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IN THE SUPREME COURT OF FLORIDA

RAMON LOPEZ, :

Petitioner, :

vs. : Case No. 82,484

STATE OF FLORIDA, :

Respondent. :

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

AMICUS BRIEF OF FLORIDA PUBLIC DEFENDER ON BEHALF OF PETITIONER ON INITIAL BRIEF OF PETITIONER ON THE MERITS

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

DEBORAH K. BRUECKHEIMER
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NUMBER 278734

Public Defender's Office
Polk County Courthouse
P. O. Box 9000--Drawer PD
Bartow, FL 33830
(813) 534-4200

ATTORNEYS FOR AMICUS CURIAE

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STATEMENT OF THE CASE AND FACTS

On March 3, 1993, the trial court in this case issued an order on Mr. Lopez's Motion to Suppress Statements. That order partially granted and partially denied the motion as follows:

> 1. As to all oral statements made by the Defendant on May 3rd, 1991, up to and including the polygraph examination administered by Robert Gately at approximately 9:00 p.m., the court finds that the Defendant's statements were voluntary and further that the Defendant was not subjected to custodial interrogation at any time during this period, thus not triggering the requirements of Miranda v. Arizona and that therefore the said statements are admissible.
>
> 2. Based on the totality of circumstances, the Court finds that the Miranda warnings read to the Defendant by Robert Gately at the time he administered the polygraph examination on May 4, 1991, were not prospective in nature. The Court further finds that after the polygraph examination, the Defendant underwent custodial interrogation, in the absence of a valid waiver of his rights as required by Miranda v. Arizona, and therefore all oral statements of the Defendant, except those specifically addressed in paragraph three (3) of this order, which were obtained from the Defendant, beginning immediately after the conclusion of the polygraph examination on the evening of May 3, 1991, up to the beginning of the formal statement at approximately 11:40 a.m. on May 4, 1991, although voluntary, are inadmissible in the prosecution's case-in-chief.
>
> 3. The Court finds that the conversation between the Defendant and Sgt. Jimenez, during the fingerprinting process that took place between 6:30 a.m. and 7:30 a.m. on May 4, 1991, was initiated by the Defendant, that the statements made by the Defendant at that time were volunteered, that Rhode Island v. Innis and its progeny are inapplicable to the instant case and that the aforesaid statements are therefore admissible.

> 4. The Court finds that the Defendant was not under arrest at any time prior to the time the Defendant was formally arrested and charged at approximately 6:30 a.m. on May 4, 1991.
>
> 5. The Court finds that the oral statements deemed inadmissible under paragraph two (2) herein, because they were obtained in violation of a valid waiver of Miranda, were properly used to establish probable cause to arrest the Defendant and were the basis of the arrest of the Defendant.
>
> 6. The Court finds that the May 4, 1991, 11:50 a.m. transcribed statement was obtained after a valid waiver of Miranda rights, that it was the voluntary statement of the Defendant and that therefore it is admissible.

The State appealed the part of the order granting Mr. Lopez relief in an interlocutory appeal. When Mr. Lopez tried to cross appeal that portion of the same order that he lost, the Third Districts Court of Appeals dismissed the cross appeal. State v. Lopez, 18 Fla. Law Weekly D1914 (Fla. 3d DCA Aug. 31, 1993). The Third District Court of Appeal held it did not have jurisdiction to consider the defendant's cross appeal; however, the court noted this decision was in conflict with the Fifth and Second District Courts of Appeal. That conflict was certified to this Court.

On October 18, 1993, this Court granted leave for the Florida Public Defender's Association to appear as Amicus Curiae on behalf of the Petitioner. This brief is the Amicus Brief filed by the Florida Public Defendant's Association on behalf of the Petitioner.

SUMMARY OF THE ARGUMENT

When the State takes an interlocutory appeal from an order partially granting and partially denying a defendant's pretrial motion, the appellate court does have jurisdiction to entertain the defendant's cross-appeal. Once an appeal is properly before the appellate court, it has jurisdiction over the entire case. Because the cross-appeal is part of the same order being appealed by the State's appeal, the appellate court must have jurisdiction over the cross-appeal for a complete determination of the cause.

ARGUMENT

ISSUE I

WHEN THE STATE TAKES AN INTERLOCUTORY APPEAL FROM AN ORDER PARTIALLY GRANTING AND PARTIALLY DENYING A DEFENDANT'S PRETRIAL MOTION, DOES THE APPELLATE COURT HAVE JURISDICTION TO ENTERTAIN THE DEFENDANT'S CROSS-APPEAL FROM THAT PORTION OF THE ORDER UNDER REVIEW DENYING THE DEFENDANT RELIEF?

It is Petitioner's contention that the answer to this issue is yes--the defendant should be entitled to file and have heard a cross-appeal on that portion of the motion that was denied. Because the Florida Rules of Appellate Procedure do not directly address this issue, the reasoning behind such a position is a complex one requiring an overall examination of the concept of cross-appeals.

As to cross-appeals in general, it is axiomatic that the time for filing a cross-appeal is not jurisdictional. Safeco Insurance Co. v. Rochow, 384 So. 2d 163 (Fla. 5th DCA 1980); Breakstone v. Baron's of Surfside, Inc., 528 So. 2d 437 (Fla. 3d DCA 1988); Sampson v. Sampson, 566 So. 2d 831 (Fla. 5th DCA 1990); Agrico Chemical Co. v. Dept. of Environmental Reg., 380 So. 2d 503 (Fla. 2d DCA 1980). Once a notice of appeal has been timely filed, a cross-appeal can be considered even if untimely filed as long as a motion seeking leave to file an untimely cross-appeal is filed, good grounds are set forth for the delay, and there will be no prejudice to the cross-appellee. Ridley v. State, 585 So. 2d 497

(Fla. 2d DCA 1991); McNair v. State, 579 So. 2d 264 (Fla. 2d DCA 1991); Dellecese v. Value Rent a Car & Cigna & Feisco, 543 So. 2d 441 (Fla. 3d DCA 1989); Sampson; Walker v. State, 457 So. 2d 1136 (Fla. 1st DCA 1984). The reason for allowing the consideration of an untimely cross-appeal is "because the court gains jurisdiction over the entire cause at the time the notice of appeal is filed, neither the timely filing of a notice of cross appeal, nor the failure to timely file such a notice will affect the jurisdiction of the appellate court." Walker, 457 So. 2d at 1137. As noted by the Third District Court of Appeal in Brickell Bay Condominium Association v. Forte, 379 So. 2d 1334 at 1335 (Fla. 3d DCA 1980), it is the filing of the initial notice of appeal that is jurisdictional; and the filing of the cross-appeal is a subsequent procedural step in the appellate process.

If the filing of a notice of cross-appeal is not jurisdictional, then it is only logical that the subject matter of the cross-appeal is not a "jurisdictional" matter. Once an appellate court takes jurisdiction over a case, it seems logical that it has jurisdiction over the entire case. In fact, Florida Rule of Appellate Procedure 9.040(a) states: "In all proceedings a court shall have such jurisdiction as may be necessary for a complete determination of the cause." (Emphasis added.) This should be especially true when what is being appealed and cross-appealed is the same order. Although the Fourth District Court of Appeal has held it has no jurisdiction to entertain a cross-appeal by a defendant on a motion to suppress in State v. Clark, 384 So.

2d 687 (Fla. 4th DCA 1980), because Florida Rule of Appellate Procedure 9.140 does not expressly authorize such a cross-appeal, the Fifth District Court of Appeal has come to the opposite conclusion. In State v. McAdams, 559 So. 2d 601 (Fla. 5th DCA 1990), the Court refused to apply the rules of an initial appeal under Florida Rule of Appellate Procedure 9.140 to a cross-appeal. It held that once the court's jurisdiction was properly invoked by the State's appeal, the court had the authority, "in the interest of justice 'to grant any relief to which any party is entitled...'" Id. at 603. Referring to State v. McInnes, 133 So. 2d 581 (Fla. 1st DCA 1961), cert. denied, 139 So. 2d 692 (Fla. 1962), the Fifth District Court of Appeal noted its opinion was consistent with the First District Court of Appeal which had allowed a defendant to cross appeal even though a direct appeal would not have been permitted on the subject matter. McInnes found "nothing in the rules which specifically prohibits a defendant from taking a cross-appeal in those instances where the main appeal has been taken by the State...." Id. at 582. McInnes was later ratified by the Florida Supreme Court when it approved the Third District Court of Appeal case of State v. McKinney, 212 So. 2d 761 (Fla. 1968). In McKinney the state filed an appeal from an order partially granting a motion to suppress, and the defendant had filed cross assignments of error on that same order. The Third District Court of Appeal denied the State's motion to strike the cross assignments of error based on the reasoning in McInnes. The Florida Supreme Court approved the Third District Court of Appeal's decision.

McAdams, which does deal with the same issue subjudice--both the State (appeal) and the defendant (cross-appeal) appealing the same order on a partial granting and partial denying of a motion to suppress, did not base its decision solely on the concept that a cross-appeal is not a jurisdictional issue. The court also considered the fact of justice and judicial economy. "Since an adverse decision at trial could trigger the appeal of the same order before a different panel, the interest of justice and judicial economy justifies considering the cross-appeal in this case." McAdams, 559 So. 2d at 603. Of special note if footnote 2:

> [2]See also Judge Nesbit's specially concurring opinion in Taylor v. State, 436 So. 2d 124 (Fla. 3d DCA 1982):
>
> Additionally, there are sound reasons for determining all issues once valid jurisdictions has been obtained.
>
> Needless steps in litigation should be avoided wherever possible and courts should always bear in mind the almost universal command of constitutions that justice should be administered without "sale, denial or delay." Piecemeal determination of a cause by our appellate court should be avoided and when a case is properly lodged here there is no reason why is should not then be terminated here.... .
>
> Taylor, at 128, quoting Zirin v. Charles Pfizer & Co., 128 So. 2d 594 (Fla. 1961).

McAdams, 559 So. 2d at 6034. Although the Third District Court of Appeal has now held in this case that it does not believe the new rules of appellate procedure allow a defendant to cross-appeal the partial denial of a motion to suppress when the State's appealing the partial granting of said motion, citing to State v. Williams,

444 So. 2d 434 (Fla. 3d DCA 1983); State v. DeConingh, 396 So. 2d 858 (Fla. 3d DCA 1981); State v. Clark, 384 So. 2d 687 (Fla. 4th DCA), rev. denied, 392 So. 2d 1372 (Fla. 1980); and State v. Ferguson, 405 So. 2d 294 (Fla. 4th DCA 1981), it has also stated that cross-appeals should be entertained when it involves the same order as that at issue in the State's appeal. In Webb General Contracting, Inc., v. PDM Hydrostorage, Inc., 397 So. 2d 1058 (Fla. 3d DCA 1981), the Court dismissed a cross-appeal seeking review of an entirely different and separate judgment from that appealed in the initial appeal. In dismissing the cross-appeal, the court stated:

> The function of a cross-appeal is to call into question error in the judgment appealed, which, although substantially favorable to the appellee, does not completely accord the relief to which the appellee believes itself entitled. It is not the function of a cross-appeal to seek review of a distinct and separate judgment, albeit rendered in the same case below, favorable to the appellant.

Id. at 1059, 1060. This same reasoning was re-affirmed by the Third District in Breakstone v. Baron's of Surfside, Inc., 528 So. 2d 437 at 439 (Fla. 3d DCA 1988):

> It does not follow, however, that this court has jurisdiction to entertain a cross appeal from every order or ruling made in the case which is adverse to the appellee. This court's jurisdiction to entertain an appeal is invoked solely by the notice of appeal which must timely seek review of an appealable trial court order or orders. Hawks v. Walker, 409 So. 2d 524 (Fla. 5th DCA 1982); Dibble v. Dibble, 377 So. 2d 1001 (Fla. 3d DCA 1979); § 59.081(2), Fla. Stat. (1985). The notice of cross appeal, on the other hand, is not a jurisdiction-invoking document, but instead is in the nature of a cross assignment of error.

> See supra cases collected at note 1. It therefore allows that the cross appeal must necessarily "piggy back' jurisdictionally on the notice of appeal, and is, accordingly, confined to those trial court orders or rulings adverse to the appellee which either "merge" into or are an inherent party of the order or orders which are properly under review by the main appeal - much as the main appeal is confined to similar trial court orders or rulings which are adverse to the appellant.

The court goes on to restate its holding/reasoning in Webb Gen. Contracting, Inc., and then it goes on to clarify its reasoning:

> By this we mean that a cross appeal is not a separate appeal in itself but "rides along" with the main appeal - that is, the cross appeal contemplates, jurisdictionally speaking, an appeal from same judgment from which the original appeal is taken. The function of the cross appeal, then, is to call into question error in certain trial court orders or rulings adverse to the appellee which "merge" into or are an inherent part of the order or orders under review by the main appeal - although the latter may be favorable or substantially favorable to the appellee. It is not, however, the function of a cross appeal to seek review of a distinct and separate appealable order which does not otherwise "merge" into the order or orders from which the main appeal is taken.

Breakstone, 528 So. 2d at 439. Thus, although the Third District has now held that it follows the Fourth District on this issue, it has also issued opinions which send out a conflicting signal. Yet, it is the reasoning in Webb General Contracting, Inc., and Breakstone that follows the intent of Florida Rule of Appellate Procedure 9.040(a).

The First District has not yet issued an opinion directly on point on this issue. When faced with a State appeal from an

order granting a motion to suppress and a cross-appeal from a separate and different order failing to quash the information filed against the defendant, the court found it had no jurisdiction to entertain the cross-appeal. State v. Willits, 413 So. 2d 793 at 795 (Fla. 1st DCA 1982). The court does not set forth its reasoning; but under the concept expressed in Webb Gen. Contracting, Inc., and Breakstone this result is explainable in that the cross-appeal in Willits did not merge with what was being initially appealed. The cross-appeal was not from the same order being appealed by the State. This reasoning harmonizes the decision in McInnes with Willits.

As for the Second District, that court was recently faced with this issue in State v. Waterman, 613 So. 2d 565 (Fla. 2d DCA 1993). When faced with a lengthy, complex defendant's motion to suppress that had been partially granted and partially denied, the Second District aligned itself with the Fifth District's case of McAdams. It held that because a notice of cross-appeal is not jurisdictional, a cross-appeal in this type of situation is not foreclosed. The Second District specifically noted its decision allowing the cross-appeal was limited to "matters arising wholly out of the order that is under review in the direct appeal." Waterman, 613 So. 2d at 566. Undersigned counsel is the attorney handling Mr. Waterman's appeal, and I have attached copies of the initial briefs by the Appellant (State) and Appellee/Cross-Appellant (Mr. Waterman) in the appendix to demonstrate just how

intertwined the facts and issues are in this appeal.[1] In Mr. Waterman's case the defense contested not only the legal reasoning of the trial court but also the factual findings the trial court

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[1]Briefly, the facts in Mr. Waterman's case are as follows: Mr. Waterman was initially arrested for loitering at around 10 p.m. on July 16, 1991; the Buick was towed away at that time and searched on July 17, 1991; Mr. Waterman was interrogated from 10 p.m. on July 16, 1991, until 5 a.m. on July 17, 1991; after that interrogation the Renault was towed away and searched on July 17, 1991; as a result of the interrogation and searches Mr. Waterman's house was searched on July 18, 1991; and Mr. Waterman was arrested for homicide immediately thereafter on that date. Mr. Waterman's motion to suppress was partially granted and partially denied as to the following issues:

> A. Was the initial arrest of Mr. Waterman for loitering and prowling lawful? The trial court found it was.
>
> B. Was the seizure and search of the car Mr. Waterman was driving at the time of his arrest (1991 Buick belonging to his employer) lawful? The trial court found it was.
>
> C. Was the seizure and search of the car Mr. Waterman owned (1985 Renault) lawful? The trial court found it was not and suppressed all the evidence found therein.
>
> D. Was the search warrant for Mr. Waterman's home valid? The trial court found it was.
>
> E. Was all the property seized within Mr. Waterman's home validly seized under the warrant? The trial court found that 20 items were validly seized but 10 items were invalidly seized and would be suppressed.
>
> F. Were the statements made by Mr. Waterman after his father was denied the opportunity to bail out his son on the loitering charge at 1:30 a.m. on July 17, 1991, illegally obtained resulting in their illegal use to obtain a search warrant of Mr. Waterman's home? The trial court, by not specifically ruling on this issue, found the statements permissible.

made. In his petition for rehearing, Mr. Waterman points out factual errors made by the trial court as supported by the record. If the appellate court were to only address the State's issues, it may very well do so on the basis of facts that may not agree with the trial court's summary of facts. On a subsequent appeal after trial, Mr. Waterman will be dealing with a res judicata problem that can prevent him from fully addressing his issues on the motion to suppress. Mr. Waterman will also, most likely, be dealing with a different appellate panel. These same problems plague Mr. Lopez in the case sub judice.

What this Court must presently decide is whether to allow a cross-appeal when the cross-appeal deals with the partial denial of a motion to suppress and the State's appeal is from the same order partially granting said motion. From a policy stand-point there are two areas to address in this issue. The first area is one of a legal standpoint as to whether jurisdiction exists. The Fourth and Third Districts say the rules doe not provide jurisdiction over such a cross-appeal; and the Fifth and Second Districts say once jurisdiction is initially obtained over the case in the appeal, then the court has jurisdiction to consider the case in its entirety. This latter viewpoint is in keeping with Florida Rule of Appellate Procedure 9.040(a). The Second and Fifth's view is quite compatible with the second police consideration--the interest of justice and judicial economy. Motions to suppress are a complicated area of law often turning on a combination of case law and facts. It is easy to see how such motions can result, as here, in

cutting the baby in half. It is illogical from a fundamental fairness viewpoint as well as a judicial economy viewpoint to rule on only part of a trial court's order. In light of the ever-increasing caseload by all parties concerned, it makes no judicial economic sense to only address part of the order denying the motion to suppress at this time. From a legal viewpoint, it may be impossible to do so as it may be impossible to determine the legal and factual basis for the appellate court's conclusion on the interlocutory appeal. If this Court does not believe Florida Rule of Appellate Procedure 9.040(a) allows jurisdiction over this type of cross-appeal, then this Court has the power to settle this conflict by creating a rule of appellate procedure that fills the gap on whether or not a cross-appeal is allowed in this type of situation. Article V, Section 2(a), Constitution of the State of Florida. Petitioners ask that this Court do so and, in doing so, use the reasoning of the Second and Fifth Districts in allowing such a cross-appeal.

CONCLUSION

Based on the above, this Court should reverse the Third District's dismissal of the Petitioner's cross-appeal.

<u>APPENDIX</u>

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IN THE DISTRICT COURT OF APPEAL, SECOND DISTRICT
STATE OF FLORIDA

STATE OF FLORIDA,

Appellant,

v. Case No. 91-3843

JOHN WATERMAN,

Appellee.

_____________________________/

ON APPEAL FROM THE CIRCUIT COURT
OF THE TWELFTH JUDICIAL CIRCUIT
IN AND FOR SARASOTA COUNTY

INITIAL BRIEF OF APPELLANT

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

CAROL M. DITTMAR
Assistant Attorney General
Florida Bar No. 0503843
2002 North Lois Avenue, Suite 700
Tampa, Florida 33607-2366
(813) 873-4739

Received By
MAR 22 1993
Appellate Division
Public Defenders Office

COUNSEL FOR APPELLANT

/aoh

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STATEMENT OF THE CASE AND FACTS

The appellee (hereinafter referred to as the defendant) was charged by indictment for first degree murder on August 16, 1991 (R. 975-976). He was alleged to have killed Jacqueline Galloway on or about June 12, 1991 (R. 975). This appeal arises from the trial court's order partially granting the defendant's motion to suppress physical evidence seized pursuant to three search warrants (R. 1391-1402; Exhibit A). The following evidence was adduced at the suppression hearings held on September 20, October 4, October 9, and October 18, 1991 (R. 1, 337, 531, 755).

The body of a white female was found in an open field in east Sarasota County on June 13, 1991 (R. 455, 505, 763). The woman was wrapped up in a sheet, which was tied around her body with cords at the neck, waist, and ankles (R. 375, 763, 769). The sheet was a double size flat sheet, beige with a brown piping border (R. 376, 787, 1275, 1287). There were ligature marks on the victim's wrists, and a ligature around her neck (R. 376, 771, 786). The ligature was the same thin, white nylon, traverse rod-type cord as the cords that tied the sheet around the body (R. 769, 771, 784). The cord had an unusual, unique knot and loop at one end (R. 367-368, 376, 784-785). The woman was later identified as Jacqueline Galloway, of 2225 Floyd Road (R. 92-93, 867).

The police believed that the homicide had occurred somewhere else, because no weapon was found at the scene, and there were no

drag marks or signs of a struggle (R. 372-373, 764). There were no tire or foot tracks, although one boot print was found a few feet on the other side of the road, which was about fifty feet from the body (R. 376, 765, 841).

Black, gray, and silver fibers were found on the body (R. 369, 378, 773, 777). Due to the type and texture of the fibers, they were believed to have come from a car trunk lining or trunk carpeting (R. 388). While there were no significant fibers found on the sheet wrapped around the body, the few fibers that were found were mostly colorless and "did not appear to be the same" as those found on the body (R. 378, 779, 782). In addition, it was noted that the victim had been wearing fake fingernails, which had been forcibly removed from each of her fingers (R. 376-377, 694, 771). Criminologists from the sheriff's department theorized that the victim's body had been transported in two different cars, due to the presence of fibers on the body and the lack of visible fibers on the sheet itself (R. 387, 789-790). During the course of the investigation, on June 27, the police attempted to re-enact the crime (R. 387, 1275). This reenactment lent support for the two-car theory (R. 391, 791).

Jackie had been missing since about noon on June 12, 1991 (R. 386-387, 469). She had lived in a small apartment that was attached to the side or rear of a single family dwelling (R. 476). The apartment was neat, with no sign of a struggle, and her purse and belongings were there (R. 382). At the time of her disappearance, her door was unlocked, her unlocked car was in the

driveway, a window was open, and the television was on (R. 382). The reenactment suggested that due to the small size of the apartment Jackie must have left voluntarily (R. 392). There were no beige sheets found in her apartment, mostly just full and queen size pastels, but it was difficult to tell if any sheets were missing as the ones found were mix and match rather than coordinated sets (R. 1279-1280). From the nature of the death and abduction the police believed that the perpetrator was someone close by or someone that knew about Jackie's activities (R. 386, 1254).

On July 16, 1991, the defendant was arrested for loitering and prowling in a residential area about five blocks from Jackie's apartment (R. 93, 158, 280). Detective Don Wenger of the Sarasota County Sheriff's Department was at his home at 2708 Floyd Street, within the city limits of Sarasota, when he noticed a white, late model Buick parked in front of the house across the street (2709 Floyd) shortly after 10:00 p.m. that evening (R. 82, 83, 115). The car had not been there when Wenger had gotten home about 9:45 p.m. (R. 122). Wenger was concerned because he knew that no one lived in the home, and the only activity around the house was usually in the daytime (R. 89-90). In fact, there hadn't been anyone using the house at night for a number of years (R. 96). He was also aware of some crime in the area, such as stolen bicycles and cat burglaries, and he knew there had been several sexual assaults in an area a couple of blocks to the north (R. 92, 94).

The Buick was parked in the road in front of the house (R. 115, 175). Wenger did not recognize the car and there was no one in or around the car, but the engine felt warm (R. 116, 117). Wenger did not see anyone around the house or in the backyard, but it was dark and somewhat overgrown (for picture, see Ex. 6, at R. 1109), and he could not see the part of the yard directly behind the house (R. 109, 118-120). There was no one inside the house, and no lights were on, although Wenger could not see inside the windows very well due to blinds or shelves up against the windows (R. 110-111). The house next door also did not have any lights on or anyone living there (R. 111). Suspecting that the car was stolen, Wenger walked back to his own car and ran the tag number from the Buick, and learned that it was registered to Mrs. Alice Hammond, who lived on Gulf Stream Drive and was born in 1907 (R. 117, 120).

Wenger sat and watched the car for another fifteen or twenty minutes (R. 121-122). About 10:25, he saw the defendant come from the yard on the east side of 2709, dressed in black pants, a black shirt, and black shoes (R. 124, 132). As the defendant approached the car, the trunk opened (R. 132). The defendant did not have a flashlight, and Wenger felt that there was no plausible reason for him to be there (R. 133). Wenger approached and identified himself, and asked the defendant what he was doing there (R. 134). The defendant stated that he was looking at the house because he was possibly interested in buying it (R. 134). The defendant was very nervous, sweating, shaking, his voice was quivering, and he did not look Wenger in the eye (R. 134-135).

Wenger asked why the defendant thought the house was for sale, since there was not and had not been a sign in the yard, and Wenger was not aware of anyone trying to sell it (R. 112, 135). In response, the defendant said that he lived five blocks away, at 2215 Floyd, and was considering relocating because he'd had some problems in the neighborhood (R. 140). The defendant also said that he lived next door to Jacqueline Galloway, and asked if Wenger was working on that case and if they were making any progress on it (R. 144). Wenger wondered at that point if the defendant knew or had seen something, since he brought up the homicide (R. 144-146). Wenger glanced into the open trunk, saw a bag of some type, and noticed that the carpeting was black and gray, recalling that those were the colors of the fibers found on Jackie's body, and that she was believed to have been transported in the trunk of a car (R. 92, 113, 114, 147).

Wenger felt that a crime had been or would be committed, and his fears were not dispelled by the defendant's explanation (R. 142). Although Wenger believed that he had authority to arrest someone within the city limits, the sheriff's department had a policy not to get involved in minor incidents in other jurisdictions if they could summon the correct agency (R. 85-87). Therefore, he radioed a request for a city police officer to come to the scene (R. 148, 150).

Sarasota Police Department Officer Brenda Redden arrived a few minutes later (R. 150, 274). Wenger walked with Redden to her car and explained the circumstances, indicating that he

thought the defendant had committed loitering and prowling and, although he knew he couldn't tell her what to do, he "essentially" requested that she arrest the defendant (R. 150, 157-158, 222, 275-277). Wenger did not mention anything to Redden about the homicide (R. 166, 286, 304). Redden radioed the police Communications department and had them call Mrs. Hammond to find out if she knew where her car was (R. 276). Mrs. Hammond advised that she thought that the car was in her parking garage, but that it was okay that the defendant had it (R. 31, 330). Redden walked back to the defendant to ask him what was going on while Wenger walked around the house at 2709 Floyd to check for any sign of burglary (R. 153, 158, 278). Wenger noticed at that point that a person could see into the house behind 2709, where a lady lived with two teenage daughters, through a break in the fence (R. 154; see also Ex. 9, R. 1112).

The defendant told Redden that he was looking for real estate in the area, killing time until he could pick up his girlfriend from work, and that she got off work at 10:00 p.m. (R. 277, 278, 302). The defendant was very nervous, agitated, sweating, talking fast, and was dressed all in dark clothes (R. 278). Redden concluded that the defendant was not in a place that a law abiding citizen would be, and that he had failed to dispel her fears, so she placed him under arrest for loitering and prowling (R. 280).

Redden also got consent from the defendant to search the car, as it was a traffic hazard, illegally parked in the

westbound lane of Floyd Street, and would be towed pursuant to department policy (R. 159, 280, 281, 317). Redden planned to look for burglary tools or valuables (R. 281, 316). The defendant signed a consent form but Redden did not take any action on it because, at some point, the keys had gotten locked inside the car (R. 159, 282, 312, 317, 1113).

Wenger contacted a detective directly involved in the murder investigation, Det. Kimball, to advise her of the defendant's arrest and interest in the Galloway killing (R. 160, 1252). She reviewed the file to determine if the defendant had been interviewed as part of a neighborhood canvass that had been conducted to gather information about the victim (R. 1253). She could not locate any notes suggesting that the defendant had been contacted, and "most definitely" wanted to speak with him (R. 1253-1254). She walked over to the jail where the defendant was being brought for booking on the loitering and prowling arrest, and had him placed in an interview room upon his arrival (R. 1255, 1256). Kimball testified that she definitely would have contacted the defendant even if he had not been arrested at that point (R. 1254-1255).

Det. Kimball and Det. Robeson read the defendant his Miranda rights, and he voluntarily agreed to be interviewed (R. 1256). The defendant was very willing to cooperate, and never indicated that he wanted an attorney or to call his father or girlfriend (R. 1257). Kimball asked if the defendant wanted them to call someone for him, and he told her that his girlfriend was not off

of work yet (R. 1257). The defendant said that he was more than willing to talk about the case because he felt bad about the death (R. 1258).

The defendant agreed to go over to the Criminal Investigations Bureau in another building for the interview as the interview room at the jail was very noisy (R. 1258-1259). He had not yet been booked for the arrest, and was handcuffed to a chair during the interview (R. 1295-1296). At some point while they were at CIB, the defendant said he was supposed to pick up his girlfriend at 11:00, but when Det. Robeson called the store where she worked and learned that she had gone home with her mother, the defendant said that was fine (R. 1288). He never indicated any desire to end the interview (R. 1257, 1267).

The defendant told the detectives that he lived with his fiancee, Noel Strickland, and worked as a security guard at Bay Plaza Condominiums and as a chauffeur for an elderly woman that lived at Bay Plaza (R. 1260). He had moved into 2215 Floyd Street around August, 1990, and lived there when Jackie moved in next door (R. 1264, 1312). He stated that he had never been formally introduced to Jackie, but he knew what she looked like as he had seen her unloading groceries, going to the mailbox, etc. (R. 1261). He knew that she rented an apartment set up on the house next door, and that the front part of the house was occupied by two men (R. 1261). He knew what type of car Jackie drove, that she was sometimes gone for several days at a time, and that Jackie's friends had a blue van or large white vehicle that would be parked out front (R. 1261).

The defendant admitted that he had a lot of rope around his house, noting "you can never have enough rope," and that he had been a boy scout and tied most everything with a square knot (R. 1262). He said that after a recent burglary he secured his house by tying the doors and windows shut so he could sleep better (R. 1262). He described how his house was decorated, listing the colors of his sheets which included beige sheets with brown trim (R. 1262). He also discussed his sexual relationship with Noel, noting that one time he had tied her to the bed but he had to cut the bindings off as they'd gotten too tight on her wrists and she was very uncomfortable (R. 1263).

Kimball noticed a prominent wound in the middle of the defendant's forehead, which the defendant said had come from hitting his head against the top part of a truck while he was parking cars (R. 1264). She also noticed scratches on his forearms which were almost healed, that the defendant claimed came from a cat (R. 1264).

The defendant recalled that during the week of June 12 he drove for Mrs. Hammond every morning, then would go home to shower and would return to Bay Plaza to work security from 3:00 p.m. to 11:00 p.m. (R. 1265-1266). He occasionally kept Mrs. Hammond's car overnight so it could be washed and filled with gas, but did not know if he had done so during that week (R. 1272).

While Kimball was speaking with the defendant, Det. Wenger and Sgt. Sullivan went to inspect the defendant's car at Bay

Plaza (R. 161-162, 349). The defendant had indicated that his car, a 1985 red Renault, was located in the parking garage for Bay Plaza Condominiums (R. 1288). Noel Strickland had also told them that the Renault was probably at the Bay Plaza garage (R. 161, 349). Wenger and Sullivan spoke with Bert Wimer, a security guard on duty at the parking garage (R. 53, 162, 351). Wimer showed them to the Renault, located on the second floor of the garage (R. 60, 74-75, 351).

The garage had limited access to the public for the first three floors, as these floors were used for valet parking by the shops and a restaurant at Bay Plaza (R. 73, 78, 441-442). There was a swinging arm-type gate at the entrance to the garage that was operated by the attendant (R. 441-442, 466-468). The floors above the first three floors were closed to the public, and secured for the condominium residents only (R. 73). A floor-to-ceiling gate divided the first three floors of the garage from the more secure floors above (R. 73, 352). Thus, the defendant's car was located in an area with limited accessibility, yet below the secured area that was closed to the general public (R. 60, 74-75, 352).

The officers inspected the Renault from the outside (R. 58, 162-163, 237). The Renault had vinyl seats, which would not be conducive to the transfer of fibers, consistent with the lack of fibers found on the sheet around Jackie's body (R. 394, 475). Using a flashlight, they looked into the car, and observed a thin, white piece of cord lying between the front seats, with the

same unique knot and loop that was on the ligature found around Jackie Galloway's neck (R. 164-165, 352-353, 368, 446-447, 794-796). Sullivan testified that the cord appeared to be identical to the one found on Jackie's body (R. 352, see also Ex. 16 at R. 1193 for picture of cord from body and cord from car laying side-by-side, R. 362). They took Polaroid pictures of the car, and particularly of the cord as seen from outside the car (R. 354-355, Ex. 13 at R. 1190). The police gave their phone number to Wimer, and asked to be notified immediately if anyone showed an interest in the car or came to move it (R. 61).

Following the interview, Kimball shared the defendant's statements with Det. Sims and Sgt. Sullivan (R. 401, 1266). She went back in the room to see if the defendant would mind taking a polygraph test, and when he agreed to do so, Sims and Lt. Skeens took over (R. 1266). After the polygraph, the defendant remained relaxed and cooperative (R. 493, 495, 726). The defendant told Sims that he had "lots of cords" which he kept in his car and at home (R. 499). He said he had recently taken a quantity of cord off of a traverse rod that he'd gotten from Bay Plaza (R. 499, 728).

He denied killing Jackie (R. 496). When Sims showed the defendant the picture that had been taken of the cord in his car, the defendant invoked his right to counsel (R. 495, 500, 729). This was at 3:55 a.m. (R. 500, 730). Sims and Skeens left the room at that point but, unfortunately, they were directed to go back into the room in the hope of obtaining incriminating

statements (R. 500-501, 730). However, nothing that happened after the defendant requested an attorney was used by the police to demonstrate probable cause for the search warrants or was otherwise considered by the court below (R. 397-401, 614).

Det. Wenger and Det. Robeson returned to Bay Plaza with a tow truck (R. 240). They spoke with the general manager of Bay Plaza, then seized the car around 5:30 or 6:00 a.m. on July 17 (R. 241-242). The police were in the process of obtaining search warrants for both the Renault and the Buick, but no warrants had been signed at that time (R. 241, 443-444, 525). The police did not go into the Renault at any time while at Bay Plaza (R. 61, 69). The officers discussed the fact that evidence might be lost as soon as the defendant was released from jail, which could happen at any time as the defendant had not been arrested for the homicide and there was no conscious effort being made to keep him in jail (R. 444, 471). They were particularly concerned since they had confronted him with the picture of the cord (R. 503-504). The car was taken to the sheriff's department impound lot (R. 241).

The defense presented testimony that the defendant's uncle and father had come down to the jail around 1:15 a.m. on July 17 to bail him out, but they were told that the defendant could not leave because his paperwork was still being processed (R. 255-257, 575-577). They went back home after about an hour, but kept calling to try and get the defendant released (R. 257). The defendant was ultimately released about 6:30 or 7:00 a.m. (R. 258, 588).

In addition, a Sarasota attorney testified that the defendant's father called him about 5:30 or 6:00 that morning, upset that he couldn't bail the defendant out (R. 534-537). The attorney called the jail, and they indicated that the defendant would be released as soon as someone showed up with the bond (R. 540). When the attorney stopped by the jail around 7:30 or 8:00, the defendant had been released (R. 542). The attorney never indicated to the sheriff's office that he represented the defendant or that they should not speak to the defendant (R. 545).

On July 17, 1991, identical search warrants were obtained which authorized searches of the Buick and the Renault (R. 627, 629, 940-943). The affidavits to secure the warrants were prepared by Det. Sims a little after 5:00 a.m. (R. 502-503, 607, 609). Sims testified that he first completed the section for the facts giving rise to probable cause, writing out all of the information that had been gathered relating to the murder, and ran a photocopy of this affidavit since the same information would be used for both warrants (R. 610-611). One warrant was completed, except that the area that was supposed to describe the property/vehicle to be searched was left blank so a photocopy could be made for the second warrant, since the vehicle information was the only difference between the two (R. 612, 617-618). Lt. Brewer later added the vehicle descriptions to the affidavit, but neglected to add this information to the warrants (R. 613, 940-943). In addition, the defendant's name was listed

on the warrants as "John Water" rather than "Waterman" (R. 940-943).

Sims finished preparing the warrants a little after 7:00 a.m., and met with Judge LoGalbo at the courthouse about 8:15 (R. 622-623). The two pages of the warrant and the five pages of the affidavit were not stapled separately, but all seven pages were paper clipped together as one packet, with the pages touching, and all seven pages were handed to the judge as one document (R. 623-625). The judge read all of it, swore in Sims to verify the facts of the affidavit, and then signed the warrant (R. 626-627). The procedure was then repeated with the affidavit and search warrant for the Buick (R. 627-630).

When the warrant was executed, the affidavit was still "physically in touch" as it had been given to the judge (R. 633). Sims testified that there was no confusion as to the car to be searched, due to the description provided in the affidavit (R. 631). Sims first became aware of the missing description when he read the warrant to the Renault, and realized this section was blank (R. 680-681, 684-685). At that point, he flipped over to the affidavit and read the description provided there, and then turned back and finished reading the warrant (R. 680-681). After the warrant was read, the VIN number was checked against the affidavit, and then the car was searched (R. 632).

The Renault was searched around 8:00 a.m. (R. 456). The search of the Buick was delayed while Det. Kimball went to Alice Hammond's condominium to get Hammond's set of keys and written

consent for the search (R. 39-40, 456, 1268-1271). As a result of the searches, fibers were seized from the trunk of the Buick, and the cord and other miscellaneous items were seized from the Renault (R. 944, 946). After both cars had been searched, the returns were completed and copies were made (R. 634). The returns were stapled to the warrants, and the warrants and returns, without the affidavits, were left inside the cars (R. 262, 270, 634-635, 682).

A warrant authorizing a search of the defendant's house at 2215 Floyd Street was prepared and executed on July 18, 1991 (R. 637, 639-641, 653, 948-953). The warrant identified blood, saliva, hair, fingernails, fibers, cords, ligatures, bed sheets, and pillowcases as the items to be located within the home (R. 953). As a result of that search, police confiscated pieces of cord with knots and loops similar to that found around the victim's neck; beige sheets with brown trim; carpet, fiber, and dust samples; videotapes; a paperback book, "Post Mortem"; and other miscellaneous items (R. 886, 954).

The fingernails were a material part of the search of the defendant's house, since the police were aware that many killers keep "souvenirs" of their crimes and the fingernails in this case were conspicuously missing (R. 404, 813, 815). As part of the search, officers were looking "anywhere" for the fingernails - through drawers, under beds, in shoes, in pockets, thumbing through books, opening canisters, etc. (R. 406, 815).

The paperback book was seized by Sgt. Sullivan (R. 407). Initially, it was the title of the book "Post Mortem" that got Sullivan's attention (R. 407). When he picked the book up to flip through it, he was intrigued by the picture of a dead woman covered by a sheet on the cover of the book, similar to the way Jackie Galloway had been found (R. 407, 409, see also picture of cover of book, Ex. 19 at R. 1196). It was apparent that the book had been read, because of the way the pages fell open (R. 410). He felt at that point that the book was connected to the crime, and his first thought was that the homicide had been a copy cat based on the book (R. 409).

Sullivan noticed that the book depicted a homicide, and was struck by the first passage he read, on page ten:

> One cord bound her wrists which were pinned at the small of her back, the other cord was tied in a diabolical creative pattern, also consistent with the first three cases. Looped once around her neck.

(R. 411). Sullivan also noticed an excerpt on page seventy-five suggesting it was classic behavior for the psychopath to become involved in the investigation and wanting to assist police and rescue teams searching for a body that had been dumped in the woods (R. 411). As he continued to randomly skim passages, it was apparent that the book paralleled Jackie's murder (R. 416-418). Sullivan testified that he scanned the book for twenty to thirty minutes (R. 464).

On August 1, 1991, the defendant filed a Motion to Dismiss Search Warrants and Return Property pursuant to Section 933.14,

Florida Statutes, which was later amended to include the suppression of all of the evidence seized under the warrants pursuant to Florida Rule of Criminal Procedure 3.190(h), in order to protect the state's right to appeal any adverse ruling (R. 4-5, 922-927, 1064-1069). The motion challenged the legality of the defendant's arrest, the validity of each of the three search warrants and the searches conducted pursuant to each warrant, and the legality of the seizure of items which were not included in the search warrants (R. 922-927, 1064-1069).

The trial court granted partial relief to the defendant (R. 1391-1402; Exhibit A). The court made specific factual findings and legal conclusions in its written order (R. 1391-1402). The court concluded that the defendant's arrest was lawful, and that the appellant did not have standing to contest the search of Alice Hammond's Buick (R. 1396-1397). In addition, the court noted that the validity of the warrant for the Buick was moot since the police had obtained Hammond's voluntary consent prior to the search of the car (R. 1397).

However, the court found that the warrant authorizing the search of the defendant's Renault was so defective that the detectives could not, in good faith, rely on the warrant to authorize the search (R. 1398-1399). The court also found that there were no exigent circumstances to justify a warrantless search, and rejected the state's reliance on the doctrine of incorporation to cure the deficiency in the warrant because the warrant and affidavit were not adequately attached at the time

PAGE(s) MISSING

SUMMARY OF THE ARGUMENT

The trial court erred in suppressing the evidence seized from the defendant's Renault. Under the facts of this case, a warrantless search of the Renault should be upheld, and therefore any invalidity of the warrant should not result in suppression of the evidence seized. In addition, the facial deficiency of the warrant was cured by the attached affidavit. Even if the affidavit did not suffice to cure the problem, the exclusionary rule should not be applied since the detectives relied upon the warrant, as limited by the affidavit, in good faith.

The trial court also erred in suppressing the paperback book, "Post Mortem," that was seized from the defendant's home. The book was immediately apparent as evidence relating to the crime for which the search warrant had been issued, and therefore was properly seized under the plain view doctrine.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN SUPPRESSING EVIDENCE SEIZED FROM THE DEFENDANT'S RENAULT.

The state initially challenges the trial court's suppression of evidence seized from the defendant's car, a 1985 Renault. Specifically, there are three grounds asserted to support the state's claim that the trial court erred in suppressing this evidence. These alternative grounds for relief will each be examined independently.

I. NO WARRANT REQUIRED

Before considering the validity of the search warrant issued for the Renault in this case, it is necessary to determine whether the police would have been justified in searching the car under the automobile exception to the warrant requirement announced in Carroll v. United States, 267 U.S. 132, 45 S. Ct. 280, 69 L. Ed. 543 (1925). Obviously, if the search could be upheld in the absence of a warrant, any defect in the warrant itself would not mandate suppression.

In California v. Carney, 471 U.S. 386, 105 S. Ct. 2066, 85 L. Ed. 2d 406 (1985), the Supreme Court basically eliminated the principle that the interior of a car is a constitutionally protected area. The Court held that police officers with probable cause to believe that there is evidence of a crime inside a car that is located on nonresidential property have the

right to enter the car and seize such evidence without a warrant and without any showing of exigent circumstances. The first district has interpreted this decision to mean

> Thus, it appears that the automobile 'exception' to the warrant requirement has now become the automobile 'rule', with a warrant 'exception.' We understand from the holding in *Carney* that the police are now free to search any vehicle, any time, and any place (except when it is upon residential property) simply because the police have probable cause to believe that the vehicle contains contraband or other evidence of a crime. It is our understanding that the *Carney* holding has eliminated any Fourth Amendment requirement for a warrant or showing of exigent circumstances.

State v. Starkey, 559 So. 2d 335, 339 (Fla. 1st DCA 1990). In Starkey, the trial court had suppressed pistol cartridges that had been seized from the inside of Starkey's automobile, parked in a public parking lot, after Starkey had been arrested and charged with first degree murder. The agent that seized the cartridges had been advised of a homicide involving a pistol, and knew that the investigation focused on Starkey and that several witnesses had identified Starkey's vehicle. The agent was dispatched to the vehicle, some distance from where Starkey had been arrested, and he looked into the car and saw the pistol cartridges on the console between the front seats. The agent then entered the car, drove it to an impound lot, and seized the cartridges. The district court reversed the suppression based on Carney, noting that the car was located in a public parking lot and that the agent had ample probable cause to believe that the car contained evidence of a crime.

The conclusion in Starkey that Carney eliminated the search warrant requirement for cars which are (1) readily mobile and (2) located on nonresidential property is mirrored in federal appellate court decisions. See, United States v. Parrado, 911 F. 2d 1567 (11th Cir. 1990), cert. denied, ___ U.S. ___, 112 L. Ed. 2d 1088 (1991); United States v. Panitz, 907 F. 2d 1267 (1st Cir. 1990); United States v. Reis, 906 F. 2d 284 (7th Cir. 1990); United States v. Vasquez, 858 F. 2d 1387 (9th Cir. 1988), cert. denied, 488 U.S. 1034 (1989). State courts in other jurisdictions agree. See, People v. Romero, 767 P.2d 1225 (Colo. 1989); State v. Williams, 816 P.2d 342 (Idaho 1991); State v. Tomah, 586 A.2d 1267 (Me. 1991); see generally, LaFave, Search and Seizure, §7.2(b) (2d ed. 1987), and cases cited therein.

The instant case is much like Starkey. There was testimony presented to the court below to demonstrate the public nature of the parking garage at Bay Plaza Condominiums, where the Renault was located (R. 73-75, 352, 441-442, 466-468). Although the defendant may argue that the limited accessibility of the garage provided a greater privacy interest than that involved in Starkey, clearly the facts demonstrate that the area of the garage where the defendant's car was located was "nonresidential" for Fourth Amendment purposes. It is undisputed that the defendant's car was located before the floor-to-ceiling gate which marked the entrance to the residential parking for condominium owners (R. 60, 74-75, 351-352). While members of the general public may have been restricted by the swinging arm at

the entrance to the garage, the area was still open to valet drivers, security guards, and pedestrian traffic (R. 73, 78, 441-442). Thus, it could not be considered to generate the reasonable expectation of privacy afforded to vehicles located on residential property.

The court below necessarily found that probable cause for the search existed the moment that Det. Sullivan peered into the defendant's Renault and saw the cord with the unique loop and knot. This finding is evident since the court specifically found that the affidavit for the search warrant was based on probable cause, and the affidavit itself included Det. Sims' knowledge of the case up to and including the observation of the cord in the car (R. 930-939, 1398). Since Sullivan had probable cause and the defendant's car was located on nonresidential property, Sullivan would have been justified in entering the car and driving it to the impound lot to conduct a search under the authorities discussed above. Therefore, any deficiency in the warrant that was ultimately issued for the search should not affect the admissibility of the evidence seized from the Renault.

The state's suggestion to the court below that any invalidity of the warrant did not mandate suppression because the search could be upheld under Carroll and Carney was rejected because the court found that there were no exigent circumstances to justify the failure to obtain a warrant (R. 1398). However, even if the state was required to demonstrate the existence of exigent circumstances to support a warrantless search, such

circumstances are apparent on the facts of this case. At the time Sullivan saw the cord in the Renault, the defendant was at the county jail talking with detectives (R. 161-162, 349). The defendant was engaged in a consensual interview which could have ended at any time (R. 444, 471, 503). As part of the interrogation, the defendant had been confronted with the fact that the police believed that he had killed the victim, and had been shown a picture of the cord that the police had seen in this car (R. 503-504). The detectives had no way of knowing if anyone else had access to the defendant's car that might come along and move it before it could be searched (R. 61). The testimony presented demonstrates that the police were in fact concerned with the possible loss of evidence, knowing that the defendant's release was imminent and advising the security guard to call them if anyone showed an interest in the car or came to move it (R. 61, 444, 471, 503-504).

These facts demonstrate that the search of the Renault should have been upheld since, even if exigent circumstances are arguably necessary to support a warrantless vehicle search, such circumstances were present. Therefore, the court below should have denied the motion to suppress as to the evidence found in the Renault without consideration of the validity of the search warrant issued.

II. DOCTRINE OF INCORPORATION

The trial court also rejected the state's argument that the warrant's failure to describe the Renualt as the location to be searched was cured by the affidavit which undisputedly provided a complete and accurate description of the car (R. 935). In rejecting this argument, the court specifically found that the affidavit and the warrant "were not adequately physically attached in a legal sense" in that "each separate page was loose and secured only by a paper clip" (R. 1399). The court also noted that the doctrine of incorporation is not applicable in the state of Florida according to State v. Schrager, 472 So. 2d 896 (Fla. 4th DCA 1985).

While the undersigned cannot speak for the fourth district, this Court has clearly recognized and applied the doctrine of incorporation in search warrant situations in the second district, using an affidavit to cure a defective search warrant. State v. Carson, 482 So. 2d 405 (Fla. 2d DCA 1985), rev. denied, 492 So. 2d 1330 (Fla. 1986). Schrager rejected the doctrine on the basis of Carlton v. State, 449 So. 2d 250 (Fla. 1984). However, this Court has determined that Carlton did not eliminate the use of the doctrine of incorporation in this situation. State v. Wade, 544 So. 2d 1028 (Fla. 2d DCA), rev. denied, 553 So. 2d 1168 (Fla. 1989). Federal courts also routinely apply the doctrine of incorporation to cure facially deficient warrants with adequate affidavits. See, United States v. Harris, 903 F. 2d 770, 775 (10th Cir. 1990); United States v. Vaughn, 830 F. 2d

1185 (D.C. Cir. 1987); United States v. Weinstein, 762 F. 2d 1522, 1531 (11th Cir.), modified, 778 F. 2d 673 (1985), cert. denied, 475 U.S. 1110 (1986). Thus, the court below should have given greater consideration to whether the doctrine could be applied in the instant case.

The court's finding that the affidavit and search warrant were not sufficiently physically attached at the time they were presented to the magistrate is also clearly erroneous. Det. Sims testified that he presented the warrant and affidavit to Judge LoGalbo for review (R. 622-623). The two pages of the warrant and the five pages of the affidavit were not stapled separately, but all seven pages were paper clipped together as one packet, with the pages touching, and all seven pages were handed to the judge as one document (R. 623-625). The judge read all of it, swore in Sims to verify the facts of the affidavit, and then signed the warrant (R. 626-627). When the warrant was executed, the affidavit was still "physically in touch" as it had been given to the judge (R. 633). Det. Sims testified that there was no confusion as to the car to be searched, due to the description provided in the affidavit (R. 631). The warrant was read to the Renault, the VIN number was checked against the affidavit, and then the car was searched (R. 632).

Since the warrant and the affidavit were physically bound with a paper clip as one document at the time that the warrant was signed and executed, the court below should not have found that they were not adequately attached as required for the

doctrine of incorporation. In Carson, supra, an officer presented a judge with a file folder containing a search warrant, an affidavit for the warrant, and several exhibits. This Court rejected Carson's argument that because the documents were not stapled or paper clipped together they could not have been physically attached for purposes of the doctrine of incorporation. Rather, this Court found that such an extremely technical view of the physical attachment requirement was without merit. The opinion also noted that there was no suggestion that the warrant, with the exhibits, was lacking in specificity or that any other documents had been substituted for the ones used to obtain the warrant.

In addition, the search warrant in this case referred to the affidavit at least three times (R. 940-943). While these references were part of the boilerplate language to acknowledge the probable cause in the affidavits, even this language appears to be sufficient for the doctrine of incorporation. See, State v. Gayle, 573 So. 2d 968 (Fla. 5th DCA 1991); State v. Stone, 322 A.2d 317, 317 (Me. 1974) (no particular means of attachment or words of incorporation is necessary to satisfy doctrine, appropriate to review facts on a case-by-case basis to determine if magistrate actually evaluated the supporting documents).

It is also important to note that the detective that executed the warrant in this case was the affiant, and it is undisputed that there was no confusion created by the missing description (R. 631). The knowledge of the executing officer can

be a factor for consideration in determining the sufficiency of a warrant. For example, in United States v. Wuagneux, 683 F. 2d 1343 (11th Cir. 1982), the defendant argued that the affidavit could not be used to cure an ambiguity in the warrant because the affidavit was neither incorporated into the warrant by express reference nor attached to the warrant. The Eleventh Circuit recognized that while courts typically have looked for these two factors, these criteria have not been rigidly applied in every case. The court in Wuagneux pointed out that in United States v. Haydel, 649 F. 2d 1152 (5th Cir.), modified, 664 F. 2d 84 (1981), cert. denied, 455 U.S. 1022 (1982), the record was not clear on whether the affidavit was physically attached, although the record did indicate that the affidavit was available at the search site and that the agents knew what they were looking for. In Wuagneux, the case agent's affidavit was brought to the search site, and the agent was present and had previously explained the contents of the affidavit to the other agents and given them an opportunity to read it. Thus, the Eleventh Circuit believed a more flexible approach was appropriate than the one urged by the defendant. The court in Wuagneux concluded that the searchers were adequately informed of the limitations on the search given their instructions by the case agent, their opportunity to read the affidavit, and its presence at the search site.

Similarly, in United States v. Gahagan, 865 F. 2d 1490 (6th Cir.), cert. denied, 492 U.S. 918 (1989), the defendants argued that a defect in the search warrant could not be cured by

reliance on the supporting affidavit because the affidavit was not specifically incorporated in the warrant and it was not attached to the warrant. Although the affidavit was not attached to the warrant, the agent testified that the affidavit was in his vehicle and readily accessible to the officers. Though the warrant itself did not specifically incorporate the affidavit, the trial judge found the warrant cross-referenced the affidavit and the court found the affidavit could be relied upon, in addition to other facts known by the executing officers, to cure the defect in the warrant. Thus, when one of the executing officers is the affiant who describes the property to the judge, the judge finds probable cause to search the property as described by the affiant, and the search is confined to the areas which the affiant described, then the search is in compliance with the Fourth Amendment.

In the instant case, there is no dispute that the description in the affidavit was proper; the affiant/executing officer was familiar with the vehicle to be searched; and the proper car was, in fact, searched. The affiant/executing officer supplied the magistrate with the description contained in the affidavit and therefore could reasonably ascertain the subject of the search warrant. Further, there was no risk that a mistaken search of another vehicle was possible given the officer's knowledge of the facts. On these facts, the warrant and accompanying affidavit were sufficient to permit the search of the Renault.

III. GOOD FAITH

The trial court rejected the state's good faith argument by simply noting language in United States v. Leon, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984) to the effect that a warrant may be so deficient, as in failing to particularize the place to be searched or the things to be seized, that the executing officers could not reasonably presume its validity (R. 1398-1399). At first blush, this rejection seems appropriate since good faith is not available where a warrant is so facially deficient that the police could not reasonably rely on it. State v. Ross, 471 So. 2d 196 (Fla. 4th DCA), cert. denied, 474 U.S. 945 (1985). However, in this case, Det. Sims' actions clearly demonstrate that he reasonably believed that the description in the affidavit had been incorporated and therefore limited the warrant, justifying the application of the good faith doctrine.

Sims testified that he first became aware of the omission of the Renault's description from the warrant when he was reading the warrant to the car prior to the search (R. 680-681, 684-685). At that point, he turned to the description in the affidavit, read the description, then continued reading the warrant (R. 680-681). The VIN on the affidavit was then compared with the Renault and the search commenced (R. 632). Thus, as a practical matter, he simply incorporated the description from the affidavit when reading and executing the warrant.

There are numerous federal cases which apply the good faith exception to the exclusionary rule when a warrant is facially deficient based on an officer's reasonable belief that an accompanying affidavit had been incorporated into the warrant. In fact, in Massachusetts v. Sheppard, 468 U.S. 981, 104 S. Ct. 3424, 82 L. Ed. 2d 737 (1984), Leon's companion case, the Court applied good faith while recognizing that if the affidavit been properly attached and incorporated, the warrant would have been valid, and resort to the good faith doctrine would have been unnecessary.

In United States v. Maxwell, 920 F. 2d 1028 (D.C. Cir. 1990), the court rejected the government's argument that the boilerplate language in the warrant referring to the probable cause affidavit was sufficient to incorporate the affidavit (although the court recognized that other federal circuits were more lenient in applying the doctrine of incorporation on similar facts). However, the court held that suppression was not required despite the warrant's failure to describe the premises to be searched or the items to be seized since the executing officer reasonably believed that the otherwise overbroad warrant was properly limited by the affidavits.

This appears to be the prevailing view. See, United States v. Russell, 960 F. 2d 421 (5th Cir.), cert. denied, 61 U.S.L.W. 3261 (1992)(good faith applied where clerical error resulted in omission of attachment which described things to be seized); United States v. Blakeney, 942 F. 2d 1001 (6th Cir. 1991), cert.

denied, ___ U.S. ___, 116 L. Ed. 2d 785 (1992)(good faith precluded operation of exclusionary rule where magistrate failed to explicitly incorporate affidavit); United States v. Curry, 911 F. 2d 72 (8th Cir. 1990), cert. denied, ___ U.S. ___, 112 L. Ed. 2d 1065 (1991)(while rejecting the doctrine of incorporation, the court held that reliance on the warrant was objectively reasonable under the totality of the circumstances, including the knowledge possessed by the executing officer); United States v. Anderson, 851 F. 2d 384 (D.C. Cir. 1988), cert. denied, 488 U.S. 1012 (1989); United States v. Thomas, 746 F. Supp. 65 (D. Utah 1990) (good faith applied where officers reasonably believed lack of particularity was cured by affidavit not sufficiently attached or doctrine of incorporation).

The application of good faith is particularly compelling where there is a total omission of a description of the place to be searched or the things to be seized due to inadvertence or clerical error, yet an indisputably sufficient description is provided in the supporting affidavit, as in the instant case. This was also the situation in Curry, Anderson, and Russell. Clearly, under these authorities, an objectively reasonable reliance is not limited to those situations where an affidavit is used to clarify an ambiguous description or to correct an erroneous one, but such reliance can also be found when the space provided on the warrant for a description has been left completely blank.

The facts of this case demonstrate that Det. Sims reasonably relied on the warrant as limited by the attached affidavit, and therefore suppression of the evidence seized from the Renault would not further the purposes of the exclusionary rule. Even if this Court agrees with the trial court that the doctrine of incorporation will not operate to cure the facial deficiency of the warrant in this case, the good faith doctrine should apply to uphold the search and seizure of this evidence.

ISSUE II

WHETHER THE TRIAL COURT ERRED IN SUPPRESSING THE PAPERBACK BOOK "POST MORTEM" SEIZED FROM THE DEFENDANT'S HOUSE.

The state also challenges the trial court's suppression of the paperback book "Post Mortem" which was seized from the defendant's house (R. 954, 1401). The book was suppressed as being beyond the scope of the warrant, since it was not particularly listed in the warrant (R. 1401). While it is true that the book was not included as evidence to be seized in the warrant, the state respectfully submits that it was readily apparent that the book was evidence pertaining to the crime to which the warrant was directed, and therefore was properly seized pursuant to the plain view doctrine.

The book was actually seized by Sgt. Sullivan in the course of searching for the fake fingernails that had been ripped off of the victim (R. 406-407, 813-815). The fingernails were a material part of the search of the defendant's house, since the police were aware that many killers keep "souvenirs" of their crimes and the fingernails in this case were conspicuously missing (R. 404, 813, 815). As part of the search, officers were routinely pulling books off of shelves and leafing through them in an attempt to locate the fingernails (R. 815). Initially, it was the title of the book "Post Mortem" that got Sullivan's attention (R. 407). When he picked the book up to leaf through it, he was intrigued by the picture of a dead person covered by a

sheet on the cover of the book, similar to the way Jackie Galloway had been found (R. 407, 409). He felt at that point that the book was connected to the crime, and his first thought was that the homicide had been a copy cat based on the book (R. 409). He could tell that the book had been read, at least partially, by the way the pages fell open (R. 410). The first passage that he noted described a woman with her wrists bound behind her with a cord, and another cord around her neck (R. 411). As he scanned other excerpts, it was apparent to Sullivan that the book paralleled the murder of Jackie Galloway (R. 416-418).

It is well settled, of course, that police may seize an item during the execution of a search warrant that is not included in the warrant if the police see the item in plain view within the lawful scope of the search and the incriminating nature of the item is "immediately apparent." Horton v. California, 496 U.S. 128, 110 S. Ct. 2301, 110 L. Ed. 2d 112 (1990); Coolidge v. New Hampshire, 403 U.S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971). The plain view doctrine is premised on the rationale that the officer has a prior justification for the intrusion, although it cannot "be used to extend a general exploratory search from one object to another until something incriminating at last emerges." 403 U.S. at 466. Thus, the application of the doctrine necessarily turns on the proper scope of the authorized search, and is therefore limited by the nature of the items being sought.

Since the police in this case were justified in leafing through books as part of their search for small items such as the missing fingernails, and the incriminating nature of the book was more and more apparent as Sgt. Sullivan read the book, the question becomes to what extent police were constitutionally permitted to peruse the written words of the book. While there is a dearth of case law on such a unique situation, the cases that do exist seem to consistently uphold an officer's right to read and digest information printed on a document where the right to view the document itself is uncontested. For example, in Bennett v. State, 787 P.2d 797 (Nev.), cert. denied, ___ U.S. ___, 112 L. Ed. 2d 260 (1990), the case that seems most on point with the instant facts, police were searching a suspect's house for his clothes, pursuant to a valid warrant issued in a murder case. In the defendant's bedroom, they inadvertently discovered poetry that had been written by the defendant on pieces of paper, and noticed that the poetry dealt with death and killing. The Nevada court held that the poetry was lawfully seized under the plain view doctrine.

Similarly, in State v. Parker, 690 P.2d 1353 (Kan. 1984), the police were searching a massage parlor for marked money which had been supplied by an undercover officer in a prostitution bust. They discovered and seized handwritten notes on plain sheets of paper lying on a desk top which gave specific instructions on what the "girls" should do in the event of a police raid. While Parker argued that the incriminating nature

of the notes was not evident, the court disagreed and upheld the seizure. Citing Coolidge, the court noted that the authorities only needed reasonable or probable cause to believe that the object taken was evidence of a crime, and found that a mere glance of the first page of these notes would reveal that the instructions pertained to an illegal enterprise.

In People v. Edwards, 579 N.E.2d 336 (Ill. 1991), cert. denied, ___ U.S. ___, 119 L. Ed. 2d 204 (1992), the defendant had been arrested for kidnapping and murder after the police had conducted surveillance based on tapped telephone calls of ransom demands. The officers were subsequently searching his house pursuant to a valid warrant, and they picked up a local telephone directory and flipped through it for evidence. They seized the book upon noticing that the victim's telephone number had been circled. In upholding the seizure, the court noted that the officers were permitted to flip through the book since they were looking for small items, and the fact that the victim's name was circled transformed the directory from a possible holding place for evidence to incriminating evidence in itself, properly subjecting it to seizure.

United States v. Jenkins, 901 F. 2d 1075 (11th Cir. 1990) involved the seizure of letters to the defendant from his mortgage company, indicating that the defendant was behind in his payments. The letters were discovered during a robbery investigation, while police were executing a warrant. Since the warrant authorized a search for small items such as bills and

stock certificates taken in the robbery, the police were justified in opening the bank deposit bag where the letters were found. The court upheld the seizure since the officers, upon seeing the letters, realized that they were evidence of a motive for the robbery. See also, United States v. Bonfiglio, 713 F. 2d 932, 936 (2d Cir. 1983) (in upholding the seizure of a cassette tape found in an envelope marked "Tap on Ben Bon Hoft" the court rejected the defendant's argument that the tape was not necessarily evidence of an illegal wiretap, since the tap may have been consensual, noting "it is not a prerequisite for a legal seizure ... that ... officers know with certainty ... the item is evidence of a crime"); United States v. Talbott, 902 F. 2d 1129 (4th Cir. 1990) (books on making bombs and handwritten "hit list" properly seized during execution of warrant authorizing search for identity-changing materials; guns and two pipebombs also found during course of search).

All of these cases seem consistent with the United States Supreme Court decision of Arizona v. Hicks, 480 U.S. 321, 107 S. Ct. 1149, 94 L. Ed. 2d 347 (1987). That case considered whether the plain view doctrine could be extended to situations where the police had less than probable cause to believe that the item in question was contraband or evidence of a crime. The police had entered Hicks' apartment after a bullet had been fired through the floor, striking and injuring a man in the apartment below. After officers properly (under exigent circumstances) entered the apartment to search for the shooter and any weapons or other

victims, they "noticed two sets of expensive stereo components, which seemed out of place in the squalid and otherwise ill-appointed four-room apartment." 480 U.S. at 323. One officer, suspecting the equipment had been stolen, moved some of the components to read and record the serial numbers. He then called headquarters and was advised that the equipment was in fact stolen, so he seized the components.

In ruling that the seizure violated the Fourth Amendment, the Court analyzed whether the officer's actions amounted to a "search" or a "seizure" of the serial numbers on the stereo. It held that the mere recording of the numbers was not a seizure, since it did not "meaningfully interfere" with Hicks' possessory interest in the stereo. Furthermore, "[m]erely inspecting" the objects that came into view when the equipment was moved was not a search, since it likewise "produced no additional invasion" of a privacy interest. However, the officer's action in moving the components was a "search" since it was "unrelated to the objectives of the authorized intrusion" and exposed otherwise concealed portions of the contents of the apartment, thus creating a new invasion of privacy unjustified by the exigent circumstances which validated the entry. 480 U.S. at 324-325.

It follows that Sgt. Sullivan's actions in reading excerpts from the book "Post Mortem" taken off the defendant's shelf in the instant case was not a search or seizure implicating the Fourth Amendment. Sullivan was justified in having the book open to search for small objects that were specified in the search

warrant, and his "mere inspection" of the words on the pages properly opened did not produce any additional intrusion beyond that authorized under the warrant. Sullivan's testimony that this inspection compelled an immediate realization that the book paralleled the murder they were investigating was undisputed. This testimony must be accepted since it was not "impeached, discredited, controverted, contradictory within itself, or physically impossible." State v. Bowden, 538 So. 2d 83 (Fla. 2d DCA 1989).

In Texas v. Brown, 460 U.S. 730, 103 S. Ct. 1535, 75 L. Ed. 2d 502 (1983), the Court cautioned that the phrase "immediately apparent" should not be "taken to imply that an unduly high degree of certainty as to the incriminatory character of evidence" would be necessary for application of the plain view doctrine. 460 U.S. at 741. The Court reiterated that probable cause was the correct standard, requiring

> that the facts available to the officer would 'warrant a man of reasonable caution in the belief' that certain items may be contraband or stolen property or useful as evidence of a crime; it does not demand any showing that such a belief be correct or more likely true than false. A 'practical, nontechnical' probability that incriminating evidence is involved is all that is required.

460 U.S. at 742 (citations omitted). Certainly Sullivan's discovery of a paperback book depicting a homicide that factually paralleled the murder the police were investigating during the execution of the warrant in this case warranted a reasonable belief that the book might be useful as evidence of the crime.

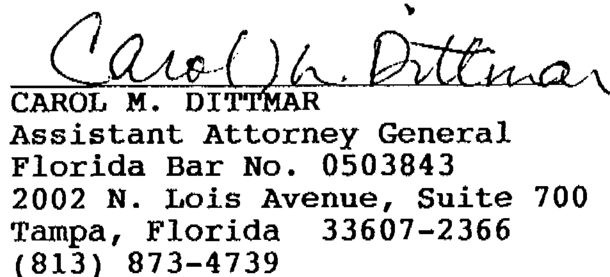
PAGE(s) MISSING

CONCLUSION

Based on the foregoing arguments and citations of authority, the appellant respectfully requests that this Honorable Court reverse the order of the trial court suppressing the evidence seized from the defendant's car and the paperback book seized from the defendant's house.

Respectfully submitted,

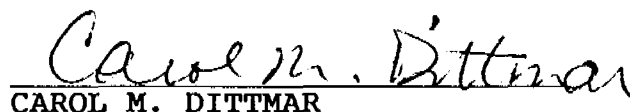
ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



CAROL M. DITTMAR
Assistant Attorney General
Florida Bar No. 0503843
2002 N. Lois Avenue, Suite 700
Tampa, Florida 33607-2366
(813) 873-4739

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Deborah K. Brueckheimer, Assistant Public Defender, Polk County Courthouse, P.O. Box 9000--Drawer PD, Bartow, Florida, 33830, this 19th day of March, 1993.



CAROL M. DITTMAR

OF COUNSEL FOR APPELLANT

cmd.waterman

IN THE DISTRICT COURT OF APPEAL, SECOND DISTRICT
STATE OF FLORIDA

STATE OF FLORIDA,

Appellant,

v. Case No. 91-3843

JOHN WATERMAN,

Appellee.

______________________/

INDEX TO APPENDIX

Exhibit "A" Order on Defendant's Motion to Suppress Evidence

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT
SARASOTA COUNTY, STATE OF FLORIDA

STATE OF FLORIDA,

Plaintiff, CASE NO. 91-2217-F

vs.

JOHN WATERMAN,

Defendant.
_______________________________/

ORDER ON DEFENDANT'S MOTION TO SUPPRESS EVIDENCE

THIS CAUSE having come to be heard on the Defendant's Motion To Suppress and the Court having heard testimony, reviewed relevant evidence, heard arguments of counsel, reviewed written Memorandums of Law, and being otherwise fully advised, hereby makes the following findings:

Summary of Facts

On July 16, 1991, Defendant, while at the intersection of Floyd Street and Briggs, in the City of Sarasota, County of Sarasota, Florida, was stopped by an off-duty Sarasota County Sheriff's Deputy, Detective Don Wenger. Detective Wenger was at his home, located at this same intersection, when he noticed a 1991 white Buick parked in front of the house across the street. This took place at approximately 10:00 p.m., and seeing no occupants of the car, he called his office to have them check on the identity of the owner. Suspecting that the vehicle may be stolen, he requested his office to contact the Sarasota Police Department, since the car was located within the City limits, and asked that a patrol officer respond to that location.

While awaiting the arrival of a City Police Officer,

Detective Wenger saw the Defendant approach the vehicle from behind a house that had been converted to a business use. The house was unoccupied and dark at that time of night. The Detective approached the Defendant, identified himself as a Deputy Sheriff and asked the Defendant for identification and an explanation for his presence in the area. The Defendant provided Detective Wenger with his drivers license and stated that he was looking at the property as a possible real estate investment. The house in question had no for sale sign or other indication of it being for sale. The Defendant was dressed in black and appeared visibly nervous.

A few minutes later, Officer Brenda Redden of the Sarasota Police Department arrived on the scene in her marked patrol unit and engaged in a conversation with Detective Wenger, outside of the Defendant's hearing. While this took place, the Defendant was not restrained and made no attempt to flee the scene. Detective Wenger explained to Officer Redden what he had observed. Detective Wenger asked Officer Redden to arrest the Defendant.

Mrs. Hammond was the owner of the 1991 Buick. When contacted by law enforcement she stated that she thought her vehicle was in her parking garage and that the Defendant did not have permission to use the vehicle on the night in question.

At this point, Officer Redden arrested the Defendant for Loitering and Prowling.

Defendant was placed in Officer Redden's patrol car, and a tow truck was called to remove the Buick from the scene. While under arrest, the Defendant was requested by Officer Redden to

sign a consent to search the Buick and Defendant complied. Mrs. Hammond signed a separate consent to search the Buick.

Officer Redden transported the Defendant to the Sarasota County Sheriff's Department for booking (all City arrests are booked at the Sarasota Sheriff's Department) where she delivered the Defendant to the custody of the Detention Officers and commenced to complete her arrest report and the Probable Cause Affidavit for the charge of Loitering and Prowling.

Meanwhile, Detective Wenger, recalling a discussion with the Defendant as to why he would want to move from his current location, became suspicious when the Defendant indicated that his next door neighbor had been murdered and further expressed interest in the homicide. Detective Wenger, although not directly involved in the homicide investigation of Jacqueline Galloway, recalled that she had been living on Floyd Street at the time her body was found on June 13, 1991 and began wondering whether or not the detectives had interviewed the Defendant.

As the Defendant was being arrested by Officer Redden and taken to jail, Detective Wenger contacted Detective Kimball of the Sarasota County Sheriff's Department, who was familiar with the Galloway homicide investigation. Detective Wenger relayed to Detective Kimball what had taken place, and it was decided that they would question the Defendant about the Galloway murder after he was brought to the jail for the Loitering and Prowling charge.

The Defendant was subjected to interrogation by detectives of the Sarasota County Sheriff's Department regarding any knowledge he may have concerning the Galloway homicide. This

interrogation lasted until approximately 5:00 a.m.

During this period of interrogation, the Defendant was cooperative and provided the detectives with information concerning the location of his own personal vehicle and the contents of his residence. However, when questioning continued concerning the Galloway homicide, he requested an attorney and to see his father. This request for an attorney was ignored and the interrogation continued for another hour. The Defendant made no incriminating statements nor did he provide any new information during this period after he had invoked his constitutional right to counsel.

As a result of the interrogation of the Defendant and the information received from his girl friend, Noel Strickland, the detectives learned that the Defendant's automobile, a 1985 Renault, was parked on the second floor of a private parking garage which is part of the Bay Plaza Condominium in downtown Sarasota, Florida. Thereafter, Detective Wenger proceeded to that location and asked the Security Guard at the parking lot, Bart Wimer, to show him the Defendant's vehicle. Mr. Wimer was personally acquainted with the Defendant and his vehicle, knowing him to be the chauffeur for Mrs. Hammond, a resident of the condominium. Mr. Wimer opened the security gate and permitted the detective to enter into the parking garage and showed him the location of the Defendant's vehicle on the second floor. Also present with Detective Wenger was Detective Sullivan who, upon seeing the Defendant's car, used a flashlight to look through the windows where he spotted a length of cord balled up and laying

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between the driver and passenger seat. The detectives felt that this cord was similar to the cord used to strangle Jacqueline Galloway. They left the parking garage and returned a short while later with a tow truck and towed the Defendant's vehicle to the Sheriff's Department compound, without benefit of any Warrant.

Later, that same morning, Detective Sims of the Sarasota County Sheriff's Department located a County Judge and presented him with two identical Search Warrant Affidavits, one for the Buick and one for the Renault. These two Search Warrants were signed, but neither Search Warrant described any place to be searched (the description of the place to be searched was left blank). Furthermore, each Warrant said "John Water" (not Waterman) was believed to have committed the crime of murder.

Thereafter, both vehicles were searched and items of physical evidence were seized from each vehicle. As a result of the materials seized from the vehicles, statements made by the Defendant, and knowledge of the Galloway homicide, Detective Sims prepared a Search Warrant Affidavit for the Defendant's home.

The next day, July 18, 1991, after obtaining a Search Warrant from Scott Brownell, Circuit Judge for the Twelfth Judicial Circuit, Detective Sims and officers of the Sarasota County Sheriff's Department conducted a search of the Defendant's home, seizing various items of property which they deemed to be potential evidence in the Jacqueline Galloway homicide. Shortly after completion of this search, the Defendant returned to his home, while the detectives were still present, and was placed under arrest for the charge of Homicide.

The issues in this cause are:

I. Was the arrest of Loitering and Prowling lawful?

II. Was the seizure and subsequent search of the 1991 Buick lawful?

III. Was the seizure and subsequent search of the 1985 Renault automobile from the Bay Plaza Condominium parking garage lawful?

IV. Was the search warrant for the Defendant's home valid?

V. Was there an illegal seizure of property which was not described in the search warrants?

Findings of Law

1. As to the arrest of Defendant, John Waterman, for Loitering and Prowling, the Court makes the following findings:

The arrest of the Defendant, John Waterman, by Officer Brenda Redden of the Sarasota Police Department was lawful. Detective Wenger encountered the Defendant under circumstances which reasonably indicated that the Defendant had committed, was committing, or was about to commit a violation of the criminal laws. The "fellow officer rule" as set forth in Carroll v. State, 497 So. 2d 253 (3rd DCA 1985) is applicable as Detective Wenger requested Officer Redden to arrest the Defendant. Furthermore, Detective Wenger's probable cause to arrest John Waterman was based upon specific and articulable facts, which, taken together with rational inferences from those facts, reasonably warranted a finding that on July 16, 1991, at approximately 10:00 p.m., the Defendant loitered or prowled in a place, at a time or in a manner not usual for a law abiding individual, and such loitering and prowling was under circumstances that warranted justifiable and reasonable alarm or immediate concern for the safety of persons or

property in the vicinity. Prior to his arrest, the Defendant was given an opportunity to dispel Detective Wenger's alarm or concerns, however, the Court finds that the offered explanation failed to adequately dispel the Detective's alarm or concern for persons and property in the vicinity.

2. As to the seizure and subsequent search of the 1991 Buick owned by Alice Hammond, the Court finds as follows:

The 1991 Buick, having been parked in the right-of-way and potentially impeding traffic, was lawfully impounded by the Sarasota Police Department, as a caretaking function for the safety of the public and for the protection of the vehicle and it's contents. The Defendant was not in lawful possession of the 1991 Buick on the night in question as it's owner, Mrs. Hammond, testified that she thought the vehicle was in her garage; that she had not given the Defendant permission to have the vehicle on the night in question; and the Defendant was always to have her approval to take the vehicle at night. Therefore, the Defendant had no legitimate reasonable expectation of privacy in the 1991 Buick and is not entitled to challenge the seizure of items taken from the vehicle during the subsequent search. See Rakas v. Illinois, 439 U.S. 128 (1978).

The validity of the search warrant regarding the 1991 Buick is moot as the Defendant had no expectation of privacy in the vehicle and prior to the search, a voluntary consent was given by both the Defendant and the owner, Alice Hammond.

3. As to the seizure and subsequent search of Defendant's 1985 Renault from the Bay Plaza Condominium parking garage the

Court finds as follows:

The 1985 Renault vehicle was parked in a private parking garage with limited access at the Bay Plaza Condominium Complex. At the time of the seizure of the subject vehicle, no warrant had been issued. As in the U.S. Supreme Court decision of Coolidge v. New Hampshire, 30 LEd. 2d 120 (1971), the Court finds there are no exigent circumstances to justify the failure to obtain a valid search warrant before searching the subject vehicle. Secondly, the search warrant itself regarding the 1985 Renault vehicle is defective. The Court specifically finds the Affidavit for said search warrant to contain sufficient probable cause, however, the search warrant itself is blank as to the property to be searched. The Fourth Amendment to the United States Constitution and Article I, Section 12 of the Florida Constitution both provide that search warrants shall particularly describe the property to be seized. This constitutional command is further amplified by Florida Statute Section 933.05 which specifically prohibits the issuance of search warrants in blank and again commands that the warrant particularly describe the property or thing to be seized.

The State further argues that the search of the 1985 Renault is valid under the "good faith exception" as set forth in United States v. Leon, 468 U.S. 897, 104 S.Ct. 3405 (1984). This argument fails in light of the fourth exception to the rule set forth in United States v. Leon with the Leon Court having stated that exception as follows:

> "Finally, depending on the circumstances of the particular case, a warrant may be so facially deficient - i.e., in failing to particularize the place to be

> searched or the things to be seized- that the executing officers cannot reasonably presume it to be valid."

104 S.Ct. 3405 at page 3421.

The search warrant in the instant case is deficient on it's face by failing to particularize the place/thing to be searched. The State's remaining arguments on this point that this was a lawful "Carroll Search" and that the affidavit in support of the blank search warrant suffices under the "Doctrine of Incorporation" are also rejected. On the "Doctrine of Incorporation" argument, the Court specifically finds that the affidavit in support of the search warrant and the search warrant itself were not adequately physically attached in a legal sense at the time they were handed to the magistrate for review and signing as, at best, each separate page was loose and secured only by a paper clip. This requirement of sufficient physical connection of the affidavit and search warrant is set forth in Bloom v. State, 283 So. 2d 134 (4 DCA 1973). In addition, the Court in State v. Schrager, 472 So. 2d 896 (4 DCA 1985) has taken the position that the "Doctrine of Incorporation" is no longer applicable in the State of Florida. That Court in rather succinct language at page 898 of it's Opinion stated the following:

> "...the contents of a supporting affidavit may no longer be considered in determining the validity of a warrant."

4. As to the search warrant for the Defendant's home the Court finds as follows:

The Court realizes that any information regarding items seized from the 1985 Renault which were incorporated into the

affidavit for search warrant of the Defendant's home may not be properly considered in determining probable cause as the items seized from the Renault have been suppressed. Nevertheless, even excluding language applicable to the 1985 Renault from the affidavit for search warrant, the Court concludes that there were sufficient factual allegations contained in the affidavit to support a finding of probable cause to search the Defendant's residence.

5. Was there an illegal seizure of property which was not described in the search warrants?

There was no illegal seizure of property regarding the 1991 Buick and, accordingly, the items seized from that vehicle are not suppressed. Conversely with the Court having previously found that the seizure and search of the 1985 Renault was improper, all items seized from the search of that vehicle are suppressed. The remaining seizure of property concerns the search and seizure that took place at the Defendant's residence. In that regard, the Court finds that the following items were specifically enumerated in the search warrant or are covered under the "plain view" doctrine and thus were properly seized to wit:

beige pillow case with brown binding
second beige pillow case with brown binding
dust sample
length of cord - chest
piece of cord with loop - top of chest
piece of cord in hall closet
fiber sample - bedspread
fiber sample - ruffled bedspread
shoelace with loop
gray Pierre Cardin bag
cloth string with loop
two vacuum bags with debris
fiber clump - couch
beige sheet

001400

carpet from closet (sample)

The search warrant contained additional language that stated the following:

> "Other contraband or stolen goods, or other implements or devices that could have been used or could further be used in the violations of the laws of the State of Florida relative to the subject matter of this warrant..."

That language together with the "plain view" doctrine allows the following items to have been properly seized, to wit:

rocking blade knife
black hood
plastic gloves
gray driving gloves
maroon necktie
one pair of boots

The State attempts to validate the seizure of the remaining items under the "plain view" doctrine as set forth in the U.S. Supreme Court case of Coolidge v. New Hampshire, 403 U.S. 443, 29 L.Ed. 2d 564, 91 S.Ct. 2022 (1971) and a number of other cases. In essence the "plain view" doctrine states that items may be seized which were not otherwise set forth in the warrant provided that they were in plain view and were apparent to the officer that they constituted incriminating evidence. See Horton v. California, 110 L.Ed. 2d 112 (1990). The remaining items seized in the search of the Defendant's residence are not covered by the language of the warrant or the "plain view" doctrine and are thus suppressed as evidence. Those items are as follows:

two spiral notebooks
one paperback book titled "Post Mortem"
miscellaneous papers - desk drawer
I.D. badge and socket
five video tapes

6. Any further miscellaneous matters raised by the Defendant in his Motion To Suppress which have not been specifically addressed in this Order are hereby denied.

DONE AND ORDERED in Sarasota County, Florida, this 6th day of November, 1991.

JAMES W. WHATLEY, CIRCUIT JUDGE

CC: Tobey Hockett, Esquire
Assistant Public Defender

David Denney, Esquire
Assistant State Attorney

001402

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

STATE OF FLORIDA,	:	
Appellant/Cross-Appellee,	:	
vs.	:	Case No. 91-3843
JOHN WATERMAN,	:	
Appellee/Cross-Appellant.	:	
	:	

APPEAL FROM THE CIRCUIT COURT
IN AND FOR SARASOTA COUNTY
STATE OF FLORIDA

ANSWER BRIEF OF APPELLEE/AND INITIAL BRIEF ON MERITS BY CROSS-APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

DEBORAH K. BRUECKHEIMER
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NUMBER 278734

Public Defender's Office
Polk County Courthouse
P. O. Box 9000--Drawer PD
Bartow, FL 33830
(813) 534-4200

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STATEMENT OF THE CASE AND FACTS

Mr. Waterman accepts the State's Statement of the Case and Facts with such additions or objections noted in the issues in this brief. Appropriate "R" numbers are set forth in such instances.

SUMMARY OF THE ARGUMENT

The suppression of the evidence from the Renault was proper in that a warrant was required to search the car. In order to have a valid warrantless search of a vehicle there must be probable cause to believe there is criminal evidence in the car and the car must be on non-residential property. Neither of these two elements existed in this case when the seizure and search was made. The alternative way to have a valid warrantless search is to have exigent circumstances; but the only exigent circumstance in this case was that created by the officers. The warrant that the State had in this case was no good because it failed to describe what property was to be searched. Although the affidavit described what was to be searched, the affidavit could not be incorporated by reference into the warrant. If the doctrine of incorporation is still valid, then this affidavit was not properly incorporated - the affidavit was not physically attached to the warrant, there was no specific reference of adoption of the affidavit in the warrant, there was an error in Mr. Waterman's name on the warrant, and the affidavits were not left with the cars searched. The good-faith exception cannot save this warrantless search because the warrant was so facially deficient as to make the good-faith exception

inapplicable, and the deficiency was caused by the officer - not the judge.

The trial court was also correct in suppressing the book found in Mr. Waterman's house because the book was not specified in the warrant and was not in "plain view" - it had to be removed from the bookshelf and read in order to determine if it was criminal evidence. That movement constituted a separate seizure and search that could not have been done without probable cause. In this case there was no probable cause to believe the book was evidence of a crime before it was moved.

As for the evidence the trial court did not suppress, Mr. Waterman claims the trial court did err. First and foremost, the trial court erred in finding there was probable cause to arrest Mr. Waterman for loitering and prowling because there was no reason to believe the immediate safety for persons or property in the near future was a valid concern. In addition, the arresting officer did not witness anything pertaining to this alleged misdemeanor; thus, she could not make a warrantles arrest for a misdemeanor not committed in her presence. The "fellow officer" rule doesn't apply to the crime of loitering and prowling; and, in this case, the officer who did witness some of the events did not command a fellow officer to make the arrest (he only suggested she make the arrest).

The trial court also erred in not suppressing all of Mr. Waterman's statements as they were illegally obtained - statements made as a result of police inquiry without benefit of Miranda warnings and statements made while illegally detained.

Last but not least, the evidence seized from Mr. Waterman's residence should also be suppressed. The affidavit does not set forth sufficient information to establish probable cause for the search, and the objects to be seized are of such a general nature so as to have resulted in a general exploratory search of Mr. Waterman's residence.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN SUPPRESSING EVIDENCE SEIZED FROM THE DEFENDANT'S RENAULT. (AS STATED BY APPELLANT/CROSS-APPELLEE.)

The State challenges the suppression of the evidence seized from Mr. Waterman's car, a 1985 Renault, on three grounds: (1) no warrant was required initially to seize and search the car based on the automobile exception; (2) if a warrant was required, then the warrant was not fatally defective inasmuch as the missing description was in the affidavit which was incorporated into the warrant; and (3) if the warrant is bad, then the search was valid based on the good faith exception. Each of these will be addressed below, but it must first be noted that none of these issue are valid if the initial arrest of Mr. Waterman was invalid. That issue will be addressed in Issue III.

A. No Warrant Required

The State argues California v. Carney, 471 U.S. 386, 105 S.Ct. 2066, 85 L.Ed.2d 406 (1985), for the proposition that the police could conduct a warrantless seizure and search of Mr. Waterman's

car without exigent circumstances. There are three items needed for Carney, however, to be applicable: probable cause to believe there is evidence of a crime inside the car, the car is on nonresidential property, and the car is mobile. The first two items do not exist in the case sub judice.

Fist of all any probable cause the police might have had to justify a search and seizure came directly as a result of the unlawful arrest of Mr. Waterman for loitering and prowling. (This issue will be fully addressed in Issue III.) Without that illegal arrest, probable cause could not exist to seize and search the Renault.

Secondly, the car was not on nonresidential property. It was parked in a private parking garage with limited access at the Bay Plaza Condominium Complex. This was a parking garage not open to the general public. This parking garage is mainly for residents, and what little access is made to the public is very limited. As the security guard Bartram Wimer pointed out, swinging arms block the access to the entrance to the garage (not just part of the garage). If a visitor approaches, they have to state their business before being let in; and visitors to the restaurant (which was not open at the time of the search - R564) have to use valet parking. (R75, 78) Mr. Waterman's father - Jerry Waterman - had one of the few businesses allowed in the Bay Plaza Condominium, and not even he nor his clients could simply park their cars in the parking garage. He always used valet parking; and if his customers did not want to use valet parking, they would have to park on the street.

The same procedure, according to Jerry Waterman, was used by visitors of residents or workers; and this procedure had been in effect when Jerry Waterman became an owner in February 1986. (R566-569) The State argued that big metal doors separated the garage into residential and nonresidential areas with Mr. Waterman's car being in the nonresidential section, but the reality of the situation is that these doors did not really make any difference. As Jerry Waterman pointed out in the State's cross examination, if the spaces on the first three floors before the doors were filled, it was common practice for the valets to park the cars in the area beyond the metal doors (R594, 595). In addition, the way the entire parking garage was treated demonstrates extremely limited access. Even the police could not gain access without assistance from the guard, and that guard questioned the authority of the police to simply take without a warrant a car parked in that garage (R53, 57, 63, 65, 70).

In Carney the court merged the concepts of mobility and expectations of privacy. If the car is on the highways or readily capable of such use (i.e., mobile) and is found stationary in a place not regularly used for residential purposes - temporary or otherwise - there is a reduced expectation of privacy. Carney, 471 U.S. at 392, 393. Reduced expectation of privacy is the key issue here. The cases cited by the State clearly show cars parked in public areas: U.S. v. Parrado, 911 F.2d 1567 (11th Cir. 1990) (van had left defendant's home and gone to a coffee shop); U.S. v. Panitz, 907 F.2d 1267 (1st Cir. 1990) (vehicle stopped and seized

while in transit on a road); U.S. v. Reis, 906 F.2d 284 (7th Cir. 1990) (vehicle parked in street in front of defendant's house); U.S. v. Vasquez, 858 F.2d 1387 (9th Cir. 1988) (defendant arrested when he delivered cocaine to an undercover police officer and his car was searched at time of arrest; defendant was not at his apartment at the time but had driven to another location); State v. Williams, 816 P.2d 342 (Idaho 1991) (defendant stopped in transit on interstate when warrantless search of car took place; People v. Romero, 767 P.2d 1225 (Colo. 1989) (defendant stopped while driving; car left in parking lot of a bar when defendant arrested); State v. Tomah, 586 A.2d 1267 (Me. 1991) (defendant's car parked on street in front of girlfriend's house); State v. Starkey, 559 So.2d 338 (Fla. 1st DCA 1990) (defendant's car parked in public parking lot). Also, see State v. Hicks, 579 So.2d 836 (Fla. 1st DCA 1991) (defendant's car was parked in a bank parking lot). Contrary to the State's interpretation of Carney, Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971), has not been overruled by Carney. In Coolidge, a seizure of a parked car on private property with a defective warrant was found to be no good. The court focused on the difference between stopping, seizing, and searching a car on the open highway and entering private property to seize and search an unoccupied, parked car not presently being used for any illegal purpose. The automobile exception was not applicable. Carney can be harmonized with Coolidge.

Carney has made location of a vehicle an important issue with the idea that if a person is out and about in their vehicle, then

they have a reduced expectation of privacy because the vehicle is in public places. That level of reduced expectation is not present here. Mr. Waterman's car was parked in a private garage; he was not out and about exposing his car to the public. Under the totality of the circumstances Mr. Waterman had a reasonable - not reduced - expectation of privacy when he parked his car at the private parking garage at Bay Plaza. See State v. Suco, 521 So.2d 1100 at 1102 (Fla. 1988) (reasonable expectation of privacy to be determined by totality of the circumstances in any given case). This expectation of privacy is applicable to the work place, as well as the home, in the context of Mr. Waterman's private property being searched. See O'Connor v. Ortega, 480 U.S. 709, 107 S.Ct. 1492, 94 L.Ed.2d 714 (1987) (an employee may have an expectation of privacy in his private office, desk, and anything brought into the office of a personal nature such as a suitcase as well as a reasonable expectation of privacy in the workplace from intrusions by the police). Carney is not applicable.

Of course, the State goes on to argue that if exigent circumstances are required in this case to uphold a warrantless seizure and search, then such circumstances exist because Mr. Waterman had been confronted with the following: the police said they believed he killed the victim, and the police had been to his car and seen the cord. Because Mr. Waterman could have been released at any time (although he was not released until about 7 a.m. - R588), the police believed James Waterman could go to his car and move it or have someone else move it. This is an exigent

circumstance created by the government, and such deliberately created exigent circumstance cannot justify a warrantless search. See Panitz, 907 F.2d at 1270; U.S. v. Curzi, 867 F.2d 36 at 43 n.6 (1st Cir. 1989); U.S. v. Thompson, 700 F.2d 944, 950 (5th Cir. 1983); and cases cited therein. Furthermore, the sheriff's department had the information for the warrant by 4 a.m. and they would not release Mr. Waterman (despite repeated efforts by his father to bond Mr. Waterman out), till 7 a.m. During that time they could have obtained a warrant. "[L]aw enforcement officers cannot be permitted to convert self-imposed delay into a circumstance of exigency when the elapsed time is sufficient to seek a warrant." Alvarado v. State, 466 So.2d 335 at 337 (Fla. 2d DCA 1985).

B. Doctrine of Incorporation

If the warrantless seizure and search of the Renault is bad, then the State alternatively argues the warrant that was obtained on the Renault was good. Thus, the State is trying to justify the search of the Renault based on the warrant that was obtained several hours after the car was seized (car seized at 4:30 a.m. and warrant signed at 8:15 a.m. - R62, 63, 623-627). This argument must rely on the reasoning of Segura v. U.S., 468 U.S. 796, 104 S.Ct. 3380, 82 L.Ed.2d 599 (1984) (holding that securing a dwelling on the basis of probable cause to prevent the destruction or removal of evidence while a search warrant is obtained is not an unreasonable seizure and subsequent search under warrant is valid) to make this leap to the warrant. The problem with this is that

probable cause must first exist (which will be argued in Issue III) and that there is an assumption of a search done pursuant to a valid warrant. The warrant, however, in this case was not valid.

There is no dispute that the description of what was to be searched was left out of both of the vehicle warrants. Because the preparer of these warrants was using identical information in both the warrants and affidavits, he made 2 sets of paperwork by just xeroxing the original set (R617). In the name of expediency, Det. Sims created 2 identical search warrants that could be used on either car (R618). This short cut was further complicated when the detective did not bother to staple the paperwork together for each vehicle. Thus, the detective had 2 sets of unnumbered, unattached identical paperwork wherein pieces of each set could easily be swapped and no one could tell which set belonged to which car - not even the author. In order to argue the validity of the warrant, the State argues that the affidavit could be incorporated into the warrant. Mr. Waterman and the trial court disagree with this argument.

Although the State glosses over State v. Schrager, 472 So.2d 896 (Fla. 4th DCA 1985), it is a case that merits discussion inasmuch as it establishes conflict with opinions issued by this Court. Schrager specifically stated that based on language set forth by the Florida Supreme Court in Carlton v. State, 449 So.2d 250 (Fla. 1984), "the contents of a supporting affidavit may no longer be considered in determining the validity of a warrant."

Schrager, 472 So.2d at 898. The language referred to in Carlton is:

> We believe that the particularity requirement and its constitutionality must be judged by looking only at the information contained within the four corners of the warrant. We do not believe that the drafters of our constitution and this state's legislators intended that the language of a warrant be scrutinized and compared to the knowledge of the officer seeking the warrant and/or the information contained in the supporting affidavit.

Carlong, 449 So.2d at 251. Thus, the 4th DCA has held that the doctrine of incorporation has been abolished. This Court's holding to the contrary in State v. Wade, 544 So.2d 1028 (Fla. 2d DCA 1989), addresses Carlton but says nothing about Schrager. Likewise, this Court's opinion in State v. Carson, 482 So.2d 405 (Fla. 2d DCA 1985), upheld the concept of incorporation by reference but makes no reference to Schrager. Since the conflict has not been addressed in these prior cases, it needs to be addressed now.

The facts in these 2d DCA cases are also distinguishable from this case. In Wade the space in the search warrant where certain items should have been instead - due to limited space on the warrant - had words about exhibits (A and B) being incorporated and made a part of the warrant. The issuing judge in that case then "carefully identified each page of the exhibits with his initials, the date, and the time of day. He did all that he could to indicate that the exhibits were part of the body of the search warrant." Wade, 544 So.2d at 1030. In Mr. Waterman's case none of

these circumstances were present: there is plenty of room on the search warrant for the description needed on the vehicles (R935, 940-943); there are no words at all where the description of what is to be searched is at - the entire area is blank (R940-943); neither the judge nor the detective numbered, initialed, or dated the search warrants and affidavits (R679). Unlike Wade nothing was done to make the affidavit a part of the body of the search warrant. Likewise in Carson the exhibits were referred to and incorporated by reference specifically in the spaces reserved for certain information (exhibit A had detailed description of premises to be searched and exhibit B had detailed statement setting forth probable cause); and the judge and the police officer initialed each page of the exhibits. In addition, the one warrant and one affidavit were in one file folder; and the defendant was served with the entire packet. As for the additional facts not present in Wade, we are dealing with two warrants which were identical. The only thing that could have set these two warrants apart was the description that was left totally blank. The fact that one set was in a file folder in Carson shows that no confusion could take place. The same cannot be said in Mr. Waterman's case. Physically trying to hold the two separate packets together with a paperclip is not a sufficient safeguard in this case - contrary to the State's argument. With so many identical sheets of paperwork being handled at the same time, a mere paperclip was not enough to insure a separation of documents. Also, the fact that the defendant in Carson got a total package served on him was noted by this Court.

The same was not true in this case. In both the Renault and the Buick only the warrants and a property receipt were left in the cars. The affidavits were not left in the cars (R260-263, 268-270, 682-684).

Perhaps the problem with poorly prepared warrants that must be rescued by affidavits is causing this Court to rethink its original position in Carson. In the recent case of State v. Kingston, 18 Fla. L. Weekly D1075 (Fla. 2d DCA April 21, 1993), this Court looked at a warrant issued in the same county (Sarasota). Instead of just holding the warrant to have incorporated the affidavit for the missing description of the place to be searched, it noted that if the warrant was invalid it would apply the good faith exception pursuant to U.S. v. Leon, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984). This same qualification/alternative means of disposing of the issue was not used in Carson, 482 So.2d at 407: "Because of our disposition of the case, we need not address whether the good faith exception to the warrant requirement would have been applicable." In Kingston the warrant did not describe the place to be searched at all. The 9 pages of materials - warrant, affidavit and return - were numbered consecutively and handed to the judge. Physical attachment was equivocal (the pages may or may not have been stapled together when handed to the judge), and the 3 form "whereas" clauses in the warrant referred to the affidavit. Although there was no specific incorporation by reference to the affidavit and although there was no physical attachment, this Court was "inclined" to conclude the warrant was sufficient. This Court

concluded the warrant was valid because it enabled the searcher to identify the place to be searched with reasonable effort. In our case there is a paperclip holding the pages together and 3 form "whereas" clauses with general references to the affidavit, but no specific adoption of the affidavit for a specific purpose. Mr. Waterman contends that this general boilerplate reference does not constitute "'suitable words of reference' which incorporate the affidavit by reference." U.S. v. Vaughn, 830 F.2d 1185 at 1186 (D.C. Cir. 1987). Other courts have agreed with this contention in rejecting mere boilerplate language as an incorporation. U.S. v. Maxwell, 920 F.2d 1028 at 1032 (D.C. Cir. 1990); U.S. v. Strand, 761 F.2d 449, 453-454 (8th Cir. 1985).

The additional problem in our case is that there are two different cars being searched and the two search warrants are identical. It cannot be said that the searcher would obviously figure out what was to be searched. With one set of paperwork that might be true, but with two sets and two places to be searched that assumption cannot be made. The State argues that the officer executing the warrants had inside information inasmuch as he was the same officer that prepared the warrants and took them to the judge. This concept was rejected by the 1st DCA in Shedd v. State, 358 So.2d 1117 (Fla. 1st DCA 1978), wherein the warrant described the wrong address to be searched; but the officer who gave the affidavit on the warrant, accompanied the officers to the address that was really supposed to be searched. The address on the warrant was ignored. The court held that this was not proper and

the motion to suppress should have been granted. The court stated that the search must be based on the description set forth in the warrant and not left to the discretion of an officer. If an officer without independent knowledge does not know where to search, then the warrant is no good. The authority to search, the court held, is limited to the place described in the warrant and does not include additional or different places. Id. at 1118. In our case there were two locations that could be searched - the Renault or Buick. Independent officers might not have been able to keep the searches straight.

This Court's more lenient approach to the concept of incorporation by reference is perhaps why this Court alternatively relied on the good faith exception. This issue will be discussed in the next subsection, but Mr. Waterman argues (and the trial court agrees) that this good-faith exception is not applicable to this case.

In addition to the affidavit not being incorporated into the warrant, there are other problems. The warrants improperly identified Mr. Waterman as "John Water" (R940-943). The Florida Supreme Court held that a scrivener's error on the search warrant as to the name of the owner of the residence to be searched was not important inasmuch as the place to be searched was sufficiently identified on the face of the warrant. Power v. State, 605 So.2d 856 (Fla. 1992), citing to Carr v. State, 529 So.2d 805, 806 (Fla. 1st DCA 1988). Although the error does not pertain to Mr. Waterman being referred to as the owner of the cars to be searched, it is

one more error that shows the importance of having a proper search warrant with the place to be searched properly set forth on the face of the warrant. Because there was no place to be searched set forth in these two warrants, the scrivener's error of Mr. Waterman's name may now take on a more prejudicial aspect in determining whether to uphold the trial court's decision on the warrant being fatally defective.

More importantly, the defective search warrants were served on the cars without the all-important affidavits being attached (R260-263, 268-270, 688-684). Only the warrants were left with the cars. In State v. Nelson, 542 So.2d 104 (Fla. 5th DCA 1989), the warrant did not independently contain a description of the premises to be searched. The warrant had incorporated the affidavit by reference, but said affidavit was removed and not physically attached at the time of execution. The officer executing the warrant did not have the affidavit when he executed the search contrary to Section 933.11, Florida Statutes (1987). That statute requires the officer to serve a copy of the person named in the warrant. Because the warrant itself was not complete, executing it without the affidavit made the search illegal. In our case the officer does not say how the affidavit was connected to the search warrant when he read the warrant to the cars, but paperclips are not good for flipping pages back and forth. Definitely, the affidavit was not left with the cars as part of the execution process. Thus, the missing description on the warrant and the missing/unattached affidavit made the search warrant invalid.

C. Good Faith

As an argument of last resort, the State argues the good-faith exception under U.S. v. Leon, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984), to salvage the seizure and search of the Renault. The State tries to claim that Det. Sims reasonably believed the affidavit was incorporated into the warrant and acted in "good faith." The State then cites a string of cases for this proposition. The concept of believing an affidavit was properly incorporated, however, is not really the issue in this case or in the cases set forth by the State. With the exception of one case,[1] the cases cited by the State all stand for one concept: the judge/magistrate issuing the warrant made some type of mistake that led the officer to reasonably believe the warrant had been cured of any defects. Because Leon noted the exclusionary rule is not applicable to punish magistrates (to so apply such a rule would have no purpose as there would be no deterrent effect on an issuing judge/magistrate and the whole point of the exclusionary rule is as deterrent, and there is no reason to believe that judges/magistrates are ignoring the Fourth Amendment so as to require extreme sanctions), it makes no sense to punish the officer for the magistrate's error. The companion case of Massachusetts v. Sheppard, 468 U.S. 981, 104 S.Ct. 3424, 82 L.Ed.2d 737 (1984), is right in line with the Leon decision. In Sheppard the officer was trying to use a form warrant created for controlled substances and

[1] U.S. v. Curry, 911 F.2d 72 (8th Cir. 1990), does not appear to comport with Leon and undersigned counsel cannot distinguish this case.

adopt it for a murder investigation. The officer handed the form to the magistrate and pointed out the problem of having to change it. The magistrate made some changes (but not <u>all</u> necessary changes), handed the warrant to the officer, and told the officer that the warrant was now okay. The United States Supreme Court held the officer could reasonably believe the warrant was valid because he had the right to believe a judge who had acted on the warrant to correct and then said the warrant was now ok. The same is true of the other cases cited by the State (with the exception of <u>Curry</u>) wherein the judges/magistrates did something to try to cure the warrant or was in some way responsible for making a mistake. The officer was not to be held responsible for the magistrate's mistake, and the exclusionary rule was not applicable.

Recently, this Court had the opportunity to address this type of situation in <u>Kingston</u>. In upholding the validity of the search this Court found the warrant valid; or if it wasn't valid, then the good-faith exception applied. In <u>Kingston</u> the place to be searched was left blank; and when the trial court saw this blank space, he drew a line in the blank area and signed the warrant. This Court held the officer could reasonably believe the judge had cured the problem and the warrant was now valid.

The fact that distinguishes all of the above cases, including <u>Kingston</u>, from this case is that the trial court did nothing to try to cure any problem with the warrant. The trial court was not asked to cure any problem, and it did not make any pretense of trying to cure any problem. The mistake made with these warrants

belongs exclusively to the officer, and he had no reasonable belief that the warrants were valid. The description of the vehicle to be searched was left totally blank, and the judge did not mention this void to Det. Sims. Det. Sims stated he did not realize the problem until he started to read the warrants to the cars, but at that point he simply went to the affidavits for the missing descriptions. He did not have a reason for not going back to the judge for a corrected warrant (R680, 681, 684, 685).

Leon specifically notes that "a warrant may be so facially deficient - i.e., in failing to particularize the place to be searched or the things to be seized - that the executing officers cannot reasonable presume it to be valid." Leon, 468 U.S. at 923. Leon also points out that the deterrent purpose of the exclusionary rule "assumes the police have engaged in willful, or at the very least negligent, conduct ...." Leon, 468 U.S. at 919 (emphasis added).

This is exactly the situation we have in this case. The officer negligently committed an oversight so obvious on the warrants' face that he cannot claim the good-faith exception. See State v. Ross, 471 So.2d 196 (Fla. 4th DCA 1985) (word processing error resulted in warrant not having description of property for which search was authorized - such facial invalidity prevented the State from relying on the good-faith exception because the officer cannot reasonably presume the warrant is valid). And once Det. Sims realized the oversight, he lost any claim under the circumstances to a good-faith exception. See Bonilla v. State, 579 So.2d

802 (Fla. 5th DCA 1991) (as officer read warrant to defendant officer realized the word processor had failed to print the probable cause paragraph; the officer did not act in objectively reasonable reliance upon a warrant he knew was defective - good-faith exception not applicable). The trial court was correct in refusing to apply the good-faith exception when it found the warrant invalid.

ISSUE II

WHETHER THE TRIAL COURT ERRED IN SUPPRESSING THE PAPERBACK BOOK "POST MORTEM" SEIZED FROM THE DEFENDANT'S HOUSE. (AS STATED BY APPELLANT/CROSS APPELLEE.)

Initially it is to be noted that the trial court suppressed several items taken from Mr. Waterman's house as not being covered by the warrant on the "plain view" doctrine, but the State is only arguing about one item - the book titled Post Mortem. It can be assumed the State is abandoning its claim to all the other items suppressed from the house; and, therefore, there is no issue as to these other items that were suppressed. As for the book Post Mortem, it is Mr. Waterman's contention and the trial court's finding that the book was not within any of the categories set forth in the warrant as to what was to be seized and was not seizable under the "plain view" doctrine. Before we get into the legal argument, however, it is important to set forth a few facts surrounding the finding and seizing of the book.

First of all according to Lt. Whitehead, the man in charge of the evidence seized under the warrant, it was Det. Kuchar who found

the book who, because of the title and picture on the cover, started to read the book. Det. Kuchar then handed the book to Sgt. Sullivan (R881). Sgt. Sullivan claims to have discovered the book while searching around the livingroom, and he stated he pulled the book out because the title was interesting. Once he pulled the book out and saw the cover (female body lying on a morgue table with a sheet over it), he believed it was connected to the Galloway murder. Because he believed there was a connection, he opened the book up and started to read it. He read the book for 20-30 minutes (R407, 461-465). No matter who found the book, the reason for pulling it off the shelf and reading it was the same - the title which lead to seeing the cover which lead to reading the book. No one tried to claim that he was looking through the book for false fingernails when he happened to see certain passages. Thus, the State's argument at Pg. 36 of their brief claiming the officers were justified in reading the book because they were looking for missing false fingernails and were leafing through pages in all the books is not supported by the facts in this case. Not only is there nothing in the record to show that any other books were being opened and looked at for false nails (and in reality there would be no need to open any book that did not appear to have something stuck inside - something easily discernable due to the nature of books), the officers themselves do not try to hide behind such a pretense.

Legally, the only way the State can justify the seizing of the book is under the "plain view doctrine" - there is no claim that

the book was within the scope of the warrant itself. The "plain view doctrine" is not a catch-all exception that allows an officer to seize anything he/she sees and wants while executing a warrant. Coolidge v. New Hampshire, 403 U.S. 443 at 446, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990), sets forth the applicability of this doctrine: the police officer has a prior justification for an intrusion (such as executing a search warrant) during which he comes across a piece of immediately apparent incriminating evidence. The court goes on to state that "the extension of the original jurisdiction is legitimate only where it is immediately apparent to the police that they have evidence before them; the 'plain view' doctrine may not be used to extend a general explanatory search from one object to another until something incriminating at last emerges." Id. The court goes on to note the need to make searches deemed necessary as limited as possible - "the specific evil is the 'general warrant' abhorred by the colonists, and the problem is not that of intrusion per se, but of a general, exploratory rummaging in a person's belongings." Coolidge, 403 U.S. at 467. This is why there is a requirement that warrants describe with particularity what is to be seized. Horton v. California, 496 U.S. 128 at 136, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990), emphasized that the item must be in plain view and its incriminating character must also be immediately apparent - the officer must have a "lawful right of access to the object itself." Horton, 496 U.S. at 137.

Arizona v. Hicks, 480 U.S. 321, 107 S.Ct. 1149, 94 L.Ed.2d 347 (1987), is factually very much on point with Mr. Waterman's

situation. The State's brief sets forth the facts and ruling of Hicks at pages 38 and 39 of its brief. Basically the facts are correct, but there is one error as to the Court's holding - the State claims that inspecting objects that had come into view when the equipment was moved was not a search. Undersigned counsel saw nothing in the opinion about the movement of the stereo equipment for any reason being okay. The whole point of Hicks is that any movement of the stereo equipment - even only a few inches - constituted an impermissible search since it was unrelated to the objectives of the search. The difference between looking at a suspicious object in plain view and moving it made all the difference in the case. Had the serial numbers been already exposed without the need for movement, the officers could have taken down the numbers; but having to move the equipment to see the serial numbers constituted an independent search. If such an independent search is to take place, the officer must have probable cause to believe he is looking at evidence of a crime - not just reasonable suspicion - before he/she can take action on the object. Hicks, 480 U.S. at 326, 327. In Mr. Waterman's case the officer that took the book from the shelf - be it Det. Kuchar or Sgt. Sullivan - did so out of curiosity and suspicion (not because they were looking for false fingernails). Merely looking at the title did not give probable cause to take the book from its shelf, let alone open it and read it. Once the officer had to utilize movement in order to determine its nature as criminal evidence, another independent search took place that was not reasonable under

the Fourth Amendment since the officer did not have probable cause to search and seize this book.

The State unsuccessfully tries to compare Mr. Waterman's situation in the cases it cites that uphold the seizure of materials read in plain view. These cases are factually distinguishable. In Bennett v. State, 787 P.2d 797 (Nev. 1990), the seizure of poetry was upheld as being in plain view, but there is nothing in the facts of this case that indicate movement was required to read the poetry. For all we know the poetry was written on a sheet of paper lying face up in easy ready view. Such was definitely the case in State v. Parker, 690 P.2d 1353 (Kan. 1984) (handwritten notes on top of a desk wherein a mere glance at the first page revealed matters pertaining to the operation of an illegal enterprise). Many of the cases the State cites deals with the search for small items or papers that lead to the observing of some other writing sought by the defendant to be suppressed. In these cases the courts state that the officers were actually looking for something when they inadvertently came across the document or writing at issue. People v. Edwards, 579 N.E.2d 336 (Ill. 1991) (officer flipping through telephone directory in search of small items when he discovers victim's surname was circled); U.S. v. Jenkins, 901 F.2d 1075 (11th Cir. 1990) (officers looking for various small paperwork items pertaining to a bank theft under warrant had the right to look into a bank bag and examine all paperwork contained therein); U.S. v. Talbot, 902 F.2d 1129 (4th Cir. 1990) (officers looking for identity-changing documents had

the right to examine all documents; in addition, plain view discovery of pipebombs made the seizure of books on bomb-making readily apparent evidence of a crime). Because the officers in Mr. Waterman's case do not pretend to have been looking for small evidence (such as nails or fibers) when they picked up the book Post-Mortem, none of these cases are applicable. As for the latter part of Talbot and U.S. v. Bonfiglio, 713 F.2d 932 (2d Cir. 1983), these cases stand for the proposition that inadvertently observed criminal evidence in plain view that an officer has probable cause to seize (books on bomb-making when pipebombs found and cassette marked "tap" when nonconsensual wiretaps are illegal) is a valid seizure. This rule is not applicable in Mr. Waterman's case because the mere title of the book did not give rise to the high standard of probable cause to believe the book was criminal evidence. Contrary to the State's contention, the only belief the officers had before the book was moved was one of mere suspicion.

A case much more on point would be U.S. v. Silva, 714 F.Supp. 693 (S.D.N.Y. 1989), wherein the defendant's home was being searched pursuant to a warrant for evidence of a bank robbery. When an officer searched the defendant's briefcase, he came across a spiral notebook. As the officer leafed through the pages looking for money, he came across the defendant's letter to a person named Samantha. The officer read the letter. In finding this to be an unreasonable search requiring the suppression of the letter, the court stated that even a minor investigation of a notebook beyond inspecting what is visible constitutes a search; and an officer may

not inspect a book or document beyond reading what is plainly visible unless he/she has probable cause to proceed with the search. "Therefore, the act of opening the notebook and looking through it page by page is undoubtedly a search, which could not be conducted absent probable cause." Id. at 696.

Because probable cause did not exist merely from the viewing of the title Post-Mortem, picking it up and reading through it constituted an unreasonable search. The trial court properly suppressed the book in this case.

ISSUE III

DID THE TRIAL COURT ERR IN FINDING THE ARREST OF MR. WATERMAN WAS VALID (AS STATED BY APPELLEE/CROSS-APPELLANT).

This issue is the most important issue in this case in that it is dispositive of the entire appeal on the motions to suppress. If this Court agrees that Mr. Waterman should prevail on this issue, then all evidence that resulted from his illegal arrest (the search of the cars and his house in addition to all statements obtained) must be suppressed as fruits of the poisonous tree. Wong Sun v. U.S., 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). There are three parts to this issue: (1) was there probable cause to arrest Mr. Waterman for loitering and prowling, (2) does the "fellow officer" rule apply in this case where the arresting officer is acting on her own and not at another officer's request in arresting

for a misdemeanor not committed in her presence, and (3) does the "fellow officer" rule apply to misdemeanors.

A. Was there probable cause to arrest Mr. Waterman for loitering and prowling?

As pointed out by this Court in Peterson v. State, 578 So.2d 749 at 750 (Fla. 2d DCA 1991), when it comes to a misdemeanor, "only the officers' own observations will be considered in determining probable cause to arrest." Loitering and prowling is a misdemeanor under Section 856.021, Florida Statutes (1989). See also Section 901.15(1), Florida Statutes (1989). Carter v. State, 516 So.2d 312 at 313 (Fla. 3d DCA 1987), restates the criteria needed before an officer can make an arrest for loitering and prowling:

> (1) the defendant loitered or prowled in a place, at a time, or in a manner not usual for law abiding individuals; [and] (2) such loitering and prowling were under circumstances that warranted a justifiable and reasonable alarm or immediate concern for the safety of persons or property in the vicinity.

The focus in Mr. Waterman's case is point 2 - whether or not the circumstances warranted a justifiable and reasonable immediate concern for the safety of persons or property in the vicinity. The best way to demonstrate what situations don't meet this criteria is to set forth some case examples:

The defendant in Carter, fit the description of a suspicious-looking black male who had approached residents in a neighborhood asking for water. The defendant was stopped riding his bicycle on a public street. When the officers didn't like his inconsistent explanations for being in the neighborhood, he was arrested for

loitering and prowling. Subsequent searching and interrogation revealed evidence of a burglary. In suppressing all the evidence and statements, the court held the officers lacked probable cause to arrest the defendant. The officers had not observed conduct satisfying the elements to establish probable cause to arrest for loitering and prowling, and the officers could not rely on acts they had not actually witnessed.

In Freeman v. State, 617 So.2d 432 (Fla. 4th DCA 1993), the court held there was no probable cause to arrest two black men jumping over a six-foot high wall surrounding a residential complex at 3:20 a.m. and landing in a rear parking lot of a fast-food restaurant. The men were not carrying anything (there had been a complaint about two black men carrying a burlap bag and hanging around parked cars in a residential complex). In holding these facts did not give probable cause to arrest for loitering and prowling, the court set forth other examples wherein the mere fact of defendants found in a place at a time that was questionable still did not give rise to probable cause to arrest for loitering:

> See Chamson, 529 So.2d at 1161 (unlawful arrest for loitering where defendant found crouching in an alley next to hotel at 11:30 p.m. and failed to identify himself or explain his purpose for being in the area); D.A. v. State, 471 So.2d 147, 151 (Fla. 3d DCA 1985) (police lacked probable cause to arrest for loitering where defendant, who was standing next to van that was later determined to be stolen, ran from approaching officers); Boal v. State, 368 So.2d 71, 72 (Fla. 2d DCA 1979) (police did not have probable cause to arrest defendant for loitering where defendant was observed at 2:00 a.m. walking in a mixed business and residential area that had recent burglaries).

Freeman, 617 So.2d at 433.

In Griffin v. State, 603 So.2d 48 (Fla. 1st DCA 1992), an officer was dispatched at about 2:00 a.m. to investigate a complaint of loud noises behind a house. The complainant told the officer he saw two people trying to break into a business, but could not describe them. The officer then advised other officers to detain any persons in the area. The defendant was one of the people "rounded up." The officer did not like the defendant's 'story' (the defendant said he was cutting through yards to avoid a car that had been following him) and testified the defendant's "answers 'gave him probable cause to arrest him for loitering and prowling.'" Id. at 49. The court noted some circumstances that could be considered in determining whether alarm or immediate concern is warranted - flight from officers, refusal to identify oneself, obvious endeavor to conceal oneself or an object. The court held that the circumstances in this case did not support the probable cause needed for an arrest.

In Carroll v. State, 573 So.2d 148 (Fla. 2d DCA 1991), this Court found no probable cause to arrest a defendant for loitering and prowling. The defendant was legally parked at 6:40 p.m. with an unidentified person standing outside the driver's door. Suspecting a drug transaction, the officers approached the car; the unidentified person ran. The officers did not like the defendant's explanation of what he was doing (inconsistent answers and claiming to be waiting for a Jose Rodriguez when Mrs. Rodriguez - who was passing by - said she didn't know the defendant), so he was

arrested for loitering and prowling. Noting that the loitering and prowling statute "reaches the outer limits of constitutionality and must be applied with special care," this Court found the defendant's conduct - although suspicious - to give "no basis for immediate alarm for persons and property." Id. at 148, 149.

In T.L.F. v. State, 536 So.2d 371 (Fla. 2d DCA 1988), the defendant was arrested for loitering and prowling outside an office building which had been broken into a few days earlier and vandalized. Prior to the arrest, the officer attempted to question the defendant; but the defendant refused to identify himself, other than his first name, and would not explain his presence at the rear of the building. Following the arrest, a set of keys were found on the defendant's person; and he later confessed to a burglary. The trial court denied his motion to suppress the confession and the keys, but this Court reversed the conviction and found that the loitering and prowling arrest was unlawful:

> Since loitering and prowling is a misdemeanor, only the officer's own observations may be considered in determining whether probable cause exists to make a warrantless arrest for loitering and prowling.
>
> * * *
>
> In this case, the officers observed appellant conversing with two other individuals during business hours. Appellant made no attempt to flee or conceal himself, and his shirtless attire was not unusual for Florida and certainly not unlawful. There was no basis for the officers to conclude that appellant was loitering or prowling or that his behavior imminently threatened the safety of persons or property.
>
> * * *

> In addition, appellant's failure to provide identification or explain his presence, in itself, does not constitute sufficient probable cause for a loitering and prowling arrest. Failure to provide identification is not an element of the charged offense, E.B. v. State, 537 So.2d 148 (Fla. 2d DCA 1989), nor is failure to explain one's presence and conduct.
>
> * * *
>
> The police cannot be allowed to use the loitering and prowling statute to detain an individual for another offense for which probable cause is lacking and then use of fruits of the unlawful detention as evidence that the individual committed the other offense. See E.B. To allow such "boot strapping" of evidence would lead back to the dark ages when police were able to use the loitering and prowling statute as a catch all charge to arrest persons at their whim. See Ecker.

Id. at 372, 373.

In Addis v. State, 557 So.2d 84 (Fla. 3d DCA 1990), the defendant was observed by a police office at 2:40 a.m. walking down an alley looking into parked vehicles. The defendant was dressed like a "drifter." "Believing" that the defendant was "thinking" of breaking into a car, the officer attempted to stop the defendant. The defendant then began walking in another direction. The officer stopped the defendant and asked what he was doing in the alley, and the defendant replied that he was walking to a restaurant. The defendant did not have any identification. The officer pointed out that the restaurant described by the defendant was in an opposite direction from the way defendant was walking. Then, the defendant tried to explain that he was looking for a friend who lived at a hotel next to where the parked cars were located; but, when asked, he could not give the officer the name of his friend. At this

point the officer arrested the defendant for loitering and prowling, and a subsequent search of his person revealed cocaine. The defendant's motion to suppress the cocaine was denied by the trial court, but the appellate court reversed finding that the loitering and prowling arrest (which the Court pointed out had been previously nolle prossed by the State) was unlawful.

> In order to support an arrest under the loitering statute, an officer must be able to articulate specific facts indicating that a breach of the peace is imminent or that the public safety is threatened. State v. Ecker, 311 So.2d at 109; Chamson v. State, 529 So.2d at 1160. The facts articulated in this case do not meet the probable cause requirements of the statute. The defendant was arrested because: (a) he had looked into two parked cars, (b) he had no identification, (c) the officer did not believe that the defendant had a particular destination, and (d) the officer did not consider the defendant's answers to be straightforward. This behavior is not criminal and does not support an arrest for loitering and prowling. See Chamson v. State, 529 So.2d at 1160; L.C. v. State, 516 So.2d 95 (Fla. 3d DCA 1987).
>
> Something more than the above is needed before such an arrest can be considered legally justified. Additional facts and circumstances would be needed to tip the balance in favor of upholding the arrest and resulting search. Here, for example, no door handles were tried and no cars were repeatedly circled by the appellant. Therefore, with the arrest being unlawful, it was error for the trial court to deny the defendant's motion to suppress the evidence gathered therefrom.

Addis, 557 So.2d at 85 (emphasis added).

In Woody v. State, 581 So.2d 966 Fla. 2d DCA 1991), the defendant was arrested for loitering and prowling; and a subsequent search of his person revealed cocaine which he sought to suppress.

The arrest for loitering and prowling was based on a deputy sheriff observing the defendant in a residential area known for drug-related activity at 6:40 p.m. When the deputy entered the area in a marked patrol unit, he noticed a group of males who immediately took flight, one of them being the defendant. He observed the defendant enter and hide in an area of dense foliage 30 to 40 feet from any residence. The deputy ordered the defendant to come out and explain what he was doing, and the defendant replied he was "just hanging out." This explanation did not satisfy the deputy; he arrested the defendant for loitering and prowling because he was hiding in the bushes and the deputy was concerned for the safety of passersby who might be robbed or kidnapped by the defendant. This Court found that there were no circumstances in this case that would suggest either of the two elements of a proper arrest for loitering and prowling. This Court went on to state that the deputy's concern for the potential robbery or kidnapping of a pedestrian if the defendant were allowed to remain in the bushes was not supported by any articulable facts which could reasonable warrant such a concern:

> ...any such concern was based on <u>pure speculation</u>; there was no nothing to suggest any independent criminal activity afoot.
>
> * * *
>
> Contrary to the dictates of <u>B.A.A.</u>, the sergeant here used the loitering and prowling statute, Section 865.021, Florida Statutes (1989), as a catch-all provision to detain a citizen and prosecute him where there was insufficient basis to convict on some other charge.

Woody, 581 So.2d at 967 (emphasis added).

Last but not least, there is the case of Springfield v. State, 481 So.2d 975 (Fla. 4th DCA 1986). In that case the arresting officer responded to a complaint of a black male walking from behind the complainant's house carrying something. The complainant followed this male to East Main Place. The arresting officer stopped the defendant on East Main Place; the defendant was carrying a tape recorder. The officer did not believe the defendant's explanation of where he had gotten the recorder, and the officer knew the defendant had been previously arrested and convicted for burglary and had given a similar explanation at the time of that prior arrest. The defendant had no identification, money, or residence; and he was not able to explain his presence in that neighborhood at that time of night. In finding that probable cause did not exist to arrest the defendant for loitering and prowling, the court sets out several case examples and gives a detailed review on the law. Because this case represents a good overall view on probable cause needed to arrest for loitering and prowling. The majority of that opinion is set out below:

> In order to arrest a person for violation of this statute, the arresting officer must have probable cause to believe that the offense has been committed. D.A. v. State, 471 So.2d 147 (Fla. 3d DCA 1985),
>
> The elements of loitering and prowling, both of which must be present, are:
>
>> (1) the defendant loitered or prowled in a place, at a time, or in a manner not usual for law-abiding individuals; (2) such loitering and prowling were under circumstances

> that warranted a justifiable and reasonable alarm or immediate concern for the safety of persons or property in the vicinity.

State v. Ecker, 311 So.2d 104, 106 (Fla.), cert. denied, 423 U.S. 1019, 96 S.Ct. 455, 46 L.Ed.2d 391 (1975); D.A., 471 So.2d at 150. This statute has been found to reach the "outer limits of constitutionality," and therefore it has been held that it "must be applied by the courts with special care so as to avoid unconstitutional applications." Id. at 153. See also Ecker, 311 So.2d at 104. As noted by our supreme court, application of this statute "requires a delicate balancing between the protection of the rights of individuals and the protection of individual citizens from imminent criminal danger to their persons or property." Ecker, 311 So.2d at 107. The courts have repeatedly disapproved use of the loitering and prowling statute as a "'catchall' provision [w]hereby citizens may be detained by police ... when there is an insufficient basis to sustain a conviction on some other charge." B.A.A. v. State, 356 So.2d 304, 306 (Fla. 1978) (footnote omitted); Ecker, 311 So.2d at 111. See also D.A., 471 So.2d at 153; Patmore v. State, 383 So.2d 309 (Fla. 2d DCA 1980).

In Ecker the supreme court found that:

> The whole purpose of the [loitering and prowling] statute is to provide law enforcement with a suitable tool to prevent crime and allow a specific means to eliminate a situation which a reasonable man would believe could cause a breach of the peace or a criminal threat to persons or property.

311 So.2d at 110. To this end, in order to justify an arrest, "'the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant' a finding that a breach of the peace is imminent or the public safety is threatened." Id. at 109 (citation omitted). See also B.A.A., 356 So.2d at 304. Further, since

loitering and prowling is a misdemeanor, only the officer's own observations may be considered in determining whether probable cause exists to make a warrantless arrest. Section 901.15(1), Fla. Stat. (1983); Ecker, 311 So.2d at 111; T.L.M. v. State, 371 So.2d 688 (Fla. 1st DCA 1979).

In D.A. v. State, 471 so.2d (sic) at 147, the police responded to a complaint about a disturbance. When they arrived, there was no disturbance, but they saw appellant next to a van parked in an alley. As they approached, he ran, as did others in the vicinity of the van. The officers observed that the van's ignition had been "punched" so that it could be started with a screwdriver, and that tape had been placed over the name "Tropical Provision Company" on its door. The officers learned via police radio that the van had been stolen from that company the same morning. Appellant was apprehended a short distance away and arrested for loitering and prowling.

In finding lack of probable cause to arrest appellant for loitering and prowling, the third district stressed that the statute is forward-looking with its sole purpose being to prevent imminent future criminal activity, and that it "is not directed at suspicious after-the-fact criminal behavior which solely indicates involvement in a prior, already completed substantive criminal act." Id. at 151. The court concluded that appellant's presence at the stolen van indicated that he had been involved in a completed criminal act, but not that he was about to commit a crime. The court found the fact that appellant fled to be evidence, according to the statute, of commission of the offense, but insufficient in itself to justify his arrest on that ground. Also, the court noted that appellant's failure to explain his presence could not constitutionally be used to establish the offense of loitering and prowling,

Similarly, in T.L.M. v. State, 371 So.2d at 688, a police officer responded to a report of a disturbance at a local hospital at 2:00 a.m. When he arrived, appellant and another juvenile were merely standing outside. Appellant appeared to be under the influence of alcohol.

The appellate court found that the officer had no authority to arrest appellant because there was nothing about these facts to justify a belief that he would endanger public safety.

See also B.A.A. v. State, 356 So.2d 304 (Fla. 1978) (insufficient basis to arrest defendant for loitering where officer merely observed that she approached a number of cars at an intersection and engaged the drivers in conversation); Patmore v. State, 383 So.2d 309 (Fla. 2d DCA 1980) (where police who were looking for robbery suspects observed that appellant acted peculiar upon approach of police car, and turned and ran, no reasonable grounds to believe he would threaten public safety and thus no basis for arrest under loitering statute, though police may have had reasonable grounds to suspect him of the robbery); Boal v. State, 368 So.2d 71 (Fla. 2d DCA 1979) (that appellant was walking at a late hour in an area where recent burglaries had occurred was sufficient to justify officer's stop of appellant but not arrest under loitering statute). (The Boal case was subsequently overruled in part in State v. Levin, 452 So.2d 562 (Fla. 1984), where the supreme court held that even a stop was not justified).

The primary difference between the above cases and those in which probable cause for arrest for loitering and prowling is found is that the latter involve circumstances leading the officers to believe that the defendant is about to engage in criminal conduct, or that a criminal act which was already started is still in progress. The D.A. court gave some examples of such cases:

> For example, in Bell v. State, [311 So.2d 104] which affirmed a loitering and prowling conviction, the defendant's actions in hiding in the bushes of a private dwelling at 1:20 a.m. obviously threatened the safety of persons and property in the said dwelling. And in Hardie v. State [333 So.2d 13 (Fla. 1976)] which affirmed a loitering and prowling conviction, the defendant's actions in rummaging through two

cars at a closed gas station at 2:55 a.m. obviously constituted a threat to the safety of the cars in question. Also in In re A.R. [460 So.2d 1024 (Fla. 4th DCA 1984)] which affirmed a loitering and prowling adjudication, the juvenile's actions in watching the traffic while his companion burglarized an adjacent closed car lot at 10:00-11:00 p.m. obviously constituted a threat to the safety of the cars on the lot.

471 So.2d at 152. See also State v. Jones, 454 So.2d 774 (Fla. 3d DCA 1984) (arrest for loitering and prowling proper where officers saw defendant in front of auto parts store in early morning hours with shopping cart full of cartons, suspected that burglary was in progress, and where after seeing police, defendant abandoned the cart and later gave conflicting explanations for his behavior); T.J. v. State, 452 So.2d 107 (Fla. 3d DCA 1984) (officer who had report that three black males were trying to snatch purses from cars in a high crime area, and who observed defendants approach a stopped car and then walk off in another direction when they saw him, had probable cause to arrest defendants for loitering and prowling).

In the instant case it is undisputed that Officer Burroughs did not have probable cause to arrest appellant for burglary; the only issue is whether he had probable cause to make an arrest under the loitering and prowling statute. Applying the foregoing principles of law, we note, first, that since the officer could rely only on his own observations, he could not base his decision in any way on the report of the two witnesses that a black male carrying something had been observed in their backyard. The officer himself observed only that appellant was walking with a staggering gait on a public sidewalk at 10:40 p.m. and that he was carrying a tape recorder and may have been drinking. There is nothing in the record to indicate the character of the neighborhood where appellant was walking, and it therefore cannot be determined whether it was unusual for a pedestrian to be there at that hour. As previously noted, evidence of a

pedestrian's intoxication, without more, cannot justify an arrest for loitering and prowling, nor can appellant's failure to explain his presence in the area be considered.

All that remains is that appellant was observed on a public street carrying a tape recorder. Although when questioned he could not satisfactorily explain his possession of the article, thus leading the officer to believe - particularly based on his past encounter with appellant - that it had been stolen, as in the D.A. case involving the stolen van, this indicates only that appellant had already committed a crime, but not that any future criminal activity was imminent.

The state relies heavily on the third district's Jones case, to which we have previously referred, where the defendant was found outside an auto parts store with a cart full of cartons. At first blush, that case appears to be in conflict with D.A., also from the third district. However, a closer examination reveals that the two cases are distinguishable on their facts because in Jones the officers indicated that they believed a burglary was still in progress, while D.A., like the instant case, involved an already completed theft, and there was no indication of continuing criminal activity.

In Ecker, 311 So.2d at 111, the supreme court found disturbing the police officer's statement that he had arrested the defendant for loitering "'because we could not prove anything else'...." Id. The record here contains similar statements by Officer Burroughs, such as his comment that appellant had been booked into jail as a "sleeper" until a burglary could be located. In considering the transcript as a whole, it is apparent that the loitering and prowling statute was unconstitutionally applied here as a mere "catchall" provision to detain appellant until sufficient evidence could be obtained to charge him with burglary. The trial judge himself indicated that the factor that convinced him to uphold the arrest was the officer's suspicion, based on his past experience with appellant, that he had committed a burglary. This is clearly an

> <u>impermissible basis for a loitering and prowling arrest because it relies upon already-completed criminal activity, rather than upon any imminent future threat to persons or property</u>.
>
> We therefore reverse the judgment and sentence of the trial court and direct the trial court to strike the conviction from appellant's record.

<u>Springfield</u>, 481 So.2d at 976-979 (emphasis added).

The important rules to be gleaned from all these cases are: (1) There has to be an immediate concern for the safety of persons or property - i.e., the statute is forward-looking with its sole purpose being to prevent ongoing or future criminal activity. It is not for suspicious after-the-fact behavior where there is an indication of a completed crime. (2) Merely being in an area late at night where a person should not be (walking behind people's houses) is not enough to give an officer probable cause to arrest. (3) The officer's knowledge that other crimes have been committed in the area where the defendant is seen and/or stopped is not enough. (4) Suspecting a different crime has been committed and using loitering and prowling to arrest until the other crime is established or as a "catch-all" is an unconstitutional application of the loitering and prowling statute (a statute that has always had severe constitutional problems in light of its ability to be used in an overbroad manner). (5) Dressing suspiciously is not enough. And most importantly (6) not liking the defendant's explanation of why he is where he is and what he is doing is <u>definitely</u> not a reason to arrest the defendant for loitering and prowling. <u>See</u> also <u>Lucien v. State</u>, 557 So.2d 918 at 919 (Fla. 4th

DCA 1990) ("The failure to provide identification or a reasonable explanation for the questioned activity are not elements of the crime. The criminal conduct must be completed prior to any attempt to identify or explain. See State v. Rash, 458 So.2d 1201 (Fla. 5th DCA 1984)." Emphasis added.)

Applying these rules to Mr. Waterman's situation, it is apparent that the officers did not have probable cause to arrest Mr. Waterman for loitering and prowling. When Det. Wenger saw Mr. Waterman, Mr. Waterman was coming from behind a vacant house and returning to his car. Although Det. Wenger "suspected" many possible crimes (burglary, a homicide occurring about a month ago 5 blocks away, prior sexual assaults committed in the neighborhood), these suspicions could not justify an arrest for loitering and prowling (R89-105, 122-124). In addition, the fact that Mr. Waterman was returning to his car meant that any criminal activity - if it had even occurred - was over. Loitering and prowling is only for the protection of the public against ongoing or future criminal activity. The fact that neither Det. Wenger nor Officer Redden believed Mr. Waterman's explanation of why he was there at that time of night is not relevant (R141-145, 277-280, 285, 286). "Dispelling" the officers' fears with an explanation is not an element of loitering and prowling. Whatever factual basis the officers have for an arrest must have occurred before the explanation is given. Mr. Waterman's being behind houses at night is also not enough to justify an arrest. In addition, using pre-Miranda statements to justify an arrest for loitering and prowling

constitutes an invalid arrest. See B.R.S. v. State, 404 So.2d 194 at 195 (Fla. 1st DCA 1981), rev. denied 413 So.2d 877 (Fla. 1982). ("Without the Miranda predicate, the deputy's crucial testimony concerning the appellant's inconsistent explanations should have been excluded... . And once those explanations are excluded, there being no other competent, substantial evidence of guilt, the court's adjudication of delinquency [for loitering and prowling] must be reversed.") The fact that Mr. Waterman was dressed all in black was also not indicative of a crime (R132). It was not as though Mr. Waterman was wearing a mask. Finally, Det. Wenger's concerns that Mr. Waterman might be a witness in the Galloway murder (R146) did not give him the right to use the loitering and prowling statute as a catch-all to justify the arrest of Mr. Waterman.

When Det. Wenger identified himself, Mr. Waterman provided identification and never tried to flee. He had nothing in his hands other than a key chain (R133, 134). The only fact of real concern was Mr. Waterman's possession of a car registered to a woman born in 1907, but this "concern" was dispelled when the owner was contacted and let the officers know that Mr. Waterman had a right to have the car (R120, 226, 227, 297). Although even this suspicion would not have been enough to arrest Mr. Waterman for loitering and prowling. Suspecting him of car theft and arresting him for loitering until the theft can be established was exactly the type of conduct rejected in Springfield. In addition, Det. Wenger checked the vacant house where Mr. Waterman had come out

from and saw absolutely no evidence of a burglary. Despite no evidence of any ongoing or future criminal activity, Officer Redden arrested Mr. Waterman (after the checking of the house and car) - because Mr. Waterman's statements of why he was there and what he was doing (had been looking in windows of a vacant house because he was possibly interested in buying it) was - in her mind - evidence of prowling (R298-307). Officer Redden admitted, however, that she saw no crime being committed or about to be committed (R307). Yet, merely looking in the windows of an empty house - like looking in the windows of parked cars - is not enough. As in Addis there must be more (an observation of an attempt to break in). Clearly, there was no probable cause in Mr. Waterman's case to arrest for loitering and prowling.

B. Does the "fellow officer" rule apply in this case where the arresting officer is acting on her own and not at another officer's request in arresting for a misdemeanor not committed in the arresting officer's presence?

If this Court rejects argument A and finds that there was probable cause for the arrest, there is the problem of Officer Redden arresting Mr. Waterman for alleged misdemeanor criminal activity she never observed. Officer Redden admitted she saw nothing criminal going on (R307). She also stated that even though Det. Wenger asked her to arrest Mr. Waterman, she was the one who made the ultimate decision to arrest Mr. Waterman (R285, 286).

Initially, Mr. Waterman argues that factually the "fellow officer" rule is not applicable because Officer Redden did not arrest Mr. Waterman based on Det. Wenger's request. In her mind

Det. Wenger made a request, but she made the ultimate decision (R285, 286). That ultimate decision was, however, based on what Det. Wenger said he saw and what Mr. Waterman said (R286, 306, 307). She spoke with Mr. Waterman after Det. Wenger made the request in order to help her make up her own mind. This is supported by Det. Wenger's testimony that he asked her to make the arrest, but did not tell her to do so (R150, 222, 223). This is hardly the type of situation that comes under the "fellow officer" rule.

In Carroll v. State, 497 So.2d 253 (Fla. 3d DCA 1985), rev. denied 511 So.2d 297 (Fla. 1987) (the case cited by the trial court in rejecting Mr. Waterman's argument on this issue), the court discussed the fellow officer rule. A Miami detective had probable cause to arrest the defendant for murder, and the detective "suspected" the defendant was with his family in New York. He contacted New York detectives to let them know the defendant was a suspect in a homicide, and he asked them to inform him if the defendant was located in their jurisdiction. Although no warrant had been issued and the New York authorities had not been specifically asked to make an arrest, they located and arrested the defendant believing a warrant had been issued. The court held that the warrantless arrest was valid because probable cause existed for the arrest, and the fact that New York was not specifically asked to make the arrest was not important - it was a valid assumption that an arrest was what Miami wanted and no magic words were required. This case is not applicable to Mr. Waterman's situation

for several reasons: (1) Initially, Mr. Waterman argues there was no probable cause to arrest. This, of course, is the subject of Issue III, A. If no probable cause to arrest existed in the first place, "an otherwise illegal arrest cannot be insulated from challenge by the decision of the investigating officer to rely on fellow officers to make the arrest." Whiteley v. Warden, Wyoming State Penitentiary, 401 U.S. 560 at 568, 91 S.Ct. 1031 at 1037, 28 L.Ed.2d 306 (1971). (2) Carroll dealt with a felony. A warrantless arrest based on probable cause for an offense not committed in an officer's presence is okay for felonies. The same is not true for warrantless arrests for misdemeanors. See Section 901.15, Florida Statutes (1989). It is axiomatic that only the officer's own observations may be used in determining whether probable cause exists to make a warrantless arrest for a misdemeanor (see cases cited above in Issue III, A; Section 901.15, Florida Statutes (1989); and Issue III, C.). And (3) although no magic words need be used for one officer to ask another officer to make an arrest, in this case the request was couched in such a fashion as to make the issue of whether Officer Redden would make the warrantless arrest equivocal. In this case it cannot be assumed Officer Redden was going to make the arrest based on Det. Wenger's request. She was given an option, and she used her own judgment in arresting Mr. Waterman. Unlike the situation in State v. Eldridge, 565 So.2d 787 (Fla. 2d DCA 1990), wherein a warrantless arrest of a misdemeanor was committed outside the presence of the arresting officer but done to assist the officer who had observed the conduct constitut-

ing the misdemeanor, this was not an arrest to assist an officer who had his hands full. Det. Wenger did not want to get involved in a city problem (although he said he had the authority to arrest in the city - R85, 86) and was making a request. Officer Redden did not feel obligated to comport with Det. Wenger's request. Thus, factually and legally the "fellow officer" rule is not applicable in Mr. Waterman's case.

C. Does the "fellow officers" rule apply to warrantless arrest for misdemeanors?

It is Mr. Waterman's contention that the "fellow officer" rule is limited to certain narrowly defined situations as set forth by statute. Section 901.15, Florida Statutes (1987), set forth when a warrantless arrest can be made. Generally speaking, warrantless arrests based on probable cause (including the probable cause of fellow officers) are valid for felonies but misdemeanors must have been committed in the presence of the arresting officer. A few exceptions are set forth in the statutes. Probable cause can be used to arrest: for a violation of a domestic violence injunction for protection - § 901.15(6), Fla. Stat. (1987); for domestic violence (spouse on child) - §901.15(7), Fla. Stat. (1987); for a misdemeanor when based upon a signed affidavit given to the arresting officer by a law enforcement officer of the U.S. Government or a U.S. military law enforcement officer or a Florida National Guard law enforcement officer when the affiant has witnessed the commission of the misdemeanor - §901.15(8) and (9), Fla. Stat. (1987); and for retail or farm theft (including petit theft) - §812.015(3) and (4), Fla. Stat. (1987). Loitering and

prowling §856.021, Fla. Stat. (1987) - is not one of the listed exceptions, and the case law (see Issue III, A.) is well-settled that this misdemeanor must be committed in the officer's presence if the officer is to make a warrantless arrest.

The majority of cases that discuss arrests under the "fellow officers" rule factually applied to felonies: Crawford v. State, 334 So.2d 141 (Fla. 3d DCA 1976); Shriner v. State, 386 So.2d 525 (Fla. 1980); Carroll; Salas v. State, 246 So.2d 621 (Fla. 1971); Routly v. State, 440 So.2d 1257 (Fla. 1983). The only two exceptions are easily accounted for. In Cummings v. State, 378 So.2d 879 (Fla. 1st DCA 1979), officers who had not witnessed the retail theft of gasoline were allowed to make the arrest at the request of the Quincy Department of Safety because of the exception for retail theft (then set forth under §901.34, Fla. Stat. (1985), but moved to §812.015, Fla. Stat. (1987)). And in Eldridge the officer who had witnessed the misdemeanor had her hands full in writing up one charge on theft while her call for backup assistance handled the charge on DUI. Under §901.18, Fla. Stat. (1987), "[a] person commanded to aid a peace officer shall have the same authority to arrest as that peace officer. ..." In Eldridge the assisting officer was "commanded" to arrest for the DUI, while in Mr. Waterman's case - as pointed out in Issue III, B. - there was no command. There was merely a request that Officer Redden believed she had the option to reject.

Because there is no applicable exception in this case for having a fellow officer who did not witness the misdemeanor offense

of loitering and prowling make an arrest, the arrest of Mr. Waterman by Officer Redden was illegal. The subsequent searches of the cars and house and Mr. Waterman's statements - all of which flowed from this illegal arrest - must be suppressed as fruits of the poisonous tree. Wong Sun.

ISSUE IV

WHETHER STATEMENTS MADE BY MR. WATERMAN WERE ILLEGALLY OBTAINED? (AS STATED BY APPELLEE/CROSS-APPELLANT.)

There are three sets of statements that fall under this issue: (1) pre-Miranda statements made prior to the arrest for loitering and prowling; (2) post-Miranda statements made after Mr. Waterman was booked for loitering and prowling but detained for purposes of the homicide investigation; and (3) post-Miranda statements made by Mr. Waterman after he invoked his rights and asked for an attorney. The last set of statements is not really an issue here because the trial court properly suppressed those statements, and the State does not contest that decision. The trial court, however, rejected Mr. Waterman's contention that the other two sets of statements should also be suppressed. Because Mr. Waterman's illegally obtained statements were used to obtain the search warrants of the house and cars, these warrants were not validly obtained; and the evidence obtained from the searches conducted under these warrants must also be suppressed. Wong Sun.

A. Pre-Miranda statements made prior to arrest illegally obtained.

The officers in this case questioned Mr. Waterman as to why he was where he was and what he had been doing without giving Mr. Waterman his Miranda rights (R301). As noted in Driscoll v. State, 458 So.2d 1188 (Fla. 4th DCA 1984), rev. denied 466 So.2d 218 (Fla. 1985), even though the loitering and prowling statute requires an officer to give a person the opportunity to dispel any concern by identifying himself and explaining his presence before an arrest can be made, that statute cannot supersede the Fifth Amendment of the United States Constitution. See also Hardie v. State, 333 So.2d 13 at 14 (Fla. 1976) ("a suspect cannot be compelled to explain his presence and conduct without first being advised of his Miranda rights. ..."). If statements are made to explain presence per the officer's inquiry and no Miranda has been given, these statements must be suppressed. B.R.S. (see Issue III, A.).

Because Mr. Waterman was not given Miranda warnings until after his arrest, all the statements made prior to arrest must be suppressed as having been illegally obtained.

B. Post-Miranda statements made after Mr. Waterman was booked for loitering and prowling illegally obtained due to illegal detention.

§907.04, Fla. Stat. (1987), is quite clear: "If the person who is arrested has a right to bail, he shall be released after giving bond on the amount specified in the warrant." (emphasis added). Mr. Waterman was arrested a little after 10:30 p.m. on July 16, 1991; and Det. Redden believed normal procedure was an hour to an hour and a half to be eligible to be bonded out (R274, 313, 320,

321). Somewhere between 12:30 a.m. and 1:00 a.m. on July 17, 1991, Mr. Waterman's father found out Mr. Waterman had been arrested. Mr. Waterman's uncle immediately contacted the Sarasota County Jail and was told at about 1:15 a.m. that bail was at $219 and that Mr. Waterman was available to be bonded out (R570, 571, 255, 256) Mr. Waterman's father and uncle had the cash and went down to the jail at 1:30 a.m. where they were eventually told Mr. Waterman would not be able to bond out for an indefinite period of time (R574-577, 257). Mr. Waterman's father was told "even the president of the United States could not get your son out of jail at this time" (R579). Mr. Waterman's father was not able to bond Mr. Waterman out until 7:00 a.m. (R588, 258). Obviously, this delay in bailing Mr. Waterman out on his charge of loitering and prowling had nothing to do with the charge Mr. Waterman was arrested for - the loitering and prowling arrest was merely a vehicle used by the officers to detain and interrogate Mr. Waterman on the homicide case. Even though one of the interrogating officers stated they did not have probable cause to arrest Mr. Waterman for the homicide and another interrogating officer knew Mr. Waterman was not at the jail of his own volition (R511, 732), Mr. Waterman was held and continuously questioned (even <u>after</u> he invoked his rights - R500, 501, 515) for hours after he was entitled to bond. This violation of §907.04 in combination with a lack of probable cause to arrest Mr. Waterman on the homicide charge made all statements given by Mr. Waterman invalid.

There is not a great deal on the subject of continued custody when there comes a point when the defendant should be released, and the cases seem to deal with searches made. The holdings in these cases and the legal reasoning should also apply to any statements made.

LaFave, Search and Seizure, §5.3(d) (2d ed. 1987), addresses this issue and provides an excellent overview:

> (d) Validity of continued custody. If a person is searched during post-arrest detention, either upon arrival at the detention facility or at some later time during his incarceration, then obviously the search is unlawful if the proceeding arrest was unlawful, and this is so whether the search is characterized as truly "incident" to the arrest or as a booking inventory. But with these searches which occur some time after the arrest, it may also be said that the search may not pass muster even if the arrest was lawful, for intervening events may have rendered the custody at the time of the search unlawful. It is this latter problem which is considered here.
>
> Even if a particular arrest was lawfully made upon probable cause to believe that the person arrested had committed an offense, additional information coming to the attention of the police after the arrest may establish an absence of probable cause, in which case the arrested person is entitled to be released. If he is instead retained in custody and subjected to a search, the evidence obtained in that search is subject to suppression on Fourth Amendment grounds. Illustrative is United States v. Coughlin, (ftnt. 132) where customs officials, after finding marijuana in packages sent into the country, dusted the contents with fluorescent powder and sent the packages on to their destination. Government agents observed receipt of the packages by a maid employed by defendant's parents and later saw defendant enter the house. When he exited some 25 minutes later, the agents arrested him and searched his

person and car. Although no marijuana was found and although it was then learned the defendant was not the addressee of the packages, he was taken to a police station, where defendant made incriminating statements and was subjected to an ultraviolet light test which established he had handled the contents of the packages. The court concluded:

> The act of stopping the defendant's car and the subsequent search exculpated him. This exculpation dissipated the original probable cause to stop and search. The continued detention of the defendant, after government agents discovered that he did not have contraband on his person or in his vehicle and was not the addressee on the packages, was unjustified. This is so because the search by the government clearly established that there was no probable cause to believe that the defendant had committed a crime. It follows, therefore, that the inculpatory statements and the scientific test results must be suppressed as the product of an illegal detention. (ftnt. 133)

The Coughlin type of situation must be distinguished from that in which the probable cause has not been dissipated but it appears that the defendant would not have been booked and incarcerated but for the failure of the police to afford the defendant an available opportunity for stationhouse release. Such was the situation in United States v. Mills, (ftnt. 134) where the defendant was arrested for driving without a license, taken to the station and booked, and then subjected to a pre-incarceration inventory search during which heroin was found in a change purse. Mills was not told of his right to post $50 collateral and leave the station. The court held:

> When circumstances justify stationhouse detention, there is reason for some search of the person involved - putting aside, for present purposes, any attempt to grapple

> with the difficult questions of permissible occasion and extent of "inventory" searches. But it would be entirely unreasonable to hold that policemen have discretion to detain and therefore thoroughly search petty offenders like Mills, who may avoid stationhouse detention altogether by posting collateral. A huge proportion of the public is guilty of some sort of petty infraction almost every day - jaywalking, exceeding the 25-mph limit, using high beams, parking in a loading zone, among many others. Informing a person arrested for such a minor offense of his option to post collateral, and giving him an opportunity to exercise that option, is a necessary precondition to a thorough and complete search that is conducted only as an incident to the needs of stationhouse detention. ...

When a person is charged with a collateral-type petty offense, under which he rightfully has the opportunity to post collateral and avoid further detention, and there is no probable cause to believe he committed a more serious crime, the police may not engage in an inventory search of the offender, or an equivalent direction that he empty his pockets, and seek to support it on the ground of holding him in further confinement, unless at a minimum he was timely notified of his opportunity to post collateral (and thus avoid further detention) and refused or was unable to do so. (ftnt. 135)

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132 338 F.Supp. 1328 (E.D. Mich. 1972).

133 To the same effect are People v. Quarles, 88 Ill.App.3d 340, 43 Ill. Dec. 497, 410 N.E.2d 497 (1980) (after defendant arrested for burglary, landlord said he never heard of two complainants and that tenant had obtained permission for defendant to stay at premises in question; held, "at that point Stewart should have released defendant, since he no longer had

probable cause; McNeely v. State, 277 So.2d 435 (Miss. 1973) (defendant arrested for being a convicted felon in possession of a firearm; at station the shotgun measured and found to be slightly longer than prohibited under the concealed weapons statute, but defendant was not released because police erroneously believed it a violation of law for a convicted felon to carry any type of firearm; in a subsequent booking search narcotics found on defendant's person; narcotics suppressed because found in a search after the probable cause for the prior arrest had dissipated).

Compare People v. Smith, 50 Ill.App.3d 320, 365 N.E.2d 558 (1977) (defendant's detention in police station after probable cause had dissipated when witness failed to identify him was not unreasonable where initial purpose of brief detention was to fill out juvenile arrest forms and then either drive defendant home or release him to juvenile authorities, defendant volunteered information about participants while officer was filling out forms, and officer then decided to hold defendant briefly while bringing in people he had named for his possible identification of them); State v. Radziewicz, 122 N.H. 205, 443 A.2d 142 (1982) (defendant arrested for driving under influence but at station breathalizer test produced reading considered prima facie evidence defendant not under influence of alcohol; continued custody and search lawful, as defendant's movements not normal and thus reason to believe he under influence of drugs).

134 472 F.2d 1231 (D.C.Cir. 1972).

135 The court went on to say that even assuming the "presumption of regularity puts a burden on the defen-

> dant to come forward with evidence that such an opportunity was not afforded," that burden is met when the defendant "establishes that he had on his person money enough to post the necessary collateral," in which case the government must "make a showing that it accorded the opportunity to post collateral."

The case of People v. Mallory, 365 N.W.2d 673 (Mich. 1984), referred to in a footnote by LaFave, is a case most on point with Mr. Waterman's situation. The defendants had been arrested without a warrant on a felony charge and were denied their due process rights to a prompt arraignment. Because their rights to a prompt arraignment were violated, their detentions were unlawful. Because their detentions were unlawful, the exclusionary rule was utilized as the appropriate remedy inasmuch as the unlawful detention had been used as a tool to extract a statement. The statements were excluded - even if they had been given voluntarily, "because they might never have been made by the detainee but for the illegal prearraignment delay." Id. at 678.

In Florida courts have held that although an initial detention was justified to check into possible criminal conduct, once the officer verified the defendant had committed no crime continued detention was no longer valid. Evidence obtained after the detention was no longer valid was found to be violative of Fourth Amendment guarantees. State v. Rizo, 463 So.2d 1165 (Fla. 3d DCA 1984); Castillo v. State, 536 So.2d 1134 (Fla. 2d DCA 1988); Tennyson v. State, 469 So.2d 133 (Fla. 5th DCA 1985).

In Rizo the court held the initial stop of the defendant was invalid; but even if the stop was valid, the court believed "the police exceeded the bounds of any authorized temporary detention when they transported Rizo to the police station to conduct a custodial interrogation without probable cause." Id. at 1167. In Mr. Waterman's case the initial argument is that the officers did not have probable cause to arrest Mr. Waterman for loitering and prowling; but if this Court disagrees, then it is argued that once he was booked for loitering and prowling he should have been allowed to post bail. Instead, he was physically moved to another building (R432, 433) and interrogated against his consent for several hours about a crime for which probable cause did not exist to arrest and detain him. The police exceeded their bound of temporary detention in so holding Mr. Waterman and interrogating Mr. Waterman, and his statements must be suppressed because of this Fourth Amendment violation.

In Tennyson, the factual situation has many similarities to Mr. Waterman's case. The defendant was stopped by officers which were investigating a robbery. The officers transported the defendant to the scene of the robbery so that the victims could identify him. The victims, however, unequivocally stated the defendant was not the robber. While driving the defendant back to his car, the officer received a call from another officer stating that the defendant had been arrested 8 months earlier for battery on an officer. Because of this call, the officer "asked" if he could search the defendant's car for weapons (the deputy claiming

he had defendant's consent and the defendant claiming he never gave consent) and proceeded to search the car. Drugs were found. During the search the defendant remained in the back seat of the police cruiser while a second deputy stood outside watching the defendant. The defendant believed he had been arrested or detained because no one said he could go and no one opened the car door to let him out. The court held that once the officers were satisfied the defendant had nothing to do with the robbery, the defendant was entitled to immediate release under the Stop and Frisk law, §901.151, Fla. Stat. (1981). The defendant's continued detention constituted an illegal stop. The officers had no probable cause to believe the defendant was carrying contraband. As for the issue of consent, the court held that the illegal detention rendered any consent the defendant may have given involuntary. Since there was no break in the chain of illegality between his illegal detention and the alleged consent to the search, the taint to the consent was not dissipated. At best there was merely the defendant acquiescing to the authority of the officer.

The similarities to Mr. Waterman's case are as follows: Although Mr. Waterman was initially questioned by the police about the loitering and prowling, they (i.e., Det. Wenger) became suspicious about Mr. Waterman's connection to the Galloway homicide. Once the booking for loitering and prowling was over, Mr. Waterman had the right and the means to post bail and go home; but the officers continued to detain him - transporting him to another building - to question Mr. Waterman about a crime that the

officers did not have probable cause to believe Mr. Waterman committed. Even though Mr. Waterman did not voice any objections to this continued interrogation until 3:55 a.m. (R500), it cannot be said he was there of his own free will. He was not free to leave. Thus, the illegal detention tainted any statements made by Mr. Waterman and invalidated any "consensual" claims. There was definitely no break in the chain of illegality sufficient to dissipate the taint of the illegal detention. In addition, Miranda warnings are not a per se cure for a Fourth Amendment illegal search or seizure which leads to a confession. See Talley v. State, 581 So.2d 635 (Fla. 2d DCA 1991).

Finally, in Hayes v. Florida, 470 U.S. 811, 105 S.Ct. 1643, 84 L.Ed.2d 705 (1985), the United States Supreme Court reviewed a case in which Punta Gorda police officers, without a warrant, went to the defendant's home and requested to obtain his fingerprints. When the defendant expressed reluctance to go with them to the police station, they threatened to arrest him. At that point, the defendant agreed to go with them and his fingerprints were obtained. The Supreme Court reversed his conviction finding that there was no probable cause to arrest, no consent to go with them to the police station, and no prior judicial authorization for detaining him. Thus, the Court concluded that the investigative detention at the station for fingerprinting purposes violated the defendant's rights under the Fourth Amendment; and the fingerprints became inadmissible fruits of the illegal detention.

> And our view continues to be that the line is crossed when the police, without probable

> cause or a warrant, forcibly remove a person from his home or other place in which he is entitled to be and transport him to the police station, where he is detained, although briefly, for investigative purposes. We adhere to the view that such seizures, at least where not under judicial supervision, are sufficiently like arrests to invoke the traditional rule that arrests may constitutionally be made only on probable cause.

Id. at 470 U.S. 816, Emphasis added.

The continued detention of Mr. Waterman for the purpose of investigating a homicide when there was no probable cause to arrest constituted a violation of Mr. Waterman's Fourth Amendment rights. His statements must be suppressed as inadmissible fruits of that illegal detention. Wong Sun.

ISSUE V

WAS THE SEARCH WARRANT FOR THE HOUSE INVALID? (AS STATED BY APPELLEE/CROSS-APPELLEE.)

There are two problems with the search warrant for Mr. Waterman's home - the supporting affidavit clearly fails to establish probable cause sufficient to justify a search, and the objects to be seized are of such a general nature so as to have allowed the officers a general exploratory search during which they could seize just about anything they felt like taking. Before discussing these two problems separately, it is to be noted that either of these two areas would prevent the State from relying on the good-faith exception in Leon to uphold the search. Leon outlined four instances when good-faith is not reasonable and suppression is appropriate:

(1) If in issuing the warrant the magistrate was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth; (2) Where the issuing magistrate wholly abandoned his judicial role; (3) Where the warrant is based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable; and (4) Where a warrant is so facially deficient (i.e., in failing to particularize the place to be searched and/or the items to be seized) that the executing officer could not reasonably presume it to be valid.

Id., 468 U.S. at 933. Points 3 and 4 clearly state that an affidavit so lacking in probable cause to make reliance on it unreasonable or a warrant so facially deficient when it fails to particularize the items to be searched that it cannot reasonably be relied upon makes an objective good-faith argument inapplicable. Thus, if this Court agrees with either of Mr. Waterman's two arguments on the house warrant, then the good-faith exception is not available to the State. See Bonilla v. State, 579 So.2d 802 at 806 (Fla. 5th DCA 1991); and Vasquez v. State, 491 So.2d 297 at 300 (Fla. 3d DCA 1988). In addition, any evidence excluded based on other arguments would have to be stricken if that evidence was used to obtain the house warrant.

A. The affidavit for the search warrant for the house lacked probable cause.

In Schmitt v. State, 590 So.2d 404 at 409 (Fla. 1991), the Florida Supreme Court set forth some guidelines in determining what probable cause is for purposes of an affidavit to a warrant:

> In the past, we have defined "probable cause" as a reasonable ground of suspicion supported by circumstances sufficiently strong

to warrant a cautious person in the belief that the person is guilty of the offense charged. Dunnavant v. State, 46 So.2d 871 (Fla. 1950). The reasons cited by the police must be sufficient to create a reasonable belief that a crime has been committed. Florida East Coast Ry. Co. v. Groves, 55 Fla. 436, 46 So. 294 (1908). As long as the neutral magistrate has a substantial basis for concluding that a search would uncover evidence of wrongdoing, the requirement of probable cause is satisfied. Polk v. Williams, 565 So.2d 1387 (Fla. 5th DCA 1990). In the same vein, the United States Supreme Court has noted:

> The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, ... there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a substantial basis for ... conclud[ing] that probable cause existed.

Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 2332, 76 L.Ed.2d 527 (1983) (emphasis added) (quotation marks omitted).

The Court went on to state that the inquiry of probable cause must be confined entirely to the four corners of the affidavit.

The house affidavit stated the following:

> 1. That your Affiant is a Deputy Sheriff with the Sarasota County Sheriff's Office. Your Affiant has been so employed for the past nine years. Your Affiant is assigned to the Criminal Investigation Bureau. Your Affiant has the responsibility of investigating homicide investigations while a member of the Criminal Investigation Bureau.
> 2. That on 06/13/91 the body of Jacqueline Galloway, W/F, 12/4/54, was discovered in an open field in the rear of the Laurel Oaks Subdivision in eastern Sarasota County.
> 3. That the cause of death to Jacqueline Galloway was determined to be strangulation by

verse rod cord. A loop had been fashioned to one end of the ligature.

4. That during the murder of Jacqueline Galloway press-on fingernails were forcibly removed from all of her fingers.

5. That Jacqueline Galloway was abducted from her residence at 2225 Floyd Street in Sarasota on 6/12/91.

6. That on 7/16/91 at or about 2215 hours John Waterman, W/M, 5/6/66, of 2215 Floyd Street was arrested for loitering and prowling in the area of Floyd and Briggs Avenue. John Waterman lives next door to Jacqueline Galloway.

7. That at the time Jacqueline's body was found her body was wrapped in a beige flat bed sheet. Criminalistics personnel discovered black, grey and silver fibers on the body of Jacqueline Galloway. However there were no fibers found on the sheet. Consultation with Criminalistics personnel indicates that Jacqueline was transported in two separate vehicles due to a lack of fibers on the sheet Jacqueline was wrapped in.

8. That during an interview at the Sarasota County Sheriff's Office and Post Miranda John Waterman stated he has several types of cords at his house. Also during interviews John Waterman stated he has beige sheets at home.

9. During an interview and Post Miranda John stated to Affiant that approximately two weeks to a month ago he received traverse rods from an apartment at Bay Plaza Condominium in Sarasota and removed the cord from the rods. John further stated that he kept some of the cords in his house.

10. That relatives of Jacqueline Galloway have stated the bed sheet she was found in did not belong to her and that during a search of Jacqueline's apartment, a fitted sheet matching the flat sheet Jacqueline was wrapped in was not found.

11. That on 7/17/91 search warrants were executed on John Waterman's 1985 Renault and a 1991 Buick that John was operating when arrested on 7/16/91. Subsequent to those warrants a cord similar to the ligature around Jacqueline's throat was recovered from John's car. The cord had a loop fashioned to one end similar to a loop found on the ligature around Jacqueline's throat.

> 12. That fibers recovered from the 1991 Buick are of the same color and quality as fibers on the body of Jacqueline Galloway.
> 13. That your affiant believes that evidence in the form of hair, blood, saliva, fingernails, cords, ligatures, fibers, bed sheets and pillow cases existed at 2215 Floyd Avenue, Sarasota.
>
> (Undersigned counsel has numbered the paragraphs for convenience in making references.)

(R949, 950) The probable cause defects in this affidavit fall into four categories:

> (1) "Unsupported hearsay" with "no basis of knowledge";
> (2) No facts to justify a conclusion that there is a "fair probability" evidence of a crime would be found;
> (3) No "factual predicate" for the allegations; and
> (4) Facts alleged supported nothing more than a "mere suspicion" or only demonstrate "suspicious conduct."

As noted in Vasquez, 491 So.2d at 299, "'[v]eracity' and 'basis of knowledge' are among the factors to be considered in assessing the reliability of the information." See Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). As in Vasquez there is no information regarding the source's credibility - nothing in the affidavit to enable a judge to evaluate the truthfulness or accuracy of the information. Even when we know the source of some of the information, mere knowledge of the source is not enough to show that source's veracity or accuracy. Going through each paragraph of the affidavit, it can be readily seen that the basis of knowledge is missing and/or not verified as to accuracy or veracity.

Another aspect of an affidavit noted in Vasquez as per Gates is that it must be shown that there is a fair probability that evidence of a crime will be found in a particular place. See also Polston v. State, 424 So.2d 15 (Fla. 1st DCA 1982); and Rodriguez v. State, 420 So.2d 655 (Fla. 3d DCA 1982). Mere suspicion and bare conclusions cannot support a probable cause determination. Gates; State v. Webb, 378 So.2d 884 (Fla. 1st DCA 1979). A lack of factual predicate clearly shows the conclusions to be "bare-bones" and not proper for a judge to find probable cause to exist in this case.

In order to clearly point out the affidavit's flaws, certain paragraphs will be quickly discussed as to their shortcomings (much of this is drawn from Mr. Cooper's memo at R1361-1363, 1377-1382):

> (1) Paragraph 4, above, says that during the murder of Jacqueline Galloway press-on fingernails were forcibly removed from all of her fingers. How does the Affiant know this? There are no facts alleged to support this statement - no "factual predicate."
> (2) Paragraph 5, above, says the victim was "abducted from her residence" on 6/12/91. How does the Affiant know this? There are no facts alleged to support this statement - no factual predicate.
> (3) Paragraph 6 says "John Waterman lives next door to Jacqueline Galloway." This is a totally irrelevant statement without a factual predicate indicating that he lived next door to her at the time of the homicide. Without this, the statement means nothing.
> (4) Paragraph 7, dealing with fibers on the body, is cited as some form of support for the speculation of other persons that the victim's body was transported in two different vehicles. There is no factual predicate for this speculation. In addition, the testimony contradicts this paragraph in that there were fibers found on the sheet - R777, 779, 791, 792.

fibers found on the sheet - R777, 779, 791, 792.

(5) Paragraph 8 indicates that Mr. Waterman was interrogated and told of having "several types of cords" and "beige bed sheets" in his home. (At this point, it should be noted that Mr. Waterman argues that these facts were illegally included within the Affidavit, because this information was unlawfully obtained from Mr. Waterman and constituted the "fruits" of the prior illegal conduct by the police.) Merely having several types of cord and beige bed sheets in his home, without some showing of a connection to the alleged crime, constitutes nothing more than meaningless observations. There is no factual predicate to support the conclusion that this information would lead to, or cause one to believe, that there is evidence of any crime contained within his home. It certainly is not contraband, nor a weapon. There is nothing to indicate that this is the fruits of any crime. Furthermore, any suspicions which this paragraph might raise concerning the subject of "cords" is totally eliminated by paragraph 9 which indicates that Mr. Waterman came into the possession of this cord "two weeks to a month ago." Since the Affidavit is dated July 18, 1991, and the victim was found on June 13, 1991, this would mean that the cord was not in Mr. Waterman's possession until after the death. Therefore, the subject of this cord being located in his home has no relevancy.

(6) Paragraph 10 says that "relatives of Jacqueline Galloway have stated that the bed sheet she was found in did not belong to her." This statement falls into the category of "unsupported hearsay" with no "basis of knowledge" and cannot be used to support a finding of probable cause. The same holds true with the second part of paragraph 10 wherein the Affiant states "that during a search of Jacqueline's apartment, a fitted sheet matching the flat sheet Jacqueline was wrapped in was not found." This statement is entirely without factual support nor is it supported by information demonstrating its veracity. We have no idea how information supplied by unnamed relatives can be accurate, and we have no idea who conducted this search for matching sheets and whether or not the search was adequate.

(7) Paragraph 11 is basically stricken as it deals with evidence found in the Renault - evidence stricken by the trial court.
(8) Paragraph 12 alleges that fibers recovered from the 1991 Buick are "of the same color and quality" as fibers found on the body of Jacqueline Galloway. It should be noted that the Affiant fails to include in the Affidavit whether or not the fibers from the Buick were "black, grey and silver" so as to be consistent with paragraph 7 concerning the fibers found on the body. This is especially necessary in light of the testimony that came out at the hearing that there were many colors of fibers found on the sheet and body as well as colorless/clear fibers (R777, 782, 891, 892). In addition, allegations about the Buick have no relevance because there is nothing in the affidavit alleging that Mr. Waterman had access to the Buick at the time of the murder.

What can be seen from the above-stated allegations in the affidavit is that these allegations consist of many unsupported facts resulting in bare-bones conclusions. The end result is that an examination of the four corners of the affidavit fails to demonstrate that evidence of a crime exists in Mr. Waterman's house. Even though the officers testified as to why they had certain theories as to where the killing didn't take place and might have taken place (no evidence of a struggle at victim's home; victim left house when expecting a visitor and leaving objects behind and house open), at the hearings, none of this made it to the search warrant. The judge could not go beyond the affidavit in issuing a warrant based on probable cause. Thus, the affidavit must stand - and fall - on its own. In this case the affidavit falls because it does not set forth a substantial basis to show probable cause exists to believe evidence of a crime was in Mr. Waterman's home. The substance of the affidavit boils down to the

following - Mr. Waterman is living next door to where the victim used to live, the victim was wrapped in a beige sheet and tied with cord, Mr. Waterman has beige sheets and cords at his home. This is not a substantial basis for probable cause. The search of Mr. Waterman's home must be held invalid.

In addition to a lack of probable cause, the warrant in this case was too general in describing what was to be searched for; so a general explanatory search could, and did, occur of Mr. Waterman's entire residence. Such generic terms of hairs, fibers, cords, combined with a catchall phrase - "other contraband or stolen goods, or other implements or devices that have been used or could be further used in the violation of the Laws of the State Florida relative to the subject matter of this warrant" - made for an impermissible search. In fact, Lt. Whitehead admitted that he and the people he supervised seized what the detectives told him to take or what he decided was important. Yet, he never read the search warrant and did not know what he was supposed to seize (R872). Sgt. Sullivan also added that the entire house was searched due to what they were looking for (R406, 407).

This warrant did not limit the search officer's discretion in any way and was an illegal general warrant. It improperly left to the officer's discretion which items would be seized.

> The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.

Marron v. United States, 275 U.S. 192, 196 (1927). The warrant also violated Section 933.05, Florida Statutes (1987), which provided that a "search warrant cannot be issued except upon probable cause supported by affidavit or affidavits, naming or describing the person, place, or thing to be searched and particularly describing the property or thing to be seized."

Because the warrant was improperly general, the police could engage in a general exploratory search for evidence of crime, and they clearly believed that they could seize anything they felt like taking. As often occurs, the proof was in the pudding, namely, the other items that they seized. These items included, spiral notebooks, miscellaneous desk papers, videotapes, shoelace, carpet samples, a knife, a black hood, gloves, necktie, boots, book, pillowcases, and fiber samples. Although each of these items arguably in an extremely broad sense "could" be used in some way to violate Florida Laws, the breadth and variety of this seized evidence proved that the warrant was general and allowed the police to seize everything in the residence. A search warrant so general that it leaves the scope of the seizure to the discretion of the officer executing the warrant is constitutionally over-broad. State v. Nelson, 542 So.2d 1043 at 1045 (Fla. 5th DCA 1989).

The illegal general search warrant in this case was much more general than the search warrant authorizing the seizure of "documents recording the extension of credit," which Polakoff v. State, 586 So.2d 385, 392-93 (Fla. 5th DCA 1991), found was too vague. It was more general than the direction to seize blue wheelbarrows,

which was too vague in Sims v. State, 483 So.2d 81 (Fla. 1st DCA 1986), because it did not specify which blue wheelbarrows to take. It was no better than the warrant in Perez v. State, 521 So.2d 262 (Fla. 2d DCA 1988), which only discussed cocaine and guns and therefore did not authorize seizure of a VCR. Moreover, the items seized were not contraband, for which warrants may sometimes authorize searches in more general terms. Carlton v. State, 449 So.2d 250 (Fla. 1984).

Although the trial court suppressed some of the evidence seized as not being covered by the warrant or under the plain view exception (book, notebooks, miscellaneous papers, I.D. badge and socket, tapes), it allowed the remaining evidence seized in the search to come in - including a hood and gloves and necktie and boots. This clothing was not in the affidavit or warrant, and the boots - in light of the footprint - could have been specifically listed. The other articles of clothing were more suspect of other crimes (the sexual batteries); yet, these articles are not per se illegal nor was this a search for possible evidence of sexual batteries. In actuality, the warrant did not embrace these items and they should not have been seized.

Because the affidavit failed to set forth a substantial basis to show probable cause exists to believe evidence of a crime was in Mr. Waterman's home and because the warrant was too general in describing what was to be searched for, the search of Mr. Waterman's home pursuant to this warrant was invalid. All fruits of this search must be suppressed. Wong Sun.

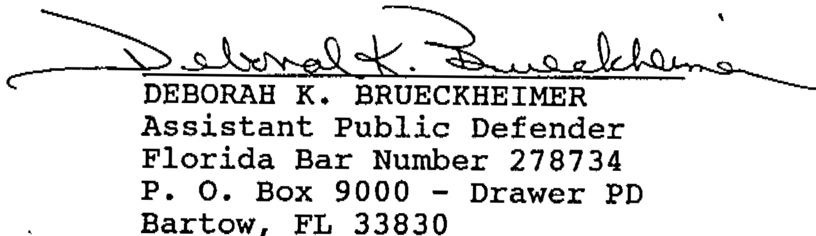
CONCLUSION

In light of the foregoing reasons, arguments, and authorities, Appellee/Cross-Appellant respectfully asks this Honorable Court to suppress all evidence obtained against Mr. Waterman in this case obtained from the searches and seizures from the cars and the house. In addition, all statements made by Mr. Waterman must be suppressed.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Butterworth, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 9th day of August, 1993.

Respectfully submitted,



DEBORAH K. BRUECKHEIMER
Assistant Public Defender
Florida Bar Number 278734
P. O. Box 9000 - Drawer PD
Bartow, FL 33830

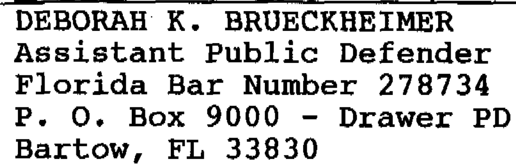
JAMES MARION MOORMAN
Public Defender
Tenth Judicial Circuit
(813) 534-4200

DKB/an

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Michael Neimand, Assistant Attorney General, 401 N.W. 2nd Avenue, Suite 921N, Miami, FL 33128; Mark Leban, 2920 First Union Financial Center, 200 South Biscayne Boulevard, Miami, FL 33131-5302 on this 27th day of October, 1993.

Respectfully submitted,



JAMES MARION MOORMAN
Public Defender
Tenth Judicial Circuit
(813) 534-4200

DEBORAH K. BRUECKHEIMER
Assistant Public Defender
Florida Bar Number 278734
P. O. Box 9000 - Drawer PD
Bartow, FL 33830

DKB/tll