IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 69,484

CLEO DOUGLAS LeCROY
Appellant,
v.
STATE OF FLORIDA,
Appellee.
_____/

BRIEF OF APPELLANT

An Appeal from the Fifteenth Judicial
Circuit Court for Palm Beach County

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PRELIMINARY STATEMENT

Appellant was the Defendant in the Circuit Court in and for Palm Beach County, Florida. Appellee was the prosecution. The parties will be referred to as they appear before this Court. Jurisdiction lies in this Court pursuant to Article V, Section 3 (b)(1) Fla. Const. and Rule 9.030(a)(1)(A)(i), Fla. R. App. P., because Appellant was sentenced to death (R2690).

The symbol R followed by a number will refer to the record on appeal. The symbol SR refers to the additional record ordered by this Court on June 29, 1987. Exhibits will be referred to by number, and, for those which were not introduced at trial, the date of the hearing will follow.

STATEMENT OF THE CASE

By indictment returned Feburary 4, 1981, Appellant and his brother were each charged with two counts of murder in the first degree, two counts of armed robbery and one count of concealing evidence (R4098-4099). The crimes allegedly occurred January 4, 1981. The victims were alleged to be John and Gail Hardeman.

Appellant entered a plea of not guilty (R5) and filed the following pretrial motions with the following results:

R4115-4120	To declare Death Penalty Unconstitutional	Denied (R746, 4237)
R4121-4129	To Dismiss	Granted in part (R4267-4270)
R4130-4131	For Phase II Discovery	Granted (R789)
R4132-4134	For Individual Voir Dire	Granted in part (R49-50
R4136-4137	To Dismiss because of Defendant's Age	Denied (R758, 4268)
R4150-4153	To Dismiss and to Quash Jury Panel	Denied (R4271)
R4154-4155	To Retain Government Notes	Stipulated (R50-51)
R4156-4157	For Bifurcated Jury Selection	Denied (R791)
R4158-4159	For Disclosure of Criminal Records	Granted (R787&4272)
R4162-4163	To Produce Grand Jury Testimony	Denied (R4272)
R4164-4165	To Preclude Challenge for Cause of Death Scrupled Jurors	Deferred to Trial
R4166	To Exclude Uniformed Guards During Trial	Denied without Prejudice (R58)
R4169	For Homicide Bill of Particulars	Denied (R4271)
R4171-4173	For Mental Evaluation	Granted (R4268)
R4177	In Limine to Exclude Pictures of Victims' Faces	Deferred to Trial
R4184-4185	To Suppress Statements	Granted in part (R4273-4276)

R4186-4187	To Sever Defendants	Granted (R4268)
R4192-4195, 4198-4199	To Suppress Evidence	Granted in part (R4276)
R4216	For Additional Preemptory Challenges but the Defendant was given 5 extra.	Denied (R1071) (R1587)
R4296-4297	To Produce Dog	Denied (R4298 but see R4331)

On appeal, the Fourth District Court of Appeal affirmed the suppression of evidence grounded on the police telling Appellant:

> "This statement is taken primarily in order to refresh your memory at the time you may be called upon to testify, if and when this matter goes to court." (R4305)

It affirmed dismissal of Count V, but reversed dismissal of the robbery counts, State v. LeCroy, 435 So.2d 354 (Fla. 4DCA 1983). After that Court recalled its mandate and accepted an out-of-time rehearing petition (R4335), it certified the case to this Court on rehearing (441 So.2d 1182). This Court ruled that the quoted warning did not automatically require suppression and reversed, State v. LeCroy, 461 So.2d 88 (Fla. 1984). Objection to the statements was renewed at trial (R1075-1076, 1725, 2518, 2604).

Subsequently, one of the principal investigating officers, Kenneth Welty, demanded help with a DWI case if he were to testify (R1016, 4379-4380).

The State's announced intention to call Roger Slora as a witness prompted a request to unseal his psychiatric records (R4411-4412) and other portions of his Court file (R4414-4415) both granted (R1006, 4413).

Trial commenced on February 18, 1986 (R1067).

Defense objections to gruesome pictures showing the faces and bodies of the deceased after exposure to animals (R1698-1699) were sustained as to Exhibits 16 & 17 (R1712) and 11 & 12 (R1714) and overruled as to 17 & 21 (R1713), 1, 10 & 13 (R1714).

The Court expressed its concern over the reference in the extra warning, to wit:

> "This statement is taken primarily in order to refresh your memory at the time you may be called upon to testify if and when this matter goes to Court."

Now, that admonition was given to the Defendant by Officer

> Browning when he made a later taped statement after the one we are fixing to hear.
>
> Now, I commented on that, that that added admonition on the grounds of his comment not to testify.
>
> The Supreme Court doesn't even address that issue. They said that the statement is admissible so I am going to let it all in, including that admonition, even though it might later on be determined to be a comment on his right to remain silent." (R2359-2360).

The State offered to excise the extra warning, but the defense declined because it goes to voluntariness (R2360-2361).

On February 28, after deliberating for two hours and forty minutes (R3283), the jury found Appellant guilty as charged on all four remaining counts (R4499). The jury found the murder of John Hardeman was felony murder, but the murder of Gail was premeditated (R3286).

Appellant moved to dismiss Count III on grounds that it was the felony which supported the felony murder of Count I (R3427-3430, 4502). The Motion was denied (R3430-3431).

Appellant's motion for new trial (R4516-4517) was amended (R4560-4563, 4566-4567, 4574-4580, 4585-4602) to note that the State took inconsistent positions as to which defendant was the triggerman, and the State admitted Roger Slora liked to it.

A pro se motion to remove counsel was denied without prejudice (R3756-3764, 4606-4607, 4610-4611), as was counsel's motion (R3753-3754, 3766-3773, 4608, 4609).

Appellant challenged the presentence report as presenting nonstatutory aggravating circumstances (R3805-3826, 4564-4565). The motion was denied then (R3816) and when renewed (R3890-3892, 4661-4662). The Court noted that the opinions of the victim's family counted (R3822) and they had the right to be heard (R3865-3866), but he would not be swayed by opinion (R3824, 3893).

A defense request that all the aggravating and mitigating circumstances be read to the jury was denied (R3464-3473). However, defense counsel was allowed to read them (R3679-3686).

After one hour and 28 minutes (R3721, 3726) the jury recommended death as to Count II 7 ro 5 and life as to Count I 8-4 (R3730-3731, 4526, 4527). The Judge followed those recommendations (R4870-4878), finding prior convictions for violent crimes

in the contemporaneous convictions, that the homicide was in the course of a robbery and was for the purpose of evading arrest for another killing to be aggravating circumstances (R4872-4873), and absence of significant prior criminal activity (R4874) and the age of the accused (R4875-4876) as mitigating circumstances. In finding age insufficient to require a life sentence, the Court rejected an extensive defense memorandum (R4666-4864). Earlier the Court rejected a proffer as to the ABA position on death for juveniles (R3568-3576), but then accepted it (R3937-3938).

The sentence imposed October 1, 1986, was life, 25 years no parole on Count 1, thirty years concurrently on Count 3, and, consecutively to those sentences, death on Count 2, and thirty years concurrent to Count 2 on Count 4 (R4054-4056, 4865-4869). By notice of appeal filed that day (R4880) and amended two days later (R4881), Appellant seeks review of the Judgments and Sentences in this cause. The State has cross-appealed as to evidentiary rulings during the trial (R4889-4890).

By Order of June 29 (SR4), this Court ordered the record supplemented to include the disposition in the Codefendant's case, and extended the time for serving this brief.

This appeal follows.

STATEMENT OF THE FACTS

John and Gail Hardeman were last seen hunting at Brown's Farm on January 4, 1981. Their disappearance triggered a massive search which culminated with the finding of their bodies on January 11. Appellant and his family participated in the search.

A Miami police officer was hunting at Brown's Farm on January 4. He saw the Hardemans early that morning and spoke to them briefly (R2048-2049). Later that morning he saw and spoke to Appellant (R2050-2051). They discussed seeing the Hardemans. Appellant had a shotgun and a pistol which resembled State's Exhibits 53 and 36 (R2152). Five or ten minutes later, he saw Appellant talking to the Hardemans. At about 10:45 or 10:50 he heard what sounded like a shotgun being fired, with several smaller caliber shots a couple of minutes later (R2056-2057). There were other hunters with weapons nearby (R2066).

When the officer returned on the 9th to help look for the bodies, Appellant saw him and mentioned seeing him on the 4th (R2054-2055, 2065). Both Appellant and his brother took the searchers to where they'd last seen the Hardemans (R2139-2140, 2158-2159, 2170). Appellant ran through the brush and found a knapsack (R2140, 2159, 2171).

A wildlife officer, Elsie Bevan, was one of the searchers. She testified Appellant told her on the 10th he could help find the bodies. Though she hoped the victims were still alive, she agreed to go with him (R2265-2266). When they got to where the backpack was found, he objected to having others around and asked her to walk 10 minutes away. He said he was a great tracker. First he would see tracks and then he wouldn't. She couldn't see any (R2267-2268). He told her John was dead and Gail was running, screaming, wanting to see if her husband were dead (R2269). He suggested the girl might be in heavy brush despite being afraid of snakes if she had a gun to her head. That would also force her husband to put his gun down (R2270). He described their guns (R2270). He also pointed to one spot and said the girl had been raped there and knocked out (R2271).

He told her he was smarter than the police because he knew more than they thought he did. He also said he couldn't take her

to the bodies because they'd think he did it (R2272). He said police were looking for blood but wouldn't find any because strangling doesn't leave blood (R2290).

Appellant told her the bodies were lying down and slightly covered. He said that and the cold was why they could not be smelled (R2273). He told her the girl was tied up with orange construction tape (R2274). He described the girl as pretty with long blond hair and always with her husband (R2275). He said they were both dead (R2275).

He told her he couldn't take her to the bodies, his brother would have to. The next day both brothers went with her. Jon drew a circle on the ground, told them where they were going, said he had a gut feeling he would take them right to the bodies, and did so (R2278-2279).

After the first body was found, Appellant told her the girl was alive between there and the next finger road. Then he said she was back at the old campsite. Appellant said she was blind without her glasses and was not wearing them now. He appeared nervous before the bodies were found (R2279-2281).

Appellant never told her he killed these people. He indicated his revelations were based on his tracking and reading of signs (R2281). He knew he was a top suspect (R2283-2284), but he kept on talking a lot anyway.

Another game officer who heard some of these discussions heard Appellant say Mrs. Hardeman was wearing white thermal underwear (R2211). He thought Appellant was more nervous on the 10th (R2310), but became nervous again when the first body was found (R2312).

The witness thought Appellant had an active imagination (R2314). He was reading things into the signs that couldn't be read (R2315-2316). When the first body was found, Appellant said "I know she is around here. She has got to be alive." (R2318).

Mrs. Bevan's son was also a wildlife officer. He was with Appellant and his mother on the 10th, and saw Appellant reading signs he could not see. He claimed Appellant said it was stupid

to look for blood because she could have been hit on the head. He said she was out for five minutes (R2328-2329). He said he was sure his brother could find them the next day (R2330). He said the bodies are not far apart (R2329), and the female would not be wearing glasses, but they would be close by her (R2331). He could not remember it at trial, but he testified on deposition that Appellant said there was no odor because the ground was cold and the bodies would be buried (R2334). This officer was present the next day when Jon lead them to the bodies. The body he saw was not buried at all (R2340).

Because the transcripts are out of order, the next witness is in Volume Nineteen. Edward Santamarina was a hunting friend of John Hardeman and his wife (R2544-2555). She never shot anything, but carried a .38 pistol in her coat (R2556). They always stayed together (R2557-2559).

The witness noted the area off the third finger road where they always camped near the only shade around (R2567). When he heard they were missing and came to help look, he saw their car and equipment there (R2568). He thought it unusual that the cooler, lantern and water were left out (R2568), as well as the table and folding chairs (R2569-70). He said she had a blue backpack, even though State's exhibit 50 is green (R2589). It was stuff like hers inside (R2600-2602).

When he was with the Hardemans, they hunted within 100 yards of the campground (R2572). He did not go in farther because it was too thick (R2573). They did not hunt at the burn areas (R2574), or another area marked green on the diagram (R2575) or the head areas (R2576). However, the witness was ordinarily at least one to two hundred feet away from them, and could not see what they were doing (R2596).

Sergeant Braido (R1789) was the crime scene investigator (R1790). On January 7, he photographed the campsite and the vehicle he found there (R1790-1791). His rough diagram of the area was admitted over objection (R1792-1795).

The campsite was 170 feet from L-6 Levy Road in a burn area 90X150 feet. The backpack was found there. The bodies were found in a group of trees near another burn area half a mile away (R1807-1808).

Mrs. Hardeman was found with a brown coat covering her. Her hands were in the coat pocket (R1817, State's Exhibits 4 and 10). Her hat and glasses were there (R1820, 1832, State's Exhibits 1 and 41). Mr. Hardeman was found 400 feet away (R1821).

Because material from Mrs. Hardeman's thermal underwear was imbedded in her wound, he concluded the shirt had been disturbed and she'd been shot. Her bra was halfway off her left breast (R1822-1823).

She had three bullets in her (R1834-1835). The pathologist described wounds to the chest, neck and head (R1973). One penetrated the heart, one fractured the jaw and one penetrated the brain (R1974). At least two bullets were fired from close range, possibly contact (R1975, 1980, 1982). She died from one, but he could not tell which. All three were potentially lethal (R1982-1984). There were no signs that she had been tied up (R1901-1902). The bodies had not been dragged (R1906, 1915).

She had a green coat, with 30-06 hunting rounds, green hat and gloves in it (R1837-1838). Their car also contained 30-06 ammunition (R1838-1839).

There was no sign of a theft or robbery or struggle at the campsite (R1888). Their equipment was there (R1888-1892). Had it been taken, it could not have been traced (R1893). Both victims still had gold jewelry (R1916).

John had massive penetrating injuries to the head and mouth area (R1986). The pathologist concluded he had been shot in the head, causing his death (R1988) instantly (R1992-1993). There was no sign of a struggle or that he'd been tied up.

A firearms expert testified that the barrel of State's Exhibit 36, a .22 caliber revolver, had been damaged by the introduction of something in the muzzle (R2019-2020), making comparison to the bullets which killed Mrs. Hardeman impossible (R2024).

The parties stipulated that the bodies found in the woods and autopsied by Dr. Hobin were John and Gail Hardeman, as named in the indictment (R2583-2586), and the jury was so advised (R2587).

Appellant's former girl friend (R2176) testified that Appellant told her on the 3rd he'd been using some guy's gun and the guy didn't even know it (R2177). She thought it had been used for a couple of hours, but earlier she said it had only been borrowed for a minute (R2215-2216). When she arrived to meet him the next day at 8:30, Appellant was not there (R2178).

Jon was there sleeping, and remained until what the witness called 1 PM (2180-1), although she admitted it was possibly as early as 11 AM (2209-2210). Jon was the first to leave and he left alone (2208, 2210). Appellant's father left next and returned with Appellant (2211). Jon came back 1 to 1½ hours later and was angry (2211). She heard no shots until after Jon left (2208-2209).

When Appellant returned he told her the man whose gun he was using shot at him and he had to shoot him in the head. He claimed a bullet went through the collar of his jacket and he threw the jacket away. He said he took his wallet, kept the $30.00 or so and hid the wallet in a tree stump. Later, as they returned to Miami, Appellant allegedly told her a woman came running out of the woods and he had to shoot her too. He said he had blood on his jeans, and he burned them in the camp fire (R2182-2185). She saw the guns he said he hid in the bushes, and they looked like State's Exhibits 54 and 35 (R2185-2187). He allegedly told her he shot the girl three times, in the head, neck and chest. He alternated telling her he got the pistol from the guy and from the girl (R2190).

She was charged at first as an accessory after the fact. She had her lawyer present in Court (R2196-2198). She testified on cross-examination that appellant thought the guy he shot might have money, but didn't know for sure until he took the billfold, and he took that to cover the identification. That was also the reason he took the guns. He fled the scene first, and returned later for the guns (R2217-2219). He described the shooting of the female as an instinctive reaction when she scared him coming out of the bushes fast (R2219).

She described appellant as wanting to go back to cut the bullets out of the bodies, but earlier she said she was told it was Jon who did so (R2221-2223).

Rodney Keep testified that he sold State's Exhibit 54, a 30-06 shotgun and Exhibit 35, a pistol, to John Hardeman (R2075-2076).

William Ellett testified that Appellant offered him that 30-06 shotgun for sale on January 5, saying his father could sell

it (R2083, 2085). They had discussed such a sale several weeks earlier (R2084-2085). Ellett could not recall whether the gun was said to be his father's or his brother's (R2086) but at one point Appellant told him his brother wanted the next installment payment on it (R2098-2099).

Richard Freshorn heard Appellant say on the 9th that he hoped his brother got there before the sheriff to dig out the bullets (R2256), Jon was sharpening his knife.

Jon gave this witness a .38 caliber gun which looked like Exhibit 35. He gave it back to Jon after the ride to Brown's to search for the bodies (R2259-2260).

The witness heard Appellant say he shot a man after the man shot him (R2260).

Deputy Welty testified he talked to Appellant on the 10th. Appellant theorized there were two who did the killing, that the man was shot first and the girl ran. The man who did the killing ran around the head, stopped her and killed her. She'd probably been raped, shot in the head and chest. The bodies would not be together (R2614).

Welty questioned Appellant on the 11th. A copy of the rights card was excluded on defense objection (R2618-2621). Over further defense objection, the witness was allowed to refresh his recollection repeatedly from a standard rights card (R2622-2629). Appellant was taken to the station and warned of his rights again (R2633). Welty identified the tape of that interrogation (R2634) and it was admitted over objection as to the predicate (R2635-2636).

The defense requested excision of the following:

1. An exhortation to tell how he could go straight to the backpack (R2642).

2. A discussion about humanity and leaving nice people out there with the animals for seven days (R2643).

3. The statement: "Wait a minute. You are acting -- hang in there. You don't con me. You are going to have to con a jury, you know." (R2644)

The request was denied (R2645), and the tape was played for the jury (R2365-2416).

Appellant said he met the Hardemans at finger road 2 (R2368). He recalled talking to the offduty officer and talking to the Hardemans (R2370-2372). He said he shot a hog and the bullet ricocheted around in the head (R2373). He saw John's body inside the head (R2375). He panicked and did not check it (R2376).

He said he heard twigs break, turned around and shot three times with a .22, then saw his (John's) jacket (R2377). He didn't know for sure if it was Gail (R2378) but he was almost sure (R2379). He did not want witnesses.

He denied removing their guns (R2381). He denied touching her at first, then made an ambiguous response (R2383). He told his brother he had made a mistake and shot someone (R2387). He didn't think his brother went back in there (R2388).

Earlier he described blacking out and being unable to remember (R2376, 2394-2395). He suddenly remembered everything and said she fired at him first (R2396). He remembered hitting her in the neck (R2399).

Appellant described threats that had been made to him, people saying that if he didn't tell he's in a lot of trouble, and to take him out in the woods and beat him (R2402). He said the deputies had treated him fairly (R2403).

Appellant was told repeatedly that he was not telling the whole truth (R2407-2410). It was when Appellant mentioned the phrase "self-defense" that Welty accused him of conning and told him to stop. After more questioning, he remembered Gail's hands were in her jacket pocket (R2413).

Welty went to Miami and recovered Hardeman's rifle, (Exhibit 54, R2416-2417). Then he got Appellant's guns from his house, (Exhibits 53 and 36, R2418-2420). On the way to Miami, Appellant allegedly admitted running a nail through his barrel to keep ballistics from running it (R2420). Welty also visited the former girl friend, to ask about the other guns (R2422).

On cross-examination Welty admitted he had been arrested and charged with drunk driving and leaving the scene of an accident (R2425-2426). That and other problems prompted him to consider leaving the State and disappearing and he told the prosecutor so (R2430-2433). He told the prosecutor he was an alcoholic and alcoholics have bad memories, even though that was a lie (R2423-

2424). He said he wanted help with his charges if they wanted his testimony (R2428-2429, 2431, 2433-2434). He was threatened with prosecution for those statements to the prosecutor (R2437-2438).

He conceded Appellant was going around in circles on the 10th (R2447). He theorized at one point that Mrs. Hardeman was tied up in a small hut and people were bringing her food and water (R2448).

Welty also arrested Jon LeCroy and took him to jail at the same time (R2449-2450). The many questions about whether Appellant was protecting his brother (R2450-2451) may have been because Welty thought an adult often throws blame off on a juvenile (R2453-2454). Welty was surprised Appellant did not know more about the guns he was using. He said it was his brother's gun (R2455-2457). He also said, at one point he wanted to "get the blame off everybody else" (R2459), State's Exhibit 35, the Hardeman pistol, was recovered from a friend of Jon's (R2494).

Deputy Browning confirmed talking to Appellant during the search and learning he'd seen the Hardemans on the 4th (R2530-2504). At the end of the 10th he said he could find the bodies if he had enough time (R2508).

The witness was also allowed to refresh his recollection as to the Miranda warnings over objection (R2511-2514). The taped statement he obtained was played (R2520-2536). It included the extra warning which triggered the pretrial appeal (R2423).

Appellant said he followed a hog into the head, shot at it, hit John, panicked and took the guns. Then Gail came up and asked why he had John's gun. She yelled and he shot her three times (R2523-2525). He hid the guns in the truck (R2526).

The female's pants were unfastened at the top because he checked near the belly button and on the rib cage for a heart beat (R2527). He put her hands in the pocket. He denied any sexual contact with her (R2532).

Appellant denied placing the backpack and belongings where he found them (R2529). He did ask his brother to hold the pistol and gave the rifle to his friend, Bill Ellett (R2531).

He told his brother about it (R2525), but not his girl friend (R2533). He tried to get the searchers close enough to find them (R2533), then told his brother where they were so he could find them (R2534). He closed by saying that a shot was fired from the direction of the female (R2535).

Afterward, the officer went to Miami to get a 30:06 from Bill Ellett that looked like Exhibit 54 (R2537-2538).

Roger Slora was deposed just before his testimony (R2666-2667) because he had testified against another prisoner (R2659-2660). Afterward, defense counsel requested a continuance to investigate a letter apparently used by Slora to make himself a witness in the other case (R2671-2674), because it appeared he was motivated by a desire to get transferred from Florida State Prison (R2764-2678). The motion was denied (R2679-2681). The Judge thought the evidence to that point overwhelming (R2681).

Slora testified he knew Appellant in the Palm Beach County Jail and helped him during a fight with another inmate (R2688-2690). Appellant allegedly told him the killing started as a robbery (R2692, 2698). He said one thing and then another about the murder of Mrs. Hardeman, saying he'd fondled her, then becoming evasive, then graphic (R2693). He said he looked John in the eyes shot him, and got a rush out of it better than sex (R2698).

The witness denied he was hoping for help with parole (R2702-2703). He admitted Appellant had been listed as a witness for the State in his case, but denied he'd been thinking about that for four years (R2706-2707). His earlier deposition contradicted him on the subject of parole hopes (R2725).

On proffer Slora said he's been in the Federal System earlier doing 1 to 6 years. There he worked in the library and studied psychology and psychoses. The proffer was refused (R2712-2715), but Appellant was allowed to establish the extent to which he studied psychology and how to answer psychological tests (R2719-2722). He lied and told doctors he could not remember his crime in hopes they'd find him crazy (R2767, 2770, 2777, 2778, 2793). He faked his answers on a test (R2772-2773) and falsely asserted the victim was laughing at him (R2779-27780) and that he hated his

mother (R2780, 2781).

Slora admitted he has been trying to get out of the State prison since he got there (R2726-2727, 2835-2853). He told no one what Appellant told him in 1981 until he wrote to the prosecutor on June 14, 1984 (R2732-2735). His letter said he wanted to be a witness (R2737). He wanted help getting transferred (R2741). He exaggerated the extent of his knowledge (R2742-2748). He did not hear from the State Attorney for a while (R7853).

He ended up testifying against another inmate, and demanding transfer because of the danger it put him in (R2854-2855). He wrote a letter much like the one he did in this case (R2855-2856). He denied fearing he'd be returned if he did not testify, but his deposition was to the contrary (R2727-2729).

He lied repeatedly in an effort to manipulate the doctors (R2793-2805). He faked taking his medicine, and acted subdued to hide it (R2786-2791). He wrote "crazy" and false letters to the Judge (R2807-2817, 2820-2826).

After Slora's testimony, the State rested (R2892). Appellant moved for a directed verdict on all counts, arguing with particularity that there was no evidence of robbery as to Gail Hardeman. The Court denied the motion, noting that it is possible to rob a dead person (R2895-2896). The defense rested and renewed its motions (R2898). The defense agreed to waive sequestration (R2905-2907). It did so again for the advisory sentencing (R3482).

At the charge conference, Judge Harper noted that jailhouse confessions like the one Slora testified to are generally 100% bad (R2930-2931). Appellant requested dismissal of the underlying felonies, which was denied (R2937-2939). Appellant waived most of the lessers on the robbery counts (R2978-2981). The Court declined to give penalties on lessers (R2998-2999). The Court also gave page 26 over objection (R3003) and refused to modify page 28 (R3002, 3004).

The Judge acknowledged that one does not commit robbery by stealing from a dead man unless one did the killing (R3009-3010).

When the charge conference resumed for phase II, the parties debated what constituted avoidance of arrest (R3327-3330). Appellant had special requests (R3352-3373, 3435-3437) some of which were granted (R3437, 3448), and most denied (R3460-3464). Objections to 1A, 1B and 2 were overruled (R3418-3420, 3422, 3426, 3432).

The prosecutor persuaded the Judge to count the new convictions (R3314-3318, 3387-3388, 3395-3396, 3406) as a violent history over defense objection that the robbery conviction as to John was invalid and that the conviction had to precede the instant crime.

At the advisory sentencing hearing, the State relied on its evidence from the trial (R3529).

The defense called Appellant's juvenile probation counselor to say his trespassing charge did not involve violence (R3532-3533). It was his first trouble to the counselor's knowledge, and he was a good probationer (R3536-3537).

The prosecutor asked whether the witness knew Appellant was placed on probation August 31, 1978, for burglary and had been arrested for theft (R3542). On objection, the Court conducted a Richardson inquiry (R3544-3556). The Court sustained the objection to the use of police reports which were hearsay, and to want of discovery (R3552). The jury was instructed to disregard the question (R3556-3557).

Appellant's family testified that he has matured a lot since this happened, especially because of his marriage (R3585, 3593, 3598, 3599,). Also, he has a baby now (R3585-3586, 3594, 3600).

On allocution, Appellant's family recommended life in prison for him (R3918, 3923, 3926, 3929-3930). A deputy testified he'd been no problem during the 2 years and 8 months he's been his guard (R3934-3936).

Susan Lafehr Hession testified that she was the jail psychologist, and saw Appellant right after he was arrested and regularly thereafter (R3962-3963). She found him to be very immature, egocentric, highly manipulative and hostile, harboring distructive, sadistic impulses (R3964). She characterized it as character disorder of an antisocial type (R3965). Her report to that effect was made in late 1981 (R3966).

During his stay, he was not a problem. He occupied the responsible position of houseman for several years (R3967-3968). She was amazed at his good adjustment. She thought his basic personality characteristics are stable in a tightly secured structure like jail (R3971-3972). She predicted successful

incarceration for him (R3973-3974).

She could not guarantee that he would not kill again if ever released (R3978). Nor could she guarantee he would be violent (R3983-3984). Though he is manipulative, she does not think he is fooling her (R3984). She considers his remorse genuine (R3985).

After the State tried again to establish an alleged prior burglary conviction (R3991-3995), it began calling relatives of the victim to plead for the death penalty by describing their agony (R3999-4002, 4005-4009, 4012-4013, 4015). The Defense was allowed a standing objection (R3996-3998).

SUMMARY OF ARGUMENT

This Court has previously considered the extra warning given Appellant that his second statement was primarily to refresh his recollection for trial, and found it did not compel suppression as a matter of law. It can and should reconsider, not only on the facts of this case, but also because the warning must be repeated for the jury to allow it to determine voluntariness, but can not be repeated with impermissably calling attention to Appellant's failure to testify.

The jury in this case heard that Appellant's codefendant had a great deal to do with this case. He lead searchers straight to the bodies after a week of futile searching. He had possession and control of the victims' guns after the killings. What they did not hear was that the codefendant told people he was the last one to see the victims alive. It was error for the Judge to exclude these admissions against interest.

It was also error to put Appellant to trial over his timely objection on robbery charges which did not allege an intent to permanently deprive.

Just as capital punishment is different, juveniles are different too. It is unconstitutional to apply the death penalty to a juvenile.

In any event, Appellant's death sentence can not stand. The aggravating circumstances do not bear close scrutiny. Further, the advisory sentencing hearing and the ultimate sentence are marred by appeals from the victim's family and for the victims' family.

The Court also erred in sentencing Appellant for the same robbery which the jury relied on for its verdict on felony murder, and in imposing consecutive minimum mandatory sentences for the two robberies.

POINTS INVOLVED

I. THE COURT ERRED IN REFUSING TO SUPPRESS SO MUCH OF THE APPELLANT'S STATEMENT AS FOLLOWED A WARNING WHICH NOT ONLY MISLEAD HIM BUT ALSO CALLED ATTENTION TO HIS FAILURE TO TESTIFY.

II. THE COURT ERRED IN EXCLUDING EVIDENCE THAT THE CODEFENDANT SAID HE WAS THE LAST ONE TO SEE THE VICTIMS ALIVE.

III. THE COURT ERRED IN PUTTING APPELLANT TO TRIAL ON ROBBERY CHARGES WHICH DID NOT ALLEGE AN INTENT TO PERMANENTLY DEPRIVE.

IV. FLORIDA'S CAPITAL PUNISHMENT LAW IS UNCONSTITUTIONAL FACIALLY AND AS APPLIED TO APPELLANT.

V. THE COURT ERRED IN SENTENCING APPELLANT TO DEATH.

VI. THE COURT ERRED IN ALLOWING THE JURY TO CONSIDER THE FEELINGS OF THE VICTIMS' FAMILY AND IN HEARING FROM THEM HIMSELF.

VII. THE COURT ERRED IN SENTENCING APPELLANT FOR ROBBERY WHERE THE JURY EXPRESSLY FOUND HIM GUILTY OF FELONY MURDER DURING THAT ROBBERY.

VIII. THE COURT ERRED IN IMPOSING CONSECUTIVE MINIMUM MANDATORY SENTENCES IN CONNECTION WITH ROBBERIES WHICH WERE ALLEGEDLY PART OF THE SAME CRIMINAL TRANSACTION.

ARGUMENT POINT I

THE COURT ERRED IN REFUSING TO SUPPRESS SO MUCH OF APPELLANT'S STATEMENT AS FOLLOWED A WARNING WHICH NOT ONLY MISLEAD HIM BUT ALSO CALLED ATTENTION TO HIS FAILURE TO TESTIFY.

This is a request that this Court reconsider its prior ruling. The ruling may be the law of the case, but this Court can always reconsider. See Strazzulla v. Hendrick, 177 So.2d 1 (Fla. 1965). It should do so here.

What this Court held before was that telling the accused the statement was being taken to refresh his recollection when he testifies at trial did not automatically require exclusion.

Appellant's statement was deemed voluntary and otherwise admissible, perhaps because it was so posited in the question certified to this Court. However, the record makes that assumption dubious. Consider the following:

1). The "refresher" advice. Even if it does not create a per se exclusion, it can not have helped Appellant with his understanding of his rights or his situation.

2). Understanding of rights. Did Appellant understand what he was told about rights. It seems unlikely. This is a young man who thought the right to bear arms was one of the 10 Commandments (R2460).

3). Understanding of situation. Did Appellant know how much harm he was doing himself and how much trouble he was in. The record says no. After giving police more than enough information to arrest him, Appellant still seemed to think he was going home. The following was said:

> "DETECTIVE WELTY: "Is there anything that you can think of that we haven't talked about that happened?
>
> "THE WITNESS: Right now, no but I am willing to call back in your office tonight if I can remember anything." (R2400).

This was undoubtedly the result of his

4). Age and inexperience. The susceptibility of

juveniles to respond to adult questioning is well-known. See e.g. In the Interest of R.L.J., 336 So.2d 132 (Fla. 1DCA 1976). That is why our statutes provide special safeguards. § 39.03(3) Fla.Stat. requires a reasonable effort to notify the parents of detained juveniles, and forbids unreasonable delay in delivery to the intake officer. A request for a parent is treated like a request for counsel, Dowst v. State, 336 So.2d 375 (Fla. 1DCA 1976) and the parent who demands notice may not be left out, Stokes v. State, 371 So.2d 131 (Fla. 1DCA 1979).

The pressures here were undoubtedly greater than for most. There was, of course, the usual police station pressures which produced the landmark Miranda decision. There was also the implicit command from his parents when they authorized his interrogation and the threats from others to beat him if he did not talk.

Thus, there is good reason on this record to question the voluntariness of Appellant's decision to talk. However, Judge Harper put his finger on a more compelling reason to exclude the statement. The warning given implicates both voluntariness and the right to remain silent.

Appellant has the right to have all evidence relating to voluntariness presented to the jury, which is instructed it may disregard any statement it finds involuntary (R3252-3253). See Graham v. State, 91 So.2d 662 at 664 (Fla. 1956).

Appellant was also entitled to be free from any comment fairly susceptible of interpretation as calling attention to his silence. The "refresher" warning, with its direct reference to being called upon to testify is far more explicit than some of the comments condemmed in State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). See also State v. Kinchen, 490 So.2d 21 (Fla. 1985).

Appellant got a double dose because thejury heard the questioner say "You are going to have to con a jury, you know." (R2410).

Appellant was thus faced with the Hobson's choice -- give up the privilege against self-incrimination by having his confession heard without all the evidence the jury needed to determine voluntariness and weight or give up the privilege by having its exercise at trial referred to directly in the State's

case. A defendant may not be forced to choose which way he prefers to have his rights violated.

As this Court said in State ex rel Johnson v. Edwards, 223 So.2d 393 at 395 (Fla. 1970):

> "In brief, the accused found himself in a vise. His constitutional right is to a speedy trial by an impartial jury. After seeking a speedy trial, he found himself facing the risk of trial by a jury which had been exposed to pretrial prejudicial publicity. The presiding Judge found this to be a real risk, when he granted the motion for change of venue.
>
> Respondent now argues that in seeking his constitutional right to a trial by an impartial jury, petitioner forfeited his constitutional right to a speedy trial.
>
> We so not believe such to be the case. While Sec. 915.01 (2) should apply, and the continuance provision apply, when a continuance is sought for the mere convenience of the accused, we hold that it was not intended to apply when an accused takes such steps as are necessary to protect his fundamental rights."

See also Sherbert v. Verner, 374 U.S. 398 at 403-404, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963).

The only answer is to suppress the statement which followed the flawed warning. This Court should reconsider and grant a new trial without the offending statement. At a minimum, the talk of conning a jury had to be excluded and it was not.

ARGUMENT POINT II

THE COURT ERRED IN EXCLUDING EVIDENCE THAT THE CODEFENDANT SAID HE WAS THE LAST ONE TO SEE THE VICTIMS ALIVE.

Appellant recognizes there was some evidence from which the jury could have reached the verdict it did, though he would not characterize it as overwhelming. Most of it consists of things Appellant did and said during the search and much of what he said was contrary to the evidence. For example, the girl showed no sign of being raped or knocked unconscious. The bullets had not been cut out of the bodies. The bodies were not buried. The arresting officer was surprised Appellant knew so little about the guns he was using. He said it was his brother's gun.

There was another person who the jurors could reasonably have believed committed the murders. That was Appellant's brother and codefendant, Jon. It was he who said the night before he'd lead them straight to the bodies and did so the next day. It was he who was supposed to cut the bullets out of the bodies. He was the last to return to the LeCroy camp on the fatal day. His friend ended up with the pistol. He had what may have been Hardeman's .38 during the search. He was said to be demanding payment from Ellett for the shotgun. The arresting officer appeared to suspect Appellant was covering up for him.

The jury heard all of that. It also heard Appellant's statement that he wanted "to get the blame off everybody else". What it never heard was that Jon told many people he was the last one to see the victims. Appellant's frequent proffers to that effect were excluded as hearsay. For example, on the 9th he told Deputy Alderman he'd seen them at 11 AM on the 4th. He also said if they found dead bodies it wouldn't bother him -- he'd seen dead bodies 5 or 6 days earlier (R2162-2167, 2174). Jon even told Elsie Bevan he was the last person to see the victims alive (R2297).

Such a statement is against interest within the meaning of Section 90.804(2)(c) Fla.Stat.[1] The last person to see the victims alive was the killer. Coupled with all the other suspicious activity on Jon's part, this was powerful evidence, suggesting a reasonable doubt as to Appellant's guilt. It not only tended to implicate Jon, but it did help get him charged with complicity to the point where the prosecutor claimed he was the gunman for one of the killings.

Since the prosecutor intended to make the claim he did later, his objection at trial was without merit. Were he not planning to do so, this evidence would still provide its own indicia of reliability.

Not having been tried yet, Jon was "unavailable" as a witness just as was the codefendant in Brinson v. State, 382 So.2d 322 (Fla. 2DCA 1979). There a new trial was ordered because of exclusion of evidence as to the codefendant's statement implicating himself. On authority of Brinson, supra, Appellant demands a new trial.

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[1](2)(c) reads in part:
"Statement against interest.-A statement which, at the time of its making, was so far contrary to the declarant's pecuniary or proprietary interest or tended to subject him to liability or to render invalid a claim by him against another, so that a person in the declarant's position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is inadmissible, unless corroborating circumstances show the trustworthiness of the statement."

ARGUMENT POINT III

THE COURT ERRED IN PUTTING APPELLANT TO TRIAL ON ROBBERY CHARGES WHICH DID NOT ALLEGE AN INTENT TO PERMANENTLY DEPRIVE.

Intent to permanently deprive the owner of the use of his property has traditionally been an essential element of robbery, Bell v. State, 394 So.2d 979 (Fla. 1981). As such, it should have been alleged in the indictment or information, Green v. State, 414 So.2d 1171 (Fla. 5DCA 1982).

Unlike Green, Appellant timely challenged his indictment. He even prevailed before the trial Judge. Nonetheless, Appellant was put to trial on indictment which alleged only that he did: "feloniously rob, steal, and take away" (R4098). The District Court of Appeal thought that sufficient to allege an intent to deprive, State v. LeCroy, supra, 435 So.2d at 356, and ignored permanency.

When "intent to permanently deprive" is an element, it is not enough to merely allege "intent to deprive". That holding as to the theft statute was reversed in State v. Dunmann, 427 So.2d 166 (Fla. 1983) only because the omnibus theft statute was amended to alter the requisite intent. There has been no such amendment as to the robbery statute, Hall v. State, 505 So.2d 657 (Fla. 2DCA 1987), so the indictment here was defective by any standard.

Contrary to the fourth district's view, a charging document which does not allege intent should be dismissed, as held in decisions like State v. Copher, 395 So.2d 635 (Fla. 2DCA 1981), and State v. Burnette, 188 So.2d 347 (Fla. 1DCA 1966).

It was error to put Appellant on trial on such a defective charge in view of his timely motion to dismiss, for which Appellant demands reversal of his robbery convictions with directions to dismiss those counts of the indictment.

ARGUMENT POINT IV

FLORIDA'S CAPITAL PUNISHMENT LAW IS UNCONSTITUTIONAL FACIALLY AND AS APPLIED TO APPELLANT.

Appellant challenged Florida's death penalty scheme on grounds enumerated below as follows:

1. The aggravating circumstances relied upon are not specified in the indictment (R4115).

2. The statutes are vague, and also fail to properly distinguish between murder in the first degree and murder in the second degree (R4115-4116).

3. The statutes constitute arbitrary infliction of punishment (R4116).

4. The sections are so vague as to make it impossible to prepare a defense (R4116).

5. Section 921.141 Fla. Stat. unconstitutionally requires the defense to prove mitigating circumstances (R4116).

6. The instruction to recommend death unless mitigating circumstances outweigh aggravating violates the accused's right to the benefit of a reasonable doubt.

7. Either life in prison without parole for twenty-five years or the death penalty violates the Eighth Amendment (R4117).

8. Statutory mitigating circumstances are too vague, and fail to give proper emphasis to unenumerated mitigating circumstances (R4117-4118).

9. Section 921.141 Fla. Stat. does not require the State to prove a compelling State interest requiring imposition of the death penalty (R4117-4118).

10. Section 921.141 Fla. Stat. is invalid because it deals with procedural matters (R4118).

11. Applying the death penalty to a felony murder without a finding of an intent to kill is invalid because it is grossly out of proportion to the crime and has no deterrent effect (R4118).

12. The penalty is applied excessively to the poor, to males and where the victim is white (R4118).

13. The penalty is applied irregularly because this Court's rulings lack uniformity (R4118-4119).

14. The statute is invalid because this Court does not review the life cases for comparison (R4119).

15. The statutes do not give notice of whether felony murder is being relied upon (R4119).

16. Imposition of the Death Penalty on a juvenile is grossly disproportionate to the severity of the crime, and constitutes cruel and unusual punishment (R4136).

The grounds are set forth in detail in the motions and are self-explanatory. Appellant is aware that this Court has repeatedly affirmed validity of Florida's law, and will rely on the arguments below without further comment except as to those relating to the age of the accused.

Reasons for treating juveniles differently are well documented in the record. Judge Harper's attention was directed to the following from the brief of Paul Magill:

> "[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be more susceptible to influence and to psychological damage.... [M]inors, especially in their earlier years, generally are less mature and responsible than adults. 'Particularly during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment' expected of adults.

Eddings v. Oklahoma, 455 U.S. 104, 116-117 (1982) (quoting Bellotti v. Baird, 433 U.S. 622, 635 (1979)).

> [A]dolescents, particularly in the early and middle years, are more vulnerable, more impulsive, and less self-disciplined than adults. Crimes committed by youths may be just as harmful to victims as those committed by older persons, but they deserve less punishment because adolescents may have less capacity to control their conduct and to think in long-range terms than adults. Moreover, youth crime as such is not exclusively the offender's fault, offenses by the young also represent a failure of family, school, and the social system, which share responsibility for the development od America's youth.

Eddings, 455 U.S. at 116 n.11 (quoting Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders, Confronting Youth Crime 7 (1978). See also Haley v. Ohio, 332 U.S. 596, 599 (1948); Gallegos v. Colorado, 370 U.S. 49, 54 (1962).

Adolescence is a distinct and special period in a child's life during which young people lack the capacity to understand the consequences of their actions. Adolescents are less experienced and mature than adults; are far more subject to impulsive and defiant conduct; and are less developed than adults in their capacities for long-range thinking and their abilities to control their conduct.

Threatening a child with death does not have the same impact as threatening an adult with death. Adolescents live for today with little thought of the future consequences of their actions. Kasterbaum, Time and Death in Adolescence, in The Meaning of Death 99 (H. Feifel ed. 1959). The defiant attitudes and risk-taking behaviors of some adolescents are related to their "developmental stage of defiance about danger and death". Fredlund, Children and Death from the School Setting, 47 J. School Health 533 (1977). Some adolescents play games of chance with death from a feeling of omnipotence. Miller, Adolescent Suicide: Etiology and Treatment, 9 Adolescent Psychiatry 327 (1981). They typically have not learned to accept the finality of death. R. Lonetto, Children's Conceptions of Death 134-41 (1980); Hostler, The Development of the Child's Concept of Death, in The Child and Death (O. Sahler ed. 1978). Adolescents tend to view death as a remote possibility; old people die, not teenagers. Consider, for example, teenagers' propensity to flirt with death through reckless driving, ingestion of dangerous drugs, and other similar "death-defying" behavior.

Adolescence is a time when young persons are frequently struggling to arrive at a definition of their own identity; adolescents are particularly likely to rebel against adult authority and to seek affirmation by their peers. E. Erikson, Childhood and Society 261-63 (2d ed. 1963). The teen years are "a period of experiment, risktaking and bravado. Some criminal activity is part of the patterns of almost all youth subcultures." F. Zimring, "Background Paper" 37, in Twentieth Century Fund Task Force, supra at 3. But

> much of the criminal activity attributable to the young seems to abate with age. As they pass from the turbulent years of adolescence to the period of 'settling in' that characterizes the early twenties, most young offenders -- whether or not they are apprehended and whether or not they participate in official rehabilitation programs -- seem to commit fewer offenses. For most adolescents age alone is the cure of criminality.

By the time a child attains the age of 15 or 16, he has generally achieved significant cognitive ability and is able to deal with abstract concepts and ideas. J. Piaget, The Moral Judgment of the Child (1932). Nevertheless, a child's ability

> to think abstractly and to engage in mature judgment continues to develop further into late adolescence and early adulthood. See M. Rutter, Changing Youth in a Changing Society 83 (1980); E. Peel, The Nature of Adolescent Judgment 131-34 (1971). Of particular significance is the considerable body of research which demonstrates that a person's ability to think in moral terms and to engage in moral judgments develops significantly during late adolescence, reaching a plateau only after leaving school or reaching early adulthood. See, e.g., Rest, Davison & Robbins, Age Trends in Judging Moral Issues, 49 Child Development 263 (1978); Kohlberg, Development of Moral Characher and Moral Ideology, in Hoffman & Hoffman Review of Child Development Research 404-05 (1964). The ability to make moral judgments depends, at least in part, on broader factors of social experience. Most adolescents simply do not have the breadth and depth of experience which are essential to making sound value judgments and to understanding the long-range consequences of their decisions. See Kohlberg, supra at 404-05; Rutter, supra, at 238.
>
> 'Our history is replete with laws and judicial recognition that minors, especially in their earlier years, are less mature and responsible than adults.' Eddings, 455 U.S. at 116-17. Florida law itself is protective of 17-year-olds, defining them as 'minors' and 'children', see Fla. Stat. secs. 1.01(12), 39.01(7), and treating them as children, not as mature adults capable of exercising judgment or discretion. Thus, for example, an unmarried 17 year old, such as appellant, cannot vote, serve on a jury, purchase or possess alcoholic beverages, attend a horse or dog race, dispose of property by will, enter into a contract, sue, or be sued. See Fla. Stats 97.041, 40.01, 562. 11, 550.04, 732., 501, 743.01 (by implication)(1983). Without parental consent, a 17-year-old may not marry or obtain an abortion. Id. at secs. 741.0405, 390.001(4)(a)." (R4784-4787).

Even with regard to capital crimes, Section 794.011 (2), Fla. Stat. requires the defendant to be at least 18 to quality for the most severe punishment for sexual battery.

Law Professor Streib (R3563) confirmed that juveniles almost never get the death penalty, and where they do, the cases are inappropriate, causing the ABA to take a stand against the death penalty for juveniles (R3572). The recidivism rate for juvenile offenders, especially juvenile murderers, is the lowest of all, confirming the view that they get better with age (R3572-3573). The death penalty is no deterrent for juveniles because they are too impulsive (R3573).

Juries do not put juveniles on death row. As defense counsel notes, only 8 of over 400 sentenced to die in Florida were juveniles at the time of the offense. Of those 8, this Court overturned 7 of the sentences (R4666).

It may be that this Court will not have to determine this issue, because the United States Supreme Court has the very issue before it now, and may issue a definitive ruling. However, this Court need not wait for that. It is clear that any application of capital punishment to a juvenile in Florida would be freakish, arbitrary, cruel and unusual within the meaning of the Eighth Amendment. This Court should so hold, declare capital punishment unconstitutional as applied to juveniles and vacate Appellant's death sentence.

ARGUMENT POINT V

THE COURT ERRED IN SENTENCING APPELLANT TO DEATH.

Because there are mitigating circumstances here, if the Court erred in any regard in the aggravating or mitigating circumstances, the sentence can not stand, Elledge v. State, 346 So.2d 998 at 1003 (Fla. 1977). Appellant submits that the sentencing order here is flawed in the following details:

Homocide in the course of a robbery. There is some evidence to support this finding, but there is still a question as to how one can rob a dead person. The Judge thought you could rob a dead person if you killed the person. His pronouncement is contrary to McCall v. State, 503 So.2d 1306 at 1307 (Fla. 5DCA 1987), which holds flatly:

> "Contrary to the finding by the trial Court, neither sexual battery nor robbery can be committed against a corpse."

It seems quite certain that this victim was dead when the gun was taken.

If what the Judge is finding in this case is that the murder was necessary to carry out the robbery, then we must question the next finding, which is:

Avoidance of arrest. There is some evidence in Appellant's statements to suggest Gail Hardeman was killed to eliminate a witness. There is also some suggestion the killing was a spur of the moment result of her rushing out of the bushes and surprising Appellant. There is even a suggestion of a shot from her direction. Finally, there is the State's theory that the purpose of the murders was robbery.

This Court has refused to limit this circumstance to cases where a law enforcement officer is killed, but has required that the motive in killing a civilian must appear unmistakably, as in Riley v. State, 366 So.2d 19 at 22 (Fla. 1978). The proof must be very strong as in Armstrong v. State, 399 So.2d 953 at 963 (Fla. 1981).

Appellant submits that the State can not have this both ways. One or the other aggravating circumstances must drop out,

invalidating the sentence. Also suspect is:

Prior convictions for violent crimes. Basically, Appellant has no history of violent crimes except for this one criminal episode. This Court has authorized the Judge to rely on contemporaneous convictions for this finding, but Appellant submits there should be some noncontemporaneous conviction to authorize the finding. Otherwise, the person who has one moment of madness in an otherwise exemplary life qualifies for the death penalty.

This Court declined to allow that result in Wasko v. State, 505 So.2d 1314 (Fla. 1987) and also explained why the Judge was at least partially wrong here. The contemporaneous conviction for the robbery of the murder victim can not be counted for this purpose (505 So.2d at 1318).

The result of allowing a single violent episode to eliminate all hope of rehabilitation is exacerbated where the defendant is so young. If that mitigating circumstance does not compel a life sentence, it should at least militate against the extreme penalty for one misstep. Appellant was shortchanged too on mitigating circumstances because of:

The treatment of the codefendant. It appeared to be the State's position throughout this trial that Appellant personally killed both victims, based on Appellant's statement. However, we subsequently learned the State was quite convinced the codefendant pulled the trigger personally in one of the killings, thus equalizing the culpability of the two defendants in this case. Appellant is sentenced to die. The codefendant was acquitted (SR1).

The disparate treatment of equally culpable codefendants is a nonstatutory mitigating factor to be considered at sentencing, Brookings v. State, 495 So.2d 135 at 143 (Fla. 1986), McCampbell v. State, 421 So.2d 1072 at 1075-1076 (Fla. 1982), Gafford v. State, 387 So.2d 333 at 337 (Fla. 1980).

The Judge's order fails to give any consideration to the disparate treatment of the codefendant. For that reason also, the sentence must be reversed, and this time the jury should consider this matter as well.

ARGUMENT POINT VI

THE COURT ERRED IN ALLOWING THE JURY TO CONSIDER THE FEELINGS OF THE VICTIMS' FAMILY AND IN HEARING FROM THEM HIMSELF.

The State's appeals to sympathy for the victims' family began early. White questioning a friend who identified the bodies, the prosecution gratuitously[2] called his attention to John's father, sitting in the Courtroom. Though objection was sustained (R2561), the die was cast.

The State renewed its efforts in earnest in its closing argument at sentencing, when the prosecutor said:

> "Further, to have sympathy or pity, any sympathy should be felt for us all." (R3656)

Objection was sustained (R3657), and the jury instructed to disregard that sentence (R3658). Soon the prosecutor said:

> "If you are to have sympathy or pity and that is to be felt as a human element in this case, then that sympathy or pity should be divided fairly, should be divided fairly for those who deserve such." (R3658-3659)

On objection, the following was said:

> "THE COURT: Sustained for the same reason I made side bar. Get off that subject and get onto another one.
>
> MR. EISENBERG: I ask for another cautionary instruction.
>
> THE COURT: The jury heard me sustain the objection. Get off the argument of sympathy and pity and get onto something that involves aggravating and mitigating circumstances. Move on." (R3659)

The prosecutor immediately continued:

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[2] It would have been error to call the father to identify the body under Hathaway v. State, 100 So.2d 662 at 664 (Fla. 3DCA 1958), because it places before the jury the nonrelevant factor that the victim left as family. What happened here was worse, because this relative did not have to leave as a witness would have.

> "MR. BARLOW: Ladies and gentlemen, don't be persuaded by arguments that life in prison is sufficient penalty and the Defendant will suffer in prison, that he won't be able to enjoy his life, his wife and his child because I submit neither will John and Gail Hardeman." (R3659)

This time, objection to the nonstatutory aggravating circumstances was overruled, but the prosecutor was admonished again (R3660-3661).

Then, on allocation, the family members came forward and inundated the Judge with appeals to sympathy, all over standing objection. The case which demonstrates the error of this approach is Booth v. Maryland, ___U.S.___(1987) 55 LW 4836. There a Maryland statute requiring family members to be heard at sentencing was held to require a new sentencing in a capital case. The Court says:

> "First it described the personal characteristics of the victims and the emotional impact of the crimes on the family. Second, it set forth the family members' opinions and characterizations of the crimes and the defendant. For the reasons stated below, we find that this information is irrelevant to a capital sentencing decision, and that its admission creates a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner." (55LW4837).

The Court noted that the function of sentencing in a capital case was to focus on the defendant as a "uniquely individual human bein[g]", not on the victim's family. Because the defendant rarely knows much about the victim, because of the vagaries inherent in whether a family is left behind and whether they are willing and able to express their grief, because the sentencing should not turn on whether the victim was perceived as a sterling member of the community and because any effort at rebuttal so alters the focus of the proceeding, such evidence is simply not admissible (55LW4837-4838). Nor are efforts by the family to characterize the horror of the crime (55LW at 4839).

Section 921.143 Fla.Stat., our law on victim impact statements, is indistinguishable from Maryland's. At every stage where the family was introduced, it was wrong. It was wrong to point out the father in the Courtroom during the trial. It was wrong, and, cumulatively very harmful to have the prosecutor persist in appeals for sympathy for the victims and their families at sentencing, for which a new advisory sentencing is required. Finally,

though the Judge here imposed the ultimate sentence instead of the jury, it was wrong for the Judge to receive all of the statements of the family. Since he was under statutory directive to receive them, and did so with the acknowledgement that they counted, the death sentence must be reversed with directions to conduct a new sentencing proceeding.

ARGUMENT POINT VII

THE COURT ERRED IN SENTENCING APPELLANT FOR ROBBERY WHERE THE JURY EXPRESSLY FOUND HIM GUILTY OF FELONY MURDER DURING THAT ROBBERY.

Count III charged robbery of John Hardeman and Count I charged murder of John Hardeman. The special verdict on Count I was for felony murder, leaving no doubt the murder conviction was based on the robbery.

When the defense attorney raised this point, the Judge correctly noted the conviction was valid, but Appellant could not be sentenced for the robbery (R3429-3430). Then, inexplicably, he imposed a 30 year sentence on Count III, consecutive to the sentence for the other robbery and with a separate minimum mandatory.

This was error under State v. Hegstrom, 401 So.2d 1343 (Fla. 1981), which holds that the accused may be convicted of both felony murder and the underlying felony, but may not be sentenced for both. See also Copeland v. State, 457 So.2d 1012 at 1018 (Fla. 1984).

Appellant's sentence for robbery on Count III is a fundamental error under Section 775.04 Fla. Stat. and Marsden v. State, 400 So.2d 194 (Fla. 2DCA 1981). It would require reversal even if Appellant had not objected earlier.

ARGUMENT POINT VIII

THE COURT ERRED IN IMPOSING CONSECUTIVE MINUMUM MANDATORY SENTENCES IN CONNECTION WITH ROBBERIES WHICH WERE ALLEGEDLY PART OF THE SAME CRIMINAL TRANSACTION.

Were the appellant's robbery sentence not invalid as argued in Point VII, it would still require reversal because it imposes consecutive sentences containing three year minimum mandatory terms for what is essentially one criminal transaction.

Whether one accepts the State's theory that the purpose of the murders was to steal the weapons or one believes Appellant returned later to get the guns, it is clear that both guns were taken at the same time. Thus, the robberies are part of a single criminal episode. Under Palmer v. State, 438 So.2d 1 (Fla. 1983) it was error to impose consecutive minimum mandatory sentences for use of a firearm in these cases. See also Harmon v. State, 506 So.2d 500 (Fla. 1DCA 1987).

CONCLUSION

It is respectfully submitted that Appellant's convictions must be reversed with instructions to exclude the statement which followed the refresher warning, to admit the codefendants' admissions against interest and to dismiss the robbery counts. Alternately, Appellant should be resentenced to life in prison, or granted a new sentencing. Further, one of his robbery sentences must be vacated or the mandatory minimums must be made to run concurrently.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by mail to JOY SHEARER, ESQUIRE, Assistant Attorney General, 111 Georgia Avenue, Room 204, West Palm Beach, Florida 33401, this 31st day of July, 1987.

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