IN THE SUPREME COURT
OF THE STATE OF FLORIDA

AUGUSTINE PEREZ,

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

Case No. 79,446
Cir. Ct. Nos. 90-2556CFAES
(Pasco) 90-2739DFAES

ON APPEAL FROM THE CIRCUIT COURT FROM
THE SIXTH JUDICIAL CIRCUIT IN AND FOR
PASCO COUNTY, FLORIDA.

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TABLE OF CONTENTS

TABLE OF CITATIONS

Statutes

PREFACE

AUGUSTINE PEREZ will be referred to as "PEREZ" or "Defendant".

The State of Florida will be referred as "State" or "prosecution".

The first reference to any other person will consist of the person's full name and each subsequent reference to that person will contain that person's last name.

References to the record will be by an R in parentheses followed by the page number from the original record index. References to evidentiary exhibits will be to the page number in the record where introduced and by the exhibit number. A copy of the actual exhibit can then be located in the unnumbered record volume entitled "Evidence That Could Be Copied".

STATEMENT OF THE CASE

A. Proceedings below

AUGUSTINE PEREZ was arrested on July 14, 1992 and charged with one count of aggravated assault on CHAD FROST, one count of aggravated assault on PAUL FROST and kidnapping (R9-10). On August 7, 1990, the Defendant was indicted for first degree murder which allegedly occurred on July 14, 1990 (R29-30).

Defendant was adjudged indigent (R4) and counsel was appointed to represent the Defendant (R21). Prior to Defendant's indictment, defense counsel filed a motion challenging the constitutionality, selection and procedure of the grand jury and supplied to court with requested jury instructions with which to instruct the grand jury (R24-28; 31-34). After hearing the court denied the Motion challenging the constitutionality, validity, selection and procedure of the grand jury, denied the requested jury instructions but allowed Defense counsel limited voir dire of the proceedings (R35; 131-156). Subsequent to the return of the indictment, Defense counsel filed a Motion to Dismiss Indictment, Plea of Abatement, Demurrer and Motion to Dismiss Indictment based on failure to allow relevant inquiry of grand jury by Defense counsel--all of which were heard by the court and denied (R62-72; 157-159).

PEREZ pled not guilty to all charges and filed Motion to Suppress Due to Illegal Stop, Motion to Suppress Due to Illegal Search of Accused's Place of Residence and Seizure of Evidence, Motion to Suppress Due to Illegal Seizure or Arrest, Motion to

Suppress Statements, Admissions or Confessions, Motion to Suppress Identification and Motion to Suppress Due to Illegal Search of Accused's Vehicle (R171-191). An evidentiary hearing on all of the motions was held on March 1, 1991 and the motions were denied (R215-381; 200-208).

Defendant filed a Motion for Disclosure of Exculpatory Evidence and Witnesses which was granted in part and denied in part (R389-390; 394-395).

Defendant filed a Motion for Funds for penalty phase to obtain funds to travel to Cuba for investigation of Defendant's background. The motion was denied by the court (R1653-1655; 2027-2035).

The case went to trial before a jury in Pasco County, Florida on November 4, 1991. At trial, the jury found the Defendant guilty as charged of First Degree Murder, two counts of Aggravated Assault and Kidnapping on November 7, 1991 (R468-470). Immediately after Defendant's conviction, Defendant requested a continuance of the penalty phase to enable Defense counsel to travel to Cuba to gather evidence for the penalty phase of the trial. This request was denied (R1656-1659).

The penalty phase was held on November 8, 1991. The jury verdict recommended life (R417; 1778). The verdict form indicates "10 vs. 2" (R493).

Life Death

Sentencing was held on December 13, 1991. At sentencing, the court overrode the jury's verdict of life and sentenced the Defendant to death for First Degree Murder, fifteen years on the

Kidnapping charge and five years on each of the two Aggravated Assault charges (R497-499; 474-481).

The Defendant filed a Notice of Appeal on January 10, 1992 and appeals his convictions of Murder, Kidnapping and two counts of Aggravated Assault (R483).

STATEMENT OF FACTS

Defendant believes presentation and understanding of facts of this case will be enhanced by sub-dividing the statement of facts into three distinct sections as follows: a) Motion to Suppress; b) guilt phase of trial; and, c) penalty phase.

A. Motion to Suppress

At the hearing on Defendant's Motion to Suppress held March 31, 1991, PAUL FROST testified that he and his nine-year old son, CHAD FROST, were stopped in FROST's truck at the intersection of Wesley Chapel Loop Road and Emory Drive in Pasco County, at or about 6:00 p.m. on July 14, 1990 (R232-233). At the time, a van was proceeding through the intersection in front of FROST and his son. A woman fell out of the van (R233). The woman got on her feet and started running towards the FROST's truck (R234). The woman was yelling "he's trying to kidnap me" (R234). FROST got out of his truck and the woman got into FROST's truck with FROST's son (R234). A man came around the van and pointed a gun at FROST (R234). The man, in his thirties, had a reddish brown wig on, thick mustache and was five feet, eleven inches or five feet, ten inches tall with a medium build (R245). The man had a very black beard and a dark or olive complexion (R247). FROST was eight to ten feet away from the man and was in the man's presence approximately a minute (R247). FROST testified he was nervous, but did not become hysterical (R246). The van was a white Aerostar with black running boards and gold stripe (R234-243). CHAD FROST had exited the truck and went to the back of

the truck (R235). The man went in front of the truck and pointed the handgun in the windshield (R236). FROST and his son began running (R236). While running, FROST looked back in the passenger side of his truck and could see the back of the man (R236). FROST and his son ran to a neighbor's home and the police were called (R237).

When the police arrived on the scene fifteen minutes later, FROST was very, very nervous (R247). FROST gave a written statement of what happened for the police officer (R249; EVIDENCE THAT COULD BE COPIED DEFENSE EXHIBIT #1).

DET. MUCK of the Pasco County Sheriff's office arrived and asked FROST to write a second statement in detail (R250; EVIDENCE THAT COULD BE COPIED DEFENSE EXHIBIT #2). FROST did not leave anything out of the written statements on purpose (R251).

The police brought a van back to the Wesley Chapel area and asked FROST to identify the van (R251). FROST said it was not the same van involved in the subject incident. FROST indicated the people in the van brought back to the Wesley Chapel area were fifty to sixty years of age (R252).

At approximately 8:00 p.m., DEP. McMILLAN, a crime scene technician with the Pasco County Sheriff's Department, received a call at his home North of Dade City to go to the area of Wesley Chapel Loop Road and Emory Drive (R265). DEP. McMILLAN, over his radio heard the complaint involved in an aggravated assault with a firearm and there was to be on the lookout (BOLO) being put out for a white Ford Aerostar van, late model, with gold running

boards (R266). DEP. McMILLAN was in a Dodge, green and white marked with working "Pasco County Sheriff" on it (R268). McMILLAN saw a van matching the description. The van was heading north into San Antonio on County Road 577 (R267). DEP. McMILLAN turned around at CR 577 and CR 579 and as he did, looked in his rear-view mirror and saw a van leaving fairly quickly (R268). Upon completing his turn, DEP. McMILLAN did not see the van (R268). DEP. McMILLAN headed north, back toward SR 52 on CR 577, reached the intersection of SR 52 and CR 577 and took a right, heading eastbound on SR 52. As DEP. McMILLAN got in front of the Holy Name Priory on SR 52, DEP. McMILLAN saw a van heading back towards San Antonio (R269). DEP. McMILLAN turned around again, made a left-hand turn on SR 52 and as he did so, noticed the van pulled up in the driveway of a vacant residence (R270). DEP. McMILLAN was not armed (R270). DEP. GRIFFIN had arrived on the scene (R270). DEP. GRIFFIN exited her vehicle, she had her weapon out and a man, who turned out to be PEREZ, was standing in front of the van. DEP. GRIFFIN ordered PEREZ, at gunpoint, to come from the front of the van and lay face down on the ground with his hands behind his head--which PEREZ did (R271).

DEP. GRIFFIN had stopped on the roadway blocking PEREZ's van that was in the driveway in front of a residence on SR 52 (R277). DEP. GRIFFIN, in pulling a gun on PEREZ and ordering him to step away from the van, spoke in English and PEREZ followed her commands (R277-278). The Defendant was handcuffed (R271). DEP. GRIFFIN indicated that she planned to hold PEREZ until someone

came and told her otherwise (R281). DEP. GRIFFIN indicated she read PEREZ his Constitutional rights in English and she believed PEREZ said he understood his rights (R280). At deposition on October 30, 1990, taken before the Motion to Suppress, DEP. GRIFFIN indicated she did not try to communicate with PEREZ because he could not speak English and so they waited for a jailer to come (R281-282). At the Motion to Suppress, DEP. GRIFFIN stated if she made the statement previously at deposition that PEREZ could not speak English, she was wrong (R283).

DEP. JERKINS, who arrived on the scene in San Antonio where PEREZ's van was stopped, helped search the immediate vicinity looking for a white female who was not found (R285). DEP. JERKINS was advised to keep PEREZ comfortable until a detective arrived to interview him (R285). It was approximately an hour after DEP. JERKINS arrived on the scene, where PEREZ was in custody in St. Leo, that DET. MUCK arrived at the scene (R287). Prior to DET. MUCK's arrival, DEP. JERKINS conversed in English with PEREZ about his job and what he was doing that evening. After DET. MUCK arrived at the scene in St. Leo, PEREZ acted like he could not speak English at all (R283; 287). DEP. JERKINS indicated PEREZ spoke with a very heavy accent which sounded Spanish to her (R288-289).

DET. MUCK got a call on the radio to go to St. Leo (R255). FROST and DET. MUCK rode to St. Leo together (R237). Before FROST got to St. Leo, FROST was told another van had been stopped and FROST needed to identify someone (R238). When they got to

St. Leo, FROST saw what he believed was the same van he had seen previously at Emory Drive and Wesley Chapel Loop Road (R238). As FROST got out of the car and walked up, he saw PEREZ sitting on the ground with his knees up. There were four or five police officers standing around there (R257). PEREZ was six or eight feet away from the van (R257). FROST looked at PEREZ and said "that's the man". PEREZ did not stand up when FROST initially approached him (R258). When FROST was going back to his car, PEREZ stood up. When FROST saw PEREZ stand up, PEREZ looked smaller and shorter than he had looked in Wesley Chapel (R259).

After FROST identified PEREZ, DET. MUCK felt he had probable cause to arrest PEREZ for aggravated assault and kidnapping (R337). DET. MUCK believed the van had been used in the commission of an aggravated assault and kidnapping (R337). The Sheriff Office's policy when an arrest is made, is to impound the vehicle for forfeiture. DET. MUCK had the van impounded and instituted forfeiture proceedings (R337). PEREZ's van was searched that evening (R273). DET. MUCK read PEREZ his Miranda rights in English and PEREZ said he understood (R352). PEREZ initially gave permission to search his vehicle, then said I really don't understand this, referring to the waiver of search section of the form which DET. MUCK had started reading to PEREZ in English (R353). At that time, DET. MUCK called for a Spanish-speaking officer to make sure PEREZ understood. DET. MUCK began questioning PEREZ in English before OFF. MONTERO who spoke Spanish got there (R353). DET. MUCK questioned PEREZ in English,

asking PEREZ to take him to the body so they could make sure it was buried right (R353-354). DET. MUCK told PEREZ it would look better in his eyes if PEREZ was to tell him where the body was so he could get the body buried (R354). Before OFF. MONTERO got there and before the search form was signed, DET. MUCK told PEREZ if PEREZ did not sign the waiver of search form, DET. MUCK would try to get a search warrant (R354-355). When OFF. MONTERO arrived and DET. MUCK and OFF. MONTERO began to interview PEREZ, DEP. JERKINS got a note pad and came back and began writing down what she was hearing (R290-291; 310).

OFF. MONTERO was a transport officer with the Pasco County Sheriff on July 14, 1990, and spoke Spanish and English fluently (R296). When OFF. MONTERO got to the scene, DET. MUCK told him that PEREZ did not understand English and he wanted OFF. MONTERO to help translate (R303). DET. MUCK told OFF. MONTERO before OFF. MONTERO talked to PEREZ that he wanted OFF. MONTERO to get PEREZ to open up -- to talk (R307-308). The conversation with PEREZ at the scene while OFF. MONTERO was translating for DET. MUCK lasted two and one half hours (R303). OFF. MONTERO never spoke English with PEREZ (R304). OFF. MONTERO read PEREZ his Miranda rights from a card in Spanish (R297). PEREZ indicated he understood his rights and was willing to answer questions (R299). OFF. MONTERO showed PEREZ a waiver of rights form (R305; 310; 201; EVIDENCE THAT COULD BE COPIED STATE'S EXHIBIT #39). OFF. MONTERO read the top section, titled Waiver of Search, off the form to PEREZ in Spanish (R300). PEREZ did not say anything in

response when OFF. MONTERO read the waiver of search -- however PEREZ signed the form (R301). OFF. MONTERO did not ask PEREZ to sign the Waiver of Miranda Rights on the same form which contained a number of rights (R305). OFF. MONTERO does not know why he did not request PEREZ to sign the Waiver of Miranda Rights on the same form (R306). OFF. MONTERO did not know if PEREZ understood the words he explained or if PEREZ understood the wording of the form he signed (R307).

OFF. MONTERO continued questioning PEREZ back at the police station (R308). OFF. MONTERO questioned PEREZ at the station from 12:00 to 6:30 a.m., although PEREZ was not being questioned about the incident all the time (R308-309). PEREZ appeared to be tired during that time (R308). OFF. MONTERO did not stop questioning PEREZ and ask him if he wanted to sleep (R308). It was obvious to OFF. MONTERO that after approximately eight hours of intermittent questioning, PEREZ was tired at 6:00 or 6:30 in the morning when OFF. MONTERO left PEREZ (R309).

DEP. OYOLA of the Pasco County Sheriff's office came to the east-side police station on July 15, 1990, to translate English to Spanish, as Spanish was his native language (R311-312). DEP. OYOLA arrived in Dade City about 5:30 a.m. and stayed in contact with PEREZ up until 8:30 to 9:00 a.m. (R313). PEREZ told DEP. OYOLA that he had ulcers and PEREZ had ulcer medication when DEP. OYOLA got there (R314). DEP. OYOLA did not read PEREZ Miranda warnings, as DEP. OYOLA was advised that Miranda warnings had been read to PEREZ (R314). DET. PUIG came in while DEP. OYOLA

was there and after DET. PUIG was there a few minutes before PEREZ stated to DET. PUIG that he didn't want to answer any more questions (R316).

DET. PUIG speaks Spanish (R318). DET. PUIG testified that PEREZ did not, during questioning, indicate he did not want to talk to DET. PUIG (R320). DET. PUIG did not read PEREZ his Miranda warnings (R322). PEREZ told DET. PUIG right off in the interview, while DEP. OYOLA was still there, he was tired of talking and for DET. PUIG to talk to the other people PEREZ had talked to in order to get the requested information (R323). As DET. MUCK recalled, PEREZ told DET. PUIG right off that PEREZ wasn't going to answer DET. PUIG and whatever he wanted to know--ask the other officers (R358).

On the early morning of July 15, 1990, DET. LAWLESS of the Pasco County Sheriff's office took a photopak of six photographs to CHAD FROST and FROST. PEREZ's photo was included in the photopak (R325; 327). DET. LAWLESS showed the photopak to FROST and CHAD FROST separately from each other and FROST and CHAD FROST each picked out PEREZ's photograph (R328-329). DET. LAWLESS was unaware FROST had come in contact with PEREZ the previous evening (R331).

DET. HAND of the Pasco County Sheriff's office testified that at 2:00-2:30 a.m. on July 15, 1990, he went to an address on Emerald Drive in Tampa at the request of DET. LAWLESS to speak to the girlfriend of PEREZ, BETTY FERGUSON, to ascertain if certain items were at the home (R365-366). PEREZ had lived with FERGUSON

for approximately ten years and had lived at the Emerald Avenue address for approximately four years (R215-216). DET. HAND had two uniformed Hillsborough County Deputies with him (R369). DET. HAND asked if PEREZ owned a gun or if they owned a gun. FERGUSON said yes (R367). FERGUSON went to a bedroom, opened the dresser drawer, pulled out a box marked Jennings J22 on it. PEREZ kept his underclothes and socks in the dresser drawer where the gun sheath and box were located (R218). FERGUSON opened up the box but there was no gun in the box (R367). She took out the gun rug with a zipper pouch, opened it up but there was no gun in it either (R367). The officer asked if he could have the items and FERGUSON said yes (R225). FERGUSON told the officer when she gave him the gun sheath in the box that it was PEREZ's (R225). FERGUSON did not know she did not have to give the items to the police officer. Had she known, she would not have given the items to DET. HAND (R225). FERGUSON thought she had to talk to the police. FERGUSON did not know she could refuse to talk to the police officer (R218). PEREZ had lived with FERGUSON for approximately ten years and had lived at Emerald Avenue for four years as of March, 1991 (R215-216).

During the time FERGUSON knew him, approximately ten or eleven years, PEREZ spoke perfect Spanish and broken English (R216). FERGUSON could not communicate with PEREZ on complicated subjects in English (R216). PEREZ could not write English (R216). If PEREZ needed to fill out a document, he could write his name (R216). FERGUSON filled out PEREZ's job applications

because he could not write English (R217). FERGUSON had difficulty communicating with PEREZ. She could speak Spanish a little more than she could understand it (R222). FERGUSON testified if you speak slow enough in English to PEREZ, sometimes he understands what you are saying (R223). If PEREZ did not understand something, she would show him or he would show her (R223).

VINCENTE GONZALEZ had known PEREZ since October 1989 (R370). GONZALEZ saw PEREZ when PEREZ came and picked up trash (R371). PEREZ and GONZALEZ spoke in Spanish when they talked (R371). GONZALEZ had asked PEREZ do you speak English and PEREZ said not much a little bit (R371). GONZALEZ would translate instructions between PEREZ's boss BARBARA BOSTIC and PEREZ (R372). Every time BOSTIC went to tell PEREZ something to do, BOSTIC had to show PEREZ with hands (R372). BOSTIC would tell GONZALEZ to see if PEREZ can understand what I mean. GONZALEZ would relay the message to PEREZ in Spanish and PEREZ would say "yeah, I'll do it, okay" (R372).

BOSTIC testified that she worked at American Building Maintenance at Jim Walter Corporation since October 1, 1989 and had known PEREZ since that time. BOSTIC was PEREZ's boss up through July 14, 1990 (R375). PEREZ was an excellent worker (R375). PEREZ could only speak a few words in English to BOSTIC such as yes and no (R375). If she told PEREZ he needed to do something besides his main job and PEREZ did not understand, she

would ask one of her other workers to translate English to Spanish for PEREZ (R375).

PEREZ testified, through an translator, on July 14, 1990, that he owned the white Ford Aerostar van with gold running boards seized by the Pasco County Sheriff on July 14, 1990 (R381-382).

At the conclusion of the evidentiary hearing on the Motion to Suppress, the trial court denied all of Defendant's motions to suppress (R2212-2240).

B. TRIAL FACTS

On July 14, 1990, CRISTLE LEWIS, then named CRISTLE DELORME, lived in an apartment at 203 South Fremont Street, Tampa, Florida (R835-836). KAY DEVLIN and her boyfriend, RUDY HAMMOND, were living in the apartment with LEWIS and her boyfriend (R838). DEVLIN was a prostitute and HAMMOND was being supported by DEVLIN's prostitution (R835; 838). JILLANN NELSON, a prostitute, was DEVLIN's friend, back on July 14, 1990 (R820). Late morning or early afternoon, DEVLIN and NELSON were working along Kennedy Blvd. where prostitutes frequently work (R820-821). DEVLIN was talking at the window of a white van with tinted windows--talking to a man (R821). The man in the van had a black shoulder-length wig on (R826). NELSON had seen the man before, as he had tried to pick her up two weeks before, when he was driving a brown van and wearing a black wig (R833-834).

Mid to late morning on July 14, 1990, DEVLIN brought a date to LEWIS' apartment. DEVLIN and the man went into the bedroom (R839). DEVLIN and the man were in the room an unusually long time and LEWIS became worried. DEVLIN came out of the bedroom--said we have a problem--the man won't leave (R840). The man came out of the bedroom and LEWIS told the man he was going to have to leave (R840). The man said something to the effect this isn't over and the man left through the back gate (R842). LEWIS looked out the back window and out the back fence and saw the roof and window of a white van back there (R842). DEVLIN told LEWIS the man couldn't sexually perform, demanded his money back and DEVLIN

refused to give the money back (R841; 851). DEVLIN told LEWIS she had never seen the man before (R852). LEWIS tried to convince DEVLIN not to go back out on the street, but was unsuccessful (R843). At trial, LEWIS identified PEREZ as the man who was with DEVLIN the morning of July 14, 1990 (R846). BRIDGET PRICE lived at 203 South Fremont Street, Apt. 5, Tampa, Florida which is upstairs (R880). On the afternoon of July 14, 1990, PRICE was looking out the kitchen window upstairs (R881). PRICE saw DEVLIN outside standing on the sidewalk (R880). PRICE testified that a man she identified as PEREZ and DEVLIN were arguing (R881; 885). PEREZ was trying to get DEVLIN to get in the van and DEVLIN didn't want to go (R881). PRICE saw PEREZ pull a gun, a .25 automatic, out of his waist and he stuck it in DEVLIN's side (R881). He had on surgical, plastic-type gloves (R882). PRICE saw DEVLIN inside the van with DEVLIN's head pressed against the passenger side and DEVLIN was kicking him like she was trying to get away (R882). The van was white with tinted windows with gold trim to the bottom (R882).

DANNY WEST lived at 203 South Fremont Street, Apt. 2, Tampa, Florida on July 14, 1990, where he lived with his wife, MICHELLE (R858). WEST saw DEVLIN about 10:00 or 11:00 a.m. on July 14, 1990, enter the apartment building at 203 South Fremont with a man who WEST identified as the Defendant, PEREZ (R859-860; 863). At approximately 2:00 or 3:00 p.m. on July 14, 1990, WEST ran outside the apartment and saw a white van and a man who WEST identified as PEREZ getting into a white van in which he saw

DEVLIN (R861-862). WEST and a friend gave chase to the van, but were unable to catch up with it (R862).

DEVLIN's boyfriend, HAMMOND, tried not to report DEVLIN as a missing person that night and he was walking the streets looking for DEVLIN (R846). HAMMOND testified the next day he reported the abduction to OFF. HEIMS of the Tampa Police Department who HAMMOND said told him that he would have to wait 24 hours before OFF. HEIMS would take a formal report (R891). OFF. HEIMS testified the abduction was first reported on July 16, 1990 at 5:00 p.m. and that he had inquired as to why the abduction was reported 48 hours after the fact (R1096). OFF. HEIMS testified there is no policy of the Tampa Police to wait 24 hours to take a report and that he would not have told HAMMOND any such thing (R1097).

On July 14, 1990, at approximately 6:00 to 6:30 p.m. PAUL FROST and his son, CHAD FROST, were stopped at the intersection of Wesley Chapel Loop Road and Emory Drive in FROST's truck (R929). A van approached the intersection and a woman came out of the passenger side of the van and came running over to FROST's truck (R930). FROST was stunned (R946). FROST got out of his truck and the woman climbed in the truck (R930-931). A man came around the back of the van with a gun in his hand (R931). The man, when 10-12 feet away, pointed a gun at FROST--who thought he might be shot (R932). The man did not say anything to FROST (R932). The man ran around the front of FROST's vehicle because the passenger door opened up and FROST's son was apparently

getting out of the truck (R933). FROST started stepping backward (R932). When he got to the back of his truck, FROST saw his son, CHAD FROST, back there (R933). FROST grabbed his son and ran toward a neighbor's house (R934).

While running, FROST looked back and saw a man's tail end in the passenger side of FROST's truck (R934). The whole incident lasted a minute at most according to FROST (R947). The woman was white, in her thirties, wearing a white jump suit (R936). The woman said this man is trying to kidnap me (R909). The gun displayed by the man was a revolver, silverish in color with a short barrel (R937). FROST did not think the man said anything (R948). FROST testified the man was white, in his thirties, with a reddish brown wig which was straight and a real thick mustache (R938; 948). CHAD FROST, who is ten years old, testified that the man pointed a gun at CHAD FROST and that CHAD FROST was afraid he might be shot (R912). CHAD FROST testified the man was in his thirties or forties, tannish-white complexion, wearing a yellow-brownish wig which looked fake to CHAD FROST (R916). The man had a thick black mustache and a silvery gun (R915-916). At trial, CHAD FROST and FROST identified PEREZ as the man who pointed the gun at them (R920-945).

DEP. LAW, with the Pasco County Sheriff's office arrived at the scene at the intersection of Wesley Chapel Loop Road and Emory Drive in Pasco County on July 14, 1990 (R969). DEP. LAW's incident report, admitted into evidence, indicated the incident occurred at 6:56 p.m., it was called in at 6:58 p.m., DEP. LAW

was dispatched at 7:00 p.m. and he arrived at the scene at 7:05 p.m. (R981). DEP. LAW knew the case involved a possible kidnapping (R973). DEP. LAW wanted to get details about the suspect from FROST and his son, but they were extremely upset. FROST and his son were unable to give DEP. LAW details regarding date of birth, height, weight, complexion, speech or special indicators concerning the suspect (R975-976). FROST could not tell DEP. LAW if the gun involved was a handgun or an automatic (R977). FROST and his son told DEP. LAW the suspect had a brown wig with straight shoulder-length hair (R976). FROST told DEP. LAW the suspect had yelled halt at FROST and his son (R977). DEP. LAW was told the suspect had FROST's son stand by FROST (R979). Someone at the scene advised DEP. LAW that the van in question had a temporary tag and DEP. LAW noted that fact on his incident report (R977-978). In its final form, the BOLO put out by DEP. LAW was a white Ford Aerostar with red pinstripe and gold running boards, a kidnapping with a suspect possibly being armed (R971). At some point, a white van containing an elderly couple was brought back to Wesley Chapel and FROST was asked if he could identify the van (R950-951). DEP. LAW obtained a written statement from FROST (R970; EVIDENCE THAT COULD BE COPIED DEFENSE EXHIBIT #1).

DEP. McMILLAN, a crime scene technician with the Pasco County Sheriff's office, was asked to respond to the intersection of Emory Drive and Wesley Chapel Loop Road on July 14, 1990 (R983). DEP. McMILLAN drove a van marked with the Sheriff's star

and the writing Pasco County Sheriff's Office to an area just South of San Antonio on County Road 577 (R984-986). DEP. McMILLAN heard a BOLO over the radio describing a white Ford Aerostar van with gold running boards. DEP. McMILLAN saw what he believed was the vehicle described in the BOLO heading North on CR 577 going into San Antonio (R986). DEP. McMILLAN was advised by DET. MUCK to get a tag number on the van, if it was possible to do so. DET. MUCK went to turn around and the white van appeared to be speeding up. It was approximately 8:20 p.m. (R988). DEP. McMILLAN lost sight of the van when he turned around (R989). DEP. McMILLAN proceeded into San Antonio and turned right on SR 52. As he was heading toward Dade City, DEP. McMILLAN saw the van headed back toward him (R992). DEP. McMILLAN again turned around and as he slowed to make a turn and noticed the van in the driveway of the private residence (R992-993). DEP. GRIFFIN and DEP. McMILLAN both saw a person standing in front of the van looking in their direction (R996). DEP. GRIFFIN took out her gun, ordered the man to come around to the side of the van and lay face down on the ground in English (R996-997). PEREZ responded to the commands in English (R998). DEP. GOETHE arrived and handcuffed PEREZ (R998). At that time, PEREZ was wearing a pair of white boxer-type shorts and what appeared to be a light-colored pullover shirt (R999). After DET. MUCK arrived at the scene in St. Leo he advised DEP. McMILLAN that DET. MUCK had oral and written consent from PEREZ to search the van (R1019). DEP. McMILLAN observed clothing in the back of the

van which was wet (R1020). In the van were clothes, a pair of jeans, a vest with no sleeve on it, boots, socks and rope (R1019).

DEP. McMILLAN was at the scene at St. Leo from approximately 8:30 to 9:30 a.m. DEP. McMILLAN looked in PEREZ's van and saw what appeared to be a few small drops of blood inside the passenger door (R1042). DEP. McMILLAN located what appeared to be a couple of blonde hairs in the van (R1043-1044). DEP. McMILLAN visually noticed no blood on PEREZ's clothing and no blood on the jeans and vest which were wet (R1044). The van had a normal Florida license tag for Hillsborough County--not a temporary tag (R1046). DEP. McMILLAN subsequently dusted for fingerprints and found a number of prints in the van as well as some fibers which were subsequently sent to the FBI (R1045-1047). The search of the van resulted in the seizure of numerous items introduced at trial as State Exhibits #15-38 over Defense counsel's objection (R1216-1245). Among the items were condoms, .22 bullets, rope, a butcher knife and rubber gloves (R1216, R1219, R1226, R1229, R1233, R1240, R1242-1243).

DEP. McMILLAN proceeded to Wesley Chapel and completed a crime scene investigation at the scene of the initial complaint (R1032-1036). DEP. McMILLAN had a hard time lifting prints from FROST's vehicle because the vehicle was damp as it had rained earlier in the day (R1034).

DEP. GRIFFIN of the Pasco County Sheriff's Office testified at the scene in St. Leo, she advised PEREZ of his Miranda rights

by card in English. PEREZ shook his head yes when asked by DEP. GRIFFIN if he understood his Miranda rights. PEREZ said he was going to deliver some VCR tapes he had rented to Orlando. PEREZ said he worked at a cigar factory in Tampa (R1066). DEP. GRIFFIN admitted that at a prior deposition on October 30, 1990, when asked if she had talked to PEREZ at all, DEP. GRIFFIN said PEREZ didn't understand English so she didn't say too much to him (R1071). DEP. GRIFFIN went on, at that previous deposition, to say that PEREZ couldn't speak English and the police waited for one of their jailers to come (R1071). When confronted with her prior testimony, DEP. GRIFFIN admitted the prior inconsistent statement, but explained there was a lot going on during that time and she did not recall previously (R1072).

DEP. JERKINS of the Pasco County Sheriff's office searched around and in the house at the vicinity of the van located off SR 52 in St. Leo, but did not locate any weapons or evidence (R1109; 1112-1113). DEP. JERKINS saw fresh cuts up and down the front of PEREZ's legs and shinbones (R1116). DEP. JERKINS testified, at trial, she presently was working in corrections and has seen PEREZ more than 100 times in jail and PEREZ speaks and understands instructions in English (R1119).

DET. MUCK of the Pasco County Sheriff's office worked in the Crimes Against Persons Division (R1256). He went to the scene of the incident at Emory Drive and Wesley Chapel Loop Road (R1257). DET. MUCK asked FROST for a second written statement (R1313; EVIDENCE THAT COULD BE COPIED DEFENSE EXHIBIT #2). While at

Wesley Chapel, DET. MUCK was told a van matching the BOLO had been stopped on SR 52 outside St. Leo (R1260). DET. MUCK took FROST with him to try and identify the suspect (R1261). When DET. MUCK and FROST arrived in St. Leo, PEREZ was sitting on the ground (R1261) PEREZ was cuffed (R1314). DET. MUCK asked FROST if PEREZ was the person who had pulled a gun and FROST said it was (R1262). Shortly thereafter, DET. MUCK went back to FROST and asked him if he was sure of his identification. FROST said he was not sure because the guy looked too short standing up (R1317). DET. MUCK went back to PEREZ and asked if he would sign a Waiver of Search. DET. MUCK read the Waiver of Search to PEREZ. PEREZ said he didn't understand it and DET. MUCK made the decision to call for a Spanish-speaking officer (R1262). DET. MUCK was told by another officer that PEREZ had been advised of his Constitutional Rights (R1262). DET. MUCK pretty much disregarded PEREZ until OFF. MONTERO, the Spanish-speaking translator, arrived (R1264). When OFF. MONTERO arrived, DET. MUCK briefed him (R1264). OFF. MONTERO was given a Waiver of Search form and asked to go over it with PEREZ (R1264). Because of human error, DET. MUCK did not have PEREZ sign the Waiver of Miranda on the waiver form (R1266; EVIDENCE TO BE COPIED STATE EXHIBIT #39). DET. MUCK referred to the failure to have PEREZ sign the Miranda wavier as MUCK's fault (R1266). Following the signing by PEREZ the search form, DET. MUCK was present when DEP. McMILLAN reached in the van in the vest jacket, pulled out rubber gloves, a .22 bullet, a handcuff key, and odd pieces of rope

(R1268). DET. MUCK was advised what appeared to have been blood and blonde hair were found in the van (R1268). DET. MUCK took PEREZ aside and said, regarding the possible female victim and told PEREZ, if she's tied up out there tell me where she's at, that way maybe her family can I.D. her before her body gets all messed up (R1270). PEREZ answered there had been no woman his car in English (R1270).

At one point, PEREZ told DET. MUCK that his car was missing on the interstate and he got out to check underneath the car and that's why PEREZ's clothing got wet. PEREZ said he was going to Orlando to try to get to a park, but was unable to identify the park by name or location (R1271). PEREZ said the rope in the van was where he hung his clothes when he did the laundry (R1272). PEREZ denied having any woman in the van (R1272).

Pasco County Sheriff's Office transport OFF. MONTERO responded to the scene in St. Leo to translate for DET. MUCK (R1131-1132). When OFF. MONTERO arrived at the scene DET. MUCK told OFF. MONTERO that PEREZ did not understand English and DET. MUCK wanted OFF. MONTERO to translate (R1152). PEREZ and OFF. MONTERO talked for two and one half hours while standing up (R1154). During the nine or so hours, PEREZ and OFF. MONTERO talked, PEREZ spoke no English--only Spanish (R1154). OFF. MONTERO determined that PEREZ had a seventh or eighth grade education (R1155). DET. MUCK instructed OFF. MONTERO to keep PEREZ talking (R1155). PEREZ gave OFF. MONTERO the same story four or five times (R1155). PEREZ was advised of his

Constitutional Rights in Spanish and PEREZ indicated he understood and would answer questions (R1137). OFF. MONTERO asked PEREZ about the blonde looking hair found in the van and PEREZ replied it was probably his girlfriend's hair (R1144). PEREZ said he did not do anything--he was lost and that was why he was in St. Leo (R1141). OFF. MONTERO was with PEREZ until 6:00 a.m. the next morning (R1141). PEREZ denied he killed or abducted DEVLIN or assaulted the FROSTs (R1157).

At the police department, PEREZ was offered food and use of a bathroom during questioning and requested Maalox for his ulcers which was provided by DET. MUCK (R1139; 1276). PEREZ indicated he hadn't owned a gun for years and he had found the ammunition seized from the van in the dumpster (R1278). PEREZ said he used surgical gloves to work on his car (R1278). When asked by DET. MUCK about suspected hair and blood found in PEREZ's van, PEREZ told DET. MUCK if you found blood and hair in there and you can match it to the female I killed her ... unless somebody had the vehicle before me and killed her (R1277-1278).

DET. OYOLA reported to the Pasco County Sheriff's Office on July 15, 1990 and OFF. MONTERO was leaving as DET. OYOLA arrived (R1159-1160). DET. OYOLA was with PEREZ approximately three hours until DET. PUIG took over at 8:30 or 9:00 a.m. (R1162). PEREZ only used one word of English the whole time he spoke to DET. OYOLA (R1162). PEREZ, during the two and one half hours to three hours of questioning, continued to maintain the same story (R1163). PEREZ, when questioned about the condoms which had been

found in his van, stated he had seven condoms and never uses them. When told ten condoms had been found in the van, PEREZ said he bought a box of ten. PEREZ indicated he had owned a gun but sold the gun two months before. When questioned a second time about the gun, PEREZ said he sold it six months previous (R1164).

DET. OYOLA heard the beginning of the conversation between DET. PUIG and PEREZ. PEREZ told DET. PUIG to get a tape recorder to record the transaction so it could played back (R1172).

DET. PUIG was also called to the Sheriff's office on July 15, 1990 (R1174). PEREZ told DET. PUIG he had a weapon but had sold the weapon to an individual at the cigar factory where he worked (R1175). PEREZ told DET. PUIG he used the rope in the van to hang his clothes because he had been to a laundromat earlier in the day (R1176). PEREZ told DET. PUIG that he used the condom found in the van for protection due to the amount of diseases going around (R1176). During the course of the questioning, PEREZ stated he was tired of answering questions--why wasn't the conversation being recorded (R1180). DET. PUIG was not sure how long he questioned PEREZ--it may have been from one half to one and one half hours (R1182).

DET. HAND of the Pasco County Sheriff's office went to where PEREZ resided with his girlfriend, BETTY FERGUSON, on July 14, 1990 in Tampa, Florida (R1490). FERGUSON delivered to DET. HAND a gun rug, a gun box and box of .22 ammunition from PEREZ's dresser drawer. These items were introduced in evidence as

State's Exhibit #4 over Defense counsel's objection (R1495). NELSON told the police PEREZ had tried to pick her up (R1328). NELSON did tell the police that PEREZ had tried to pick up DEVLIN on Saturday, July 14, 1990 (R1328). On July 16, 1990, when shown the photo-pak, she could not or would not pick PEREZ out (R1329). LEWIS told DET. MUCK that she could not remember what the subject looked like (R1329). LEWIS told DET. MUCK that a trick had a problem sexually performing and there had been some kind of argument (R1330). On July 15, 1990, DET. LAWLESS went to CHAD FROST and FROST's home on July 15, 1990 (R1197). DET. LAWLESS separated CHAD FROST and FROST and showed each of them a photo-pak which included PEREZ's picture. Both FROST and CHAD FROST picked out PEREZ's photograph (R1200). FROST indicated to DET. LAWLESS that the man had yelled halt at FROST and his son (R1202). Nothing was done to see if the FROST's could identify PEREZ's voice (R1202). DET. LAWLESS did not know that FROST had seen PEREZ in St. Leo the previous night (R1201).

On Monday, July 16, 1990, DET. MUCK was contacted by OFF. HEIMS from the Tampa Police Department (R1283-1284). As a result of the conversation, DET. MUCK and DET. PUIG went to Tampa and met with OFF. HEIMS (R1286). OFF. HEIMS provided photographs of five or six men, some of whom were police officers (R1286). The officers went to 203 South Fremont where they showed various witnesses the photo-pak which included PEREZ's picture (R1287). while PRICE did not pick out the photo of PEREZ, she did pick out the photo of one of the police officers in the photo-pak (R1287).

When DET. MUCK talked to PRICE, he tape recorded her statement because he didn't think she would be around in a few days (R1339).

DET. MUCK testified in showing a photo-pak to a witness, you only have witness sign photo if they pick out the suspect (R1327). DET. MUCK stated if any witness picked out the wrong person, you kind of forget about it (R1327).

On or about July 20, 1990, the body of DEVLIN was found in a ditch in an orange grove off Elam Road in Pasco County (R1296-1297). The body had been staked down and some stakes and ropes pulled loose and the front portion of the body had floated up. The body was removed and an autopsy conducted.

JOAN WOOD, the Chief Medical Examiner, performed the autopsy (R1361-1370). The body was decomposing (R1360). The cause of death was two gunshot wounds to the chest with injury to the right lung, heart and aorta (R1369). The bullet wound to the left chest with injury to the heart and aorta was not a survivable injury (R1365). This would have caused unconsciousness within perhaps 30 seconds and death in a very few minutes (R1366). The bullet wound to the right chest and lung would have been survivable with immediate medical attention and would have caused death within a few minutes up to an hour (R1366). There was a laceration to the head which appeared to have been caused by blunt trauma (R1367). If DEVLIN had been in a van when the head injury occurred, DR. WOOD would have expected a significant quantity of blood in the van (R1368). DR. WOOD

cannot say if the skull injury was before or after death (R1372).

ROBERT SIEBERT, an expert witness in firearms identification for the FBI, examined the two bullets recovered from DEVLIN's body and determined they were .32 Smith and Wesson long caliber bullets (R1381). The two bullets were fired from the same barrel (R1383). The bullets could have come from the empty box of .32 Smith and Wesson long ammunition retrieved from the home of PEREZ by DET. MUCK (R1300-1302).

MICHAEL P. MALONE was Senior Examiner of the Hair and Fiber Unit of the FBI and was the agent in charge of the case for the FBI (R1392-1394). A number of items of evidence were sent to the FBI. MALONE compared everything associated with PEREZ to everything associated with DEVLIN and was able to find no hair and fiber transfers (R1398). MALONE was provided ropes from the victim and several lengths of rope from PEREZ's van and the vest of PEREZ (R1399). MALONE's opinion was that the ropes from DEVLIN's body were constructed exactly like the rope from PEREZ's van and from the vest of PEREZ (R1402). MALONE also indicated the length of rope in the vest pocket was consistent in length and in the same ball park with the short rope found on DEVLIN (R1405). MALONE testified the rope was a fairly common substance and it was unknown where or when the rope was manufactured and sold (R1406).

MALONE found hair in the sample from PEREZ's van which matched PEREZ's (R1412). MALONE indicated there was no blood found on any item that was submitted to the FBI (R1413). A

gunshot residue test was inconclusive and MALONE could not say whether the hand had ever fired a gun (R1414). MALONE and the FBI did not receive any lifted latent fingerprints to make a comparison on (R1408). With regard to the hair samples provided, the FBI did not have a sample from PEREZ's girlfriend to match against the hairs found in the van (R1410). The pair of rubber gloves submitted to the FBI were not checked for the presence of blood as no blood exams were requested for that item (R1411). There were dozens of hairs from the van, several which matched PEREZ; however, there were several blonde to brown caucasian hairs which did not match PEREZ and did not match DEVLIN (R1411).

TARY LYNN HUFFMAN was in the Pasco County jail around July 14, 1990, on burglary and a couple other charges (R1345). HUFFMAN had conversations with PEREZ in jail (R1345). HUFFMAN indicated he believed PEREZ had been to the area of Pasco County around CR 577, CR 579 and Elam Road a few times (R1345). PEREZ gave HUFFMAN directions to an area where PEREZ had thrown some guns away. PEREZ made the insinuation he had dropped a body (R1346). PEREZ said the woman got what she deserved (R1346-1347). HUFFMAN had talked to DET. MUCK about what PEREZ said the day before HUFFMAN was sentenced on some pending charges (R1351). HUFFMAN testified he did not get anything for his cooperation (R1349). At a previous deposition on April 9, 1991, HUFFMAN had testified that in their conversations, PEREZ did not mention he had one pistol or more that one just said a small .22 caliber (R1353). HUFFMAN knew he had been convicted of more than ten

felonies but said it would be guesstimation as to whether he had been convicted of more than 20 felonies. An attempt to introduce certified copies of HUFFMAN'S prior felony convictions was denied and the certified copies were proffered for record purposes (R1354-1355; EVIDENCE THAT COULD BE COPIED DEFENDANT'S PROFFER #1).

BETTY FERGUSON testified that in July of 1990, she had lived at 7202 North Emerald, Tampa, Florida for about 3 years with her daughter and PEREZ (R1471). FERGUSON had lived or been with PEREZ 11 or 12 years in July 1990 (R1471). In July 1990, PEREZ owned a white van with gold running boards (R1472). FERGUSON rode in the van about twice a week (R1474). There was a reddish or brownish wig in the van that PEREZ had gotten out of the trash dumpster at work (R1475). There were some handcuffs like a children's toy which had been won at the fair (R1476). Before July 1990, PEREZ had two guns in the home (R1478). PEREZ had taken the .38 out to sell and FERGUSON had not seen it for awhile (R1485). One was a small caliber .22 the other was a .38 (R1478). On July 15, 1990, DET. HAND came to FERGUSON's home and took from FERGUSON's home a gun pouch and a box which came from PEREZ's dresser (R1482). PEREZ and FERGUSON lived together as man and wife for approximately 10 to 11 years, during which time they had sexual intercourse frequently (R1483). PEREZ never had a problem getting an erection (R1484). PEREZ was hard to part with a dollar but with FERGUSON, PEREZ was very good to her (R1484).

PEREZ understood very little English (R1486). PEREZ and FERGUSON communicated in monkey English, a half-English/half-Spanish combination (R1486). When she first met PEREZ, he did not know any English at all and FERGUSON knew very little Spanish (R1486). PEREZ did not read English (R1487). PEREZ had about a third or fourth grade education (R1487). PEREZ occasionally wore white surgical gloves when he worked on his van and at his work because he cleaned toilets and bathrooms (R1488).

The State moved in limine to prohibit the defense from introducing evidence of an alibi for failure to file a Notice of Alibi pursuant to the Florida Rules of Criminal Procedure (R1456-1464). The trial court granted the State's motion and ruled the court would not allow FERGUSON to testify and say she saw PEREZ at the same time PEREZ was alleged to have been at the Fremont address or in Pasco County. Nor would the trial court inquire as to whether the Defense's failure to file a Notice of Alibi prejudicial even when requested to do so by the Defendant's counsel (R1462-1454).

The State rested and the Defense moved for a judgment of acquittal on all counts on the grounds of insufficiency of evidence which was denied (R1499-1500). The Defense proffered the deposition of FERGUSON to perpetuate testimony taken at the Hillsborough County Courthouse on December 19, 1990. The deposition to perpetuate testimony had been taken before trial, pursuant to court order. The deposition was proffered for the record (R1500-1501; EVIDENCE THAT COULD BE COPIED DEFENDANT'S

PROFFER #2 Transcript of Betty Ferguson's Deposition of December 1990). In the deposition, FERGUSON testified on July 14, 1990, the last she saw of PEREZ was 5:45 p.m. when she left her house to go to St. Patrick's. When FERGUSON left, PEREZ had no shirt and a pair of red shorts (Ferguson Transcript 17-18). On Saturday, July 14, 1990, FERGUSON went to work at the Reedy, where she worked as a deli manager (Ferguson Transcript 22). She got to work about 7:00 a.m. and must have gotten home at 10:30 to 10:45 a.m. (Ferguson Transcript 22). FERGUSON only worked about three to three and a half hours that day (Ferguson Transcript 23). When FERGUSON got home, PEREZ was washing the car in the rain. PEREZ and FERGUSON went to the laundromat and got home about 12:30 or 1:00 p.m. The rest of the afternoon, PEREZ fiddled around and got all dirty while FERGUSON watched television (Ferguson Transcript 23). The last she saw of PEREZ was 5:45 p.m. when she left her house to go to St. Patrick's. When FERGUSON left, PEREZ was not wearing a shirt and hand on a pair of red shorts (Ferguson Transcript 17-18).

FERGUSON did not actually testify for the Defense at trial. The Defense rested without presenting any evidence to the jury (R1502).

The jury returned verdicts of guilty as charged on all four counts (R468-470; 1653-1655).

C. PENALTY PHASE

JEFFREY T. CONKLIN, a Pasco County Sheriff's Deputy, knew PEREZ since the afternoon he was booked in, a year and a half before the penalty phase (R1676). While working in the Dade City detention facility, DEP. CONKLIN came into daily contact with PEREZ. The Deputy later went to work in the Land O'Lakes facility as a transport officer. For about four months, PEREZ was in the sector assigned to DEP. CONKLIN in Land O'Lakes (R1677). DEP. CONKLIN had daily contact with PEREZ at this time. DEP. CONKLIN testified that the jail staff never had any problems with PEREZ, that he had never been reprimanded or housed in solitary, and that he pretty much followed the rules (R1678).

MARIO GARRIDO was PEREZ's supervisor at Villazon Cigar Company (R1681). GARRIDO was in daily contact with PEREZ (R1687). PEREZ was one of the best employees that he supervised (R1686). The shift was from 5:00 a.m. until 3:00 p.m. (R1684). PEREZ was never late for work. At the most, he missed no more than two days in three years (R1686). PEREZ always completed assigned tasks and GARRIDO did not have to check up on him. PEREZ's job involved heavy physical work, yet he maintained a good attitude, was of good humor to his co-employees and enjoyed coming to work (R1687).

PEREZ also had another job after his regular shift at the cigar company concluded. PEREZ cleaned the Jim Walter Building as an employee of American Building Maintenance (R1691-1694). PEREZ worked for the company and its predecessor for

approximately four years. His supervisor was BARBARA JEAN BOSTIC (R1694). According to BOSTIC, PEREZ was one of the best employees she had (R1695). He worked from 5:30 to 9:30 p.m. and he was always on time (R1695). He never missed work, not even when his jaw was swollen after dental work (R1698). PEREZ was a reliable, dependable person (R1699). Bostic never had to check up on PEREZ or wonder whether he would complete his assigned task. In fact, PEREZ would double-check the work of other workers to make sure the job was done properly (R1696-1697). BOSTIC would use a translator to communicate with PEREZ because he spoke very little English and half the time she didn't know what he was saying and he didn't know what she was saying (R1697).

PEREZ is a Mariellito, having come to this country on the Mariellito boat lift in the early eighties (R1719).

BETTY FERGUSON lived with PEREZ for ten years (R1704). PEREZ was employed continuously for this ten year period (R1705-1706; 1686; 1694). PEREZ helped clear land and erect a mobile home that the couple lived in (R1709). FERGUSON's daughter lived with them (R1708-1709). PEREZ did chores around the house, cleaning, yard work and shopping (R1709-1710). The two enjoyed visiting parks and recreation attractions in their limited free time (R1716). BETTY FERGUSON loved PEREZ very much (R1717).

SUMMARY OF ARGUMENT

Because of the number and complexity of the issues raised on appeal together with the page limitations imposed, a summation of the arguments would be mere repetition of arguments which are, themselves, summarizing and would only add to an already lengthy brief.

The Defendant would focus the Court's attention on the trial court's violation of the procedural rule promulgated in Grossman. The trial court did not prepare written findings prior to the oral pronouncement of sentence, nor file written findings concurrently with the pronouncement of the death sentence. Accordingly, the death sentence must be reversed and a life sentence imposed, consistent with to the 10-2 jury recommendation.

Defendant would respectfully request the Court's indulgence and ask to proceed directly to the merits of this case.

I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN GRANTING THE STATE'S MOTION IN LIMINE TO EXCLUDE THE TESTIMONY OF BETTY FERGUSON REGARDING THE DEFENSE OF ALIBI, IN FAILING TO INQUIRE INTO WHETHER THE FAILURE TO FILE A NOTICE OF ALIBI CAUSED PREJUDICE TO THE STATE AND IN FAILING TO CONSIDER WHETHER A LESS EXTREME SANCTION SHORT OF EXCLUSION OF BETTY FERGUSON'S TESTIMONY WAS AVAILABLE.

The trial court committed reversible error when, upon learning that no notice of intent to rely on alibi had been filed by the Defense, ruled that noncompliance with the Notice of Alibi Rule by Defense mandated exclusion of BETTY FERGUSON's testimony regarding alibi. The trial court also erred in refusing to determine whether noncompliance with the Rule resulted in prejudice to the State and in refusing to consider whether there were any alternatives short of exclusion to overcome any prejudice which might have existed.

Florida law is abundant with decisional law construing Florida Rule of Civil Procedure 3.200 and the procedure to be followed when a Defendant has failed to file a Notice of Alibi, but wishes to introduce testimony of witnesses other than the Defendant. In Fedd v. State, 461 So.2d 1384 (Fla. 1st DCA 1984) with regard to a violation of Rule 3.200, the Court stated that exclusion is not mandatory and for good cause shown, the court may waive the requirements of the rule. The Court in Fedd went on to say that a trial judge must do more than simply ascertain that a discovery rule has been violated. The inquiry must involve a determination of whether the violation resulted in substantial prejudice to the opposing party. A failure to

conduct an inquiry into the existence of prejudice constitutes error pursuant to Richardson v. State, 246 So.2d 771 (Fla. 1971). In Fedd, the trial court excluded the testimony of the Defendant's witnesses solely because Defense counsel had violated the notice of alibi rule. The trial court in Fedd just as the trial court below failed to inquire into possible prejudice to the State. The trial court in Fedd, just as the trial court below, failed to explore reasonable alternatives to the drastic remedy of exclusion to attempt to mitigate any potential prejudice.

FERGUSON was listed as both a Defense and State witness (R168). Prior to trial, FERGUSON was very ill with liver cancer. The State and Defense agreed to take a videotaped deposition of FERGUSON and agreed her testimony would be admissible at pre-trial motions or at trial (R2006). FERGUSON ultimately testified at trial when called as a witness by the State (R1470-1484).

McDugle v. State, 591 So.2d 660 (Fla. 3d DCA 1991), discussed the significance of a witness who was a listed state witness being excluded from testifying for failure of Defendant to list the witness on a Defense witness list. In McDugle, the State successfully argued there was a willful discovery violation. The Appellate Court ruled that where a witness who the Defense had failed to list, but wished to call, was already listed on the State's witness list. It was clearly error to limit the Defendant from calling the officer as a witness without at least ascertaining what prejudice would have resulted by the

admission of the witnesses' testimony. The court went on to say that failure to consider prejudice to the State which would have resulted from the Defendant's introduction of objected to testimony was violative of Richardson and not harmless error.

On December 19, 1990, more than ten months before the actual trial, the deposition of FERGUSON to perpetuate Trial Testimony was taken in the Hillsborough County Courthouse. Present at the deposition were the Defendant, an interpreter, a videographer and two guards (Ferguson Transcript p.1) At the deposition, the following dialogue occurred between the prosecutor and FERGUSON in the Prosecutor's direct examination of FERGUSON at page 17 and 18 of the Ferguson transcript.

Q: Do you know what time it was you last saw Mr. Perez that day?

A: I left the house at quarter to six to go to St. Patrick's.

Q: That would have been p.m.?

A: p.m.

Q: Do you know what he was wearing when you saw him when you left?

A: When I saw him when he (sic) left, he had no shirt. He had just come out of the backyard. He had a pair like I think red shorts.

Q: Did Mr. Perez tell you where he was going to go or what he was going to be doing that day?

A: I asked him. He said that he was going to pick up some tapes.

In the examination of FERGUSON, at the aforementioned deposition by Defense counsel, FERGUSON testified without

objection that she worked from seven until ten thirty in the morning on July 14, 1990, and when she got home, PEREZ was washing his car (Ferguson Transcript 22-23). FERGUSON and PEREZ went to the laundromat and got home from the laundromat and then PEREZ went out fiddled around and got all dirty and FERGUSON watched television and PEREZ closed up the shack and came inside. FERGUSON took her shower and left the house at quarter to six (Ferguson Transcript 23). This testimony was crucial for the jury to hear because at trial the State's witnesses had testified that PEREZ had initially been at the apartments at Fremont Street and been seen with KAY DEVLIN mid to late morning and that PEREZ had been seen back at the same apartments abducting DEVLIN the afternoon of July 14,1990, from 2:00 or 3:00 p.m. on (R861-862; R881). Then PEREZ was allegedly seen with DEVLIN in Pasco County subsequent to the abduction at 6:00 p.m. to 7:00 p.m. (R981; R929).

FERGUSON's testimony, if believed, may well have created in the jury's mind a reasonable doubt as to whether PEREZ could have abducted DEVLIN if he was with FERGUSON. PEREZ was clearly deprived of his right under the Sixth Amendment to the United States Constitution to present witnesses and his right to have the factual dispute regarding the whereabouts of PEREZ during that day resolved by the jury.

In Pelham v. State, 567 So.2d 537 (Fla. 2d DCA 1990), the court held that a violation of the notice of alibi rule in analogous to a failure to furnish witnesses under Fla. R. Crim.

P. 3.220 and that the matter should be treated as a Rule 3.220 violation in the manner prescribed in Richardson v. State, 246 So.2d 771 (Fla. 1971). In Pelham, although Defense counsel argued strenuously there was no prejudice to the State and requested the court make a finding as to whether the State had suffered prejudice the court expressly declined to make such a finding. Clearly, the trial court in the case at bar erred in failing to consider other less drastic measures than exclusion of the witness testimony such as an overnight adjournment, continuance or allowing the State to depose FERGUSON again before allowing her to testify.

The words of Austin v. State, 461 So.2d 1380 (Fla. 1st DCA 1984) should be kept in mind.

> In a system in which the search for truth is the principal goal the severe sanction of witness exclusion for failure to timely comply with the rules of procedure should be a last resort and reserved for extreme or aggravated circumstances particularly when the excluded testimony relates to critical issues or facts and the testimony is not cumulative.

FERGUSON's testimony was of the utmost importance to PEREZ's case. Based on the court's ruling prohibiting FERGUSON's testimony, no testimony was presented on Defendant's behalf on this issue. FERGUSON was a credible witness and her testimony in the penalty phase of the trial obviously was a significant factor in the jury recommendation of a life sentence. The jury should have been allowed to hear FERGUSON's testimony regarding PEREZ's whereabouts on the critical day.

Most respectfully, the Defendant requests reversal of his convictions and remand of this case for a jury trial on the merits including the excluded testimony of FERGUSON.

II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ALLOWING DET. LAWLESS TO TESTIFY, OVER OBJECTION, THAT IN RESPONSE TO A QUESTION FROM DET. LAWLESS REGARDING WHY THE DEFENDANT PARKED HIS VAN WHERE HE DID, THE DEFENDANT "COULD NOT ANSWER THE QUESTION".

The statement by DET. LAWLESS to PEREZ regarding the fact that when PEREZ was asked why he had parked his van in the area where he did instead of a nearby convenience store Perez "could not answer the question" (R1194), constituted an improper comment on Defendant's right to remain silent and the trial court committed reversible error in allowing such testimony.

It is clearly established law that comment on the Defendant's failure to testify violates the privilege against self incrimination of the Fifth Amendment to the United States Constitution Griffin v. California, 380 U.S. 609, 85 S.Ct. 1797, 14 L.Ed.2d 730 (1965). Any comment which is fairly capable as being interpreted as a comment on silence will be interpreted as such State v. DiGuilo, 491 So.2d 1129 (Fla. 1986). The testimony that PEREZ "could not answer the question" was clearly intended to demonstrate to the jury that a question to the Defendant went unanswered and was met with prejudicial silence. The testimony is fairly capable of being and should be interpreted as a comment on Defendant's silence.

Although PEREZ had answered some questions of DET. LAWLESS, comment on a Defendant's invocation of his right to remain silent

after he has answered some questions is Constitutional error. State v. DiGuilio.

In Peterson v. State, 405 So.2d 997 (Fla. 3d DCA 1981), a police officer testified that after answering some questions, the Defendant discussed some gloves in the Defendant's possession; however, "he would not explain" the time of day, and such testimony was held to be independently erroneous. The Appellate court held that the statement "he would not explain" is conceptually identical to the statement "he would not talk any further" and thus implicates the Defendant's right to remain silent.

The testimony of DET. LAWLESS that PEREZ could not explain why PEREZ had parked in the yard of a home when there was a store nearby with a telephone is conceptually identical to the statement in Peterson v. State.

In Phillips v. State, 591 So.2d 987 (Fla. 1st DCA 1991), involving a conviction for burglary and grand theft, it was held at trial that the court erred in overruling an objection to testimony by a police officer that the Defendant had failed to provide an explanation of how Defendant came into possession of some stolen property. The Appellate court held that such testimony was fairly susceptible of being interpreted by the jury as a comment on the Defendant's silence. Phillips makes clear the prosecution is not permitted to comment upon a Defendant's failure to offer an exculpatory statement prior to trial since

this would amount to a comment upon the Defendant's right to remain silent.

PEREZ was being subjected to interrogation and had been read Miranda rights. He clearly had the right to not answer any particular question without being placed in the quandary that the police or a jury would determine that such silence constituted an admission. As stated in Brown v. State, 367 So.2d 616 (Fla. 1979), all admissions derived from a Defendant's silence in the course of a custodial interrogation are absolutely barred from the Defendant's trial.

The error complained of was met with a timely objection and denied by the court. It is respectfully requested that Defendant's convictions should be reversed and this cause remanded for a new trial.

III. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FINDING THAT THE DEFENDANT VOLUNTARILY WAIVED HIS RIGHTS PURSUANT TO MIRANDA AND IN FINDING THAT ANY STATEMENT OF THE DEFENDANT WAS NOT THE PRODUCT OF COERCION.

The trial court committed reversible error in determining that the State met its burden of establishing that PEREZ knowingly, intelligently and voluntarily waived his Miranda rights and that the statements were not the product of coercion.

Prior to trial, Defense counsel filed a Motion to Suppress Statements on the basis that said statements were violative of Defendant's privilege against self incrimination guaranteed under the Fourth, Fifth and Sixth Amendments to the United States Constitution, Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16

L.Ed.2d 694 (1966) and Article I, §9 and §16 of the Florida Constitution. It was also asserted in the Motion to Suppress that oral statements were obtained from the Defendant which were not freely and voluntarily given in violation of the Defendant's rights under the Fourth, Fifth and Fourteenth Amendments to the United Stated Constitution and Article I, §9 of the Florida Constitution. Finally, the Motion to Suppress alleged that statements were obtained from the Defendant in violation of his right to be free from unreasonable searches and seizures guaranteed by the Fourth and Fourteenth Amendments of the United States Constitution (R186-187). An evidentiary hearing on the Motion to Suppress was heard prior to trial and denied by order of the court (R211-383; R2211-2246; 204).

At trial, after the jury was sworn and prior to testimony, Defense counsel renewed Defendant's Motions to Suppress.

At the evidentiary hearing on the Motion to Suppress held on March 1, 1991, it is respectfully submitted that the State failed to show by a preponderance of the evidence that PEREZ had not been subjected to coercion or that PEREZ voluntarily, knowingly and intelligently waived his rights set forth in Miranda v. Arizona.

In determining whether a waiver of Miranda occurred, the Defendant's level of understanding of English was important. The testimony of three Defense witnesses, at the Motion to Suppress was important. BETTY FERGUSON, Defendant's girlfriend, BARBARA BOSTIC, Defendant's boss, and VINCENTE GONZALEZ, a co-worker,

clearly indicated that PEREZ spoke Spanish as his primary language. Other than his name, PEREZ could not write English. In addition, their testimony was PEREZ spoke broken English which was somewhat difficult to understand. There was some conflicting testimony from police officers who indicated Perez appeared to understand spoken English--particularly commands.

As stated in Balthazar v. State, 549 So.2d 661 (Fla. 1989), before introducing a Defendant's statement, the State must show by a preponderance of evidence that the Defendant made the statement voluntarily. The State's burden is heavier in proving the voluntariness of a Defendant's statement when the Defendant claims language difficulties. Balthazar v. State. The degree of a Defendant's ability to adequately speak and understand English is a significant factor which should be considered in the totality of the circumstances. Ordinarily, the Defendant's claim of language difficulties requires the State to present additional proof to establish a knowledgeable waiver. Balthazar. While the State presented some evidence indicating Defendant understood certain commands and could speak broken English, there was no testimony that Defendant could understand or had any understanding whatsoever of the legal terms in general and "waiver" and "Constitutional rights" in particular.

The State clearly failed to show any knowing, intelligent and voluntary waiver of Miranda by AUGUSTINE PEREZ and the statements by PEREZ to DEP. GRIFFIN and DEP. JERKINS about PEREZ's job, his profession and that he was on his way to Orlando

to bring some tapes back to a VCR store should have been suppressed. DET. MUCK, at a later time, testified he advised PEREZ of his Miranda rights in English and PEREZ understood his rights (R340). After that, DET. MUCK sought consent to search PEREZ's van and PEREZ said he really did not understand the consent form. DET. MUCK's call for a Spanish speaking officer corroborates Defense's position that PEREZ was not capable of voluntarily waiving his Miranda rights in English. The fact that DET. MUCK called a Spanish speaking translator taken together with OFF. MONTERO's testimony that DET. MUCK said that PEREZ did not understand English lead to the inescapable conclusion that the State clearly failed to meet its burden of showing PEREZ waived his rights. Therefore, the statements PEREZ made to DET. MUCK before the arrival of OFF. MONTERO should have been suppressed.

OFF. MONTERO arrived and read PEREZ his Miranda rights in Spanish. PEREZ indicated he understood Miranda according to OFF. MONTERO. OFF. MONTERO and PEREZ spoke only in Spanish. Importantly, OFF. MONTERO never explained the term "Constitutional rights" or "waive" to PEREZ. OFF. MONTERO was admittedly trying to get PEREZ to open up. While having PEREZ sign a part of a waiver of rights form titled waiver of search, OFF. MONTERO did not have PEREZ sign the waiver of Miranda section on the same form (R1266; EVIDENCE TO BE COPIED STATE EXHIBIT #39). In addition, in the questioning by DET. MUCK, PEREZ was told "if he takes me to the girl it will look better in

my eyes". Clearly what was an implicit promise on the part of DET. MUCK to PEREZ while PEREZ was being subjected to in-custody interrogation should be considered to vitiate any voluntariness on the part of PEREZ.

While OFF. MONTERO did advise PEREZ of his Miranda rights in Spanish, the implied promise "if he takes me to the girl it will look better in my eyes" is similar to the situation in Fillinger v. State, 349 So.2d 714 (Fla. 2d DCA 1977), where the arresting officer told the Defendant he would advise the State Attorney of the Defendant's cooperation or failure of cooperation. The Appellate court stated an accused from whom a confession is sought should be free from influence. While PEREZ did not confess to the killings, he did make statements acknowledging ownership of certain items such as condoms, rope and clothing found in the van which clearly constituted damaging admissions at trial.

The questioning of PEREZ continued over an approximately eleven hour period by DEP. GRIFFIN, DEP. JERKINS, DET. MUCK, OFF. MONTERO, DET. LAWLESS, DEP. OYOLA and DET. PUIG. OFF. MONTERO testified that before DEP. OYOLA began questioning PEREZ appeared tired, had not slept and had been given ulcer medication. The "tag team" approach utilized by the police officers when questioning PEREZ should not be condoned by this court.

State v. Sawyer, 561 So.2d 278 (Fla. 2d DCA 1990), involved both admissions and confessions of a Defendant which were suppressed by the trial court and said suppression was upheld on

appeal. Sawyer stated that the test of determining whether there was police coercion is determined by reviewing the totality of the circumstances. According to Rickard v. State, 508 So.2d 736 (Fla. 2d DCA 1987), police coercion can be not only physical but psychological. Clearly, under the totality of the circumstances, there was physical and psychological coercion applied by the police officers in this cause.

DEP. PUIG was the last officer to interview PEREZ and PEREZ said he was tired of answering questions and did not want to answer any more questions. Any statements of PEREZ to DEP. PUIG clearly should not have been admitted at trial.

Although particular statements or actions considered on an individual basis might not be vitiate a confession--when two or more statements or courses of conduct are employed against a suspect, the courts have more readily found the confession to be involuntary. Williams v. State, 441 So.2d 653 (Fla. 3d DCA 1983). The cumulative effect of the Defendant's language barrier, DET. MUCK's instructions to subordinates to keep PEREZ talking, the deprivation of sleep and length of interrogation (2 1/2 hours at the scene and 9 hours at the station), together with the "tag team" approach of sending in fresh officers clearly lead to the conclusion that PEREZ's statements were involuntary and that PEREZ did not knowingly, intelligently and voluntarily waive his Miranda rights.

It is also interesting to note that the Appellate Court in Sawyer commended the police for tape recording the conversation

to preserve the record and recommended the practice to other law enforcement agencies. In this case, despite the fact DET. MUCK utilized a tape recorder with another witness in the course of the investigation, PEREZ was not tape recorded during the more than ten hours, even though PEREZ specifically asked to be. This is another important factor this court should consider.

Because the State failed to show a knowing, intelligent and voluntary waiver of Miranda and because of the cumulative physical and psychological police coercion present, the statements and admissions of PEREZ made to the various officers should have been suppressed by the trial court and held inadmissible at trial.

It is respectfully submitted that on this issue this Court should reverse the convictions of PEREZ and remand for a new trial.

IV. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN RULING THAT THERE WAS NO STOP OF THE DEFENDANT AND DENYING DEFENDANT'S MOTION TO SUPPRESS EVIDENCE AND STATEMENTS WHERE THE INITIAL STOP OF PEREZ WAS NOT BASED UPON A REASONABLE SUSPICION.

The trial court erred in ruling that there was no stop of the Defendant and denying the Defendant's Motion to Suppress Evidence and Statements where said stop was based on a BOLO of an automobile not particularized as to location or time and devoid of details as to the suspect or persons involved.

As the facts at the Motion to Suppress indicated, at approximately 6:00 p.m. at Emory Drive and Wesley Chapel Loop Road, the assault of FROST and CHAD FROST occurred. It was after

8:00 p.m., two hours later, when DEP. McMILLAN and DEP. GRIFFIN saw PEREZ's van in the San Antonio area. There was no testimony at the Motion to Suppress regarding the distance from the Wesley Chapel Loop Road and Emory Drive intersection to San Antonio where the van was located, nor was there testimony at the motion about the level of traffic in the particular area.

DEP. McMILLAN knew the complaint involved was a possible kidnapping with a firearm and that there was a BOLO for a white Ford Aerostar, late model with gold running boards. It is, for purposes of this argument, conceded that PEREZ's van met the description set forth in the BOLO. However, it is vigorously asserted that 1) the indefiniteness and vagueness of the BOLO with respect to description of the individual and location involved and 2) the lapse in time between the occurrence of the incident and the stop means that the BOLO is insufficient to serve as a legal basis for the initial detention of PEREZ.

DEP McMILLAN indicated the van turned around twice and that it speeded up when DEP. McMILLAN turned around. Significantly, DEP. McMILLAN did not testify that the van was operated in an illegal or unsafe method. It is clear that PEREZ was stopped, not because of the manner of operation of the van, but because PEREZ's van fit the description of the BOLO and PEREZ's van was in the general vicinity, two hours after the crime occurred.

There is no question that DEP. GRIFFIN pulled in and blocked the driveway behind PEREZ's van and then drew down on PEREZ with her gun and commanded PEREZ to step away from the van and lay

face down on the ground with his hands behind his head while an officer walked up and put handcuffs on PEREZ. This series of events clearly indicate all the elements of a stop which required a reasonable suspicion pursuant to Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) and pursuant to Florida Statute 901.151(2). While it is contended, in a later argument in another part of this brief, that very quickly after the stop, the detention became unduly intrusive, there is no question that initially there was a stopping of PEREZ. The stop of PEREZ was violative of his rights under the Fourth Amendment to the United States Constitution and of Florida Statute 901.151(2). In addition to the trial court's incorrect finding that PEREZ's vehicle was not stopped, the court failed to address the issue of whether, as stated in the motion, the initial stop of the Defendant was not justified and, therefore, illegal under the circumstances.

In L.T.S. v. State, 391 So.2d 695 (Fla. 1st DCA 1980), the Appellate court held that where the description of two robbery suspects was two white males with curly hair where within one to two minutes of the BOLO and three quarters to one mile from the scene, a police officer observed a car, traveling in a direction away from the liquor store, which had been three or four occupants, two to three of them silhouetting fairly bushy hair, a stop of the vehicle was improper because the description of the suspects given in the BOLO was lacking in specificity. The fact that another van of elderly persons was stopped and brought back

to the scene in Wesley Chapel for FROST to try and identify is a clear indication that the BOLO in question was too vague. As stated in State v. Hetland, 366 So.2d 831 (Fla. 2d DCA 1979), a vague description simply does not justify a law enforcement officer in stopping every individual or every vehicle which might possibly meet that description. It is important to note in L.T.S. v. State there was no indication that the road involved was a fairly untraveled road at that particular hour or that it was one of the few routes available for flight from the scene of the robbery. There is a lack of information in the record of the Motion to Suppress regarding the traffic conditions in the area at or near the time of the occurrence which fails to justify the officers' actions in stopping PEREZ.

In State v. Andrews, 40 Fla. Sup. 128 (11th Cir. Ct. Dade County 1990), the trial court suppressed evidence obtained from a Defendant on the basis of an illegal stop where the officers involved observed the Defendant driving a blue Monte Carlo which matched the general description of the vehicle in a BOLO, which had been put out sometime earlier that evening, regarding a shooting. It is obvious that a general description of a vehicle should not be construed as justifying the stop of a fairly common vehicle without additional factors.

The presence of a vehicle in the general area of a complaint regarding a possible kidnapping two hours after the kidnapping occurred is too vague and indefinite to justify the stop of PEREZ, even if said vehicle matched that of vehicle disseminated

in the BOLO. Because the BOLO failed to contain sufficient identifiers of PEREZ as the individual involved in criminal activity and because of the passage of time and distance from the crime scene, the stop of PEREZ should be deemed illegal and the statements of PEREZ and tangible evidence seized from the van of PEREZ should be suppressed and the convictions of PEREZ reversed.

V. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING DEFENDANT'S MOTION TO SUPPRESS EVIDENCE AND STATEMENTS WHERE THE DETENTION OF THE DEFENDANT WAS NOT BASED UPON PROBABLE CAUSE AND WAS UNDULY INTRUSIVE.

When DEP. GRIFFIN pointed her gun at Defendant, ordered the Defendant to get down and put his hands on his head, the Defendant was handcuffed and an hour passed until the arrival of the police officer and the eyewitness on the scene, the seizure in question was unduly intrusive, given the totality of the circumstances. All statements made by the Defendant and all evidence seized from the Defendant and his van should have been suppressed by the trial court and not admitted into evidence at trial.

The facts of the Motion to Suppress showed that after PEREZ was seized at gunpoint and handcuffed, approximately one hour passed before DET. MUCK and FROST arrived on the scene in St. Leo and FROST identified PEREZ (R287). At that time, DET. MUCK felt he had probable cause to arrest PEREZ for aggravated assault and kidnapping. Before this point in time, it is submitted that there did not exist, in the record, probable cause to arrest PEREZ. The detention of PEREZ for an hour under the

circumstances, was not minimally intrusive and, therefore, illegal. The evidence seized from PEREZ's van and all statements made by PEREZ should have been suppressed.

In Florida v. Royer, 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983), the United States Supreme Court discussed the line between an investigative stop and seizure. While the United States Supreme Court did not suggest a litmus-paper test for distinguishing when a seizure exceeds the bounds of an investigative stop, the Supreme court, in Royer, upheld the ruling of the Florida District Court of Appeal that a suspect's involuntary detention had exceeded the limited restraint permitted by Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

Royer makes clear that a suspect cannot be subjected to a more serious intrusion on his personal liberty than is allowable on suspicion of criminal activity.

In a separate argument advanced in this brief, Defendant maintains there was not a reasonable suspicion that Defendant had been involved in criminal activity sufficient to justify even a "Terry" stop. If the court agrees there was not reasonable suspicion to stop the Defendant, this issue is probably moot. If, however, this court determines that there was a reasonable suspicion to justify a stop of the Defendant that consisted of having the Defendant lay down with his hands behind his head at gunpoint, being placed in handcuffs and, waiting for more than an hour for DET. MUCK and FROST to arrive at the scene constituted

far more than a "Terry" stop and was a intrusion of the character requiring probable cause which is not shown in this record.

This court addressed the issue of the use of handcuffs in connection with a "Terry" stop in Reynolds v. State, 592 So.2d 1082 (Fla. 1992), where this court found that police may properly handcuff a person whom they are temporarily detaining when circumstances reasonably justify the use of the restraint. However, this court further restricted the use of handcuffs in such a situation to no longer than necessary to verify and dispel that the suspect may be armed and dangerous.

While the court may disagree with counsel for Defendant and find the initial stop of Defendant based upon reasonable suspicion, it is submitted that there is no evidence in the record to show the necessity for the delay of one hour between the time DEP. JERKINS arrived on the scene and Defendant was in custody and the time DET. MUCK and FROST arrived on the scene. To allow a "Terry" stop to turn into unrestrained and unfettered detention of suspects would be to severely weaken the protection afforded citizens by the Fourth Amendment of the United States Constitution. In United States v. Place, 462 U.S. 696, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983), the United States Supreme Court held that the brevity of the invasion of the individual's Fourth Amendment interests is an important factor in determining whether a seizure is so minimally intrusive as to be justifiable on reasonable suspicion.

In United States v. Sharpe, 470 U.S. 675, 105 S.Ct. 1568, 84 L.Ed.2d (1985), the United States Supreme Court upheld detention of an individual whose truck was stopped and detained by drug enforcement agents until another agent could arrive because, given the circumstances, the investigation was conducted in a diligent and reasonable manner and a twenty minute stop was not unreasonable. However, the court went on to note, in Sharpe, that the brevity of the invasion of the individual's Fourth Amendment interests is an important factor in determining whether the seizure is so minimally intrusive as to be justifiable on reasonable suspicion. In no way can the initial detention of PEREZ, for over an hour while he had a gun pointed at him, was forced to lie on the ground and put his hands over his head and handcuffed, be considered minimally obtrusive.

The purpose of the detention of PEREZ was obviously to have PEREZ identified as the perpetrator by the victim. The State has failed to show the detention of Defendant was for the briefest possible time to achieve the requisite identification. The detention of PEREZ for an hour substantially exceeds the mere twenty minute detention in Sharpe and is of substantially different character because of the cumulative effect of the severe intrusion. The facts of the detention of PEREZ more closely approximates the detention of Royer determined to be a seizure because of its significant intrusiveness.

It is true that the police officers felt they were investigating a possible kidnapping and a potential armed

suspect. However, once the Defendant was detained an immediate effort should have been commenced to get FROST in contact with PEREZ or PEREZ in contact with FROST so that the delay of one hour during the detention of the Defendant did not occur.

The seizure of PEREZ until his identification by FROST was clearly not based upon probable cause. At the time, PEREZ was detained by the police until said identification, there was a dearth of particularized facts other than what had been published in the BOLO and the fact PEREZ was driving a vehicle which met the description of the vehicle in the BOLO. This fell far short of a showing of particularized probable cause upon which to predicate a seizure in excess of a "Terry" type stop.

Should this court uphold the detention of Defendant, it is respectfully submitted that such a ruling would threaten to swallow the general rule that Fourth Amendment seizures are reasonable only if based on probable cause contrary to the warning of Dunaway v. New York, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979).

For the foregoing reasons, Defendant respectfully requests this Honorable court to reverse Defendant's convictions and remand this case for trial.

VI. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING DEFENDANT'S MOTION TO SUPPRESS ITEMS TAKEN FROM THE DEFENDANT'S RESIDENCE BY THE POLICE WHERE THE EVIDENCE FAILED TO SHOW CONSENT BY DEFENDANT'S GIRLFRIEND OR THAT THE POLICE HAD AN INDEPENDENT BASIS TO TAKE POSSESSION OF THE ITEMS IN QUESTION.

The trial court erred in denying the Defendant's Motion to

Suppress the gun box, gun rug and ammunition box which had been located in PEREZ's dresser drawer at PEREZ's residence where BETTY FERGUSON told the police officer these items were PEREZ's and there was no evidence that PEREZ's girlfriend, BETTY FERGUSON, had authority to give PEREZ's property to anyone.

PEREZ, as a resident of the home of FERGUSON, clearly has standing to challenge FERGUSON's delivery of the items to DET. HAND and the officer's seizure of the items despite the officer's knowledge that said items belonged to FERGUSON.

The evidence fails to show that the words and actions of FERGUSON in delivering the items to DET. HAND constitute a knowing, intelligent and voluntary consent and not mere acquiescence to authority. If consent on the part of FERGUSON is found by this court, it is submitted that the scope of her consent did not include giving PEREZ's property away and there was an insufficient showing of an independent basis for the police to seize the items in question.

FERGUSON testified that the gun box and gun rug were located at FERGUSON's home where she and PEREZ resided in PEREZ's dresser drawer where PEREZ kept his underclothes and socks (R218). PEREZ never gave MS. FERGUSON permission to give the gun box and gun rug to anyone (R218). FERGUSON and PEREZ shared the master bedroom where the dresser was located. FERGUSON indicated she could go in the dresser drawer and put PEREZ's things away. On July 15, 1990, when the detective came to her home, he asked if PEREZ had a gun and FERGUSON replied yes. FERGUSON could not

find the guns, but found a gun box and gun case and ammunition box. The detective asked FERGUSON if he could take the items and she said yes. FERGUSON told the officer the items were PEREZ's (R225). FERGUSON testified she did not know she did not have to talk to the detective, nor give him the items (R218, R225). FERGUSON did, however, give the police officer the items when he asked for them.

The question of consent is a question of fact to be determined from the totality of all the circumstances. Schneckloth v. Bustamonte, 42 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). The State has the burden of proving consent Bumper v. North Carolina, 391 U.S. 543, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968). The prosecutor must show by clear and convincing evidence that consent was freely and voluntarily given. Norman v. State, 379 So.2d 643 (Fla. 1980). While it is true there was no coercion or threat to FERGUSON to obtain a search warrant of the premises, it is also true that, FERGUSON was ignorant of her right to refuse to give the requested items to the police. The fact that the encounter occurred in the early morning hours of July 15, 1990, when the detective had two Hillsborough County Deputies with him and the fact that the detective told FERGUSON he did not know exactly what kind of difficulty PEREZ was in are all factors leading to the conclusion that FERGUSON merely acquiesced to authority when she handed the items over to the detective. The State failed to show by clear and convincing evidence that there was, in fact, consent.

According to United States v. Matlock, 415 U.S. 164, 94 S.Ct. 988, 39 L.Ed.2d (1974), it is reasonable to recognize that any of the coinhabitants have the right to permit an inspection and that other coinhabitants have assumed the risk that one of their number might permit the common area to be searched. It is submitted, however, that the scope of FERGUSON's ability to consent did not include delivering items belonging to PEREZ to the police.

The difference between the case at bar and Matlock is that at the time DET. HAND took the items from FERGUSON, she explained to the detective that the items did not belong to her. Based upon the information known to DET. HAND at the time he went to FERGUSON's premises, DET. HAND did not have probable cause to seize the items as contraband or instrumentalities of a crime, even if he came upon the items in plain view. The items clearly could not be considered a gift to DET. HAND, therefore, the taking of possession of the items by DET. HAND without a warrant was not justified under the law.

The Defendant respectfully requests this Honorable Court enter an order reversing Defendant's convictions and remanding this cause for a new trial.

VII. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING DEFENDANT'S MOTION TO SUPPRESS IDENTIFICATION OF DEFENDANT AS UNDULY SUGGESTIVE AND IN PERMITTING PAUL FROST TO MAKE AN IN COURT IDENTIFICATION OF DEFENDANT AT TRIAL.

Before trial, the Defendant filed a Motion to Suppress Identification of the Defendant as being unduly suggestive and a violation of Defendant's due process rights under the Fifth and Fourteenth Amendments to the United State Constitution and under Article I, Section 9 of the Florida Constitution.

At the conclusion of the evidentiary hearing on the Motion to Suppress, the trial court agreed that the show up utilized was not the most desirable way to accomplish the identification of the Defendant by the victim and was not as good as it should have been. The court, however, denied the Motion to Suppress Identification (R2238; 205). At the Motion to Suppress, FROST testified the assailant was a man in his 30's with a brownish red wig, a real thick mustache and five foot ten or eleven inches, DET. MUCK said the description of the assailant FROST provided him was of a male wearing a wig, jeans and some type of jacket, who had pointed a gun at FROST and his son (R334-335).

It is submitted that two key issues regarding the admissibility of the identification of PEREZ at the scene, the identification of PEREZ's photo and the identification at trial as set forth in Cribbs v. State, 297 So.2d 335 (Fla. 2d DCA 1974) are:

1. Whether the pre-trial confrontation was impermissibly suggestive

2. If the pre-trial identification confrontation was improper whether a sufficient independent legal basis exists to validate the witness identification.

A critical factor in this analysis is the suggestibility of the show up in St. Leo where FROST was taken to view PEREZ. The show up at St. Leo was impermissibly suggestive in the following respects: 1) FROST's written statement and the BOLO contained no description of the suspect (R249; 250; 264; 348; EVIDENCE THAT COULD BE COPIED DEFENSE EXHIBITS #1 AND #2); 2) prior to the show up, FROST was told the police had a van stopped and he needed to I.D. someone (R238); 3) FROST saw the van upon arrival in St. Leo before he saw PEREZ (R256); 4) when FROST and DET. MUCK arrived, PEREZ was sitting on the ground, handcuffed, with his knees up, by the van with five or six police officers standing around (R256-258; 349); 5) PEREZ did not stand up during FROST's initial viewing of PEREZ (R258); and, 6) when FROST walked back to his car and PEREZ stood up, PEREZ looked smaller and shorter and FROST told DET. MUCK I'm not really sure now that he's standing up (R350).

As pointed out in Simmons v. United States, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968), the danger of misidentification is increased if only a single suspect is displayed to the witness or if police indicate to the witness there is other evidence the person committed the crime. Both dangers existed in the case at bar.

Subsequently, the next day, upon being shown PEREZ's picture among five others in a photo-pak, FROST picked out PEREZ's photo.

FROST identified PEREZ at trial as the person who pointed a gun at him on July 14, 1990.

In Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972), the United States Supreme Court discussed five factors relevant to the determination of reliability of an identification procedure. Those factors and how they relate to this case can be set forth as follows:

> 1. Opportunity of witness to view criminal at time of crime - It was daylight and FROST stated he had a clear view of the Defendant. However, during the approximately one minute FROST was in the assailant's presence, FROST's attention was undoubtedly focused on making contact with his son who had become separated across the truck from his father.
>
> 2. Witness' degree of attention - Here again, FROST was highly attentive during the incident, however, at various times a significant amount of his attention was focused on the woman and his own son. The police officers at the scene testified to FROST's being emotionally upset.
>
> 3. Witness' prior description of criminal - The prior description of the assailant as reflected in FROST's oral and written statements is almost void of any identifying characteristics. This is a key indication that the stress of the ordeal severely compromised FROST's ability to perceive and recall details concerning the assailant.
>
> 4. The degree of certainty demonstrated by the witness - It is important here to note PEREZ was detained on the ground in the area of the van with five or six police officers standing around. While FROST initially felt certain of his identification when he subsequently viewed PEREZ standing up FROST told DET. MUCK he was not sure.

The totality of the circumstances clearly are indicative of unreliability which was not cured or alleviated in any way, when

the following day FROST was showed a photo-pak including PEREZ's photo. The subsequent identification of PEREZ's picture by FROST after PEREZ had already been viewed, one on one and identified by FROST as the assailant, was meaningless and, in fact, augmented the suggestiveness of the previous show up. State v. Sepulvado, 362 So.2d 324 (2d DCA 1978).

While the State may argue that a show up under the circumstances was proper, there is no excuse for the failure of the police to separate PEREZ from the van, to have PEREZ stand up when viewed by FROST and to have FROST view PEREZ before viewing the van or before FROST was told a van was stopped and he needed to identify someone. There was no reason for any of the aforementioned unreasonably suggestive procedures to have been utilized. While any one of the procedures might not, by themselves, have been impermissibly suggestive--taken together, they cast significant doubt on the reliability of the identification.

For the foregoing reason, Defendant respectfully requests this Honorable Court enter an order reversing Defendant's convictions and remanding this cause for a new trial.

VIII. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING INTRODUCTION OF RECORDS OF CONVICTION OFFERED TO IMPEACH THE TESTIMONY OF STATE WITNESS TARY LYNN HUFFMAN AFTER HUFFMAN FAILED TO TESTIFY ACCURATELY REGARDING THE NUMBER OF HIS PRIOR CONVICTIONS.

HUFFMAN's rendition of a jailhouse confession was devastating to the Defendant's case. On HUFFMAN's direct testimony, in an effort to "take out the sting", the prosecutor

asked HUFFMAN how many times he had been convicted of a felony. HUFFMAN did not know. When asked on cross-examination, HUFFMAN acknowledged more than ten felony convictions, but said it would be a guesstimation as to whether he had been convicted of felonies more than twenty times. Defendant's counsel moved to introduce certified copies of HUFFMAN's prior convictions. The State objected on grounds that such evidence was not impeachment and the court sustained the objection. The certified copies of HUFFMAN's convictions were proffered for the record (R1354). Florida Statutes 90.610 provides in pertinent part as follows:

> a party may attack the credibility of any witness including an accused by evidence the witness has been convicted of a crime if the crime was punishable by death or imprisonment in excess of one year under the law which he was convicted...

A perusal of the proffered records of past conviction indicate HUFFMAN had, at various times in the past, been convicted eighteen felonies consisting of seven counts of burglary, six counts of dealing in stolen property, three counts of grand theft, one count of aggravated assault and one count of failure to appear (R1354; EVIDENCE THAT COULD BE COPIED DEFENDANT'S PROFFER #1).

When a witness is questioned about prior convictions and accurately states the number, the questioning should end unless the witness has opened the door to further inquiry.

HUFFMAN clearly opened the door to further inquiry by his answer, on direct, that he did not know the number of prior felony convictions he had. No witness should not be allowed to

obfuscate jury consideration of credibility by actual or feigned ignorance about the number of prior felony convictions. Admittedly, some witnesses are unfamiliar with legal terminology or simply fail to keep correct count of the number of priors. Should said untruthfulness or inadvertence be present--the mechanism to permit the jury to make an informed judgment about a witness' credibility is the introduction of the record of conviction Irvin v. State, 324 So.2d 684 (Fla. 4th DCA 1976).

While the prosecutor, at trial, correctly characterized HUFFMAN as a thief, that characterization was not a talisman in which Defendant's right to have the jury informed of the correct number of felony convictions evaporated.

The mechanism and limitations on impeachment of a witness by prior criminal record are undoubtedly justified and no quarrel is made with same. However, HUFFMAN obviously attempted to utilize the shield of Florida Statute 90.610 as a cocoon to hide from the jury a full forty percent of his past felony convictions. In refusing the allow the proffered judgments and sentences into evidence, the trial court committed reversible error.

HUFFMAN was a critical witness whose testimony that PEREZ told him where PEREZ dumped the body was extremely prejudicial. No testimony or other admissions of PEREZ from any other witness regarding the dumping of the body is present in the record making the error very prejudicial.

The State had been ordered, prior to trial, to disclose the prior criminal record of its witnesses to Defense counsel so the

number of convictions HUFFMAN had should have clearly been available to the State (R394). HUFFMAN testified he had received no benefit for his testimony. Interestingly, HUFFMAN disclosed his information to DET. MUCK regarding the alleged jailhouse confession the day before HUFFMAN was to be sentenced on pending charges. In order to meet HUFFMAN's assertions head on, it was essential that the jury be advised of the correct number of HUFFMAN's prior felony convictions.

For the foregoing reasons, the Defendant respectfully requests Defendant's convictions be reversed and this cause remanded for a new trial.

IX. THE TRIAL COURT ERRED IN INSTRUCTING THE JURY IN A CAPITAL CASE IN PART THAT "IF YOU RETURN A VERDICT OF GUILTY IT SHOULD BE FOR THE HIGHEST OFFENSE WHICH HAS BEEN PROVED BEYOND A REASONABLE DOUBT".

The instruction given by the trial court during the guilt phase of the trial was a non-standard instructions which read as follows:

> If you return a verdict of guilty it should be for the highest offense which has been proved beyond a reasonable doubt. If you find that no offense has been proved beyond a reasonable doubt then of course your verdict must be not guilty (R447).

The instruction was objected to by the Defense counsel at the charge conference and renewed after the instructions were given orally to the jury (R1526-1527; 1645; 1649).

Pursuant to Harris v. State, 438 So.2d 787 (Fla. 1983), the Defendant has a right to have instructions on necessarily

included lesser offenses given to a jury as part and parcel of the jury's pardon power.

In Beck v. Alabama, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980), the United States Supreme Court held that a state cannot prohibit the giving of lesser offense instructions in a death case without violating the United States Constitution.

While the trial court in the case at bar instructed on necessarily included offenses on all counts, the action of the trial court in giving the objected to instruction, improperly impaired the right of the Defendant to have the jury fully and fairly consider the lesser necessarily included offenses in this cause. The instruction was contradictory to existing law and Florida Rule of Criminal Procedure 3.510(b) which provides in pertinent part:

> Upon an indictment or information upon which Defendant is to be tried for any offense the jury may convict the Defendant of:
>
> b) any offense which is as a matter of law is a necessarily included offense or a lesser included offense of the offense charged in the information or indictment and is supported by the evidence. The judge shall not instruct on any lesser included offense as to which there is no evidence.

Florida Rule of Criminal Procedure 3.510(b) is based upon recognition of the jury's right to exercise it's pardon power. State v. Barker, 456 So.2d 419 (Fla. 1984); State v. Wimberly, 482 So.2d 530 (Fla. 1st DCA 1986); and, State v. Alreau, 363 So.2d 1063 (Fla. 1978).

To allow the Judge to impair and obfuscate the right of the Defendant to have the jury fully consider and convict the Defendant of a necessarily lesser included offense by instructing the jury they should convict the Defendant of the highest offense proved is to emasculate the aforementioned rights of the Defendant in this cause.

Nowhere is it more important than in a capital case for a jury to be able to exercise its pardon power and to allow an instruction such as the one in the case at bar is to critically impair the function of the jury and trample on the rights of the Defendant.

As recognized by this court in Potts v. State, 430 So.2d 900 (Fla. 1982), quoting from J. Milton "Paradise Lost" in 32 Great Books of the Western World 276 (1952):

> In its ultimate wisdom the jury has been given the power to temper ... justice with mercy.

The instruction that the jury should convict the Defendant of the highest offense proved beyond a reasonable doubt was confusing, contradictory and deprived the Defendant of his right to have justice tempered with mercy. Defendant respectfully requests this Honorable court reverse Defendant's convictions and remand for a new trial on this issue.

X. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN INTRODUCING, OVER DEFENDANT'S OBJECTION, PHOTOGRAPHS OF THE VICTIM'S DEAD BODY WHERE ANY PROBATIVE VALUE OF THE PHOTOGRAPHS WAS FAR OUTWEIGHED BY THE PREJUDICIAL VALUE.

The trial court committed reversible error in allowing the introduction of the photographs of victim's body after death.

The photographs depicting the decomposing body with ropes and stakes were introduced at trial as STATE EXHIBITS 5, 6 and 7 over Defendant's objection (R1024-1026). Because the probative value of the photographs was substantially outweighed by the danger of unfair prejudice, the admission of the photographs was harmful error.

At trial, the Defendant stipulated to the identity of the victim and did not contest the medical examiner's testimony as to cause or manner of time of death. Nor did the medical examiner utilize the subject photographs in her testimony (R1356-1373). The photographs of the victim did not purport to address any contested issue in the case and if the State was trying to show location of where the body was found, it could have done so much easier and clearer with a map (R1024).

In Czubak v. State, 570 So.2d 925 (Fla. 1990), this court approved the holding that

> where photographs are relevant the trial Judge first and the Florida Supreme Court on Appeal 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."

Like in Czubak, the identity of the victim in this case was not an issue because it was stipulated to. The photographs in question did not reveal any discernible wounds nor were they probative of the cause of death. The medical examiner did not utilize the photographs in explaining the cause of death to the jury in any other manner. The medical examiner testified that

the victim was probably dead before being placed in the ditch and there was no evidence to contradict that opinion. There was a delay of at least a week between the death and discovery of the body in Czubak and a lapse of approximately six days in the case at bar. While in Czubak the deceased's body had been mauled by dogs after death, there can be no doubt that natural elements severely affected and induced changes to KAY DEVLIN's body during the time the body was in the orange grove ditch before its discovery.

In summary, there was no need for the photographs. They were not related to any issue necessary for the fact finder to resolve the issue and the probative value clearly outweighed any prejudicial value and pursuant to §90.403 and Czubak, the introduction of the deceased's photographs constituted reversible error and Defendant's convictions should be reversed on this issue.

XI. THE TRIAL COURT'S FAILURE TO PROVIDE THE WRITTEN FINDINGS REQUIRED BY FLORIDA STATUTE 921.141(3) CONCURRENTLY WITH THE ORAL PRONOUNCEMENT OF THE DEATH SENTENCE MANDATES A REMAND FOR THE IMPOSITION OF A LIFE SENTENCE.

The Supreme Court of the United States in Furman v. Georgia, 408 U.S. 238, 239-240; 92 S.Ct. 2726, 2727; 33 L.Ed.2d 346 (1972), and subsequent decisions, struck down the previously existing death provisions of many states, including that of Florida by holding:

> The imposition and carrying out of the death penalty in [these cases] constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.

The constitutional violation inured in the discretionary systems under which the death penalty was imposed in the various states.

In order to rectify the constitutional error, the Florida legislature enacted a statutory scheme designed to eliminate the capricious and discriminatory exercise of judicial discretion condemned in Furman. The death penalty statute, Section 921.141, Florida Statutes, provides a defendant with five steps between conviction and imposition of the death penalty--each step intended to provide concrete safeguards beyond those of the trial system to protect the defendant from death where a less harsh punishment might be sufficient. State v. Dixon, 283 So.2d 1, 7 (1973).

The fourth step in the constitutionally mandated process requires that the trial judge justify a sentence of death in writing:

> (3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH.--
>
> Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:
>
> (a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and
>
> (b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.
>
> In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5)

> and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with s.775.082. (emphasis added)

§921.141(3), Florida Statutes (1991). The required written findings provide the opportunity for meaningful review by this Supreme Court. The rationale for this constitutional requirement was noted in State v. Dixon, 283 So.2d 1, 8 (Fla. 1973), "Discrimination or capriciousness cannot stand where reason is required and this is an important element added for the protection of the convicted defendant."

The specific statutory language clearly requires written findings at the time sentence is imposed. Despite this relatively clear legislative pronouncement, the Court has been presented with a number of cases in which the timeliness of the trial judge's sentencing order filed after oral pronouncement of sentence has been at issue. See generally, Patterson v. State, 513 So.2d 1257 (Fla. 1987); Muehleman v. State, 503 So.2d 310 (Fla. 1987); Van Royal v. State, 497 So.2d 625 (Fla. 1986); Cave v. State 445 So.2d 341 (Fla. 1984); Thompson v. State, 328 So.2d 1 (Fla. 1976). Varying conclusions were reached in the above cases; but, a common thread throughout was the Court's strong desire that written sentencing orders and oral pronouncements be concurrent. This ensures that the weighing of aggravating and mitigating circumstances takes place at sentencing. The preparation of written findings after the fact runs the risk that the "sentence was not the result of the weighing process or the

'reasoned judgment' of the sentencing process that the statute and due process mandate." Van Royal v. State, 497 So.2d 625, 630 (Fla. 1986) (Ehrlich, J., concurring).

In order to clarify the command of Van Royal, the court established a procedural rule that all written orders imposing a death sentence be prepared prior to the oral pronouncement of sentence for filing concurrent with the pronouncement. Grossman v. State, 525 So.2d 833, 841 (Fla. 1988).

The trial court in the present case failed to comply with the procedural rule adopted in Grossman. The trial court overrode the 10-2 jury recommendation of life (R493), and imposed a death sentence (R497-499; R474-481). The sentence was imposed without any written findings. Near the beginning of the oral pronouncement of sentence, the court remarked:

> In passing upon this evidence, I make the following findings: The following findings the Court does hereby direct the court reporter to transcribe and submit to the court for inclusion into the court file (R1925, lines 6-10)

It is apparent from the face of the record that the written findings imposing death were not prepared prior to the oral pronouncement of sentence, nor were they filed concurrent with the pronouncement. The result is a clear-cut violation of the Grossman rule. The violation is not ameliorated even though the trial court here did dictate findings into the record at the time of sentencing, because no separate written findings are contained in the record on appeal; and, in any event, dictating oral findings cannot be construed to be equivalent to

contemporaneously filing written findings. See, Stewart v. State, 549 So.2d 171, 176 (Fla. 1989).

The action of the trial court was erroneous even without application of the Grossman procedural rule. The dictated oral findings were not reduced to writing, adopted by the judge and filed in the record before certification of the record. See, Van Royal v. State, 497 So.2d 625 (Fla. 1986); Ferguson v. State, 417 So.2d 639 (Fla. 1982). The record was certified by the Clerk of the Circuit Court for Pasco County on March 11, 1982. (R-unnumbered page appearing after p. 484). The original record did not contain written findings or even a transcript of the dictated findings. The dictated findings were only transcribed and included in a supplement after the order of this court requiring the transcription of all proceedings (R501).

The remedy for the statutory violation is as clear as the violation itself. "If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with §775.082." §921.141(3), Fla. Stat. (1991). See also, Christopher v. State, 583 So.2d 642 (Fla. 1991). This remedy is mandated by the Grossman procedural rule and the statutory death scheme. Failure to demand this remedy re-injects the elements of capriciousness and discrimination constitutionally condemned in Furman.

PEREZ's death sentence should be quashed and remanded to the trial court to impose a sentence of life imprisonment without parole for twenty-five years for the murder conviction.

XII. THE TRIAL COURT'S DENIAL OF DEFENDANT'S MOTION FOR FUNDS FOR INVESTIGATION OF ACCUSED'S BACKGROUND DEPRIVED PEREZ OF HIS CONSTITUTIONAL RIGHT TO PRESENT EVIDENCE IN MITIGATION.

A defendant in a capital murder trial must be allowed to proffer, and a jury permitted to consider, any evidence of mitigation submitted as a basis for sentence less than death. Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). In Lockett, the Supreme Court concluded that:

> [T]he Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

Id. 438 U.S. at 604, 98 S.Ct. at 2964 (emphasis in original) (footnotes omitted). The plurality upholding the death penalty statute in Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), emphasized that Georgia's sentencing procedures "focus the jury's attention on the particularized nature of the crime and the particularized characteristics of the individual defendant." Id. 428 U.S. at 206, 96 S.Ct. at 2940. The plurality further emphasized the statute's provision permitting the jury to consider any mitigating circumstances. 428 U.S. at 206, 96 S.Ct. at 2941.

The Supreme Court reiterated these safeguards in Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), by invalidating a death sentence imposed without the consideration of individualized mitigating factors required by the Eighth and

Fourteenth Amendments in capital cases. In Eddings, the state trial court refused to consider the defendant's troubled upbringing and emotional disturbance in mitigation. The Supreme Court held that this refusal violated the rule announced in Lockett because the state trial court had limited its consideration of mitigating circumstances. The Court stated that "[j]ust as the state may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer, refuse to consider, as a matter of law, any relevant mitigating circumstance." Id. 455 U.S. at 113-115, 102 S.Ct. at 875, 71 L.Ed.2d at 10-11 (emphasis in original).

Lockett v. Ohio and Gregg v. Georgia have been interpreted as vehicles for extending a capital Defendant's right to present evidence in mitigation to the placing of an affirmative duty on the state to provide funds necessary for the production of the evidence. Westbrook v. Zant, 704 F.2d 1487, 1496 (11th Cir. 1983). The Westbrook court noted, "Permitting an indigent capital Defendant to introduce mitigating evidence has little meaning if the funds necessary for compiling the evidence is unavailable." Id., 704 at 1496.

Accordingly, following the Westbrook rationale, the trial court in PEREZ deprived the Defendant of his constitutional right to present evidence in mitigation by denying the Motion for Funds for Investigation of Accused's Background for Guilt and Possible Penalty Phase (R2032-2034).

Hearing on the motion was held February 21, 1991 (R2027). It was established that PEREZ is a native of Cuba, spent the first twenty eight years of his life there, has a mother and four sisters and five brothers there, went to school there and was seen by at least one psychiatrist there (R2033). Written and telephonic inquiries of the family were unsuccessful. PEREZ's appointed psychiatrist believed there may be relevant information in Cuba regarding school or prior psychiatric treatment (R2033). The requested information was to be used to develop statutory and non-statutory mitigating factors (R2034)

The Defendant's motion was grounded in terms of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. PEREZ's right to effective assistance of counsel was cited as a basis for the motion. Failure to travel to Cuba to obtain mitigation evidence has been advanced in at least two Florida cases as a basis for an ineffectiveness claim in a post-conviction action. See, Medina v. State, 573 So. 293 (Fla. 1990); Blanco v. Wainwright, 507 So.2d 1377 (Fla. 1987). Relief was denied in the two cases because trial counsel made tactical decisions to de-emphasize the Defendants' Mariel background and because background evidence was available from other witnesses without the necessity of a trip to Cuba.

In contrast, counsel in the present action repeatedly expressed a desire to develop and present PEREZ's Cuban history. In fact, after the jury verdict and before the penalty phase,

counsel renewed the request made in the pre-trial motion (R1656-1659). Once again, the trial court denied the request (R1659).

The denial was fundamentally unfair; not only because it prevented the presentation of mitigation evidence but, because the prosecution was granted latitude by the trial court to prejudicially inject adverse inferences to PEREZ's Cuban experience without Defense counsel's being able to respond. For example, the prosecution was given permission to photograph tattoos on PEREZ's person (R1981-1985). An agent of the FBI then drew some conclusions as to whether PEREZ was held in prison in Cuba as a political or a common criminal. These conclusions were included in the Presentence Investigation report relied upon by the trial court in overriding the jury recommendation (R1931). Reliance on such conclusions was inequitable given the court's own refusal to allow defense counsel funds to conduct a responsive investigation in Cuba.

More importantly, without the supporting information from Cuba, defense counsel did not introduce any evidence that PEREZ was involved with the Mariel boatlift. It was the prosecution, over Defense's objection, that introduced the fact that PEREZ was a Mariellito (R1718-1719).

Allowing the prosecution to bring out that fact prejudicially injected PEREZ's status without affording him the opportunity to respond with evidence from Cuba to counter any adverse or negative association with the Mariel boatlift. PEREZ

couldn't respond authoritatively because the trial court thwarted his ability to pursue investigation.

The upshot of this constitutional argument is that the trial judge may not now justify PEREZ's sentence of death by stating that upon examination he finds that none of the non-statutory mitigating circumstances apply. It was the trial court's determination that prevented the development and presentation of the Cuban history as a mitigator (R1933). The jury made a life recommendation without hearing the Cuban history. The trial court should not have overridden that decision without allowing all mitigating evidence pursuant to Lockett and Gregg. "Where a Defendant's life is at stake, the Court has been particularly sensitive to insure that every safeguard is observed." Gregg v. Georgia, 428 U.S. supra at 187. A person on trial for his life is entitled, under the Eighth and Fourteenth Amendments, to fundamental fairness. Houston v. Estelle, 569 F.2d 372 (5th Cir. 1978). In fact, heightened standards of due process apply. See, Elledge v. State, 346 So.2d 998 (Fla. 1977). The trial court's refusal to open the purse strings denied this indigent Defendant the only opportunity to make a proper mitigation presentation. The death sentence should be reversed and the life sentence, recommended by the jury, be imposed.

XIII. THE IMPOSITION OF THE DEATH PENALTY OVER THE JURY'S RECOMMENDATION OF LIFE IMPRISONMENT DOES NOT COMPLY WITH THE STANDARD ENUNCIATED IN TEDDER.

A trial court may not impose the death penalty over a jury's recommendation of life imprisonment unless the facts suggesting

death are so clear and convincing that no reasonable person could differ. Tedder v. State, 322 So.2d 908 (Fla. 1975). The initial task of both the jury in rendering its advisory sentence and the court in rendering its sentence is to determine whether the prosecution has proven a sufficient number of aggravating circumstances by proof beyond a reasonable doubt. Then the task turns to a determination whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist.

In reviewing the propriety of judicial overrides this Court is hampered by the lack of a record regarding the jury's findings specifying the basis for the advisory sentence. This reviewing Court does not know whether the jury found any aggravating factors beyond a reasonable doubt. Nor do you know the number, or specification of aggravating circumstances found. Conversely, if aggravating factors were found, the Court does not know which mitigating factors were found, and considered to outweigh the aggravating factors.

Accordingly, this Court should search the record to discover whether there was a reasonable basis for the jury's life recommendation. If there is support for such a decision then the life recommendation should be affirmed. Walsh v. State, 418 So.2d 1000, 1004 (Fla. 1982). This is true even though the Court in its individual opinion might have reached a different conclusion.

Accordingly, to determine whether there was a reasonable basis for the life recommendation, this Court should first

determine whether all the aggravating factors considered by the trial court were proven beyond a reasonable doubt. If not, such a failure is a rational basis for the life recommendation. If the aggravating circumstances were proper, then the Court must survey the record, both the guilt and penalty phase, to glean whether there is any support for any statutory or non-statutory mitigating circumstance. Any support for a mitigating factor will also support finding a reasonable basis for the jury's recommendation.

XIV. THE TRIAL COURT IMPROPERLY FOUND THE AGGRAVATING CIRCUMSTANCE "ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL."

All murders are heinous, atrocious and cruel to the layman. State v. Dixon, 283 So.2d 1 (1973), provides Florida's legal definition.

> It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accomplished by such additional acts as set the crime apart from the norm of capital felonies--the conscienceless of pitiless crime which is unnecessarily torturous to the victim. Id. at 9.

To be considered an aggravating factor, the crime must be especially heinous, atrocious and cruel. §921.141(5)(h) Fla. Stat. (1991).

Crimes where the Defendant physically abused or tortured the victim easily meet the Dixon definition. See, Mendyck v. State,

545 So.2d 846 (Fla. 1989); Bolender v. State, 422 So.2d 833 (Fla. 1982). In Dobbert v. State, 375 So.2d 1089 (Fla. 1979), Dobbert's long-term torture of his children justified the trial court's finding the crimes to be heinous, atrocious or cruel. Strangulations, King v. State, 390 So.2d 315 (Fla. 1980), beatings, Ross v. State, 398 So.2d 1191 (Fla. 1980), rapes, LeDuc v. State, 365 So.2d 149 (Fla. 1978), and multiple killings, Hay v. State, 353 So.2d 826 (Fla. 1977) can be defined as heinous, atrocious and cruel.

Generally, the longer a victim is aware of impending death, the greater the chance that his subsequent murder will be found to be heinous, atrocious or cruel. In, Knight v. State, 338 So.2d 201 (Fla. 1976) the victims knew they were going to die several hours before their deaths. In Maggard v. State, 399 So.2d 973 (Fla. 1981), the victim was killed without knowing he was about to die, thus this murder was found not to be heinous, atrocious or cruel.

Death by a single gunshot or quick volley of shots which causes quick death and is not preceded by a lengthy period in which the victim knows of his impending death does not amount to an especially heinous, atrocious or cruel killing. See generally, Mello, Florida's "Heinous, Atrocious or Cruel" Aggravating Circumstance: Narrowing the Class of Death-Eligible Cases Without Making It Smaller, 13 Stetson L.Rev. 536-537, n. 56 (1984).

Although murders after kidnapping may be heinous, atrocious or cruel, LeDuc v. State, 365 So.2d 149 (Fla. 1978), the mere fact of kidnapping and death will not sustain a heinous, atrocious or cruel finding, Bundy v. State, 471 So.2d 9 (Fla. 1985).

The facts from the record should be applied to this cursory delineation of circumstances which constitute especially heinous, atrocious or cruel killings. When compared, the PEREZ facts fall short of proving the circumstance beyond a reasonable doubt.

From the outset, this reviewing Court should be aware that the factual findings articulated by the trial court at sentencing were erroneous or simply not in the record. The simplest way to handle these erroneous findings is to catalog them, discard them from the HAC calculus and then determine whether enough proven facts, not conjecture, remain to establish the aggravating circumstances.

The erroneous factual findings regarding the heinous, atrocious or cruel circumstance are:

1. The victim remained in the Defendant's vehicle for many hours (R1927), perhaps as much as twelve hours (R1928). [There was no evidence in the record proving the victim was in the vehicle for the total time of the incident. Moreover, the total elapsed time stated by the court was erroneous.]

2. The length of time alone served no purpose other than to cause maximum pain to the victim (R1926). [There was no evidence the victim was subject to pain before she was shot.]

3. Defendant forced the victim into the torture vehicle (R1927). [There was no evidence of torture.]

4. During the course of the kidnapping, the victim was bound in a truss as a pig would be trussed up for slaughter (R1927). [There was no evidence the victim was tied up prior to her death.]

5. That the victim was struck on the head which must have caused intense pain (R1927). [There was no evidence as to the source of the trauma to the head, or that the trauma occurred prior to death.]

The above court findings were erroneous. It was equally erroneous to use the findings to establish the especially heinous, atrocious or cruel aggravating circumstance. The court's findings were conjecture, unsupported by the facts.

A comparison of the PEREZ facts to those in Bundy v. State, id at 471 So.2d 22, is illustrative. Bundy kidnapped and murdered Kimberly Leach. Bundy was convicted and sentenced to death with the trial court finding that:

> The court finds that the victim was a twelve year old female junior high school student attending the Lake City Junior High School. The Defendant kidnapped her from the said Junior High School sometime between 9 and 10 am on February 9, 1978, and her deteriorated body was found in a hog pen approximately 45 miles from the scene of abduction on April 7, 1978. The victim died of homicidal violence to the neck region of the body. At the time the body was found it was unclothed except for a pullover shirt around the neck. There were semen stains in the crotch of her panties found near the body. Blood was found on the bluejeans also found near her body, and there were tears and rips in some of her clothes. The Court finds this kidnapping was indeed heinous, atrocious and cruel in that it was extremely wicked, shockingly evil, vile and with utter indifference to human life.

On appeal, Bundy argued that the absence of proof establishing the cause of Leach's death and the attendant circumstances surrounding it gave the court no factual basis which could

justify a finding that this aggravating factor existed. The Supreme Court agreed, stating:

> No specific cause of death could be determined from the autopsy reports. There was no clear evidence offered to show that Kimberly Leach struggled with her abductor, experienced extreme fear and apprehension, or was sexually assaulted before her death. In the absence of these types of facts, we must conclude that this case does not fit in with our previous decisions in which we have found the manner of the killing to be the conscienceless or pitiless type of killing which warrants a finding that the capital felony was especially heinous, atrocious or cruel.

Bundy v. State, 471 So.2d 9, 22 (1985).

The PEREZ factual scenario, or the lack thereof, is completely analogous to the Bundy facts. There was no proof regarding the manner of the killing. There was no proof of torture, suffering or knowledge of impending death. There was no evidence of a struggle by the victim warding off her killer.

Further, there is no indication from the record that the jury reached the same factual conclusions as the trial court. Arguably, without a kidnapping, the proven facts of the killing would not warrant a first degree murder conviction. There simply was no evidence proving the manner of the killing beyond a reasonable doubt. The jury might well have believed PEREZ to have committed the killing, but have been unsure of the circumstances. The jury was instructed on felony murder (R423), and the Defendant's request for a special instruction delineating the basis for the verdict was denied (R1533). Accordingly, it is entirely plausible that the jury believed the degree of the

actual killing was not proved but that it became first-degree murder because it occurred in the process of a kidnapping. Any other factual determination, like that of the trial court supporting its HAC finding, would be unsupported in the record.

In contrast, the proven facts are that the victim lost consciousness and died quickly from a volley of two gun shots. These facts typically will not support a HAC finding. The trial court's override, therefore, should be reversed since the factor of especially heinous, atrocious or cruel was not proved beyond a reasonable doubt.

XV. THE TRIAL COURT IMPROPERLY FOUND THE AGGRAVATING CIRCUMSTANCE "COLD, CALCULATED AND PREMEDITATED."

The Florida Legislature promulgated the "Cold, Calculated and Premeditated CCP" aggravating circumstance, Section 921.141(5)(i), Fla. Stat., in 1979, to include execution-type killings as one of the enumerated aggravating circumstances. Senate Staff Analysis and Economic Impact Statement, SB 523 (May 9, 1979, revised). See also, Barnard, Death Penalty (1988 Survey of Florida Law), 13 Nova L.Rev. 907, 936-937 (1989). The standard construction is that CCP ordinarily applies in those murders which are characterized as executions or contract killings. See, McCray v. State, 416 So.2d 804, 807 (Fla. 1982). Proof of heightened premeditation is required in order to constitutionally differentiate this aggravating factor from every premeditated murder. See, Porter v. State, 564 So.2d 1060, 1063-1064 (Fla. 1990).

The CCP finding is improper for the same reasons advanced in the previous argument section. There is no evidence in the record to support the manner of killing. The assumptions reached by the trial court to support a CCP are just that -- assumptions.

The court assumed the murder was an execution because PEREZ had ample time to cool down and think about what he was doing after his rebuff by the victim (R1928). The court further assumed PEREZ was aware of the murder location and went there accordingly (R1928). In addition, having the stakes at hand for the disposition of the body showed a cold and calculating manner (R1928). [This contention is refuted by the evidence which indicates the stakes were make-shift, hand-hewn affairs (R1026, State's Exhibit #7-"Evidence That Could Be Copied"). There is no evidence to indicate they were taken to the scene by PEREZ in anticipation of body disposal.]

There is no proof for the trial court's assumptions, or for its finding the killing was done in a cold, calculating and premeditated manner. There is planning activity to support a kidnapping, but there is none to support the conclusion that PEREZ intended to kill the victim from the outset. In fact, when the victim broke from PEREZ at Wesley Chapel Loop Road and ran to FROST's vehicle, she said to them, "he's trying to kidnap me." (R909, line 25; R930, line 23-24).

No one knows how the killing occurred except that it was in the process of a kidnapping. The mere removal of the victim by itself does not establish CCP. See, Preston v. State, 444 So.2d

939 (Fla. 1984); Cannady v. State, 427 So.2d 723 (Fla. 1983). The trial court's unfounded assumptions fail to rise to the constitutionally required standard of proof necessary for consideration of the cold, calculating and premeditated aggravating factor. The trial court's reliance on the circumstance was invalid and demands reversal of the override.

XVI. THE OVERRIDE MUST BE REVERSED BECAUSE THERE WAS A REASONABLE BASIS FOR THE JURY'S LIFE RECOMMENDATION.

This Florida Supreme Court has repeatedly reversed death sentences imposed over life recommendations and directed the trial court to impose life imprisonment where there was a reasonable basis for the jury's recommendation. See, Walsh v. State, 418 So.2d 1000, 1003-1004 (Fla. 1982), with citations.

A reasonable basis for the life recommendation could flow from the lack of evidence showing the manner of killing. The jury's first degree verdict could only rationally be based on felony murder since there was not sufficient evidence to support a first degree conviction on other grounds. A reasonable basis for the jury recommendation could be the finding there were no aggravating factors other than being committed in the course of a kidnapping. See, Delap v. State, 440 So.2d 1242 (Fla. 1983).

Further, there was evidence of mitigating factors. Sentencing phase testimony clearly established PEREZ's good character, good employment record and a good, albeit untraditional, family background. These are all established

mitigating factors. See, Smalley v. State, 546 So.2d 720, 723 (Fla. 1989); Wasko v. State, 505 So.2d 1314, 1318 (Fla. 1987).

Moreover, the testimony showed that PEREZ exhibited a good attitude and good conduct while awaiting trial in jail. This is also a recognized mitigator. See, Skipper v. South Carolina, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986); Craig v. State, 510 So.2d 857 (Fla. 1987); Valle v. State, 502 So.2d 1225 (Fla. 1987); Delap v. State, 440 So.2d 1242 (Fla. 1983).

Finally, testimony showed that PEREZ was a Mariellito having come to this country on the Mariellito boat lift in the early 1980's (R1719). He came from a depressed country (R1719). He had difficulty speaking and understanding English (R1697). PEREZ worked long hours in low paying manual labor jobs (R1680-1712). From this history, the jury could find a valid, composite non-statutory mitigating factor based on PEREZ's deprived background and cultural adjustment. See Medina v. State, 466 So.2d 1046 (Fla. 1985).

In this cause, there was a reasonable basis for the jury's 10-2 life recommendation and the trial court should have followed that recommendation.

XVII. THE AGGRAVATING CIRCUMSTANCE THAT THE KILLING WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL IS UNCONSTITUTIONALLY VAGUE UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS, BOTH IN ITS OVERALL EFFECT AND IN ITS APPLICATION TO PEREZ.

In Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988) the United States Supreme Court relied upon its earlier decision in Godfrey v. Georgia, 446 U.S. 420, 100

S.Ct. 1759, 64 L.Ed.2d 398 (1980) to hold that Oklahoma's aggravating factor of "especially heinous, atrocious or cruel" was unconstitutionally vague. Because Florida uses the same words [section 921.141(5)(h), Fla. Stat. (1987)], Florida's aggravating factor also is unconstitutionally vague under the Eighth Amendment.

PEREZ is mindful that this Court decided this issue adversely in Smalley v. State, 546 So.2d 720 (Fla. 1989). Smalley's attack, however, was on the jury instruction. PEREZ's claim is that the trial court found a statutory aggravating factor, HAC, to justify the imposition of a death sentence. The aggravating circumstance on its face, and in application, provides no limits or guides to imposing a death sentence.

In order for Florida's statutory death scheme to be constitutionally free of the discrimination and capriciousness condemned in Furman, "aggravating circumstances must genuinely narrow the class of persons eligible for the death penalty." Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983).

Florida's section 921.141(5)(h) is unconstitutional for two reasons. First, the circumstance has been applied to virtually every type of first degree murder. The sheer number of cases applying HAC evidences its use as an unconstitutional catch-all. See, Adamson v. Ricketts, 865 F.2d 1011, 1031-1037 (9th Cir. 1988)(en banc). Second, even when principles have been adopted for applying HAC, the principles have not been adopted with coherence or consistency. See, Mello, Florida's "Heinous,

Atrocious or Cruel" Aggravating Circumstance: Narrowing the Class of Death - Eligible Cases Without Making It Smaller, 13 Stetson L.Rev. 523-554 (1984).

Due to the lack of guidance and uneven application, section 921.141(5)(h) is unconstitutional. The trial court imposed a sentence of death using the statute as justification. The result was the capricious and discriminatory imposition of the death penalty in violation of the principles espoused in Furman. The sentence should be reversed.

XVIII. SECTION 921.141(3), FLORIDA STATUTES, IS UNCONSTITUTIONAL IN ITS APPLICATION BECAUSE IT ALLOWS THE TRIAL JUDGE TO CAPRICIOUSLY AND DISCRIMINATORILY OVERRIDE A JURY RECOMMENDATION OF LIFE.

Furman rendered state death schemes unconstitutional unless they provide mechanisms to eliminate the capricious and discriminatory exercise of judicial discretion. In response, Florida adopted its present scheme set forth in Section 921.141, Fla. Stat. (1991).

One of the steps in the scheme is that the trial judge actually determines the sentence to be imposed--guided by, but not bound by, the findings of the jury. This step is designed to prevent the capricious and discriminatory exercise of jury discretion. As stated in State v. Dixon, 283 So.2d 1 (1973):

> To a layman, no capital crime might appear to be less than heinous, but a trial judge with experience in the facts of criminality possesses the requisite knowledge to balance the facts of the case against the standard criminal activity which can only be developed by involvement with the trials of numerous Defendants. Thus the inflamed emotions of

> jurors can no longer sentence a man to die; the sentence is viewed in the light of judicial experience. (emphasis added)

id. at p. 8.

Unfortunately, in general application and as specifically applied to PEREZ, this statutory protection is illusory. In practice, trial judges have the unfettered discretion to override a jury's life recommendation. A jury, whose decision to convict is allowed to stand as reasonable, suddenly becomes totally unreasonable when it submits a life recommendation.

In order to rein in this unbridled discretion, the statutory override of a life recommendation must be found to be unconstitutional. Dixon speaks of the ultimate sentencing role of the trial judge as a safeguard against emotional jury recommendations of death. PEREZ agrees that such a check is necessary to satisfy Furman. However, Furman does not require that a trial judge be allowed to override a life recommendation. Florida should return to a system followed by 29 of the 32 states in the Union which have the death penalty. The majority allows the jury to make a binding recommendation of life, but would allow a recommendation of death to be overridden by the trial judge.

XIX. THE JUDICIAL OVERRIDE OF THE LIFE SENTENCE SHOULD BE REVERSED BECAUSE THE TRIAL COURT ADMITTED NON-STATUTORY, VICTIM-RELATED TESTIMONY.

The trial judge allowed the presentation of victim-related information at sentencing (R1852, R1862-1863), over Defense counsel's objection (R1852). The testimony occurred after the

jury's recommendation, but prior to the court's imposition of sentence.

Booth v. Maryland, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), listed three categories or types of victim evidence. They are, respectively, "victim characteristic", "victim impact", and "victim opinion". Booth and South Carolina v. Gathers, 490 U.S. 805, 109 S.Ct. 2208, 104 L.Ed.2d 876 (1989) prohibited the introduction of these three types of victim information at sentencing as violative of the Eighth Amendments.

Booth and Gather were overruled in Payne v. Tennessee, 501 U.S. _____, 111 S.Ct. _____, 115 L.Ed.2d 720 (1991). Payne held that if a state, presumably through its legislature and courts, wishes to allow the introduction of the first two categories of victim-related evidence, it may do so.

Florida has not allowed such evidence. State v. Dixon, 283 So.2d 1 (1973), noted that the aggravating factors are limited to that contained in section 921.141(5). This Court has consistently rejected any attempt to justify a death sentence by the use of a non-statutory aggravating circumstance.

The trial judge presumably allowed the victim testimony pursuant to the directive of Section 921.143, Fla. Stat. (1991). This section, however, is not part of the Florida statutory death scheme.

The introduction of the victim-related evidence violates Dixon and the Eighth and Fourteenth Amendments because it fails to provide a principled way to distinguish cases in which the

death penalty is imposed, from the many cases in which it is not.

This Court has, itself, held that "victim impact" evidence is not admissible in Florida capital sentencing proceedings. See, Jackson v. Dugger, 547 So.2d 1197 (Fla. 1988). Although the "federal" components of this holding are open to questions because of Payne, its state law components are not. The override should be reversed because there is no way for this Appellate Court to provide a meaningful review to ensure only non-discriminatory and non-capricious circumstances formed the basis for the death penalty.

XX. THE DEATH SENTENCE SHOULD BE REVERSED BECAUSE THE COURT FAILED TO FOLLOW THE CORRECT STANDARD OF PROOF FOR DETERMINING THE EXISTENCE OF AGGRAVATING FACTORS.

In the oral pronouncement of sentence, the trial court stated, "the Court feels and finds that these three aggravating circumstanced have been substantially shown by the evidence ..." (emphasis added)(R1930). Such a comment clearly is an erroneous statement of the law. Its application to PEREZ results in a violation of his rights under the Fifth, Eighth and Fourteenth Amendments of the United States Constitution.

Proof of the existence of an aggravating circumstance must be by proof beyond a reasonable doubt, State v. Dixon, 283 So.2d 1, 9 (1973), otherwise the circumstance should not be considered.

The death sentence imposed against PEREZ should be reversed because it was not based upon aggravating factors proven to a constitutional level of certainty.

XXI. THE IMPOSITION OF THE DEATH SENTENCE FOR PEREZ

IS NOT JUSTIFIED ON PROPORTIONALITY GROUNDS.

In order to ensure that the death penalty is not imposed in a discriminatory or capricious manner, a death sentence must be subjected to meaningful appellate review. See, Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). Such review requires this Court to compare the circumstances of similar cases. The aim is to ensure that capital punishment is inflicted only in "the most aggravated, the most indefensible of crimes." State v. Dixon, 283 So.2d 1, 8 (1973). That goal is achieved by this Court being the appellate "equalizer." It is the final task of this reviewing Court, after all other matters are considered, to determine whether individual cases decided by a disparate trial judiciary are receiving similar punishments. Like crimes should receive like punishments. The worst--the death penalty.

The facts of PEREZ are not substantially different than those in Douglas v. State, 575 So.2d 165 (Fla. 1991) and Barclay v. State, 470 So.2d 691 (Fla. 1985). All three involved a kidnapping, asportation in a vehicle to a remote location and killing by gunshot. All involved a jury recommendation of life and a judicial override. The overrides in both Douglas and Barclay were reversed. The fact patterns of each were actually worse than the factual scenario in PEREZ. A similar life sentence is also proportionately warranted for PEREZ.

There is another class of cases which would warrant application of the proportionality doctrine. Although the facts

in PEREZ are dissimilar, the rationale for reversing the judicial override in Smalley v. State, 546 So.2d 720 (Fla. 1989) also calls for a proportionate reversal in PEREZ. In Smalley, the Court noted that, "Except for the theory of felony murder, it is doubtful that he (Smalley) could have been convicted of a crime greater than second-degree murder." id. at 723. In PEREZ, proof of the kidnapping was clear. Proof of the manner of killings was not. Absent the theory of felony murder, the evidence may have been insufficient to convict PEREZ of first degree murder. Such a proposition would provide a reasonable basis for the jury's recommendation. It also provides the basis for a proportionality argument. PEREZ should be treated the same as Smalley. His death sentence should be reversed.

CONCLUSION

For all of the foregoing reasons, the convictions of Defendant, AUGUSTINE PEREZ, on all counts should be reversed.

In any event, the trial court's imposition of the Death Sentence should be reversed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to the Attorney General, Westwood Center, 7th Floor, 2001 North Lois Avenue, Tampa, Florida 33607, this 6th day of November, 1992.

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