IN THE SUPREME COURT OF FLORIDA

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ANTHONY B. BRYAN,

Appellant,

-v-

STATE OF FLORIDA,

Appellee.

_____/

CASE NO. 68,803

APPELLANT'S INITIAL BRIEF

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(served 1 day late)

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STATEMENT OF THE CASE AND OF THE FACTS

Appellant was taken into custody in Madison, Florida, on the 26th day of August, 1983 and subsequently indicted by a Grand Jury in Santa Rosa County, Florida, for First Degree Murder, Kidnapping and Armed Robbery (T-2).

Prior to being returned to Santa Rosa County for trial, he was tried in Federal Court in Mobile County, Alabama, for robbery of a bank in Grand Bay, Alabama and found guilty by a jury after using an insanity defense.

After that trial, he was transported to Santa Rosa County and subsequently escaped from the Santa Rosa County Jail on or about the 26th day of June, 1984 and was reapprehended in Colorado on the 15th day of October, 1985.

Appellant was then brought to trial after the denial of Motions to Suppress and rulings upon several motions before the Honorable George E. Lowrey, Circuit Judge, on the 11th day of February, 1986. After several days of trial and testimony, a mistrial was declared because of improper comments of the State's primary witness, Sharon Cooper, concerning collateral crimes evidence; the theft of a Sting-Ray Boat (See Appendix "A").

Pursuant to a Motion for Change of Venue and a Stipulation between the State and the Defense, the case was

transferred for re-trial in Walton County, Florida, before the Honorable Clyde B. Wells.

Prior to the trial of the cause on the 31st day of March, 1986, Judge Wells heard motions in Chambers including Appellant's Motion in Limine to exclude Williams Rule or collateral crime evidence (T-126-151). The Court also denied a Motion to Continue and a Motion to Sequester the Jury during that pre-trial session. The Court adopted Judge Lowrey's prior ruling on a Motion to Suppress (T-147) and certified that for appellate review (T-148). The Defense requested an evidentiary hearing on its Motion in Limine concerning the Williams Rule evidence and the Court denied the same (T-149).

During the guilt phase of the trial, the Court allowed into evidence the sawed-off shotgun sought to be suppressed; pictures of the victim's body in a decomposed state, over Appellant's objections; and further allowed testimony of Sharon Cooper concerning a taped telephone conversation with Appellant contrary to Appellant's objection and without a Richardson hearing to determine the admissibility thereof.

The Court further refused to admit the testimony of a psychologist, Dr. Gentner, to explain Appellant's memory problems and denied the Appellant's Motion for Judgment of Acquittal.

The Trial Court also denied Appellant's Motion for Mistrial (T-806) based upon evidence of other crimes becoming a feature of the trial; the Prosecutor commenting upon the Defendant exercising his right to remain silent and the Prosecutor's comment upon the Appellant's failure to produce a witness.

In the penalty phase, the Court allowed the State to present the live rebuttal evidence of a Psychiatrist, Dr. Benjamin Ogburn although his deposition had been previously admitted because of his unavailability and further allowed Appellant's witness, Jean Hanley, to be threatened by the prosecutor with arrest by the F.B.I., causing her to invoke her fifth amendment right against self incrimination and to abbreviate her testimony in support of the Appellant.

The Appellant was subsequently found guilty upon a jury verdict of (1) First Degree Murder by Premeditation; (2) Kidnapping; and (3) Robbery with a Firearm (T-101). The jury by a seven to five vote advised for a death sentence (T-102). The Court entered an Order entitled Finding of the Court on Aggravating and Mitigating Circumstances and Sentence (T-107), adjudging Appellant guilty of murder in the first degree and sentencing him to death in the electric chair (T-111).

The Appellant filed a timely Notice of Appeal (T-116) invoking the jurisdiction of this Honorable Court.

The facts presented at trial would indicate that Appellant met State witness, Sharon Cooper, in Jacksonville, Florida and she traveled with him to Mississippi to work as a prostitute. After pursuing that profession and obtaining Appellant's truck, the couple went to Pensacola and Gulf Breeze, Florida, whereupon they embarked to Pascagoula, Mississippi, on a Sea-Ray boat whereupon they stayed for several days at a municipal dock near Clark's Seafood where the alleged victim, George Wilson, was employed as a security guard. George Wilson lived in a travel trailer on those premises and left Pascagoula in the company of Appellant and Sharon Cooper, seated in the back seat of his automobile, with Appellant and Sharon Cooper in the front seat. Appellant was driving and Sharon Cooper was in the passenger seat. The parties stopped for gas and stopped in Grand Bay, Alabama, at the Blue Bayou Bar for beer and drinks before proceeding to Crestview, Florida, where they spent the night in a Scottish Inn Motel. The victim was found in Juniper Creek in Santa Rosa County some weeks later in a decomposed state. Sharon Cooper testified that the Appellant went down a path with the victim and she followed. She further testified that Appellant hit the victim with the butt of a sawed-off shotgun and that

she immediately turned and ran. After hearing a splash of the water, she heard a gunshot. The pathologist, Dr. Bell, testified that the blow to the head prior to the gunshot probably rendered the victim unconscious. Sharon Cooper further testified that she did not think Appellant would kill the victim and so advised the victim.

Appellant and Sharon Cooper proceeded to a point in Santa Rosa County known as Turkey Bluff where Appellant drove the victim's vehicle into the East River where it was subsequently recovered.

Appellant and Sharon Cooper then hitch-hiked to Louisiana and returned in an allegedly stolen car to Madison, Florida, where they were arrested. The sawed-off shotgun was seized and that is the subject matter of the suppression hearing and subsequent testimony of Officer Craddock and Special Agent Shelfner of the F.B.I.

Appellant was thereafter contacted by Sharon Cooper who was in the custody of the Santa Rosa County Sheriff's Department and telephonically and by letter communicated with her. Despite Appellant's demands upon the State to disclose the substance and/or tapes of such communications, the Appellant was never provided therewith and Sharon Cooper was allowed to testify about the substance thereof at trial.

SUMMARY OF ARGUMENT

There are three major issues that require reversal and remand for a new trial.

Reversible error was committed by allowing evidence of crimes not charged in violation of the Williams Rule and Section 404 of the evidence code. The Court allowed evidence of a bank robbery, theft of a boat, details of an escape and cross-examination about prior marijuana dealings to become a feature of the trial.

The Trial Court further erred by failing to conduct an adequate Richardson hearing and allowing impeachment and rebuttal evidence about the subject matter of a recorded telephone call made by State witness Sharon Cooper to Appellant where Appellant had specifically requested the information which was not furnished in discovery.

The Court further mistakenly determined that four aggravating circumstances existed in support of imposition of the death penalty and found only two mitigating circumstances. The Court should have found five statutory mitigating circumstances together with some non-statutory mitigating circumstances and no more than two aggravating circumstances. That mistaken finding and computation mandates a reversal of death penalty sentence and remand for a new penalty phase trial and re-sentence.

ARGUMENT

DID THE TRIAL COURT ERR IN DENYING THE APPELLANT'S MOTION IN LIMINE AND ADMITTING EVIDENCE OF PRIOR AND COLLATERAL CRIMES AS EVIDENCE?

Prior to the first trial in Santa Rosa County, the State filed a Notice of Intent to Rely Upon Prior Crimes and the Court originally held that no such collateral evidence was admissible in the guilt phase (T-89) and confirmed the affirmation of the State that it did not intend to offer such evidence.

At the trial before the Honorable Judge George E. Lowrey, the Court, upon hearing testimony and the argument of counsel, allowed testimony concerning the bank robbery, but disallowed testimony concerning any other collateral crimes and when State witness, Sharon Cooper, testified about the theft of a Sting-Ray boat, Judge Lowrey declared a mistrial.

Thereafter, upon Stipulation and Appellant's Motion to Disqualify the trial judge, the matter was transferred to Walton County to be tried by Judge Wells.

At a pre-trial hearing, Judge Wells decided that he would admit testimony about the theft of a Sea-Ray boat; the very testimony upon which Judge Lowrey declared a mistrial; and at trial, admitted evidence concerning Appellant's escape from

the Santa Rosa County Jail, in detail, together with testimony of the Appellant's prior dealings in marijuana over Appellant's objections.

The bank robbery and other collateral crimes evidenced was allowed to become a "feature of the trial" contrary to the teaching of Cotita -v- State, 381 So.2d 1146 (Fla. 1 DCA 1980). The State presented the testimony of three F.B.I. agents Donald McVay (T-460), Canton Gantt (T-453), and Daniel Lee (T-464) together with the manager of the bank, Kirk Beanblossom (T-456) exclusively about the bank robbery and the Court admitted pictures of the Defendant robbing the bank over Appellant's objection (T-458). State witness, Mark Hart, testified about the bank robbery (T-500) and Sharon Cooper was allowed to testify about the bank robbery and the theft of a Sting-Ray boat.

The State's entire closing argument (T-743) was laced with references to collateral crimes and capped off by referring to Appellant as a bank robber and boat thief (T-800). Appellant objected to those remarks and moved for a mistrial (T-806). The Court acknowledged that the bank robbery had become a feature of the trial (T-810), but denied the Motion for Mistrial.

Over the Appellant's continuing objection (T-413), the State was allowed to cross-examine Appellant about robbing the

bank (T-633), stealing a boat (T-660), and despite Appellant's objections and motion to strike (T-682-683), about details of his escape from the Santa Rosa County Jail (T-683). The State also asked Appellant about dealing in marijuana (T-674).

To examine this issue, it is necessary to begin with Williams -v- State, 110 So.2d 654 (Fla.) and the codification of the Williams Rule in the evidence code, Florida Statute 90.404 which provides:

> Similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity.

In the Williams case, Justice Thornal stated that:

> Although similar fact evidence is generally admissible when relevant to prove a material fact in issue an exception to the broader rule of admissibility exists when the sole relevancy is character or propensity of the accused.

The Third District Court of Appeal in Vazquez -v- State, 405 So.2d 177 (Fla. 3 DCA, 1981) correctly characterized the prejudice to the Defendant in the following excerpts:

> The theory behind this line of cases is that such evidence, with rare exceptions, is so overwhelmingly prejudicial to a

> defendant that the presumption of innocence is thereafter destroyed and a fair trial rendered impossible, and
>
> The danger of a miscarriage of justice lies in the real possibility that, in spite of correct instructions, the prior conviction, irrelevant to the present count, will negate any reasonable doubt of defendant's guilt..., that he will be convicted 'on principle'.

That same Court in Roman -v- State, 438 So.2d 487 (Fla. App. 3 Dist. 1983), recognized testimony about the defendant's involvement in a robbery for which he was not charged as requiring a reversal.

Likewise, the Third District in Harris -v- State, 427 So.2d 234, held that testimony that the defendant had a "prior felony past" was "utterly inadmissible in evidence as its sole relevance was to attack the defendant's character or to show the propensity of the defendant to commit crime".

Testimony of a state witness in Finklea -v- State, 471 So.2d 596 (Fla. App. 1 Dist. 1985), about the Defendant's participation in a robbery required reversal of that conviction.

Evidence of the Defendant's trying to get into the victim's pocket on a prior occasion caused a reversal of a petit theft conviction in Brown -v- State, 472 So.2d 475 (Fla. 2 Dist. 1985).

Recently, in Garrette -v- State, 12 FLW 470 (Fla. 1 Dist. 1987), the First District reversed convictions for sale and possession of marijuana because of testimony that the Defendant had twice previously been in possession of marijuana. That Court quoted liberally from this Court's opinion in Peek -v- State, 488 So.2d 52 (Fla. 1986), to-wit:

> A mere similarity will not render the similar facts legally relevant to show identity. There must be identifiable points of similarity which pervade the compared factual situations. Given sufficient similarity, in order for the similar facts to be relevant, the points of similarity must have some special character or be so unusual as to point to the defendant, and
>
> Our justice system requires that in every criminal case, the elements of the offense must be established beyond a reasonable doubt without resorting to the character of the defendant or to the fact that the defendant may have a propensity to commit the particular type of offense.

The landmark Peek case reversed a first degree murder and sexual battery conviction because of evidence of a subsequent rape. The Court quoted from State -v- Jackson, 451 So.2d 458 (Fla. 1985).

> There is no doubt that this admission [to prior unrelated crimes] would go far to convince men or ordinary intelligence that the defendant was probably guilty of the crime charged. But, the criminal law departs from the standard of the ordinary in that it requires proof of a particular

> crime where evidence has no relevancy except as to the character and propensity of the defendant to commit the crime charged, it must be excluded.

State -v- Bricker, 462 So.2d 556 (Fla. 3 Dist. 1985) set out the "fingerprint type characteristic test" and cited language from Green -v- State, 427 So.2d 1036 (Fla. 3d DCA, 1983) for the proposition that:

> The similar crimes test is a stringent one: there must be something so unique or particulary unusual about the perpetrator or his modus operandi that it would tend to establish, independently of an identification of him by the collateral crime victim, that he committed the crime charged.

The Bricker Court further cited the holdings in Crammer -v- State, 391 So.2d 803 (Fla. 2d DCA 1980) that:

> Although collateral crime evidence is admissible to show a common plan, scheme, or pattern of criminality, it is merely similar to the crime for which the defendant is on trial.

McKinney -v- State, 462 So.2d 46 (Fla. 1 Dist. 1984), is a case where the State introduced similar fact evidence of an incident at Robert's Food Store, located approximately six miles from the site of the robbery for which the defendants were on trial. A man in McKinney's car had a shotgun similar to the shotgun used in the robbery. Although affirming on the basis of harmless error, the Court said regarding the similarity of the shotgun:

> We find this sufficient to connect Clifford [McKinney] to the incident so as to render it admissbile against him, assuming its relevance to the crime charged. However, the incident does not appear to us to have any bearing on the subsequent robbery. We cannot agree, therefore, that the incident demonstrates "identity, opportunity, intent, preparation or plan" in relation to the robbery charged, and it was error to admit it for that purpose.

In the instant case, the Appellant was convicted of robbing a bank in Grand Bay, Alabama, several months prior to the alleged murder. In the bank robbery, he carried a shotgun similar to the alleged murder weapon, but wore a stocking over his head and had no accomplice. No one was killed or injured.

The charges for which Appellant was convicted herein arose from an incident in Pascagoula, Mississippi, at a Seafood Company far removed from the bank in Grand Bay, Alabama, where the Appellant in the company of Sharon Cooper allegedly abducted the victim, without a disguise, to Crestview, Florida and then killed him with a shotgun blast to the head.

The events are unrelated in time and place and as in the case of State -v- Joseph, 447 So.2d 246 (3 Dist. 1983), the

> marked dissimilarities in the manner and method in which the crimes were perpetrated, as compared to similarities so general as to be found in a vast number of like crimes,

> render the evidence of the collateral crimes irrelevant, and therefore inadmissible to establish the identity of the accused.

It should further be noted that identity is not an issue since the Appellant acknowledged his presence with the victim, but testified that the victim went with him and Sharon Cooper willingly to consummate a drug deal in Florida and that he awoke the next day to find the victim and Sharon Cooper gone from the motel room with his shotgun. He further testified that Sharon Cooper told him later that George Wilson had been killed at the scene of the drug deal.

It is therefore obvious that the evidence of the bank robbery was not relevant to prove a material fact in issue, either motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident, but was presented only to show bad character or propensity.

Evidence of the theft of a Sea-Ray boat falls far shorter of meeting the criteria for admissibility under the Williams Rule. The evidence elicited was that the Appellant swam out to a boat anchored in the bay near Gulf Breeze, Florida, hot-wired it, picked up Sharon Cooper at a nearby landing and took it to Pascagoula, Mississippi, where they tied up to a municipal pier near Clark's Seafood where the victim was employed as a security guard. The boat had been damaged when

it struck something in the river and was inoperable. Appellant and Sharon Cooper were merely living aboard it when they met George Wilson and borrowed tools to repair the outdrive.

There is no evidence nor can the State seriously contend that when Appellant took the boat in Gulf Breeze, that he had any plan to use that boat in kidnapping, robbing or killing George Wilson, nor any basis that it was taken in preparation for committing those crimes.

The only connection of the boat to the crime is that Appellant was living on it at the time, and as argued at trial, there is no relevance to the manner of acquisition thereof except to show bad character and a propensity to commit crime. Judge Lowrey declared a mistrial when Sharon Cooper testified about the theft of the boat at the first trial and Judge Wells may well have avoided a subsequent re-trial had he granted Appellant's Motion in Limine and excluded it from evidence herein.

The State further sought to impeach the Appellant's testimony by questioning him about his escape from the Santa Rosa County Jail, an event which occurred long after the murder, while awaiting trial thereon. At the time of the trial, Appellant had been charged with Escape, but was

awaiting trial and had not plead guilty nor been adjudicated guilty of Escape.

The issue of the admissibility of the escape first arose at trial when Appellant objected to questions leading to testimony about an outdrive stolen to repair the Sea-Ray boat. The State raised the issue of the escape (T-648) and Appellant objected to its admissibility and engaged in a colloquy with the Court wherein the Court concluded that when Appellant took the stand, he submitted himself to questioning about the escape (T-650).

After a lunch recess, Appellant presented the Court with authority from Florida Evidence, Charles W. Ehrhardt, Second Edition. Section 608.1 thereof provides that, "A criminal defendant who takes the stand and testifies may have his credibility attacked in the same manner as any other witness". According to Ehrhardt, the evidence code suggests six methods that may be used to impeach, including under Section 90.610 by showing that the witness was convicted of certain crimes.

Section 610.6 of Ehrhardt sets out the classic question and answer scenario whereby the witness may only be asked whether he has ever been convicted of a felony or a crime involving dishonesty or false statement. "If the witness answers the questions correctly, the questioning must cease; counsel can not go further and specify the nature of the crime

of which the witness was convicted or the sentence that was imposed."

The State sought to circumvent that rule by asking the Appellant about using a fake name in Arizona (T-681) and how he had an occasion to be there (T-682). In anticipating the State's intention to elicit testimony about the escape, Appellant twice objected and was twice overruled. Another objection and motion to strike the answer was overruled (T-638). The State then sought to elicit details of the escape and the Court again, incredibly, over Appellant's objection, allowed the State to inquire further into the details (T-683).

Section 610.8 of Ehrhardt sets out the general rule that

> "the credibility of a witness may not be attacked by proof that he has committed specific acts of misconduct which bear on his truthfulness. Under Section 90.610 only conduct which results in a criminal conviction is admissible to prove bad character.

Since the Court readily conceded (T-654) that evidence of the escape did not come under the Williams Rule, it must come in under Section 610 as impeachment and there is no basis for admissibility thereunder.

The entire precepts of the State's case is summed up in its' final argument, when the prosecutor sarcastically argued:

> But we should believe this bank robber. We should believe this boat thief. We should believe this escaped prisoner (T-800).

The argument reiterates that the evidence was presented only to show bad character and propensity. The State set out to convict Tony Bryan without regard to the Rules of Evidence and of the case law thereunder. The Trial Court unfortunately succumbed to the State's argument without precedence, rule nor reason and consequently, the conviction must be reversed and a new trial ordered. The totality of the circumstances are that the bank robbery; the theft of the boat; the escape; and prior dealings in marijuana were allowed to become a feature of the tial and given all the inadmissible prejudicial evidence presented against the Appellant, he could not have received a fair trial nor could the evidence admitted in any way be considered harmless error.

ISSUE II

DID THE TRIAL COURT ERR IN ALLOWING TESTIMONY OF A TAPE RECORDING OR THE SUBSTANCE THEREOF IN VIOLATION OF THE RICHARDSON RULE AND THE SECURITY OF COMMUNICATIONS ACT?

Appellant received a copy of an immunity agreement between the State and Sharon Donna Cooper wherein it was agreed that she would attempt to call Appellant who was then incarcerated at F.C.I. in Tallahassee. Upon noting the reference thereto in the immunity agreement, Appellant's counsel wrote a letter to the State (T-666) specifically requesting that the State advise whether the call was made; that they relate the subject matter of the call; and that the defense be provided any tape recording and transcripts thereof.

A copy of the letter was sent to the Court and the State acknowledged receipt thereof (T-667). Despite a colloquy among the Court and counsel, the Court did not swear witnesses and conduct a Richardson hearing.

The State took the position that there was an oral communication concerning the tape with defense counsel at a hearing, but the State Attorney's secretary, Gayle, relied upon to substantiate that position had no memory thereof (T-665).

Defense counsel had no memory of such a conversation and advised Appellant that there was no tape in preparation for Appellant's testimony. The tape was first produced by the State after Appellant's testimony denying a telephone conversation and after the harm was done. The problem is further exacerbated in this case by Appellant's memory problems documented by Dr. Gentner and Dr. Ogburn. Therefore, defense counsel was required to rely on information furnished by the State in advising a client who had serious lapses in recollection.

After Appellant's objection (T-663), the Court stated that, (T-669)

> Sharon, whether I let go to the jury or not, she can testify as to the contents of that tape, if you want to let her listen to it at one of the breaks before she testifies, to refresh her memory.

The State was then allowed to lead Appellant down a primrose path about the existence and substance of a telephone conversation with Sharon Cooper of which he had no memory, only to be contradicted by either a tape upon which the Court had not determined to be admissible or Sharon Cooper's testimony about the contents thereof not furnished in discovery.

The State then sought to offer the tape and upon Appellant's objection, the Court still without the benefit of an adequate Richardson hearing, ruled (T-715):

> Well, if you want--I think this tape itself, the jury's entitled to hear the tape. There was a case--I mean, it was about the same kind of thing on Wells and Weeks and I let that one in. Of course, it hasn't passed muster yet. But I think it will, on Wilbur Weeks

The Wells and Weeks cases did not pass muster. They were reversed by the First District Court of Appeal at 11 FLW 1581 and 11 FLW 1589.

The Court's holding in Richardson -v- State, 246 So.2d 771 (Fla. 1971) is summarized as:

> When it is brought to the attention of the trial court during the course of the proceedings that the State has failed to comply with the Rule the Court has a discretion to determine if such failure has prejudiced the defendant on trial. But, as there noted, the trial court's discretion can be properly exercised only after the court had made an adequate inquiry into all of the surrounding circumstances.

In Richardson, the State failed to disclose the name of a witness, Dick Davis. The Court said,

> It is true that no such witness, "Dick Davis," was called by the State to testify, but his name should have, under the mandatory requirement of the rule, been furnished to the Petitioner.

Likewise, in the instant case, the State's ultimate decision not to introduce the tape in issue does not excuse the discovery violation when it was used to cross-examine the Defendant and to refresh the memory of State witness, Sharon Cooper, whose testimony paraphrased the contents of the tape.

The State failed to disclose the substance of the taped conversation and that was not only detrimental to Appellant as above, but could have furnished exculpatory materials which should have been available to Appellant under the Brady rule. See Williams -v- State, 12 FLW 665, (Fla. 3d DCA 1987).

In Hickey -v- State, 484 So.2d 1271, (Fla. App. 5 Dist. 1986, the Court held:

> Just as a defendant is entitled to the names of all persons known to the state who have information pertaining to the charge, and not just those persons the state intends to call as witnesses at trial, so is a defendant entitled to a disclosure of all statements made by him, not just those the state intends to use at trial. Rule 3.220(a)(1)(iii) requires the prosecution to disclose, upon demand,
>
> any written or recorded statements and the substance of any oral statements made by the accused, including a copy of any statements contained in police reports or report summaries, together with the name and address of each witness to the statements.

Again, the tape recording of Appellant's conversation with Sharon Cooper must fall into the category above, was not furnished as required, and the inherent prejudice to the Appellant is demonstrated on the record.

Surprise testimony of two police officers concerning statements made by the defendant was determined to be inadmissible in Cumbie -v- State, 345 So.2d 1061 (Fla. 1977), although the officers had been listed as witnesses but the existence of the statements was not disclosed during depositions taken by the defense. When one of the officers was deposed, he stated that the petitioner had not made any statements. The other officer was not questioned in regard to possible statements, defense counsel having no reason to suspect any had been made. The trial court admitted the statements only because the defendant was the one who made the statement. This Court said:

> Obviously, the trial judge misconceived the effect of our rules and the significance of Richardson. In Richardson, we held that a violation of the Rules of Criminal Procedure by the state would require an appellate court to reverse a conviction unless the trial court made an inquiry into all the circumstances surrounding the breach, with the state having the burden of showing to the trial court that there was no prejudice to the defendant.

In the case below, Sharon Cooper was twice deposed, but the immunity agreement which gave rise to the inquiry about

the telephone call was not disclosed until after her depositions. Due to the State's failure to respond to Appellant's inquiry, there was no reason to depose her further or to believe that such a taped conversation occurred. The limited inquiry made by the trial court consisted of contradictory unsworn, unverified statements of counsel and nothing to meet the State's burden to show there existed no prejudice to Appellant.

Appellant attaches Appendices "B", "C", "D" and "E"; a certified copy of the January 7, 1986, letter to the State Attorney from the Court File, a certified copy from the Court File of a Notice of Taking Continuation of Deposition of Sharon Cooper on December 27, 1985, in Wilmington, North Carolina; a copy of a letter dated December 30, 1985, to the State Attorney concerning reference to the immunity agreement discovered at said deposition; and a copy of the Immunity Agreement and letter of transmittal dated January 2, 1986.

The Court can thereby readily discern that Appellant acted with due dispatch to discover the immunity agreement and the resulting telephone call to Appellant. However, the State's failure to disclose the tape of that call and the subject matter thereof before using it for impeachment and rebuttal at trial, given the failure of the Court to conduct an adequate Richardson hearing and the State's failure to

account for the discovery violation, mandates a reversal herein.

This Court in Smith -v- State, 12 FLW 10 (Fla. 1986), State -v- Ward, 12 FLW 127 and State -v- R. R., 12 FLW 127, determined harmless error does not excuse a Richardson violation and the Smith Court held that "the admission of the statement as rebuttal evidence does not make it any more appropriate than admitting it during direct examination. There is neither a "rebuttal" nor an "impeachment" exception to the Richardson rule.

The Defendant filed a Motion for Disclosure of Statements Made by Witnesses, Accused or Co-Defendant and Judge Lowrey at a pre-trial hearing thereon (T-88), recognized that "the normal discovery process has been invoked, so the State was obligated already, without Court order, to furnish any statements made by persons that were witnesses in the cause." The State's failure to fulfill that obligation as to a statement attributed to the Appellant in the aforesaid telephone conversation with Sharon Cooper requires reversal and remand for a new trial.

It is further pointed out, as raised at trial, that Florida Statute 934.09(9)(a) provides for the suppression of any unlawful interception of wire communication as occurred

herein, there being no consent by either party thereto produced (T-668).

ISSUE III

DID THE TRIAL COURT ERR IN IMPOSING THE DEATH PENALTY?

The facts set out earlier indicate that the only evidence to support a conviction and subsequent sentence was the testimony of Sharon Cooper. She testified that the victim was taken from Clark's Seafood in Pascagoula, Mississippi in the victim's car and seated in the back seat. Appellant drove the car and Sharon was seated in the passenger seat in the front (T-417). Neither Appellant nor Sharon Cooper held a weapon upon the victim during the trip of approximately 120 miles which according to her testimony took about seven hours to complete (T-432-433).

Chris Gulfers, the proprietor of the Blue Bayou Bar in Grand Bay, Alabama, testified that Appellant, the victim and a female meeting the description of Sharon Cooper stopped at his establishment just off Interstate 10 on that evening and drank for several hours. According to Gulfers, the victim's liberty was in no way impeded.

Shoron Cooper further testified that the party arrived in Crestview, Florida, at 4:00 A.M. and she went into the office of the Scottish Inn Motel and registered. She did not alert the desk clerk to call the law because, "I didn't think Tony was gonna kill him" (T-443).

Further, according to Sharon Cooper's testimony, she told the victim at the scene that Appellant was not going to shoot him, but was just going to tie him up (T-419).

She further stated that Appellant and the victim, after those reassurances, were walking down a path when the Appellant picked up a gun and hit the victim in the back of the head. She turned around to run and just as she did, she heard a gunshot (T-419). She did not see Appellant hit the victim, but heard it (T-436). She heard a splash before she heard the gunshot, but did not see the victim shot (T-437).

Dr. William Reid Bell, Jr., the pathologist, stated (T-450) that it is quite possible that the wound to the back of the head from blow from being hit by the shotgun could have caused loss of consciousness.

The scenario developed, even if the testimony of Appellant and Chris Gulfers is discounted, is that the victim was taken from Pascagoula in his own automobile, was not held at gunpoint, had one or more opportunities to escape while Appellant was missing, was told prior to his demise by his supposed confidant, Sharon Cooper, that he would not be shot and had no reason to believe otherwise. According to her, he was hit in the head with the shotgun without warning or reason to anticipate the same, was probably rendered unconscious by that blow, and after splashing into Juniper Creek, was shot

and killed by a single shotgun blast. He apparently did not survive that shot and any further evidence as to the deterioration of the body should not be considered on the issue of the death penalty.

The Honorable Trial Court Judge in his order of Finding of the Court on Aggravating and Mitigating Circumstances and Sentence, purportedly found four aggravating and two mitigating circumstances. However, upon closer examination thereof, it appears that the Court combined aggravating circumstance (d) and (f), treating those as one; and further combined aggravating circumstances (h) and (i), as one.

Although the court mistakenly computed the aggravating circumstances to be four, it is clear from the Order that the only remaining aggravating circumstance was (e) and that if the Court combined (d) and (f) together with (h) and (i), (T-109), only three aggravating circumstances were determined by the Trial Court.

Appellant maintains his position that the graphic details of the bank robbery should not have been admitted in the guilt phase and should not have been considered since many months elapsed from the bank robbery to the murder. The Appellant went to Jacksonville, back to Mississippi; through Grand Bay where the bank robbery allegedly occurred, and returned to several Florida cities. It is inconceivable that a flight

from a bank robbery would consist of an itinerary bringing Appellant so close to the scene of the alleged bank robbery. The only conclusion to be drawn is that the Appellant was not in flight, but was engaged in an ordinary course of travel that would have resulted despite any violations of the law. The facts of the bank robbery should not have been considered by the Trial Court nor this Court since there is no evidence this alleged crime occurred during the commission thereof and can be considered only as to flight.

As to aggravating circumstance (e), there is no evidence that George Wilson knew the Appellant by name, that he knew anything about a bank robbery or that he could in any way identify the Appellant. The person who could best identify the Appellant was Sharon Cooper and he certainly made no effort to eliminate her so that she could not further testify. The facts are that she testified in the bank robbery trial and this trial. If the Appellant had any intention to eliminate witnesses, the victim would have been Sharon Cooper as opposed to George Wilson. This Court held in Menendez -v- State, 268 So.2d 1278 (Fla. 1979) that the dominant or only motive for the murder must be the elimination of witnesses for that aggravating circumstance to be considered.

The Court, with reference to aggravating circumstance (f) determined that Appellant took the victim's car for pecuniary

gain. The evidence was that the car was very old, worth little money and that the victim was dead at the time of any taking. It is undisputed that shortly thereafter, the car was run into East River at Turkey Bluff. There is not evidence that Appellant derived any monetary or pecuniary gain from that vehicle which was soon ditched in a river.

The Court found aggravating circumstance (h) although there is no evidence the crime was especially heinous, atrocious or cruel. In Oats -v- State, 446 So.2d 90 (Fla. 1984), citing Kampff -v- State, 371 So.2d 1007 (Fla. 1979), it was held that a pistol shot straight to the head of the victim does not establish that the murder was especially heinous, cruel or atrocious.

In McCray -v- State, 416 So.2d 804 (Fla. 19), a case with similar circumstances, the Court found that none of the aggravating circumstances relied upon herein existed, and citing Jent -v- State, 408 So.2d 1024 (Fla. 1981) and Combs -v- State, 403 So.2d 418 (Fla. 1981), reiterated the rule that in order for the murder to be committed in a "cold, calculated and premeditated manner without any pretense of moral or legal justification," it must be an execution or contract murder. That rule was further addressed in Floyd -v- State, 11 FLW 595, citing Phillips -v- State, 476 So.2d 194 (Fla. 1985) and Bates -v- State, 465 So.2d 490 (Fla.

1985). The court went further to say that a "heightened" form of premeditation must be present.

The Court should have found no more than two aggravating circumstances and acknowledged two mitigating although he should have found at least five statutory mitigating circumstances.

The arguments in support thereof are set out in the transcript of the sentencing hearing together with additional case authority. It would not appear necessary to reiterate that argument since the Court has the benefit thereof in pages 1 - 105 of the Supplemental Transcript of Record.

Of course, this Court is obliged to compare the circumstances of this case with other death penalty cases and it is suggested that those circumstances do not merit the death penalty.

CONCLUSION

Many issues were at trial in this multifaceted case and renewed in the Motion for New Trial. However, because of the strength of Appellant's position on the issues argued, to address the weaker issues which research reveals are without foundation would serve only to disparage the credibility of Appellant's strong argument.

It is therefor submitted that the Court should reverse the Judgment and Sentence and remand for a new trial on the basis of violations of the Williams Rule and the Richardson Rule.

It should not be necessary to decide the death penalty question, but in that event, the Court should reverse that sentence and remand for a new penalty phase trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been furnished to Royall P. Terry, Esquire, Assistant Attorney General, The Capitol, Tallahassee, Florida 32301, by delivery, this 12 day of March, 1987.

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