IN THE SUPREME COURT OF FLORIDA

PAUL ALFRED BROWN,)

Appellant,)

v.) Case No. 70,483

STATE OF FLORIDA,)

Appellee.)

_____)

APPEAL FROM THE CIRCUIT COURT
IN THE THIRTEENTH JUDICIAL CIRCUIT
IN AND FOR HILLSBOROUGH COUNTY

BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Appellee does accept the statement of the case and facts as presented by the Public Defender.

Appellee notes that Appellant does not argue sufficiency of the evidence in his brief. This record does not support a sufficiency argument; and, the statement of the facts presented by the Public Defender demonstrates that a prima facie case was established. This Court will automatically review the evidence to determine if the interest of justice requires a new trial. See, Fla.R.App.Pr. 9.140(f).

On September 29, 1988, the Clerk of the lower court filed a supplemental record on appeal which contains a transcription of Wanda Brown's testimony. (R. 994-1002) Ms. Brown's testimony was video-taped and the court reporter, at the time of trial, apparently had not reported the audio. That reporting and transcription has been accomplished.

SUMMARY OF THE ARGUMENT

1. Appellant was fully advised of his Constitutional rights under the authority of Miranda. Appellant does not demonstrate otherwise. There was a full and fair hearing in the trial court on the claim. There was no police abuse in the apprehension of appellant; nor, was there police abuse in the custodial interrogation which followed. When appellant testified, he stated that he had no present recollection of being given his Miranda warnings. Also, he had no present recollection of not being read his Miranda rights. On this record, there is no error below.

2. There was no error below in trial court declining to allow defense counsel to challenge prospective Juror Scalfari for cause. The State under this argument sets forth the complete interchanges between Mr. Scalfari and the trial court and counsel. The declination of the trial court to strike Mr. Scalfari for cause did not force appellant to expend his peremptory challenges needlessly. There simply was no cause to excuse Mr. Scalfari. There was no actual bias established which would prevent Mr. Scalfari from sitting. Mr. Scalfari was an impartial, indifferent juror as to the death penalty and this record does not show otherwise.

3. The Florida Standard Jury Instructions publish the language to be read to jurors on "reasonable doubt". This Court has approved those instructions; and, below Appellant gave no persuasive reasons as to why his instruction should be given.

4. On the proportionality review, this conviction stands along with those cases where this Court has affirmed the death sentence. Here, there are several valid aggravating factors which support levy of the death penalty. The State in argument presents cases for this Court to compare and contrast. Appellee has turned the Court's attention to cases where the death penalty has been disapproved; and, the State relies on cases showing otherwise.

5. Appellant did seek modification of the Standard Jury Instructions; however, the facts of this case did not justify such relief. This claim is controlled by Combs, infra; and, no good reasons are set forth for this Court to recede from that precedent. Under the Florida death model, the judge and not the jury has the final decision as to sentencing. All instructions as given are correct statements of the law and appellant does not demonstrate otherwise.

6. The trial court's instruction on cold, calculated and premeditated circumstances in support of aggravation was not vague. This instruction as applied withstands constitutional scrutiny because the Florida process provides for proportionality

on direct review. The application of this factor by the trial court is subject to a determination by this Court as to whether the jury was appropriately "channeled" in its recommendation. Here, the standard instruction accomplishes that goal; and, below, trial counsel failed to establish otherwise.

7. This Court in Alvord, infra, held that a simple majority vote for a death sentence is sufficient to affirm. That there was a 7-5 vote is insufficient to recede from Alvord. The Constitution requires that there be a simple majority...not unanimity when this issue is considered. Alvord remains good law; and, a record is not established to mandate that this Court recede from Alvord.

8. The trial court was correct in finding a cold, calculated, premeditated manner in the death of Pauline Cowell. The killing was an execution to eliminate witnesses. The attempted killing of Tammy Bird cannot be overlooked; nor, can the statements given by appellant which support this finding.

ISSUE I

BROWN'S CONFESSION SHOULD HAVE BEEN SUPPRESSED BECAUSE DETECTIVE DAVIS DID NOT ADEQUATELY ADVISE HIM OF HIS CONSTITUTIONAL RIGHTS AS REQUIRED BY MIRANDA V. ARIZONA. (As Stated by Appellant)

Prior to trial, appellant filed a motion to suppress his confession. Apparently, the written motion was filed in State v. Brown, Fla. 13th Judicial Circuit Case No. 86-4033 (the attempted homicide of Tammy Bird). (R. 740) For purposes of the hearing, the cases were consolidated. (R. 740) That motion to suppress does not appear in this record proper. There was a full and fair hearing on the Motion. (R. 738-792) The motion was denied at the conclusion of the hearing (R. 792) and later, at trial, it was again denied. (R. 372-373)

At bar, this claim presents another issue dealing with police interrogation. Obviously, confessions are important in solving crime and convicting criminals. Here the State submits there was no police abuse in seeking to obtain a confession from Mr. Brown. In Culombe v. Connecticut, 367 U.S. 568, 81 S.Ct. 1860, 6 L.Ed.2d 1037 (1961), Justice Frankfurter wrote:

> Despite modern advances in the technology of crime detection, offenses frequently occur about which things cannot be made to speak. And where there cannot be found innocent human witnesses to such offenses, nothing remains -- if police investigation is not to be balked before it has fairly begun -- but to seek out possibly guilty witnesses and ask them questions, witnesses, that is, who are

> suspected of knowing something about the offense precisely because they are suspected of implication in it.

(6 L.Ed.2d at 1040)

As in Culombe, the questions asked appellant might well have served to clear him of suspicion; however, here they lead appellant to furnish proof which sends him both to prison and his death. Obviously, questioning continues to remain indispensable to crime detection.

On appeal, appellant argues that Caso v. State, 524 So.2d 422 (Fla. 1988) controls; however, the State excepts. Turning to the transcript, there is no place during the interrogation of appellant that Miranda was not used. Detective Davis developed appellant as a suspect from speaking with the victim's relatives. (R. 744) Police were working what turned out to be a connecting case; to wit, the robbery of a Thriftway Market and the shooting of a Mr. Powell. (R. 744-746) Mr. Powell followed appellant from the Thriftway Store and eventually Mr. Powell reported appellant's abandoned automobile to police. (R. 747) Found in the automobile were the fruits of the robbery. (R. 747) Eventually, police came into contact with appellant in a mobile home park where his brother resided. (R. 748) When Detective Davis arrived at the park, he saw appellant fleeing; and, at that point, Deputy Sandra Gisha screamed: "Halt, Sheriff's Office, halt." (R. 750) Immediately, she identified appellant as the

prime suspect. (R. 750) Police reduced appellant to capture and upon approaching him asked: "Where is the gun?" Appellant answered that it was in his pocket. (R. 750-751) This question was asked for the protection of police. (R. 751) While on the ground, appellant was given his Miranda warnings. (R. 751) Detective Davis stated that appellant appeared to understand these rights; and, that he declined to invoke his rights to silence. (R. 752-753). Appellant was then re-advised of his Constitutional Rights at the police car from a State Attorney's "rights card". (R. 753) Detective Davis' memory was that appellant began making statements indicating his involvement in a homicide between being given his "rights" by memory and from the card. (R. 754) There was no testimony that the statements were anything other than freely and voluntarily given. (R. 756) Appellant never requested that an attorney be present. (R. 757) Appellant was then transported to the Sheriff's Office in Ybor City and upon entering the "interview room" his Constitutional Rights (for the third time) were given to him. (R. 757) Appellant agreed to making a "taped" statement as his verbal skills exceeded his written skills. (R. 759) At that point, a "consent" was read into the tape recording. (R. 760) Detective Davis testified that appellant never in his presence invoked his right to remain silent. (R. 762) Cross-examination of Detective Davis does not establish otherwise. (R. 762-779) However,

cross-examination did answer the question as to how appellant was developed as a suspect. It would appear that appellant had been subjected to Hillsborough County Sheriff's Investigation No. 86-52758 which was a juvenile sex crimes project; and, the basis for that investigation was Pauline Cowell (the present homicide victim) alleged that appellant had raped her. (R. 764) Regretfully, that investigation had not been cleared. (R. 764) However, appellant attempted to establish that when captured, Deputy Gisha was standing over him with her canine unit dog along with other police with guns drawn. (R. 770) That appellant's eye glasses were broken. (R. 775) Detective Davis was under the opinion that appellant was under neither the influence of drugs or alcohol. (R. 776) Detective Davis never testified to any facts which would support a Miranda claim.

Appellant, Paul Alfred Brown, then testified. Brown stated that upon arrest he had been without sleep for two (2) days. (R. 781) Brown had no present recollection of being read his Miranda rights; however, he could not testify that police did not read these rights to him. (R. 781) All Brown could recall was that police took his "blood splattered" eye glasses from him. (R. 775, 784)

Trial counsel urged that there was no probable cause for arrest and that the first Miranda rights from memory were insufficient. (R. 788) The trial court denied the motion

finding that appellant never attempted to invoke any of his rights. (R. 792)

Appellant urges that police inadequately informed im that he had the right to cut off questioning from police. The testimony of Detective Davis does not support that proposition:

> Q. I am asking whether you ever asked him or told him -- excuse me -- that if he requested an attorney and didn't have one he would be put in touch with the Public Defender's Office.
>
> A. I told him if he wished to have an attorney and couldn't afford one one would be provided for him. About the only thing that I told him that I have not so far in the rights was the fact that when I was lighting his cigarette I said: "Paul, you know you don't have to talk to me." He said: "Yeah, I want to talk to you." He said: "I know I done wrong, I know I am going to have to pay for what I did."
>
> Then he made the statement he'd probably get the chair for what he had done.

(R. 774, L. 5-18)

When the totality of the circumstances is considered, there is no Constitutional deprivation. The State would rely on State v. Graham, 240 So.2d 486 (Fla. 2d DCA 1970) for the proposition that even though Detective Davis did not have his Miranda Card with him for his first advisement of rights, his testimony was sufficiently detailed to satisfy Miranda warnings mandate. Here, there was no contradictory testimony from appellant as he had no present recollection of the events...he just could not recall

specific events of the early morning. If any of the warnings for any reason were deficient, obviously the warnings read from the Miranda card were sufficient. That the published card is complete and correct satisfies any deficiency appellant might urge.

ISSUE II

THE TRIAL COURT ERRED BY DENYING APPELLANT'S CHALLENGE FOR CAUSE ON PROSPECTIVE JUROR SCALFARI WHO SHOWED A PREDISPOSITION IN FAVOR OF DEATH AS THE PROPER PENALTY. (As Stated by Appellant)

There are two ways in which either the prosecution or defense can eliminate prospective jurors from the petit panel. One approach is to challenge for cause. If a prospective juror appears sympathetic to the opposition or unsympathetic to the inquiring side, the challenger must satisfy the trial court that there is a sufficient likelihood that the prospective juror is biased in some way. Alternatively, there exists the peremptory challenge. In this latter challenge, the party need not give a reason for striking a juror and the court is without control. These strikes are reserved for jurors who are suspected of being biased. The question before this Court is whether appellant established a basis for challenge for cause before Judge Spicola.

At the beginning of voir dire, Judge Spicola pointed out to the prosecution and defense that their initial goal would be to qualify **14** to **16** jurors in the capital punishment area and the court would handle that initial aspect of voir dire. (R. 3) Defense counsel suggested that this approach might well create a presumption that his client was guilty. (R. **4-5)** It was agreed then that voir dire would cover all aspects of the case and defense counsel agreed for the trial court to inquire. **(R. 6)**

Prior to voir dire, defense counsel argued that he needed additional peremptory challenges. (R. **10)** The trial court reserved ruling; and, as a basis for that ruling he noted that he would evaluate what developed during voir dire. (R. 10) It was the position of the defense that the cumulative maximum challenges in this case would be **30** possible peremptory challenges. (R. **11)** The trial court again reserved ruling. (R. 12)

The prospective jurors were brought forward and the trial court introduced the court personnel and the parties. (R. **18-19)** Judge Spicola then stated the purpose for voir dire:

> What we're trying to do in the little time that we have to get to know you is to find out if you have any opinions or personal experience or special knowledge that would predispose you to one side or the other or to one verdict or the other, so that is what voir dire is all about.

(R. **19, L.** 23 - R. 20, L. **3)**

As to juror Scalfari, the following transpired during voir dire:

> THE COURT: All right. Thank you, sir.
>
> Mr. Scalfari, is that correct, sir?
>
> MR. SCALFARI: Yes.
>
> THE COURT: Are you opposed to the death penalty?
>
> MR. SCALFARI: No, Your Honor.
>
> THE COURT: All right. Let me ask you the same question I asked this gentleman before you: Would your views prevent you from

finding the Defendant guilty if the evidence so warranted because you might be concerned that the death penalty might be imposed?

MR. SCALFARI: No, sir.

(R. 28, L. 22 - R. 29, L. 7)

Voir dire then shifted into questioning by counsel. The prosecutor then began explaining the felony-murder theory of prosecution as contrasted to premeditation. (R. 71-72) The following was elicited:

Does everybody understand that?

Mr. Scalfari, do you understand that, sir?

MR. SCALFARI: Yes.

MR. BENITO: Do you have any problems with the law of first degree felony murder?

MR. SCALFARI: No.

MR. BENITO: Even though the indictment alleges premeditation, Mr. Scalfari, do you understand that the State can proceed under both theories: First degree premeditated murder and first degree felony murder?

MR. SCALFARI: Yes.

(R. 72, L. 8-18)

The defense counsel then began inquiry:

MR. CHALU: All right. I know that's a cute question as well as an important question, and I meant to simply illustrate it to you before. In our system of justice that is different from some others in the world, particularly in the eastern bloc of the nations in the world, the mere fact that the government, or the powers that be, or the State, or whatever has charged somebody with

a crime, that doesn't make them automatically guilty.

Mr. Scalfari, you think that is a good principle?

MR. SCALFARI: Certainly.

(R. 85, L. **7-17)**

Defense counsel also inquired about service in our armed forces:

MR. CHALU: Yes, sir, Mr. Scalfari.

MR. SCALFARI: United States Air Force, four years, and disabled discharge.

MR. CHALU: What?

MR. SCALFARI: Buck Sergeant.

MR. CHALU: When were you discharged?

MR. SCALFARI: **1961.**

(R. **111**, L. 25 - R. **112**, L. **6)**

Defense counsel requested a recess so that appellant might avail himself of the restroom facilities. (R. **116-120)**

After the recess, defense began inquiry into death penalty partialities and/or impartialities:

Mr. Scalfari.

MR. SCALFARI: Yes, sir.

MR. ALLDREDGE: Knowing what you now know about the degrees of homicide, do you feel that death is the only punishment for first degree murder:

MR. SCALFARI: No, sir.

MR. ALLDREDGE: Would you be able to consider any mitigating circumstances that the Defense would present?

MR. SCALFARI: Certainly.

MR. ALLDREDGE: Mr. Scalfari, you earlier stated that you generally believe in the death penalty. Why is that?

MR. SCALFARI: I believe that the correct set of evidence is produced that shows premeditation, first degree murder, I believe, for instance, the death penalty without any other mitigating evidence, should be a fair verdict.

MR. ALLDREDGE: Now what do you think society accomplishes by the death penalty?

MR. BENITO: Judge, I'm going to object to that. I don't think that bears any relationship to his ability to act as a juror in this particular case.

THE COURT: Response, Counsel.

MR. ALLDREDGE: Your Honor, I believe it obviously goes to the Court's initial inquiry as to the jury's belief in the death penalty. I think it's important, number one, what their belief is, and why they have such beliefs.

I belief that is within the scope of the Court's questioning.

THE COURT: Overrule.

MR. ALLDREDGE: Mr. Scalfari, I don't mean to put you on the spot, but what do you think society accomplishes by the death penalty?

MR. SCALFARI: If it's justified that he has taken away potential of another similar occurrence.

MR. ALLDREDGE: Stop it from happening again?

MR. SCALFARI: Correct.

(R. 131, L. 6 - R. 132, L. 19)

Defense counsel then challenged Mr. Scalfari for cause:

> MR. CHALU: Your Honor, I would challenge Albert C. Scalfari, Number 7, on the grounds my notes indicate that he presumes that death to be the appropriate penalty for first degree murder. In other words, he believes in -- presumes the death penalty and the first degree.
>
> THE COURT: I don't have that with --
>
> MR. BENITO: I disagree. I don't recall those answers at all. I believe he, as well as Mr. Alldredge, talked about different degrees of first degree.
>
> THE COURT: We rule on that or deny that request.
>
> Transcribe the questions and answers to Juror Number 7, Albert Scalfari.

(R. 162, L. 22 - R. 163, L. 10)

Defense counsel then announced that he would use his peremptory challenge if Mr. Scalfari were not struck for cause. (R. 165) The trial court reminded defense counsel that he was having Mr. Scalfari's voir dire transcribed. (R. 165) The trial court did not excuse Mr. Scalfari and directed that his group return at 9:30 a.m. the next day. (R. 169)

The following day, court convened and Judge Spicola began considering the propriety of striking Juror Scalfari for cause. (R. 175-176) At that point, Judge Spicola had the benefit of

designated transcription of voir dire. (R. 176-177) The public defender made the following argument, after the court had reviewed voir dire:

> MR. CHALU: I think the part that I am referring to, Judge, is where he said the death penalty without the murder -- without any mitigating circumstances that the death would be appropriate, and again, my argument is that shifts the burden to us to come forth with mitigating circumstances rather than leaving the burden with the State to establish aggravating circumstances.
>
> My point being that a first degree murder without any aggravating circumstances is not a death sentence case, and you never shift the burden to prove mitigation.

(R. 177, L. 10-20)

The trial court made it abundantly clear that the Public Defender was being given a full and fair opportunity to establish the purported bias on the part of Mr. Scalfari. (R. 177) Again, questions were asked of Mr. Scalfari; first by the prosecution:

> Mr. Scalfari, how are you, today?
>
> MR. SCALFARI: Fine, thank you.
>
> MR. BENITO: Correct me if I am wrong, yesterday you did not think that every first degree murder case warrants the death penalty, did you, sir?
>
> Mr. SCALFARI: That's correct.
>
> MR. BENITO: You are willing, if you are seated as a juror, to listen to all of the evidence, aggravating and mitigating circumstances, and if a man is found guilty, determine whether or not the death penalty should be imposed?

MR. SCALFARI: Yes, sir.

MR. BENITO: You're not going to think that if a man is convicted of first degree murder that he should get the death penalty, are you?

MR. SCALFARI: No, sir.

MR. BENITO: All right. Of the next sixteen people that we are asking, and if you have heard my questions yesterday, obviously, any questions of me regarding anything I brought up?

(No response.)

(R. 196, L. 11 - R. 197, L. 6)

And, then by the defense:

Mr. Scalfari, for example, if you find as a matter of fact that my client, Mr. Brown, did in fact commit a murder or a homicide, you would not automatically consider that to be first degree murder, would you?

MR. SCALFARI: No.

MR. CHALU: All right. You would be capable of listening to the Judge's instruction about the different degrees of homicide and decide based on the facts and law given to you by the Judge which type of homicide was the appropriate one?

MR. SCALFARI: Yes.

(R. 210, L. 2-12)

And again, by the defense:

Mr. Scalfari.

MR. SCALFARI: Sir.

MR. ALLDREDGE: Mr. Scalfari, what has been the nature of your relationship with these people?

MR. SCALFARI: Many years ago my father was in a state of depression. He was very successfully treated by a psychiatrist.

MR. ALLDREDGE: Would it be fair to say that your experience was a positive experience?

MR. SCALFARI: Positive, yes, sir.

(R. 230, L. 14-23)

Then there was a jury selection conference outside the presence of the jury:

THE COURT: That is just what I was going to rule, and I don't believe that Scalfari is challengeable for cause, either, for the record.

MR. CHALU: ell, I will renew my request for challenge for cause on Mr. Scalfari.

THE COURT: That's denied, so let's start with the State from one through 41.

(R. 235, L. 24 - R. 236, L. 5)

The State has set forth the complete interchanges between Mr. Scalfari and the trial court; prosecution; and, defense so that this Court might be able on this direct review to determine if error exists. The State recognizes that Moore v. State, 525 So.2d 870 (Fla. 1988) holds that it is reversible error where a trial court declines to excuse for cause forcing a defendant to expend his peremptory challenges. The federal courts follow suit. See Celestine v. Blackburn, 750 F.2d 353 (5th Cir. 1984),

certiorari denied 472 U.S. 1022. There in a capital collateral appeal of a district court's denial of 28 U.S.C. §2254 attack, Judge Williams points out a constitutional deprivation exists only if the trial court's refusal to excuse a juror exhibits manifest error. See, Irvin v. Dowd, 366 U.S. 717, 723, 81 S.Ct. 1639, 1643 6 L.Ed.2d 751 (1961) and Smith v. Phillips, 455 U.S. 209, 218, 102 S.Ct. 940, 946, 71 L.Ed.2d 78 (1982)(citing 28 U.S.C. §2254 presumption of correctness of state court findings). Judge Spicola found as fact no such violation and this record supports his factual finding. This record does not establish that Mr. Scalfari had a "state of mind" in reference to death penalty litigation which would support a finding of actual bias. As pointed out in Smith, the remedy for allegations of juror partiality is a hearing in which an accused has an opportunity to establish actual bias. In Smith, the allegation was that one of the jurors had sought employment with the office of the prosecutor and had not disclosed same during voir dire; and, of course, this de hors the record proper. Here, nothing de hors the record proper. In Buchanan v. Kentucky, 483 U.S. ___, 107 S.Ct. ___, 97 L.Ed.2d 336, 351 (1987), Justice Blackmun relies on Lockhart v. McCree, 476 U.S. 162, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986) quoting Wainwright v. Witt, 469 U.S. 412, 423, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985) for the proposition that jury impartiality requires only "'jurors who will conscientiously apply the law and

find the facts.'"' On this record, there is simply no support that Mr. Scalfari was anything other than an impartial, indifferent juror as to the death penalty. There was no error in the trial court's declination to excuse Mr. Scalfari; and, thus appellant's claim that he was forced to expend a peremptory challenge must fail.

ISSUE III

THE TRIAL COURT'S INSTRUCTION TO THE JURY ON "REASONABLE DOUBT" (STANDARD JURY INSTRUCTION) UNCONSTITUTIONALLY DILUTED THE DUE PROCESS REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT. (As Stated by Appellant)

At bar, the public defender objected to the standard jury instruction on "reasonable doubt". (R. 436-437) Interestingly enough, defense counsel conceded that this was a generic objection which he always made. (R. 436) He also conceded that he was aware that this Court had approved the instruction to which he was making his objection. (R. 436) The objection to the instruction is that the public defender opined that the jury should not be informed that a "reasonable doubt" is not a "possible doubt."

The instruction given follows the Florida Standard Jury Instructions. (R. 883) This Court approved the Florida Standard Jury Instructions as proposed. See, In re Standard Jury Instructions in Criminal Cases, 431 So.2d 594, 595 (Fla. 1981). In that opinion, this Court recognized that there had been internal committee dispute concerning the language on "reasonable doubt." There were two statements of dissent by Justices Sundberg and Adkins. This Court has not receded from these standard instructions.

At the conviction stage, it remains the burden of the government to establish guilt beyond a reasonable doubt through admissible evidence. The jury is to apply a high standard of

persuasion; and, that standard is the reasonable doubt test. This is a federal constitutional requirement under the due process clause. In re Winship, 437 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Under the Florida jury instructions as given on this direct review, it cannot be argued that there is a federal constitutional deprivation. In Yates v. Aiken, 484 U.S. ___, 108 S.Ct. ___, 98 L.Ed.2d 546 (1988), Justice Stevens in a collateral review of a South Carolina jury instruction, again returned the case to the Supreme Court of South Carolina as there was concern that South Carolina had not complied with a former mandate of the Court. Justice Stevens set forth from Francis v. Franklin, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985) that basis due process explanation:

> "The Due Process Clause of the Fourteenth Amendment 'protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charge.' In re Winship, [397 US 358, 364 [25 L Ed 2d 368, 90 S Ct 1068, 51 Ohio Ops 2d 323] (1970)]. This 'bedrock, "axiomatic and elementary" [constitutional] principle,' id., at 363 [25 L Ed 2d 368, 90 S Ct 1068, 51 Ohio Ops 2d 323], prohibits the State from using evidentiary presumptions in a jury charge that have the effect of relieving the State of its burden of persuasion beyond a reasonable doubt of every essential element of a crime. Sandstrom v Montana, supra, at 520-524 [61 L Ed 2d 39, 99 S Ct 2450]; Patterson v New York, 432 US 197, 210, 215 [53 L Ed 2d 281, 97 S Ct 2319](1977); Mullaney v Wilbur, 421 US 684, 698-701 [44 L Ed 2d 508, 95 S Ct 1881](1975); see also

> Morissette v United States, 342 US 246, 274-275 [96 L Ed 288, 72 S Ct 240](1952). The prohibition protects the 'fundamental value determination of our society,' given voice in Justice Harlan's concurrence in Winship, that 'it is far worse to convict an innocent man than to let a guilty man go free.' 397 US, at 372 [25 L Ed 2d 368, 90 S Ct 1068, 51 Ohio Ops 2d 323]. See Speiser v Randall, 357 US 513, 525-526 [2 L Ed 2d 1460, 78 S Ct 1332](1958)." 471 US, at 313, 85 L Ed 2d 344, 105 S Ct 1965.

(98 L.Ed.2d at 552)

At bar, there is no constitutional infirmity in the instruction given. To the extent that trial counsel has a continuing objection to specific standardized jury instructions, perhaps he should use his efforts to seek appointment to this Court's continuing Committee on Standard Jury Instructions in Criminal Cases; however, this case is not the vehicle for the revision and modification sought.

The "reasonable doubt" jury instruction comports with Holland v. United States, 348 U.S. 127, 75 S.Ct. 127, 99 L.Ed. 150, 166 (1954); however, should there be error, it is subject to a harmless error analysis. See, Kimball v. State, 184 So. 847 (Fla. 1939) and Miller v. Norvell, 775 F.2d 1572 (11th Cir. 1985) certiorari denied 90 L.Ed.2d 675. On this claim, this Court must affirm.

ISSUE IV

A SENTENCE OF DEATH IS DISPROPORTIONATE IN THIS CASE WHEN COMPARED TO OTHER CAPITAL CASES WHERE THIS COURT HAS REDUCED THE PENALTY TO LIFE IMPRISONMENT. (As Stated by Appellant)

This Court as a matter of state law provides a "proportionality" review. See, Goode v. State, 365 So.2d 381 (Fla. 1978). Sometimes the trial court is made aware of a number of factors the jury did not have an opportunity to consider. Although the jury was presented with a motive...that motive can be clarified. In his brief, appellant asserts that his unlawful entrance into Pauline Cowell's bedroom was for the purpose of confronting her about some rumors. There were rumors and those rumors were the basis of a criminal investigation. At the suppression hearing, it was developed by the Public Defender that Mr. Brown had been charged with a sexual battery of Pauline Cowell; and, the crime was being investigated by George Hill of the juvenile sex crimes unit. (R. 764) Thus, there is certainly record support for Appellant's motive to confront Pauline Cowell in her bedroom. When one is being investigated for sexual battery under an active sheriff's investigation (Case No. 86-52758), then the motivation in confronting your purported victim is more than innocent. (R. 764) In a proportionality review, it is recognized that sometimes the trial court is made aware of a number of factors which the jury did not have an opportunity to consider. See, White v. State, 403 So.2d 331, 339 (Fla. 1981).

In this Court's proportionality review, the State established the aggravating circumstances which the trial court found, Appellant's argument is that these findings should not be given the weight accorded and your Appellee urges on the proportionality review that the death sentence is warranted. See generally, State v. Henry, 456 So.2d 466, 469 (Fla. 1984).

At bar, the findings in support of the death penalty are incorporated as an Appendix to appellant lead brief. (R. 912-916) The jury has rendered a recommendation of death by a seven to five vote.

As to §721.141(5)(d), Florida Statutes (1987), this homicide was committed during the actual perpetration of an armed burglary. The simultaneous conviction of the attempted murder of twelve year old, Tammy Bird establishes a previous conviction of a felony involving the use of violence under §921.141(5)(b), Florida Statutes (1987). Further under §921.141(5)(i), Florida Statutes (1987), this homicide was committed in a cold, calculated, and premeditated manner without any pretense of moral or social justification. Here, appellant took planned efforts to enter the dwelling at nighttime by using bolt cutters; cutting a lock; returning to his automobile to arm himself; and, entering the young women's bedroom while they slept. There is factual support for Judge Spicola's conclusion that the victim's death was an execution. As Paul Brown was a rape suspect, the trial court was

apprised of why there was an armed, "middle of the night" confrontation instigated by appellant. Appellant recognizes that in this Court's scope of review, it is not the purpose to reweigh the findings of the trial court; but, rather to compare this sentence of death to the cases in which this Court has approved or disapproved such a sentence. At bar, appellant has furnished this Court with cases attempting to establish the latter. As to cases where the death penalty has been approved under these statutory findings, they do exist.

This Court has held §721.141(5)(d), Florida Statutes (1987) established in Jackson v. State, 502 So.2d 409, 413 (Fla. 1986) (where Mr. Jackson was found to be the non-triggerman in an armed robbery) and Suarez v. State, 481 So.2d 1201 (Fla. 1985) (where Mr. Suarez, while in flight, fired a weapon into a migrant labor camp). This Court has held §721.141(5)(b), Florida Statutes (1987) established in Craig v. State, 510 So.2d 857, 868 (Fla. 1987) (where this Court held that contemporaneous and subsequent convictions may be considered in establishing this aggravating factor). This Court held:

> This Court has rejected this argument and held that the aggravating circumstances can be established by contemporaneous and subsequent convictions. Ruffin v. State, 397 So.2d 277 (Fla.), cert. denied, 454 U.S. 882, 102 S.Ct. 368, 70 L.Ed.2d 194 (1981); King v. State, 390 So.2d 315 (Fla. 1980), cert. denied, 450 U.S. 989, 101 S.Ct. 1529, 67 L.Ed.2d 825 (1981); Elledge v. State, 346 So.2d 998 (Fla. 1977).

(510 So.2d at 868)

See, Correll v. State, 523 So.2d 562, 568 (Fla. 1988) and Wasko v. State, 505 So.2d 1314, 1317 (Fla. 1987). In the Wasko case, the trial court had improperly found an aggravating circumstance of previous conviction of violent felony as it relied on the attempted sexual battery of his child victim. This case falls in line with the internal authority relied on Wasko where contemporaneous convictions involved several victims in a single incident. This Court has held §721,141(5)(i) valid in Dufour v. State, 495 So.2d 154 (Fla. 1986) where Donald Dufour planned to pickup a homosexual; rob him; and kill him. The announcement of his intention to commit the homicide and the subsequent execution-styled shooting established the aggravating circumstance. Id. at 164. Later, in Remeta v. State, 522 So.2d 825 (Fla. 1988), this Court upheld the aggravating circumstance of cold, calculated, and premeditated where Daniel Remeta planned the robbery in advance and planned to leave no witnesses. So it follows at bar, Paul Brown arrived at the residence with wire cutters; armed himself; executed his accuser of rape; and, attempted to execute the remaining twelve year old witness.

As to mitigation, the trial court either declined to find mitigation or alternatively gave the mitigation little weight. As a matter of law, there is no error in these determinations.

Finally, should any of these aggravating circumstances fall (and they should not), then this Court has held repeatedly that when there are one or more valid aggravating factors and none in mitigation, death is presumed to be the appropriate penalty. See, Jackson v. State, supra.

ISSUE V

THE TRIAL COURT ERRED BY DENYING APPELLANT'S SPECIALLY REQUESTED MODIFICATIONS TO THE STANDARD PENALTY PHASE JURY INSTRUCTIONS. (As Stated by Appellant)

Appellant urges that the Florida Standard Jury Instructions were inadequate to inform the jury as to the facts established in this case. The State urges that this trial was not so unique as to require modification of our uniform instruction schedule.

Appellant recognizes that this claim is controlled by Combs v. State, 525 So.2d 853 (Fla. 1988); and, to the extent that there is tension between this Court and the Eleventh Circuit on this issue, it must be remembered that Eleventh Circuit decisions are not binding on this Court except in specific cases. See, Fletcher v. Weir, 455 U.S. 603, 102 S.Ct. 1309, 71 L.Ed.2d 490, 493 (1982). There the high Court explains:

> The principles which evolved on the basis of decisional law dealing with appeals within the federal court system are not, of course, necessarily based on any constitutional principle. Where they are not, the States are free to follow or to disregard them so long as the state procedure as a whole remains consistent with due process of law. See Cupp v. Naughten, 414 U.S. 141, 146, 94 S.Ct. 396, 38 L.Ed.2d 368 (1973)

(71 L.Ed.2d at 493)

Additionally, in Bradshaw v. State, 298 So.2d 4, 6 (Fla. 1973), certiorari denied 417 U.S. 919, 94 S.Ct. 2626, 41 L.Ed.2d 225 (1974), Justice Atkins points out that "...[i]t is axiomatic that

a decision of a federal trial court, while persuasive if well-reasoned, is not by any means binding on the courts of a state." To the extent Appellant suggests that Dugger v. Adams, 804 F.2d 1526 (11th Cir. 1987) amended on rehearing, 816 F.2d 1493 (11th Cir. 1987), certiorari granted 44 Cr.L. 4019 (U.S. March, 7, 1988)(No. 87-121), controls, those questions presented may well be limited as an opportunity is presented for the Court to recede from Reed v. Ross, 468 U.S. 1, 104 S.Ct. 2901, 82 L.Ed.2d 1 (1984). In any event, this Court has approved the Florida Standard Jury Instructions; and, Appellant fails to establish error. As Justice Overton points out, the Florida process has the final decision maker as the court--not the jury. Combs v. State, supra. The instructions as given to not channel otherwise.

Appellant also argues that there was error in the trial court declining to strike the following language from the standard jury instruction:

> If you are reasonably convinced that a mitigating circumstance exists, you may consider it established.

This language does not support a constitutional deprivation. Initially, this Court has previously and consistently declared that the standard jury instructions are a correct statement of the law and thus the trial court's giving of such instruction cannot be error. This Court has previously held that it is adequate to instruct the jury according to the standard instruction under the

statute. Peek v. State, 395 So.2d 492 (Fla. 1981); Mason v. State, 438 So.2d 374 (Fla. 1983); Johnson v. State, 438 So.2d 774 (Fla. 1983); Armstrong v. State, 429 So.2d 287 (Fla. 1983); Straight v. Wainwright, 422 So.2d 827 (Fla. 1982); Lara v. State, 464 So.2d 1173 (Fla. 1985). Next, the fear enunciated by appellant that the instruction would be perceived as shifting a burden of proof to the defendant is belied by the fact that the preceding sentence of the standard jury instruction recites that a mitigating circumstance need not be proved beyond a reasonable doubt by the defendant. Furthermore, the jury was instructed that "you should consider all the evidence tending to establish one or more mitigating circumstances and give that evidence such weight as you feel it should receive in reaching your conclusion as to the sentence that should be imposed."

The complained of instruction is a mere tautological expression: it simply states that if a jury believes a mitigating circumstance exists, they may consider it established (there is no threshold level of proof necessary). Thus, the given instruction is a benefit to the Defendant rather than a detriment. A similar claim has been considered and rejected by the Eleventh Circuit Court of Appeals in Ford v. Strickland, 696 F.2d 804, 817-819 (11th Cir. 1983). Here, there is no error; and, if there is error, at most it is harmless.

As to requested instruction no. 1, trial counsel conceded that the standard jury instruction was a correct statement of the law. (R. 601) As to requested instruction no. 5, the argument below reads:

> Number 5, I want to hear the argument on that.
>
> MR. CHALU: Well, the argument on this, Your Honor, is reasonably convinced sounds like there is some kind of preponderance of evidence for proof of mitigation, and in Lockett vs. Ohio, doesn't indicate there has to be any standard of proof for mitigating circumstances at all.
>
> THE COURT: Where is that language. I can't find that language.
>
> MR. BENITO: Mitigating circumstances, probably the third paragraph after you read that last of the mitigating circumstances, I think it's the third paragraph.
>
> THE COURT: Okay. What is your argument?
>
> MR. CHALU: That the instruction I stated seems to indicate that there is a standard of proof of preponderance of evidence for mitigation, and that is just not the case.
>
> MR. BENITO: That is his interpretation, Judge. I don't read that that way. I believe it is a fair statement of the law.
>
> First, it says you need to make sure that the mitigating circumstances need not be proved beyond a reasonable doubt. It's just saying be reasonable in determining whether or not a mitigating circumstance exists, don't be unreasonable.
>
> THE COURT: All right. Any further argument on that one?

MR. CHALU: No, **Your Honor.**

THE COURT: **Denied.**

(R. **605,** L. 5 **-** R. **606, L. 9)**

The State maintains that these requested instructions, which have been preserved for appellate review (R. 604), are not legally required as the Florida Standard Jury Instructions are correct statements of the law and need no modification.

ISSUE VI

THE TRIAL COURT'S INSTRUCTION ON THE COLD, CALCULATED AND PREMEDITATED AGGRAVATING CIRCUMSTANCE WAS UNCONSTITUTIONALLY VAGUE BECAUSE IT DID NOT INFORM THE PENALTY JURY OF THE LIMITING CONSTRUCTION GIVEN TO THIS AGGRAVATING CIRCUMSTANCE. (As Stated by Appellant)

Here, appellant does not argue on the merits that this factor was not sufficiently established; rather, appellant argues that the instruction as given was infirm because it did not give a "limiting construction." In the trial court, the objection reads:

> Next.
>
> MR. BENITO: The last one, I or whatever that number is?
>
> THE COURT: 9.
>
> MR. BENITO: 9. Capital felony was -- or the crime to which --
>
> THE COURT: Which the Defendant is to be sentenced was committed in a cold, calculated, premeditated manner without any pretense or moral justification.
>
> MR. BENITO: That's all I have.
>
> MR. CHALU: I object to that one. There is no basis in the evidence before the Court. It is insufficient evidence to border on the instruction on that.
>
> THE COURT: Any further objection?
>
> MR. CHALU: No.

> THE COURT: Objection overruled. I'm going to read 9.
>
> Now we're moving right along to mitigating, and we turn to the Defendant, and what do you want me to give?
>
> (R. 616, L. 10 - R. 617, L. 4)

Trial counsel's objection was limited to whether this aggravating factor had been adequately established; and, not to whether it be given a limiting construction. (R. 616) The State has, in its proportionality argument, set forth authority which gives cases holding this factor to be sufficiently established. For example, in Jennings v. State, 512 So.2d 169, 175-176 (Fla. 1987), six-year old Rebecca Kunash subjected to a kidnapping, rape and murder. Baby Kunash, as the victim here, was asleep in her bed. Her home, too, was burglarized. On most horrible facts, Baby Kunash's body was swung like a sledge hammer on the ground; and, then she was drowned. The record fully supported that the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. That same record support exists at bar.

Appellant's reliance on Maynard v. Cartwright, 486 U.S. ___, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988) is misplaced. There the Oklahoma aggravating factor "especially heinous, atrocious or cruel" was found to be unconstitutionally vague. It was also found to have constitutional infirmities in the Tenth Circuit. See, Cartwright v. Maynard, 822 F.2d 1477 (10th Cir. 1987)(en

banc). However, the Court was sensitive not so much as to facial validity; but, rather to application of the statutes to particular cases. The Court recognized that Florida channels the discretion of the sentencer by requiring separate guilt and sentencing proceedings, consideration of both the mitigating and aggravating circumstances, and direct state appellate review. In Proffit v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976), the United States Supreme Court upheld the constitutionality of the Florida guided discretion statute. There is no question but that a statute might be so vague that it could fail to adequately channel jury sentencing decision patterns (such as in Oklahoma) or jury recommendation decision patterns (such as in Florida). This Court construes §921.141(5)(i), Florida Statutes to apply only to where there is a "careful plan or prearranged design to kill" during the homicide. See, Rogers v. State, 511 So.2d 526, 533 (Fla. 1987). In Nibert v. State, 508 So.2d 1, 4 (Fla. 1987), this Court was persuaded by Billy Nibert's argument that there was no record support for heightened premeditation. In other words, there must be record support that the intent is of a more contemplative, methodical, controlled nature. Here, the sentencing order reflects that appellant secured bolt cutters, arrived at the victim's residence in the middle of the night; cut the lock to her residence; returned and entered the victim's sleeping quarters; confessed knowledge about what he knew he would

have to do. (R. 913, 914) The trial court found support for this aggravating factor in that Paul Alford Brown armed himself to "talk" to a seventeen year old girl and shot her in the head to "make it quick" constitutes the aggravating factor. Here, the jury was not given an unbridled instruction. There was guidance; and, there is record support for the trial court's finding of this aggravating circumstance.

ISSUE VII

BROWN'S SENTENCE OF DEATH VIOLATES THE EIGHTH AMENDMENT, UNITED STATES CONSTITUTION BECAUSE A BARE MAJORITY JURY DEATH RECOMMENDATION IS NOT RELIABLY DIFFERENT FROM A TIE VOTE JURY LIFE RECOMMENDATION. (As Stated by Appellant)

Appellant concedes that this Court's decision in Alvord v. State, 322 So.2d 533 (Fla. 1975) holds that a simple majority vote for a death sentence is sufficient to affirm; however, appellant points out that the Alvord decision predates this Court's holding in Tedder v. State, 322 So.2d 908 (Fla. 1975). This is not exactly correct. The Alvord opinion was filed on September 17, 1975, and rehearing was denied on December 15, 1975. Thus Alvord was final on December 15, 1975. The Tedder opinion was filed on November 19, 1975, and no rehearing was prosecuted. Thus, the Tedder opinion predates the Alvord opinion as rehearing was pending in Alvord. The Alvord opinion remains the law; and, appellant's argument to recede from Alvord is without merit.

This Court last visited this claim in James v. State, 453 So.2d 792 (Fla. 1984), certiorari denied, 469 U.S. 1098, 105 S.Ct. 608, 83 L.Ed.2d 717 (1984). There, this Court held:

> Finally, the United States Supreme Court has never held that jury[6] unanimity is a requisite of due process, and in Alvord v. State, 322 So.2d 533 (Fla. 1975), cert. denied, 428 U.S. 923, 96 S.Ct. 3234, 49 L.Ed.2d 1226 (1976), this Court held that the jury in a capital case could recommend an advisory sentence by a simple majority vote. We do not find that

unanimity is necessary when the jury considers this issue.

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[6]. Johnson v. Louisiana, 406 U.S. 356, 92 S.Ct. 1620, 32 L.Ed.2d 152 (1972).

(453 So.2d at 792)

An opportunity presented itself in James for this Court to recede from Alvord; and, this Court declined the opportunity. Alvord remains the law in Florida; and, there is no Sixth Amendment constitutional deprivation.

ISSUE VIII

THE FINDING BY THE SENTENCING JUDGE THAT THE COLD, CALCULATED AND PREMEDITATED AGGRAVATING FACTOR APPLIED WAS ERRONEOUS. (As Stated by Appellant)

What appellant overlooks and fails to consider is that the intrusion into the residence was anything less than innocent. There was a plan to enter and to confront the victim about accusations of rape. (R. 764) This was information available to the trial court. Thus, this was not simply a confrontation during a burglary that went a awry.

Reliance is placed on Bates v. State, 465 So.2d 490 (Fla. 1985) for the proposition that the aggravating factor of a homicide committed in a cold, calculated and premeditated manner is to be reserved primarily for these murders which are characterized as execution or contract murders and/or witness elimination murders. There was a dissent in Bates by Justice Boyd who urged that the facts of the homicide (his advance planning of the crime) justified making this finding. The majority in Bates relied on Herring v. State, 446 So.2d 1049, 1057, cert. denied, 469 U.S. 989, 105 S.Ct. 396, 83 L.Ed.2d 330 (1984) where the defendant stated that he shot his robbery victim a second time to prevent his testifying against him. The motive and/or reason why this homicide was committed was to silence a rape victim's accusations against appellant. (R. 764) The confrontation was for the purpose of witness elimination; and the shooting itself

was accomplished in the manner of an execution. The evidence is sufficient to find proof in support of witness elimination. Dr. Berland, during sentencing, testified that appellant told him he went to talk with the victim; she screamed and he shot her. (R. 567) The psychologist acknowledged that appellant had given a statement reflecting that he considered shooting his victim before he went there. (R. 567) The testimony established:

> *Q.* Are you aware that he said -- he said he had no intention of harming her, and he figured that he would have to use the gun if she hollered? Are you aware of that?
>
> A. That sounds familiar.
>
> Q. And in effect, she did holler, and then he shot her. Are you aware of that?
>
> A. Yes.

(R. 567, L. 19-25)

Dr. Berland conceded that the homicide may well have been a pre-planned act rather than an "impulsive" one. (R. 568) This is where this homicide differs from the ones relied on by appellant. The other homicides were concommitant to the other criminal acts where, here, the homicide was planned subject to one contingency; and, that being if the victim screamed, she would be killed. She screamed and she was executed. Further, the collateral acts of appellant establish this factor. How? The girl, Tammy Bird, who was sleeping in the bed beside Pauline Cowell, was also shot to eliminate her as a witness:

Q. What do you recall he said he did to Tammy Bird?

A. My recollection is that she sat up and looked at him, laid down, and he shot her.

Q. Are you not aware that he said, "That she had seen me -- she had seen me, and that's why I shot her.

Are you aware of that?

A. Yes, I am aware of that.

Q. And you don't see a cold bloodedness to that, Doctor?

(R. 569, L. 17-25)

Although Dr. Berland equivocated on giving an opinion on this question, the trial court did not. (R. 913-914)

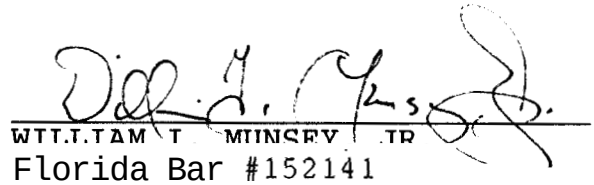
The attack on Tammy Bird is not to be overlooked. Under the authority of Provenzano v. State, 497 So.2d 1177, 1183 (Fla. 1986), the cold, calculated manner may be directed at a third person who is not necessarily the victim. Thus, it becomes significant to view the manner in which appellant effectuated the design of death. In this case, that manner was cold, calculated and premeditated beyond a reasonable doubt.

CONCLUSION

WHEREFORE, based on the foregoing reasons, argument, and authority, the State would pray that this Honorable Court make and render an opinion affirming the judgment of guilt and sentence of death by electrocution.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to DOUGLAS S. CONNOR, Assistant Public Defender, P.O. Box *9000* - Drawer PD, Bartow, Florida 33830 this 30th day of December 1988.

OF COUNSEL FOR APPELLEE