside of the truck lid. (R-V2-377-389).

David Williams testified that he is a firearms expert with FDLE. He identified the bullet from the victim's head as the base portion of a .38 or .357 caliber bullet. He identified the bullet recovered from the scene where the body was located as a wad cutter type bullet of the .38 or .357 caliber classification. His opinion

was that these two bullets were of the same type. He further testified as to what brand of pistol these bullets could have been fired from, He testified that a .38 caliber Smith and Wesson pistol could have fired the bullets only if that revolver had been rebarreled with a different barrel. (R-V2-390-400) and (R-V3-401-403).

Paula Sauer testified that she was employed by FDLE in their fiber analyst section, She compared standards of carpet from the vehicle with the clothing of the victim. She found two fibers from the clothing that were consistent with the carpet from the vehicle. (R-V3-403-421).

Larry Smith testified that he is employed as a micro-analyst with FDLE. He testified that a hair found on the victim's chest was characteristic of a negroid body hair, but not head or pubic hair. He testified similarity to one hair in debris from the victim's shoes and five hairs in debris from the victim's clothing, None of the hairs were suitable far comparison purposes to any individual. He also found other hairs on the victim's chest that were of Caucasian origin, (R-V3-421-433).

Fred Mann testified that he is an investigator with the Walton County Sheriff's Department. He was the first officer on the scene at the liquor store, He described what he found upon arrival, Subsequently, Terry Poston took him and showed him the victim's body, He picked up Ricky Corbett and talked to him. After talking to Corbett, he picked up Appellant. He first talked to Appellant on the evening of May 11, 1989. He next talked to him the next

morning. In the first interview Appellant told him that on May 5, 1989 he had gone to Sampson, Alabama and then came back to DeFuniak Springs. Then left to go to Tallahassee a little after noon. This statement was not recorded, After the statement, Appellant was allowed to *go* home.

Officer Mann testified that the next statement on May 12, 1989 was recorded. Appellant continued to deny any knowledge of the robbery and denied being with Ricky Corbett that day. He denied knowing anything about a gun. Other **officers** talked to Appellant after Mann did. Mann did not talk to Appellant further on May 12, It should be noted that Appellant was arrested on May 12th and an attorney was appointed to represent Appellant on the morning of May 13th.

Officer Mann testified he obtained information that Appellant **had** been with Corbett on Friday, May 5th. On May 13th at approximately 7:00 P.M. officer Mann interviewed Appellant again, Mann testified that Appellant admitted he had been with Corbett on May 5th but he denied going into the King Bee liquor store on that date. Mann testified that Appellant told him that he and Corbett had been to Sandestin and on their way back Corbett wanted to stop and get cigarettes. Mann testified that appellant stayed in the car while Corbett went in and a few minutes later Corbett came out of the store along with the clerk. Mann testified that Appellant said when they got in the car Corbett pulled a gun from beneath the front seat. Mann testified that Appellant told him that was the first he had seen or knew of a gun. Mann testified that Appellant

said the gun was not carried into the store. Mann testified that Appellant said they left the store and headed south down highway 331 taking the first dirt road to the left. That road led back out to highway 20 and they went east towards Bruce. Mann testified that Appellant told him that they eventually got to an area where it looked like they'd been doing some pulp wooding. Mann testified that Appellant told him that Corbett turned the switch key off and pulled the keys out and left him sitting in the car and then Corbett took the clerk and walked about fifty yards from the car into the bushes. Mann testified that Appellant then said he heard a scream and four shots and that Corbett came running back with clothes in his hand. Mann testified that Appellant continued to deny anything about the robbery.

Shortly after ending that interview Mann testified that he interviewed Appellant again. In this interview Mann said that Appellant admitted his participation in the robbery and said that he and Corbett had planned to rob the store. Mann testified that Appellant admitted that the gun was in his house approximately one month prior to this and that he had taken the paper sack containing the gun and the bullets. Mann testified that Appellant said that Corbett put the gun in his clothing and that the plan was to put the clerk in the back room. He testified that Appellant related that he parked the vehicle so that it would be pointing toward the highway and he left the engine running. Mann testified that Appellant described the actions in the store. Corbett pulled the gun. The clerk saw the gun and said take the money. She reached

in the cash drawer and put the money on the counter. Appellant took the money and put it down the front of his pants and left the store. Mann testified that Appellant said he got in the car and a few seconds later Corbett came out with the clerk. The clerk got in the backseat, Appellant was driving and Corbett got in the front passenger's seat. Mann testified that the remainder of Appellant's story was consistent with his previous statement,

At this point in officer Mann's testimony the taped statement of the Appellant was played to the jury and they were allowed to have transcripts of said statement, (R-V7-1036-1107).

Officer Mann further testified that there was other money in the store. There was approximately $530.00 in the desk in the back room and approximately $20.00 in the clerk's purse behind the counter. Officer Mann testified that no gun was ever found. Be further testified that one could not see the body from where the vehicle was parked. He did not *see* the body when he first went out there until he got close. (R-V3-434-472).

The State rested, (R-V3-473).

Appellant's counsel moved for a directed verdict which was denied. (R-V3-473-476). It should be noted here that the trial court gave every indication that without Appellant's last statements the motion for directed verdict would have been granted. (R-V3-473-476).

Appellant's counsel attempted to call several witnesses for the purpose of his coercion defense. Counsel wanted to show Corbett's violent character as well as a specific incident that

occurred between Corbett and a female clerk at the same liquor store approximately two weeks prior to this incident to show grudge and motive on the part of Corbett. One witness had been solicited by Corbett on May 4, 1989 to *go* down to Freeport and commit a robbery. Appellant's counsel argued that these witnesses would lend credibility to Appellant's defense. The court would not allow any of those witnesses to testify and stated that their testimony was totally irrelevant to the guilt or innocence of the Appellant **(R-Y3-476-484).**

Brad Trusty was the first witness to testify for the defense. He testified that he is a Captain with the Walton County Sheriff's Department and was one of the first officers to the scene where the body was located. There was a two-rut road that turned off Cow Ford road and went approximately 100-150 yards. A vehicle could not go any farther because it was so grown up in that area. From that point there was a trail going of€ in a southeast direction. The body was 100 feet from where the vehicle would have had to stop. He could not see the body from there when he went to the scene. Officer Trusty identified and described photos of the area. He further testified that he also assisted in the recovery of the plastic jug with clothes and a pair of loafer type shoes. One of the shoes was found near the jug. The other was across the road. He identified the shoes which were Defense exhibit #4. (R-V3-485-511).

Elizabeth Forten testified that she worked at King Bee liquor store. She checked the register after the incident and determined

that $112.00 was missing. The victim's purse was behind the counter. It still contained her wallet and money and could easily be seen by anyone standing at the counter. She checked receipts in the desk drawer in the back room and they were still there. The drawer key was still in the drawer lock so that all one had to do to get in the drawer would be to turn the key and pull the drawer open. (R-V3-512-517).

Tony Christopher Phillips testified that the shoes identified as Defense exhibit #5 belonged to his brother the Appellant, He testified that Appellant was wearing those shoes when he saw him early morning of May 5th. He saw him later that afternoon and he was still wearing those shoes. (R-V3-517-521).

William Edward Scholfield testified that he went out to the Cow Ford road area in May, 1989 with Ricky Corbett, Terry Poston and Tommy Watson. Corbett was driving a brown and tan Tempo. They were out in that area 20-30 minutes. He and Tommy Watson stood at the car and drank a couple of beers. Corbett and Poston walked toward the bottom of the hill. Scholfield testified they went over the hill and he couldn't see them because of the shrubs and stuff so he didn't know what they did. They were gone three to five minutes. When they came back to the car Poston was quiet and Corbett was acting normal. (R-V3-522-529).

Tommy Lee Watson was the next defense witness. Prior to this witness testifying, the court admonished him not to testify to what somebody told him. He testified essentially the same as Scholfield. When asked how Poston was acting when he came back to

the car, Watson testified that he was in a hurry and said "lets get the hell out of here". (R-V3-530-537).

Joyce Lorraine Anderson testified that she was the fiancee of Ricky Corbett and was living with him in May, 1989. She testified that Corbett wears a size 7 - 7 1/2 shoe and she identified defense exhibit #4 as Corbett's shoes, She knew them because she went with him to Gayfers to buy them and she picked them out for him. (R-V3-537-544).

The Appellant was the final witness to testify on his own behalf. He testified that he is a 23 year old graduate of Walton High School and that he had attended Tennessee State University after high school, He identified defense exhibit #5 as his shoes. He said he wore them on May 5, when he left home and was still wearing them when he got back. Appellant identified defense exhibit #4 as shoes that Ricky Corbett was wearing on May 5th. Be last saw them when Corbett took them off while they wee stopped on a bridge in the Ebro area. Corbett threw them away when he threw away the jug with the clothes. he threw one shoe to the right and one to the left. Appellant said that he and Corbett went to Sandestin on May 4th to check on a job. They were told they'd have to come back the next day, Corbett was driving his girlfriend's beige and brown Tempo. They went to Sampson, Alabama the night of May 4th where Appellant borrowed money from his father to buy his girlfriend a birthday present, They talked about a burglary that had occurred at Corbett's girlfriend's home. Corbett wanted to borrow the gun that Appellant's mother had, That night he gave

Corbett the gun. Appellant had plans to pick up his check on Thursday from the company he worked with, then he and his girlfriend were going to Tallahassee around noon. Appellant testified that he did not know Corbett very well and did not socialize or visit with him. Corbett picked him up at about 6:15 A.M. to go check on the job. They went to Sandestin, Corbett talked to his supervisor who said they'd have to go through personnel. They went to personnel, Apparently the supervisor had called over and told them not to rehire Corbett. Appellant testified that Corbett got upset, He was tripping and saying he had to have money. They drove to Destin and ate at McDonalds. Appellant said he bought because Corbett was broke. They then drove east on Highway 98 and took highway 331 north, Appellant was driving, Corbett continued to talk about needing money, Appellant testified that Corbett wanted to stop at the King Bee liquor store to buy cigarettes, Appellant testified that they had not talked about the liquor store prior to stopping there. Appellant decided to get a pint of gin for the Tallahassee trip. Appellant testified that both went in and that he was over looking at the gin. Corbett asked him for 75 cents to help buy cigarettes. Corbett asked the clerk for a pack of Marlboros, When she went to mash buttons on the cash register Corbett came out of his pants with a gun, Appellant testified that he first knew Corbett had the gun at that time. Appellant testified that he asked Corbett what he was doing and Corbett told him to shut the fuck up and pick up the money. The clerk had put the money on the counter. Appellant testified

that he picked up the money and left the store. He got in the car on the passenger side. Appellant testified that Corbett came out of the store with the clerk in front of him. When asked why did you pick up the money, Appellant testified, "because he told me to pick up the fucking money. He had a gun". The record reflects that at various times during the incident, according to Appellant, Corbett pointed the gun at him. Appellant testified that he asked Corbett where he was taking her. Corbett said "I'm gonna take her down the road and drop her off", Appellant testified that he told Corbett that he wasn't going to take her anywhere, and that he was leaving the car. Corbett said "nigger, you ain't going nowhere". Corbett then took the gun out of his pants and told the clerk to get in the back seat. He told Appellant to move over and Corbett got in the front passenger seat. Appellant testified that Corbett told him where to go. The clerk was crying and saying don't hurt me, let me go. Appellant testified that Corbett told her to shut up or he'd blow her brains out. Corbett then said he was going to put her off at the first dirt road he saw, Appellant testified that after Corbett said that the clerk stopped crying and didn't say anything. Appellant testified that Corbett was holding the gun on them. Appellant testified that he saw a dirt road and pulled off in front of a car and told Corbett to let her out. Corbett said this was the wrong road. Appellant testified he drove back on the highway almost hitting a car. He later turned onto a dirt road as directed by Corbett, It lead to a path, Corbett told him to pull off and stop, Appellant testified that Corbett told the

clerk to get out. Appellant said that he and Corbett were in the car and the clerk was standing beside the car. Appellant is thinking that Corbett was just going to run her off in the woods and leave her. Appellant testified that Corbett got out of the car and walked her down a trail and disappeared. Appellant later heard her scream **and** then heard four gunshots, Corbett came running back with the clothes. Appellant testified that Corbett told him he took her clothes *so* she wouldn't try to come to the highway or go to a house and that would give them time to get away. Appellant testified that he had no indication that Corbett had shot the girl. They came back to the highway and went east, Appellant testified that he was driving but Corbett was directing him because he'd never been in that area before. They went on some dirt road near Corbett's uncle's house. They stopped on a bridge. Corbett got the jug from the trunk of the car, put the clothes in it and threw away the jug and his shoes. appellant testified that Corbett drove Erom there. They stopped at a gas station off Interstate 10. Corbett would not let Appellant go to the restroom alone. Appellant testified that they returned to DeFuniak Springs to his home. Appellant went in the house. Later his brother, Chris, came in and had the gun and wanted to know what they were doing with the gun. Appellant's girlfriend was there. He got his clothes together and they left for Tallahassee. His mother had given him $125.00 that a co-worker had brought by earlier that day. Appellant testified that Corbett followed them until they got to the Interstate. Appellant testified that the last time that he saw

the gun was when he, Chris and Corbett were in the room together at his mother's house. Appellant testified that he took the money and drove the car because Corbett had the gun and told him to, Appellant testified that he went to Tallahassee and returned Sunday afternoon. He first learned that the clerk was still missing when Corbett came to his house on Monday and showed him a newspaper article. Appellant testified that he then told his mother what had happened. when asked why he gave different versions to the investigators, Appellant said he was scared. He didn't come forward because he was scared for his own life. Appellant testified that there was no plan to rob the liquor store and that there was no plan to take anyone from the store. Appellant denied that they planned on killing or robbing anyone.

On cross-examination several inconsistencies were pointed out between Appellant's trial testimony and his previous statements to investigators, Appellant testified that the statements given to investigators were from being scared and were out of fear. Appellant denied making some specific answers when questioned about his previous statements. Appellant again denied any plan to rob the store, He specifically denied that he shot the clerk, cut her finger or made any incision around the vaginal area. He said he did not kidnap her. Appellant testified that he drove away from the store under force because Corbett had a gun. (R-V3-545-600) and (R-V4-601-631).

The defense rested (R-V4-631).

Appellant's counsel renewed the motion for directed verdict

which was denied. (R-V4-641).

After closing arguments and jury instructions, the jury returned a verdict of guilty on all counts as charged. (R-V6-994).

The case proceeded to the penalty phase. The State did not put on any additional evidence. The Appellant made a short statement but called no witnesses. After closing argument and jury instructions the jury returned a recommended sentence on Count I of life imprisonment without the possibility of parole for twenty-five years. (R-V6-996).

After the case was concluded but prior to sentencing, the trial judge, Honorable Clyde B. Wells, was killed in a plane crash. The Honorable G. Robert Barron was assigned to preside over all further proceedings. (R-V6-1001).

On April 26, 1990 the trial court adjudged Appellant guilty on all counts. Appellant was sentenced as follows: Count I - life without parole for twenty-five years: Count II - life (consecutive to Count I); Count III - life (consecutive to Count I but concurrent with Count II); Count IV - no sentence was imposed. The court used the conviction on Count IV to upgrade the guideline sentence on Counts II and 111. (R-V6-1017).

Notice of Appeal was timely filed. (R-V6-1026). The public defender was appointed to handle the appeal (R-6-1027). This Court subsequently entered an order granting the public defender's motion to withdraw. On November 20, 1990 the trial court appointed the undersigned as counsel to represent Appellant on appeal.

The case was briefed in the First District Court of Appeal, The First District Court of Appeal filed an opinion on August 30, 1991 affirming the trial court. The First District did, however, recognize that the case of Peoples v. State, 576 So.2d 783 (Fla. 5th DCA 1991) is presently pending in this Court on the basis of its conflict with State v. Douse, 448 So.2d 1184 (Fla. 4th DCA 1984) and Sobczak v. State, 462 So.2d 1172 (Fla. 4th DCA 1984). The First District further acknowledged that the opinion in our case at bar also conflicts with Douse and Sobczak. The First District certified to this Court the following question as one of great public importance:

> DOES ARTICLE I, SECTION 16 OF THE FLORIDA CONSTITUTION AFFORD A GREATER RIGHT TO COUNSEL PROTECTION THAN THE SIXTH AMENDMENT PROVIDES?

SUMMARY OF ARGUMENT

The trial court erred in allowing the state to use peremptory challenges to strike black jurors over Appellant's objection, Appellant properly raised appropriate Neil issues, but the procedure followed was open to racial discrimination and was in violation of the criteria established in State v. Neil, 457 So.2d 481 (Fla. 1984) and State v. Slappy, 522 So.2d 18 (Fla. 1988), cert. denied, 487 U.S. 1219, 108 S.Ct. 2873, 101 L.Ed.2d 909 (1988). Appellant was deprived of his right to a jury composed of a fair cross section of the community pursuant to Article I, Section 2 of the Florida Constitution and the Equal Protection Clause of the 14th Amendment to the United States Constitution.

The trial court erred in denying Appellant's motion to suppress statements which were the result of police interrogation of Appellant after he had been appointed an attorney. After an individual has retained or been appointed counsel then that person has an extra mantel of protection from interrogation initiated by law enforcement. The Florida Constitution provides even greater protection than the federal law on the issue of when an individual's right to counsel attaches. Pursuant to Article I, Section 16 of the Florida Constitution and Rule 3.130, Fla. R. Crim.P. Appellant's right to counsel attached at first appearance.

The trial court erred in excluding the out of court statements of the co-defendant. These statements were clearly exceptions to the hearsay rule pursuant to Florida Statute, Section 90.804(b)(3). They were certainly relevant and were crucial to Appellant's

defense. The trial court's ruling excluding the co-defendant's statements was a critical blow to Appellant's coercion defense.

Finally, the trial court erred in not granting Appellant's motion in limine and in allowing in evidence a gruesome photograph of the victim's body. The gruesome photograph was extremely prejudicial and inflammatory and had little or no relevance or probative value.

ARGUMENT

I. THE TRIAL COURT ERRED IN NOT UPHOLDING DEFENSE COUNSEL'S OBJECTION TO THE STATE'S PEREMPTORY CHALLENGE TO THREE PROSPECTIVE BLACK JURORS

In State v. Neil, 457 So.2d 481 (Fla.1984) the Florida Supreme Court held that Article I, Section 16 of the Florida Constitution guarantees the right to an impartial jury. The right to peremptory challenges is not of constitutional dimension. The primary purpose of peremptory challenges is to aid and assist in the selection of an impartial jury. It was not intended that such challenges be used solely as a scalpel to exercise a distinct racial group from a representative cross-section of society. It was not intended that such challenges be used to encroach upon the constitutional right to an impartial jury. (457 So.2d at 486)

The Neil Court further held that peremptory challenges are presumed to have been exercised in a nondiscriminatory manner, but upon a timely objection and demonstration that a party has used its peremptory challenges against a distinct racial group and that there is a strong likelihood that the peremptory challenges were

exercised solely because of race, the trial court is to evaluate the presumption that the peremptory challenges were not racially motivated, 457 So.2d at 486. If the trial court believes that there is a "likelihood" that peremptory challenges were improperly used, then the burden shifts to the party exercising its peremptories to demonstrate that the challenged prospective jurors were excused for a reason other than race. Id. at 486-487.

In State v. Slappy, 522 So.2d 18 (Fla. 1988) the Court fine tuned the Neil decision. It reiterated that when the complaining parties objection is proper, the burden of proof shifts. At this juncture the other party must rebut the objection, This rebuttal must consist of a "clear and reasonably specific" racially neutral explanation of "legitimate reasons" for the state's use of its peremptory challenges. Id at 22, quoting Batson v. Kentucky, 476 U.S. 79, 96-98 & n.20, 106 S.Ct. 1712, 1722-1724 & n.20, 90 L.Ed.2d 69 (1986). The trial judge should not merely accept the reasons proffered at face value, but must evaluate those reasons as he would weigh any disputed fact. In order to permit the peremptory challenge the trial judge must conclude that the proffered reasons are, first, neutral and reasonable and, second, not a pretext. These two requirements are necessary to demonstrate a clear and reasonably specific racially neutral explanation, Broad leeway must be accorded to the objecting party and any doubts as to the existence of a likelihood of impermissible bias must be resolved in favor of the objecting party. Id. at 21-22.

The Supreme Court listed in Slappy, five factors, and stated

that the presence of one or more of those factors would "tend" to show that the reason given for challenging a juror was not actually supported by the record or was pretextual. The five factors are: (1) an alleged group bias not shown to be shared by the juror in question; (2) failure to examine a juror or conducting only a perfunctory examination, assuming the juror had not already been questioned by the trial court or opposing counsel; (3) singling the juror out for special questioning; (4) the prosecutor's reason is unrelated to the facts of the case, and (5) the challenge is based on reasons equally applicable to a juror who was not challenged. Id.

The Slappy Court stated that 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. This is so because "the striking of a single black juror for a racial reason violates the Equal Protection Clause, even where other black jurors are seated, and even when there are valid reasons for the striking of some black jurors". Id at 21, quoting from United States v. Gordon, 817 F.2d 1538, 1541 (11th Cir. 1987). The Court further stated "the appearance of discrimination in court procedure is especially reprehensible, since it is the complete antithesis of the court's reason for being--to insure equality of treatment and evenhanded justice". 522 So.2d at 20. Slappy went on to explain that the peremptory challenge is uniquely suited to masking discriminatory motives and thus must be vigilantly policed. Id at 20.

In our case at bar there can be no doubt that defense counsel met the first requirement of the Neil test. Counsel did timely object and he did demonstrate that the prosecutor used three peremptory challenges on three black prospective jurors. He stated that Appellant was black and that the victim was white. He further stated that there was no articulable reason based on the prospective juror's responses to voir dire questions to justify their exclusion. He stated that he felt there was a racial bias in the prosecutor attempting to stack the jury with all whites. (R-V9-1451).

The burden, at that point, shifted to the prosecutor to provide clear and reasonably specific racially neutral explanations which provided legitimate reasons for the use of its peremptory challenges. Appellant firmly believes that the state failed to meet its burden. The reasons provided by the prosecutor were pretextual only and must be construed as racially motivated.

In examining the prosecutor's explanations we should take each prospective juror and search the record to determine whether the prosecutor's explanation passes the Neil/Slappy test. We should keep in mind that the exclusion of even one prospective juror without a sufficient race neutral reason is cause for reversal. Slappy, 522 So.2d at 20.

The prosecutor challenged prospective black juror Victoria Tillery because she had previously been a defendant in a petit theft case. (R-V9-1451). In addition the prosecutor stated that this juror knew the Appellant. (R-V9-1453). The prosecutor's

reason for challenging prospective black juror Linda Paul was that she said she could not give the death penalty to someone that didn't pull the trigger. (R-V9-1452). An additional reason given was that she knew the Appellant (R-V9-1453). Finally, the prosecutor challenged prospective black juror Cora Lee Wilson because he had prosecuted her son. (R-V9-1456).

What does the voir dire record actually reflect regarding juror Tillery? She indicated that she went to the same high school as Appellant. However she'd had no contact with him in two to three years, When specifically questioned by the prosecutor "Do you feel like that would affect you in any way in serving as a fair and impartial juror in this case?" Tillery responded "No, sir". (R-V8-1220-1221).

Tillery had been previously charged with petit theft, Questions and responses regarding same can be found at R-V8-1245-1246 as follows:

> MR ADKINSON: Okay, would that affect your decision in this case here today, Ms. Tillery?
>
> PROSPECTIVE JUROR: No, it would not.
>
> MR ADKINSON: It would not. Did that experience leave you with a bad impression of the judicial system?
>
> **PROSPECTIVE JUROR: No.**
>
> MR. ADKINSON: Okay, how about a good impression of the judicial system?
>
> PROSPECTIVE JUROR: I would abstain on saying anything on that one,
>
> MR. ADKINSON: Okay, were you prosecuted by the State Attorney's office here in this county?
>
> **PROSPECTIVE** JUROR: No, I never went to court.

Additionally, the prosecutor further questioned Tillery later in voir dire at R-V9-1399 as follows:

> MR. ADKINSON: I believe you said you had been charged with petit theft earlier.
>
> PROSPECTIVE JUROR: Yes.
>
> MR. ADKINSON: Okay, but you didn't have any animosity toward the State Attorney's office about that?
>
> PROSPECTIVE JUROR: No, not at all.

What does the record actually reflect regarding prospective juror Linda Paul? Even though there was some discussion regarding juror Paul's personal belief that a person should not have the death penalty unless he was the triggerman, she was unequivocal in stating that she would follow the law, The record at R-V9-1405 so reflects:

> MR. ADKINSON: Ms, Paul, you have some reservations about that,
>
> PROSPECTIVE JUROR PAUL: I would follow the law, you know, but...
>
> MR. ADKINSON: Well, can you assure me that the fact that he may get the death penalty would not affect your decision concerning guilt or innocence?
>
> PROSPECTIVE JUROR PAUL: No, it wouldn't affect my decision.
>
> MR. ADKINSON: It would not affect it at all.
>
> PROSPECTIVE JUROR PAUL: No.
>
> MR. ADKINSON: And you can assure me of that.
>
> PROSPECTIVE JUROR PAUL: Yes.

Additionally, juror Paul said she previously knew Appellant by seeing him around at school. She was older than Appellant so she

really didn't "go to school with him". When asked by the prosecutor if her knowledge of Appellant would affect her in any way in serving as a fair and impartial juror in the case, juror Paul responded "No, sir". (R-V8-1225).

What does the voir dire record actually reflect regarding prospective juror Cora Lee Wilson? The record at R-V8-1248 reads as follows:

> MR. ADKINSON: Okay, and I believe I have probably prosecuted Craig ...
>
> PROSPECTIVE JUROR: Yeah, I think so.
>
> MR. ADKINSON: ... two or three times, I believe, correct?
>
> PROSPECTIVE JUROR: (Indicating in the affirmative)
>
> MR. ADKINSON: Ms. Wilson, would that affect your decision in this case?
>
> PROSPECTIVE JUROR: No, it wouldn't.
>
> MR. ADKINSON: Do you hold any animosity or hatred towards the State Attorney's office because of the cases that we have filed against your son?
>
> PROSPECTIVE JUROR: No.
>
> MR. ADKINSON: Okay, and you feel that you could serve as a fair and impartial juror in this case and listen to the evidence and not be affected by your son's past troubles.
>
> PROSPECTIVE JUROR: That's right.

When one looks at the five factors discussed in Slappy and applies them to our case at bar it is obvious that one or more of those factors would tend to show that the prosecutor's reasons for his peremptory challenges were only pretextual. In this argument we will limit our discussion to factor #5, i.e. the challenge is based on reasons equally applicable to a juror who was not

challenged, The record reflects that at least two prospective jurors who had been previously prosecuted or had relatives prosecuted for crimes remained on this trial jury. Juror David Amason had been convicted of the crime of trespassing in Walton County (R-V8-1247). This is the same reason given for the challenge of black prospective juror Tillery. Of *course,* juror Amason is white. Juror Randy McInnis had a brother who had been prosecuted for "bad checks and things like that". He said his brother had just got out of jail. (R-V8-1244). McInnis is white, This was the very reason given by the prosecutor for challenging prospective black juror Cora Lee Wilson, i.e. that her son had been prosecuted. This was even though Ms. Wilson had stated just as did Mr. McInnis and Mr. Amason, that this would not have any affect on her ability to sit as a fair and impartial juror,

In Roundtree v, State, 546 So.2d 1042 (1989) the Florida Supreme Court found that the reasons given by the prosecutor for his peremptory challenges of prospective black jurors were obvious pretext. Two black jurors had been challenged by the state because of their views regarding the death penalty although both indicated that they could follow the law. The state objected to one black juror because she was unemployed. However the state accepted an unemployed white juror. Also, other blacks were excused because they were single, but this factor did not cause the state to challenge five whites.

In Floyd v. State, 511 So.2d 762 (3rd DCA 1987) the state challenged a young black because she was a student. A white

student was not challenged. The prosecutor explained that he did not like having young students on his juries. The Court reversed and held that because the state did not challenge the white juror that this was strong evidence that the state's explanation was a subterfuge to avoid admitting discriminatory use of the peremptory challenge.

In Mitchell v. State, 548 So.2d 823 (1st DCA 1989) the state's asserted justification that a challenged black juror was divorced and had never served on a jury was equally applicable to a juror who was not black and was not challenged by the state. As in Floyd the Court said "this circumstance is strong evidence that the state's explanation was a subterfuge to avoid admitting a discriminatory motive". The Court went on to say "and Slappy indicates that an explanation based on reasons equally applicable to a juror who is not challenged weighs against the legitimacy of a race-neutral justification and tends to suggest an impermissible pretext". The Court held that because the state's explanation did not distinguish the excluded individual from jurors who were accepted without challenge, the state has not rebutted the inference that it utilized a peremptory challenge in a racially discriminatory manner. The case was reversed on that basis.

In our case at bar the record reflects that jurors were challenged for "reasons" equally applicable to jurors who actually remained on Appellant's trial jury. In addition, the prosecutor tried to question the prospective black jurors and obtain responses that would give him sufficient reason for his peremptory

challenges. He was absolutely unsuccessful. In each and every instance the reason being suggested by the prosecutor's question was met with the response that: it would not effect the juror's ability to sit as a fair and impartial juror. Why did the prosecutor exercise these challenges? For exactly the reason objected to by defense counsel at trial. The prosecutor's explanation for his challenges was simply a pretext to obtain an all white jury.

Once a Neil inquiry has been initiated, it is Incumbent upon the trial Judge to evaluate the credibility of the explanation for the peremptory challenges and to determine whether the proffered reasons are supported by the record. The trial Judge cannot merely accept the reasons proffered at face value. Tillman v. State, 522 So.2d 14 (Fla. 1988). In our present case the record is clear that the trial Judge apparently did not understand his duty pursuant to Neil and Slappy. In response to defense counsel's argument and request that the peremptory challenges not be allowed the trial Judge responded that he didn't think he had that option (R-V9-1451). The questions and responses between counsel and the trial Judge later in the record (R-V9-1455) further revealed the trial Judge's mistaken understanding, While the trial court did ultimately state, that "he has a factual basis" (R-V9-1457) in referring to the prosecutor's stated reasons for his peremptory challenges, the court never really required an explanation from the state and never really ruled on the issues as contemplated in Neil and Slappy.

There can be no question of the reversible incorrectness of a lower court's declination to rule, one way or the other, as to the Slappyworthyness of the preferred explanation. The trial court should analyze and rule on the sufficiency of the state's reasons for excluding black jurors. Thompson v. State, 548 So.2d 198, 202 (Fla. 1989). Smith v. State, 16 FLW D460, 3 DCA revised opinion, February 12, 1991,

In Barwick v. State, 547 So.2d 612 (1989) the trial Judge did not believe Neil applied. The prosecutor provided reasons for his challenges anyway. The Court held "Because of the trial court's impression that Neil did not apply, however, we find no indication in the record that the court made a conscientious evaluation of the Neil claim".

The procedure followed in this case failed to insure that Appellant's right to a jury composed of a fair cross section of the community was protected. Instead, Appellant was subjected to a proceeding that was open to racial discrimination by the state. This violated Article I, Section 2 of the Florida Constitution, as well as the Equal Protection Clause of the 14th Amendment to the United States Constitution,

II. THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION TO SUPPRESS STATEMENTS AND IN ALLOWING THEIR ADMISSIBILITY AT TRIAL

The record is clear that Appellant was subjected to interrogation over a three-day period. Appellant was interrogated

more than once prior to being in custody. He was further interrogated after his arrest, Pursuant to Rule 3.131(a)(1), Fla.R.Crim.P., a first appearance was held on May 13, 1989. Appellant was ordered held without bond, (R-V5-767). The trial court, at Appellant's request, appointed an attorney to represent Appellant (R-V5-768). Later, on the same day, Appellant's court-appointed attorney met with Appellant. The attorney told Appellant that he could not help him or advise him because he was representing the codefendant, (R-V8-1170). The police knew that Appellant had been appointed counsel and were well aware that he had an attorney (R-V7-1036). Yet they continued their attempts to obtain further statements from Appellant. It was under these circumstances that Appellant was subsequently interrogated by the police and made incriminating statements.

Appellant contends that the admission of these statements at trial was a clear violation of his Sixth Amendment rights pursuant to the Constitution of the United States,

The First District in its opinion in this case (Phillips v. State, 1st DCA, August 30, 1991) held that since formal judicial proceedings had not been initiated against Appellant by way of indictment, information, arraignment or other adversarial proceedings, then his right to counsel under the Sixth Amendment had not attached. The First District relied heavily on a recent decision from the United States Supreme Court, i.e., McNeil V. Wisconsin, 501 U.S._____ , 111 S. Ct, _____, 115 L.Ed.2d 158 (1991). Appellant concedes that, pursuant to McNeil and other

United States Supreme Court cases, as construed by the First District, Appellant may not have a Sixth Amendment violation. Appellant **does** specifically request that this Court review McNeil as well as other relevant decisions before reaching the **same** conclusion. See: Michigan v. Jackson, 457 U.S. 625, 89 L.Ed.2d **631, 106** S.Ct. 1404 (1986); Minnick v. Mississippi, 498 U.S. ____, 112 L.Ed.2d 489, 111 S.Ct. 489 (1990); Moran v. Burbine, 475 U.S. **412, 106** S.Ct. **1135, 89** L.Ed.@d 410 (1986); Maine v. Moulton, 474 U.S. 159, 88 L.Ed.2d 481, 106 S.Ct. 477 (1985); Patterson v. Illinois, 487 U.S. 285, 101 L.Ed.2d 261, **108** S.Ct.2389 **(1988).**

Regardless of this Court's decision as to the Sixth Amendment claim, Appellant strongly advocates that the law of Florida provides greater protection than does the Sixth Amendment. Language from some of the United States Supreme Court decisions lend great weight to Appellant's position. In McNeil the Court stated:

> "The Sixth Amendment right to counsel attaches at the first formal proceeding against an accused, and in most States, at least in respect to serious offenses, free counsel is made available at that time and ordinarily requested." McNeil, 115 L.Ed.2d at 170.

In Michigan v. Jackson, the Court cited with approval statements by the Michigan Supreme Court to the effect that the average person does not understand and appreciate the subtle distinctions between the Fifth and Sixth Amendment rights to counsel and that it makes little sense to afford relief from further interrogation to a defendant who asks a police officer for

an attorney but permit further interrogation to a defendant who makes an identical request to a judge. The simple fact that a defendant has requested an attorney indicates that he does not believe that he is sufficiently capable of dealing with his adversaries single-handedly. See: Michigan v. Bladel, 421 Mich. 39, 63-64, 365 **NW 2d** 56,57 **(1984).**

Article I, Section 16, of the Florida Constitution guarantees the right to assistance of counsel in all criminal prosecutions. Rule 3.130, Fla.R.Crim.P., provides that the right to assistance of counsel attaches as early as the defendant's first appearance, which should occur within twenty four (24) hours of arrest. Rule 3.111(a), Fla.R.Crim.P., provides that a person is entitled to appointment of counsel when he is formally charged with an offense, or as soon as feasible after custodial restraint, or upon his first appearance before a committing magistrate, whichever occurs first. State v. Douse, 448 So.2d 1184 (Fla.4th DCA 1984); Sobczak v. State, 462 So.2d 1172 (Fla. 4th DCA 1984). Thus, the interrogation of Appellant after he requested and was appointed counsel at first appearance violated Appellant's state constitutional right to assistance of counsel and should have resulted in suppression of any statement(s) given at that time.

The First District, in its opinion below, and the Fifth District in **Peoples** v. State, 576 So.2d *783* (Fla. 5th DCA 1991), have reached a contrary result.

In determining whether or not Florida law lends greater protection than the federal law this Court must construe the

language and intent of Article I, Section 16 as well as the intent of Rules 3.130 and 3.111(a), Fla.R.Crim.P. In making this determination, this Court should also consider the facts and circumstances of Appellant's situation. Interrogation of Appellant was initiated by the police after the trial court had appointed an attorney at Appellant's request. Appellant was in custody being held without bond. His attorney had been to see him and had informed Appellant that he was representing the codefendant and could not help him. It is obvious that Appellant wanted the assistance of an attorney. He had invoked that right when he requested an attorney at first appearance. Pursuant to Rule 3.111(a) the trial court honored that request and appointed an attorney Appellant was then told by his attorney that he could not help him or advise him. He was, in fact, helping his codefendant. The First District did not construe this course of events as having any effect on Appellant's rights attaching to the appointment of counsel. With all due respect, nothing could be more wrong. Because of this unusual course of events, surely the Appellant must have been confused. He certainly must have been in a quandary. He was an easy mark for the trained professional who, knowing all that had transpired, came to interrogate the Appellant again,

Could situations like this be the reason why Article I, Section 16 guarantees the assistance of counsel? Could situations like this be why Florida law requires appointment of counsel at first appearance? Is this why, a5 stated in McNeil, many States make counsel available at the first formal proceeding in a case?

Are situations like this why the United States Supreme Court in Minnick stated:

> "A single consultation with an attorney does not remove the suspect form persistent attempts by officials to persuade him to waive his rights, or from the coercive pressures that accompany custody and that may increase as long as custody is prolonged, This case before us well illustrates the pressure and abuses that may be condiments of custody,"

Appellant submits that this case is a shining example of why Florida law guarantees the assistance of counsel and the appointment of counsel at first appearance.

This Court should additionally consider whether Article I, Section 9 of the Florida Constitution, under the facts and circumstances particular to this case, provides further grounds for holding that Appellant's statement(s) should have been suppressed. In the case of Walls v. State, 16 F.L.W. S254 (April 11, 1991) this Court held that the due process provision of Article 1, Section 9 embodies the principles of fundamental fairness. This Court cited to Scull v. State, 569 So.2d 1251 (Fla.1990) and stated "The term 'due process' embodies a fundamental conception of fairness that derives ultimately from the natural rights of all individuals." In Walls this Court further stated "as we stated in Haliburton v. State, 514 So.2d 10888 (Fla. 1987), 'due process requires fairness, integrity, and honor in the operation of the criminal justice system, and in its treatment of the citizen's cardinal constitutional protection.' Id at 1090 (quoting Moran v. Burbine, 475 U.S. 412, 467, 106 S.Ct. 1135, 1165 (1986)." Also cited in

Walls was Miller V. Fenton, 474 U.S. 104 (1985). In Miller the Court held that the admissibility of confessions obtained by ruse does not rest merely on whether those confessions were voluntary. Rather, due process requires an examination of the particular methods used to extract the confession, even if that confession was voluntary in the strictest sense of the term. The Walls Court again quoted from Haliburton the following: "Police interference in the attorney-client relationship is the type of governmental misconduct on a matter of central importance to the administration of justice that the Due Process Clause prohibits."

The procedure employed by the police in Appellant's situation flaunted these standards of fundamental fairness and is the type of governmental misconduct that Article I, Section 9 prohibits.

Any statement(s) made by Appellant after appointment of counsel and without counsel present should have been inadmissible.

III. TEE TRIAL COURT ERRED IN GRANTING THE STATE'S MOTION IN LIRINE AND NOT ALLOWING TESTIMONY OF THE CO-DEPENDANT'S STATEMENT TO WITNESS, TERRY POSTON

It was crucial to Appellant's defense to be able to present evidence to the jury that he did not shoot the clerk and that he was forced or coerced to participate in all of the offenses by the co-defendant, Ricky Corbett. Appellant was frustrated throughout

the trial by the trial court rulings that nothing about Corbett was going to come into Appellant's trial and vice versa. Nowhere was this more apparent than in the testimony of witness Terry Poston.

The state knew the importance of Poston's testimony. Prior to trial the state filed a motion in limine seeking an order from the trial court to prevent defense counsel from "inquiring of Terry Poston as to what statements co-defendant, Ricky Steve Corbett made to him". (R-V6-987). The trial court did not rule on this motion until just prior to Poston's testimony, At that time there was a discussion regarding defense counsel's intention to question Poston regarding what Corbett had told him. Defense counsel argued the admissibility of the testimony as an exception to the hearsay rule. The court granted the State's motion in limine. (R-V2-304-306). That ruling was error and was a critical blow to Appellant's defense.

The excluded testimony of Poston is part of the record on appeal. (R-V10-1617-1647). This refers to Poston's deposition taken prior to trial. Poston testified that Corbett ask him had he heard anything about the robbery in Freeport. Corbett then told Poston that he had committed the robbery (R-V10-1617). Poston testified that Corbett said that he had shot the woman, (R-V10-1640). Poston testified that Corbett did not mention anyone else being involved in the crime. (R-V10-1642). In Poston's taped statement to the police, under oath, on May 11, 1989, Poston testified that Corbett pointed at the body and said "That's what I think about life". (R-V10-1644-1647).

It is crucial to note that at no time during Corbett's statements to Poston did he ever indicate that Appellant or anyone else was responsible for these crimes, Corbett's statements referred only to himself.

Clearly these statements by Corbett should have been admissible as an exception to the hearsay rule. In fact, Florida Statute, Section 90.804(2)(c) specifically makes these statements admissible as hearsay exceptions. Section 90.804(2)(c) reads as follows:

> 90.804 Hearsay exceptions: declarant unavailable.
> (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 which at the time of its making, was so far contrary to the declarant's pecuniary or proprietary interest or tended to subject him to liability or to render invalid a claim by him against another, so that a person in the declarant's position would not have made the statement unless he believed it to be true. 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.

In Baker v. State, 336 So.2d 364 (Fla. 1976), relying on Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973), the Florida Supreme Court held that hearsay declarations against penal interests were admissible. The Florida Supreme Court, as late as 1989, has held that the statement of a co-defendant would be admissible under this particular exception, because it tends to expose the declarant co-defendant to criminal liability and exculpate the defendant. The Court provided,

however, that the witness the statement was made to was available to testify - or - the witness's statement itself qualified as a statutory exception to the hearsay rule. The Court additionally stated that there must be corroborating circumstances which showed the trustworthiness of the statement. Hill v. State, 549 So.2d 179 (Fla. 1989).

What is then required before the hearsay statement of a co-defendant is admissible? The answer is found in the following cases: Maugeri v. State, 460 So.2d 975 (Fla. 3rd DCA 1984): Rivera v. State, 510 So.2d 340 (Fla, 3rd DCA 1987); United States v. Riley, 657 F.2d 1377 (8th Cir. 1981), cert. denied, 459 U.S. 1111, 103 S.Ct. 742, 74 L.Ed.2d 962 (1983). There are three requirements before such statements are admissible. First, the statements must be a declaration against interest. A statement is a declaration against interest if it tends to subject declarant to criminal liability so that a reasonable person in declarant's position would not have made the statement unless he believed it to be true. Second, the declarant is unavailable as a witness. Third, that corroborating circumstances surrounding the statement indicate the trustworthiness of the statement.

We will examine these requirements one at a time. Were the statements in question against Corbett's interest and did they tend to subject him to criminal liability? The answer to this question is obvious, Corbett confessed to Poston. He subjected himself to prosecution for the robbery, kidnapping and first degree murder of the clerk. Nothing could be more against his interest. He is

presently on death row largely because of these statements.

Second, was Corbett, unavailable as a witness? Appellant's trial counsel had issued a subpoena for trial for Corbett. Corbett's counsel filed a motion to quash the subpoena. (R-V6-997). Corbett's counsel argued that requiring him to testify would be a violation of his Fifth and Fourth Amendment rights and would be a violation of due process. On November 2, 1989 the trial court entered an order quashing the subpoena. (R-V6-999). Florida Statute 90.804(1)(a) provides that a declarant is unavailable as a witness for purposes of a hearsay rule exception where the declarant:

> "Is exempted by a ruling of a court on the ground of privilege from testifying concerning the subject matter of his statement."

Pursuant to 90.804(1)(a) there is no doubt that the declarant was not available.

Third, did the circumstances surrounding the statements indicate the trustworthiness of the statements? What were the circumstances in our case at bar? Corbett told Poston he committed the robbery and that he shot the woman. He then took Poston to the scene of the body. The body was still there. He stood over the dead victim and said "that's what I think about life." What more in the way of corroborating circumstances could ever be shown in order to give the statements trustworthiness?

Pursuant to Florida Statute, Section 90.804(2)(c), the statements of Corbett were clearly admissible, The trial court's ruling was error and was extremely crippling to Appellant's

defense.

IV. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION IN LIMTNE AND ALLOWING A GRUESOME PHOTOGRAPH OF THE VICTIM TO BE ADMITTED INTO EVIDENCE

The trial court allowed the State, over objection of defense counsel, to introduce a photograph of the victim's body. (R-V1 82-86). Appellant's counsel had previously filed a motion in limine to preclude prejudicial photographs of the victim's body. (R-V6-973). Of all the photographs available to the State, the prosecutor chose the one which depicted the crotch area of the victim. (R-V6-84). Defense counsel argued that the photograph might lead jurors to conclusions which there was no evidence to cooberate. The Appellant was not charged with any sexual related offense. However, there was reference to possible sexual assault throughout Appellant's trial and in the prosecutor's closing. In fact the prosecutor stressed the photograph in his closing argument (R-V9-708-709). That certainly raises the question as to why the prosecutor introduced this particular photograph at all. Was it because it was relevant or was it because it was gruesome, inflammatory and extremely prejudicial?

Defense counsel also objected to the photograph because it depicted a body that had been at that scene and exposed to the elements for at least five days. There was extensive decomposition, Additionally, defense counsel argued that the decomposition in the crotch area might easily lead jurors to believe that something more than her murder had occurred at the scene, Defense counsel argued that the photograph was gruesome and

inflammatory. (R-Vl-85).

Appellant concedes that photographs are admissible if they are relevant and are not so shocking in nature as to defeat the value of their relevance. Bush v. State, 461 So.2d 936 (Fla.1984), cert. denied, 475 U.S. 1031 (1986); Williams v. State, 228 So.2d 377(Fla. 1969). Where photographs are relevant then the court must determine whether the gruesomeness of the portrayal is so inflammatory as to create an undue prejudice in the minds of the jury and distract them from a fair and unimpassioned consideration of the evidence. Leach v. State, 132 So.2d 329 (Fla. 1961), cert, denied, 368 U.S. 1005 (1962).

In cases where the photographs are gruesome and inflammatory and have little or no relevance, they are inadmissible as evidence. In Czubak v. State, 590 So.2d 925 (1990), the Florida Supreme Court held certain photographs of the victim's body to be inadmissible. In Czubak the victim had been dead at least a week when the body was found. Her body was somewhat decomposed and discolored. The Court stated that the photographs were indeed gruesome, and that they held little relevance or probative value. They were not used to establish identity. The victim's identity was established by the number on the pacemaker removed from her body during the autopsy. The photographs did not reveal any wounds which were probative of the cause of death, The medical examiner determined cause of death by examining the victim at the autopsy. The photographs did not assist him in explaining cause of death. The photographs were not corroborative of other relevant evidence.

In our case at bar, the victim had been dead at least five days. The body was severely decomposed. The photographs were not relevant or probative. The victim's identity was established through dental records. The medical examiner described the victims cause of death and the gun shot wounds from his autopsy examination. The photograph was not used by the medical examiner except possibly to discuss a wound to the lower abdomen area. Again, this wound had nothing to do with the cause of death according to the medical examiner's testimony and was not relevant to any charge against Appellant.

As in Czubak, the gruesome nature of the photograph was caused by factors apart from the crime itself and the probative value of the photograph was at best extremely limited. The photograph was particularly gruesome and inflammatory due to decomposition of the body. The trial court should have determined that the relevance of the photograph, if any, was far outweighed by the shocking and inflammatory nature of the photograph. It was error to allow the photograph in evidence.

CONCLUSION

Based upon the preceding analysis and the authorities cited herein, Appellant contends that reversible error has been demonstrated. As a result of said error Appellant requests that this court remand this case to the trial court with directions to grant a new trial.

Respectfully submitted,

JOHN C. HARRISON
JOHN C. HARRISON, P.A.
P.O. BOX 873
12 OLD FERRY RD.
SHALIMAR, FL 32579
(904)651-0354
FLORIDA BAR #187949

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Initial Brief of Appellant has been furnished to the Office of the Attorney General, Attorney for Appellee, The Capitol, Tallahassee, Florida 32301, by regular U.S. Mail this 31st day of October, 1991.

JOHN C. HARRISON
JOHN C. HARRISON, P.A.
P.O. BOX 873
12 OLD FERRY RD.
SHALIMAR, FL 32579
(904)651-0354
FLORIDA BAR #187949