IN THE FLORIDA SUPREME COURT

ENRIQUE GARCIA, :

Appellant, :

vs. : Case No. 64,841

STATE OF FLORIDA, :

Appellee. :

_____ :

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

REPLY BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

Appellant Enrique Garcia will rely upon his initial brief to reply to the arguments presented in the State's answer brief, except for the following additions regarding Issues I, II, IV, VI-B, VII-B, VII-C, VII-D, VIII, and X. This brief also constitutes Enrique Garcia's answer brief to the State's cross-appeal issue.

STATEMENT OF THE FACTS

Appellee claims that Rosenna Welch identified Enrique Garcia as one of the four men in the back room of the West Farm Market who robbed and killed the Wests (Brief of Appellee, p.2). The record reflects otherwise (R2029):

> Q. [by prosecutor] CAN YOU TELL US IF YOU SEE ANY OF THE INDIVIDUALS THAT WERE THERE IN THE COURTROOM, OR WOULD YOU RATHER NOT? DO YOU WANT TO LOOK AROUND THE COURTROOM OR NOT?
>
> A. [by Rosenna Welch] I HAVE ALREADY SAW HIM. (CRYING) HE'S SITTING RIGHT OVER THERE.
>
> Q. NEXT TO MR. BONE?
>
> A. I'M SORRY. (CRYING)
>
> MR. GARDNER [prosecutor]: COULD THE RECORD REFLECT--
>
> Q. WHAT WAS THEIR ATTITUDE WHEN THEY FIRST CAME IN?

Thus the record does not reflect that Rosenna Welch positively identified Enrique Garcia as even being at the Farm Market, let alone as being one of the four men in the back room who robbed and killed the Wests.

Appellee cites the testimony of Garcia's brother-in-law, Geraldo Gaona, for the propositions that Garcia shot someone, and the purpose of shooting the victims was to eliminate them as witnesses (Brief of Appellee, p.2). However, a fair reading of the entirety of Gaona's testimony shows it to be so ambiguous on major points as to be worthless. For example, on recross examination the following sequence of questions and answers occurred (R1425):

Q. (by Mr. Bone)[defense counsel] YOU SAID YOU THINK MAYBE RICKY [Enrique Garcia] SHOT SOMEBODY?

A. YEAH.

Q. YOU'RE NOT SURE?

A. NO.

Later, on further recross, defense counsel asked Gaona about his testimony on redirect that "Ricky" (Enrique Garcia) and another person shared guns and did the shooting (R1426):

BY MR. BONE [defense counsel]:

Q. THEY SHARED THE GUNS?

A. YEAH.

Q. HOW MANY GUNS WERE IN THERE?

A. ONLY ONE.

Q. ONE GUN?

A. WELL, RICKY IN THAT ROOM.

Q. DID THEY SAY THEY SHARED THE GUNS OR SHARED THE SHOOTING, OR DO YOU KNOW?

A. I THINK THE GUN.

Q. BUT YOU'RE NOT SURE, ARE YOU?

A. NO.

The ambiguity surrounding Gaona's testimony may be accounted for by the fact that he did not speak English very well. This is evidenced by the fact that the jury apparently took the highly unusual step of requesting an interpreter for Gaona. Although, inexplicably, the record does not contain the jury's request in this regard, it does contain the court's response thereto, as follows (R1438):

> The only response I can give the jury requesting that we have an interpreter for Giraldo [sic] Gaona, the testimony has already been given. It's not possible at this time to have an interpreter.

The confusion generated by Gaona's testimony was manifested after the jury began deliberating when they found it necessary to review his testimony. (R2201,2790)

Appellee misstates a portion of thrice-convicted felon Johnny Huewitt's testimony at page three of its brief where Appellee says, "Appellant then draws his pistol towards the older man's head and tells him to shoot the woman." The record reflects that Huewitt testified that Garcia told him that he (Garcia) "turned and drawed his pistol towards the older man" (R1779), not that Garcia drew it toward the man's head.

ISSUE I.

ENRIQUE GARCIA'S ABSENCE FROM SEVERAL STAGES OF THE PROCEEDINGS BELOW VIOLATED HIS CONSTITUTIONAL RIGHT TO BE PRESENT.

Appellee claims that Enrique Garcia was not absent from any crucial stage of his trial (Brief of Appellee, p.9). In Proffitt v. Wainwright, 685 F.2d 1227,1256 (11th Cir. 1982), modified on pet. for reh., 706 F.2d 311 (11th Cir. 1983), pet.for cert.denied, __U.S.__, __S.Ct.__, 78 L.Ed.2d 697 (1983) the court recognized the right of a criminal defendant to be present at

> all hearings that are an essential part of the trial - i.e., to all proceedings at which the defendant's presence "has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." Snyder v. Massachusetts, 291 U.S. 97,105-106, 54 S.Ct. 330,332, 78 L.Ed. 674 (1934).

Applying this standard to Garcia's case, his presence was required at most, if not all, of the nine times during the proceedings below when he was absent.

Furthermore, Appellee completely overlooks the fact that Rule 3.180 of the Florida Rules of Criminal Procedure specifically defines some of the crucial stages of a trial at which a defendant "shall" be present. (In Francis v. State, 413 So.2d 1175, 1177 (Fla.1982) this Court relied upon Rule 3.180 in finding that the stage at which Francis was absent from his trial was indeed a stage requiring his presence.) These include the pretrial conference (unless the defendant waives his presence in writing) and all proceedings before the court when the jury is present. Garcia was absent from the pretrial conference, and was absent when the jury returned to the courtroom to hear Geraldo Gaona's testimony read back to them, and was absent twice during the penalty phase when the jury was present.

Appellee's reliance upon Hall v. State, 420 So.2d 872 (Fla.1982) to distinguish the instant case from Francis, supra, is misplaced. In Hall this Court found only that the roll call and general qualification of prospective jurors was not a critical stage of the trial requiring the defendant's presence.

Appellee also claims that Garcia waived his presence "either directly or through counsel" and that his absences were "voluntary" (Brief of Appellee, p.9). But in Hopt v. Utah, 110 U.S. 574, 4 S.Ct. 202, 28 L.Ed. 262 (1884) the Supreme Court of the United States rejected the State's argument that a capital defendant could waive his right to be present at a portion of his trial:

> That which the law makes essential in proceedings involving the deprivation of life or liberty cannot be dispensed with or affected by the consent of the accused; much less by his mere failure, when on trial and in custody, to object to unauthorized methods ....If he be deprived of his life or liberty without being so present, such deprivation would be without that due process of law required by the Constitution.

28 L.Ed. at 265. See also Hall v. Wainwright, 733 F.2d 766 (11th Cir. 1984).

Even if Garcia could waive his presence, his purported waivers in this case were inadequate to fulfill constitutional requirements. Any such waiver would have to be knowing and voluntary. Proffitt, Francis. In Johnson v. Zerbst, 304 U.S. 458,464, 58 S.Ct. 1019, 82 L.Ed. 1461,1466 (1938) the Supreme Court of the United States observed that

> "courts indulge every reasonable presumption against waiver" of fundamental constitutional rights [footnote omitted] and [courts] "do not presume acquiescence in the loss of fundamental rights." [Footnote omitted.] A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege.

On the two occasions out of the nine purported waivers when Garcia himself appeared before the trial court no meaningful inquiry was conducted to ascertain whether Garcia was fully aware of his right to be present and its significance, and whether he nevertheless wished to give up this important right. See Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

Appellee cites State v. Melendez, 244 So.2d 137 (Fla. 1971), Henzel v. State, 212 So.2d 92 (Fla.3d DCA 1968), and Smith v. State, 453 So.2d 505 (Fla.4th DCA 1984) for the following proposition:

> If the defendant has no objection to his counsel, counsel may waive objection to his absence and case law imputes actual or constructive knowledge of the proceedings to the defendant. Upon his re-appearance, defendant must acquiesce or ratify the actions his counsel took in his absence.

(Brief of Appellee, p.10) However, Appellee does not claim, nor does the record show, that Garcia ratified or acquiesced in the actions his attorney took during his multiple absences. Nor are the three cases cited by Appellee death penalty cases. Furthermore, a statement by counsel that the defendant does not wish to return to the courtroom is insufficient to establish an intelligent and competent waiver by the defendant. Cross v. United States, 325 F.2d 629 (D.C. Cir. 1963), Hopt, supra.

With regard to Garcia's absence from the pretrial conference, Appellee cites Eastwood v. Hall, 258 So.2d 269 (Fla.2d DCA 1972) for the contention that

> counsel's oral waiver of Appellant's presence, in open court, recorded and transcribed by the court reporter, obviated the writing requirement of Florida Rule of Criminal Procedure 3.180(a)(3).

(Brief of Appellee, p.10). Eastwood is inapposite, being a non-capital case involving a waiver of speedy trial, not a waiver of the defendant's presence.

This Court is faced with a very similar issue concerning waiver in Amazon v. State, No. 64,117, another capital case which is still pending. Amazon's trial counsel purported to waive his presence at a jury view of the homicide scene. In an order dated December 11, 1984 this Court, on its own motion, relinquished partial jurisdiction to the trial court "to conduct an evidentiary

hearing to determine whether appellant knowingly and intelligently waived his right to be present at the jury view of the crime scene." The Court expressed concern "regarding the adequacy of notice and advice by defense counsel, and also the scope of the authority Amazon gave his counsel to waive his presence." (This order is reproduced in an Appendix to this brief.) If the Court is of the opinion that a capital defendant may waive his presence, Garcia suggests that it would be appropriate for the Court to issue an order similar to the one issued in Amazon so that the Court will have a sufficient record for it to ascertain whether Garcia knowingly and intelligently waived his presence each of the nine times he was absent from the proceedings below.

Appellee claims that Garcia was not prejudiced by his nine absences from the proceedings below, but cites no authority to establish that he must show he was prejudiced; indeed, the case law indicates that he need make no such showing. For example, in Francis this Court reversed the defendant's conviction for capital murder and awarded him a new trial due to his absence from his counsel's exercise of peremptory challenges, even though the Court was "unable to assess the extent of prejudice, if any, Francis sustained by not being present...." 413 So.2d at 1179 (emphasis supplied). Proffitt addressed this question directly:

> ...[W]hether 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 [testimony produced at a hearing related to appellant's sentencing hearing] affected the sentencing decision, we will not engage in speculation as to probability that his presence would have made a difference.

685 F.2d at 1260. The court also noted:

> The right of a criminal defendant to be present at all critical stages of his trial is a fundamental constitutional right. [Citations omitted.] It is clear that once the defendant has established a violation of that right his conviction is unconstitutionally tainted and reversal is required unless the State proves the error was harmless beyond a reasonable doubt. [Citations omitted.]

685 F.2d at 1260 (footnote 49). The court thus found the burden to be on the State, not the defendant, to establish a lack of prejudice. This approach is the only one which makes sense. It would place an intolerable burden on a criminal defendant to require him to establish prejudice resulting from what occurred at a proceeding to which he was not privy.[1/]

Appellee's assertion that Garcia is attempting a so-called "gotcha!" maneuver such as the Third District Court of

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1/ The record does reveal prejudice to Garcia in at least one aspect of this case, to-wit: the trial court's failure to instruct the jury on all proper lesser included offenses. For example, he did not instruct on attempted second degree murder, assault, aggravated assault, battery and aggravated battery as lesser included offenses of attempted first degree murder. (R2177-2178) Morgan v. State, 417 So.2d 1027 (Fla.3d DCA 1982); Kimbrough v. State, 356 So.2d 1294 (Fla.4th DCA 1978); Fla.Std.Jury Instr. (Crim.), p.258 (Schedule of Lesser Included Offenses). Nor did he instruct on third degree felony murder as a lesser included offense of first degree felony murder, even though such an instruction was justified by the fact that the four men who entered the Farm Market perpetrated an aggravated assault and an aggravated battery on each of the victims. §§782.04(3), 784.021, and 784.045, Fla.Stat. (1983); Fla.Std.Jury Instr. (Crim.), p. 258 (Schedule of Lesser Included Offenses). The court also failed to instruct on robbery with a weapon, a lesser included offense of robbery with a firearm. (R2178-2182) §812.13(2), Fla.Stat. (1983); Reddick v. State, 394 So.2d 417 (Fla.1981); Growden v. State, 372 So.2d 930 (Fla.1979); Stephens v. State, 396 So.2d 741 (Fla.5th DCA 1981). Had Garcia personally participated in the jury charge conference, he could have made appropriate requests and objections concerning the instructions.

Appeal condemned in State v. Belien, 379 So.2d 446 (Fla.3d DCA 1980) is singularly inappropriate. In Belien the court found that the defendant had asserted his right to a speedy trial after executing an effective waiver thereof in conformity with the requirements of Johnson v. Zerbst. Here, as discussed above, Garcia did not, insofar as the record shows, knowingly and intelligently waive his right to be present, and so the situation is nothing like that which existed in Belien.

ISSUE II.

THE COURT BELOW ERRED IN ADMITTING INTO EVIDENCE AT ENRIQUE GARCIA'S TRIAL STATEMENTS GARCIA MADE TO LAW ENFORCEMENT PERSONNEL.

Appellee takes Garcia to task for not making a pretrial motion to suppress his three statements which were tape-recorded by the police, and for allegedly making an objection that was neither timely nor specific.

Florida Rule of Criminal Procedure 3.190(i)(2) permits the trial court to entertain at trial an objection to a confession, which is what the court below did as to all three tapes. (R1373,1490)

As to timing, Garcia lodged his objection to the first two tapes, State Exhibits 50A and 50B, immediately after the prosecutor moved "for introduction and publication." (R1373) The objection could not have been any more timely. To object again, as Appellee suggests Garcia should have done, immediately before the second tape was played to the jury would have been a useless act. Similarly, as to the third tape, State Exhibit 53, Garcia

objected as soon as the State moved for "introduction of the exhibit and publication to the jury" and had the tape marked for identification. (R1489-1490) The objection was as contemporaneous as it could be.

Garcia's counsel made the following objection to the first two tapes (R1373):

> I WOULD OBJECT AT THIS TIME, BECAUSE THE STATE HAS NOT SHOWN THE COMPLETE VOLUNTARINESS OF THE SITUATION.
> APPARENTLY, THERE WERE CONVERSATIONS NOT TAPED BETWEEN THE FIRST ONE AND THE SECOND ONE.

His objection to the third tape was as follows (R1490):

> I WOULD OBJECT TO THE INTRODUCTION BECAUSE IT HASN'T BEEN SHOWN CONSTITUTIONALLY TO BE A FREE AND VOLUNTARY STATEMENT GIVEN.

While the objections Garcia's attorney made were perhaps not models of specificity, they did at least call the trial court's attention to the involuntariness of the statements. The court could have requested clarification or more specific information if he deemed it necessary. Because this is a death penalty case, and because of the obvious promises of leniency the police made to induce Garcia to confess, this Court should refrain from scrutinizing the objections here with an overly-critical eye. The paramount focus should be on whether justice was served by the admission into evidence of statements acquired in the manner in which Garcia's statements were acquired.

In LaRocca v. State, 401 So.2d 866 (Fla.3d DCA 1981), which Appellee cites at page 20 of its brief, the person who questioned the defendant said, in effect, that because LaRocca did not fire the first shot, what he did was not "that big of

deal." 401 So.2d at 868. This was far less egregious than Detective Stout's promises to Garcia of lenient treatment. LaRocca does not, as Appellee seems to suggest, stand for the proposition that law enforcement officers can make promises of leniency with impunity, as long as they are responding to a question asked by the accused.

ISSUE IV.

THE COURT BELOW ERRED IN ADJUDICATING ENRIQUE GARCIA GUILTY OF THE TWO ROBBERIES WHICH WERE THE FELONIES UNDERLYING HIS FELONY MURDER CONVICTIONS.

Appellee relies solely upon Hawkins v. State, 436 So.2d 44 (Fla.1983) to support its contention that Garcia was properly adjudicated guilty of the burglaries underlying his felony murder convictions. In Hawkins this Court held that the appellant should not have been sentenced for the robbery underlying his felony murder conviction, but that the robbery conviction was proper. The Court did not elaborate.[2/]

Hawkins seems to be in conflict with this Court's decision in Bell v. State, 437 So.2d 1057 (Fla.1983). Hawkins clearly conflicts with many later decisions of the various district courts of appeal. For example, in Snowden v. State, 449 So.2d 332 (Fla.

[2/] In Copeland v. State, 457 So.2d 1012 (Fla.1984) this Court also vacated only the sentence for the felony which supported Copeland's felony murder conviction, citing State v. Hegstrom, 401 So.2d 1343 (Fla.1981) as authority. However, it is not clear whether or not Copeland challenged his conviction for the underlying felony on double jeopardy grounds. The opinion refers to "appellant's objections to his sentences." 457 So.2d at 1018 (emphasis supplied).

5th DCA 1984) the court held that the defendant's conviction and sentence for the grand theft underlying his third degree felony murder conviction had to be set aside. The court noted the apparent inconsistency between Hawkins and Bell, but concluded that Bell is "the binding opinion of the supreme court on the double jeopardy issue here." 449 So.2d at 336. The court suggested two possible explanations for the inconsistency: (1) Hawkins was issued in error; or (2) because Bell was not final when Hawkins was issued, Bell is actually the latest pronouncement of this Court, and the Court has receded from Hawkins. Similarly, in Chapin v. State, 458 So.2d 339 (Fla.5th DCA 1984) the Fifth District Court of Appeal vacated the defendant's conviction and sentence for trafficking in cannabis, which was the felony underlying his third degree murder conviction, relying upon Bell and State v. Hegstrom, 401 So.2d 1343 (Fla.1981). The court acknowledged the uncertainty in the case law and certified the following question to this Court as being of great public importance:

> DOES THE DOUBLE JEOPARDY CLAUSE OF THE STATE CONSTITUTION OR THE UNITED STATES CONSTITUTION BAR CONVICTION AND SENTENCING FOR BOTH THE UNDERLYING FELONY AND A FELONY MURDER CHARGE BASED ON THE SAME FELONY IN THE CONTEXT OF A SINGLE (RATHER THAN SUCCESSIVE) CRIMINAL PROCEEDING?

458 So.2d at 341.

In Enriquez v. State, 449 So.2d 845 (Fla.3d DCA 1984) the Third District Court of Appeal vacated the defendant's conviction and sentence for the robbery which supported his felony murder conviction, relying in part on Bell. The court noted: "But see, Hawkins v. State, 436 So.2d 44 (Fla.1983)." 449 So.2d at

849. The court held again in Gonzalez v. State, 449 So.2d 882 (Fla.3d DCA 1984) that one may not be sentenced both for felony murder and the underlying felony, citing Bell and other cases.

The Fourth District Court of Appeal likewise held, in Jones v. State, 452 So.2d 643 (Fla.4th DCA 1984), that a defendant could not be convicted both for felony murder and the felony upon which the felony murder was based. The court cited Bell and other cases, with no mention of Hawkins. In Small v. State, 458 So.2d 1136 (Fla.4th DCA 1984) the court reversed the defendant's conviction and sentence for felony murder, again citing Bell and omitting any reference to Hawkins.

The Second District Court of Appeal relied upon Bell in reversing Earl Enmund's conviction and sentence for robbery in Enmund v. State, 459 So.2d 1160 (Fla.2d DCA 1984). The court recognized the apparent conflict between Bell and Hawkins and certified to this Court the following question as one of great public importance:

> WHEN A DEFENDANT IS CONVICTED OF FELONY MURDER, CAN HE BE CONVICTED OF, ALTHOUGH NOT SENTENCED FOR, THE UNDERLYING FELONY?

459 So.2d at 1162.

Enrique Garcia asks this Honorable Court to clarify the law on this important issue, and apply Bell in the felony murder context to vacate his convictions and sentences for the robberies underlying his felony murder convictions.

ISSUE VI.

THE SENTENCING RECOMMENDATION MADE BY THE JURY WAS TAINTED BY IMPROPER ARGUMENTS OF THE PROSECUTING ATTORNEY AND BY THE COURT'S INCOMPLETE ANSWER TO A QUESTION FROM THE JURY.

B. Court's Incomplete Answer To Jury Question

The opinion of the Supreme Court of Mississippi in Wiley v. State, 449 So.2d 756 (Miss.1984) is instructive on this issue, particularly the following remarks from 449 So.2d at 762:

> Because of the importance of the juror's deliberations we must be cautious in avoiding any actions which tend to reduce the jurors' sense of responsibility for their decision. They must not be permitted to look down the road for someone to pass the buck to.

ISSUE VII.

THE TRIAL COURT ERRED IN SENTENCING ENRIQUE GARCIA TO DEATH BECAUSE THE SENTENCING WEIGHING PROCESS INCLUDED IMPROPER AGGRAVATING CIRCUMSTANCES AND EXCLUDED EXISTING MITIGATING CIRCUMSTANCES, RENDERING THE DEATH SENTENCE UNCONSTITUTIONAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

B.

The Trial Court Erred In Instructing The Jury On, And Finding The Existence Of, The Aggravating Circumstance That The Capital Felonies Were Committed For The Purpose Of Avoiding Or Preventing A Lawful Arrest.

As recently as last January 31 this Court discussed the aggravating circumstance of a homicide being committed for the purpose of avoiding arrest, and affirmed once again that the State must produce compelling evidence to support this circum-

stance where the victim is not a law enforcement officer. In Bates v. State, 10 FLW 97 (Fla. Jan. 31, 1985) the Court stated:

> The mere fact that a victim might be able to identify an assailant is insufficient. Moreover, "it must be clearly shown that the dominant or only motive for the murder was the elimination of" the witness. [Citations omitted.]

10 FLW at 98 (emphasis in original).

C.

The Court Below Erred In Finding As An Aggravating Circumstance That The Capital Felony Was Especially Heinous, Atrocious And Cruel.

The cases cited by the State in support of its contention that the homicides of the Wests were especially heinous, atrocious, or cruel are all distinguishable from the case now before this Court. Essentially, all three involved protracted ordeals. The young female victim in Adams v. State, 412 So.2d 850 (Fla.1982) was strangled (not shot, as were the Wests) after being kidnapped as she was walking home from school. In Knight v. State, 338 So.2d 201 (Fla.1976) at least one of the victims apparently was kidnapped, and both suffered mental strain for hours preceding their killing. The six victims who died in Francois v. State, 407 So.2d 885 (Fla.1981) were all tied, gagged and blindfolded, and were aware of their impending death for a considerable period of time. At least one of them "'for many hours was subjected to the taunts of the conspirators.'" White v. State, 403 So.2d 331,338 (Fla.1981). (White involved the same murders for which Francois was prosecuted.)

The incident at the West Farm Market, in contrast, was over relatively quickly, probably within a matter of minutes. The Wests were not subjected to a drawn-out ordeal.

Nor is there any direct evidence that the Wests suffered great mental anguish during this time. Perhaps, as they knew one of the four men, Benito Torres, they did not believe they would be shot. (Compare with the murders in Francois/White, where the surviving victims testified to the anxiety and fright they suffered, and one victim who was killed cried to God for help.)

It does not appear that the trial court focused upon any "fear and emotional strain that preceded the victims [sic] death" (Brief of Appellee, p.45--emphasis in original) in finding this aggravating circumstance.

D.

The Court Below Erred In Restricting Garcia's Presentation Of Mitigating Evidence And In Failing To Consider The Mitigating Evidence He Was Allowed To Present.

In Hargis v. State, 451 So.2d 551 (Fla.5th DCA 1984) the court reversed the defendant's sentences because the trial court refused to listen to and consider a tape recording his attorney wished to submit in lieu of "live" testimony from the three witnesses who spoke on the tape, and refused even to hear a summary of the proposed evidence. The appellate court found that the lower court's action contravened Rule 3.720 of the Florida Rules of Criminal Procedure.

The action of the lower court in Garcia's case in refusing to allow him an additional sentencing hearing at which to present further mitigating evidence was even a greater affront to the defendant's rights, as Garcia was facing the ultimate penalty.

ISSUE VIII.

THE COURT BELOW ERRED IN GIVING THE PENALTY RECOMMENDATIONS RETURNED BY THE JURY GREATER WEIGHT THAN THAT TO WHICH THEY WERE ENTITLED.

Appellee claims that the following instruction given by the trial court was a correct statement of the law:

> (1)...your [the jury's] recommendation cannot be lightly taken by the judge, and must be given very strong consideration. In fact, the law is that a recommendation of a jury should not be overruled unless there is no reasonable basis for it existing. (Jury instruction, penalty phase, in open court (R2258))

(Brief of Appellee, p.49). But, in fact, this statement was not accurate. Only a life recommendation is entitled to such deference under Tedder v. State, 322 So.2d 908 (Fla.1975)(see Ross v. State, 386 So.2d 1191 (Fla.1980)), and the instruction therefore was misleading to the jury.

Appellee criticizes Garcia at page 49 of its brief for allegedly taking a statement out of context by omitting the words "[o]n these findings" from the following statement of the trial court in his written sentencing order:

> On these findings [regarding aggravating and mitigating circumstances], the Court is in agreement with the jury that the aggravating circumstances outweigh the mitigating circumstances.

(R2927) The three excluded words do not change the substance of the paragraph in any way; that is why Garcia did not include them in the quote contained in his initial brief.

ISSUE X.

ENRIQUE GARCIA'S SENTENCE OF DEATH DENIES HIM EQUAL JUSTICE UNDER THE LAW, AS NONE OF THE OTHER PARTICIPANTS IN THE INCIDENT AT THE FARM MARKET WAS SENTENCED TO DIE.

Appellee asserts, in part, that Garcia was a triggerman (Brief of Appellee, p.55). In other parts of its brief Appellee emphasized the allegedly planned, premeditated nature of the shootings (Brief of Appellee, pp.34, 38, 41-43, 52). Appellee fails to come to grips with the inconsistency between its position that Garcia was a "shooter" in a planned killing and the jury verdicts specifically finding Garcia guilty only of felony murder. While there may have been evidence from which the jury could have inferred premeditation, they were free to, and did, reject this evidence in finding Garcia not to be guilty of premeditated murder. See Fla.Std.Jury Instr. (Crim.) 2.04.

Garcia urges this Court to keep in mind that neither judge nor jury below had the benefit of knowing that the lives of the other three participants, including the planner, Benito Torres, were spared, and that only Ricky Garcia was sentenced to die for the events at the Farm Market.

APPELLEE'S ISSUE (ON CROSS-APPEAL)

WHETHER THE TRIAL COURT ERRED IN DISMISSING COUNT IV OF THE INDICTMENT (ATTEMPTED FIRST DEGREE MURDER) FOR FAILURE TO ALLEGE PREMEDITATION; WHETHER APPELLANT WAIVED OBJECTION TO ANY SUCH FAILURE.
[As stated by Appellee.]

Premeditation is an essential element of murder in the first degree. Driggers v. State, 164 So.2d 200 (Fla.1964). Premeditation is likewise an essential element of attempted first degree murder, the crime the State tried to allege in count IV. of the indictment herein. Fleming v. State, 374 So.2d 954 (Fla. 1979); Deal v. State, 359 So.2d 43 (Fla.2d DCA 1978).

In Catanese v. State, 251 So.2d 572 (Fla.4th DCA 1971) the court found the information to be fatally defective where it failed to charge that it was a "building" which the defendant broke and entered. Significantly, the court noted: "The duty of preparing the information in accordance with law is fully upon the state." 251 So.2d at 574. The Florida Supreme Court similarly has placed the burden upon the State to produce an adequate charging document. In Gibbs v. Mayo, 81 So.2d 739 (Fla.1955) this Court observed that all doubts concerning whether the information brings the defendant within the reach of a particular criminal statute must be resolved in his favor. 81 So.2d at 740.

This is not a case, as the State seems to suggest, where a necessary element of the crime is imperfectly alleged--premeditation is not alleged at all. Where, as here, the charging document wholly fails to allege an essential element of the crime, fundamental error exists. State v. Dye, 346 So.2d 538 (Fla.1977); Brewer v. State, 413 So.2d 1217 (Fla.5th DCA 1982); State v. Fields, 390 So.2d 128 (Fla.4th DCA 1980). In Dye this Court explained:

> An information must allege each of the essential elements of a crime to be valid. 17 Fla.Jur. Indictments Informations §104 (1958). No essential element should be left to inference. [Citations omitted.]

346 So.2d at 541.

The State's apparent argument that the motion to dismiss should not have been granted because Garcia knew of the missing element (through discovery) is unavailing, for the reasons explained in K.M.S. v. State, 402 So.2d 593 (Fla.5th DCA 1981).

The court below properly found count IV. of the indictment to be "defective fatally," and his order dismissing this count should be affirmed.

CONCLUSION

Appellant, Enrique Garcia, renews his prayer for the relief requested in his initial brief. He also asks this Honorable Court to affirm the trial court's order dismissing count IV. of the indictment herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Attorney General's Office, Park Trammell Building, 1313 Tampa Street, 8th Floor, Tampa, Florida 33602 by mail on this 8th day of March, 1985.

Robert F. Moeller

ROBERT F. MOELLER

RFM:js