IN THE SUPREME COURT OF FLORIDA

CASE NO. 64,148

BOBBY MARION FRANCIS,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

* *

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

* *

BRIEF OF APPELLEE

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INTRODUCTION

Appellant, Bobby Marion Francis, was the Defendant in the trial court. The Appellee, State of Florida, was the prosecution. The parties shall be referred to in these terms.

The symbol "R" will designate the Record on Appeal. The symbol "TR" will designate the transcript of proceedings. Page numbers relate to those numbers on the bottom of each page.

All emphasis is added by the writer unless otherwise noted.

Appellee notes that the Brief of Appellant cites to an attached Appendix. Appellee has filed a Motion to Strike the appendix and shall not accept it as part of the record on appeal.

STATEMENT OF THE CASE

The long and twisted history of the State of Florida's attempt to convict Bobby Marion Francis for the first degree murder of Titus Walters began with the arrest of Francis in Miami, Florida on August 19, 1975. (TR. 824-825). On August

27, 1975, Francis was indicted for first degree murder in the Circuit Court of the Sixteenth Judicial Circuit, in and for Monroe County, Florida. (R. 1-4).

On March 23, 1983, the case was called for jury trial[1] by the Honorable Phillip Knight, Judge[2] of the Eleventh Judicial Circuit of Florida, in and for Dade County. The State of Florida rested its case on March 28, 1983. After moving unsuccessfully for Judgment of Acquittal or, a reduction in the degree of murder, the defense rested its case. (TR. 1050-51). The court then denied renewed defense motions for acquittal and sent the case to the jury. (TR. 1050-51, 1229). Upon due deliberation, the jury returned a verdict of guilty as charged in case 82-18230. (R. 850). (TR. 1232). The court adjudicated the defendant and ordered a sentencing hearing. (R. 802, 885-886).

On March 29, 1983, the court conducted the sentencing hearing and received from the jury a recommendation of a sentence of life imprisonment without the possibility of

[1]The Defendant had been previously adjudicated guilty and sentenced to death on two occasions only to successfully overturn the convictions. The basis for both of these reversals is set out in Francis v. State, 413 So.2d 1175, 1176-1179 (Fla. 1982).

[2]Judge Knight, a Dade County Judge, was specially designated to try the case in Monroe County by Order of the Florida Supreme Court on June 4, 1982. (R. 485). The case was later moved from Monroe to Dade County upon motion of the defendant. (R. 487-521, 522-523).

parole for twenty-five years. (TR. 1292-1293).(R. 804) The trial court considered the jury's recommendation but, rejected it and sentenced the defendant to death. (R. 907, 921-924),(TR. 1305-1306).

The defendant moved for a new trial. The court denied the motion after hearing argument on June 16, 1983, by written order on June 23, 1983. (R. 941-972, 929). A timely notice of appeal was filed on July 20, 1983.

STATEMENT OF THE FACTS

On August 17, 1975 the Key West, Florida, Police Department responded to a reported murder at 725 Whipmarsh Lane. The time was approximately 2:30 p.m. (TR. 681-682, 691). According to Officer Charles Powers, an early arrival at the scene, the police made the following discovery:

> In the back room off the living room there was a black male subject slumped over in the bathtub, trickle of blood coming out of the corner of his mouth, some type of gray matter on top of his head. (TR. 683)(R. 842).

Powers saw that the man had been shot in the head and that his mouth was covered with tape. (TR. 683--84)(R. 842).

Detective Robert Lastre arrived about the same time as Officer Powers. He knew Mr. Elmer Wesley occupied the house at 725 Whipmarsh. (TR. 691). Lastre examined the body in the bathtub. He saw that the victim's mouth was stuffed with a washcloth and covered with tape and that his hands were taped behind his back. The man had been shot in the head two times. (TR. 698). Lastre knew the dead man. His name was Titus Walters. (TR. 693, 697).

On arrival, Officer Lastre had observed a number of civilians on the scene. Besides Elmer Wesley, there was his sister Deborah, and also, two brothers, Arnold and Arthur Moore. (TR. 326-327). Lastre observed all four were acting strangely and that Elmer Wesley, Deborah Wesley and Arnold Moore were "very nervous, very upset." (TR. 692).

Lastre, the lead detective, went inside and began his investigation. In a bedroom he found an open can of Drano and a spoon on top of a dresser. (TR. 703). He also found a spool of Johnson and Johnson tape and a pillow. (R. 844). The pillow had six holes in it. The holes were covered with a black substance. (TR. 704). It was seized and entered as State's Exhibit 10 at trial. (TR. 711). In due course, the tape, washcloth and Drano can were introduced into evidence as Exhibits 11-14. (TR. 711-719). See also (R. 842.844).

The police investigation was initially stymied by the refusal of Elmer Wesley, Deborah Wesley, Arnold Moore or Arthur Moore to discuss the crime with them. (TR. 446, 562, 359). An apparent break in the case came on August 19th when the police arrested Bobby Francis, and called in Elmer Wesley and Arnold Moore for questioning. After seven hours of interrogation Elmer Wesley stated, "Do you want me to say I killed him? Okay. I killed him." (TR. 740). According to Detective Lastre, Wesley then put his head on the table and began crying. (TR. 740). Significantly, Wesley told the police he had shot Titus Walters three times in the head. (TR. 741). Lastre did not personally arrest Wesley because he didn't believe Wesley was the killer. (TR. 777).

The police did have reason to believe Bobby Francis was the killer. The Monroe County Sheriff's Department had utilized Titus Walters in a drug investigation on August 1, 1975. Detective Charles Major had Walters lead the police to a motel room where Bobby Francis was dealing in narcotics. (TR. 940-943). The police entered the room and found Francis and Deborah Wesley inside. (TR. 944). According to Deborah Wesley, the police arrested Francis. (TR. 565). Officer Larry Dollar and Detective Major confirmed the fact that Walters was a police informant and that he "set up" Mr. Francis. (TR. 916-919, 942-943). This led to a decision to have Francis arrested. Later, while looking for

Francis, the Metro-Dade Public Safety Department seized a fully loaded .38 caliber pistol from the bedroom of the house where he was staying. The gun was spotted, partially concealed in a bed. (TR. 826). At trial, the pistol was introduced into evidence as State Exhibit 27. (TR. 829). It was subsequently proved to be the murder weapon by test firing analysis. (TR. 840-844).

Detective Lastre drove up to Miami, took custody of Francis and transported him back to Key West. (TR. 724). Lastre gave a Miranda warning to Francis prior to starting this trip. He related the following statement made by Francis in the car:

> The defendant stated that he had come to Key West on Sunday, August the 17th, at about 1 p.m. He had arrived in Key West at 1 p.m., and when he got to 725 Whipmarsh Lane, he related to me that Arnold Moore and Elmer Wesley told him that they, Arnold Moore and Elmer Wesley, had tried to overdose Titus and that he, the defendant, went into the bathroom and Titus was in the bathroom already dead.
>
> * * *
>
> The Defendant told me when he left 725 Whipmarsh Lane, they went to the intersection of Truman Avenue and Duval where they picked up two Negro females, one named Charlene, the other one named Red, and from there they headed right up to U.S. 1, Miami.
>
> (TR. 727).

Francis told Lastre that Charlene took a .38 caliber pistol from out of her handbag and gave it to him. He told Lastre the gun was not in proper working order. (TR. 730-31).

In Key West the Defendant gave a second statement to the police, after being given a second Miranda warning. (R. 846)(TR. 733). The written statement, signed by Mr. Francis, was introduced into evidence as State's Exhibit 15. (TR. 734).

In that second interview Francis admitted to lying about his receiving the pistol ". . .he wanted me to know he bought the gun from Elmer Wesley for thirty dollars.", Lastre recalled. (TR. 738). That same evening, Arnold Moore and Elmer Wesley were interrogated in the presence of Bobby Francis. As noted earlier, Elmer Wesley broke down and confessed at that time. He and Arnold Moore were charged with murder on the basis of that confession. (TR. 365, 515)

The reason Elmer Wesley confessed was that he feared Bobby Francis. (TR. 451). The next day, August 20, 1975, he recanted his confession, and for the first time described to the police the facts surrounding the death of Titus Walters. (TR. 450-451). Deborah Wesley also made a statement to the police the next day. (TR. 563, 609). She had also feared the defendant and had been afraid to come forward until her

brother and Arnold Moore were arrested. (TR. 563, 611). Finally, Arnold Moore and Elmer Wesley testified before a Grand Jury. They were subsequently released and the charges against them were dropped. (TR. 382, 515).

What the Wesley's and Arnold Moore told the authorities and what they and Charlene Duncan repeated to the jury was a chilling story of rage, revenge, torture, intimidation and execution-style murder.

The incident began with the arrest of Francis on August 1, 1982 after Titus Walters set him up for a police raid. Francis was furious and told Arnold Moore, ". . .he'd swear on his mom's grave he was going to kill Titus, that if he don't kill him that he'd have somebody else kill him and he would give him two weeks that Titus would be dead." (TR. 366-367). Deborah Wesley testified that just before the police entered the motel room on August 1, Francis said, "The nigger got to die. He set me up." (TR. 566). Arnold Moore warned Titus Walters to avoid Francis and nothing happened until the evening of August 16th.

Charlene Duncan testified that she and Opal Lee took a bus from Miami to Key West on August 16, 1975 to deliver a package from Bobby Francis to Elmer Wesley. (TR. 961). Because Elmer had no money, Charlene took his gun as collateral and gave him two bags of "something to get high off

of." (TR. 962). Charlene took the gun, a .22 caliber pistol, emptied out the bullets and put it in her purse. (TR. 962). While at Wesley's house, Ms. Duncan encountered Titus Walters. Walters kept trying to talk about Francis and matters which Duncan did not comprehend. To avoid him, she went to some bars with Opal Lee and the transvestites, Moore and Wesley. Walters followed them and finally attacked them. He tried to run them down with his car and when Opal Lee fell down in an attempt to run, Walters caught her and beat her about the face. (TR. 964--966, 968). Opal managed to escape and she fled with Charlene to a friend's house. On the way, Charlene called Bobby Francis and told him that Walters had beaten up on Opal Lee.

Charlene's testimony regarding this incident was corroborated by the testimony of Donald "Poopie" Batey. It was Batey who took the women home after the attack by Walters. (TR. 656-658). The women stayed at Batey's home the night of August 16. (TR. 969-970). The next morning Bobby Francis came over with Willie Orr and picked them up in his car. (TR. 660). They drove over to Elmer Wesley's house and waited for Titus Walters. According to Charlene Duncan, Francis hid his car from sight, saying "he would lay dead for that nigger." (TR. 972). Elmer Wesley concurred on this point. (TR. 415). Walters arrived within five to ten minutes. With him were Deborah Wesley and Arnold Moore.

(TR. 973). Francis was on Walters within seconds of his entry according to all the witnesses. (TR. 343, 23-424, 534-536, 973).

Arnold Moore recalled Francis ordering Walters to get on his knees. Everyone else was ushered by an armed Willie Orr[3], into the kitchen. Moore and Deborah Wesley heard Walters begging and then a shot. (TR. 344, 538). Charlene Duncan and Elmer Wesley saw Francis shoot the floor. (TR. 423, 976). They also heard Walters plead for his life. (TR. 423, 976).

His hands were taped behind his back and he was taken into the bathroom and seated backwards on the commode. (TR. 349, 429, 546, 985). Francis put a washcloth in his mouth and taped it up. (TR. 429). He sent Elmer to get some needles and Charlene and Arnold to buy Drano. He gave Charlene money he took from Titus. (TR. 345-346, 351, 427, 976-977). They came back with their purchase and Francis apparently tried to mix up a Drano injection to torture Walters.[4] (TR. 602). There was no evidence that he actually injected his victim.

[3]Nothing is said of the fate of Willie Orr in the record on appeal.

[4]Recall Detective Lastre's discovery on the bedroom dresser. (TR. 403).

In approximately 15-20 minutes Francis emerged from the bedroom with his gun and a pillow in hand. Arnold Moore recalled what happened next in graphic detail:

> He said, "Damn, his momma must have some good strong blood roots, that fucker just won't die." That's when Bobby Francis said that he would have to buy her another pillow, and he had the gun in his hand and I just so happened to go back and again, be nosey, and that's when I see Bobby Francis over the tub and Titus was in the tub and he had the gun with the pillow and that's when I heard one shot and I had run back in there, in the kitchen.
>
> Then I heard another shot.
>
> (TR. 353).

Charlene Duncan, Elmer Wesley and Deborah Wesley concurred on this report of the final act. (TR. 430, 434, 554-555, 986-988). Deborah Wesley stated that Francis emerged and told the Wesleys and Arnold Moore to dispose of the body. (TR. 555). Elmer and Charlene also recalled that order. (TR. 436, 987). Arnold Moore only recalled, "Bobby Francis came out laughing." (TR. 355).

As Francis stood laughing in the hall the occupants scattered. Francis followed. Opal, Willie Orr, Charlene and Bobby Francis got in Francis' car and drove back to Miami. On the way they stopped and dumped the empty shell casings in the Gulf of Florida. (TR. 988-990).

Arnold, Elmer and Deborah went to a bar and got drunk. (TR. 356-357, 439, 559). Elmer then took a woman named Samantha back to his house, supposedly to use drugs. (TR. 439-440). She found the body in the bathtub. (TR. 444).

The official report of the County Medical Examiner concluded that Titus Walters had been shot three times at close range. Once in the chest and twice in the head. The fatal shot was to the chest. It passed through the heart causing massive blood hemmoraging. (TR. 864-870).

POINTS INVOLVED ON APPEAL

I

WHETHER THE TRIAL COURT ERRED IN IMPROPERLY PROHIBITING THE DEFENDANT FROM CROSS-EXAMINING DEBORAH WESLEY EVANS CONCERNING HER THEN PENDING CHARGES BEFORE THE SAME STATE ATTORNEY'S OFFICE WHO WAS PROSECUTING THE DEFENDANT, THEREBY DENYING THE DEFENDANT HIS SIXTH AMENDMENT RIGHT TO CONFRONT HIS ACCUSERS?

II

WHETHER THE DEFENDANT WAS DEPRIVED OF DUE PROCESS OF LAW AND A FAIR TRIAL THROUGH THE ACTIONS OF THE STATE IN CONNECTION WITH THE TESTIMONY OF CHARLENE DUNCAN, INCLUDING THE USE OF FALSE, FRAUDULENT OR MISLEADING TESTIMONY; ACTING OUTSIDE OF ITS AUTHORITY; AND FAILING TO INFORM THE DEFENDANT OF EXCULPATORY MATERIAL IN ITS POSSESSION, ALL IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 9 OF THE FLORIDA CONSTITUTION?

III

WHETHER THE TRIAL COURT ERRED IN FINDING AN AGGRAVATING CIRCUMSTANCE OF DISRUPTING OR HINDERING THE EXERCISE OF ANY GOVERNMENTAL FUNCTION OR THE ENFORCEMENT OF LAWS IN THAT THE EVIDENCE DID NOT PROVE THIS AGGRAVATING CIRCUMSTANCE BEYOND AND TO THE EXCLUSION OF EVERY REASONABLE DOUBT?

IV

WHETHER THE TRIAL COURT ERRED IN FINDING AN AGGRAVATING CIRCUMSTANCE OF ESPECIALLY, WICKED, EVIL,

IV
CONTINUED

ATROCIOUS AND CRUEL IN THAT THE EVIDENCE DID NOT SUSTAIN THIS AGGRAVATING CIRCUMSTANCE BEYOND AND TO THE EXCLUSION OF A REASONABLE DOUBT?

V

WHETHER THE TRIAL COURT ERRED IN FINDING AN AGGRAVATING CIRCUMSTANCE OF COLD, CALCULATED MURDER IN THAT (A) THE EVIDENCE DID NOT SUSTAIN THIS AGGRAVATING CIRCUMSTANCE BEYOND AND TO THE EXCLUSION OF EVERY REASONABLE DOUBT, AND (B) THIS AGGRAVATING CIRCUMSTANCE WAS IMPROPERLY APPLIED RETROACTIVELY IN VIOLATION OF ARTICLE I, SECTION 10 OF THE UNITED STATES CONSTITUTION, AS WELL AS ARTICLE I, SECTION 10 OF THE CONSTITUTION OF THE STATE OF FLORIDA?

VI

WHETHER THE TRIAL COURT ERRED IN OVERRIDING THE JURY RECOMMENDATION OF LIFE AND IMPOSING A SENTENCE OF DEATH IN THAT THERE WAS A REASONABLE BASIS FOR THE JURY'S RECOMMENDATION AND THE FACTORS SUGGESTING THE SENTENCE OF DEATH WERE NOT SO CLEAR AND CONVINCING SUCH THAT NO REASONABLE PERSONS COULD DIFFER AS TO THEIR APPLICABILITY?

VII

WHETHER THE TRIAL COURT UNCONSTITUTIONALLY SENTENCED THE DEFENDANT TO DEATH IN THAT SAID SENTENCE WAS IMPOSED AS A PENALTY FOR THE DEFENDANT'S EXERCISE OF HIS CONSTITUTIONAL RIGHTS AND REJECTION OF THE COURT'S PLEA OFFER OF LIFE IMPRISONMENT?

ARGUMENT

I

THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN PROHIBITING THE DEFENDANT FROM CROSS-EXAMINING DEBORAH WESLEY CONCERNING HER THEN PENDING CHARGES BEFORE THE SAME STATE ATTORNEY'S OFFICE THAT WAS PROSECUTING THE DEFENDANT.

Prior to beginning the trial, the State moved in limine to prevent the defense from questioning Deborah Wesley regarding her recent arrest for second degree murder.[5] It is important to note that the motion was limited to this request by Mr. Garringer:

> Whatever charge against Miss Wesley is in 1983. The fact that she's been arrested and charged for any crime is not admissible. He can't ask her the question: "Are you on charge for murder."
>
> He can only ask her: convicted of a felony, if so, how many times.
>
> He may inquire of Miss Wesley, I do believe, "Has the State made you any offer, any deal or any promise for your testimony, in exchange for working something out for the case pending against you."
>
> He can ask her this. I know the answer is "No", because I haven't talked to her. I know no other prosecutor has gotten near her. . .
>
> (TR. 10).

[5]The actual written motion, if one existed, is not contained in the record.

The trial judge granted the motion and outlined the scope of his ruling just before the first witness testified:

> My ruling on that is. . .the fact that a person has been arrested and is charged and is presently pending trial is not going to be admissible and I don't want any statement made in reference there to unless the-- and I can recede from a ruling upon showing that a deal or something has been made with the State Attorney's Office in reference to the giving of their testimony which I'll hear outside the presence of the jury.
>
> (TR. 275).

The defense later conceeded there was no evidence to even suggest any possibility that a deal could be struck on Ms. Wesley's pending case. (TR. 617). History bears witness to the fact that no deal was made. In Evans v. State, __So.2d ___(Fla. 3d DCA 1984)[9 F.L.W. 1381] Ms. Wesley-Evans conviction for the second degree murder of her husband was affirmed.

In his first point on appeal Mr. Francis contends that the court order granting the Motion in Limine violated his Sixth Amendment right to confrontation in that he was denied the opportunity to establish bias on the part of Ms. Wesley. In raising this point in the lower court defense counsel limited his proffer to the following argument:

> . . .I felt I should have an opportunity to cross-examine her as to those charges for whether she's doing it to gain any favor from the State, for the jury to have an opportunity to determine whether these charges would have any effect on her testimony and as a general consideration for the jury's truth, bias and veracity, obviously.[6]
>
> (TR. 617).

In this context it is clear that no reversible error exists.

First, the court did not abuse its discretion in suppressing the fact that the witness faced a pending charge of murder. The Florida Evidence Code prohibits the introduction of evidence of an unrelated crime absent a showing that the evidence is relevant to the crime charged. Section 90.404(2). One possible point of relevancy is a showing tht the testimony presented is biased or otherwise tainted by the witness' desire to curry favor with the authorities. Morrell v. State, 297 So.2d 579 (Fla. 1st DCA 1974).

What separates the appellant's perception of the law from the appellee's view is the appellant's failure to recognize the overview of relevancy as an evidentiary concern. To be admissible, evidence must be relevant. To be relevant, evidence must prove or disprove a material fact.

[6]Those portions of the appellant's argument which go beyond this proffer are not properly before this Court. Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982); German v. State, 379 So.2d 1013 (Fla. 4th DCA 1980).

Mere speculation on the part of counsel does not equate with relevancy. As far back as Shagra v. State, 84 So.2d 42 (Fla. 1955) this court rejected a defense claim regarding limitation of cross-examination where the record failed to establish the relevance of the inquiry. In the case sub judice no proffer was made of the witness' answer or what that answer would have revealed. This omission provides two basis for rejection of this claim. First, the issue is not preserved. Secondly, the failure to proffer negates the assertion that the trial judge abused his discretion in the matter. The theories are intertwined and shall be presented as such. In Hernandez v. State, 360 So.2d 39 (Fla. 3d DCA 1978) the defendant appealed the limitation placed on the cross-examination of the alleged victim of an aggravated assault. Specifically forbidden was any question concerning the victim's pro-Castro politics and the defendant's anti-Castro stand. The defense contended this would show a possible bias or motive for fabrication of testimony. This contention was rejected by the appellate court:

> Bias on the part of a prosecution witness is a valid point of inquiry in cross-examination, but the prospect of bias does not open the door to every question that might possibly develop the subject. In the early case of Wallace v. State, 41 Fla. Fla. 547, 26 So. 713, 722 (1899), the Supreme Court of Florida laid down the rule that inquiry into collateral matters should not be permitted, unless there is reason to believe it may

> tend to promote the ends of justice and it seems essential to the true estimation of the witness's testimony by the jury. Cf. United States v. Fowler, 151 U.S. App.D.C. 79, 81-82, 465 F.2d 664, 666-667 (1972), and cases cited therein.
>
> Id. at 41.

Unlike the cases cited in appellant's brief, the instant case involved mere speculation--a mere prospect of bias--which the learned trial judge had to weigh against the tendency of the evidence to mislead the jury or confuse the real issue in the case. Section 90.403. The so-called proffer found on page 617 of the transcripts indicates that defense counsel had investigated the possibility of a deal between the State and Ms. Wesley but had found no proof of such a transaction. Counsel did not proffer what answer he believed Ms. Wesley would give or how her answer would be relevant to prove a material fact other than her bad character or propensity towards violence. This omission waived further review on the issue. Hernandez, supra. In an analogous situation the Third District Court of Appeal distinguished those cases where relevancy is apparent from the question or the proferred answer from those cases where the line of questions indicates "a fishing expedition during trial" by counsel. A.McD. v. State, 422 So.2d ~~928~~ 336, ~~931~~ 337 (Fla. 3d DCA 1982). Compare, Lee v. State, 422 So.2d 928, 931 (Fla. 3d DCA 1982).

The instant case is a classic example of why a proffer of the excluded testimony is required prior to appellate review. There is nothing in this record to disclose the abuse of discretion by the trial judge. He indicated that his mind was open and his ruling flexible. He was also aware of the prior sworn statement given by Ms. Evans at the first trial in 1976. (R. 941-942). On several occasions defense counsel attempted to impeach Ms. Evans with that statement. (TR. 591-594). It was plain to the trial judge that Ms. Wesley was not changing her story in any significant way from her previous testimony. That fact, when coupled with the nature of the pending crime and the potential for grossly improper impeachment by showing mere bad acts not related to this crime establish that the court's order was within the reality of proper discretion. The speculative claim made below when compared with facts known to the judge was not sufficient to apprise him of the significance the defense placed on this testimony. This was the essence of the court's ruling. (R. 959).

Had the appellant followed the procedure used in Watts v. State, 450 So.2d 265, 267 (Fla. 2d DCA 1984) in making his "proffer" he might have avoided procedural default. His failure to offer more than speculation to the trial court preclude further review of this point. Hughes v. Raines, 641 F.2d 690, 693 (9th Cir. 1981).

To summarize, the unique factual background of this case distinguishes this judge's decision that the evidence of pending crimes should be suppressed from all prior cases. The rule is not inflexible. It is colored by a respect for the sound discretion of the trial judge who knows the background of his case and the potential mischief to be caused by an unsubstantiated and clearly refuted claim of bias. This fact when coupled with the waiver above, supports affirmance.

Assuming arguendo this court finds the limitation of cross-examination was error, the appellee contends the mistake was harmless. Every witness called by the State gave the same testimony about how Walters was killed by Francis. Corroborating this testimony was the physical evidence, including the murder weapon found in the appellant's possession, and the testimony of Donald Batey and Johnny Williams. These two disinterested witnesses provided crucial unimpeached testimony regarding two key episodes leading up to the killing. Batey recalled the problems Charlene Duncan and Opal Lee had with Walter's on the night prior to his death. (TR. 654-659). He also recalled how Francis, Johnny Williams and others arrived to pick up Charlene and Opal the next morning. (TR. 660-661). Johnny Williams told the jury how he drove Francis and Elmer Wesley to Batey's house at 8:50 a.m. on August 17. (TR. 622). He also testified about

visiting the Wesley home later that day only to find Francis and Willie Orr carrying guns and using drugs. (TR. 627-629).

Even if the defense had been able to impeach Ms. Wesley there was ample supporting evidence upon which a jury could have found Francis guilty. Accordingly, this alleged error is harmless. Brantley v. State, 279 So.2d 290, 291-292 (Fla. 1973); Sloan v. State, 427 So.2d 808, 809 (Fla. 4th DCA 1983); Brown v. State, 426 So.2d 76 (Fla. 1st DCA 1983).

II

THE DEFENDANT WAS NOT DEPRIVED OF DUE PROCESS OF LAW OR A FAIR TRIAL THROUGH ANY ACTION OF THE STATE IN CONNECTION WITH THE TESTIMONY OF CHARLENE DUNCAN INCLUDING ANY ALLEGED USE OF FALSE, FRAUDULENT OR MISLEADING TESTIMONY; ANY ALLEGEDLY UNAUTHORIZED ACTIONS; OR ANY ALLEGED FAILURE TO INFORM THE DEFENDANT OF ANY EXCULPATORY MATERIAL IN ITS POSSESSION IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 9 OF THE FLORIDA CONSTITUTION.

In his Motion for New Trial the Appellant raised the issue now presented on appeal. (R. 941-972). Specifically contested was the testimony of Charlene Duncan regarding her case status and the possibility of the State's agreement in a plea bargain if she won her appeal. In the new trial hearing and now on appeal, Appellant contends that the State knowingly used false testimony in connection with Duncan's testimony and later afforded to her more favorable treatment than was explained by her to the jury.

In order to gain a new trial under the type of due process argument now raised the Defendant must show the non-disclosed evidence was material in order to prevail. Lister v. McCleoud, 240 F.2d 16 (10th Cir. 1957); Alcorte v. Texas, 355 U.S. 28, 78 S.Ct. 103, 2 L.Ed.2d 9 (1957).[7] In Alcorte

[7]The annotation to Alcorte appears at 2 L.Ed.2d 1575.

the non-disclosed evidence went straight to the heart of the heat-of-passion defense. That contrasts to this cas where the material facts were the preferred treatment, the precise details and the notion that the State would go the extra mile for her. The testimony of Miss Duncan revealed to the jury that in exchange for her testimony she would get ". . . a new trial to plea guilty to third degree. I would get ten years or either a pardon. The non-disclosed evidence of the details of how Charlene Duncan was rewarded for her assistance is not the stuff of due process violations. To quote Judge Garwood from United States v. Jennings, 724 F.2d 436, 445 (5th Cir. 1984): "Even if Jennings had not known of the conviction, it is apparent that he got all the mileage out of it that he could have if informed of it earlier." The relevant factors were made known to the jury. The State's mechanisms for providing that aid were not relevant to the bias theory presented at trial. Accordingly this claim is meritless.

Beyond the lack of materiality is the clear lack of prejudice. Unlike the many cases cited by the appellant: Alcorte, supra. (one witness case); Wolfe v. State, 190 So.2d 394 (Fla. 1st DCA 1966)(principle witness was accomplice); Lee v. State, 324 So.2d 694 (Fla. 1st DCA 1976)(two principle witneses both co-defendants) this case involves independent physical evidence and independent unimpeached

testimony from three eyewitnesses to the killing and testimony from two unimpeached witnesses corroborating key segments of the eyewitness testimony. see Argument I, above. No prejudice or taint infects the verdict in this cause. It should not be reversed upon a questionable allegation of discovery violation or use of false testimony.[8] As Appellant's own case, Commonwealth v. Hallowell, 383 A.2d 909, 911 (Pa. 1978) points out:

> The good faith, or lack thereof, by the prosecutor is immaterial because the concern is not punishment of society for misdeeds of the prosecutor, but avoidance of an unfair trial to the accused.

The lack of prejudice in this case is tied not only to the overwhelming evidence against Francis. Mere impeaching evidence is rarely so vital that its non-disclosure merits a new trial. The settled rule in both Florida and federal case law is that a motion for new trial will not be granted where the newly discovered evidence does not go to the merits but merely impeaches a witness and is not such as would produce a different verdict. Harvey v. State, 87 So.2d 582 (Fla. 1956); Hudson v. State, 353 So.2d 633 (Fla. 3d DCA 1977); Roth v. State, 368 So.2d 1310, 1312-1313 (Fla.

[8]The allegations of bad faith, improper conduct and abuse of discretion which fill the Brief of Appellant are not germane to resolution of this issue and shall not be addressed in this Brief. If Appellant is not aware of State v. Murray, 443 So.2d 955 (Fla. 1984) he should review it prior to making an argument that bad acts alone require a new trial.

3d DCA 1979), cert. den., 379 So.2d 208 (granting a state cross-appeal of a new trial order on this issue); Diamond v. State, 233 So.2d 418 (Fla. 4th DCA 1970); and United States v. Antone, 603 F.2d 566 (5th Cir. 1979).

The Antone decision is especially pertinent in that it incorporates the many federal decisions cited by appellant in its review of non-disclosure of an impeaching fact regarding a witness' deal with prosecutor's. In viewing the specific non-disclose in light of the admitted impeaching evidence the court concluded:

> In any event it was quite apparent to the jury that Haskew was motivated primarily by self-interest. The revelation that the attorney's fees [of Haskew's lawyer] were being paid by the State would not have been especially significant as it would only have further revealed Haskew's self-interest motivation, already amply shown.
>
> Id. at 570.

The same rationale amply supports the decision of the trial judge below.

III

THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN FINDING AN AGGRAVATING CIRCUMSTANCE OF DISRUPTING OR HINDERING THE EXERCISE OF A GOVERNMENTAL FUNCTION OR THE ENFORCEMENT OF LAWS IN THAT THIS AGGRAVATING CIRCUMSTANCE WAS PROVED BEYOND AND TO THE EXCLUSION OF ANY REASONABLE DOUBT.

The appellee takes strong exception to appellant's suggestion that he was not aware of Titus Walter's status as a confidential informant for the Narcotics and Vice Units of Monroe County and Key West. (Brief of Appellant, p. 37). The uncontested testimony presented at trial established Titus Walters as a confidential drug informant used by Officers Larry Dollar and Charles Major. (TR. 916-919, 940-941). Detective Major testified that Walter's was used to set up Bobby Francis for arrest on August 1, 1975. (TR. 942-943). Larry Dollar told the jury that Walter's was dead within approximately three weeks of his first duty. (TR. 920).

Bobby Francis knew it was Walters who had aided the police in arresting him for narcotics offenses. According to Deborah Wesley, Francis had determined his course of action before he was even arrested! Walters had to die because he was an informant who "set up" Francis. (TR. 566, 366-367). Francis' allegation that he did not, or could not, know that the murder of a key police informant would

hinder, that is, obstruct or hold back the investigation of narcotics-related crime in Key West, is a factual consideration which is to be given deference when addressed by this court on appeal. State v. Savage, 156 So.2d 566 (Fla. 1st DCA 1963).

In a similar case this court has upheld a trial court finding of aggravating circumstance under §921.141(5)(g). In Bolender v. State, 422 So.2d 833 (Fla. 1982), cert. den., ___U.S.___, 103 S.Ct. 2111 (1983), the court upheld a finding that the murder of a known police informant resulted in the disruption of law enforcement activities.

Appellant's attempt to convince this court that this particular aggravating factor should only be utilized when it is the dominant or sole motive for the killing is refuted by this court's upholding the aggravation in Bolender, supra; Antone v. State, 382 So.2d 1205 (Fla. 1980); and Bottoson v. State, 443 So.2d 962, 966 (Fla. 1984). The standard of proof is beyond a reasonable doubt.

IV

THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN FINDING AN AGGRAVATING CIRCUMSTANCE OF ESPECIALLY WICKED, EVIL, ATROCIOUS AND CRUEL IN THAT THE EVIDENCE SUSTAINS THIS AGGRAVATING CIRCUMSTANCE BEYOND AND TO THE EXCLUSION OF EVERY REASONABLE DOUBT.

From the moment he walked into Elmer Wesley's house and saw Bobby Francis, Titus Walters knew his life was in danger. Arnold Moore had related to Walters the jailhouse threat by Francis that Walters would be dead in two weeks. (TR. 367). Walters tried to make amends by explaining his circumstances to Charlene Duncan and Opal Lee, Francis' drug couriers, on the night of August 16. (TR. 964-966). When they refused to listen, he struck Opal Lee. (TR. 964-965, 656-658).

As Walters entered the house the next morning, Francis placed a pistol to his head and disarmed him. In the process he ordered Walters to get on his knees. (TR. 343, 423-424, 534-536, 973). As Walters whimpered, cried and begged to explain his conduct Francis shot into the floor. (TR. 344, 423, 538, 974-976). Elmer Wesley recalled Walters specifically asking not to be killed. (TR. 424).

According to Charlene Duncan, Walters lay on the floor, begging and crying for approximately 10-15 minutes. (TR.

976). At that time Francis taped Walter's hands behind his back and moved him into the bathroom. (TR. 349, 429, 546, 985). He also stuffed a washcloth in Walter's mouth and taped it shut. (TR. 429).

A period of time passed while Elmer, Charlene and Arnold went to buy tape and Drano and syringe needles. (TR. 345-346, 351, 427, 976-977). They returned and both Charlene and Elmer saw Walters seated on the commode, sweating profusely. (TR. 429, 985). Elmer said Walters had been crying. (TR. 430).

More time passed by when Johnny Williams arrived to smoke marijuana. (TR. 629). Finally, about 15-20 minutes later, Francis emerged with the gun and pillow and announced Walter's fate. He entered the bathroom moves Walters into the tub, put the pillow to his head and shot him three times. (TR. 353, 430, 434, 554-555, 986-988). When the group ran out of the house immediately after the shooting, Charlene Duncan looked at a clock in Francis' car. The time was approximately 1 to 2 p.m. (TR. 990). According to Arnold Moore, he, Deborah and Titus had entered Elmer's house a little after 10 a.m. (TR. 337).

All during this ordeal the only thing separating the gagged and frightened Walters from the other occupants was a

curtain separating the bedroom from the dining area. (TR. 429). Obviously, Walters could hear the discussions regarding the purchase of needles and drano. The distance from the toilet to the dresser was minimal. (R. 841). More importantly, Elmer Wesley testified that Walters was positioned so that by he could look from the bathroom through the open door, into the bedroom. It was in this position that Elmer said Walters saw him give the drano to Opal Lee. (TR. 429).

Upon review of these facts, the trial judge found an aggravating factor of heinous, atrocious and cruel conduct beyond and to the exclusion of any reasonable doubt. (R. 922). The established standard for such a finding is set out in this court's opinion in State v. Dixon, 283 So.2d 1, 9 (Fla. 1973), cert.den., 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974):

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

Since the Dixon opinion this court has included within the parameters of §921.14(5)(h) those cases where the fear, emotional strain, and prolonged captivity under threat of death are established in conjunction with an execution-style killing. Adams v. State, 412 So.2d 850, 857 (Fla. 1982), cert. den., ___U.S.____, 103 S.Ct. 182 (frightened and screaming eight year old girl, hands taped behind back, abducted and removed to remote area prior to being strangled); Smith v. State, 424 So.2d 726 (Fla. 1983), cert. den., ___U.S.____, 103 S.Ct. 3129 (". . .proven facts of the abduction confinement, sexual abuse and ultimate execution-style killing..." constitutes heinous, atrocious and cruel murder); Knight v. State, 338 So.2d 201, 202-205 (Fla. 1976),(hours of confinement under constant fear of impending death coupled with final removal of victims to remote area establish the pitiless and torturous nature of the crime); Combs v. State, 403 So.2d 418, 419-421 (Fla. 1981), cert. den., 456 U.S. 984 (1982),(victim removed to remote area, told she would be killed and then executed as she begged for life.)

As recently as Jennings v. State, ___So.2d__(Fla. 1984) (case No. 62,600, opinion filed July 12, 1984)[9 F.L.W. 297, 299, this court affirmed the proposition, "that the mindset or mental anguish of the victim is an important factor in determining whether the aggravating circumstance of heinous, atrocious and cruel applies." The record in this case proved

without any doubt that Titus Walters was told that Bobby Francis had vowed to kill him; that Walters sought to save himself by pleading his case to Charlene Duncan; that he was disarmed and forced to crawl on the floor while he begged for his life; that he was alert and within listening distance as Francis spoke of injecting him with drano and then joked about buying Elmer Wesley a new pillow. The horror this man confronted for over two hours cumulated in his removal to the bathtub and his execution. Appellant's contention that there is no evidence to support these findings indicates a shocking ignorance of the testimony and record. The period between 10:00 a.m. (TR. 337) and 1:00 or 2:00 p.m. (TR. 990) is three to four hours. The distance between the bathroom and the dresser where Francis attempted mixing drano is a matter of one or two yards. (R. 841). From his seat Walters could hear the talk about a drano object and Elmer Wesley testified that Walters saw him give a bottle of Drano to Opal Lee as she stood by the dresser. (TR. 429). Appellant may try ignoring these established facts in his brief on the merits but this court, upon review, will be unable to ignore the overwhelming evidence upon which the trial court made its finding. To say this killing was "accomplished by such additional acts as to set the crime apart from the norm[9] of most premeditated murders" is an

[9]State v. Dixon, 283 So.2d 1, 9 (Fla. 1973), cert. den. 416 U.S. 943, 94 S.Ct. 1951, 40 L.Ed.2d 295 (1974).

understatement. No recorded case of premeditated murder in Florida compares with this particular crime.

V

THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN FINDING AN AGGRAVATING CIRCUMSTANCE OF COLD, CALCULATED, MURDER IN THAT (A) THE EVIDENCE SUSTAINS THIS AGGRAVATING CIRCUMSTANCE BEYOND AND TO THE EXCLUSION OF EVERY REASONABLE DOUBT, AND (B) THIS AGGRAVATING CIRCUMSTANCE WAS NOT APPLIED IN VIOLATION OF THE EX POST FACTO PROHIBITION SET OUT IN ARTICLE I, SECTION 10 OF THE UNITED STATES CONSTITUTION AS WELL AS ARTICLE I, SECTION 10 OF THE FLORIDA CONSTITUTION.

The appellant has presented two subpoints in this fifth point on appeal. He asserts a lack of evidence to justify a finding of aggravation under §921.141(5)(i) in subpoint (A). In subpoint (B) he alleges a violation of the constitutional prohibition against Ex Post Facto application of criminal sanctions. These points merit independent discussion.

(A)

THE EVIDENCE SUSTAINED THE TRIAL COURT'S FINDING OF AN AGGRAVATING CIRCUMSTANCE BEYOND AND TO THE EXCLUSION OF EVERY REASONABLE DOUBT.

Bobby Francis formed a premeditated intent to kill Titus Walters even before his arrest on August 1, 1975. (TR. 566). He reconfirmed that intent while jailed, (TR. 366-367), and later on the morning of August 17th, when he hid his automobile from sight and declared to his companions his

intent to "lay dead" for Walters. (TR. 415, 972). Compare Sireci v. State, 399 So.2d 964, 967 (Fla. 1981). The sole point now open for this court's consideration is whether the trial court correctly determined that this premeditation was "cold, calculated and . . .without any pretense of moral or legal justification." Herring v. State, ___So.2d____(Fla. 1984)[9 F.L.W. 49].

This court has limited the application of the aggravating circumstance set out in §921.141(5)(i), finding it is not inclusive in every premeditated killing, McCray v. State, 416 So.2d 804 (Fla. 1981); Combs v. State, 403 So.2d 418 (Fla. 1981), cert. den., 456 U.S. 984 (1982). As pointed out in the Herring decision, supra, the factor has traditionally been applied to those murders which are characterized as execution, contract or witness-elimination killings.

The trial court's written findings in support of this aggravation appear in the record on appeal. (R. 922-923). As previously set out in appellee's statement of facts and in prior argument on points III and IV, above, these facts establish "heightened premeditation" beyond and to the exclusion of any reasonable doubt. Francis announced his intent, set a deadline for meeting it, indicated he would hire someone to kill Walters if he could not do it himself, hide in wait of his victim, kept his victim bound, taped and

gagged for over two hours, moved his victim into the bathtub, put a pillow against the victim, fired twice, paused and fired a third time to insure death in a man he characterized as having "strong blood root."[10] The evidence indicates the trial court's finding of aggravation. The case law of Florida demands affirmance of his rule. Squires v. State, ___So.2d____(Fla. 1984)[9 F.L.W. 98-99](After initially wounding his victim, defendant placed a pistol to victims head and fired four shots); Middleton v. State, 426 So.2d 548, 552-552 (Fla. 1983),(Defendant sat with a shotgun in his hands thinking about killing his victim for over one hour prior to murder); Smith v. State, 424 So.2d 726, 728, 732-733 (Fla. 1983), cert. den. ___U.S.____, 103 S.Ct. 3129 (1983),(victim removed to remote area and shot three times in back of head); Hill v. State, 422 So.2d 816, 819 (Fla. 1982), (Defendant announced his plan to rape and murder victim substantially before the time he met her for a social date); and Combs v. State, 403 So.2d 418, 420-421 (Fla. 1981), cert. den., 456 U.S. 984 (1982),(premeditated murder without legal or moral justification as evidenced by

[10]Appellant makes a feeble attempt to excuse his actions as morally or legally justifiable in light of his victim's previous beating of Opal Lee. This argument, like the others presented on appeal, ignores the overwhelming evidence of Francis' vow to kill Walters made on or about August 1st. It also presents an unanswered question: Since when is it legally or morally justifiable to murder a man who hits a woman in the mouth?

defendant's preconceived plan to lure victims to remote area, rob and kill them.[11]

(B)

THIS AGGRAVATING CIRCUMSTANCE WAS NOT IMPROPERLY APPLIED RETROACTIVELY IN VIOLATION OF ARTICLE I, SECTION 10 OF THE UNITED STATES CONSTITUTION OR ARTICLE I, SECTION 10 OF THE FLORIDA CONSTITUTION.

As appellant conceeds this point has been resolved against him in Combs v. State, 403 So.2d 418, 421 (Fla. 1981), appellee will not detail an argument on the issue. Appellee will point out that certiorari was denied in the Combs case, 456 U.S. 984 (1982) and that similar argument was rejected in Smith v. State, 424 So.2d 726 (Fla. 1982), cert. den., __U.S.___, 103 S.Ct. 3129. These decisions provide ample basis for rejecting appellant's contention, which parenthetically was not raised in the trial court.

[11]Appellant's contention on page 47 of his initial brief that the long period of time between the initial encounter of the parties and the shooting negates this finding of aggravation is not only inconsistent with his position on page 43 where he argues that the time period brief, it ignores a central, if failed, portion of Francis' overall plan. He wanted to torture and kill Walters by injection but lacked the proper impliments. He therefore sent out Arnold Moore (under gunpoint of Charlene) and Elmer Wesley (under threat of his sister's death) to buy them. This made them parties to the killing, a factor Francis announced to them in hope of buying their silence and the silence of Deborah Wesley. Appellant has also ignored the role of the second armed man, Willie Orr, who kept the Wesley's and Moore under control while Francis and Opal Lee tried to mix up the drano.

VI

THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN OVERRIDING THE JURY RECOMMENDATION OF LIFE IMPRISONMENT AND IMPOSING A SENTENCE OF DEATH IN THAT THE TRIAL COURT CORRECTLY FOUND THREE AGGRAVATING FACTORS AND NO MITIGATING CIRCUMSTANCES IN CONTRAST TO THE JURY'S RECOMMENDATION WHICH CAME AFTER AN UNREASONABLY SHORT PERIOD OF DELIBERATION AND A CALCULATED, EMOTIONAL APPEAL FROM DEFENSE COUNSEL WHICH OBVIOUSLY SWAYED THE JURY INTO AN UNREASONABLE DECISION.

The State recognizes that where a jury's recommendation of life imprisonment is overriden the facts justifying the death penalty must be clear and convincing. Neary v. State, 384 So.2d 881 (Fla. 1980); Stevens v. State, 419 So.2d 1058 (Fla. 1982). However, despite the great weight accorded to a recommendation of life imprisonment, pursuant to §921.141, Fla.Stat., the ultimate decision rests with the trial court. Stevens, supra (jury override, death sentence upheld where record amply supported findings of four aggravating circumstances and no mitigating circumstances); Bolender v. State, 422 So.2d 833 (Fla. 1982). (Jury override, death sentence affirmed); Gorham v. State, ___So.2d___(Fla. 1984)[9 FLW 310, 312](jury override, two aggravating and no mitigating circumstances establish jury's unreasonable action).

Death is presumed to be the proper penalty when one or more aggravating circumstances are found unless they are

outweighed by one or more mitigating circumstances. State v. Dixon, 283 So.2d 1 (Fla. 1973); White v. State, 403 So.2d 331, 340 (Fla. 1981); Bottoson v. State, 443 So.2d 962, 966 (Fla. 1984).

Below the sentencing court found three aggravating circumstances: (1) the murder was committed to hinder the lawful exercise of police investigations. (R. 921-922). As Appellee has established in its argument on Point III, above, there is no reasonable doubt that Francis sought to eliminate a confidential informant; (2) that the murder was especially heinous, atrocious and cruel. (R. 922). Appellee has established in its argument on Point IV, above, there is no reasonable doubt that this factor applies; and finally, (3) that the murder was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. (R. 922-923. As Appellee establishes in its argument on Point V, above, there is no reasonable doubt that this factor applies.

In reviewing the mitigating circumstances the trial court rejected all statutory mitigation and found as the only non-statutory mitigation the defendant's recent good behavior in prison. (R. 923). The court also "considered and weighed heavily the jury's recommendation. . ." (R. 923). In the trial judge's opinion "the mitigating factors

and strong recommendations of the jury do not outweigh the significant strong factors as to aggravation that justify the imposition of the death sentence." (R. 924).

The appellant contends that the basis for the jury override is not stated by the court or discernable from the record. (initial brief, p. 60). He insists that the override is reversible error. This argument fails to take into account the calculated and highly emotional closing argument of defense counsel. This argument was a non-legal sermon filled with references to the Easter season,[12] the last supper of Jesus and his disciples, and the covenant of God's love for humanity which counsel argued must be passed along with the cup of forgiveness to the next generation of children. (TR. 1284-1287). During his argument, defense counsel ignored the overwhelming evidence of heinous, atrocious and cruel murder. He also conceeded the murder was cold, calculated and done with heightened premeditation. (TR. 1281). Significantly, of the three findings of aggravation, the defense contested only the possibility that Walters was killed to hinder an undercover narcotics investigation. (TR. 1282). It is readily apparent from the record that the jury was swayed by the highly charged emotional closing of defense counsel. It is unreasonable for the jury to convict Francis of murder then ignore the

[12]The hearing took place March 29, 1983.

uncontested facts that the killing was especially wicked, torturous, cold, calculated and accomplished to eliminate a police informant. As this court stated in Buford v. State, 403 So.2d 943, 953 (Fla. 1981), "a convicted defendant cannot be 'a little bit' guilty." This jury's recommendation, based on emotion and not on the facts, was unreasonable and deserving of the trial court's override.[13] Accord, White v. State, 403 So.2d 331, 340 (Fla. 1981)(Defense counsel's vivid description of electrocution caused jury to ignore facts and rely on emotion); Porter v. State, 429 So.2d 293, 295 (Fla. 1983)(same). Compare Herzog v. State, 439 So.2d 1372, 1381 (Fla. 1983)(no record evidence that jury was led astray by emotional appeal from counsel). As pointed out by Justice England, concurring in Chambers v. State, 339 So.2d 204, 208-209 (Fla. 1976):

> ". . .the judge's role is primarily to insure the jury's adherence to law and to protect against a sentence resulting from passion rather than reason."

In this case the trial judge fulfilled his role. Only emotionalism could lead a jury to decide that recent good behavior in jail outweighed the three aggravating factors applicable to the crime. The cases cited by the appellant in this regard are distinguishable.

[13]Further proof that emotion swayed the deliberation was the Brief (thirty-two minute) period it took the jury to reach a decision. (TR. 1293).

In Hawkins v. State, 436 So.2d 44 (Fla. 1983), the murders were committed by either Hawkins or David Troedel, a fact known to the jury and on reasonably leading to their decision to spare Hawkins as he might not actually be the "shooter". In Gilvin v. State, 418 So.2d 996 (Fla. 1982), the trial court improperly doubled certain aggravating factors and ignored mitigating evidence which led to reasonable basis for recommendation of life. See, McDonald J., concurring, ". . .a more appropriate verdict would have been murder in the second degree. . ." at 418 So.2d 999. In Goodwin v. State, 405 So.2d 170 (Fla. 1981), the defendant was an accessory to murder not at the scene of the killing. The evidence indicated he was afraid of the trigger man. This was found to be sufficient mitigation, not unreasonable given the facts. In McKenno v. State, 403 So.2d 389 (Fla. 1981), there was no indication that jury was misled by emotional appeal. There was only one aggravating factor which was reasonably outweighed by the defendant's young age. In Stokes v. State, 403 So.2d 377 (Fla. 1981), there was mitigation in the form of the defendant's lack of a prior record and the fact that the leader of the gang to which defendant belonged was given immunity from prosecution for the crime. This reasonably outweighed the sole aggravating factor. In Welty v. State, 402 So.2d 1159 (Fla. 1981), the trial court ignored non-statutory mitigation which could have reasonably outweighed the death penalty. But see, Boyd, J., and Adkins

J., concurring in part and dissenting in part, at 402 So.2d 1165. In Barfield v. State, 402 So.2d 377 (Fla. 1981), this court found that appellant was only a middle man in this crime. The mastermind was dead. The State had granted one of the actual killers immunity and had given preferred treatment to two other principles. This non-statutory mitigation was held a reasonable basis for a life recommendation. In Williams v. State, 386 So.2d 539, 541, this court dismissed all but one finding of aggravation and then concluded that the life recommendation was not clearly unreasonable. In Neary v. State, 384 So.2d 881, the youthful age and learning disability of the defendant when coupled with the dismissal of all charges against the co-defendant who apparently played as great a role as Neary gave the jury a reasonable basis to recommend life. Finally, Malloy v. State, 382 SO.2d 1190, involved a number of defendants, plea bargains by certain accomplices and a lack of convincing proof as to who actually was the "trigger man" in the case. But see, Boyd, J., dissenting as to the reduction of sentence, 382 So.2d at 1193-1197.

Under the constitutional standard enunciated in Proffitt v. Florida, 428 U.S. 242, 258-260 (1976) the sentence should be consistent with other sentences imposed in similar circumstances. A review of those cases involving little or no mitigation to outweigh a prolonged, torturous,

heinous and wicked killing accomplished by an execution-style shooting of a begging, pleading and helpless victim proves that the death penalty is the just and correct penalty for this crime. Combs v. State, supra; Middleton v. State, supra; Washington v. State, 362 So.2d 658 (Fla. 1975); Hoy v. State, 353 So.2d 826 (Fla. 1977); Gorham v. State, supra; Smith v. State. supra; Jennings v. State, supra.

VII

THE TRIAL COURT'S ORDER SENTENCING APPELLANT TO DEATH WAS NOT IMPOSED AS A PENALTY FOR THE DEFENDANT'S EXERCISE OF HIS CONSTITUTIONAL RIGHT TO TRIAL OR BECAUSE HE REJECTED A PLEA OFFER FROM THE COURT.

Bobby Marion Francis was sentenced to death because Florida law imposes such a sentence when "one or more aggravating circumstances is found. . .unless it or they are overriden by one or more of the mitigating circumstances..." State v. Dixon, 283 So.2d 1, 9 (Fla. 1973), cert. den., 416 U.S. 943 (1974). As has been proved in the arguments above, this murder was truly unique and deserving of this ultimate penalty. In this final point on appeal appellant attempts to supplement his brief with non-record evidence to support a contention that the trial court promised a sentence of life imprisonment if the defendant pled guilty. The State objects to this action, (see Motion to Strike Appendix filed with this brief), and denies the allegation that it previously conceeded that the trial judge made any such offer. (see Initial Brief of Appellant, p. 69, ft. 4). The State's position is and has always been that this is not a collateral issue but one for direct appeal. The appellant's problem is that he failed to preserve the issue, or even acknowledge the issue, in the trial court. Without a proffer during the sentencing proceeding this argument lacks a factual basis for support in a fundamental error context.

Appellant's presentation of the crypt exchange between the court and defense counsel (TR. 1228-1229) refutes the point now argued. If the defense was aware of a plea bargain from the court as suggested, why would counsel reply "I don't understand" instead of saying "Judge we reject the court's offer of a life sentence in exchange for a plea of guilty"? Furthermore, once the jury returned a recommendation of life why did counsel not make the arguments now presented to the trial judge? This is not merely a case of a failure to preserve an issue. This is a case of no issue existing!

Assuming arguendo the court wishes to address the merits of this argument the State would contend that the entire premise for the argument is false and that appellant's lead case, Fraley v. State, 426 So.2d 983 (Fla. 3d DCA 1983), is currently withdrawn pending en banc review in the district court.[14] The State submits, that under the facts of the case sub judice, it is clear that the increased sentence was justified and not based on vindictiveness.

In Frank v. Blackburn, 646 F.2d 873 (5th Cir. 1980),

[14]Oral argument was heard by the court en banc on April 10, 1984. Compare Hernandez v. State, 446 So.2d 235 (Fla. 3d DCA 1984).

cert. den., 102 S.Ct. 148, the en banc panel[15] was faced with a similar situation. The State submits that the analyses contained therein is persuasive and should be adopted by this Court.

The Fifth Circuit in finding no judicial vindictiveness first analyzed the role of plea bargaining in the criminal justice system. The Court found that the United States Supreme Court has accepted plea bargaining as an integral part of the criminal justice system. Bordenkirner v. Haynes, 434 U.S. 357, 98 S.Ct. 663, 54 L.Ed. 604 (1978). The Court then analyzed the instant problem as follows:

> [8-10] We agree wholeheartedly with Frank's assertion that a defendant cannot be punished simply for exercising his constitutional right to stand trial. See Cousin v. Blackburn, 597 F.2d 511 (5th Cir. 1979), cert. denied, 445 U.S. 945, 100 S.Ct. 1343, 63 L.Ed.2d 779 (1980); United States v. Underwood, 588 F.2d 1073 (5th Cir. 1979); Baker v. United States, 412 F.2d 1069 (5th Cir. 1969), cert. denied, 396 U.S. 1018, 90 S.Ct. 583, 24 L.Ed.2d 509 (1970). We do not agree, however, that the mere imposition of a longer sentence than defendant would have received had he pleaded guilty automatically constitutes such punishment. The Supreme Court's plea bargaining decisions make it clear that a state is free to encourage guilty

[15]Out of the affirming panel, seven members now sit as a majority in the Eleventh Circuit.

> pleas by offering substantial benefits to a defendant, or by threatening an accused with more severe punishment should a negotiated plea be refused. Corbitt v. New Jersey, 439 U.S. 212, 99 S.Ct. 482, 58 L.Ed.2d 466 (1978). It is equally clear that a defendant is free to accept or reject the 'bargain' offered by the state. Once the bargain-whether it be reduced charges, a recommended sentence, or some other concession is rejected, however, the defendant cannot complain that the denial of rejected offer constitutes a punishment or is evidence of judicial vindictiveness. To accept such an argument is to ignore completely the underlying philosophy and purposes of the plea bargaining system. If a defendant can successfully demand the same leniency after standing trial that was offered to him prior to trial in exchange for a guilty plea, all the incentives to plea bargain disappear; the defendant has nothing to lose by going to trial.
>
> 646 F.2d at 882-83.

In the case sub judice, Defendant argues that his increased sentence does not stem solely from the denial of leniency offered in plea negotiation. Rather, he alleges that the trial court imposed the increased sentence out of sheer vindictiveness, to retaliate against him for going to trial. The record does not support this contention.

After trial, the Court had a more graphic, descriptive and detailed evidence of the crime and the character of the

witnesses at the time of sentencing. The sentencing which followed the trial upon the merits saw the trial court not only in a possession of more of the detailed facts of the offense itself, but of the applicable aggravating and mitigating facts. Therefore the State submits that the increased sentence is attributable to the trial court's more accurate appraisal of the defendant's character after hearing the full disclosure of the facts at the sentencing hearing in accordance with the mandate of the statute. §921.141(5).

In Frank v. Blackburn, supra, the Court recognized the lack of credulity of the Defendant's argument, by stating:

> Plea-bargains have become an accepted mode of resolving criminal trials. The procedure offers obvious benefits to all parties involved. In exchange for his guilty plea, the defendant obtains a reduction of charges or a guaranteed sentence. The prosecutor eliminates one more case from the crowded dockets and is free to move on to the disposition of other matters. The system punishes the offender while promoting judicial and prosecutorial economy, thereby serving the public's interest in the effective administration of criminal justice. In the case before us today, the defendant was offered a guaranteed twenty year sentence in exchange for a guilty plea. Not satisfied with the proposed bargain, he chose to take his chances and stand trial. The defendant now argues tht he should be given the fruits of the abandoned bargain-in spite of his plea of

> "not guilty." The rules of the game do not permit such a result, however. Once the defendant elects to go to trial, all bets are off. Jimmy Frank gambled and lost; having refused the plea bargain, he cannot now expect to receive the benefit of that abandoned agreement after conviction. Cousin v. Blackburn, 597 F.2d 511 (5th Cir. 1979), cert. denied, 445 U.S. 945, 100 S.Ct. 1343, 63 L.Ed.2d 779 (1980). As this court has previously stated, 'it stretches our credulity to think that one who declines to plead guilty with a... sentence acceptable to the Court should nevertheless be given the benefits of a bargain available to, but rejected by, him' United States v. Resnick, 483 F.2d 354, 358 (5th Cir.), cert. den., 414 U.S. 1008, 94 S.Ct. 370, 38 L.Ed.2d 246 (1973).
>
> 646 F.2d at 887.

Therefore, in accordance with the foregoing rationale of Blackburn, the State submits that, based on the facts of the case, the trial court's increased sentence was not based on vindictiveness. Defendant's attempt to receive the benefits of a rejected agreement for his conviction is illogical and would eventually lead to the demise, to the detriment of all defendants, of the plea bargaining process. Therefore, no error occurred in sentencing. Dixon, supra.

The idea that the Judge punished Francis with the death penalty is contrary to the facts and the well established standards of Florida's death penalty sentencing procedure.

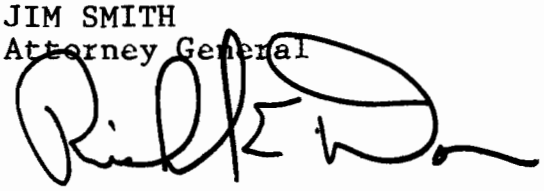
Therefore, beyond the initial contention that the issue is non-existent, is the fact that three aggravating factors outweighed the slight mitigation in the case. The sentence should be affirmed.

CONCLUSION

Based upon the above-cited legal authority the State of Florida urges this Honorable Court to affirm the judgment and sentence in the case.

Respectfully submitted,

JIM SMITH
Attorney General



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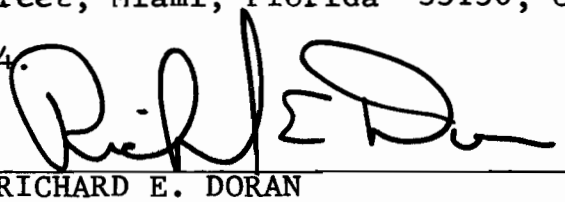
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF APPELLEE was furnished by mail to GITLITZ, KEEGAN & DITTMAR, P.A., Suite 807, Biscayne Building, 19 West Flagler Street, Miami, Florida 33130, on this 13th day of August, 1984.



RICHARD E. DORAN
Assistant Attorney General

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