IN THE SUPREME COURT OF FLORIDA

CASE NO. 68,690

MORRIS BROWN,

Appellant,

vs.

THE STATE OF FLORIDA

Appellee.

ON DIRECT APPEAL FROM THE CIRCUIT COURT, FOURTEENTH JUDICIAL CIRCUIT, IN AND FOR JACKSON COUNTY

BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

RICHARD E. DORAN
ASSISTANT ATTORNEY GENERAL

THE DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(904) 488-0600

COUNSEL FOR APPELLEE

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INTRODUCTION

Appellant, Morris Brown, was the defendant in the trial court. Appellee, the State of Florida, was the prosecution. The parties shall be referred to in these terms. The symbol "R" designates the record on appeal, including the trial transcript. Appropriate volume and page reference will follow. An appendix, containing the trial court's open-court pronouncement of a death sentence, is attached to this brief and is designated by the symbol "A".

All emphasis is added unless otherwise noted.

STATEMENT OF THE FACTS

Appellee finds appellant's statement basically adequate. When necessary, additional facts are set forth in the argument portion of this brief.

POINTS ON APPEAL

I. THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION TO RECUSE PREDICATED ON LACK OF EXPERIENCE IN CAPITAL CASES.

II. THE TRIAL COURT DID NOT ERR BY FAILING TO GRANT A SECOND CHANGE OF VENUE SUA SPONTE BECAUSE IT HAD NO AUTHORITY TO DO SO AND THE VENIRE FROM WHICH THE JURORS WERE SELECTED CONSTITUTED A FAIR CROSS SECTION OF THE COMMUNITY.

III. THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN OVERRIDING THE JURY RECOMMENDATION OF LIFE IMPRISONMENT AND IMPOSING A SENTENCE OF DEATH AS THE RECORD BELOW REFLECTS VIRTUALLY NO REASONABLE PERSON COULD HAVE VOTED AGAINST THE IMPOSITION OF THE HARSHER PENALTY.

IV. THE TRIAL COURT CORRECTLY FOUND THIS MURDER WAS ACCOMPLISHED IN AN ESPCECIALLY HEINOUS, ATROCIOUS AND CRUEL MANNER.

V. NOTHING IN THIS RECORD SUGGESTS THIS COURT SHOULD OVERTURN THIS CONVICTION AND SENTENCE AND ORDER A NEW TRIAL.

SUMMARY OF ARGUMENT

Appellant raises five issues on appeal. Only issue three (Jury override) merits serious consideration from this Court.

Issue one (Recusal) is meritless given the prior experience of Judge Edwards. Issue two (Change of venue) was waived by lack of adherence to the criminal rules. It is also meritless given this Court's prior ruling Collins v. State, 60 So. 785 (Fla. 1913). Issue four (Finding on aggravating factor of heinous, atrocious and cruel) is disposed of by the facts in the record and a long line of prior decisions from this Court, including Hargrave v. State, 366 So.2d 1 (Fla. 1978). Issue five is an assortment of waived complaints, non-issues and matters cognizable by collateral attack. None of the subpoints merits relief.

What remains for review is issue three. This is a jury override case wherein an immature young man with a long and violent criminal past murdered a police officer by shooting him twice in the head. Appellee contends that defense counsel seriously misled the jury on a number of critical elements in sentencing and that like Francis v. State, 473 So.2d 672 (Fla. 1985) this was a case of unreasonable jury action, unsupported by any indication of valid mitigation.

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION TO RECUSE PREDICATED ON LACK OF EXPERIENCES IN CAPITAL CASES.

Trial Judge Warren Edwards was an experienced jurist who had served on the Criminal Court of Record and the County Court of Orange County. The controlling rule of law is set forth in White v. State, 446 So.2d 1031, 1034 (Fla. 1984):

> A county judge who is qualified to serve as a Circuit Judge may be assigned as a temporary Circuit Judge to perform any judicial service a Circuit Judge can perform. (Case citations omitted).

Judge Edwards was subject to emergency appointment under Rule 2.050(b)(4), Florida Rules of Judicial Administration. (R. 416). He was also appointed by the Governor to fill a vacancy created by death. (Appendix to Appellant's initial brief). Pursuant to Article V, Section 8, of the Florida Constitution, Judge Edwards qualified to serve as a Circuit Judge and neither this Court nor the Governor erred in directing him to handle this case.

Appellant contends that Judge Edwards lacked the "broad and extensive experience in criminal sentencing" to impose an appropriate sentence. (Brief of Appellant, page 13). This is not an appropriate basis for recusal. Dragovich v. State, 492 So.2d 350, 352-53 (Fla. 1986). Judge Edwards was experienced in the

criminal law as a lawyer and a judge. That this was his first capital case under the new statute is not a reasoning basis for recusal. Indeed, one need only look to his oral pronouncement of sentence (A. 1), to see what a thorough and accurate job he accomplished. If he made a mistake in interpreting the law this Court can correct it and uphold the principles set forth in State v. Dixon, 283 So.2d 1 (Fla. 1973).

II. THE TRIAL COURT DID NOT ERR BY FAILING TO GRANT A SECOND CHANGE OF VENUE SUA SPONTE BECAUSE IT HAD NO AUTHORITY TO DO SO AND THE VENIRE FROM WHICH THE JURORS WERE SELECTED CONSTITUTED A FAIR CROSS SECTION OF THE COMMUNITY.

Brown alleges that the trial judge erred by failing to grant a second change of venue sua sponte, because the venire from which his jurors were selected allegedly did not constitute a representative cross section of the community where he committed his crimes.

Appellee submits that this claim is unpreserved for appellate review and is uncompelling on the merits.

Fla.R.Crim.P. 3.240(b) states:

> Every motion for change of venue shall be in writing and be accompained by:
>
> (1) Affidavits of movant and two or more other persons setting forth facts upon which the matter is based; and
>
> (2) A certificate by movant counsel that the motion is made in good faith.

A search of the record reveals that no such motion was filed by Brown pursuant to the above rule. The record does show that co-defendant Cotton filed a motion for a change of venue from Jackson County and that in light of pre-trial publicity, said motion was granted. (R 72). A perusal of that motion clearly shows that it lacked any facts or reasons suggesting that Cotton's trial be moved to any specific county, let alone a county where the ratio of blacks and whites mirrored Jackson County. On this record the State submits that Brown has waived the issue.

Brown's failure to file a second change of venue motion rendered the trial judge powerless to change venue again, so he could not have erred by failing to do so.

In Stone v. State, 378 So.2d 765 (Fla. 1979), cert. denied, 449 U.S. 986, 101 S.Ct. 407, 66 L.Ed.2d 250 (1980), the defendant was on trial for first degree murder and failed to file a motion for a change of venue. This court held that the defendant's failure to file the motion precluded appellate review of his claim that the trial judge should have granted a change of venue sua sponte. Accordingly, as Brown failed to file a motion for change of venue, there is nothing concerning this issue to be decided on appeal.

Furthermore, when a defendant applies for a change of venue and it is granted, it may properly be said that the defendant has

waived the right and "no question can arise in reference to it." See Hewitt v. State, 30 So. 795 (Fla. 1901).

Assuming arguendo, that Brown had filed a second change of venue motion, the State submits that the trial judge was not obligated to grant said motion. Collins v. State, 60 So. 785 (Fla. 1913). In Collins, the defendant was charged with first degree murder and was granted a change of venue. This Court held that it was not error to refuse an application for a subsequent change of venue, where it appeared that a fair trial could be had and where a fair trial was had resulting in defendant's conviction. As no evidence exists that appellant did not obtain a fair trial, appellant's argument fails.

Brown's argument that his jury did not comprise a fair cross section of the community is likewise without merit. In Carwise v. State, 454 So.2d 707 (Fla. 1st DCA 1984) the Court remarked:

> . . . every jury need not actually contain representatives of all economic, social, religious, racial, political and geographic groups within the community.

And:

> Rather, the constitutional requirement that a jury be comprised of a fair cross section of the community is met when the selection process for summoning jurors for empaneling occurs randomly. State v. Silva, 259 So.2d 153, 163 (Fla. 1972).

The State submits that the jury, in any given case, need not totally reflect the composition of the community, so long as it is fairly selected. Grech v. Wainwright, 492 F.2d 747, 749 (5th Cir. 1974):

> It is axiomatic that a litigant is entitled not to a jury which mirors the composition of racial, ethnic and religious groups int he community wherein he resides but rather merely a jury which is fairly selected. Alexander v. Louisiana, 405 U.S. 625, 628-629, 92 S.Ct. 1221, 1224-1225, 31 L.Ed.2d 536, 540-541 (1971); Akins v. Texas, 325 U.S. 398, 403, 65 S.Ct. 1276, 89 L.Ed. 1692 (1945). U.S. v. De Alba-Conrado, 481 F.2d 1266, 1270 (5th Cir. 1973).

The concept of a fair cross section of the community for jury selection purpose does not require that jury panel mirror the community. United States v. Briggs, 366 F.Supp. 1356 (N.D. Fla. 1973).

Brown's failure to show: (1) a lack of randomness in his juror summoning process, either in terms of the source of the jurors from which the selections were made, or in the selection process itself, and (2) that his jury was not fairly selected; defeats his argument.

The State contends that as appellant did not and could not allege that any particular juror selected to hear the case evidenced any sign of actual prejudice against him and as there is no evidence of any abuse of discretion by the trial judge, or

that a qualified jury was not selected to try the case, Brown's argument fails. The trial court's judgment and sentence should be affirmed. Smith v. Phillips, 455 U.S. 209 (1982); Lusk v. State, 446 So.2d 1038 (Fla.), cert. denied, ___ U.S. ___, 105 S.Ct. 229, 83 L.Ed.2d 158 (1984).

III. THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN OVERRIDING THE JURY RECOMMENDATION OF LIFE IMPRISONMENT AND IMPOSING A SENTENCE OF DEATH AS THE RECORD BELOW REFLECTS VIRTUALLY NO REASONABLE PERSON COULD HAVE VOTED AGAINST THE IMPOSITION OF THE HARSHER PENALTY.

It is axiomatic that a jury's recommendation of life imprisonment (without the possibility of parole for a minimum of twenty five years) cannot be properly set aside by a trial judge if the jury has received some valid mitigating evidence upon which a reasonable person could rely in rejecting the death penalty. Ferry v. State, 12 F.L.W. 215 (Fla. May 8, 1987). ("When there are valid mitigating factors discernable from the record upon which the jury could have based its recommendation an override may not be warranted").

The qualifier to this rule is that the trial court is statutorily bound to weigh the evidence in order to discern whether death is the appropriate penalty. Stevens v. State, 419 So.2d 1058 (Fla. 1982). As recently as Craig v. State, 12 F.L.W. 269 (Fla. May 29, 1987) this Court approved a jury override given an inadequate record, that is, one lacking valid mitigating evidence sufficient to spare the life of the convicted killer. See also Francis v. State, 473 So.2d 672 (Fla. 1985).

Prior to delving into an analysis of the case, appellee would request that this Court examine the trial judge's oral

pronouncement of the death sentence. (R. 6744-60), (A. 1). Appellee directs the reader's attention to the trial judge's acknowledgement of Tedder v. State, 322 So.2d 908 (Fla. 1975), his understanding of its impact on his sentencing function, and his acknowledgement and application of Stevens v. State, supra, as an appropriate exception to Tedder in this case. This request is made to counter Brown's allegation that the trial court "ignored this recommendation." (Brief of Appellant p. 13).

Appellee stresses the trial court's pronouncement because of that order's impact in this court as far as a review of what is or is not a "valid mitigating factor discernable from the record". Stevens, supra. In this regard former Justice England, the author of Tedder, stated in a later concurring opinion, "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." Chambers v. State, 339 So.2d 204, 208 (Fla. 1976) (England J., concurring). Reference first to the trial judge's order and then to the record of the sentencing phase of the trial, including defense counsel's argument, should convince this Court of the propriety of the override.

Consider first the basic facts of the crime. Appellant Brown, a convicted violent felon, robs a mini-market and shoots at a patron who luckily avoids harm. Brown (still armed with a firearm) and his cohort flee the scene. They are stopped by

Officer Bevis and arrested. Brown jumps the officer, takes his weapon, shoots and paralyzes him. As Bevis lies helpless on the ground, Brown fires point-blank in the head of his helpless victim.[1] While the jury made no specific finding of premeditated intent, the trial judge did:

> From this testimony, it is clear that Morris Lavon Brown, after having shot James Bevis in the arm, and knocking him to the ground, stood over him and pointed his service revolver at him. The court can barely conceive the agony that James Bevis was going through at this point.
>
> * * *
>
> While the victim was begging for his life the defendant Brown shot him twice in the head.
>
> (R. 6756-57).

Consider next the testimony presented by the appellant during the sentencing phase. First, his mother was placed on the stand in hope of elicting jury sympathy by describing her love for her son and their family's welfare existence. This type of "evidence" is not valid mitigation. Emotion and sympathy were flatly rejected by this court in Francis, supra. Likewise,

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[1] The State charged Brown, by indictment, with first degree murder in the alternative, (premeditated and/or felony murder). (R 4814). However, the State's theory of the case, presentation of evidence and closing argument was that the killing was premeditated. (R. 4827, 4865, 4866, 4871, 5211, 5593-97, 5898-5921, 6426-28).

poverty (or other economic status), standing alone, is not valid mitigation. Cf. Jackson v. State, 498 So.2d 406, 412-13 (Fla. 1987) (Appellant's sex standing alone has no impact on mitigation of crime); State v. Dixon, 283 So.2d 1 (Fla 1973) (neither race nor sex valid mitigation).

Following Brown's mother, the defense put Dr. Davidson, a psychologist, on the stand to attempt a showing of mitigation based on personal problems of the appellant. (R. 6536). Appellee contends that Dr. Davidson failed to offer the jury any evidence of mitigation justifying a life recommendation. Indeed, the opinions offered by Dr. Davidson favor the appellee. The record reflects the following opinions of Dr. Davidson:

1. Brown is not brain damaged. (R. 6547, 6583).

2. Brown lacks personal discipline and regards other people as a threat. (R. 6551, 6556).

3. Brown has a cronicly sour view of life. (R. 6559).

4. Brown was never a problem if treated with the appropriate degree of respect. But if ordered to do something he rebeled. (R. 6563).

5. Brown first came to the county guidence clinic as a boy for fighting. Brown is the type of person who will resort to the use of guns and knives to solve his problems. (R. 6588).

6. Brown is not retarded and can function at a fairly high level of everyday life. (R. 6581).

If Dr. Davidson did have any opinion that might be mitigating it would have been his view of Brown's emotional immaturity, poor impulse control and inability to act under stress. (R. 6549, 6561, 6564, 6568). The problem with giving any credence to the opinion is that Dr. Davidson came to it by viewing this crime as bad accident, devoid of premeditation. (R. 6564, 6568, 6572, 6576). The doctor stated told the jury:

> This distinction I'm trying to make if I can is that in my opinion there was a lack of the element of premeditation to, you know, intentinally, willfully and with a clear mind take the life of Sgt. Bevis. (R. 6577).

Had the jury relied on this opinion testimony their recommendation would have been based on the notion that Brown was only "a little bit guilty", something this court condemned in 1982. Burr v. State, 466 So.2d 1051, 1054 (Fla. 1985):

> Appellant claims that reasonable people could differ as to the appropriate punishment because Ms. William's recantation created some doubt, albiet not a reasonable doubt, tha appellant had committed the murder. However, a "convicted defendant cannot be 'a little bit guilty'. It is unreasonable for a

> jury to say in one breath tha a defendant's guilt has been proved beyond a reasonable doubt and, in this next breath, to say someone else may have done it, so we recommend mercy." Buford v. State, 403 So.2d 943, 953 (Fla. 1981) cert. denied, 454 U.S. 1163, 102 S.Ct. 1037, 71 L.Ed.2d 319 (1982).

Eddie Cotton told the jury Brown shot Bevis in cold blood. The autopsy supported that conclusion. If the jury believed Cotton it had to discount Dr. Davidson. Conversly, Brown's only trial defense was to argue that Cotton was the killer. If the jury believed Brown and thought Cotton did the actual shooting the recommendation still would not be justified on a degree of culpability or portional basis. Compare Craig v. State, supra:

> Appellant argues that the degree of participation of state witness Schmidt in the crimes, and the fact that Schmidt received sentences of life imprisonment as compared with appellant's death sentences, were factors in mitigation probably found by the jury and obligting the court to follow the jury's sentencing recommendation. We find this argument to be without merit.
>
> * * *
>
> The fact that Schmidt did the shooting does not in any way detract from the blameworthiness of appellant for this aggravated, premeditated murder.
>
> * * *
>
> As is indicated above, appellant's legal responsibility for the murder of Eubanks was not secondary to but was fully equal to that of schmidt. In

> addition, there was evidence to show that appellant was the planner and the instigator of both murders. If Schmidt had been tried for capital felony in the murder of Eubanks, the evidence would have supported a finding in mitigation that he had acted under the domination of appellant. The fact that appellant was the prime mover with regard to the murder of Eubanks distinguishes this case from Malloy. Thus we conclude that the disparate treatment of Schmidt was not a factor that required the court to follow the jury's recommended sentence for the murder of Eubanks. Id., at _____.

See also Engle v. State, ___ So.2d ___ (Fla. Case No. 68,548, June 27, 1987):

> We have no difficulty in deciding that the principle of Enmund is not applicable in this case. The evidence clearly supports the conclusion that appellant was directly involved in the abduction and murder of Mrs. Tolin. As in Jackson v. State, 502 So.2d 409 (Fla. 1986), appellant and Stevens both were major participants in the crime which necessarily contemplated the use of lethal force.
>
> The closer issue is whether it can be said that there existed a reasonable basis for the jury's recommendation of life. If so, that recommendation must be given effect. Tedder v. State, 322 So.2d 908 (Fla. 1975). Appellant does not seriously argue that what was done to Tolin does not warrant imposition of the death penalty. In essence, he contends that the jury recommendation was plausible because there was no direct evidence that appellant, rather than Stevens, actually did the killing. Appellant points out that it was Stevens' idea to rob the Majik Market and refers to

> his own statement to police that Stevens had gone crazy. Appellant also suggests that the jury could have concluded that Stevens was the more dom nant of the two because Hamilton thought appellant would be more likely to confess.
>
> Upon consideration, we conclude that the trial judge properly overrode the jury recommendation. There is ample support in the record for each of the aggravating circumstances. Appellant admitted his participation in the abduction. He acknowledged that he was with Stevens during the entire span of time within which Tolin was murdered. The evidence supports the conclusion tht it was appellant's knife which cause the fatal stab wounds and that appellant returned home with some of the money from the Majik Market robbery. It would be unreasonable under these circumstances to conclude that appellant played no part in the brutal slaying. Hence, there was not a reasonable basis for the jury's recommendation of life imprisonment.

Given these recent decisions it is clear this defendant's involvement demands the death penalty and that reliance on co-defendant Cotton's sentence is not a reasonable basis to mitigate Brown's culpability.

What remains from Dr. Davidson's testimony as potential mitigation is his opinion that Brown was mentally immature. The trial court recognized this evidence in his order, placing it in the category of statutory mitigation, to wit: Age, §921.141(g).

(R 6749-50).[2] However, after using the criterial set forth in Florida Statute §39.09(2)(c) as guidance, the trial court concluded it would be unreasonable to say this single factor outweighed the aggravating factors attached to the crime:

> It is clear that even though the mitigation of youthful age exists, it should be given little or no weight based on this defendant's prior record and prior contacts with the justice system. Moreover, for the previous three and a half years he has been an adult in the eyes of the law.
>
> (R. 6752).

In very similar cases this court has affirmed jury overrides. Thomas v. State, 456 So.2d 454 (Fla. 1984); Burr, supra; Hoy v. State, 353 So.2d 826 (Fla. 1978). In Thomas this Court held the two statutory mitigating factors of age (20 years) and lack of significant prior criminal record were not a reasonable basis to override four aggravating factors: (1) Prior conviction for murder; (2) Witness elimination; (3) Heinous atrocious and cruel; (4) Cold calculated and premeditated. Id., at 459-461. Chief Justice Boyd's opinion noted the prohibition against ". . . emotional appeal, prejudice or some similar impact. . ." and pointed out one victim was homosexual-a factor the Court's majority apparently saw as impacting the Jury's sentencing

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[2] In weighing the aggravating and mitigating evidence the trial court took great care to notice the disparate degree of proof needed in the categories.

recommendation. Id.

Appellee suggests the sole mitigating factor in this case (age) is not a reasonable basis to mitigate the cold blooded killing of a police officer, especially given the highly improper and misleading closing arguments of defense counsel. For starters, Defense Counsel Mayo likened this incident to a suicide by Officer Bevis. (R. 6438-39). Later, in the sentencing phase, Defense Counsel Stone told the jury he was a bad lawyer and scared for his client. (R. 6661-2). This is an sympathy argument. Counsel then said Florida would be abolishing parole in 1987 and that his client would never ever have even a chance to get out of jail. (R. 6664-67). This is blantantly untrue. As noted in Gresham v. State, 506 So.2d 41 (Fla. 2d DCA 1987) the passage of section 921.001(8), Florida Statutes (1985) excepts capital felonies from its scope. Thus, counsel improperly and successfully planted in the minds of the jurors a false notion as to his client's possible release from prison in the future. Appellee strongly suggests that had the jury been aware that this multiple offender could get out of jail at age forty-three, they would not have recommended a life sentence for the killing of a police officer. Compare Suarez v. State, 481 So.2d 1201 (Fla. 1986). (Defendant fleeing an armed robbery kills a policeman. Jury recommends death penalty by vote of 8 to 4); and Kyser v. State, Case No. 69,736, review pending. (same vote).

Were these arguments not sufficiently misleading, defense counsel also proffered a lingering doubt theory (R. 6695) and implicitly urged the jury to ignore their oath to follow the law. (R. 6693). These arguments also are clearly improper. Buford, supra.

Given the totality of the circumstances surrounding this trial, the appellee contends the jury's vote was predicated on misleading information and not on any valid mitigating factor apparent from the record. Accordingly, appellee urges affirmance of the trial court's order pronouncing a death sentence. Alternatively, if this court is unsure of why the jury acted as it did, a remand for a new sentencing phase would be, in appellee's view, the next most judicious resolution of the appeal.[3]

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[3] The Florida legislature amended section 921.141 this past legislative session and included the killing of a law enforcement officer as a separate aggravating factor. Senate Bill 283.

IV. THE TRIAL COURT CORRECTLY FOUND THIS MURDER WAS ACCOMPLISHED IN AN ESPECIALLY HEINOUS, ATROCIOUS AND CRUEL MANNER.

As his paralyzed victim lay on the ground begging for his life, appellant shot two bullets into his head. Given the undisputed nature of the murder the trial judge ruled in a proper fashion.

This court has developed a precise and limited standard for applying this aggravating circumstance. The murder must be accompanied by such additional torturous acts as to set the crime apart from the norm. Proffit v. Wainwright, 685 F.2d 1227, 1263 (11th Cir. 1983), cert. denied, 464 U.S. 1002 (1983). Where the victim is initially rendered helpless or incapacitated, as by wounding or binding, and then subseqently executed, this aggravating factor is appropriate. Appellee would cite Phillips v. State, 476 So.2d 194 (Fla. 1985), where the victim was shot twice in the chest, then finished off with two shots to the head after the Defendant reloaded; Squires v. State, 450 So.2d 208 (Fla. 1984), where the victim was wounded by a shotgun blast and then killed by additional shots from a revolver, Troedel v. State, 462 So.2d 392 (Fla. 1984), where the victim survived initial head wound but succombed following second head shot; Henderson v. State, 463 So.2d 196 (Fla. 1985), where the victim was bound, gagged and shot execution style; and Hargrave v. State, 366 So.2d 1 (Fla. 1978) where the victim was shot twice

and left helpless while Petitioner consumated the robbery, eventually returning to pump a final fatal round into the victim's skull.

The trial court properly found this aggravating factor existed.

V. NOTHING IN THIS RECORD SUGGESTS THIS COURT SHOULD OVERTURN THIS CONVICTION AND SENTENCE AND MOTION FOR A NEW TRIAL.

Appellant's last arugment is a hodge-podge of unpreserved alleged errors thrown together as a catch-all interest of justice argument. Appellee finds no merit in them.

First, the question of Cotton's credibility was a jury question and any inconsistency in his testimony should have been brought out by trial counsel so the jury could assess it. If trial counsel failed in this regard his conduct can be scrutinzed under Rule 3.850 Florida Rules of Criminal Procedure.

Second, the question of the propriety of using a jury instruction on flight was not preserved at trial for appellate review on the grounds now alleged. Assuming the court were inclined to reach the merits, it is clear the instruction was properly given under the facts of the case. Even assuming error, the matter is harmless given the other evidence of guilt.

Third, the only limitation on Brown's argument regarding Cotton's testimony requested by the prosecution was a limitation precluding any suggestion ". . . that there's even expressed or implied assertions that the state has promised some sort of benefit to Cotton for his testimony." (R. 6360). The trial court did not grant a limine motion. (R. 6364), and the defense was able to argue concerning Cotton's credibility and the lack of evidence against Brown. (R. 6678-79, 6681, 6683, 6690, 6694).

Never did the state request, or the judge grant, a motion directed to argument concerning Cotton's own mental impressions. The state wanted the jury to know that Cotton had not been offered any deal. That type of situation is a far cry from what appellant currently suggests as error. Affirmance is merited.

Lastly, the traditional complaint over gruesome photographs is made. The record shows the medical examiner utilized this photograph (Exhibit "G") to explain how the wounds to the victim's arm were inflicted at close range. (R. 5910). This testimony was relevant as it bolstered Cotton's description of how Brown struggled with Officer Bevis and succeeded in shooting him with his own weapon. Additionally, the photograph assisted the medical examiner in relating how Bevis would have been caused great pain and been rendered helpless by the wound. (R. 5911, 5914-5918).

In that the pictures were relevant, they were admissible. Booker v. State, 397 So.2d 910, 914 (Fla. 1981). Swan v. State, 322 So.2d 485, 487 (Fla. 1975); Rodriguez v. State, 413 So.2d 1303, (FLa. 3d DCA 1982); Edwards v. State, 414 So.2d 174 (Fla. 5th DCA 1982).

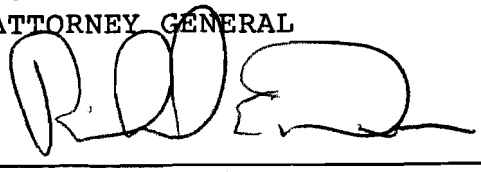
Under the facts of this case the trial court did not abuse its discretion in allowing in the photograph.

CONCLUSION

Based upon the above-cited legal authority and argument appellee prays this Honorable Court affirm the judgment and sentence imposed in this case.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



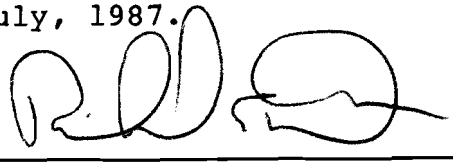
RICHARD E. DORAN
ASSISTANT ATTORNEY GENERAL

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSE, FL 32399-1050
(904) 488-0600

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by hand delivery to Mr. David A. Davis, Assistant Public Defender, Post Office Box 671, Tallahassee, Florida 32302 this 6th day of July, 1987.



RICHARD E. DORAN
ASSISTANT ATTORNEY GENERAL

COUNSEL FOR APPELLEE