IN THE SUPREME COURT OF FLORIDA

CASE NO. 64,883

HARRY PHILLIPS,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

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

* *

BRIEF OF APPELLEE

JIM SMITH
Attorney General
Tallahassee, Florida

MICHAEL J. NEIMAND
Assistant Attorney General
Department of Legal Affairs
401 N. W. 2nd Avenue (Suite 820)
Miami, Florida 33128
(305) 377-5441

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INTRODUCTION

The Appellant, Harry Phillips, was the defendant in the trial court. The Appellee, the State of Florida, was the prosecution below. The parties will be referred to as they stood in the lower court. The symbol "R" will be used to designate the record on appeal. The symbol "SR" will be used to designate the supplemental record on appeal. The symbol "T" will be used to designate the trial transcripts. All emphasis has been supplied unless the contrary is indicated.

STATEMENT OF THE CASE

On January 6, 1983, an Indictment was filed against the Defendant charging him on August 31, 1982 with the first degree murder of Bjorn Thomas Svenson. (R.1-1a). The Defendant pled not guilty.

Prior to trial, the State filed pursuant to the Florida Evidence Code, Section 90.404(2)(b)(1), Florida Statutes 1981, a Notice of Intent to Rely on Evidence of Other Crimes, Wrongs or Acts. (SR.35-40). The Notice advised that the State was going to rely on the similar fact that on August 23, 1982, the Defendant fired a handgun into the home of Parole Officers Michael Russell and Nanette Brochin. The

motive for said action was to put an end to the harrassment of these parole officers. This evidence was to be offered as similar fact evidence to prove motive, opportunity, intent, preparation plan, knowledge, identity and the absence of mistake or accident and not to prove bad character or propensity.

Thereafter, Defendant filed a Motion in Limine seeking to preclude the State from eliciting certain testimony (R.131-133). The pertinent portions of the Motion state:

> 5. Any testimony regarding an allegation that Defendant fired shots into the home of another probation officer other than the victim herein; set fire to a probation office, and automobile, in that the State has no witness who can state nor prove that the Defendant committed any of these acts and it is, thus, mere conjecture that Defendant did the above.
>
> Furthermore, such mere conjecture is not relevant evidence and should be cautiously scrutinized by the Court since it only serves the purpose of showing bad character or propensity, and is, therefore, inadmissible, Williams v. State, 110 So.2d 654 (Sup. Ct. Fla. 1959); See also Coler v. State, 418 So.2d 238 (Sup. Ct. Fla. 1982).
>
> (R.132).

A hearing on Defendant's Motion in Limine was held on December 7, 1983. (SR.1). At the conclusion thereof, the trial court granted in part and denied in part the motion. The trial court specifically denied the petition as it related to the shooting into the home of another parole officer. (SR.13).

Shortly thereafter trial commenced. During opening statements, the State specifically advised the jury that this case would be based upon circumstantial evidence and that no one would testify that they saw the Defendant actually shoot the victim. (T.151). Thereafter, trial proceeded in due course. After the state rested, the defense presented a case, although the Defendant did not testify. (T969, 972-1078). The State then presented rebuttal. (T.1073).

During the charge conference, defense counsel requested a special introduction on alibi. The trial court denied the request and instead gave the Standard Jury Instruction on Alibi. (T.1086-1088; R.28). The trial court specifically permitted defense counsel to argue the law on alibi defense during closing argument. (T.1097).

After closing arguments and the charge to the jury, the jury retired to deliberate its verdict. Thereafter, the

jury returned with its verdict and found the Defendant guilty as charged. (R.277; T.1221). The trial court then adjudicated the Defendant guilty. (R.278-279). The jury was then reconvened for the sentencing hearing. Both parties presented evidence and thereafter the jury returned with a recommendation that the death penalty be imposed. (T.1278).

The trial court agreed and concurred with the advisory sentence of the jury and imposed the death penalty. (T.1306-1326). A motion for new trial was made and denied. (R.280-281).

This appeal ensued.

STATEMENT OF THE FACTS

At approximately 9:00 p.m. on August 31, 1982, at the Parole and Probation Building located at 1850 N.W. 183rd Street, Miami, Florida, the victim, Bjorn Thomas Svenson, was shot and killed. (T.276).

Dorothy Albury resides in North Dade County, near the Parole and Probation Building. At approximately 8:30 p.m., on the day in question, she was at home when she heard gunshots. In response thereto, she went out to the street and saw an individual running towards the Parole Building.

She then heard another volley of gunshots and saw the same individual running away home from the Parole Building. All of this occurred between 8:30 and 9:00 p.m. and her scope of vision was unobstructed. (T.194-204).

Linda Sands is Albury's daughter. Her testimony was substantially similar to her mother's testimony. (T.206-213).

Glen Kitchen, resides near the Parole Building. Between 8:40 and 9:00 p.m. that evening, he was sitting in his front yard with his friend, Jerry Ponder, when they heard six or seven shots, a 30-second pause followed by another four or five shots. Ponder left and then returned. They then drove to the Parole Building, where they observed a dead body. The police were summoned. (T.214-223).

Jerry Ponder testified that when he left Kitchen's residence, he drove to where the shots emanated from, between the Parole Building and the adjacent dentist's office. Upon arrival, he saw something lying down so he returned for Kitchen and they both returned to the scene. He also heard two rounds of shots separated by a brief pause. (T.223-232).

Officer Mike Santos, on the date in question, was a uniformed officer for the Metro-Dade Police Department assigned to Carol City. His patrol area included the Parole Building. At exactly 8:38 p.m. that evening, he heard three gunshots. He was sure of the time because when he heard the shots, his partner looked at his watch. A short while later, he was dispatched to the Parole Building in reference to the shots he heard. Upon arrival, Officer Lester Jeffrey was already present and they both observed a deceased person lying in the parking lot. The east door of the Parole Building was open so they checked the building but were unable to locate anyone. (T.234-239).

Officer Carl Barnett works for the Metro-Dade Crime Lab as an investigator. On the night in question, he responded to the scene arriving at approximately 10:20 p.m. Although the Parole Building was not well lit, he was able to see the dead body. Only one car, a Volvo, was in the parking lot, but because of the rain it was not dusted for fingerprints. The victim had white powder on his hands and the trash dumpster was covered with the same powder. Samples from both were taken and were sent to the lab for comparison. (T.244-264).

Officer Lester Jeffrey, a Metro-Dade Police Officer, was the first officer to arrive at the scene. He was in the

area when Kitchen and Ponder advised that there was a body lying in the Parole Building parking lot. Prior thereto, he was not in the vicinity and therefore heard no shots. Two or three minutes later, Officers Santos and Stewart arrived. A perimeter was set up around the building but no one was located. The scene was then preserved. (T.274-281).

Gary Smith, a homicide detective for the Metro-Dade Police Department, arrived at the scene at appoximately 10:00 p.m. and remained until 10 the next morning. He saw old telephone books in the dumpster. He went into the Parole Building and into the victim's office which appeared that the victim had still been working at the time of the incident. He testified that it had rained shortly after his arrival and the rain destroyed part of the crime scene. However, prior thereto, he had taken pictures of the victim's blood stains and they indicated the victim was going in a northeastern direction. He observed the victim's rear pants pocket had been turned inside out and was empty. (T.284-311).

Frances Gator, a Probation Officer, worked with the victim. On the date in question, she worked until after 8:00 p.m. When she left, the victim and Marlene Racker were still working. New telephone books had arrived and the old ones were stacked up near the receptionist's desk. (T.323-325).

Marlene Racker is a Senior Probation Officer whose supervisor was the victim. She worked that night until 8:30 and when she left the victim was alone. Only the victim's car, the Volvo, remained in the parking lot. The gate of the parking lot was open that night. (T.328-330, 334).

Nanette Brochin Russell is presently a Probation Parole Supervisor. In the summer of 1980, she was a Field Probation Officer assigned to the Parole Building located at 1850 N.W. 183rd Street. She was assigned there from April, 1978 to June, 1983. The victim was her supervisor. In 1980, she lived in West Miramar, Broward County, with Mike Russell, a Probation Parole Supervisor, who is presently her husband. (T.336-339). She drove a green Toyota Corolla. (T.365).

The defendant, in June, 1980, was assigned to Brochin's parole supervision. From June through October, defendant caused no trouble for Brochin. Brochin never gave the defendant her home address or home telephone number. (T.343-345).

On November 14, 1980, Brochin was grocery shopping in Broward County. While shopping, she saw the defendant in the supermarket. The defendant approached her and stated

that it was a coincidence that they met in a supermarket. The defendant wanted to talk, but Brochin refused, stating she would see him at their regularly scheduled appointment on the following Monday. The defendant, who lived in Dade County, said he was shopping for his mother. He was insistent in wanting to talk to Brochin so she agreed to speak with him after she finished her shopping. After finishing shopping, Brochin went to her car. The defendant was standing on the driver's side of the car and as Brochin approached, he asked to talk to her in the car. She refused and the defendant then asked for a kiss. Brochin again refused, terminated the conversation, got in her car and drove straight home. (T.345-348).

When she returned home, Mike Russell was waiting outside for her. She told him what had just transpired with the defendant. Pursuant to Russell's advice, an incident report was filed with the Miramar Police Department. They also contacted her supervisor, the victim, and also advised about the contact with the defendant. (T.348-349).

While they were taking the groceries out of her car, they noticed a car turn the corner, turn its lights off and drive past their house. Brochin observed the defendant was

driving the car. The defendant drove by their house a second time, with the car's lights off. (T.349-350).

On the next morning, Brochin, while Russell was not home, received a phone call from the defendant. He stated that the reason he met her at the supermarket was that a woman had offered him money to paralyze Russell. He stated he drove by the house the night before to check out information this woman gave him concerning the description of the house and car, the woman gave him. Brochin told the defendant that she had reported the previous incident to the police and will include this conversation and told him she would see him at his regular appointment on Monday. (T.350-352).

On Monday morning, Brochin told her supervisor, the victim, exactly what transpired with defendant in Broward County. The victim then reassigned the defendant's case to one Gene Brown, another Parole Officer. That concluded Brochen's supervision of defendant. The defendant was informed of this both orally and in writing. (T.353). He was told by the victim to stay from Brochen. (T.371).

Since the defendant's presence in Broward County without permission was a techincal violation of his parole, the victim and Brochin reported the violation to the Parole

Commission. The Parole Commission authorized defendant's arrest for the violations and issued an arrest warrant. The defendant was arrested and was sent to Lake Butler for his formal Parole Revocation Hearing. The hearing was held in March, 1981 and based on Brochin's, Russell's and the victim's testimony, the defendant's parole was revoked. The defendant was present when all three Parole Officers testified against him. (T.354-356).

The next time Brochin saw the defendant was in August, 1982. The defendant had been recently released on parole when he came to the Parole Building, where Brochin was still assigned to, to see her. Brochin, who was not his Parole Officer and had no reason to see defendant, reported this incident to the victim. Brochin asked Mike Manguso, another probation officer, to check if the defendant's car was in the parking lot. She never saw the defendant that day. (T.357-359).

On August 24, 1982, between 7 or 9 days from the previous incident, Brochin and Russell were at home, when someone fired four shots through their front window. The police were called and they recovered projectiles from their house. (T.360).

On August 31, 1982, Brochin was required, first thing

in the morning, to report to the Metro Justice Building. As she entered, the defendant was standing by the elevator. Brochin took the escalator to her fourth floor office. When she arrived the defendant was waiting for her. Brochin asked court personnel for assistance, and reported the incident to building security. She also contacted the victim. The victim came to the courthouse. After Brochin finished her business, she had a meeting with the victim and Russell. She then returned to the Parole Building and left work at 5 p.m. The victim was alive when she left; the next time she saw the victim that day, he was dead. (T.361-365).

Dr. Sigmund Menchel was an Associate Medical Examiner for Dade County on August 31, 1982. And he performed the autopsy on the victim. (T.386). He found eight gunshot wounds in the victim. (T.393). There were two wounds to the victim's flanks and a graze wound on the top of his head. With these wounds, the victim would have been able to run normally from the dumpster where he was found, approximately 100 to 200 feet. The five remaining shots were incapacitating ones, which if inflicted first, would have prevented the victim from running. His findings were consistent with three shots, the victim running and the five additional incapacitating shots. The cause of death was multiple gunshot wounds to the head and trunk. (T.404-422).

Mike Manguso, Parole and Probation Supervisor, was the Custodian of the Defendant's Parole file, which file was kept in the ordinary cause and scope of business. The file documented all of the incidents that occurred between the Defendant, the victim and Brochin. (T.425-433). Manguso also testified than on August 16, 1982, while at the Parole Building, Brochin asked him to see if defendant's car was in the parking lot. Manguso saw the defendant as well as his car that day. When he saw the defendant, he was led away by the victim. The defendant was in the victim's office for one-half hour that day. (T.435, 446). On August 31, 1982, he left work at approximately 6 p.m. When he was leaving, he noticed old telephone books piled up at the back door. He also saw the victim during the day taking these books to the dumpster. The victim was doing this when Manguso left work. (T.438-440).

Mike Russell, a Parole and Probation Supervisor, lived with Brochin in 1980 and is now married to her. His testimony was substantially similar to Brochin's regarding the supermarket incident with the defendant. He identified the defendant as the individual who drove around the house after the supermarket incident. (T.448-451). A month after the supermarket incident, the defendant called Russell from the Broward County Jail and the defendant told him there were no

hard feelings. Russell responded by advising he would see the defendant at his revocation hearing. Russell testified at the revocation hearing. (T.453--454). On August 20, 1982, the defendant came to see Russell, who, after refusing to see the defendant, contacted his supervisor, Deputy Circuit Administrator, Phil Ware. (T.456). Russell also testified as to the August 23, 1982 shooting into his home. (T.458).

Reginald Robinson, a Parole Supervisor, had several meetings with the defendant in August, 1982. In response to Russell's call on August 20, 1982 to Ware, Robinson and the defendant had a conference where the defendant was instructed not to go near the Parole Building, Russell or Brochin. (T.469-472). After being informed on the shooting into Russell's house, Robinson searched, with Defendant's mother's permission, the defendant's home. The Defendant was present and so was the victim. The defendant became agitated when the victim arrived and became belligerent when the victim questioned the defendant's mother. Robinson tried to calm the defendant down but was unsuccessful. (T.473-477). After the courthouse incident of August 31, 1982, Robinson, Rivers, the victim and the defendant had a conference, where the victim once again instructed the defendant to stay away from the Parole Building and his people. (T.480-482). The next time Robinson saw the

defendant was on September 1, 1982, after the victim was killed. At that time, the defendant was questioned as to his whereabouts on the preceding day. The defendant stated that at 5:30 p.m., he picked up his sister at the library and took her home at about 8 p.m., and that he did not leave home again. After the interview, defendant was placed in custody for violating parole. (T.453-486).

Benjamin Rivers is in charge of Probation and Parole Services Operation for Dade County. In November, 1980, he met with the victim and the defendant reference threatening phone calls that defendant had been making. The defendant was told not to leave Dade County for any purposes. (T.490-492). Rivers was present at the August 31, 1982 meeting. The defendant who had a scheduled 9 a.m. appointment in order to be reinstructed about staying away from the Parole Building, showed up on time. The defendant was then reinstructed to stay away from the Parole Building and if he did not follow the instructions, his parole would be violated. The defendant said he was in the Metro Justice Building to see his Attorney, Mr. Woodard. (T.493).

Phillip Ware, Deputy Circuit Administrator for Probation and Parole Services, on August 20, 1982, met with the defendant and instructed him not to go to the Parole Building or leave the County. (T.500-501).

Daniel J. Horgon, Chief of Security at the Metro Justice Building, in response to the August 31, 1982 incident, got the defendant's description, and saw him leaving the building. Horgan stopped him and asked if the defendant was Harry Phillips. After an affirmative reply, they went to Horgan's office, where he asked the defendant if he was following Borchin. The defendant said he was in the building to see Woodard, his attorney and his own probation officer. The defendant left shortly thereafter. (T.512-516).

Vivian Chabrier, worked with the defendant at a Neighbor's Restaurant. On August 25, 1982, the defendant told here he was shooting a gun into a canal. Charbrier, whose father is a police officer, was asked if the police could tell by his hands if he fired a gun. After an affirmative reply, he asked if detergent could remove the evidence. The defendant stated that the police performed such a test on him. (T.603-607).

Steve Alter, a detective for Miramar Police Department, responded to the Russell home after it was shot into. He found two projectile fragments, which were turned over, on September 1, 1982, to the Metro-Dade Police Department. On the night of the shooting incident, Alters spoke with the

defendant at his residence. After advising him of his rights, the defendant was asked to go to the Miramar Police Department to have his hands swabbed to see if he fired a weapon. The test proved inconclusive. (T.520, 525, 532). On cross-examination, in response to the question if he knew who fired into the house, Alters stated that they were able to charge the Defendant in Broward County. The defense moved for a mistrial on the grounds of prejudice, which was denied. (T.531, 805).

James Woodard, a criminal defense attorney, testified that he never represented the defendant, nor did he have an appointment to see him the Metro Justice Building on August 31, 1982. (T.534-535).

Melvin Zahn, a firearms expert for the Metro-Dade Police Department Crime Lab, examined the seven projectiles recovered from the scene of the murder. Six came from either a .38 Special or a 357 Magnum revolver. All six were fired from the same weapon. The seventh was a fragment and could not be determined from which weapon it was fired. He testified that there were five manufacturers of the type of gun that these projectilies came from. He testified that since the gun was a revolver, in order to fire more than six shots the gun had to be reloaded. The color of the gun was silver blue with a four inch barrel. (T.547-561, 566).

Gopinath Rao, a criminalist with the Metro-Dade Police Department Crime Lab, testified that he analyzed the white powder removed from the victim's hands and the dumpster, and found them to be the same substance, rust. (T.572-573). He also testified that the hand swab test for firing a gun would be ineffective if the individual washed his hands or over 13 hours passed since the gun was discharged. (T.682).

William Smith testified that he knew the defendant since 1971. In September, 1982, he was in the Dade County Jail on assault charges and for violating his parole. At that time, he saw the defendant in the Dade County Jail. Smith told the defendant he was in for parole violations, whereupon the defendant stated that he had just killed a parole officer. Smith advised the defendant to get rid of the gun. The defendant said that it was already taken care of because he gave it to a woman. Defendant then said the police cannot do anything without a gun. He killed the parole officer because he was riding him. (T.501-507).

At the time of trial, Tony Smith was serving a one year sentence for violation of probation, burglary and grand theft in the Dade County Jail. In August of 1982, Smith along, with other parolees, met with defendant in a bar. They were speaking about their parole officers when defendant stated that he had two parole officers, a male and a

female, and that they were hassling his mother. The female drove a green Toyota. The defendant tried to kill the female parole officer but he missed. At the meeting, the defendant produced a gun, either a .38 or 357 Magnum, with af 4 1/2 inch barrel and silver blue in color. (T.610-617).

On cross-examination, the defense introduced an affidavit signed by Smith, which was given to defense counsel investigator which stated that Smith expected favors for his testimony. Smith denied writing the affidavit and signed it only after being threatened. The investigator told him it would be best for his safety if he did not testify. (T.637-641).

Larry Hunter was in the Dade County Jail on January 19, 1983 awaiting trial. He first met the defendant in the law library. The defendant told him about his killing the parole officer. He discussed his case with Hunter so that Hunter could develop an alibi for him. The defendant told him that one night he came from the east end of the Parole Building, one car was in the parking lot and that he killed the parole officer by the entrance of the parking lot and then left the same way. Defendant wanted Hunter to testify

that he saw him in a store at a designated time. The defendant wrote out the information and gave the paper to Hunter. Defendant wrote that Hunter saw him on Thursday, August 31, 1982 between 8:25 p.m. and 8:55 p.m., in a crowded Winn Dixie. The defendant had on a white uniform and had chicken and orange juice in his shopping cart. Hunter was not at the Winn Dixie on August 31, 1982. The defendant told him he killed his parole officer for violating his parole. Hunter eventually turned over the alibi paper to the police and it was stipulated that it was written by defendant. (T.650-658, 687). Hunter testified that after he turned over the paper to the police, he was confronted by defendant and signed an affidavit stating he knew nothing about the case. This affidavit was not written by Hunter and was signed only after his family was threatened. He was then transferred, for his safety, to another jail. (T.659-661).

At the time of trial, Malcolm Watson was serving a sentence in the Dade County Jail. In the fall of 1980, he owned a dry cleaning store in Carol City. The defendant came in and wanted to borrow $50, and use a gun as collateral. The defendant said the gun was a silver .38 caliber. He didn't take the gun. The defendant complained that his parole officer was trying to violate him for a technical violation concerning an incident with a female

parole officer. Defendant said he was going to get even. (T.690-694, 702). The next time Watson saw defendant was in September, 1982 in the Dade County Jail. The defendant answered affirmatively that he killed his parole officer, but that the police would have to prove it but they couldn't since he threw the gun away. The defendant told him to forget about the conversation of two years ago. (T.649-694). While still in jail, Watson was a party to a conversation when the defendant said he fired a shot at a parole officer because they were trying to violate his parole concerning an incident with a female parole officer. The defendant volunteered all this information. (T.697-699). After agreeing to become a State witness, the defendant threatened his family if he testified. Watson was transferred to another jail for his safety. At one time Watson, because he was afraid, told inmates he knew nothing about defendant's case. (T.700-701).

Linda Beline, a Homicide Detective for the Metro-Dade Police Department, assisted Detective Smith in the investigation of the victim's murder. At approximately 3.55 a.m. on the morning of September 1, 1982, she reported to the defendant's home to relieve other officers who were watching the residence. At about 6:30 a.m., the defendant and an elderly black woman left the residence. They entered a 1980 green Ford Fairmont, started driving and Beline

followed. The defendant stopped at a residence, parked, and both individuals went into the house. The defendant twice came back to the vehicle, the first to retrieve a small paper bag and brought it into the house. Thereafter, both the defendant and the elderly woman left the house, got into the vehicle and then drove to Neighbors Restaurant. The defendant exited the vehicle and went into a drug store. After he came out, he started towards the Neighbors Restaurant when Beline got out of her car to talk with the defendant. Beline identified herself and asked if he would come with her to the homicide office to talk about a murder that occurred that night. The defendant agreed. The defendant's rights were read and he was advised that they were investigating the victim's murder. He said he knew the victim but that he had an alibi. Defendant said that on August 31, 1982, he left work at 5 p.m. He arrived home at 5:20 p.m. and left at 5:30 p.m. to pick his sister up at the library. Then returned home and at 5:45 p.m. he left to take his sister's children to church. After dropping the children off, he was alone at 6:30 p.m. He then went to a video game room where he stayed until 7:30 or 7:45 p.m. He went directly home and at 7:50 p.m. he went to the Winn Dixie. He purchased chicken, sausage and orange juice. He left the Winn Dixie at 8:15 p.m. He went directly home, arriving between 8:20 and 8:30. Shortly thereafter, he drove his mother to his sister's house to return some

clothes. He returned home for the night with his mother at 9 p.m. Beline attempted to check out Defendant's alibi by talking to defendant's mother. The defendant's mother gave Beline a Winn Dixie cash register receipt from 9:13 p.m., August 31, 1982. She had this receipt analyzed by Nagy, the Winn Dixie Manager. (T.719-741).

Charles Hebding, a sergeant with Metro Dade Police Department, also spoke with defendant at the Homicide Office. The defendant was advised of his rights and agreed to speak. Defendant said he was very fond of Brochin and did in fact kiss her; that Russell was jealous of him and that Russell made her violate his parole. He refused to speak about anything that occurred on August 31, 1982. (T.764-769).

On August 31, 1982, Mark Nagy was store manager at the Winn Dixie the cash register receipt defendant's mother produced came from. He identified the receipt and noticed that it came from a non-speed lane although it contained only six items. He reasoned that, due to the time of night, the store was not crowded. He verified the time as 9:13 p.m. and the day as August 31, 1982. The receipt evidenced a purchase of two quarts of orange juice and some small items of meat. (T.775-791).

William Frawley is currently serving a sentence in the State Prison System. In 1982, while at Lake Butler Correctional Institution, he first met the defendant. He also met and spoke with Detective Smith and Sergeant Hebding. They asked if the defendant was talking about a murder case and Frawley said no. The officers did not tell him to ask defendant questions. Frawley then went back to the cell he was sharing with the defendant. Frawley told the defendant he had been questioned by two detectives. The defendant apologized and told him he was a suspect in a murder case. The defendant then produced a newspaper clipping and told him he murdered the man talked about in the article. Defendant said he "murdered the cracker." No objection was made concerning the use of this phrase. The defendant said he waited for this guy and then shot him a number of times. He said he obtained the gun upon his release from prison in order to kill his parole officer because he unjustly violated his parole. He also said the victim was carrying an object when he shot him. Frawley subseqently advised the two officers of this conversation. He received no favors for testifying. Frawley testified because he didn't like the defendant's bragging about the murder and he felt sorry for the little boy he saw grieving when shown the newspaper article. (T.807-819).

On cross-examination, Frawley admitted that when under pressure, he said that which he previously testified to was untrue. Said he signed the affidavit when 9 to 10 inmates where threatening him, and one Elwood White made him sign. He was then moved to another cell for his own security. The defense investigator tried to persuade him not to testify. (T.828-840, 848).

Gregory Smith, a homicide detective for the Metro-Dade Police Department, was the lead investigator. Upon his arrival on the scene, he canvassed the area and found casings from a .38 special behind the dentist's office in the grassy area. (T.859-865).

The first time he spoke with the defendant was on October 4, 1982 at Lake Butler. They spoke for forty minutes. Defendant was advised of his rights, told the detective he was expecting him and agreed to talk. Smith told him it was his job either to clear the defendant or prove him guilty. Smith knew defendant's previous alibi and defendant didn't add anything to it. At the end of the interview, Defendant asked Smith if, due to the number of shots fired, two people might have been involved. Smith though this was unusual since the number of times the victim was shot had never been released to the public. Other facts never released to the press were that the victim was

carrying an object when he was shot and a casing was found. (T.868-875).

Thereafter, Smith spoke with Frawley. Frawley didn't have any information and Smith specifically told him not to ask any questions. (T.879). Thereafter, Frawley contacted him and made his statement. The information concerning the victim carrying something; the amount of shots fired; the fact that defendant was interviewed the next day and had been released, and that the victim once violated the defendant, was information which could only have been provided by the perpetrator of the murder, the defendant. (T.883).

Smith next spoke with defendant on December 15, 1982, while he was in the Dade County Jail. Smith advised him of his rights and defendant agreed to talk. Defendant said he heard Smith talking to prisoners about him and that this could lead to harm to Smith's family. Smith asked him if the people who were going to harm his family were the same people who supplied him with Russell's address. He refused to answer. They then talked about the incident at the Metro Justice Building. Once again, defendant said he was there to see his attorney, Woodard and that he did not see Brochin that day. He said the last time he saw her was at his revocation hearing in 1980. He then responded to the Parole Office across the street for his meeting with Rivers. The

defendant denied that the victim was present at the meeting. Defendant then inquired if the victim was involved in drug dealing, but once again would not reveal his sources. The last time defendant saw the victim was at his house after the Russell shooting. He said he did not have an argument with the victim that day or ever. The defendant also met with the victim about a week after his release from prison. He stated that it was a friendly conversation and that he never received any specific instructions concerning his parole. He stated there was no animosity between himself and the victim. The time the defendant saw the victim prior thereto was at his revocation hearing. He felt that Brochin and Russell had lied and therefore he did not hold the victim accountable for his revocation. Smith then showed defendant photographs of the people who implicated him. After admitting knowing some of them, he denied telling them he killed his parole officer. (T.855-905).

The next time Smith spoke with defendant was on January 5, 1983, one day after he was indicted for the murder of Svenson. Smith told defendant the indictment was filed against him and advised him of his rights. The defendant agreed to talk. He was angry and asked if any witnesses were presented on his behalf. Smith replied negatively since defendant never provided any. He asked if there were any witnesses against him or if they found the gun.

This information was never released to the public. The defendant then said they had no case because they did not have the gun nor any eyewitnesses. Defendant said it was a circumstantial case and denied killing the victim. The defendant was very excited and said they were lucky to get him when they did or he would have killed everyone in the office. Once again, defendant said there were no witnesses and nobody saw him kill Svenson. (T.905-911).

The State then rested. Defendant's motion for judgment of acquittal was denied and the defense presented its case. (T.969-970).

The defendant's witnesses testified that either the State witnesses got a deal for testifying (T.972-975) or that they had recanted their testimony and were now lying. (T.982-988, 998-1011, 1021-1025).

Ida Phillips Stanley, defendant's sister, testified that defendant picked her up at work at about 6 p.m. They went to their mother's house to pick up her children. Defendant arrived at church around 6:30 p.m. She next saw defendant at 9:30 p.m. at her house. She did not know where the defendant was between 8:30 p.m. and 9:35 p.m. on the date of the incident. (T.1030-1042).

Laura Phillips, the defendant's mother, testified that the defendant left the house at 6:30 to take the children to church. He came home around 7:50 p.m. and went to the store between 8:00 and 8:10 p.m. and he came home for the night at 9:20 p.m. She did not know where he was at 8:40 p.m. (T.1044-1053; 1077).

After the defendant was found guilty of first degree murder, the sentencing hearing then occurred.

At the sentencing hearing, the State presented evidence that at the commission of the instant crime, the defendant was on parole from a life sentence for the crime of armed robbery in Case No. 73-2480B. (T.1237; R.233-251). Evidence was also presented that defendant was previously convicted of the felony of assault with intent to commit first degree murder in Case Number 62-6140C. (T.1237; R.252-268).

The defense called the defendant's mother who testified that her son is 38 years old and resided with her. The defendant helped support her when he was on parole. (T.1244-1245).

Then the jury returned to deliberate its sentencing verdict. After due deliberation, the jury returned with a verdict recommending that the death penalty be imposed. (T.1278).

In accordance with the jury's recommendation, the trial court imposed the death penalty. (T.1325). In so doing, the trial court found no mitigating circumstances and four aggravating circumstances. The aggravating circumstances were that the murder was committed while defendant was under the sentence of imprisonment; that the defendant was previously convicted of another felony involving the use of, or threat of violence to the person; that the murder was especially heinous, atrocious or cruel, and that the homicide was committed in a cold, calculated and pemeditated manner without any pretense or moral or legal justification. (R.329-341.)

POINTS INVOLVED ON APPEAL

I

WHETHER THE TRIAL COURT ERRED IN ALLOWING THE STATE TO ELICIT TESTIMONY CONCERNING COLLATERAL CRIMES EVIDENCE WHERE THE DEFENDANT'S MOTION IN LIMINE WAS DENIED AND THE DEFENDANT FAILED TO OBJECT TO THE INTRODUCTION OF THE EVIDENCE AT TRIAL.

II

WHETHER THE ALLEGED PREJUDICIAL COMMENTS ELICITED BY THE STATE WERE PRESERVED FOR REVIEW.

III

WHETHER THE TRIAL COURT ERRED IN GIVING THE STANDARD JURY INSTRUCTION ON ALIBI WHERE THE DEFENDANT REQUESTED A SPECIAL INSTRUCTION ON ALIBI.

IV

WHETHER THE TRIAL COURT IMPROPERLY FOUND THE KILLING TO HAVE BEEN ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL.

V

WHETHER THE TRIAL COURT IMPROPERLY FOUND THE HOMICIDE TO HAVE BEEN COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER.

ARGUMENT

I

THE TRIAL COURT DID NOT ERR IN ALLOWING THE STATE TO ELICIT TESTIMONY CONCERNING COLLATERAL CRIMES WHERE THE DEFENDANT'S MOTION IN LIMINE WAS DENIED AND THE DEFENDANT FAILED TO OBJECT TO THE INTRODUCTION OF THE EVIDENCE AT TRIAL.

The defendant filed a Motion in Limine seeking to prevent testimony concerning, among other things, the firing of shots by the Defendant into the home of Nanette Brochin and Mike Russell. (R.132). A pretrial hearing on said motion was held and the trial court denied this part of the motion in limine. (SR.13). The reason therefor was that this evidence was relevant to prove motive inasmuch as the defendant gave all his parole officers who tried to supervise him a hard time and that he tried to kill them for their effort. (SR.13).

During trial, in accordance with the trial court's ruling that said evidence was admissible, the same was elicited by the State through the various witnesses. Not once was an objection made at trial when the testimony was adduced. (T.162, 360, 457).

The defendant now claims that this testimony was

prejudicial since it only showed defendant's propensity to commit crimes. The State submits that regardless of the merits of this contention, it has not been properly preserved for appellate review. Herzog v. State, 439 So.2d 1372 (Fla. 1983)(Failure to object to testimony concerning previous incidents between the defendant and the victim was a waiver of the issue concerning its relevancy on appeal).

In German v. State, 379 So.2d 1013 (Fla. 4th DCA 1980), the defendant filed a pretrial motion in limine in an attempt to suppress certain collateral crimes evident. The trial court denied the motion and defendant did not object to the admission of this testimony at the time of its introduction at trial. The Court held that his failure to object when the collateral crimes testimony was admitted, was a failure to preserve the issue for appellate review. Accord: Crespo v. State, 379 So.2d 191 (Fla. 4th DCA 1980); Jones v. State, 360 So.2d 1293 (Fla. 3d DCA 1978).

Assuming arguendo that the proper objection was made, the evidence of the shooting into Brochin's and Russell's home was relevant to prove motive, common scheme, intent and absence of mistake or accident. See §90.404(2)(a) Florida Statutes 1719; Herzog v. State, supra. See also Griffin v. State, 124 So.2d 38 (Fla. 1st DCA 1960)

(Evidence of collateral crimes admissible to show common scheme to convert others property to their own use).

In the case _sub judice_, the collateral crimes evidence was admissible since it showed motive and a common scheme by defendant to eliminate all of his Parole Officers. (T.909).

Although defense objected to Detective Alters comment concerning the defendant's being charged with the shooting incident in Broward County, he cannot now complain since said comment was in response to defendant's question of who fired the shots into the house. (T.529). Finally, even if said comment was improper evidence of collateral crimes, the State submits it was harmless in face of the overwhelming evidence of guilt including the testimony that defendant had admitted shooting into the house. (T.613, 692). _See Holland v. State_, 432 So.2d 60 (Fla. 1st DCA 1983)(Erroneous admission of collateral crimes evidence harmless where there was clear and convincing evidence that defendant was the perpetrator).

II

THE ALLEGED PREJUDICIAL COMMENTS ELICITED BY THE STATE WERE NOT PRESERVED FOR REVIEW.

The defendant contends that the following testimony of Frawley was elicited by the State solely to inflame the jury:

> Q:[Prosecutor]: Did he [Appellant] tell you anything about the crime itself?
>
> A:[Witness]: Yes sir.
>
> Q: Please tell us what he told you.
>
> A: He said that he actually murdered the man.
>
> Q: What words did he specifically use?
>
> A: He said that he actually murdered the cracker.
>
> Q: Murdered the cracker?
>
> A: Yes, sir.
>
> Q: What does that word mean?
>
> A: Well, it's like a derrogatory term, like say if I was a racist and a white called me a niggerr. It's the same thing.
>
> Q: So, he said: I murdered the cracker?
>
> A: Yes, sir.
>
> (T.812-813).

He also alleges that the following testimony of Frawley was elicited solely to evoke sympathy for the victim and his family:

> Q: What else did Mr. Phillips tell you?
>
> A: Well, during--at that point he produced a news article from out of a folder that he have.
>
> Q: Where did he have this newspaper article?
>
> A: In a manila folder.
>
> Q: Was the manilla folder anywhere special?
>
> A: No, it just a folder.
>
> Q: And, did he show you that article?
>
> A: Yes, sir.
>
> Q: What did it say or what did you see on it?
>
> A: Well, it was a picture of a lady and a little boy --
>
> Q: A lady and boy?
>
> A: -- departing a funeral.
>
> Q: Departing a funeral?
>
> A: Right, sir.
>
> (T.811-812).

* * *

> ...And, besides that, I was sort of like sorry--I was real sorry for the little kid, the grieving little boy I seen in the news article.
>
> (T.819).

Regardless of whether this testimony was prejudicial, the defendant failed to object to this testimony at trial and therefore he may not raise the issue on appeal. Clark v. State, 363 So.2d 331 (Fla. 1978); Castor v. State, 365 So.2d 201 (Fla. 1978).

Assuming arguendo that this point has been preserved for appellate review, the State submits that no error occurred in permitting said testimony since its relevancy far outweighed any prejudicial impact. Tafero v. State, 403 So.2d 358 (Fla. 1981), cert. denied, 102 S.Ct. 1492, rehearing denied, 102 S.Ct. 200.

The testimony of Frawley that defendant told him that he murdered the cracker was relevant to discredit defendant's attempted alibi and was not prejudicial since it corroborated the testimony of William Smith (T.581-587), Larry Hunter (T.650-655) and Malcolm Watson (T.694-696), who all stated that defendant told them he murdered the victim. See Anderson v. State, 241 So.2d 390 (Fla. 1970)(Testimony

by defendant on day after rape that "I made the whore crawl in the back seat and she was saying 'please'," was relevant to discredit alibi that defendant was somewhere else at night of rape).

The testimony concerning the newspaper article was also relevant to discredit the alibi said testimony also explained the context of the incriminating admission which showed the defendant admitted killing the victim. Waterhouse v. State, 429 So.2d 301 (Fla. 1983).

The final testimony complained of has been taken out of context by defendant. Since Frawley was serving a prison sentence, he was asked why he was testifying since the defense was attempting to show that all of the prisoner witnesses were benefiting by their testimony. The fact of the witnesses self-interest is a proper matter to be brought out by the State on direct examination. See Jacobson v. State, 375 So.2d 1133 (Fla. 3d DCA 1979).

III

THE TRIAL COURT DID NOT ERR IN GIVING THE STANDARD JURY INSTRUCTION ON ALIBI WHERE THE DEFENDANT REQUESTED A SPECIAL INSTRUCTION ON ALIBI.

At the charge conference, defense counsel requested a special instruction on alibi. The trial court denied the request and gave the Standard Jury instruction on alibi. (T.1085-1086). The instruction given was Florida Standard Jurys Instruction (Revised) 3.04 which states:

> An issue in this case is whether the defendant was present when the crime allegedly was committed.
>
> If you have a reasonable doubt that the defendant was present at the scene of the alleged crime, it is your duty to find the defendant not guilty.
>
> (R.28).

The defendant contended that since all instructions talked about reasonable doubt in terms of beyond the exclusion of every reasonable doubt, the standard jury instruction might be interpreted to mean that the alibi had to be proven beyond the exclusion of every reasonable doubt. (T.1085). The trial court in denying this request, permitted defense counsel to argue this point during closing argument. (T.1097).

The defendant now claims that the trial court erred in failing to give the old alibi instruction based on the possibility of confusion on the issue of reasonable doubt. The State submits that the trial court did not abuse its discretion and therefore no error occurred.

In Williams v. State, 437 So.2d 137 (Fla. 1983), this Court was presented with the issue as it pertained to the "old" circumstantial evidence instruction. This Court found that the old instruction could be given if the trial court, in its discretion, felt it was necessary under the facts of the case. However, this Court held that the trial court's, in its discretion, refusal to give the old instruction would not be disturbed unless palpable abuse of this discretion is clearly shown from the record. This Court then found the trial court's action was not abusive of his discretion.

In Lacy v. State, 387 So.2d 561 (Fla. 4th DCA 1980), the Court held that where Standard Jury instructions are involved, a clear showing that the rights of the accused were meaningfully prejudiced by the instruction must be made. In finding the accused failed to meet the burden to show that the standard jury instruction on excusable homicide prejudiced him, the Court looked at the weakness of the testimony concerning said defense.

In the case sub judice, the trial court did not abuse its discretion in only giving the standard jury instruction on alibi. This is clear in light of the fact that defense counsel was permitted to argue the law on alibi during closing argument. Further, as the record reflects, defendant's alibi was almost non-existent. Although his defense was that he did not commit the murder, none of his witnesses were able to account for his presence at the time the incident occurred. (T.1042, 1077). The defendant's reliance on the fact that the evidence was circumstantial is unconvincing since the evidence was sufficiently strong to exclude every reasonable hypothesis of innocence. McArthur v. State, 351 So.2d 972 (Fla. 1977).

IV

THE TRIAL COURT PROPERLY FOUND THE KILLING TO HAVE BEEN ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL.

The trial court found the aggravating factor of heinous, atrocious and cruel conduct beyond and to the exclusion of any reasonable doubt. (R.334). The established standard for such a finding is set out in this court's opinion in State v. Dixon, 283 So.2d 1, 9 (Fla. 1973), cert. den., 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974):

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

In Jennings v. State, 9 FLW 297 (Fla. July 12, 1984), this Court affirmed the proposition, "that the mindset or mental anguish of the victim is an important factor in determining

whether the aggravating circumstance of heinous, atrocious and cruel applies.

The record in the case sub judice, as the trial court's order reflects (R.334), amply supports the imposition of this factor. The victim was stalked by the defendant while leaving work. The defendant shot the victim three times but did not disable him. The victim ran 100 to 200 yards before he was finally killed. (T.393-415). This suspected agony over the prospect of imminent death is sufficient for the imposition of this factor. Routly v. State, 440 So.2d 1257 (Fla. 1983); Francois v. State, 407 So.2d 885 (Fla. 1981); White v. State, 403 So.2d 331 (Fla. 1981); Sullivan v. State, 303 So.2d 632 (Fla. 1974).

This factor is further supported by the defendant's waiting for the victim and compounded by his previous harrassment. See Harrison v. State, 414 So.2d 1032 (Fla. 1982), cert. denied, 103 S.Ct. 764, rehearing denied, 103 S.Ct. 1264.

The defendant's reliance on Lewis v. State, 377 So.2d 640 (Fla. 1979) is misplaced inasmuch as in Lewis, the second round of shots occurred during flight. In the instant case, the victim's flight had stopped and he was on the ground while the defendant fired the second round of shots.

V

THE TRIAL COURT PROPERLY FOUND THE HOMICIDE TO HAVE BEEN COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER.

This court has limited the application of the aggravating circumstance set out in §921.141(5)(i), finding it is not inclusive in every premeditated killing, McCray v. State, 416 So.2d 804 (Fla. 1981); Combs v. State, 403 So.2d 418 (Fla. 1981), cert. den., 456 U.S. 984 (1982). As pointed out in the Herring v. State, 446 So.2d 1049 (Fla. 1984), the factor has traditionally been applied to those murders which are characterized as execution, contract or witness-elimination killings. Factors supporting this aggravating factor are present before the time of the killing. Hill v. State, 422 So.2d 816 (Fla. 1982).

In the case sub judice, the defendant waited for the victim to leave work, confronted him in the parking lot, and shot him three times. The wounds were not disabling, and the victim was able to run approximately 100-200 yards, when the defendant caught up with him and shot him another five times. (T.393-415). In order for all shots to be fired, the defendant had to take the time to reload his revolver. (T.559).

The evidence also revealed that the defendant, who was on parole, did not want to return to prison. Therefore, in order to avoid his parole being violated, he planned to kill his parole officer. (T.611-613).

These facts were found by the trial court to be sufficient to impose this heightened degree of premeditation. (R.335). The State submits that aggravating factor was properly imposed since the defendant had enough time to think about his actions and chose to kill the victim. These facts clearly show an "execution" type murder. Herring v. State, supra (Defendant first shot victim and then shot him a second time after clerk had fallen to the floor were sufficient facts to show the heightened premeditation required for this aggravating factor); Squires v. State, ___So.2d___ (Fla. 1984)[9 FLW 98-99](After initally wounding his victim, defendant placed a pistol to victim's head and fired four shots); Middleton v. State, 426 So.2d 548, 552-552 (Fla. 1983)(Defendant sat with a shotgun in his hands thinking about killing his victim for over one hour prior to murder); Smith v. State, 424 So.2d 726, 728, 732-733 (Fla. 1983), cert. den., ___U.S.___, 103 S.Ct. 3129 (1983)(victim removed to remote area and shot three times in back of head); Hill v. State, supra, (Defendant announced his plan to rape and murder victim substantially before the time he met her for a social date); and Combs v. State, 403 So.2d 418, 420-421

(Fla. 1981), <u>cert. den.</u>, 456 U.S. 984 (1982)(premeditated murder without legal or moral justification as evidenced by defendant's preconceived plan to lure victims to remote area, rob and kill them).

Furthermore, the jury convicted the defendant of first degree premeditated murder, and he has raised no objection to the sufficiency of the evidence, albeit circumstantial, to support the verdict. Therefore, this Court must accept the evidence of premeditation, and must uphold this aggravating factor since the record is devoid of any reasonable hypothesis inconsistent with the heightened premeditation required. <u>Eutzy v. State</u>, 9 FLW 397 (Fla. Sept. 20, 1984).

The defendant has not challenged the validity of the remaining aggravating factor; that the murder was committed while he was under a sentence of imprisonment and that he was previously convicted of another capital felony or of a felony involving the use of, or threat of violence to the person. The State submits that there is sufficient evidence to support these factors.

Evidence was presented that defendant was on parole, via certified copies of the appropriate documents, as well as fingerprints and photograph of the individual on parole. They matched defendant. (T.1237, 1268; R.233-251).

Therefore, this aggravating factor was properly applied. See Williams v. State, supra; White v. State, supra; Aldridge v. State, 351 So.2d 942 (Fla. 1977), cert. denied, 99 S.Ct. 220 (1978).

Evidence via certified copies of judgment and sentence was presented to establish that the defendant was convicted of assault with the intent to commit first degree murder with a firearm. (T.1237; R.252-268). This evidence met the required standard. Lewis v. State, 398 So.2d 432 (Fla. 1981). Harvard v. State, supra

The State submits that all four of the aggravating factors imposed were proper and therefore the sentenced death should be upheld. Dixon v. State. This is especially true where no mitigating factors have been found to exist. Jones v. State, 411 So.2d 165 (Fla. 1982).

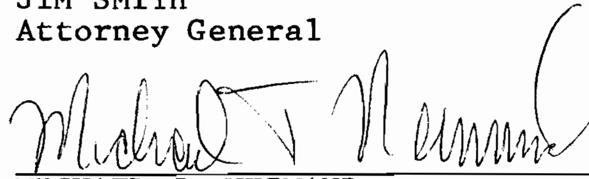
However, if this Court vacates either one or both of the challenged aggravating factors, the State submits the two remaining unchallenged and properly supported factors are sufficient to uphold the sentence of death. Gorham v. State, 9 FLW 310 (Fla. July 19, 1984); King v. State, 436 So.2d 50 (Fla. 1983); Ferguson v. State, 417 So.2d 639 (Fla. 1982).

CONCLUSION

Based on the foregoing points and citations of authority, the State respectfully submits that the judgment and sentence of the lower court should clearly be affirmed.

Respectfully submitted,

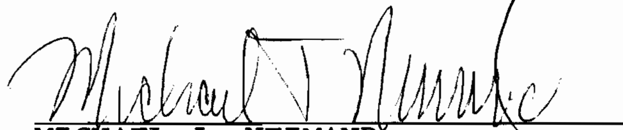
JIM SMITH
Attorney General



MICHAEL J. NEIMAND
Assistant Attorney General
Department of Legal Affairs
401 N.W. 2nd Avenue, Suite 820
Miami, Florida 33128
(305) 377-5441

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF APPELLEE was furnished by mail to ERIC W. HENDON, Attorney for Appellant, 8011 N.W. 22nd Avenue, Miami, Florida 33147, on this 18th day of October, 1984.



MICHAEL J. NEIMAND
Assistant Attorney General

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