IN THE SUPREME COURT OF FLORIDA

ANTHONY SILIAH BROWN,

Appellant,

-v- CASE NO. 64,247

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT
IN AND FOR ESCAMBIA COUNTY, FLORIDA

BRIEF OF APPELLEE

JIM SMITH
Attorney General

WALLACE E. ALLBRITTON
Assistant Attorney General

COUNSEL FOR APPELLEE

The Capitol
Tallahassee, FL 32301-8048
(904) 488-0290

TOPICAL INDEX

TOPICAL INDEX (Cont'd)

TABLE OF CITATIONS

TABLE OF CITATIONS (Cont'd)

TABLE OF CITATIONS (Cont'd)

TABLE OF CITATIONS (Cont'd)

TABLE OF CITATIONS (Cont'd)

TABLE OF CITATIONS (Cont'd)

TABLE OF CITATIONS (Cont'd)

IN THE SUPREME COURT OF FLORIDA

ANTHONY SILIAH BROWN,

Appellant,

-v- CASE NO. 64,247

STATE OF FLORIDA,

Appellee.

_____/

PRELIMINARY STATEMENT

The complete record is bound in eight volumes with consecutive pagination and references thereto will be made by the symbol "R" followed by appropriate page number.

STATEMENT OF THE CASE

Appellee accepts the statement of the case as set forth in appellant's brief on pp. 1, 2 thereof.

STATEMENT OF THE FACTS

Appellee accepts the statement of the facts as set forth in appellant's brief on pp. 2-10 thereof. However, additional references to the facts will be made in the argument portion of this brief.

ARGUMENT

ISSUE I

WHETHER A NEW TRIAL SHOULD BE GRANTED IN THE INTEREST OF JUSTICE.

With the profundity of a scriptural pronouncement of impending doom, appellant's brief opens with the thesis that this court is authorized to review the evidence to determine if the interests of justice require a new trial and that, indeed, a new trial may be granted in a capital case for insufficiency of evidence. With those sweeping pronouncements, appellee is compelled to agree. But with equal clarity appellee urges that the testimony of Wydell Rogers alone is sufficient to sustain the conviction (R 414-504). Brock v. State, 153 So. 900 (Fla. 1934); Kellerman v. State, 261 So.2d 555 (Fla. 3d DCA 1972); Florida Standard Jury Instructions (Criminal Cases) 2.04(b).

A. Weight of the Evidence

Appellant now asks this court to reweigh the evidence, calmly asserting that Tibbs v. State, 397 So.2d 1120 (Fla. 1981), affirmed, 457 U.S. 31 (1982), should be overruled. The rationale of Tibbs is that legal sufficiency alone, as opposed to evidentiary weight, is the appropriate concern of an appellate tribunal. The argument is made that since the trial judge denied a motion for new trial based on the ground, inter alia, that the verdict is contrary to the weight of the evidence, this court must also weigh the

evidence in order to determine if the trial judge erred. This goes wide of the mark. The weight of evidence (which the trial judge may determine) is not the equivalent of sufficiency of the evidence which is determined at the appellate level. In other words, the reweighing of conflicting evidence which is permitted by the trial court on a motion for new trial is distinguished from an examination for sufficiency of evidence undertaken by an appellate court. Gonzalez v. State, ___So.2d___ (Fla. 3d DCA 1984), 9 FLW 867.

The appellate standard of review for a motion granting a new trial is whether the trial court committed a clear abuse of discretion. Cloud v. Fallis, 110 So.2d 669 (Fla. 1959). Evidentiary conflicts do not supply this "clear abuse of discretion." Admittedly, there were conflicts in the testimony but this does not mandate reversal by this court as long as the evidence is sufficient as a matter of law to sustain the conviction. It has long been law that all conflicts in the evidence and reasonable inferences are resolved in support of the verdict. Boyd v. State, 122 So.2d 632 (Fla. 1st DCA 1960); Crum v. State, 172 So.2d 24 (Fla. 3d DCA 1965); Walden v. State, 191 So.2d 68 (Fla. 1st DCA 1966); Sellers v. State, 212 So.2d 659 (Fla. 3d DCA 1968); Shapiro v. State, 390 So.2d 344 (Fla. 1980). See also Meyers v. State, 303 So.2d 371 (Fla. 3d DCA 1974), holding that evidence was sufficient to sustain conviction, notwithstanding conflicts in the testimony of the state's sole witness as to the facts. After all, it is the province of

the jury, not of the court, to resolve discrepancies in testimony and to choose between competing inferences of fact. United States v. Tropiano, 418 F.2d 1069 (2d Cir. 1970), cert. denied, 25 L.Ed.2d 530. The question of guilt or innocence is one of fact and this court does not substitute its judgment for that of a jury on a question of fact. Sealey v. State, 46 So.2d 894 (Fla. 1950); Songer v. State, 322 So.2d 481 (Fla. 1975).

Appellant's argument under this point seems to be an effort to point the finger of guilt toward Wydell Rogers or David Davis, i.e., anybody but himself. However, it is not necessary that the evidence exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt, provided a reasonable trier of fact could find that the evidence establishes guilt beyond a reasonable doubt. In other words, a jury is free to choose among reasonable constructions of the evidence. United States v. Kincade, 714 F.2d 1064 (11th Cir. 1983). Appellee has long believed that the remarks of Justice Carter, writing for a unanimous court in People v. White, 278 P.2d 9 (Cal. 1955), en banc, exemplify the position of an appellate court in passing upon a sufficiency of evidence question. Please note:

> It is true that an appellate court will not uphold a judgment or verdict based upon evidence which is inherently improbable; however it is not sufficient that the circumstances disclosed by the testimony are merely unusual. Kidroski v. Anderson, 39 Cal.App.2d

> 602, 605, 103 P.2d 1000. As stated by this court in People v. Huston, 21 Cal.2d 690, 693, 134 P.2d 758, 759, "To warrant the rejection of the statements given by a witness who has been believed by a trial court, there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions. Back v. Farnsworth, 25 Cal.App.2d 212, 219, 77 P.2d 295; Lufkin v. Patten-Blinn Lumber Co., 15 Cal.App.2d 259, 262, 59 P.2d 414; Agoure v. Spinks Realty Co., 5 Cal.App.2d 444, 451, 42 P.2d 660; Hughes v. Quackenbush, 1 Cal.App.2d 259,262, 37 P.2d 99; Powell v. Powell, 40 Cal.App. 155, 158, 159, 180 P. 346. Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citations omitted.]"

Id. at 14.

B. Limiting Cross-examination

Appellant seeks to capitalize on the ruling of the trial judge excluding the proffered testimony of defense witness, David H. Howell (R 626), offered for the purpose, presumably, of impeaching the testimony of Wydell Rogers on a collateral issue, i.e., possession of firearms other than a .410 gauge shotgun after the date of the murder. Rogers had testified that he had possessed a twelve gauge, sawed-off shotgun approximately three months prior to the murder but had disposed of it by burying it

in a wooded area (R 496, 497). Rogers also testified that other than the .410 shotgun which he had given to appellant and was never recovered, the only other gun possessed by him was a 30-30 Winchester. Rogers stated that he didn't own the gun but a "guy from Quintet" gave it to him because he--the guy from Quintet--wanted someone else to see the gun, "a friend of mine [Rogers] that I used to work with a long time ago." Rogers stated that he gave the gun back to the guy and did nothing with it while he had it (R 498). The prosecution did object and was sustained by the trial judge on the ground of lack of relevancy (R 499). Appellant's trial counsel then indicated that he would call a witness to show that Rogers was not telling the truth under oath. The trial judge relented and permitted the testimony (R 500, line 16--501, line 9).

Whether the 30-30 Winchester mentioned by Rogers (R 498) is the same weapon as the "3006 rifle" mentioned by the witness Howell, we simply do not know. If it was the same rifle, then more than likely it was the one that Rogers received from the "guy from Quintet" for the purpose of showing to someone else. It is obvious that Howell at some time in the past had known Rogers (R 623) and the only reasonable conclusion is that Rogers received the rifle from the guy in Quintet for the purpose of showing it to Howell in an effort to sell it. The only possible impeachment that could come out of all this is when appellant's trial counsel asked Rogers "[t]o you[r] knowledge, have you ever

had any other guns in your possession?" Rogers answered: "Not to my knowledge." (R 501) If it is this kind of thing that appellant is relying on for reversible error, then he must indeed be hard-pushed. Rogers' testimony that he gave the 30-30 rifle back to the guy from Quintet was never challenged. Neither was his testimony that he kept the rifle "for about a day." (R 500, line 24) It should be remembered that Rogers was never asked if he had tried to sell a .306 rifle to David Howell just before Christmas in December, 1982. If this question had been asked and Rogers had responded in the negative, then Howell's testimony would have been admissible for impeachment purposes, albeit on a collateral after-the-fact issue. But as the record stands, assuming that the .306 rifle mentioned by Howell was the same rifle as the 30-30 mentioned by Rogers, then this was the only rifle that Rogers had possessed. Consequently, there can be no impeachment because Rogers was never asked if he had attempted to sell the rifle to David Howell shortly before Christmas in 1982. In any event, the testimony of Rogers sought to be impeached was elicited on cross-examination and it is the position of appellee that the cross-examiner was bound by the answer. But even if not, it must first be shown that the irrelevant or collateral issue--testimony--would be prejudicial if not rebutted. Carter v. State, 101 So.2d 911 (Fla. 1st DCA 1958). When viewed as a whole, it is difficult to see where the testimony of Rogers was prejudicial to appellant. At least, appellant has failed to direct this court's

attention to--or even claim--any resultant prejudice. This issue is controlled by Gelabert v. State, 407 So.2d 1007 (Fla. 5th DCA 1981). Please note:

> However, when a question, posed on cross-examination, relates only to a matter collateral and non-material to any issue at trial, the witness' answer to the question is deemed conclusive. Consequently, the witness cannot be impeached with regard to this testimony by any of the normal means of subsequent impeachment, including contradiction testimony by another witness. Although stated various ways, this general evidentiary philosophy of exclusion has been a part of Florida jurisprudence for many years. Thus, it has been said:
>
> > But the answer of a witness on cross-examination respecting any fact irrelevant to the issue will be conclusive, and no such question can be put on cross-examination merely for the purpose of impeaching his credit by contradicting him. Stewart v. State, 42 Fla. 591, 28 815, 816 (1900).
>
> The reasoning behind the rule has been attributed to the evidentiary philosophy that a party cannot impeach his own witness and when the question is outside the scope of direct examination and on a collateral matter, the cross-examiner adopts the witness as his own.

Id. at 1009. As noted, supra, there was no restriction on the cross-examination of Rogers. Even if there had been, the supposition that Rogers "might have possessed weapons that could have been used to commit the murder," is too tenuous to establish materiality in the constitutional sense. United States v. Agurs, 427 U.S. 97 (1976); State v. Sobel, 63 So.2d 324 (Fla. 1978).

C. Other Errors

1. Appellant claims error because of the alleged unnecessary introduction of the widow and daughters of James Dassinger (victim) to the jury during voir dire. This is a frivolous argument as the record shows (R 43, 44) that this was done as a precautionary measure to ensure an impartial jury. There was no objection, understandably so, and the issue has not been preserved for appellate review. State v. Barber, 301 So.2d 7 (Fla. 1974).

2. While reference to Rogers' willingness to take a lie detector test was made on direct examination, no mention of the results thereof was made. No objection was made to the now complained-of remarks and appellate review thereof is foreclosed. State v. Barber, supra. The now challenged comments cannot in the context of the instant case rise to the stature of fundamental error. Cf. Sullivan v. State, 303 So.2d 632 (1974); Sullivan v. Wainwright, 695 F.2d 1305 (11th Cir. 1983). Please see the discussion of fundamental error in Gibson v. State, 194 So.2d 19, 20 (Fla. 2d DCA 1967), quoted with approval by this court in State v. Smith, 240 So.2d 807, 810 (Fla. 1970).

3. To take the sting out of any possible cross-examination as to the written plea agreement between Rogers and the State of Florida, the details thereof were immediately elicited by the prosecution on Rogers' direct examination (R 414-418) and then

introduced in evidence as state's exhibit twenty-one without objection from appellant's trial counsel (R 418). State's exhibit twenty mentioned in appellant's brief on p. 19 is the letter that Rogers received along with the plea "explaining the plea to me and everything" (R 419). Appellant's trial counsel apparently well knew that the written plea agreement, as well as the letter explaining same, were admissible in evidence and for this reason lodged no objection thereto. United States v. Henderson, 717 F.2d 135 (4th Cir. 1983); United States v. Winter, 663 F.2d 1120 (1st Cir. 1981); United States v. Hedman, 630 F.2d 1184 (7th Cir. 1980). Indeed, if the jury had not been properly informed of the details of the plea bargain agreement between Rogers and the State of Florida, it may well have been error necessitating a resentencing hearing. Messer v. State, 330 So.2d 137, 141 (Fla. 1976).

Appellant further complains that it was error for the prosecution to elicit testimony from assistant state attorney John Spencer as to his reasons for nolle prossing two other charges against Rogers. See appellant's brief, p. 20, n. 7. True, appellant's trial counsel did object but not on the ground that Spencer's testimony would be improper bolstering. The basis of the objection was that Spencer's testimony would constitute a conflict of interest (R 569, lines 9-13). The trial judge properly overruled the objection.

Spencer's testimony was obviously elicited for the purpose of showing that the nolle prossing of the two other charges against Rogers had nothing to do with Rogers' plea bargain agreement and his testimony in court. Had this not been done, appellant's trial counsel could well have argued that Rogers' testimony had been bought and paid for by the state's nolle prossing those charges. This factual situation does not even resemble that presented to the court in Tait v. State, 112 So.2d 380 (Fla. 1959), where this court predicated reversible error on the argument of the state attorney advising the jury that he and his staff had considered "the matter before trial and had concluded that the death penalty should be requested." Id. at 384. The decision in Wilson v. State, 371 So.2d 126 (Fla. 1st DCA 1978), is similarly inapposite. Sub judice, the prosecutor did not say that she believed with all her "heart, mind and soul" that appellant was guilty. Id. at 127. Neither did the prosecutor comment, even indirectly, on the failure of appellant to take the stand and testify in his own behalf.

ISSUE II

WHETHER THE SEIZURE OF APPELLANT'S WRISTWATCH WAS IN VIOLATION OF THE FOURTH AND FOURTEENTH AMENDMENTS TO THE FEDERAL CONSTITUTION, OR Art. I, §12, State Const.

This issue was raised on motion to suppress (R 1087), denied by the trial judge without prejudice to renew same at a

later time (R 1117). The issue is properly before the court for appellate review.

At trial the deposition of Deputy Danny Lodge was read into evidence without objection (R 254, line 20-255, line 17). Deputy Lodge testified that he first saw appellant in the interview room on the second floor of the administrative building of the sheriff's department. This was approximately 1 a.m. on December 22, 1982. Deputy Smith was present when Lodge examined appellant for any traces of blood or anything else that might have come from the scene (R 256-O). This was a routine procedure in the course of a homicide investigation (R 256-F). Deputy Lodge testified that appellant was cooperative but did not recall whether he took the watch off appellant's arm or whether appellant removed it. Appellant was not under arrest, not in custody, and a receipt was given him for the watch (R 256-Q). On cross-examination, the voluntariness of appellant's handing over the watch to Deputy Lodge was never challenged (R 256-V-256BB).

Deputy Timothy Rhett Smith (R 284) testified that Deputy Lodge asked appellant to let him see the watch whereupon appellant removed the watch from his wrist and handed it to Deputy Lodge (R 291). Lodge then advised appellant that the watch would be taken into custody and appellant did not in any way object (R 292). The watch was offered in evidence as state's exhibit four and, over objection of appellant's trial counsel, admitted by the

trial judge (R 293, 294). On cross-examination the voluntariness of appellant's giving the watch to Deputy Lodge was never challenged (R 295-301, 309). However, it was brought out on cross-examination that appellant was given the Miranda advisory (R 299, lines 7-9). In fact, appellant signed a waiver of those rights. This is admitted by appellant in his brief on p. 4 thereof. Appellant's recorded statement was admitted in evidence as state's exhibit eighteen and was played for the jury (R 343, 344-344-R). In the course of the statement appellant admitted that he gave the watch to the officers voluntarily (R 344-K). At the very outset of the recorded statement appellant was reminded of his rights that he had been previously advised of and stated that he understood those rights (R 344). The waiver of rights form signed by appellant was admitted in evidence as state's exhibit nineteen (R 345). As noted earlier, just prior to giving the recorded statement, appellant was given the Miranda advisory (R 338, line 19--339, line 8).

There was no search; there was no seizure. The act of physically taking and removing tangible personal property is generally regarded as a seizure. However, as the court noted in Hale v. Henkel, 201 U.S. 43 (1906), a seizure contemplates a forcible dispossession of the owner. Cf. State v. Goodley, 381 So.2d 1180 (Fla. 3d DCA 1980).[1] See also Neely v. State, 402 So.2d 477

---

[1] The "slight movement" of defendant's suitcase, checked with airline, from cart to floor to facilitate examination by drug-sniffing dog "did not, even remotely, amount to a fourth amendment seizure." Id. 1182.

(Fla. 2d DCA 1981)[2], and Coolidge v. New Hampshire, 403 U.S. 433 (1971)[3].

The term "search" can reasonably be said to imply some exploratory investigation, or an invasion and quest, a looking for or seeking out. A search implies a prying into hidden places for that which is concealed and that the object searched for has been hidden or intentionally put out of the way. While it has been said that ordinarily searching is a function of sight, it is generally held that the mere looking at that which is open to view is not a search. See generally, C.J.S., Searches and Seizures, §1. For example, in Hale v. Henkel, supra, the Court asserted that "a search ordinarily implies a quest by an officer of the law," but no one has ever suggested that every "act or instance of seeking" is a search in the fourth amendment sense. Representative of this position is Hester v. United States, 265 U.S. 57 (1924); United States v. Lee, 274 U.S. 559 (1927); Oliver v. United States, U.S.____ (1984), 35 CrLR 3011.

---

[2] Court held that where an officer asks the defendant what he had in his pocket and the defendant handed over the objects, there was no search.

[3] Where police asked defendant's wife if there were guns in the house and she then produced them and turned them over to the police, Court declined to "hold that the conduct of the police here was a search and seizure.

It is settled law in this jurisdiction that where there is no search, the constitutional prohibition against unlawful searches and seizures is not applicable. Smith v. State, 333 So.2d 91 (Fla. 1st DCA 1976), followed in Neely v. State, supra, and Mata v. State, 380 So.2d 1157, 1158 (Fla. 3d DCA 1980).

It seems too well settled to require citation of authority that fourth amendment strictures apply only to unreasonable searches and seizures. If the request for and receipt of appellant's watch in the instant case can be termed either a search or seizure, then it was surely with the consent of appellant. In Cavalluzzi v. State, 409 So.2d 1108 (Fla. 3d DCA 1982), police officers approached Cavalluzzi, identified themselves, and requested to see his airline ticket. The Third District held that in response to the officers' request, Cavalluzzi voluntarily turned over his airline ticket. Even though Cavalluzzi had not been given the Miranda advisory, the act of turning over his airline ticket to the police officers was deemed voluntary. However, appellant had been given his Miranda advisory. This fact surely is a circumstance contributing to the conclusion that appellant's giving of his watch to Deputy Lodge was a voluntary act. United States v. Leichtling, 684 F.2d 553 (8th Cir. 1982), cert. denied, 75 L.Ed.2d 431; United States v. Stanley, 597 F.2d 866 (4th Cir. 1979); United States v. Miller, 589 F.2d 1117 (1st Cir. 1978) cert. denied, 440 U.S. 958. Other factors contributing to the voluntariness conclusion are appellant's complete cooperation,

the fact that he was not in custody, much less under arrest, and his own words recorded on tape (R 344-K). The advising of one's right of refusal to consent to a search is not required either to validate a consent or to prima facie establish voluntariness thereof. State v. Custer, 251 So.2d 287 (Fla. 2d DCA 1971); State v. Spanierman, 267 So.2d 102 (Fla. 2d DCA 1972). For example, in Schneckloth v. Bustamonte, 412 U.S. 218 (1973), the voluntariness of a person's consent to search was upheld despite absence of proof that he knew of his right to withhold such consent. However, it is believed that the line drawn in Schneckloth v. Bustamonte, supra, between custodial and non-custodial consents to search was eliminated in United States v. Watson, 423 U.S. 411 (1976). Please note:

> We are satisfied in addition that the remaining factors relied upon by the Court of Appeals to invalidate Watson's consent are inadequate to demonstrate that, in the totality of the circumstances, Watson's consent was not his own "essentially free and unconstrained choice" because his "will ha[d] been overborne and his capacity for self-determination critically impaired." Schneckloth v. Bustamonte, 412 US 218, 225, 36 L Ed 2d 854, 93 S Ct 2041 (1973). There was no overt act or threat of force against Watson proved or claimed. There were no promises made to him and no indication of more subtle forms of coercion that might flaw his judgment. He had been arrested and was in custody, but his consent was given while on a public street, not in the confines of the police station. Moreover, the fact of custody alone has never been enough in itself to demonstrate a coerced

> confession or consent to search. Similarly, under Schneckloth, the absence of proof that Watson knew he could withhold his consent, though it may be a factor in the overall judgment, is not to be given controlling significance. There is no indication in this record that Watson was a newcomer to the law, mentally deficient, or unable in the face of a custodial arrest to exercise a free choice. He was given Miranda warnings and was further cautioned that the results of the search of his car could be used against him. [Footnotes omitted.]

Id. at 609. Appellee is not alone in this position. The North Carolina Supreme Court is of a similar frame of mind. State v. Long, 237 S.E.2d 728 (N.Car. 1977).

It has long been recognized that it is nothing unusual for an arrested person to voluntarily cooperate with law enforcement officials. Such cooperation may be prompted by a desire for leniency for himself or others; it may also represent a person's attempt to assuage feelings of guilt or remorse which resulted from his prior actions. United States v. Robertson, 582 F.2d 1356, 1368 (5th Cir. 1978); Davis v. Zant, ____F.2d____ (11th Cir. 1983). It isn't necessary for a defendant to vocalize his consent; this can be manifested by conduct. In United States v. Griffin, 530 F.2d 739 (7th Cir. 1976), the court explained that the defendant's decision to open the door and the marked absence of coercion on the part of the officers manifested a voluntary consent to the entry. Even where a degree of coercion is obviously present, this does not vitiate an otherwise voluntary

consent. In United States v. Agosto, 502 F.2d 612 (9th Cir. 1974), the court held that a police officer's statement in asking the resident of a suspected marijuana traffic center for consent to search and that he would get a warrant if consent was not given, did not render the consent involuntary as a matter of law.

Case law is legion in this area and all of them cannot be reviewed. However, the cases that have been reviewed unmistakably teach that the actions of the police officers in the instant case constitute neither a search nor seizure. But if the act of Deputy Lodge in requesting appellant's watch can be viewed as a seizure, then the facts gleaned from the record and applicable case law compel the conclusion that appellant's compliance was voluntary.

ISSUE III

WHETHER THE INTRODUCTION AT TRIAL OF PORTIONS OF A DEPOSITION TAKEN TO PERPETUATE TESTIMONY CONSTITUTES A VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE FEDERAL CONSTITUTION AND Art. I, §16, State Const.

Appellant was first put on notice that the prosecution wanted to take the deposition of Deputy Danny Lodge for the purpose of perpetuating testimony at a hearing held in chambers on June 5, 1983. Appellant had no objection to the motion, stating that he would like to have the deposition as early as possible (R 1106). The deposition of Deputy Lodge was first taken on that

same date, July 5, 1983, (R 1118-1140) with voir dire examination by appellant's trial counsel (R 1121-1122) as well as cross-examination (R 1130-1137), and examination by the trial judge, followed by recross examination by appellant's trial counsel. While the record does not affirmatively show the presence of appellant at these proceedings, no objection was ever made by his trial counsel on the ground of his absence. Appellee does not read appellant's brief as contending to the contrary; in fact, appellant does not contend that he was absent when these proceedings took place.

At trial, the prosecution did offer in evidence the deposition of Daniel Lodge (R 228) taken on July 7, 1983, commencing at 1:30 p.m. (R 256) The deposition was then reviewed by both attorneys for the purpose of allowing appellant's trial counsel to object to anything deemed inadmissible (R 228-252). During the process of going through Lodge's deposition, the trial judge ruled on all of the objections raised by appellant's trial counsel. Because of statements made on the record, it would seem that appellant was not present at the time Lodge's deposition was taken to perpetuate his testimony on July 7, 1983 (R 236). Equally apparent is the failure of appellant's trial counsel to lodge any objection to the use of the deposition at trial because of appellant's absence at the time it was taken (R 236). Indeed, it was appellant's trial counsel who read into the record the first couple of pages of the deposition which he said set "the

stage for the deposition." (R 253, lines 22-24) His reading of those first couple of pages unmistakably shows that he had no objection to the taking of Lodge's deposition in the absence of appellant (R 253, line 25--255, line 17). Please note that when the prosecutor stated that it was her understanding that the "defense waives any objection to the testimony of Officer Lodge being taken by deposition and eventually read to the jury at the time of trial" with the defense reserving the right to object and to demand Officer Lodge's appearance for purposes of rebuttal (R 255, lines 3-11), appellant's trial counsel stated: "It is the defense's understanding" (R 255, line 17). Appellee submits that the waiver of appellant's presence is unmistakable from the following comment of his trial counsel:

> But as to the method and form that we are using now, I have no objection other than I feel we may get into a bind at trial. I'd just like to put that on the record.

(R 254, line 24--255, line 2) When the deposition of Lodge was being read into the record, the record is barren of any objection being lodged thereto on the ground that appellant was absent at the time the deposition was taken (R 256-A-256-FF). No mention is made in appellant's motion for new trial (R 1231-1233) concerning the alleged prejudicial absence of appellant at the time Lodge's deposition was taken to perpetuate his testimony. The Statement of Judicial Acts to be Reviewed (R 1258-1260) does not mention any judicial error relating to the absence of appellant

at the deposition of Deputy Lodge; in fact the matter isn't mentioned at all. The foregoing compels the conclusion that appellant waived his right to be present at the taking of Lodge's deposition and subsequently through counsel ratified that waiver by failing to object to the use of said deposition at trial.

The case of State v. Vasiliere, 353 So.2d 820 (Fla. 1978), relied upon by appellant, does not govern the precise issue now before this court. Vasiliere involved the use of a discovery deposition at trial because subsequent to the taking of the deposition, the victim died and of course was unavailable at trial. On its way to holding that a discovery deposition cannot be used for trial except for the purpose of contradicting or impeaching testimony of the deponent, this court noted that the defendant received no notice that the deposition would be used at trial. Sub judice, appellant did have notice early on that Lodge's deposition was for the purpose of perpetuating testimony to be used at trial and a written notice of the taking of said deposition was filed with the clerk of the lower court on June 24, 1983, the certificate of service bearing the same date (Supp.R. 1271). This cannot be said to be "unreasonably short notice" condemned in Chapman v. State, 302 So.2d 136, 138 (Fla. 2d DCA 1974). While the Vasiliere holding was reaffirmed in State v. James, 402 So.2d 1169 (Fla. 1981), it is emphasized that the deposition sub judice was not a discovery deposition. The certified question in State v. James, supra, came from the Fifth

District in James v. State, 400 So.2d 571 (Fla. 5th DCA 1980). It is obvious the Fifth District found persuasive the Supreme Court's decision in Ohio v. Roberts, 448 U.S. 56 (1980), as does appellee. Please note the following quoted from the opinion:

> In Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), the U.S. Supreme Court was again faced with a confrontation question as it pertained to the admissibility of out of court testimony.
>
> * * *
>
> The Supreme Court granted certiorari and held the testimony admissible, recalling that:
>
> > The Court, however, has recognized that competing interests, if "closely examined," Chambers v. Mississippi, 410 U.S., [284] at 295, 93 S.Ct., [1038] at 1045, [35 L.Ed.2d 297] may warrant dispensing with confrontation at trial. See Mattox v. United States, 156 U.S., at 243, 15 S.Ct., at 340 ("general rules of law of this kind, however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case"). Significantly, every jurisdiction has a strong interest in effective law enforcement, and in the development and precise formulation of the rules of evidence applicable in criminal proceedings. See Snyder v. Massachusetts, 291 U.S. 97, 107, 54 S.Ct. 330, 333, 78 L.Ed. 674 (1934); California v. Green, 399 U.S., at 171-172, 90 S.Ct., at 1941-1942 (concurring opinion).
>
> Roberts, 100 S.Ct. at 2538.

> The court then held that so long as the opportunity to cross-examine is present and counsel is not significantly limited in any way in the scope or nature of his cross-examination, there is substantial compliance with the purposes behind the confrontation requirement.
>
> In sum, we perceive no reason to resolve the reliability issue differently here than the Court did in Green. [California v. Green, 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970)]. "Since there was an adequate opportunity to cross-examine [the witness], and counsel . . . availed himself of that opportunity, the transcript . . . bore sufficient 'indicia of reliability' and afforded '"the trier of fact a satisfactory basis for evaluating the truth of the prior statement."'" Ibid.
>
> 100 S.Ct. at 2542, 2543.

400 So.2d at 573, 574. (Emphasis in original.) It cannot be denied, at least successfully so, that appellant's trial counsel had full opportunity for cross-examination and recross-examination of Deputy Lodge at his deposition. We do not read appellant's brief as contending to the contrary.

In summary, it is respectfully submitted that appellant knew early on of the prosecution's desire to take Lodge's deposition for the purpose of perpetuating his testimony; appellant's trial counsel had approximately twelve days notice of the time and place of taking the deposition; no objection was ever lodged to the taking of the deposition on the ground that appellant was absent; no objection was lodged to the use of the deposition at

trial on the ground that appellant was absent; appellant's trial counsel had abundant opportunity for cross-examination and recross-examination; and this resulted in a sufficient indicia of reliability to afford the trier of fact a satisfactory basis for evaluating the truthfulness of Lodge's testimony given at the deposition on July 7, 1983. Frankly, it is difficult to imagine how the presence of appellant could have been more clearly waived. And because of the opportunity for cross-examination availed of by appellant's trial counsel, it is even more difficult to understand how fundamental error can be made to appear. Absent this, State v. Barber, 301 So.2d 7 (Fla. 1974), governs because this court does not reverse on conjectural supposition. Sullivan v. State, 303 So.2d 632 (Fla. 1974).

The right of confrontation guaranteed by the Sixth Amendment to the federal constitution is a personal right and as other rights, i.e., right to counsel, may be waived Faretta v. California, 422 U.S. 806 (1975).

Proffitt v. Wainwright, 706 F.2d 311 (11th Cir. 1983), is similarly inapposite. The Profitt court did not decide the issue of whether presence at a capital trial can ever be waived; what it did decide was that no effective waiver had been made. Sub judice, we are not dealing with waiver of presence at trial; we are dealing with waiver of presence at a deposition following sufficient notice. In Proffitt, the defendant was never apprised

of the hearing. Id. at 312. Finally, if appellant is heard to claim that he did not personally waive the right to object to the admission in evidence of Lodge's deposition, then the words of Justice Stevens, concurring in Wainwright v. Sykes, 433 U.S. 72 (1977), is an appropriate answer.

> The notion that a client must always consent to a tactical decision not to assert a constitutional objection to a proffer of evidence has always seemed unrealistic to me.

Id. at 95.

ISSUE IV

WHETHER THE DEATH SENTENCE SHOULD BE REDUCED TO LIFE IMPRISONMENT.

Appellant fires a broadside at the sentencing proceedings but the pellets fall short of the target. But even assuming arguendo that the trial judge improperly found two of the four aggravating circumstances, this would be a pyrrhic victory. Particularly would this be true in the instant case because there were no mitigating circumstances, statutory or otherwise. In State v. Monroe, 397 So.2d 1258 (La. 1981), the court held that the fact that the evidence was insufficient to support one of the three statutory aggravating factors found to be present in the case did not preclude affirmance of the death sentence. The opinion contains an excellent discussion of Stephens v. Zant, 631 F.2d 397 (5th Cir. 1980), and rejects same as being controlling.

Appellant contends that the trial judge improperly found the aggravating circumstance that the murder was committed to avoid detection and arrest. §921.141(5)(e), F.S. (1983). We agree that the mere fact of death is not enough to invoke this factor when the victim is not a law enforcement official. But just as in Riley v. State, 366 So.2d 19 (Fla. 1979), there is more than just the fact of death because the evidence shows that the dominant motive, Menendez v. State, 368 So.2d 1278 (Fla. 1979), was the elimination of a witness who could positively identify appellant. The evidence shows and the trial court so found that appellant and the victim, Dassinger, knew each other. (R 1238) See also the comments of the prosecutor in closing argument at the sentencing hearing (R 815, line 13-816, line 13). Appellant's step-father, James Richard Johnson, admitted both on direct examination (R 599) and on cross-examination (R 600) that he knew the victim by name and the victim knew him by name. Appellant admitted in his statement that he knew the victim and had seen him deliver gas at his house (R 344-M). It is submitted that the robbery was for pecuniary gain; however, the killing was unnecessary for the consumation of the robbery and was done for the purpose of eliminating a witness who could identify appellant. There is simply no other plausible explanation. The evidence is totally inconsistent with any other reasonable hypothesis. Phippen v. State, 389 So.2d 911 (Fla. 1980). There is not a shred of evidence to support even the

possibility that the gun was discharged accidentally or during a struggle. The possibility that appellant reacted to a gesture made by the victim (as though reaching for a gun) is supported by nothing more than Rogers' statement to Deputy Rathlev that appellant had told him (Rogers) that he killed Dassinger because he thought he was going for a weapon or something under the seat of the truck (R 358). However, appellee has been unable to locate any such statement made by Rogers either on direct examination or cross-examination. Consequently, the theory of "self-defense" is wholly insufficient as an explanation for the killing. No weapon was found on the body of the victim or in the truck. Appellant did not contend to the contrary.

Appellant next assaults the trial judge's finding that the murder was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. §921.141(5)(i), F.S. (1983). The testimony of Wydell Rogers supports the trial judge's finding that the murder was so committed. The argument that the finding of guilt of felony murder precludes the trail judge's finding of this aggravating circumstance is without merit. It is the law in this jurisdiction that in the context of felony murder, premeditation is presumed as a matter of law. Leiby v. State, 50 So.2d 529 (Fla. 1951); Ellis v. State, 281 So.2d 390 (Fla. 1st DCA 1973); Sutton v. State, 92 So. 808 (Fla. 1922); Everett v. State, 97 So.2d 241 (Fla. 1957); Adams v. State, 341 So.2d 765 (Fla. 1977). It seems patently

clear from the legislative intent evidenced by Florida's felony murder statute that the purpose was to create a deterrent to the commission of the enumerated felonies by substituting the intent to commit those felonies for the premeditated design to effect death which would otherwise be required for conviction of first degree murder. State v. Williams, 254 So.2d 548 (Fla. 2d DCA 1971). Suffice it to say that when the jury returned a verdict of guilt of felony murder, this supplied the necessary premeditation for the judge's finding of this aggravating circumstance. The cases cited in appellant's brief on pp. 40, 41 thereof have to do with the issues of double jeopardy and collateral estoppel that may be involved in the retrial of a defendant on the same issue. This does not govern the issue in the instant case because there was no retrial; it was all one trial.

Appellant's reliance on Hawkins v. State, 436 So.2d 44 (Fla. 1983), is misplaced. There, this court determined that there was a reasonable basis for the jury's recommendation of life imprisonment because the jury's express rejection of premeditated murder was consistent with the conclusion that Troedel was the triggerman which was consistent with the evidence presented at trial. One of the aggravating circumstances found by the trial judge was that the murders were committed in a cold, calculated, and premeditated manner without pretense of moral or legal justification. Id. at 48. (Boyd, J., concurring in part and dissenting in part.) The plurality opinion did not reject

any of the aggravating circumstances found by the trial judge, much less hold that the aggravating circumstance of cold, calculated, and premeditated manner was precluded by the jury's verdict of guilt of felony murder. This court's reversal of the trial judge's override of the jury recommendation was based solely on its finding that there was a reasonable basis for the jury's recommendation of life imprisonment.

Understandably, appellant does not even challenge the validity of the other two aggravating circumstances found by the trial judge, i.e., previously been convicted a felony involving the threat of violence and committed during the commission of a robbery. But this notwithstanding, the trial judge's jury override is challenged on the basis that the jury "might have found some mitigation in appellant's age" (Appellant's brief, p. 45) and the length of time the jury deliberated on its recommendation. First, findings of a trial judge are factual matters which should not be disturbed unless there is an absence or lack of substantial competent evidence to support those findings. Sireci v. State, 399 So.2d 964, 971 (Fla. 1981), citing Hargrave v. State, 366 So.2d 1 (Fla. 1978), and Lucas v. State, 376 So.2d 1149 (Fla. 1979); Smith v. State, 407 So.2d 894, 901 (Fla. 1982); Mikenas v. State, 407 So.2d 892 (Fla. 1981). For example, in Mikenas this court squarely rejected the argument that certain testimony should have been treated as a mitigating circumstance. And while the prosecution permitted the codefendant,

Wydell Rogers, to enter a plea of guilty to second degree murder is fortunate for him, it does not require a reduction of appellant's sentence. White v. State, 415 So.2d 719 (Fla. 1982). Malloy v. State, 382 So.2d 1190 (Fla. 1979), is not inconsistent with White because in Malloy this court determined that there was a reasonable basis for the jury's recommendation because of the conflict in the testimony as to who was actually the triggerman. The Malloy court reasoned that from the evidence presented the jury could have believed the defendant's story that he was not the triggerman. In short, the plea bargains referred to in Malloy does not appear to be the motivating factor behind this court's reversal of the trial judge's jury override. Sub judice, there was no question as to who was the triggerman.

Appellant seems to be contending that a "proportionality" review must be conducted. While this court does conduct such a review, it is not constitutionally required under the Eighth Amendment to the federal constitution. Pulley v. Harris, ____U.S.____, 79 L.Ed.2d 29 (1984). However, this court's efforts toward achieving even-handed justice by uniform application of the death penalty stands for all to see.

At the penalty phase, a total of six witnesses testified and their testimony comprises a total of approximately 26 pages. It is no wonder the trial judge restricted the length of arguments, particularly in view of the lengthy arguments presented at the

conclusion of the guilt-innocence phase. The record shows that the trial judge did restrict the length of argument (five minutes) per side and on neither occasion when this was done did appellant's trial counsel voice any objection (R 808, 814). The issue has not been preserved for appellate review. State v. Barber, supra. As a matter of fact, appellant's trial counsel might have been better advised not to make any closing argument at all at the penalty phase. At least this court in Messer v. State, 439 So.2d 875 (Fla. 1984), held that trial counsel made an acceptable tactical choice not to present closing argument at either the guilt or sentencing phases. The court reasoned that by so doing he deprived the state of rebuttal argument and the opportunity to emphasize evidence of the defendant's substantial involvement in the murder. Reasonably, if a defendant's trial counsel can tactically choose not to present any oral argument, he can certainly agree to a restricted time limit imposed by the trial judge within which to do so.

In the instant case there is no problem under Elledge v. State, 346 So.2d 998 (Fla. 1977), Enmund v. Florida, 458 U.S. 782 (1982), or Lockett v. Ohio, 438 U.S. 586 (1978). Appellant's trial counsel was given every opportunity to present all the material evidence deemed necessary.

In his written findings in support of sentence of death, the trial judge did state that the jury deliberated less than

five minutes before recommending life imprisonment (R 1238). However, this is error because the record furnished to appellee shows that the jury deliberated ten minutes (R 823). Apparently, the jury was composed of a group of decisive people. Appellee will conclude its argument under this point with the following quoted from the opinion in Palmes v. Wainwright, 725 F.2d 1511 (11th Cir. 1984).

> Appellant contends that the trial judge erred in not considering non-statutory mitigating factors that were presented during the sentencing hearing. In her judgment and order of death the trial judge discusses only the statutory aggravating and mitigating factors in Fla. Stat. §921.141. Again we cannot conclude that because the order discusses only the statutorily mandated factors that the other evidence in mitigation was not considered. Appellant's citation to Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), in which the Court held that a trial judge may not as a matter of law refuse to consider evidence of mitigation, is not persuasive. Here the trial judge patiently heard all of the evidence appellant had to offer. The weight the trial judge gave to any one factor was wholly within her discretion. See Barclay v. Florida, ____U.S.____, 103 S.Ct. 3418, 3430 n.2, 77 L.Ed.2d 1134 (1983) (Stevens and Powell, JJ. concurring). Our review is completed once it is established that a full hearing was conducted in which appellant's counsel was given an opportunity to present all of the mitigation evidence. There is no indication whatsoever that the trial judge did not conscientiously consider everything presented.

> Appellant also contends that the statutory aggravating factor of "heinous, atrocious, and cruel" conduct is unconstitutionally vague in its application. This contention was rejected in Proffitt v. Florida, 428 U.S. at 255-56, 96 S.Ct. at 2968 (Stewart, Powell and Stevens, JJ.). See also, Barclay v. Florida, ____U.S.____, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983). We find that the trial judge properly applied this factor. We conclude based on the record that the trial judge met the constitutional sentencing standard of an "individualized determination on the basis of the character of the individual and the circumstances of the crime." 103 S.Ct. at 3428.
>
> Finally, appellant claims that his sentence violates the eighth and fourteenth amendments because it is so disproportionate to the grant of immunity to Jane Alpert. Ronald Straight, another actor in this murder scheme was also sentenced to death. The Supreme Court has stated that discretionary decisions of state prosecutors to grant immunity to some participants of a crime and not others is not arbitrary or cruel and unusual under the constitution. See Gregg v. Georgia, 428 U.S. 153, 199, 96 S.Ct. 2909, 2937, 49 L.Ed.2d 859 (1976) (Justices Stewart, Powell, and Stevens); Proffitt v. Florida, 428 U.S. at 254, 96 S.Ct. at 2967. Appellant's claim that Jane Alpert was not similarly punished is not a cognizable basis for relief.

Id. at 1523, 1524. Appellee would be remiss in its duty if it did not remind the court of its recent decision in Teffeteller v. State, 439 So.2d 840 (Fla. 1983), reaffirming its prior holdings that it is within the trial court's province to decide whether a mitigating circumstance is proven and the weight to be given it.

ISSUE V

WHETHER APPELLANT'S CONVICTION OF FIRST DEGREE FELONY MURDER BASED ON ROBBERY PRECLUDES AN ADJUDICATION OF GUILT FOR THE ROBBERY.

The case of Hawkins v. State, 436 So.2d 44 (Fla. 1983), does not appear to support appellant's position. There, this court affirmed the convictions for first degree felony murder but reduced the death sentences to life imprisonment and affirmed the conviction for robbery because robbery was the underlying felony for the first degree murder convictions. This appears to be in harmony with State v. Thompson, 413 So.2d 757 (Fla. 1982), where the defendant had been convicted and sentenced for attempted robbery and felony murder. The Third District upheld the felony murder conviction and sentence but reversed the conviction for attempted robbery. On certiorari, this court reversed that part of the district court's decision setting aside the defendant's attempted robbery conviction and affirmed the remainder of the opinion, including the vacation of the sentence for attempted robbery. The rationale of these cases seems to be that in felony murder-robbery cases, convictions may be had for both the felony murder and the robbery but sentence can be imposed only for the greater offense.

However, if the rule of Bell v. State, 437 So.2d 1057 (Fla. 1983), is to be applied to felony murder-robbery cases, then Hawkins and Thompson can no longer be viewed as viable. As far

as appellee has been able to ascertain, Bell is the latest pronouncement by this court on the issue and must be regarded as controlling as to the construction to be placed upon §775.021(4) prior to its amendment by Ch. 83-156, Laws 1983, effective June 22, 1983. The language of the statute excluding lesser included offenses has been deleted. See §775.021(4), F.S. (1983). It is suggested that the statute was amended for the purpose of permitting a trial judge to impose separate sentences for conviction of separate crimes arising out of one criminal transaction. But this isn't the end of the matter. If the result reached in Bell was motivated by the language of the statute (excluding lesser included offenses) prior to its amendment, then Hawkins and Thompson should be controlling. However, if Bell is bottomed on double jeopardy law, irrespective of the language of the amended statute, then it must be regarded as controlling in this instance. Of course, §775.021(4), as amended, was in effect on the date appellant was sentenced, July 27, 1983.

In a later case, Harrielson v. State, 441 So.2d 691 (Fla. 5th DCA 1983), subsequent to the effective date of §775.021(4), as amended, the Fifth District in treating a similar issue commented as follows:

> In Bell v. State, 437 So.2d 1057 (Fla. 1983), the Florida Supreme Court, relying on Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), stated that "lesser included offenses are tantamount to the greater offense charged if all the

> constituent essential elements of such lesser offenses are included within the elements of such greater offense."

Id. at 692. Appellee does not believe Bell to be controlling. It is believed that the statute as amended permits multiple convictions and sentences for separate offenses committed in a single criminal transaction. See Scott v. State, ____So.2d____ (Fla. 1984), Case No. 63,878, and State v. Gibson, ____So.2d____ (Fla. 1984), Case No. 61,325, on rehearing. Admittedly, this court has "been less than consistent" on this issue, Bell, 437 So.2d 1060, and if appellee's analysis is incorrect, it would be helpful if the court would address the issue in its opinion.

ISSUE VI

WHETHER THE TRIAL JUDGE ERRED IN DENYING APPELLANT'S MOTION TO PRECLUDE CHALLENGES TO JURORS BECAUSE OF OPPOSITION TO CAPITAL PUNISHMENT.

The four jurors who were excused for cause because of fixed opposition to capital punishment were Steve Wilson (R 60, 61), Daniel Dale (R 61, 62), Dorothy Carden (R 65, 66), and Lori Tallent (R 64, 65). Prospective juror Frater was challenged for cause because he had already formed a fixed opinion (R 58, 59).

Appellant does not contend that any of the jurors were improperly excused under Witherspoon v. Illinois, 391 U.S. 510 (1968). Appellant contends that his right to a trial by an impartial jury was violated because of the excusal of the jurors in

question, citing Grigsby v. Mabry, 569 F.Supp. 1273 (E.D. Ark. 1983). Grigsby is presently pending on appeal, case no. 83-2113, ____F.2d____ (8th Cir. 1984). This issue was treated at length in brief of appellee filed in Barclay v. State, Case No. 64,765, now pending in this court and need not be here repeated. Suffice it to say that Grigsby is inconsistent with decisions of the United States Supreme Court and this court. Riley v. State, 366 So.2d 19 (Fla. 1978), cert. denied, ____U.S.____, 74 L.Ed.2d 294 (1982); Gafford v. State, 387 So.2d 333 (Fla. 1980); Steinhorst v. State, 412 So.2d 332 (Fla. 1982); Maggio v. Williams, ____U.S.____, 78 L.Ed.2d 43, 47 (1983); Sullivan v. Wainwright, ____U.S.____, 78 L.Ed.2d 210, 212 (1983). This issue does not merit further comment.

CONCLUSION

The conviction and sentence should be affirmed.

JIM SMITH
Attorney General

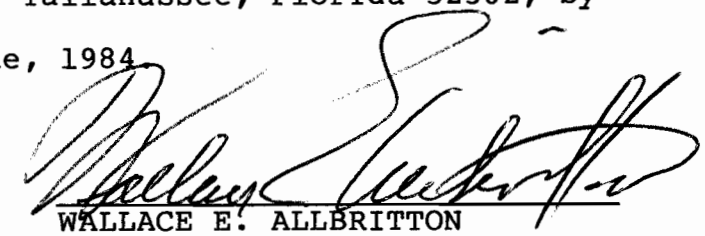
By _____
WALLACE E. ALLBRITTON
Assistant Attorney General

COUNSEL FOR APPELLEE

The Capitol
Tallahassee, FL 32301

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have furnished a copy of the foregoing Brief of Appellee to Mr. Michael J. Minerva, Assistant Public Defender, P. O. Box 671, Tallahassee, Florida 32302, by U.S. Mail, this 19th day of June, 1984.



WALLACE E. ALLBRITTON
Assistant Attorney General

of Counsel