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IN THE SUPREME COURT OF FLORIDA

ANTHONY SILIAH BROWN, :

Appellant, :

vs. : 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

INITIAL BRIEF OF APPELLANT

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IN THE SUPREME COURT OF FLORIDA

ANTHONY SILIAH BROWN, :

Petitioner, :

vs. : CASE NO. 64,247

STATE OF FLORIDA, :

Respondent. :

______________________:

INITIAL BRIEF OF APPELLANT

I PRELIMINARY STATEMENT

The documents and transcripts incorporated in Volumes VI-VIII will be referenced by the symbol "R"; the trial transcript, contained in Volumes I-V, will be referenced by the symbol "TR". The appendix will be referenced by "APP".

II STATEMENT OF THE CASE

Appellant was indicted by the Escambia County Grand Jury for first degree murder by premeditation or while engaged in a robbery, and for robbery committed while armed with a deadly weapon (R-844). [A co-defendant, Wydell Rogers, was also indicted on those charges but Rogers pled guilty to second degree murder and robbery without a firearm and testified for the state (TR-415)].

Before trial appellant's motions to suppress evidence (a watch) on the grounds of illegal search and seizure (R-1087-90) and to preclude challenging jurors for cause in the guilt phase because of opposition to capital punishment (R-902; R-1164-66) were denied [R-1150, 1151 (watch); R-968 (jurors)]. During jury selection four jurors were excused, over objection, because of their statements against capital punishment (TR-104-05).

Appellant was tried by jury and convicted of first degree felony murder and robbery with a firearm (R-1225-26). The same jury deliberated and recommended a life sentence (R-1229).

The trial judge imposed a death sentence (R-1249) and entered written findings in support of it (R-1237-39). (App.)

Adjudication of guilt was entered for the robbery (R-1227-28) but no sentence was imposed (R-1231-33).

Appellant's post-trial motion for new trial, based in part upon the weight of the evidence, was denied (R-1231-33).

III STATEMENT OF THE FACTS

Rebecca Sirmons, bookkeeper at Veteran's Gas Company, received a telephone call from a person who said she was Annie Rivers about 3:30 or 3:45 p.m. on December 21, 1982. Rivers wanted gas delivered to 3905 Pine Forest Road. She said she needed gas right away but wanted the minimum she could get. Rivers was very reluctant to give her name. About five minutes after calling, Rivers called back asking where the gas was. Sirmons gave the order to a dispatcher to relay to deliveryman James Dassinger who was the driver for the area where Rivers lived (TR-154-60).

Sirmons said that the person who ordered the gas was a female (TR-156).

At about 5:15 that afternoon gas company officials became worried when Dassinger did not return from his route; they notified the sheriff's office he was missing at about 6:00 p.m. (TR-214).

Deputy Paul Schulz, who patrolled the Pine Forest Road area, was instructed to look for Dassinger and the gas truck (TR-164, 65). He went to a house and asked the location of the address that had been given. Wydell Rogers (the co-defendant) told Schulz that was his address but denied ordering gas or seeing a gas truck. Rogers asked his girlfriend and another woman at the house and they also denied knowing about a gas delivery (TR-166, 67). This occurred before dark, about 6:30 p.m. (TR-168). Later Schulz was sent to Rogers' residence.

It was a quarter mile past the house where he earlier saw Rogers. There he found another officer, a Veteran's Gas truck, and a body. Rogers was there also (TR-170-73).

Deputy James Korinsky went to the scene about 8:30 p.m. Two other deputies were already there and a man and a woman were talking to the officers (TR-178, 79).

Korinsky examined the dead body, which had a large wound under the left armpit (TR-192). No identification or wallet were found (TR-193).

Blood was dripping on the outside of the driver's door and below it (TR-183-85); State's Exhibits 6-12). A pad in the truck contained a list of names, the last one being Annie Rivers (TR-262; Defense Exhibit 4).

Two expended 410 shot shells were found about 150 feet from the truck (TR-189) and another was found near a pair of sunglasses on a path (TR-286). Two shoeprints which looked like tennis shoes were found about 150 feet southeast of Rogers' house (TR-199).

Robert Pearson, an officer of Veteran's Gas Company, went to the scene and identified the body as that of James Dassinger. No gas had been delivered at the house. Pearson calculated that $225.00 in cash was missing. One of the people at the scene was Annie Rivers (TR-210-27).

Latent fingerprints taken from the gas truck were compared with the known prints of Rogers and appellant, but none matched (TR-193-95, 257, 276-77).

Evidence technician Danny Lodge examined the body at the scene. Under the left arm was a round hole about the size of a dime which appeared to be a contact wound (TR-256D). Lodge believed a 410 shotgun caused the wound because of the size and number of pellets in the body (TR-256M).

Lodge had noticed splatters of blood on the gas truck. Later that night he examined the appellant at the sheriff's department and noticed his watch appeared to have a small spot of blood. The watch was taken as evidence. Lodge

said some of the blood splatters just above the running board on the door facing were similar in size or shape to those found on the appellant's watch (TR- 265T). Appellant was wearing some type of hard toe shoe like a loafer that night (TR-256BB). When analyzed, the spot on the watch was found to be blood (TR-582).

Deputy Rhett Smith had also been at the scene after the shooting. He asked appellant, who arrived there during the investigation, to come to the sheriff's office for questioning. After being advised of his rights and signing a waiver, appellant stated that he was a friend of Rogers, had not seen him in some time, and stopped by to visit. He had been at a pool hall in Atmore, Alabama seeing some friends at approximately 3:00 to 4:00 p.m. and he had just returned to Pensacola when he went to see Rogers. Later, after being told that other people had seen him and Rogers together that day, appellant said he had seen Rogers earlier and had come back to see him again. He did not go to the pool hall just to see friends but went there to buy drugs (TR-299-300, 303). Appellant had a fresh track mark on the inside of his left elbow described as an injection mark, with blood still oozing from the injection (TR-300). Appellant said he knew nothing about the homicide (TR-301).

Appellant said he had been at the Oaks Tavern most of the afternoon but had gone to Atmore with two other people between 3:00 and 4:00 p.m. and had stayed until he arrived at Rogers'. He had purchased drugs at the pool hall in Atmore, calling them T's and blues. He bought one of each for himself (TR-304).

Deputy Ray Rathlev was at the scene on the 21st and saw Rogers and Rivers there. Statements were taken from them that evening and again the next day. Rogers was supposed to come back in for questioning on the 26th or 27th but did not do so (TR-326). He also did not appear on the 28th as requested (TR-327). On the 29th an unserved warrant against Rogers for grand theft was found and when Rathlev spotted Rogers' car, he took him to the sheriff's department. Rogers'

brother, Norman, and a friend, Clatie Frost went along (TR-329, 30).

Several statements were taken from Rogers (R-331, 32). Before any tape recording was made Rogers said he had heard who was involved in the robbery and killing (TR-333). In the first recorded statement Rogers did not implicate himself but did in the second statement. He named others and based on that information appellant and Ulysses Robinson (who had come with appellant to Rogers' house on the 21st) were sought by investigators (TR-337).

Rathlev had interviewed appellant and his recorded statement was played at trial. In his statement appellant said on Tuesday, the 21st, he was home washing his car in the morning; he stayed at home until 1:00 or 1:30 and drove to the Oaks Tavern where he saw Rogers. They bought a six pack of beer, brought it back to the tavern and drank it. Between 3:00 and 3:30 he asked Rogers to take him home. He stayed home and ate and then walked back to the tavern at about 4:00 or 4:30. Then he, Zollie Bryant and Ulysses Robinson went to Atmore. Appellant had about $58.00 and bought gas and a bag of dope. They returned to the Oaks and he and Robinson went to Rogers' house to give him two pills.

When asked about the spot of blood on his watch appellant said he did not know how it got there (TR-344L). Appellant said he had seen the gas delivery man at his house when they used butane gas (TR-344M). The only reason appellant knew for Rogers implicating him in a murder was that Rogers had pulled a sawed off shotgun on him several months before (TR-344Q).

By stipulation the time of sunset on December 21st was established at 4:52 p.m. (TR-367).

Annie Rivers said that on December 21st she and Wydell Rogers were living together. She had previously ordered gas from Veterans two or three time but not on the 21st. She had left her house at 7:30 that day to visit her mother who lived about three miles away; Rogers picked her up about 4:00 p.m. and

they went to the Bright Lights Cafe. They went downtown and visited Clay Davis, (it wasn't dark yet when they arrived there) and left there about 7:30. They returned briefly to the Bright Lights, then went to the Oaks Tavern, then toward home. On the way they stopped to see Viola Issacs, a neighbor, where they stayed from about 8:00 until 8:30.

When she and Rogers then drove to their house they found the gas truck and the body and returned to Issac's house where Rogers called the police (TR-367-81). Rogers had not told her what he had been doing that day (TR-382).

Wydell Rogers said that on the 21st of December he took Annie Rivers to her mother's and later went to Molino to see Anthony Clayton who told him Dave Davis had left word to be picked up on Mobile Highway. Rogers and Clayton went there and saw Davis walking with his girlfriend. They picked them up, took the girl to her aunt's house in Molino, and dropped Clayton off.

Rogers and Davis went to the Crispy Chick Restaurant and ate lunch; they also shopped for sunglasses. Afterward, about 1:00 or 1:30 they went to the Oaks in Cantonment. They were sitting in the car listing to music when appellant came over and asked Rogers to step out of the car. Appellant began talking about the gas man, saying he had seen him the day before dropping off gas and being paid a dollar a gallon. He said Rogers could go to the telephone and order gas for his house, which was in a secluded area. After listening to appellant Rogers "just more or less went along with it." (TR-427-48).

Rogers and appellant got in Rogers' car. They went to appellant's mother's house where he obtained a change of clothes, carrying them in a brown paper bag; then to a Jr. Food Store on the corner of Untreiner and Detroit Streets so appellant could make the call. Davis, who was with them, went into the store to get a drink or beer. Rogers and appellant went to the phone booth and Rogers stood up beside him at the telephone. Appellant asked for a quarter and called

the gas company after first calling information to get the number. He ordered 50 gallons of gas. Before the phone was answered appellant asked Rogers his girlfriend's name (TR-430-31). Appellant did not talk in his normal voice but more or less disguised it in ladylike fashion, during the call.

Just before appellant finished the conversation Rogers walked from the phone booth and urinated. He could see appellant from where he then was at the side of the store. When Rogers came back to the car appellant was no longer standing at the phone booth. Rogers did not know if appellant had made one call or two. The time when appellant was on the telephone was not later than 3:00 p.m. (TR-480).

After the call the three men drove to Rogers' house (TR-433, 34). While Davis stayed in the car, Rogers and appellant got out and Rogers got a 410 shotgun and some shells from underneath the house. He gave them to appellant, who loaded the gun. Rogers went back to the car and drove a short distance to a store and filling station on the corner of Highway 297 and Pine Forest Road. Appellant stayed at the house (TR-435-37). The plan was for appellant to wait in the bushes until the deliveryman came (TR-438).

While waiting at the store Rogers saw the gas truck. It turned in front of where he and Davis were parked and then headed for the house on Pine Forest (TR-440). Rogers was not able to see his house from the store (TR-441). After five or ten more minutes Rogers, who had not heard any shots, drove down the road to pick up appellant as planned. Appellant was not where he was supposed to be. Returning to the store, Rogers saw appellant standing on the side of the road waving (TR-441, 42). He stopped and picked up appellant, who sat in the back because Davis was in the front. Appellant no longer had the shotgun and Rogers had not seen it again (TR-442).

In the car appellant leaned forward and told Rogers he shot the gas man but

did not know if the man was dead (TR-444). Rogers saw that appellant had a wallet and a check (TR-452). Rogers drove appellant home and while he stood outside the car appellant put fifty dollars over the sun visor (this was in case anyone asked if Rogers could pay for the gas) (TR-452). The time then was after 3:00 p.m.

Davis was dropped off next and Rogers picked up his girlfriend, Annie Rivers (TR-447). They went to the Bright Lights, then visited Clayton Davis (until ten to seven). They came back to the Bright Lights, then went to the Oaks. When Rivers went inside the Oaks, Rogers saw appellant, who said he had gone back for the gun (TR-451). Appellant did not say what he had done with it.

While at the Issacs', before going home, Rogers was asked about an address on Pine Forest Road. Rogers and Rivers then went home, found the body, and called the police (TR-455-57).

According to David Davis, who testified for the state, he and Rogers were parked in Rogers' car at the Oaks on the afternoon of December 21st when appellant came over. Davis had not met appellant before (TR-520). Appellant wanted to speak with Rogers; Davis went in the tavern and did not hear their conversation (TR-522, 23). Rogers told Davis they were going to the beach but first they had to go to appellant's house (TR-524).

At Rogers' house Davis stayed in the car while the other two went in to change clothes (TR-524, 25). Rogers returned to the car first and drove to a service station on the corner. Appellant came back to the car and knocked on the window while the car was parked at the corner (TR-526).

When appellant came back to the car he and Rogers cancelled the beach trip. Rogers drove appellant home.

Davis was never fingerprinted by the police (TR-541) and his prints were never compared with those taken from the gas truck (TR-283).

Assistant State Attorney John Spencer testified that he had nolle prossed two charges against Rogers because of insufficient evidence and information (TR-570-74). The charges were dropped on April 20, 1983 and April 15, 1983. They related to stolen property, clothes and a 410 shotgun.

Ulysses Robinson had seen appellant on December 21st. Appellant was with Rogers and Davis and they left the Oaks in Rogers' car. He saw appellant again about 4:00 that afternoon when he (Robinson) was with Zollie Bryant. The three of them went to the Oaks and then to Atmore. Appellant bought liquor and gas. In Atmore they went to a pool hall and while Robinson was driving back appellant fixed T's and blues for Bryant and himself.

Later that evening Robinson went with appellant to Rogers' house. The police were there when they arrived (TR-561-67).

Annie Jean Gross was appellant's girlfriend on December 21st. She saw him at the Oaks about 9:00 p.m. and he offered her some pills (TR-568).

A pathologist who autopsied the body of James Dassinger said the cause of death was a gunshot from close range (within an inch). The wound was under the left armpit and would have been covered by the left arm when the arm was hanging down. The shot pellets were dispersed in a slightly upward pattern. Because of the massive bleeding, death was almost instanteous (TR-512-15).

Appellant's motion for judgment of acquittal at the end of the state's case was denied (TR-584).

Members of appellant's family testified that he was home during major portions of the day on December 21st. His mother saw him when she left the house at 3:00 p.m. and saw him at home again at 9:00 p.m. when he told of being questioned by the police about the shooting (TR-585-87). His stepfather said appellant was in the yard washing his car when he left for work at 2:30 p.m. (TR-594-99).

Coincidentally, James Dassinger and appellant's stepfather had worked together

at Monsanto eight or ten years earlier. He did not believe Dassinger ever delivered gas to his house (TR-604).

Appellant's sister said he was away from the house for short periods during the day. Davis and Rogers dropped him off at noon. She contradicted her mother by saying appellant was not home at 3:00 p.m. when his mother left. She saw appellant at home again about 9:00 p.m. (TR-606-11).[1]

Gary Shelor had two conversations with Wydell Rogers in April 1983 while they were prisoners being transported to the courthouse from the county jail. Talking about his crime, Rogers said that he was charged with murder, and had found a way to get out of it. He destroyed the gun (a shotgun) and it would never be found. During the second conversation, in a holding cell, Rogers said it was a murder-robbery; they had committed it for drugs and to buy Christmas presents for the children of his girlfriend or his wife. Rogers admitted committing the crime but was putting it off on a guy by the name of Pejoe (some people called appellant that) (TR-632-34).

On cross Shelor admitted that when deposed he had not remembered those conversations, but explained that he had developed a mental block. He had not wanted to become involved in the case then.

No other testimony was presented on the issue of guilt and the jury found appellant guilty of felony murder and robbery with a firearm.

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1. Ulysses Robinson, called by the defense, had been with appellant at the club that night at 9:00 p.m. (TR-672).

IV ARGUMENT

ISSUE I

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

The trial leading to this death sentence was plagued with various errors which, accumulated, infected the proceeding as a whole. It is for a case like this one that Fla.R.App.P. 9.140(f) is reserved. The court in capital cases is directed by that rule to "review the evidence to determine if the interest of justice required a new trial . . . ." A new trial may be granted in a capital case for insufficiency of evidence.[2]

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2. Tibbs v. State, 397 So.2d 1120 (Fla. 1981), aff'd, 457 U.S. 31 (1982) holds that appellate courts should not reweigh the evidence. That ruling, however, left open the question of what an appellate court should review when ruling on a trial judge's order granting or denying a motion for new trial based on the ground that the verdict is contrary to the weight of evidence, a ground recognized by Fla.R.Cr.P. 3.600(a)(2). A recent decision, Gonzalez v. State, ___ So.2d ___ (Case No. 82-1837 Fla. 3rd DCA, April 10, 1984) 9 F.L.W. 867, holds that the standard on review of an order granting or denying a new trial is whether the appellant has made a clear showing of an abuse of discretion.

   The evidentiary conflicts to be demonstrated here required granting a new trial either for abuse of discretion or in the interest of justice.

   The Court should reevaluate Tibbs' restriction on granting or denying a new trial based on weight of the evidence. If a motion for new trial on that ground is authorized, the trial judge's ruling will, as here, be subject to appellate review. If the standard on review is abuse of discretion, undoubtedly there will be times when that showing can be made. The appellate court will need some way to gauge whether the lower court abused its discretion. Doing this will involve the appellate court in weighing the evidence to some extent.

   By its ruling in Tibbs the United States Supreme Court has allayed possible fears that double jeopardy will bar a retrial when a verdict has been set aside because of the weight rather than the legal sufficiency of the evidence.

   Under this Court's ruling in Tibbs an appellate court has only two alternatives regarding the evidence. Affirm or acquit. Judges may not reverse in close cases because of not wanting to acquit but might still believe the evidence is unsatisfactory for a conviction. Appellate courts should have the third option, now foreclosed by Tibbs, of awarding a new trial based on evidentiary weight. Without that authority the courts have no remedy for a case like this one. The Tibbs rule prohibiting reversal based on weight of the evidence should be reconsidered and modified. Tibbs v. Florida, 457 U.S. 31, 45, n. 22 (1982).

The argument in this issue has three subparts:

A. Weight of the Evidence
B. Limiting Cross-Examination
C. Other Errors

A. Weight of the Evidence

Unlike many weight-based arguments, appellant is not asking for a weighing of his evidence against the state's. The comparisons, rather, are (1) with the differing testimony about the same event by different state witnesses and (2) with the admittedly different statements about the same event made at different times by the same state witness.

The state's theory of the evidence was that appellant solicited Rogers to commit the robbery because Rogers lived in a secluded area and the gas man, once lured there, could be robbed.

In carrying out this plan appellant and Rogers went to a pay telephone some undetermined distance ["I can't really say how many miles . . ." (TR-479)] from Rogers' house and appellant, disguising his voice to sound like a woman, ordered gas in the name of Rogers' girlfriend, Annie Rivers.

The contradictions in this event are (1) Rogers said the appellant called but the bookkeeper said the caller was a female; (2) Rogers said the call was not made after 3:00 p.m. yet Ms. Sirmons who received the call said it came later, at 3:30 or 3:45; (3) Rogers saw appellant make only one call, and loaned appellant a quarter for that, but Sirmons received two calls. Of course the second call could have been made while Rogers was at the side of the building urinating. Consider, however, that if Rogers had to give appellant a quarter for the first call how could he have made a second call without borrowing another quarter; and, even assuming appellant had money for a second call, what possible reason could have existed to call back from the phone booth five minutes after placing the order and demand to know why the gas had not been delivered yet? According to

Rogers these calls were made before he and appellant had gone to Rogers' house to get the gun and wait for the gas man. If the caller really had been at the telephone booth, he (or she) would not have wanted the gas delivered "right then" as Sirmons testified (TR-157) and could not have known whether the truck had actually arrived at Rogers' house before making the second call. (The store from which these calls were supposedly made was at Detroit and Untreiner Streets and was not the store at Pine Forest Road and 297, where Rogers said he was when he saw the truck approach his house.)

To believe Rogers is to accept as true that when the first call was made the would-be robbers were not yet in position to rob or even see the gas man. To believe Sirmons leads to the opposit conclusion: The robbers were in place and ready for the delivery when the first call was made; they became impatient and, knowing the truck had not yet arrived, made the second call. Only if they were much closer to the house and further along in their preparations than Rogers said they were could the robbers have made the calls described by Sirmons.[3]

Material conflicts exist between the testimony of Rogers and Davis. (1) Both agree they were together before going to the Oaks. But Rogers remembers in detail that they had lunch at the Crispy Chick, and both he and Davis "ate two pieces." (TR-472). Davis adamantly maintained "No, we didn't go by no chicken place." (TR-533).

(2) When leaving the Oaks with appellant and Davis, Rogers said he <u>did not tell Davis they were going swimming</u> (TR-477); he also testified that appellant changed clothes in the car (TR-446). Davis said that <u>Rogers talked about going to the beach</u> and Rogers and appellant went to Rogers' house to change clothes (TR-523, 24).

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3. The testimony of Sirmons leads to an irrepressible urge to believe that Annie Rivers made the calls from near Rogers' house.

(3) After leaving appellant at Rogers' house, Davis and Rogers parked up the street at a convenience store. Rogers said Davis went inside to buy drinks there, and he (Rogers) did not because "me and the lady had had a conflict before and so I didn't go in the store . . . ." (TR-439); Davis said at that store "I sent Wydell in [to buy the beers]" (TR-526).

(4) Rogers saw the Veteran's Gas truck pass in front of his parked car (TR-440); Davis did not (TR-536).

(5) Rogers said he drove to find appellant and saw him standing on the side of the road waving his hands (TR-442); Davis said the car had not been moved and was "sitting still when [appellant] come back" (TR-526), "knock[ed] on the window and ask[ed] was ya'll ready to go." (TR-537).

(6) Rogers said that (a) in the car after the robbery appellant, in the back seat, "kind of leaned forward and told me that he had shot the gas man." (TR-444); and (b) after reaching his house, appellant put fifty dollars over the sun visor of Rogers' car (TR-452, 53). Davis said that during the trip to appellant's house "ain't nobody said nothing" (TR-526), and at the house he did not see any money put in the car (TR-539).[4]

[Rogers' testimony that in the car appellant admitted the shooting must have surprised even the prosecutor because in her opening statement she told the jury that appellant was driven to his house and gave Rogers fifty dollars from the robbery <u>but made no indication that the gas man had been killed or that the gun had been used</u> (TR-142).]

Rogers, Davis, and Rivers also gave contradictory statements about when Rivers and Rogers had seen Davis after the robbery. Rogers and Davis both said

4. Rogers said the money had still been over the visor that night when it was searched by the police, but they did not find it (TR-453).

they went to the Bright Lights after Rogers picked up Rivers at about 4:00 p.m. They met a friend named Coleman Smith there and took him with them when they visited Clayton Davis. According to David Davis he saw Annie Rivers that night after she and Rogers brought Coleman Smith back to the Bright Lights and Smith told him they had just came from visiting Clayton Davis (TR-536-39). Rivers, on the other hand, testified that she had not seen David Davis at the Bright Lights that night, but admitted having said she had seen David Davis at the Bright Lights or Oaks on the night of the shooting and having also (mistakenly) said she was in the car with David Davis and Rogers the day of the shooting (TR-394-96). Of course, if Rivers, Rogers and Davis were together on the day of the murder that could strongly suggest Rivers' involvement, contrary to the state's theory.[5]

Serious conflicts also existed with testimony of state witnesses compared with their previous statements.

Rogers testified that at his house he got the gun and gave it and the shells to appellant. He admitted, however, that in his final statement to the police on December 29th [possibly while under oath (TR-489)] he falsely said he and appellant went to his (Rogers') house and appellant got out and went in while Rogers stayed by the road, that appellant got out with the "old piece of gun" and Rogers just glanced at it, and he did not know how it looked (TR-490,91).

Rogers also admitted that he had not mentioned Davis to the police in any of his statements (TR-488-89).

David Davis admitted that before trial he told appellant's counsel that

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5. Obvious conflicts in time pervade the state's case. Officer Schulz, for example, said he talked to Rogers at what must have been the Issacs' house before dark, at about 6:30 p.m. He was then investigating the missing person's call, which had been made about 6:00 p.m., by the gas company. Rogers and Rivers said they did not arrive at the Issacs' house until 8:00 p.m., and their earlier itinerary could not have put them there much sooner.

when appellant got in the car with him and Rogers "we had carried [appellant] home and let him out and that was it." (TR-534).

Regardless of the demeanor of the witnesses, the weight of the competent evidence was so lightened by these material inconsistencies in the state's case that the trial judge abused his discretion by not granting appellant's motion for new trial on the ground that the verdict was contrary to the evidence. Alternatively, for that same reason, this Court should grant a new trial in the interest of justice.

B. Limiting Cross-Examination

Appellant's counsel moved for a mistrial when the trial judge refused to allow defense witness David Howell to testify that two or three days after the murder Rogers had a 30 caliber rifle which he offered to sell and that Rogers had also told Howell about a shotgun he had for sale (TR-625).

Earlier, on cross-examination, Rogers was asked about guns he had possessed (TR-496-501). When the state objected appellant's counsel responded that he was prepared to show by testimony that "he's not telling the truth under oath at this time." The judge asked if "you're going to have another witness with regard to his possession of other guns?" Counsel said yes and the judge ruled "if that's the case, I'm going to permit him to -- I'll permit it then." (TR-500).

No objection was made by the state to this ruling, and on continued cross-examination Rogers said he had not possessed any guns except his brother's gun which he borrowed, the shotgun used in this offense, and a thirty-thiry Winchester that he had for one day four or five months before the robbery (TR-500-501).

When appellant's witness David Howell began to testify the prosecutor objected. Appellant's counsel said Howell was "offered for rebuttal of Wydell Rogers' statement that he had no guns in his possession after the robbery." (TR-624).

Howell's proffered testimony was that Rogers had come into his store with a thirty ought six rifle and tried to sell it to him. Rogers then had said to Howell "I have a shotgun for sale". This occurred two or three days after Howell saw reports on television about the murder of the gas man (TR-625).

In an abrupt reversal of his earlier ruling permitting cross-examination of Rogers' about his possession of guns, the judge sustained the state's objection because "that cross-examination elicited testimony outside the scope of direct examination." Even though the state had not objected at that time "It should have been objected to" and when appellant exceeded the scope of direct he "adopted" Rogers as his witness and could impeach him (TR-626-27).

This ruling was erroneous and prejudicial. The appellant did not convert Rogers into his own witness by questioning him about his possession of guns. On cross-examination, a defendant is not restricted to the exact subjects covered on direct but may ask about subjects which tend to impeach the credibility of the witness. Steinhorst v. State, 412 So.2d 332 (Fla. 1982); Sweet v. State, 235 So.2d 40 (Fla. 2nd DCA 1970).

When the judge overruled the objection to appellant's questions to Rogers about pssession of guns he held that this was a foundation for impeachment and was not, therefore, restricted to the scope of direct. Inexplicably the judge later contradicted his earlier ruling by holding that the same questions he previously had allowed were improper. The first ruling was right and the second was not only wrong but irreconcilable with the first.

The correct rule is stated in McCormick, Evidence, §22, at 49 (2d.ed. 1972) as follows:

> One of the main functions of cross-examination is to afford an opportunity to elicit answers which will impeach the veracity, capacity to observe, impartiality, and consistency of the witness; and yet the direct can seldom be expected to touch explicitly on the points to which impeach-

> ment is directed. Accordingly, the rule prevails, even in jurisdictions adopting the most restrictive practice, that cross-examination to impeach is not, in general, limited to matters brought out in the direct examination.

For Rogers to have possessed guns, particularly a shotgun, two or three days after the murder was pertinent to his credibility on a key issue.

It was also proper cross-examination on a subject brought out on direct. Rogers testified that appellant told him he disposed of the shotgun. The murder weapon was never recovered by the police. To rebut the accusation that appellant did the shooting it was properly within the scope of direct to ask if Rogers might have possessed weapons that could have been used to commit the murder.

The right of cross-examination extends to the subjects covered on direct. Coco v. State, 62 So.2d 892 (Fla. 1953). When a defendant inquires of a key prosecution witness about issues "which are both germane to that witness' testimony on direct examination and plausibly relevant to the defense" curtailing the inquiry may be reversible error. Coxwell v. State, 361 So.2d 148, 152 (Fla. 1978).

That principle applied here. The trial judge erred when he ruled that the question of Rogers about guns, which he already had allowed, exceeded the scope of direct. The jury should have been allowed to hear the testimony of Daniel Howell as contradiction and impeachment of Rogers on a crucial point. The error was reversible by itself, and certainly when combined with the other errors in this case.[6]

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6. The ruling about exceeding the scope of direct is even more remarkable because the judge himself raised that ground. Yet later he allowed the state to impeach one of appellant's witnesses on an entirely collateral matter raised on cross-examination by the state. Appellant's stepfather said on direct that appellant had money. The state cross-examined him about which bank he used and then in rebuttal produced a bank officer who testified that appellant

C. Other Errors

The state prejudiced appellant's right to a fair trial by comments and evidence, to which no objection was made, but which are still entitled to be considered in the interest of justice. These errors by the state were:

1. Introducing the widow and daughters of James Dassinger to the jury during voir dire (TR-43, 44). Unnecessary use of a member of a victim's family at trial is error. E.g., Lewis v. State, 377 So.2d 640 (Fla. 1980); Ashmore v. State, 214 So.2d 67 (Fla. 1st DCA 1968).

2. Asking Rogers if he had been willing to take a lie detector test after making his last statement to the police (TR-459-61). Mention of a lie detector test is prejudicial error and grounds for a mistrial, Walsh v. State, 418 So.2d 1000 (Fla. 1982).

3. Introducing into evidence the written plea agreement between Rogers and the state, indicating in effect that the state had determined Rogers to be truthful. (State's Exhibit 20) This document stated, in part:

> 1. Your cooperation with law enforcement officers may be necessary to bring to justice another individual whose criminal conduct warrants prosecution.
>
> 2. The proffer of testimony made by you indicates that you are not the principle offender, that you were acting in conjunction with another and that you possess much information vital to this investigation concerning the conduct of another.

Rogers was obligated by this agreement to: "If requested submit to a polygraph

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6. (continued)
closed his account with a zero balance in November (TR-599, 604, 683). Over objection by appellant the judge ruled the evidence admissible (TR-679).

The judge also erred by ruling that this witness could testify even though not disclosed in discovery by the state. The absence of any inquiry about the discovery violation or resulting prejudice is reversible error per se. Cumbie v. State, 345 So.2d 1061 (Fla. 1977).

examination to resolve any questions as to the truth of any information you provide".

It is improper for the prosecution to give personal opinion on the truthfulness of a witness or intimate the existance of other evidence of a defendant's guilt. E.g., Pait v. State, 112 So.2d 380 (Fla. 1959); Wilson v. State, 371 So.2d 126 (Fla. 1st DCA 1978). This plea agreement violated those precepts.[7]

In summary, appellant should be afforded a new trial because of the errors, singularly or in combination, aruged under this issue.

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7. Allowing the state, over objection, to present testimony of the reasons for nolle prossing two other charges against Rogers was similarly improper bolstering. Pait v. State, supra.

ISSUE II

THE WARRANTLESS SEIZURE OF APPELLANT'S WRIST-WATCH VIOLATED THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 12 OF THE FLORIDA CONSTITUTION BECAUSE THERE WAS NEITHER PROBABLE CAUSE NOR VOLUNTARY CONSENT.

A watch taken from appellant at the sheriff's office on the night of the shooting was admitted into evidence. Expert testimony that the spot on the watchband was blood, and a picture showing the spot before it was removed in the test, were also admitted. Appellant filed a motion to suppress the watch, the photograph of it and testimony about it on the ground that it had been illegally seized without probable cause or voluntary consent (R-1087-90).

A hearing on the motion was held. The only witness was Officer Danny Lodge, an evidence technician with the sheriff's department. He had gone to the scene of the shooting and saw the body, which appeared to have been shot with a small caliber shotgun. He saw splatters of blood on the truck parked near the body. Several hours later Lodge saw appellant, whom he had not seen when examining the body and truck, at the sheriff's department. Appellant was then in an interview room with Investigator Smith. After talking with Smith, Lodge told appellant he was an investigator and would like to examine him for blood or other evidence on his person. Appellant was considered a suspect but was not being detained. Lodge had appellant stand on a chair and examined his outer clothing, including the bottoms of his shoes (R-1124-26). Appellant did not object to being examined. When Lodge saw a spot on appellant's watch that looked like blood he

> advised him [appellant] there was something on the watch -- I don't recall whether I said there was blood on the watch or if I said there was something on the watch, <u>that I would need to take the watch into evidence</u> and we would give him a

> receipt for the watch. Either he took the watch off and handed it to me or I took it off of him. I don't recall (R-1140).

The prosecutor relied upon a combination of plain view and consent to justify the seizure, saying that the Fourth Amendment did not apply to objects in plain view (R-1145-47) and that appellant therefore could not complain about the seizure, or that he consented to it (R-1103-04).

The watch, and all physical and testimonial evidence derived from it, should have been suppressed because the seizure without probable cause or voluntary consent violated the Fourth Amendment and Art. I, Sec. 12 of Florida's Constitution. Contrary to the prosecutor's argument, these constitutional guarantees protected appellant from unreasonable seizures of his personal effects as much as they protected his right against unreasonable searches.[8]

Possibly because of the state's argument stressing the lawfulness of Lodge's seeing the spot, the trial judge did not rule that the seizure was valid because of either probable cause or consent. Instead the judge simply denied the motion to suppress on the authority of Ensor v. State, 403 So.2d 349 (Fla. 1981). The Court in Ensor explained the difference between plain view and open view but the opinion serves no purpose in resolving either of the issues contested here, which are whether the seizure was based on sufficient probable cause or consent.[9]

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8. The Fourth Amendment states in part that the "right of the people to be secure in their . . . effects, against unreasonable searches and seizures, shall not be violated . . . ." (emphasis added). Article 1 §12 of the Florida Constitution uses the same language.

9. Appellant has not had a full and fair hearing on his Fourth Amendment rights because the trial judge did not rule on the contested issues of fact, or mixed questions of law and fact. See Stone v. Powell, 428 U.S. 465 (1976); Townsend v. Sain, 372 So.2d 293 (1963). Lack of adequate findings in an order suppressing evidence caused reversal in State v. Cahill, 388 So.2d 354 (Fla. 2nd DCA 1980); cf, Brown v. State, 409 So.2d 255 (Fla. 4th DCA 1982) (no clear record of facts on which judge found probable cause).

The ambiguity in the trial court's ruling is analogous to the lack of a clear ruling on the voluntariness of a confession submitted to a jury. Just as it is constitutional error for a trial judge to allow a jury to consider a confession when the court has not ruled clearly on disputed issues of voluntariness,[10] a trial judge should not allow tangible evidence to go to a jury until the judge has made a clear ruling on probable cause for, or the voluntariness of consent to, the alleged illegal seizure of evidence. The remedy for the absence of a clear ruling in cases of illegal search and seizure under the Florida[11] or federal[12] constitution should be the same as the remedy when the court fails to make a clear ruling on an alleged involuntary confession. A new trial is required because a post trial determination is not sufficiently reliable. Land v. State, 293 So.2d 704 (Fla. 1974); Greene v. State, 351 So.2d 941 (Fla. 1977); Wilcox v. State, 367 So.2d 1020 (Fla. 1979); Smith v. State, 372 So.2d 86 (Fla. 1979).

If the judge had ruled that the evidence of probable cause or consent was sufficient he would have erred.

The issue here emphatically is not whether the spot on the watch was in plain view when Lodge saw it, or whether appellant was illegally detained at the time. The issue is whether the state lawfully obtained possession of the watch after Lodge saw the spot on it.

The state did not obtain a warrant to seize appellant's watch. One rather

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10. Sims v. Georgia, 385 U.S. 538 (1967); Jackson v. Denno, 378 U.S. 368 (1964); McDole v. State, 283 So.2d 553 (Fla. 1973); Peterson v. State, 382 So.2d 701 (Fla. 1980). This case is not governed by the exception to the McDole rule which applies when a ruling on voluntariness is inherent in denial of a motion to suppress. E.g., Antone v. State, 382 So.2d 1025 (Fla. 1980). The Court's ruling here is fatally ambigious. Houck v. State, 421 So.2d 1113 (Fla. 1st DCA 1982).

11. Art. I, Sec. 12, Fla. Const.

12. Fourth and Fourteenth Amendments, U.S. Const.

obvious reason was that probable cause did not exist. The only facts brought out at the suppression hearing were that appellant was considered a suspect and was being questioned by Investigator Smith. Lodge, an evidence technician, asked appellant if he could look at him and appellant consented. Lodge then saw the red spot, similar to the spots he had seen earlier on the truck, on appellant's watch. Those meager facts were not sufficient for the court to find probable cause. At the hearing there was no testimony placing appellant at the scene of the shooting, and no other evidence to connect him at all with the crime. Lodge did not know what substance made the spot and did not ask appellant for an explanation.[13]

In Henry v. United States, 361 U.S. 98 (1959) the Court held that an arrest was illegal because it was supported only by suspicion. Defining probable cause the Court said:

> Evidence required to establish guilt is not necessary. [Citation omitted] On the other hand, good faith on the part of the arresting officers is not enough. Probable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed.

When the seizure is not pursuant to consent or a search warrant or incident to a valid arrest the police must have probable cause to believe the item is contraband or evidence of a crime. Payton v. New York, 445 U.S. 573 (1980); Cupp v. Murphy, 312 U.S. 291 (1973); Colorado v. Bannister, 449 U.S. 1 (1980); Ensor v. State, 403 So.2d 349 (Fla. 1981). Some confusion arose in this case because the state neglected the probable cause requirement in the mistaken belief that plain view (or open view) justified the seizure. But plain view alone is not grounds to seize. In addition there must be probable cause for

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13. Probable cause to arrest appellant did not arise until co-defendant Rogers implicated appellant in statements given at least a week later.

believing the item is contraband or evidence of a crime. In Payton v. New York, 445 U.S. 573, 587 (1980), the Court said:

> The seizure of property in plain view involves no invasion of privacy and is presumptively reasonable, assuming that there is probable cause to associate the property with criminal activity. (Emphasis added)

Similarly, in United States v. Jacobsen, ___ U.S. ___, (No. 82-1167, April 2, 1984) 35 Cr.L.Rptr. 1 the Court approved a field test of the contents of a package opened by a private search. The opening of the package by private persons compromised the owner's expectation of privacy. The powdery contents could be subjected to a field test because it was "virtually certain" that the containers held "nothing but contraband" 35 Cr.L.Rptr. at 3004, n. 17. The Court was careful, however, to link the loss of privacy with probable cause as dual justification for the seizure (to conduct the test), saying:

> [S]ince it was apparent that the tube and plastic bags contained contraband and little else, the warrantless seizure was reasonable, for it is well-settled that it is constitutionally reasonable for law enforcement officials to seize "effects" that cannot support a justifiable expectation of privacy without a warrant, based on probable cause to believe they contain contraband". (Emphasis added)
>
> 35 Cr.L.Rptr. at 3004.

In other instances the Court has unfailingly cited probable cause as a requisite to any seizure of evidence, even when the owner had no expectation of privacy. Cardwell v. Lewis, 417 U.S. 583 (1974) (paint scrapings from car fender and casts of the tire tracks from car legally impounded from parking lot after owner arrested on probable cause); Cupp v. Murphy, supra, 412 U.S. 291 (fingernail scrapings taken after police had probable cause to make arrest although suspect not arrested until a month later); Texas v. Brown, ___ U.S. ___, 75 L.Ed.2d 502 (1983) (seizure of balloon filled with heroin after officer saw balloon and other paraphenalia in plain view, giving rise to probable

cause to believe heroin was present).

This Court in Ensor v. State, supra, 403 So.2d at 353 used the same analysis in upholding the seizure of a partially concealed gun from a car, saying that on seeing the firearm in open view "the officer had probable cause to believe that the felony of possessing a concealed firearm was being committed in his presence."[14]

Ascertainment of probable cause to seize an item in plain view is much easier when the item is contraband. Brown v. Texas, supra; Ensor v. State, supra. When, as here, the item is innocent in itself, probable cause to believe it is evidence of a crime must be shown. See, Zurcher v. Stanford Daily Press, 436 U.S. 547 (1978).

The tiny drop of red substance on appellant's watch band was insufficient to raise a reasonable probability that the watch contained evidence of a crime.[15] See, Carr v. State, 353 So.2d 958 (Fla. 2nd DCA 1978) (officer who saw two hand rolled cigarettes did not have probable cause to believe they were contraband).

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14. As noted earlier, the trial judge's reliance on Ensor is not dispositive of the probable cause question in this case. The officer in Ensor had probable cause when he saw the firearm and realized it was concealed. Possession under those circumstances constituted the offense. Citing Ensor here is not equivalent to a ruling that when Lodge saw a spot on appellant's watch he had probable cause to believe it was evidence of a crime.

15. The United States Supreme Court has approved a temporary seizure of property based on reasonable suspicion which is less than probable cause for a limited search (consisting of a dog sniff to determine presence of contraband). United States v. Place, ___ U.S. ___, 77 L.Ed.2d 110 (1983). The length of detention must be short in order to accomplish the purpose of the seizure when probable cause is absent; ninety minutes was too long in Place.

Appellant does not concede that even reasonable suspicion existed here. But assuming it did, the rule from Place would not have legitimized the seizure for an indefinite period as occurred here. After taking the watch "in evidence" the police did not tell appellant when, if ever, he could retrieve it (R-1128). Only probable cause could justify so serious an interference with appellant's possessory rights.

The other theory relied on for the seizure was that appellant consented to the seizure of his watch. The judge's reliance in Ensor is even less indicative of a ruling on consent than on probable cause. Ensor did not remotely touch upon consent. Thus this Court on appeal should reverse because the trial judge failed to rule on whether appellant consented.

In Schneckloth v. Bustamonte, 412 U.S. 218 (1973) the Supreme Court held that when the state relies on consent to justify a warrantless seach "the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied." Id., at 248. Voluntariness is a question of fact, to be determined from all the circumstances. Bustamonte, supra, at 248, 249. Consent must be proven by clear and convincing evidence. Bailey v. State, 319 So.2d 22 (Fla. 1975).

Viewing all the circumstances, the trial judge could not have found that appellant voluntarily consented. Appellant was in a sheriff's interview room on the second floor; he was a suspect and had been given Miranda warnings; no officer testified appellant was told he could leave; he was questioned by one officer and then physically examined by another both of whom probably were armed. (R-1138)

Consent is not voluntary when it is acquiescence to a claim of lawful authority. Bailey v. State, supra; Talavera v. State, 186 So.2d 811 (Fla. 2nd DCA 1966); Bumper v. North Carolina, 391 U.S. 543 (1968).

If Lodge had made a neutral request for the watch, appellant's compliance would not amount to voluntary consent under the totality of the circumstances here. Being in a police station, even voluntarily, is potentially coercive. Mobley v. State, 335 So.2d 880 (Fla. 4th DCA 1976). Two officers were with appellant when his watch was taken (R-1126). Informing appellant he could

withhold consent could have dissipated the coercive setting, but that was not done. Lack of this warning is an element to be considered in determining voluntariness. Schneckloth v. Bustamonte, supra, 412 U.S. at 249; compare Florida v. Royer, ____ U.S. ____, 75 L.Ed.2d 229 (1983) (suspect not informed he was free to leave, Court found he was detained against his will) with United States v. Mendenhall, 446 U.S. 544 (1980) (informing suspect of right to decline to consent to search was an element lessening the coercive setting).

The words actually used by Lodge to obtain the watch added to rather than lessened the coercion. He "advised" appellant "that I would need to take the watch into evidence . . . ." (R-1140). These words were more of a command than a request and would not support a finding (had it been made) that appellant's relinquishment of the watch was voluntary.[16] The state cannot satisfy its burden "by showing mere submission to a claim of lawful authority." Florida v. Royer, supra, 75 L.Ed.2d at 236; cf., Rosell v. State, 433 So.2d 1260, 1263 (Fla. 1st DCA 1983). ("The state did not show that [the defendants] interpreted the officer's gesture as a request rather than a demand.")

The watch itself, as well as photograph of it and testimony that the spot was blood, were all admitted into evidence. The jury reasonably might have been swayed to convict because of the watch and evidence derived from it. Appellant's motion to suppress, renewed at trial (TR-294), should have been granted. This error should be corrected by the awarding of a new trial, at which this evidence will not be admissible without a new hearing on the motion to suppress.

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16. Other testimony corroborates that the watch was seized by the officer rather than being relinquished voluntarily by appellant. Lodge said at the hearing ". . . I noticed a spot on the watch which appeared to me to be blood. That was the reason we took the watch." (R-1127); ". . . I feel sure I would have asked him to remove it" (TR-1136); in his deposition used at trial Lodge said he advised appellant "we were going to take the watch" (TR-265BB).

At trial Deputy Rhett Smith described the seizure by saying that Lodge pointed out what appeared to be a spot of blood on the watch and asked appellant to let him see it more closely. After both Smith and Lodge examined it they told appellant "we were taking the watch into custody" (TR-292).

ISSUE III

THE STATE INTRODUCED AT TRIAL PORTIONS OF A DEPOSITION TAKEN TO PERPETUATE TESTIMONY AT WHICH THE APPELLANT WAS NOT PRESENT, IN VIOLATION OF THE SIXTH, EIGHT AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE ONE, SECTION SIXTEEN OF THE FLORIDA CONSTITUTION.

Officer Danny Lodge was planning to attend a family gathering out of state and was not going to be present at trial. At a pre-trial hearing the state mentioned his impending absence and proposed a deposition to perpetuate his testimony (TR-877-78). The record contains no written motion on this subject although the state claimed to have filed one (R-1106).[17]

Appellant, having been denied bail, was in custody prior to trial (R-922-24). During the trial the state offered into evidence Lodge's deposition taken when appellant's counsel was present but appellant was not (TR-228, 236).[18] Objections to portions of Lodge's recorded testimony were made by appellant's counsel but he did not object to appellant's absence from the deposition (TR-228-252; 254-55). The record does not, however, show that appellant personally or by counsel affirmatively waived his presence.

Lodge's testimony described the wound on the decedent's body; the condition of shotgun shells found at the scene; the number of shot pellets in the body; the blood splatters on the truck; and the seizure of appellant's watch. Lodge also gave an opinion that some of the blood splatters on the decedent's truck were similar in appearance to the blood spot on appellant's watch (TR-256T).

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17. The directions to the clerk requested copies of all documents filed by the state and all rulings of the court (R-1257). No order pertaining to the deposition is in the record either.

18. The prosecutor read the appearances from the deposition into the record. Appellant's name was not mentioned. Merely because his counsel appeared does not justify on inference that appellant was also present. Lovett v. State, 29 Fla. 356, 11 So. 172 (1892).

Appellant had the right under the Sixth Amendment to the United States Constitution to confront the witnesses against him. He also had the right under the Florida Constitution "to confront at trial adverse witnesses."[19] To protect these valuable rights when a state witness is deposed for preserving testimony to be used at trial, Fla.R.Cr.P. 3.190(j) provides, in part:

> (3) If the deposition is taken on the application of the State, the defendant and his attorney shall be given reasonable notice of the time and place set for the deposition. The officer having custody of the defendant shall be notified of the time and place and shall produce the defendant at the examination and keep him in the presence of the witness during the examination. (Emphasis added).

The state did not comply with this rule in any substantial way. Appellant was not given personal notice of the deposition, the officer having custody apparently was not notified, and appellant was not produced at the deposition and kept in the presence of the witness during the examination, all requirements of the rule which were ignored. Appellant was not even present at the June 23rd hearing when the question of the deposition was originally posed (R-872) or at the July 5th hearing when the deposition was authorized by the court (R-1106).

In Illinois v. Allen,[20] the United States Supreme Court recognized the constitutional right of a criminal defendant to be present at every stage of a trial, subject to a waiver resulting from his own disruptive behavior.

In State v. Baisilere, 352 So.2d 820 (Fla. 1978) this Court held that the use at trial of a discovery deposition taken when the defendant was not present violated the right of confrontation. The Court cited with approval Chapman v.

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19. Art. I, Sec. 16, Fla. Const. (emphasis added).

20. 397 U.S. 337 (1970)

State, 302 So.2d 136 (Fla. 2nd DCA 1974) in which a defendant who was in custody was neither notified of nor brought to a deposition taken to perpetuate testimony of a state witness. The District Court said:

> The use of a deposition, taken in the involuntary absence of a defendant, as evidence against him violates the defendant's right to be personally present during his trial and his Sixth Amendment right to confront witnesses.
>
> Id., at 138.

By using the deposition taken out of appellant's presence as evidence against him, the state violated fundamental constitutional guarantees of a fair trial, due process and confrontation. This point is arguable on appeal without the necessity of an objection in the trial court.[21] As the Court said of this error in Chapman v. State, supra, 302 So.2d at 139:

> Additionally, since the record does not indicate that defendant either actually knew of the deposition taking or should have known of it, counsel's failure timely to object to defendant's absence did not waive these important rights.

Appellant had no formal notice that Officer Lodge was being deposed and the record does not show he received actual notice. His absence during the deposition was involuntary because he was in jail. Counsel for appellant did not even attempt to waive appellant's right to be present. The state simply failed to follow the rule designed to protect the right of confrontation during a deposition taken to perserve testimony for trial. The record is silent whether appellant knowingly waived his personal right to be present. His failure to object cannot be construed as a waiver or ratification because it cannot be presumed he knew he possessed the right. No inquiry was conducted by the court to

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21. Castor v. State, 365 So.2d 701 (Fla. 1978) holds that the contemporaneous objection rule does not bar raising fundamental error for the first time on appeal. Fundamental error is a violation of due process. Id., at 704 n.7.

determine if appellant ratified his counsel's implied waiver, a procedure used in State v. Melendez, 244 So.2d 137 (Fla. 1971) to cure the defendant's absence.

The limitations of Melendez were emphasized by this Court in Francis v. State, 413 So.2d 1175 (Fla. 1982):

> [W]here a defendant has counsel, constructive knowledge of the proceedings may be imputed to defendant but . . . this doctrine only applied to those cases in which, upon defendant's reappearance at his trial, he acquieses or ratifies the action taken by his counsel during his absence. 413 So.2d at 1178.

In Melendez, supra, 244 So.2d 140, the Court was careful to note that it did not "hold that a defendant's absence due to lack of notice or which is otherwise involuntary can be subsequently cured by defendant's silent acquiescence in continuation of his trial, without a showing of actual or constructive knowledge" (emphasis added).[22]

In Francis v. State, supra, at 413 So.2d 1175 counsel for the defendant purported to waive his client's right to be present during a portion of the jury selection and exercise of peremptory challenges in a capital case. This Court held the right to be present was personal and had not been waived by the defendant:

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22. Appellant was not voluntarily absent from the deposition, a distinction which makes the rationale of Herzog v. State, 439 So.2d 1372 (Fla. 1983) and Lowman v. State, 80 Fla. 18, 85 So. 166 (1920) inapplicable. In Herzog the defendant's absence was voluntary, his presence was waived by counsel, the proceeding pertained to suppression of evidence, and it was not a critical stage but part of a suppression hearing. In Lowman several of the defendants chose to leave the courtroom for brief periods while the jury was selected or state witnesses testified, and that conduct was construed as a waiver. Assuming that a defendant's presence in a capital case may even be waived, a point discussed in Francis but not decided, the record here will not support a waiver because appellant did not affirmatively acquiese in or ratify his involuntary absence, Melendez, supra.

> Francis was not questioned as to his understanding of his right to be present during his counsel's exercise of his preemptory challenges. The record does not affirmatively demonstrate that Francis knowingly waived this right or that he acquiesced in his counsel's actions after counsel and judge returned to the courtroom upon selecting a jury. His silence, when his counsel and others retired to the jury room or when they returned after the selection process, did not constitute a waiver of his right to be present. Id., at 1178.

In Francis the Court stopped short of deciding whether a defendant could waive the right to be present in a capital case. Although that issue need not be decided here either, because no waiver occurred, appellant asserts that the requirements of the Sixth, Eighth and Fourteenth Amendments coalesce to require the presence of a defendant at all critical stages of the trial and sentencing in a capital case.[23]

Proffitt v. Wainwright, supra, note 23 held that counsel's waiver of the defendant's right to presence at a capital trial, including the sentencing phase, was ineffectual and said:

> We need not decide the issue of whether presence at a capital trial ever is waivable, however, for here, even if we assume that the right to presence in a capital case may be waived, no knowing and voluntary and, therefore no effective waiver was made. Appellee [the state] does not deny that appellant was neither apprised of the hearing . . . no afforded an opportunity to assert his right to a hearing; hence appellant did not knowingly or voluntarily waive his right to presence . . . . [footnoes omitted] 706 F.2d at 312 (on rehearing).

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23. A defendant's presence during all critical stages of a capital trial was said to be non-waivable in Hopt v. Utah, 110 U.S. 574 (1884) and Diaz v. United States, 223 U.S. 442 (1912). More recently the issue was noted, but not decided, in Drope v. Missouri, 420 U.S. 162 (1975) and in Proffitt v. Wainwright, 685 F.2d 1227, on rehearing, 706 F.2d 311, 312 rehearing en banc denied, 708 F.2d 734 (11th Cir. 1983), cert. denied 104 S.Ct. 508.

Taking Lodge's deposition in appellant's involuntary absence, and then using that deposition at trial, violated appellant's fundamental constitutional right to be present at every stage of his trial. State v. Baisilere, supra; Chapman v. State, supra; Proffitt v. Wainwright, supra.

The remaining question is whether the error may be considered harmless. By its nature, this error does not lend itself readily to a harmlessness analysis because the Court must engage in supposition. This violation is similar to the types of errors that cause automatic reversal on the theory that "[n]o appellate court can be certain [they] are harmless." Cumbie v. State, 345 So.2d 1061, 1062 (Fla. 1977) (failure of trial judge to conduct inquiry into the reasons for non-compliance with discovery and the prejudice it caused); see also, Ivory v. State, 351 So.2d 26, 28 (Fla. 1977) (any communication between judge and jury out of defendant's presence is "so fraught with potential prejudice that it cannot be considered harmless"); Ivory, supra, at 28, (England, J., concurring) (a prejudice rule would "unnecessarily embroil trial counsel, trial judges and appellate courts in a search for evanescent 'harm', real or fancied."); Peri v. State, 426 So.2d 1021, 1027 (Fla. 3rd DCA 1983) rev. den., 436 So.2d 100 (a rule requiring the defendant to show prejudice or the state to show lack of prejudice from the judge's absence during a portion of the proceedings "is both unworkable and ill-advised").

But assuming that in some instances the Court might find the harmless error doctrine applicable, this is not a case befitting that treatment. When, as here, a federal constitutional error occurs, the appellate court may find it harmless only if it can declare beyond a reasonable doubt that the evidence did not contribute to the conviction. Chapman v. California, 386 U.S. 18 (1967).

Obviously the presence of the blood splatter on appellant's watchband was seriously incriminating evidence. The prosecutor relied on this evidence

during closing argument (TR-703). Lodge's opinion testimony was significant in that it tended to corroborate the co-defendant Rogers' testimony. Thus the admission of this evidence severely damaged appellant.

Appellant might have been able to suggest questions about the blood on the watch to his counsel during Lodge's deposition. That opportunity was lost by appellant's involuntary absence and could not have been cured during the trial because Lodge was not there to be questioned. As the Supreme Court said in Illinois v. Allen, supra, 397 U.S. at 344 "one of the defendant's primary advantages of being present at the trial [is] his ability to communicate with his counsel." Without the ability to communicate with his counsel during Lodge's testimony, appellant was denied the essence of the right of confrontation. The error was not harmless at all, a fortiori, it could not be harmless beyond a reasonable doubt.

In Chapman v. State, supra, 302 So.2d at 138, 139 the same situation occurred and the Court reversed, saying:

> Due to the nature of the error, we can only speculate as to what would have happened had defendant been actually present and been given the opportunity to advise with his counsel. Considering the closeness of the evidence in this case, such speculations are insufficient to establish beyond a reasonable doubt that the error did not contribute to defendant's conviction. Chapman v. California, 1967, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705; cf. Wade v. United States, 1971, 142 U.S.App.D.C. 356, 441 F.2d 1046.

Rejecting the assertion that the defendant's absence during a sentencing phase hearing was harmless error, the Court in Proffitt v. Wainwright, supra, 685 F.2d at 1260 said:

> Thus, whether or not appellant's absence likely prejudiced him is not the standard we must apply; rather, if there is any reasonable possibility appellant's absence and inability to respond to Dr. Coffer's testimony affected the sentencing decision, we will not engage in speculation as to

the probability that his presence would have made a difference. (Emphasis added)

Because the constitutional error cannot be found harmless in this case, a new trial is required.

ISSUE IV

THE DEATH SENTENCE FOR THIS FELONY MURDER SHOULD BE REDUCED TO LIFE IMPRISONMENT BECAUSE (A) TWO AGGRAVATING CIRCUMSTANCES WERE IMPROPERLY FOUND, (B) THE JURY'S LIFE RECOMMENDATION WAS IMPROPERLY OVERRIDEN AND (C) THE FACTS OF THIS CASE COMPARED WITH OTHERS DO NOT SUPPORT DEATH.

A. Improper Aggravating Circumstances

The court found four aggravating circumstances. Two of them were that the murder (a) was committed to avoid detection and arrest[24] and (b) was committed in a cold calculated and premeditated manner without any pretense of moral or legal justification (R-1238).[25] Those circumstances cannot be sustained.

1. Witness Elimination

The court's reasons for finding witness elimination mainly were that appellant had seen Dassinger deliver gas to his family's house and Dassinger had worked with appellant's stepfather. The finding is just speculation, as will be discussed, infra.

Another reason mentioned was co-defendant Rogers' hearsay statement to Investigator Rathlev that appellant said he thought Dassinger was reaching under the seat for a weapon.[26] That evidence cannot substantiate a finding that the

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24. Sec. 921.141(5)(e), Fla. Stat. (1981)

25. Sec. 921.141(5)(i), Fla. Stat. (1981)

26. The trial judge's order erroneously attributes this evidence to testimony given by Rogers (R-1237). Appellant could not find that in the record, although on recross examination Investigator Rathlev said Rogers told him he (appellant) killed Dassinger because he thought Dassinger was "going for a weapon or something" under the seat of the truck (TR-358)

motive for the killing was to eliminate a witness. In Riley v. State, 366 So.2d 19, 22 (Fla. 1979), an execution, the Court upheld the finding of witness elimination because the facts "admit only one interpretation". The Court cautioned, however, that "the mere fact of a death is not enough to invoke this factor when the victim is not a law enforcement official" Ibid. In Menendez v. State, 368 So.2d 1278 (Fla. 1979) the defendant killed the victim with a gun equipped with a silencer. The finding of witness elimination was reversed because that circumstance is not present when the victim is not a law enforcement officer

> Unless it is clearly shown that the dominant or only motive for the murder was the elimination of witnesses . . . . We cannot assume Menendez's motive; the burden on the state to prove it.
>
> Id., at 1282.

In Armstrong v. State, 399 So.2d 953 (Fla. 1981) the Court implied that weight of the evidence necessary to prove witness elimination is even greater than beyond a reasonable doubt. In Armstrong it was "possible to infer" a motive other than witness elimination, therefore the finding of witness elimination by the trial judge was reversed.

Assuming that appellant fired the shot, it is also possible in this case to infer another motive from the evidence, which is that appellant reacted to a gesture made by Dassinger. That motive cancels the inference made by the judge that the dominant motive was witness elimination. If the shot was fired to stop the witness from getting a weapon, that would have been a substantial motive, negating to a large extent the possibility that eliminating the witness to avoid detection and arrest was at that moment uppermost in the mind.

Another contradiction of the theory that witness elimination was the dominant motive is the judge's finding that "the robbery and killing was [sic] for the purpose of pecuniary gain." (Emphasis added) (R-1238). If the "purpose"

of the "killing" was pecuniary gain, then pecuniary gain and not witness elimination was the motive, or at least witness elimination was a shared, rather than the "dominant" motive, as required. Menendez, supra.

Assuming that the trial judge was not fettered by the suggestion of other possible motives, his finding of witness elimination fails for lack of sufficient evidence. No one witnessed the shooting. Attempts to reconstruct the event ultimately rest on supposition, which is not enough. Foster v. State, 436 So.2d 56 (Fla. 1983). The trial judge in Foster found that the two murders were committed with intent to avoid lawful arrest and hinder law enforcement. Although the medical examiner's testimony showed both victims were shot from behind as they sat in the front seat of an automobile the Court reversed and said "we do not know what events preceded the actual killing" Id., at 58. Likewise in this case no evidence shows what events preceded the shooting of Dassinger.

The possibility that Dassinger knew or recognized appellant is also speculation. Proof that appellant's father knew Dassinger or that appellant had seen Dassinger deliverying gas is not proof that Dassinger knew appellant or even that appellant was afraid Dassinger knew him. The court's finding, based largely on that speculation, impermissibly compounds inference upon inference. Cf., Simmons v. State, 419 So.2d 316 (Fla. 1982) (proof of aggravation cannot be supplied by inference from circumstances unless the evidence is inconsistent with any reasonable hypothesis other than the existence of the aggravation); Phippen v. State, 389 So.2d 911 (Fla. 1980) (circumstantial evidence sufficient to prove aggravation must extinguish every reasonable hypothesis of non-aggravation). Among the reasonable theories supporting a motive other than witness elimination are the possibilities of discharge of the gun accidentally or during a struggle.[27]

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27. These are, of course, in addition to the other possible theories discussed in the judge's order and previously argued.

Witness elimination was not established beyond a reasonable doubt. This aggravation must be stricken.

2. Cold, Calculated, and Premeditated Murder

The second contested aggravating circumstance found by the court is that the murder was committed in a cold, calculated, and premeditated fashion without any pretense of moral or legal justification.[28]

The trial judge could not have validly found premeditation at all because appellant was, by implication, acquitted of that element by the jury in the guilt phase.

The verdict form included these options; (1) premeditated and felony murder, (2) premeditated murder, (3) felony murder (R-1225). The jury was instructed that first degree murder could be committed in two ways, premeditated and felony murder (TR-739-40). The jury selected only the felony murder option.

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28. This conclusion by the trial judge on its face is inconsistent with his recitation in the order that appellant told Rogers he thought Dassinger was reaching for a gun. A defendant's statement that he shot the victim because he jumped him was held to establish at least a pretense of moral or legal justification for the shooting in Cannady v. State, 427 So.2d 723 (Fla. 1983).

Cannady also refutes the possible contention that, because no weapon was found, the judge rejected as untrue appellant's statement to Rogers about Dassinger's movements before the shooting and therefore relied on the belief that appellant lied as positive evidence of premeditation. Commenting upon this reasoning the Court in Cannady said:

> The trial judge expressed disbelief in appellant's statements because the victim was a quiet, unassuming minister and because appellant shot him not once but five times.
>
> Though these factors may cause one to disbelieve appellant's version of what happened, they are not sufficient by themselves to prove beyond a reasonable doubt that the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.
>
> 420 So.2d at 730.

By not finding appellant guilty of either premeditated and felony murder, or just premeditated murder, the jury acquitted appellant of the element of premeditation. See, Green v. United States, 355 U.S. 184 (1957), where the Court held that a defendant, tried for first degree murder but convicted of second degree, could not be retried for first degree murder after the reversal of his conviction. The failure of the jury to convict of first degree murder in the original trial was an implied acquittal of that charge and Green's subsequent conviction of first degree murder on retrial violated the Double Jeopardy Clause of the Fifth Amendment.

The Supreme Court applies double jeopardy protection to prevent a retrial for the same offense after an acquittal on the issue of guilt by the jury, or after the trial judge or appellate court has found the evidence legally insufficient. Tibbs v. Florida, 457 U.S. 31 (1983); Burks v. United States, 437 U.S. 1 (1978); Greene v. Massey, 437 U.S. 19 (1978).

The Double Jeopardy Clause applies to the sentencing phase of a bifurcated proceeding in a capital case. Bullington v. Missouri, 451 U.S. 430 (1981).[29]

In this case, when the state failed to convince the jury in the guilt phase of the existence of premeditation, the issue was forever settled in appellant's favor. Appellant could not again be subjected to being found to have committed the murder by premeditation in either a guilt or penalty trial, on the same or different evidence, and regardless of whether the jury's finding was erroneous.

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29. Bullington was convicted of murder but in the penalty phase the sentencing jury imposed a life sentence. After the conviction was reversed the state sought to subject him again to a possible death sentence. The Supreme Court held that the Double Jeopardy Clause prohibited the state from making a second attempt to prove the aggravating factors necessary for a death sentence after having failed to convince the first jury of the existence of those elements. It made no difference whether the state would have been restricted to presenting the same evidence in the second proceeding that it presented in the first.

See, Ashe v. Swenson, 397 U.S. 436 (1970) (collateral estoppel, incorporated in Double Jeopardy Clause, prevents the state from trying to prove a material fact in a subsequent trial after a jury has decided that fact adversely to the state in an earlier trial); Burks v. United States, 437 U.S. 1, 15, 16 (1978) (jury's verdict of acquittal accorded absolute finality, no matter how erroneous its decision); Bullington v. Missouri, supra, (capital sentencing verdict of life protected by Clause); Green v. United States, supra, 335 U.S. at 187-88 (the state should not be allowed to make repeated attempts to convict, enhancing the possibility that an innocent person might be found guilty). Here the state lost the opportunity to rely on premeditation in the penalty phase by failing to convince the jury in the guilt phase that the murder was premeditated.[30] It could not make another attempt to prove premeditation to the jury or the judge, and the judge was barred by the guilt phase verdict from finding premeditation as an element of an aggravating circumstance.[31]

To affirm the death sentence based on premeditation would violate the Double Jeopardy Clause of the Fifth Amendment and violate the Eighth and Fourteenth Amendments as well.[32].

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30. Appellant objected to the instruction on aggravated premeditation in the penalty phase, stating:

> The jury verdict of guilty of felony murder precludes presentation of any premeditation which is required by aggravating circumstance number nine. The jury has not found premeditation (TR-765).

The objection was overruled (TR-787) and the instruction given (TR-820). Whether the instruction violated double jeopardy is a moot question because the jury recommended life.

31. The burden of proof for premeditation in the penalty phase was at least as great as in the guilt phase. Jent v. State, 408 So.2d 1024 (Fla. 1981); McCray v. State, 416 So.2d 804 (Fla. 1982).

32. This is not an assertion that in all instances a judge's override of a jury's life recommendation would offend double jeopardy, the Eighth Amendment or due process. The argument here is directed to the narrower situation in which the jury's guilt phase verdict acquits of premeditation, but the trial judge bases a death sentence in part upon premeditation.

The Court need not reach the constitutional issue, however, because the order plainly conflicts with earlier rulings of this Court construing cold, calculated, premeditation.

The definition of this aggravation was refined in Combs v. State, 403 So.2d 418 (Fla. 1981) in response to the defendant's claim that it should not be applied to murders predating its enactment. This Court held that no violation of ex post facto rights occurred because this aggravation "only reiterates in part what is already present in the elements of premeditated murder . . . " Id., at 421. Further, the circumstance "adds to [the elements of] premeditation" by attaching "limitations to those elements for use in aggravation . . ." Ibid.

Numerous decisions of this Court have held that the circumstance of cold, calculated, and premeditated murder is not satisfied merely by proving the level of premeditation needed to convict in the guilt phase of a first degree murder trial. E.g., Jent v. State, 408 So.2d 1024 (Fla. 1981); McCray v. State, 416 So.2d 804 (Fla. 1982); Combs v. State, supra; Peavy v. State, 442 So.2d 200 (Fla. 1983).

Particularly in felony murders, such as here, the Court has refused to uphold this aggravating circumstance. In Peavy v. State, supra, the victim died from stab wounds and the Court said:

> This murder occurred during the commission of a burglary and robbery and is susceptible to other conclusions than finding it committed in a cold, calculated and premeditated manner. . . . The evidence does not establish it beyond a reasonable doubt.

In Rembert v. State, 445 So.2d 337, 340 (Fla. 1984) the proprietor of a bait and tackle shop was struck in the head once or twice with a club during a robbery. The Court said:

> We also disagree with the trial court's finding cold, calculated, and premeditated in aggravation. This is a classic example of a felony murder, and

> very little, if any, evidence of premeditation exists.

The evidence here did not establish in any way the method in which the homicide occurred and the evidence of premeditation was weak to non-existent. The requirements of cold, calculated, premeditation are lengthy premeditation and a purposefulness in the killing. See, e.g., Middleton v. State, 426 So.2d 548 (Fla. 1982); Bolender v. State, 422 So.2d 833 (Fla. 1982); Combs v. State, 403 So.2d 418 (Fla. 1981). Even some evidence of a deliberate homicide is not the heightened form of premeditation required for this circumstance. For example, in Preston v. State, 444 So.2d 939 (Fla. 1984) the trial judge found that cutting the victim's throat from one side to the other was a murder committed in a cold and calculated manner with premeditation. On review this Court said:

> We do not feel that this finding or the record adequately supports the existence of the heightened form of premeditation required by this aggravating circumstance.

In Washington v. State, 432 So.2d 44, 48 (Fla. 1983) the trial judge's finding of this circumstance was reversed, even though the proof was sufficient to convict of premeditated murder. This Court said:

> This aggravating circumstance inures to the benefit of the defendant insofar as it requires proof beyond that necessary to prove premeditation . . . . there is a lack of any additional proof that the murder was committed in a cold or calculated manner, such as a prior plan . . . .

In Washington, supra, there was only premeditation. Even then, without any accompanying felony, the finding was improper.

Hawkins v. State, 436 So.2d 44 (Fla. 1983) is more on point. The jury verdict in the guilt phase rejected premeditation but convicted on felony murder. As here, the trial judge found cold, calculated, premeditation, but this Court reversed, noting the contrary finding as to guilt (double jeopardy was not discussed).

Taken together, Washington (a premeditated murder) and Hawkins (a felony murder) demonstrate conclusively the error in applying aggravated premeditation here. Proof of premeditation alone being insufficient, it is logically and legally inconsistent for a felony murder without premeditation to be committed in a cold, calculated, and premeditated manner. Hawkins, supra. [33]

In Herzog v. State, 439 So.2d 1372, 1380 (Fla. 1983) this Court reiterated the limitations of this aggravation, saying:

> The trial court found the facts supporting this factor as follows: "[T]he killing was the consummation of prior threats and arguments based on defendant's belief that the victim had previously taken some of his money or drugs." This finding speaks to the issue of premeditation, however, it is not sufficient to establish the requirement that the murder be "cold, calculated . . . and without any pretense of moral or legal justification."

The trial judge's finding of cold, calculated and premeditated murder defies the evidence, the jury's guilt phase verdict and advisory recommendation, logic, and the prior decisions of this Court. It cannot be sustained.

B. Life Override

The jury's life recommendation was overridden by the trial judge. His sentencing order, though vague, enumerates four aggravating circumstances (R-1237-39). As previously argued, two of those circumstances are invalid, leaving as aggravations that appellant had previously been convicted of a felony involving the threat of violence[34] and that the murder was committed during the commission of a robbery for pecuniary gain.[35]

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33. The distance by which this finding misses the mark should alert this Court to the trial judge's lack of understanding of how to apply Section 921.141.

34. Sec. 921.141(5)(b), Fla. Stat. (1981)

35. Sec. 921.141(5)(d), (f), Fla. Stat. (1981)

The judge might have found some mitigation in appellant's age (26)[36] and background but he said they did "nothing to mitigate the circumstances of the killing . . . ." (R-1238)

With or without the contested aggravations, the judge erred by overriding the life recommendation.[37]

The judge's order failed to accord proper respect to the jury's life verdict. After the evidence was submitted in the penalty phase the judge told counsel:

> I am going to decline to permit any argument. I believe all argument that's necessary has been completed in the original argument as well as the testimony that's been elicited. (TR-807)

On the urging of the prosecutor the judge relented to an extent, but limited arguments to "less than five minutes per side". (TR-808).

This downgrading of the penalty phase shows that the judge must not have considered it to be important. Even if no new evidence had been presented, the jury had to consider new issues and the judge should have allowed counsel time to argue those issues.

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36. Appellant is not sure of the source of this information. It could not be found in the testimony and a presentence investigation report is not mentioned. Possibly the judge located the date of birth in the arrest report (R-827). If the judge considered information not disclosed to appellant and his counsel he violated the appellant's right to due process. Gardner v. Florida, 430 U.S. 349 (1977). Appellant does not know whether the judge in fact considered evidence outside the record.

37. Notwithstanding the prior holding of this Court in Douglas v. State, 373 So.2d 895 (Fla. 1979); Phippen v. State, 389 So.2d 991 (Fla. 1980) and others, appellant contends that a trial judge's override of a jury's factually based life recommendation violates double jeopardy, the right to jury trial, the protection against cruel and unusual punishments, and the right to due process of law, as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments. Cf., Bullington v. Missouri, supra. The jury override, as applied to appellant, violates those amendments for the reasons argued in the preceding section of this brief. In the alternative, the standards for determining when the judge may override are so broad, vague and ambiguous as to violate the Fifth, Sixth, Eighth and Fourteenth Amendments. The United States Supreme Court has granted certiorari to consider these issues. Spaziano v. Florida, ___ U.S. ___, 104 S.Ct. 697, (No. 83-5596) 34 Cr.L.Rptr. 4159.

That aside, the judge in his sentencing order disparaged the jurors' advisory verdict because they "deliberated less than five minutes before recommending life imprisonment . . . ."[38] (R-1238). The judge's reasoning on the length of argument compared with the length of deliberations contradicts itself. If the new evidence was so slight that brief argument would suffice, by the same token equally brief deliberations would do. One was as long (or short) as the other.

Plausible speculation on why the jury took such a short time must take into account that the limited arguments left little be decided. The judge, therefore, may have caused the deficiency about which he later complained.

McCampbell v. State, 421 So.2d 1072 (Fla. 1982) is right on point. The defendant committed murder during a robbery and was found guilty. After only six minutes of additional deliberation the jury returned a life recommendation. Three valid aggravating circumstances were present and the trial judge imposed death. Reversing, this Court said:

> The trial court also classified the jury's recommendation as unreasonable because of the brevity of its penalty deliberation. The jury spent about six hours deliberating the guilt issues. At the penalty phase, the jury heard 140 pages of testimony and argument bearing on the question of life or death. They were instructed to base their verdict on the evidence presented at both proceedings. It cannot be concluded that the jury did not have sufficient time within which to consider its penalty verdict. (Emphasis added). 421 So.2d at 1075

The same comments apply here. (The penalty phase transcript might have had more pages if the trial judge allowed reasonable time for the arguments.) As in McCampbell, the jurors already took ample time to deliberate on guilt.

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38. The length of jury deliberations in either guilty or penalty phases cannot be reliably determined from the record.

[several hours according to the trial judge (R-1238)], they were instructed to base the verdict on evidence from both proceedings (TR-819), and there was no basis for concluding the time was insufficient to consider the verdict.[39]

The trial judge's overall minimization of the jury's advisory verdict runs afoul of Richardson v. State, 437 So.2d 1091 (Fla. 1983) in which the life recommendation was disregarded by the trial judge who said the specially impanelled penalty jury had not heard all the evidence of guilt. On appeal Richardson's death sentenced was reduced to life with the rebuke that "we cannot countenance the denigration of the jury's role implicit in these comments." Id., at 1095.

In deciding to override the life recommendation the trial judge concluded that the facts suggesting death "to the jury" were so clear that virtually no "responsible" person could disagree.[40] The judge did not accompany this statement with any reasons for preferring his evaluation of the facts over that of the jury.

The judge paid scant attention to possible mitigation. The order does not state with certainty that he found any mitigating factors; nor does it discuss whether the jury reasonably could have found any. This is a glaring omission in apportioning weight to the life recommendation. If the jury could reasonably have found mitigation, the balance it struck between aggravation and mitigation should not lightly be disregarded. Chambers v. State, 339 So.2d 204, 208, 209

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39. Had the jury recommended and the judge imposed death after the drastic curtailment of argument in the penalty phase, the resulting sentence would have violated the Eighth Amendment right to present to the sentencer any aspect of the defendant's character or record, or the circumstances of the offense. Lockett v. Ohio, 438 U.S. 586 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1982); cf., Herring v. New York, 422 U.S. 853 (1975) (right to present closing argument in a criminal trial guaranteed under Sixth Amendment right to counsel). The judge's original decision not to allow any argument was a flagrant violation of the statute and rule governing the proceedings. Section 921.141(1); Fla.R.Cr.P. 3.780(c). It should cause this Court to have grave concern about the reliability of the entire proceedings that a fundamental right implemented by statute and rule was ignored by the judge.

40. The reference to responsible rather than reasonable is just another indication that the trial judge completely misconstrued or misunderstood the law.

(1976) (England, J., concurring).

In deciding in effect that the jury acted unreasonably the trial judge apparently believed there was no basis for mitigation. He did not seem to realize that the jury might reasonably have found as a statutory mitigating circumstance that appellant was an accomplice and his participation was relatively minor.[41] In discussing the penalty phase instructions the judge, perhaps unwittingly, disclosed his belief in the existence of that reasonable basis for mitigation when he said:

> [S]ome reasonable people might conclude that number four [§ 921.141(6)(d)] is applicable. They may conclude that Wydell Rogers was the prime actor in the case and that Brown was a passive participant and therefore that would be an applicable mitigating circumstance. (TR-768)

If reasonable jurors could find from the evidence that the co-defendant Rogers was the "prime actor" and appellant was a "passive participant" at least one arguable mitigating circumstance existed. The judge did not say whether the life recommendation itself would have been unreasonable if the jury found mitigation. Had he considered the reasonable basis for mitigation which he earlier acknowledged he could not have found the jury's verdict unreasonable.[42]

The often repeated test for evaluating a jury's life verdict was announced in Tedder v. State, 322 So.2d 908, 910 (Fla. 1975):

> A jury recommendation under our trifurcated death penalty statute should be given great weight. In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ.

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41. Section 921.141(6)(d).

42. The jury's result is more rational than the judge's because it (correctly) already had rejected the aggravation of heightened premeditation by its guilt verdict, thus weighing no more than three aggravations (one of which was not proven) against at least one reasonable statutory mitigation. Even when viewed in that isolated context, there was no apparent irrationality in a life verdict.

The life recommendation of a jury has been a vibrant force in death penalty adjudications. The momentum of those decisions carries appellant's case well into the zone of a life sentence.

In Chambers v. State, supra, the judge disregarded the life recommendation without comment. This Court said that the totality of circumstances and the weighing of aggravating and mitigating circumstances did not warrant the death penalty; rather the test was to determine whether the jury's life recommendation was appropriate.

Enlarging upon the opinion in a separate concurrence, Justice England said "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" Id., at 208. A jury's verdict on the same facts heard by the judge should stand because "that body has been assigned by history and statute the responsibility to discern truth and mete out justice". Id., at 209. The jury's evaluation of the life and death decision should prevail when it is not "impassioned and unreasonable" Ibid.

In Malloy v. State, 382 So.2d 1190 (Fla. 1979) the trial judge imposed death, over a life recommendation, for two killings. Reversing, this Court said that even though the execution murders normally would have resulted in death the jury's action was reasonable because of the conflict in testimony as to who was actually the trigger man and because of the plea bargains between the accomplices and the state.

In Barfield v. State, 402 So.2d 377 (Fla. 1981) a life sentence was proper when recommended by the jury and reasonable mitigation was that one co-defendant had received immunity. The Court said that when a judge overrides "the justification must be clear and convincing and, under the circumstances, the jury's recommendation unreasonable". Id., at 382.

In Walsh v. State, 418 So.2d 1000, 1003-04 (Fla. 1982), listing many cases the Court said:

> This Court has repeatedly held that the trial judge and this Court must weigh heavily the sentencing jury's advisory opinion of life imprisonment. [Citations omitted] We have allowed the trial court to override a life recommendation only where the facts justifying death are so clear and convincing that no reasonable person could differ. [Citations omitted] And we have reversed the death sentence and directed the trial court to impose life imprisonment where there was a reasonable basis for the jury's recommendation. [Citations omitted] In this cause we conclude there was a reasonable basis for the jury's unanimous recommendation and the trial court should have followed that recommendation.

Walsh killed a deputy sheriff when he was caught hunting hogs on fenced land.

These decisions overwhelmingly demonstrate that the judge erred in not accepting the advisory verdict of the jury, which speaks as the "conscience of our communities." McCaskill v. State, 344 So.2d 1276, 1280 (Fla. 1977). The basic flaw in the sentencing order is its failure to explain how the jury reached an unreasonable conclusion.

The verdict was not unreasonable. In addition to statutory mitigation recognized by the judge, the jury obviously could have found mitigation from the plea bargain for a life sentence made by the co-defendant.[43] See, McCampbell

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43. In Stokes v. State, 403 So.2d 377 (Fla. 1981) the defendant was convicted of the brutal and senseless beating murders of two rival gang members. The Court sustained the jury's life recommendation saying:

> Despite the heinous nature of these crimes and the fact that they occurred in the course of a kidnapping . . . mitigation was proved in the form of Stokes' lack of any significant history of prior criminal activity. In addition, the jury apparently considered that the dominant person in the Outlaws had received immunity from prosecution for his role in these deaths. Under these circumstances, the jury's recommendation was reasonable. Id., at 378. (Emphasis added)

v. State, supra; Messer v. State, 330 So.2d 137 (Fla. 1976). The lack of any prosecution against David Davis, who was present but never charged, might also have been considered in mitigation. Gafford v. State, 387 So.2d 333 (Fla. 1980); Neary v. State, 384 So.2d 881 (Fla. 1980).

The appellant's family testified for him; his sister said he was kind, loving and very gentle (TR-795); his stepfather, with whom he lived his entire life, said appellant had always been a nice person (TR-799); his real father, with whom he maintained contact, said he had been a good son (TR-802). This evidence was sufficient for a reasonable jury to find some mitigation. McCampbell v. State, supra (family background); Washington v. State, 432 So.2d 44 (Fla. 1981) (being a good son).

Appellant's trial counsel filed a memorandum in support of the life recommendation (R-1234-36). That memorandum, coupled with the evidence, was more than sufficient to bar an override.

Although it may be subject to some dispute as a mitigating circumstance, see Buford v. State, 403 So.2d 943 (Fla. 1981), appellant had a constitutional right to have the jury consider the strength or weakness of the evidence in evaluating whether death was appropriate. To foreclose a jury from considering weakness of the evidence in mitigation, notwithstanding proof beyond a reasonable doubt, would violate the precepts of Lockett v. Ohio, 438 U.S. 586 (1978) and Woodson v. North Carolina, 428 U.S. 280 (1976) that the sentencing authority is entitled to consider any aspect of the defendant's character or record or circumstances of the offense in determining whether to impose death.

Appellant does not interpret this Court's decisions as foreclosing weakness of the evidence as a reasonable basis for sustaining a jury's life recommendation. In Alford v. State, 307 So.2d 433, 445 (Fla. 1975), in upholding a death sentence based upon a death recommendation this Court commented that "additionally, the

evidence of defendant's guilt in these crimes was particularly strong, discounting the possibility of an 'innocent' man being sentenced to die." If the strength of evidence can support a death sentence, the possible weakness of evidence can support life. Possible doubts of guilt could be a reasonable basis for a life recommendation.[44] Alford implicitly allows consideration of the strength of the proof of guilt to be considered in deciding whether death is the appropriate sentence. Just as particularly strong evidence can foster confidence that an "innocent man" will not be executed, some lingering (and maybe inarticulable) uncertainties can reasonably prompt a life recommendation.

Although at first it may appear that a reasonable basis for a life recommendation could never be founded in an evidentiary weakness after the jury has found guilt beyond a reasonable doubt, the apparent inconsistency is resolved by the two different functions performed by the jury in the guilt phase and the penalty phase. An example is better than a theoretical discourse, and the facts of this case make a good demonstration. The jury may not have had a reasonable basis upon which to base a doubt that appellant somehow participated with Rogers (and possibly Davis and Rivers) in the robbery and murder. Yet the conflicts in testimony, particularly between Rogers and Davis, the possible motive Rogers had to falsely implicate appellant to obtain a life sentence for himself, and the testimony of Rebecca Sirmons that the person who called the gas company was a woman, may have left the jury somewhat uneasy about recommending death based on evidence which left room for some possible doubt. A life

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44. In Armstrong v. State, supra, the Court suggested a standard of proof possibly higher than beyond a reasonable doubt. If the evidence of guilt does not rise to that level, but is sufficient for a conviction, there is room for the existance of possible doubt in the range of proof between what is necessary for a conviction and the higher standard set by Armstrong. Proof falling in this range would not be so free of all doubt as to make a life recommendation unreasonable.

recommendation under these circumstances is certainly not unreasonable.[45]

Furthermore, in Richardson v. State, 437 So.2d 1091 (Fla. 1983) this Court reversed a death sentence after a life recommendation without discussing whether any mitigating circumstances existed. The trial judge had found no mitigation. Two of the six aggravations were ruled invalid on appeal. Appellant's brief argued the sole basis for mitigation was the possibility of innocence. (Initial Brief of Appellant pp. 24-46.)[46] Rather than remanding for the trial judge to reevaluate the jury's recommendation and weigh it against the remaining aggravations, as done in Lewis v. State, 398 So.2d 432 (Fla. 1981), the Court ordered the sentence reduced to life. Since the only asserted mitigation was possible doubt of guilt, Richardson means that a jury's life recommendation based on that possibility is a reasonable one.

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45. The Model Penal Code, § 201.6(1)(f) precludes a death sentence when the evidence "does not foreclose all doubt respecting the defendant's guilt." In the Revised Comments to Code § 201.6 (at p. 134) this provision is said to be "an accommodation to the irrevocability of the capital sanction. Where doubt of guilt remains the opportunity to reverse a conviction on the basis of new evidence must be preserved, and a sentence of death is obviously inconsistent with that goal." See, Smith v. Balkcom, 660 F.2d 573, 580-81 (5th Cir. 1981); cf., Furman v. Georgia, 408 U.S. 238, 366-68 (1972) (Marshall, J., concurring) (proof beyond a reasonable doubt standard is not foolproof; innocent people are sometimes convicted).

46. The argument was succinctly put as follows:

> In the present case, the reason for the jury's recommendation . . . is patently clear on the record - six or more jurors retained some genuine doubt of the defendant's guilt, or at least did not feel that the state's evidence was sufficiently strong to justify . . . death.
>
> Appellant's Initial Brief at 24.

As in Richardson, possible doubt about appellant's guilt (or the extent of his participation), was therefore an additional reasonable and proper justification for the life recommendation.

Whatever its exact reasons, the jury acted reasonably in recommending life. The trial judge had an obligation to sift the evidence in search of possible mitigation, statutory or otherwise, in support of a life sentence after the jury recommended life. The question now is not how the judge evaluated the evidence, but whether the jury's conclusion was unreasonable. Cf., Welty v. State, 402 So.2d 1159, 1164 (Fla. 1981) (four aggravations sustained on appeal, no mitigation found by trial judge, yet evidence of non-statutory mitigation was introduced which "could have influenced the jury to recommend life"); Gilvin v. State, 418 So.2d 996, 999 (Fla. 1982) (trial judge found no mitigation but there was evidence of non-statutory mitigation, and jury could have reasonably reached conclusions different from those of the judge on mitigating circumstances); Cannady v. State, supra, 427 So.2d 727 (judge did not find mitigation from testimony of mental health expect who said defendant was under extreme mental or emotional distress and had impaired capacity, but jury may have reasonably given that testimony more credence than did the judge).

Applying that analysis here, the jury may have reasonably attached more weight to the evidence of the various mitigating circumstances than did the trial judge. The judge's conclusion on the weight of this evidence was not entitled to precedence over the conclusion of the jury, unless some irrationality in the verdict was demonstrated. The judge gave no explanation for the override. This Court's remonstrance in Smith v. State, 403 So.2d 933, 935 (Fla. 1981) is equally pertinent here:

> The trial judge did not articulate any reason for rejecting the jury's recommendation . . . . The record does not show that he had any more information than the jury did; the trial judge did

not demonstrate how reasonable men would not differ on the matter of sentencing. Whatever his rationale, we are unable to discern a basis which would be sufficient to reject the life-sentence recommendation. (Emphasis added)

Considering all the possible mitigation which could have prompted the jury to recommend life,[47] and the lack of any cogent demonstration by the trial judge that the recommendation was unreasonable, the jury override is plainly at odds with the precedents of this Court and must be reversed.

C. Comparison With Other Cases

A review of the facts here compared with those in other cases shows that appellant should not have received a death sentence.[48]

This was not a heinous killing, thereby distinguishing this case from other robbery-murders in which death sentences have been upheld. See, e.g., Hallman v. State, 305 So.2d 180 (Fla. 1974); Spinkellink v. State, 313 So.2d 666; Knight v. State, 338 So.2d 201 (Fla. 1976); Funchess v. State, 341 So.2d 762 (Fla. 1977); Adams v. State, 341 So.2d 765 (Fla. 1977) Gibson v. State, 351 So.2d 948 (Fla. 1977); Raulerson v. State, 358 So.2d 826 (Fla. 1978); Washington v. State, 362 So.2d 658 (Fla. 1978); Clark v. State, 379 So.2d 97 (Fla. 1980); Brown v. State, 381 So.2d 690 (Fla. 1980); Magill v. State, 386 So.2d 1188 (Fla. 1980); King v. State, 390 So.2d 315 (Fla. 1980); Johnson v. State, 393 So.2d 1069 (Fla. 1981); Jacobs v. State, 396 So.2d 1113 (Fla. 1981); Palmes v. State, 397 So.2d 648 (Fla. 1981); Ruffin v. State, 397 So.2d 277 (Fla. 1981). In each of those cases there was an element of cruelty in connection with the murder.

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47. Because the jury was not requested to enumerate its reasons, it cannot be stated with great confidence just what motivated the verdict. The Tedder standard requires the trial judge to accept the life recommendation if at all reasonably supportable, even though discreet mitigating circumstances are not articulated. Appellant should not be forced to suffer death just because reasonable mitigation is not expressly stated when the procedures adopted by the court do not authorize the jury to give reasons.

48. On appeal this Court has said it will review the facts in each death case to insure "relative proportionality among death sentences which have been approved statewide" and will compare the case "with all past capital cases to determine whether or not the punishment is too great" Brown v. Wainwright, 392 So.2d 1327, 1331 (Fla. 1981).

Other robbery-murder death sentences have been reversed when, as here, the jury's life recommendation was overridden. E.g., Swan v. State, 322 So.2d 485 (Fla. 1975) (victim of robbery-burglary tied so that efforts to escape would cause choking, death resulted from a severe beating); Jones v. State, supra, 332 So.2d 615 (Fla. 1976) (three aggravating circumstances including, heinous, atrocious and cruel, mitigation in psychiatric condition); Provence v. State, 337 So.2d 783 (Fla. 1976) (robbery during an apparent drug transaction); McCaskill v. State, 344 So.2d 1276 (Fla. 1977) (robbery-murder and ensuing shootout, unclear which of three defendants fired the fatal shots).[49]

In a case factually similar to appellant's the defendant was convicted of the shooting death of a store owner. The trial judge found no mitigating circumstances and overruled the jury's life recommendation. This Court reversed, pointing out that two co-defendants had been acquitted and a third had pled guilty and testified for the state. Under these circumstances the jury recommendation was "not unreasonable" and was "consistent" with what other juries had done in similar circumstances. McCray v. State, 416 So.2d 804 (Fla. 1982).

By any yardstick, appellant should have received a life sentence. See, Rembert v. State, supra, 445 So.2d at 340 (reversing death sentence for felony murder, even after jury recommended death, because "in similar circumstances many people received a less severe sentence"); Washington v. State, supra, 432 So.2d at 48 (Fla. 1983) (premeditated murder of deputy, but the two valid aggravations of hindering governmental function and avoiding arrest were not "of such a grave nature" as to outweigh mitigation).

The evidence for and against appellant does not rank this case among the

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49. In McCaskill the Court pointed out that jurors ". . . have been reluctant to recommend . . . death . . . in all but the most aggravated cases despite general knowledge and concern of the citizenry over the substantial increase in crime." 344 So.2d at 1280.

most aggravated and indefensible of crimes, for which the death penalty is reserved. State v. Dixon, 283 So.2d 1, 8 (Fla. 1973). The death sentence in this case is disproportionate in the abstract and when compared with others which have resulted in life sentences.[50]

ISSUE

APPELLANT'S CONVICTION OF FIRST DEGREE FELONY MURDER BASED ON ROBBERY PRECLUDES AN ADJUDICATION OF GUILT FOR THE ROBBERY WHICH WAS A LESSER INCLUDED OFFENSE.

Appellant was convicted of felony murder without premeditation. The underlying felony was robbery. He could be neither convicted nor sentenced for the robbery. Appellant's conviction of robbery violates double jeopardy. Hawkins v. State, 436 So.2d 44 (Fla. 1983); Bell v. State, 437 So.2d 1057 (Fla. 1983); Whalen v. United States, 445 U.S. 684 (1980).

ISSUE

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

Before trial appellant moved to preclude challenging for cause those jurors who would not or might not be able to recommend the death penalty (R-902-03). The motion was denied (R-968).

During jury selection the judge, over appellant's objection, dismissed four jurors because of their opposition to capital punishment (TR-103-05).

These rulings deprived appellant of the right to a trial by an impartial jury, guaranteed by the Sixth and Fourteenth Amendments. Grigsby v. Mabry, 569 F.Supp. 1273 (E.D. Ark. 1983); see also Avery v. Hamilton, ___ F.Supp. ___ (W.D.

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50. To uphold this death sentence based on felony murder when there is not sufficient evidence of premeditation or intent to kill would violate the Eighth and Fourteenth Amendments. See, Enmund v. Florida, 458 U.S. 782 (1982). This was raised by appellant in a pre-trial motion (R-904-06).

N.C. 1984);[51] Hovey v. Superior Court of Alameda County, 616 P.2d 1301 (Cal. 1980).

V CONCLUSION

Appellant's conviction of first degree murder should be reversed for a new trial, at which he could not be subjected to being found guilty of premeditated murder. Even if the murder conviction is affirmed, the death sentence should be reduced to life imprisonment and the robbery conviction should be vacated.

Respectfully submitted,

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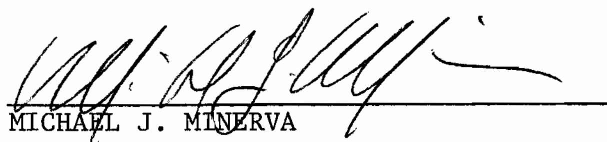
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand-delivery to Wallace E. Allbritton, Assistant Attorney General, The Capitol, Tallahassee, Florida; and by U.S. mail to Mr. Anthony Siliah Brown, #838162, Post Office Box 671, Starke, Florida 32091, on this 1st day of May, 1984.



MICHAEL J. MINERVA

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51. In Avery v. Hamilton, supra, the U.S. District Court for the Western District of North Carolina reached a conclusion similar to the holding of Grigsby v. Mabry, supra. See Woodard v. Hutchins, ___ U.S. ___ (1984) (Brennan, J. dissenting from vacation of stay) (34 Cr.L. at 4157).