IN THE SUPREME COURT OF FLORIDA

PAUL ALFRED BROWN,

Appellant,

vs. : Case No. 70,483

STATE OF FLORIDA,

Appellee. :

APPEAL FROM THE CIRCUIT COURT
IN AND FOR HILLSBOROUGH COUNTY
STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

JAMES MARION MOORMAN
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TENTH JUDICIAL CIRCUIT
BAR NO. 0143265

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STATEMENT OF THE CASE

Paul Alfred Brown, appellant, was indicted by a Hillsborough County Grand Jury on April 2, 1988 (R814-6). The three count indictment charged Brown with armed burglary, first-degree murder in the shooting of Pauline Cowell and attempted first-degree murder in the shooting of Tammy Ann Bird (R814-6).

Prior to trial, a Motion to Suppress Confession was heard before the Honorable Susan Bucklew on October 3, 1986 (R738-92). The suppression motion was denied (R792). When later renewed at trial, it was again denied (R372-3).

Over Appellant's objection, the case was transferred to another trial division and trial was held before the Honorable *Guy* W. Spicola and a jury on February 16 through 19, 1987 (R9-10, 18-669). Brown's motion for additional peremptory challenges was denied (R10, 854-5, 168). After the defense challenge for cause to prospective juror Scalfari was denied, counsel exhausted his peremptory challenges and renewed his motion for additional peremptories (R162, 236, 239-42).

Appellant moved for judgment of acquittal as to the charged offenses, contending that the State's evidence showed only the lesser included offenses of armed trespass, second-degree murder and attempted second-degree murder (R424-7). The trial court denied the motion for judgment of acquittal and the renewed motions (R427, 428, 696).

During the charge conference, Appellant objected to the standard jury instruction on reasonable doubt (R436-8). The

trial judge overruled his objection **(R437-8).**

The jury returned verdicts of guilty as charged to all three counts **(R509-10, 895).**

At the subsequent penalty phase proceedings, the state relied upon the evidence adduced during the guilt or innocence phase (R521). Brown produced two experts for psychological testimony and two family members as witnesses **(R521-97).** Defense counsel requested nine special penalty phase jury instructions, all of which were denied **(R601-10, 983-91).** The jury, by a vote of **7-5,** recommended a penalty of death (R663, **896).**

On March **2, 1987,** Brown's Motion for New Trial was heard and denied (R901-2, **696).** In connection with his Motion to Declare the Death Penalty Unconstitutional as Applied (R897-900), Brian Donerly testified as an expert witness in the field of statistics **(R703-8).** This post-trial motion was also denied (R708). Brown's father and brother testified further in regard to Appellant's character, urging that a life sentence be imposed (R712-21). The court sentenced Brown to death (R734). On the non-capital offenses, the court departed from the guidelines recommendation and imposed consecutive sentences of life and **30** years for the armed burglary and attempted first-degree murder convictions respectively **(R735-6).**

In the sentencing judge's written findings filed March **3, 1987,** three aggravating circumstances were found; F.S. **921.141** (5) **(b)** (contemporaneous conviction for violent felony); F.S. **921.141** (5) (d) (course of a burglary); and F.S. **921.141** (5) (i)

(cold, calculated and premeditated) (R912-4, see Appendix). In mitigation, the court found three statutory circumstances: F.S. 921.141 (6) (b) (extreme mental or emotional disturbance); F.S. 921.141 (6) (f) (substantially impaired capacity); and F.S. 921.141 (6) (g) (age) as well as four non-statutory circumstances of social and economic disadvantage, below average mental capacity, non-violent past and under stress at the time of the shootings (R914-5, see Appendix). The court found the mitigating circumstances did not outweigh the aggravating (R915, see Appendix). As reasons for guidelines departure in the non-capital sentencing, the court cited Brown's contemporaneous conviction of a capital felony and the extent of the victim's injuries (R915-6, see Appendix).

Brown filed a timely Notice of Appeal on March 30, 1987 (R918). On August 17, 1987 the Public Defender, Tenth Judicial Circuit was designated to represent Brown on appeal.

Pursuant to Article V, Section 3 (b)(1) of the Florida Constitution and Fla.R.App.P. 9.030 (a) (1) (A) (i), Paul Alfred Brown, appellant, now takes appeal to this Court.

STATEMENT OF THE FACTS

A. GUILT OR INNOCENCE PHASE

On March 19, 1986 Barry Barlow and his wife, Gail, were living in an apartment located on Highway 301 in Hillsborough County (R411-2). Pauline Cowell was also residing with them; she had moved from her mother's house about a week previously (R413). Paul Alfred Brown, appellant, was living with Pauline's mother and he had helped move Pauline's possessions into the Barlow's apartment (R413, 416).

Pauline slept in an add-on Florida room which had an outside entrance door secured with a padlock (R414, 417). On the night of March 19, 1986, a friend of Pauline's, Tammy Bird, stayed over (R415-6). The two girls were sleeping in Pauline's bed (R417).

The Barlows were awakened by two gunshots and a cry around 1:30 a.m. (R418, 421). They entered the Florida room and discovered Pauline dead (R420). Tammy was coughing and trying to breathe (R419). There was blood on the pillows, bed and floor (R419). The entrance door which had been locked was wide open (R420). Barry Barlow walked to a nearby service station where he telephoned for an ambulance and the sheriff's office (R420-1).

The prosecutor and defense counsel stipulated to the identities of Pauline and Tammy (R306). The parties further stipulated that Pauline died instantaneously from a single gunshot wound to the head (R306).

Dr. Kenneth M. Louis, a neurosurgeon, testified that he

performed surgery on Tammy Bird March 20, 1986 (R311). He recovered a bullet fragment from her brain during the operation (R312). Defense counsel's objection to Dr. Louis's statement that Tammy suffered extensive brain damage from the gunshot wound was overruled (R312-3).

A crime scene technician with the Hillsborough County Sheriff's Office, Steven Moore, arrived at the scene of the shooting around 2:45 a.m. on March 20, 1986 (R289). He located a padlock in a bush around thirty yards from the front door of the residence (R291). The padlock appeared to have been cut with some type of tool (R293). Moore also collected some bullets at an approximate distance of two feet from where the homicide victim was found (R293). Another technician retrieved a pair of bolt cutters from Appellant's station wagon (R336-8).

Pursuant to information developing Appellant as a suspect, Detective Paul Davis and Deputy Sandra Kay Streeter went to Bob Lester's Trailer Park where Brown's brother resided (R366, 744, 748). A police dog, handled by Deputy Streeter, indicated that someone was hiding behind a utility shed (R342). This individual who turned out to be Appellant was apprehended without incident (R342, 345).

Sheriff's Detective Paul Davis searched Brown after his arrest, seizing a gun from his front pants pocket (R367). This revolver was later linked to the homicide (R356-9). Detective Davis also seized Appellant's glasses because they appeared to have blood spatter marks on them (R369, 385-6). Brown told the

detective that he could not see well enough to read without his glasses (R387).

Detective Davis, by memory, orally advised Appellant of his constitutional rights (R369-70). However, he did not advise Brown that he could cut off questioning at any point if he desired (R773). Brown made an initial statement and was subsequently readvised of his Miranda rights from a printed card supplied by the State Attorney's Office (R752-4). The detective, rather than Appellant, initialed the rights card (R774-5). Later at the Sheriff's Office, Detective Davis read the Consent to Interview form to Brown because Brown could not read it without his glasses (R775). Brown signed this form at Detective Davis's direction (R775).

As recounted by Detective Davis at trial, Brown gave a full confession. He said that he drove to the apartment in the early morning hours because he wanted to talk to Pauline about some lies she had been telling (R378). He took a pair of bolt cutters purchased at Ace Hardware, walked to the door and cut away the bolt (R378). Brown then returned to his vehicle, drove it directly in front of the residence and put his revolver in his belt (R380-1). He entered the apartment and awakened Pauline, saying that he didn't intend to harm her, that he just wanted to talk (R381). Pauline started yelling "Get out, I don't want to talk to you, leave me alone" (R381). Brown then shot her in the head from a distance of one or two feet (R381).

Brown stated that he was unaware that anyone else was in the

room until after he fired his gun (R381). The other girl raised her head at that point, looked at Brown, and put her head back on the pillow (R382). Brown immediately fired the revolver without aiming (R399-401).

Detective Davis asked Brown if he had thought about killing Pauline before he went to the residence (R379) Brown replied that he really had no intentions of killing her but knew that he would have to use his gun if she started "hollering" (R379). He planned to shoot her in the head if he had to shoot because Pauline would not have to suffer that way (R379). When asked about the shooting of Tammy Bird, Brown said he shot because she had seen him (R382).

The defense rested without presenting any witness or evidence (R428). In closing argument, defense counsel conceded that Brown committed the homicide and attempted homicide but that he should be found guilty of the lesser crimes of second-degree murder, attempted second-degree murder and armed trespass (R457-64).

B. PENALTY PHASE

The State presented no further evidence during penalty phase, choosing to rely upon the evidence previously introduced (R521). The defense presented testimony from family members and two psychiatric experts.

Family members, Paul Brown Sr. and Jimmy Brown were character witnesses for Appellant (R521-31, 591-7). The jury

also saw the videotaped deposition of Appellant's stepmother, Wanda Brown **(R532, 998-1001).**

Appellant was the oldest of Paul Brown Sr.'s two sons **(R522).** When his parents separated, his mother had custody for a while before the Juvenile Court became aware of the filthy living conditions and placed Appellant and his brother in a children's home **(R523-5).** At this time, Paul Jr. was six years old **(R525, 592).**

Later Paul and his brother were raised by a grandmother and the grandmother's sister in Georgia **(R525-7, 592-4).** Paul was especially mistreated; he was often whipped with a wet wash rag **(R 526, 593-4).** Around age **11,** Paul and his brother returned to Tampa to live with their father who had been a long distance truck driver **(R527).** There was a succession of housekeepers before Paul Brown Sr. remarried and Wanda Brown became the boys' stepmother **(R528, 999).**

Appellant did very poorly in school **(R528, 595).** His stepmother was told by school officials that Paul was retarded **(R1000).** The school officials thought that the cause might be inadequate nutrition and gave him special lunches **(R1000).** His schoolmates picked on him because he was a slow learner **(R594-5).**

When Appellant grew up, he worked at various jobs including employment at a plant nursery and doing yardwork **(R530).** He also made money by collecting aluminum cans **(R530).** He often helped out neighbors by running errands for them and buying food for their children when they weren't working **(R531, 595-6).**

The family members all agreed that Appellant never picked fights (R530, 595, 1000). He didn't have a temper and wasn't a violent person (R596-7, 1000).

Dr. Robert Berland, a forensic psychologist, did extensive testing on Brown (R536-7). He first noted that the Hillsborough County Jail records indicated that Brown was receiving an anti-psychotic medication, Mellaril, from the time he was taken into custody (R538, 588). On an IQ test administered by Dr. Berland, Brown scored 81 (R541). The witness classified this as well below the normal range, low enough that many individuals at this level are unable to function in the world on their own (R541).

Two different tests each indicated that Brown was suffering from substantial organic brain damage (R542-3). Dr. Berland was unable to determine whether this brain damage existed from birth or whether it resulted from later trauma to the brain or exposure to toxins (R544).

Dr. Berland also gave his opinion that Brown was psychotic at the time he committed the homicides (R545-6), psychotic when he was previously tested in 1980 (R559), and still psychotic (R559). Dr. Berland defined psychosis as a measurable disturbance with a biological basis in the brain (R560). The usual symptoms are disruptions in the ability to think realistically and in appropriate emotional responses (R560).

Dr. Berland concluded that Brown mentally suffered from both a thought disorder and an organic disorder (R561). The effects were listed as increased excitability and impulsiveness, a

diminished ability to make realistic judgments complicated by low intelligence, and psychotic thinking (R547). Dr. Berland stated that Brown was under the influence of an emotional or mental disturbance and that he had an impaired capacity to conform his conduct to the requirements of law when the homicide occurred (R545-7).

Another psychiatric expert, Dr. Walter Afield, reviewed Dr. Berland's reports and conducted his own examination of Brown (R577). Dr. Afield noted that Appellant had a "rather horrendous life experience" with placement as a child in multiple foster homes where he suffered some abuse (R578-9). He determined that there was brain damage, low intelligence and indications of serious mental disturbance as far back as the 70s decade (R578-9).

Dr. Afield concluded that Brown was suffering from extreme mental or emotional disturbance and substantially impaired capacity to control his behavior when the homicide was committed (R583-4).

C. SENTENCING

At the sentencing hearing, Appellant's father, Paul Brown Sr., and brother, Jimmy Brown, again testified (R712-20). Both pointed out that Appellant was under a severe mental strain at the time of the homicide (R713-5, 718). Brown was trying to support his girlfriend (the mother of the victim) and her children (R719). His only means of income was collecting junk and reselling it (R715, 719-20). They were trying to move to

Georgia because HRS had threatened to take away the children if the living conditions didn't improve (R714, 718).

Appellant was exhausted from lack of sleep, he was without money; and he was mentally strained from trying to keep his girlfriend and her children together as a family unit (R715-6). It was totally out of character for Brown to commit any violent act (R720-1).

SUMMARY OF ARGUMENT

When Brown was arrested, he was given Miranda warnings which failed to inform him of his right to cut off questioning at any time. This right is an integral part of the Miranda warnings. Because Brown was not adequately informed, his subsequent waiver of Fifth Amendment riqhts was not knowing and intelligent. His confession should have been suppressed.

A prospective juror indicated that he believed a death sentence was appropriate for all premeditated first-degree murders unless there was some evidence in mitigation. Defense counsel challenged this prospective juror for cause but the challenge was overruled. Appellant had to exercise a peremptory strike and subsequently exhausted his peremptories. The trial judge denied his motion for additional peremptories. Brown's right to an impartial jury was denied.

Over Appellant's objection, the trial court gave the jury the standard instruction on reasonable doubt. This Florida standard instruction is open to an unconstitutional interpretation which dilutes the beyond a reasonable doubt burden of proof.

Brown's sentence of death is disproportionate because this is not one of the most aggravated and unmitigated of capital cases. Comparison with other decisions of this Court where there was another victim killed or seriously injured during the course of the capital felony shows that a life sentence is appropriate for Brown.

The trial judge erroneously denied Appellant's proposed modifications to the standard penalty phase instructions. One requested modification would have informed the jury of the great

weight that would be given to their recommendation. The other proposed deletion of language which could be interpreted as setting an unconstitutional burden of proof for the defense to meet before mitigating evidence could be considered.

The penalty jury was given the standard instruction on the cold, calculated and premeditated aggravating circumstance. This instruction violates the Eighth Amendment because it does not inform the jury of the limiting construction given to this aggravating circumstance. There is a reasonable probability that a correct definition of the CCP aggravating circumstance could have resulted in a 6-6 life recommendation rather than a 7-5 death recommendation.

Statistical analysis shows that a 7-5 death recommendation is not reliably different from a life recommendation. Where the state has only been able to persuade a bare majority of jurors to recommend death, a death sentence which depends upon weight given to that recommendation violates the Eighth Amendment.

The capital felony at bar was not cold, calculated and premeditated because premeditation of a burglary cannot be transferred to the killing. There was no prearranged plan to kill; rather Brown planned only to confront the victim and talk to her. The victim's screams caused him to shoot. The trial judge should not have found this aggravating circumstance applicable.

ARGUMENTS

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.

In Caso V. State, 524 So.2d 422 (Fla. 1988), this Court held that failure to advise a suspect in custody pursuant to Miranda of his right to appointed counsel if indigent renders any subsequent confession inadmissible in the state's case-in-chief. The case at bar presents a related scenario where the police failed to advise Appellant of a different integral part of the Miranda warnings before taking his confession.

At the hearing on Brown's motion to suppress his confession, Detective Paul Davis testified that when Brown was apprehended he was immediately searched (R751). While Brown was lying on the ground, Detective Davis advised him from memory of his constitutional rights (R751). Davis testified:

> At that time I advised him he was under arrest for armed robbery. I told him he had the right to remain silent. I said -- let me give it to you the same way I gave it to him. He had the right to remain silent. If you give up the right to remain silent anything you say can and will be used against you be in a court of law.
>
> You have the right to presence of an attorney. If you can not afford an attorney one will be appointed for you without charge if that is your desire. Do you understand these rights? Indicated yes.
>
> I says: "Is there anything you do not understand about these rights? He said:

"No." I said: "Do you want to talk to me?"

He said: "Yes."

Q. Did he make a statement at that time?
A. Yes, sir.

(R752)

According to Detective Davis, Brown then told him that he had committed the murder and "he knew he was going to have to pay for what he had done" (R754). On cross-examination, Davis admitted that he didn't advise Brown of his right to cut off questioning at any time (R773).

Davis testified that he subsequently readvised Brown of his rights from a printed Miranda warnings card (R755-8, 949) Brown, however, did not remember being read the Miranda warnings (R781). The card was not signed or initialed by Brown; rather, Detective Davis signed the card himself (R774-5, 949).

At the stationhouse, Brown was given a copy of the Consent to be Interviewed form to read (R775). Detective Davis acknowledged that Brown said he couldn't read the form because his glasses had been taken from him when he was arrested (R775-6). For this reason, Davis read the form to Brown and taped the reading (R776, 760-2). The significant portion of this taped reading follows:

> I further understand that any time that I desire to have this interview stopped, knowing my rights, I hereby refuse to "- correction -- I hereby prior to being interviewed waive my right to consult with an attorney or to have one present during this interview. Any and all statements I make are freely and voluntarily made. (R761)

As defense counsel pointed out, Detective Davis left out a line in the advisement of rights which related to the suspect's right to cut off questioning at any time (R790).

One further circumstance bears mention. Brown testified that he had been deprived of sleep for two days (R781). He was exhausted (R781).

The trial judge ruled that the faulty reading of Brown's rights did not require his confession to be suppressed because Brown never requested to talk to an attorney nor to stop the questioning (R791). This ruling was error. Whether Brown ever attempted to exercise his rights has absolutely no bearing on whether his waiver of rights was knowing and intelligent.

In Miranda V. Arizona, 384 U.S. 436 (1966), the United States Supreme Court described the purpose of its decision as:

> to assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process. 384 U.S. at 469.

The State has the burden to show "an intentional relinquishment or abandonment of a known right or privilege". Johnson v. Zerbst, 304 U.S. 458 at 464 (1938). As applied to the case at bar, Brown's confession must be suppressed unless the State can show that he was sufficiently advised of his Fifth Amendment privilege to not incriminate himself.

Subsequent to Miranda, the United States Supreme Court termed "a person's 'right to cut off questioning"' a "critical safeguard". Michigan V. Moseley, 423 U.S. 96 at 103 (1975). The

Mosely court explained:

> Through the exercise of his option to terminate questioning he can control the time at which questioning occurs, the subjects discussed, and the duration of the interrogation. The requirement that law enforcement authorities must respect a person's exercise of that option counteracts the coercive pressures of the custodial setting.
>
> 423 U.S. at 103-4.

Advisement of the right to cut off questioning has been held an essential component of the Miranda warnings. The Supreme Court of North Carolina listed the five essential rights which must be expressly mentioned in the Miranda advisement:

> (1) that he has a right to remain silent; (2) that anything he says can and will be used against him in court; (3) that he has a right to consult with a lawyer and to have a lawyer with him during interrogation; (4) that if he is an indigent a lawyer will be appointed to represent him; and (5) that if he at any time prior to or during questioning indicates that he wishes to stop answering questions or to consult with an attorney before speaking further, the interrogation must cease.
>
> State v. Riddick, 291 N.C. 399, 230 S.E. 2d 506 at 512 (1976).

The Wisconsin Supreme Court found that failure to advise a suspect of "the right to stop answering questions at any time" rendered the Miranda warnings "incomplete". Micale v. State, 76 Wis. 2d 370, 251 N.W. 2d 458 at 460 (1977).

Further support for the proposition that express reference to the right to cut off questioning at any time is an integral part of Miranda warnings may be gleaned from two recent decisions of the United States Supreme Court. In Colorado v. Spring, 479 U.S. ___, 107 S.Ct 851, 93 L.Ed 2d 954 (1987) the Court observed that the Miranda warnings ensure that

> a suspect knows that he may choose not to talk to law enforcement officers, to talk only with counsel present, or to discontinue talking at any time. 107 S.Ct. at 858.

The Spring court termed the Miranda warnings given the defendant "complete", specifically noting that Spring was advised "that he had the right to stop the questioning at any time". 107 S.Ct. at 854.

Again in Oregon v. Elstad, 470 U.S. 298 (1985), the Court expressed satisfaction with Miranda advice which included the suspect's right to "interrupt the conversation at any time". 470 U.S. at 315, fn. 4.

Because Appellant Brown was not adequately informed of his right to cut off questioning by Detective Davis, his waiver of his Fifth Amendment rights was not knowingly and intelligently exercised. When the totality of circumstances is considered, such factors as Brown's lack of sleep and inability to read because his glasses were seized also support the conclusion that his confession was inadmissible. Accordingly, Brown should now be awarded a new trial.

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.

During voir dire, defense counsel questioned prospective juror Scalfari in regard to his views on the death penalty:

> MR. ALLDREDGE (defense counsel): 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.
>
> (R131)

Appellant then challenged prospective juror Scalfari for cause based upon his belief that death should be the penalty for any premeditated murder unless there were mitigating factors (R162-3). The trial court preliminarily denied the challenge for cause but permitted further inquiry (R177).

Prospective juror Scalfari then agreed with the prosecutor's suggestion that every first degree murder case did not warrant the death penalty (R196-7). The trial judge denied Appellant's renewed challenge for cause to prospective juror Scalfari (R235-6). Defense counsel then excused Scalfari by peremptory strike (R237).

The trial judge had previously denied Appellant's motion for ten additional peremptory challenges (R167-8). After using a

peremptory strike to excuse prospective juror Scalfari, defense counsel exhausted his peremptory challenges (R239). He requested additional peremptories, noting that he would excuse jurors Montoya and Moser if he had additional peremptories (R241). The court again denied Appellant's motion for additional peremptories and his renewed challenge for cause to prospective juror Scalfari (R242).

This Court has held that a juror's bias in regard to the sentencing aspect of a capital case implicates the Sixth Amendment, United States Constitution and Article I, section 16 of the Florida Constitution. Thomas v. State, 403 So.2d 371 (Fla. 1981). The United States Supreme Court has held that the Due Process Clause of the Fourteenth Amendment requires "a fair trial by a panel of impartial 'indifferent' jurors". Irvin v. Dowd, 366 U.S. 717 at 722 (1961).

In Hill v. State, 477 So.2d 553 (Fla. 1985) a prospective juror stated that he didn't believe that every case of premeditated murder should result in a death sentence but that he was inclined toward the death penalty for the defendant if he were convicted. Hill's challenge for cause to this juror was denied and a peremptory strike expended. In vacating the sentence of death, this Court wrote:

> It is exceedingly important for the trial court to ensure that a prospective juror who may be required to make a recommendation concerning the imposition of the death penalty does not possess a preconceived opinion or presumption concerning the appropriate

> punishment for the defendant in the particular case. A juror is not impartial when one side must overcome a preconceived opinion in order to prevail.
>
> 477 So.2d at 556

In the case at bar, prospective juror Scalfari explained that he believed a sentence of death was appropriate for premeditated murder (R131). Although juror Scalfari professed his willingness to consider any mitigating evidence presented by the defense, it is clear that the defendant would have to overcome the juror's presumption that death would be the appropriate punishment for a premeditated murder conviction (R131). Therefore, prospective juror Scalfari did not possess the requisite degree of impartiality. As in Hill, defense counsel's challenge for cause should have been granted.

Recently, this Court reaffirmed the Hill rationale in Moore v. State, 525 So.2d 870 (Fla. 1988). The Moore court also held that an error in denying a challenge for cause is preserved for review when the defendant subsequently exhausts his peremptory challenges and requests an additional challenge. Appellant followed this procedure (R239-42).

Accordingly, Brown's sentence of death should be vacated because his rights to an impartial jury under Article I, section 16 of the Florida Constitution and Amendments VI, VIII and XIV of the United States Constitution were violated by forcing him to expend a peremptory challenge on a prospective juror who should have been excused for cause.

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

During the guilt or innocence phase charge conference, Appellant's counsel objected to giving the standard jury instruction on reasonable doubt **(R436-7).** In particular, counsel noted that part of the instruction which states:

> A reasonable doubt is not a possible doubt, a speculative, imaginary or forced doubt. **(R437, 883).**

The gist of his argument was that a juror could interpret the words "possible doubt" as meaning a doubt substantial enough to qualify as reasonable. Appellant agreed that speculative, imaginary and forced doubts were not reasonable **(R437).** The trial judge overruled the objection and instructed the jury in the language of the standard instruction **(R437, 498, 883).**

Appellant acknowledges that this Court indicated its approval of this standard jury instruction on reasonable doubt when adopting the revised standard jury instructions in 1981. See In re Standard Jury Instructions in Criminal Cases, **431** So.2d **594** at **595** (Fla. **1981).** Two justices however, dissented on this point and would have disapproved the revised reasonable doubt instruction. **431** So.2d at **599.** Appellant maintains that the current standard instruction on reasonable doubt violates due process under both the Florida and Federal Constitutions because the instruction dilutes the quantum of proof required to meet the

reasonable doubt standard.

An essential feature of Fourteenth Amendment due process is that in a criminal proceeding, the accused cannot be convicted except upon proof of guilt beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307 (1979); In re Winship, 397 U.S. 358 (1970). A jury instruction which fails to adequately advise the jury of such a fundamental procedural entitlement violates the Fourteenth Amendment. Taylor v. Kentucky, 436 U.S. 478 (1978).

As applied to the facts at bar, the trial court's instruction "a reasonable doubt is not a possible doubt" could well be interpreted by the jurors to mean that a doubt must be probable in order to qualify as reasonable. Such an interpretation would clearly dilute the burden of proof to an unconstitutional residue. The appropriate test to determine whether a jury instruction violates the Fourteenth Amendment is whether a reasonable juror could have interpreted the instruction in an unconstitutional manner. Sandstrom v. Montana, 442 U.S. 510 (1979).

In Vassuez v. State, 54 Fla. 127, 44 So. 739 (1907), this Court approved an instruction on reasonable doubt which read in part:

> It [reasonable doubt] does not mean a mere possible doubt, because everything relating to human affairs and depending on moral evidence is open to some possible or imaginary doubt. 44 So. at 740.

Appellant agrees that this instruction is acceptable because the word "possible" is sufficiently limited by the word "mere" to

prevent a dilution of the reasonable doubt standard. The present standard jury instruction given by the trial court does not however qualify the word "possible" and is thus open to an unconstitutional interpretation.

This standard jury instruction on reasonable doubt is as erroneous as the one which this Court found reversible in Hulst v. State, 123 Fla. 315, 166 So. 828 (1936). It is also comparable to the one which the Fifth Circuit held error in United States v. Alvero, 470 F.2d 981 (5th Cir. 1972) (requiring a "very substantial doubt"). Accordingly, this Court should reverse Appellant's conviction and remand for a new trial where the jury is properly instructed on the concept of reasonable doubt.

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

In State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943 (1974) this Court stated that the death penalty was reserved by the legislature as a punishment for "only the most aggravated and unmitigated" of first-degree murder cases. 283 So.2d at 7. Part of this Court's function in capital appellate proceedings is to "review [the] case in light of the other decisions and determine whether or not the punishment is too great". 283 So.2d at 10.

The homicide at bar is not one of the most aggravated first-degree murder cases. The sentencing judge found three aggravating circumstances applicable (R912-4, see Appendix). One of these, the cold, calculated and premeditated factor, was erroneously found . The other two aggravating circumstances, while properly found, were not deserving of much weight when compared to other capital cases.

One of the aggravating factors was Section 921.141 (5) (d), Florida Statutes (1985), committed during the course of a burglary. To be sure, Brown entered Pauline Cowell's residence unlawfully but he had no intent to abuse her, commit a sexual battery or even steal from her. He merely intended to confront

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See Issue VIII, infra. It is enough to note here that this was not a contract murder nor a witness elimination type killing.

her about some rumors.

The other proven aggravating factor was Section 921.141 (5) (b), Florida Statutes (1985), prior conviction of a violent felony. This factor was based entirely upon the contemporaneous shooting of Tammy Bird. The circumstances show that this shooting was a panic reaction when Brown discovered that there was someone else besides Pauline in the bed. He did not even aim the pistol when he fired (R399-401). It is noteworthy that even the sentencing judge mentioned that Brown was 36 years old at the time of this offense and had no previous violent behavior (R915, see Appendix).

When comparing the case at bar to other decisions of this Court, it becomes evident that there are many cases where the defendant's sentence was reduced to life where there was another victim killed or seriously injured in conjunction with the capital felony. In Holsworth v. State, 522 So.2d **348** (Fla. 1988), the defendant burglarized the mobile home of a mother and her daughter. Holsworth stabbed both, killing the daughter. Three years earlier he had attacked another woman in her mobile home during the early morning hours. Both mobile homes were in the same trailer park.

This Court noted that Holsworth's conduct was affected by drugs and alcohol. He had also, like Brown, suffered physical abuse as a child which caused psychological disturbance. This Court reduced Holsworth's sentence of death to life imprisonment.

Other cases comparable to Holsworth include Norris v. State,

429 So.2d **688** (Fla. **1983)** and Amazon v. State, **487** So.2d **8** (Fla. **1986).** In Norris, two elderly woman were beatened during the burglary of their residence and one later died. Amazon was a particularly atrocious double murder of a mother and her eleven-year-old daughter who were stabbed during the burglary of their home. A sexual battery and kidnapping accompanied the homicides. In both Norris and Amazon, this Court reduced sentences of death to life imprisonment in accordance with the jury's recommendation.

The advisory jury recommended death in Wilson v. State, **493** So.2d 1019 (Fla. **1986)** where the defendant killed his father and a five-year-old cousin while also attempting to murder his stepmother. This Court noted that there were two aggravating circumstances, prior conviction of violent felony and heinous, atrocious or cruel which were not balanced by any mitigating factors. The Wilson court concluded that murders caused by a heated domestic confrontation do not warrant a sentence of death.

At bar, there is at least a quasi-domestic aspect to the homicide. Appellant Brown was living with Pauline Cowell's mother **(R413).** Pauline Cowell had moved out of their residence about a week prior to the homicide **(R413).** Brown's reason for confronting Pauline was "some lies" she had been telling **(R378).** He intended to reason with her **(R378);** but when she started yelling, he shot her out of hurt and anger **(R401).**

What is even more significant about the comparison between Wilson and the case at bar is the contrast between the complete

lack of mitigation in Wilson and the substantial amount of mitigating evidence at bar. Brown suffered from substantial organic brain damage and had psychotic thinking for quite some time **(R542-3, 545-6, 559, 578-9).** As a child, he was shuttled among several foster homes and suffered some physical abuse **(R523-7, 592-4, 578-9).** His intelligence was low and his school record very poor **(R528, 594-5, 1000).** As an adult, he held a succession of marginal jobs such as doing yard work, selling junk and collecting aluminum cans **(R530).** He had never shown violent behavior in his thirty-six years prior to this episode **(R595-7,** 1000). Brown was also under a great deal of mental stress during the period preceding the homicide **(R713-5, 718).**

The sentencing judge recognized that the statutory mental mitigating factors of extreme mental or emotional disturbance [§ **921.141 (6) (b)]** and substantially impaired capacity [§ **921.141** (6) (f)] were established **(R914-5,** see Appendix). The sentencing judge noted that the statutory factor of age was marginally relevant in considering the mental and environmental deprivation Brown had suffered **(R915,** see Appendix). The sentencing judge considered four non-statutory factors in mitigation **(R915, see** Appendix). To this list he should have added Brown's generosity and concern towards his neighbors as a positive character trait **(R531, 595-6).**

Although this Court's function is to review proportionality among capital cases rather than reweigh the trial judge's findings, it is evident that the case at bar is not lacking in

mitigation. It is not one of the "unmitigated" first degree murder cases for which death is the proper penalty. Cf. State v. Dixon, 283 So.2d 1 at 7 (Fla. 1973).

In Masterson v. State, 516 So.2d 256 (Fla. 1987), the defendant murdered two people in their apartment. There were four aggravating factors and the trial court found nothing in mitigation. On appeal this Court found that mitigating evidence of honorable military service, post-traumatic stress disorder and substantial drug and alcohol consumption on the day of the murders was sufficient to require a reduction of the death penalty to life imprisonment in accordance with the jury's recommendation.

As a final case for comparison, this Court should consider its decision of Livingston v. State, Case No. 68,323 (Fla. March 10, 1988) [13 FLW 187]. The same two aggravating factors [5 (b) and 5 (d)] were found valid in Livingston. However, Livingston's crime involved the shooting death of a convenience store clerk during the course of a robbery. Livingston fired a shot at another woman who was in the store. Previously on the same day, he had burglarized a residence.

Both Livingston and Brown share childhood abuse and marginal intelligence as mitigating factors. While Livingston's youth and immaturity were certainly strong factors in this Court's decision to vacate the death sentence, Brown's mental disturbance is of at least equal mitigating effect.

Probably the most salient distinction between Livingston and

the case at bar is the motivation involved. Brown did not intend to commit a serious criminal offense; he intended to confront Pauline Cowell about something she had said. The idea to break into her bedroom in the middle of the night and to bring a pistol in case she screamed shows a distorted thought process rather than criminal intent. The tragedy that unfolded was perhaps predictable but Brown's moral culpability simply is not great enough to deserve a sentence of death.

ISSUE V

THE TRIAL COURT ERRED BY DENYING APPELLANT'S SPECIALLY REQUESTED MODIFICATIONS TO THE STANDARD PENALTY PHASE JURY INSTRUCTIONS

At the penalty phase charge conference, defense counsel presented nine specially requested modifications to the standard jury instructions (R601-10, 983-92). The trial judge denied each of the proposed modifications (R601-10). On appeal, Appellant will argue the denial of his requested instructions No. 1 and No. 5.

A. Denial of Specially Requested Instruction No. 1

The first of the proposed special jury instructions reads as follows:

> The fact that your recommendation is advisory does not relieve you of your solemn responsibility for the Court is required to and will give great weight and serious consideration to your verdict in imposing sentence.
>
> (R983)

This is a correct statement of the law. See Tedder v. State, 322 So.2d 908 (Fla. 1975); Grossman v. State, 525 So.2d 833 (Fla. 1988). The trial court denied this proposed instruction without comment (R601).

In Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988), the Eleventh Circuit considered the defendant's request for a similar instruction that the jury's recommendation would be given great weight. As in the case at bar, the trial judge had denied the proposed instruction and confined himself to the standard jury

instructions for penalty phase.

The Mann Court concluded that there was a danger that the jury was misinformed with regard to their role. As a result, the jury's sense of responsibility was diminished in violation of the Eighth Amendment, United States Constitution as interpreted by the United States Supreme Court in Caldwell v. Mississippi, 472 U.S. 320 (1985).

Appellant recognizes that this Court has disagreed with the Eleventh Circuit's analysis of the Florida capital sentencing procedure in general and the Mann decision in particular. Combs v. State, 525 So.2d 853 (Fla. 1988). This Court, in Combs, specifically declared that the standard penalty phase jury instructions properly explains the jury's role under the Florida Statute. Nonetheless, Appellant contends that failure to advise the jury upon request of the great weight which their penalty recommendation will carry violates the Eighth and Fourteenth Amendments, United States Constitution.

The potential for prejudice is particular great in the case at bar because the jury's recommendation was only 7-5 in favor of death. A single change in vote could have totally changed the outcome. A case currently pending before the United States Supreme Court, Dugger v. Adams, Case No. 87-121 (review granted, 108 S.Ct. 1106) is likely to clarify what a Florida jury must be told regarding their role in the capital sentencing procedure.

B. Denial of Specially Requested Instruction No. 5

In Appellant's requested modification No. 5, he asked the trial judge to strike the following language from the standard instructions:

> "If you are reasonably convinced that a mitigating circumstance exists, you may consider it estab1ished".
>
> (R987)

Counsel argued that this language could be interpreted as placing a burden of proof on the defendant similar to preponderance of the evidence before the jury could weigh evidence in mitigation (R605-6). The trial judge denied the proposed deletion (R606).

In Lockett v. Ohio, 438 U.S. 586 (1978), the United States Supreme Court considered an Ohio death penalty statute which required the sentencing judge to impose a sentence of death unless he found by a preponderance of the evidence that at least one of three statutory mitigating circumstances were proved by the defendant. 438 U.S. at 593. The Court found this statute invalid because it prevented the sentencer from considering any relevant aspect of the defendant's character or circumstance of his offense as an "independently mitigating factor" 438 U.S. at 607. Although the Lockett decision did not specifically address whether the Eighth and Fourteenth Amendments, United States Constitution precluded the States from establishing a burden of proof for a capital defendant before his mitigating evidence could be considered by the sentencer, it appears to forbid any limitation on the sentencer's consideration of relevant

mitigating evidence.

More recently in Hitchcock v. Dugger, 481 U.S. ___, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987), the Court held that merely allowing the defendant to present non-statutory mitigating evidence was insufficient. The jury must be instructed that they may consider all relevant evidence in mitigation and the sentencing judge must also consider it.

The thrust of Lockett, Hitchcock and related decisions such as Eddings v. Oklahoma, 455 U.S. 104 (1982) and Skipper v. South Carolina, 476 U.S. 1 (1986) is that the federal constitution requires a capital sentencer to consider any and all relevant evidence that a defendant wishes to offer as a basis for a sentence less than death. Accordingly, the Eighth and Fourteenth Amendments, United States Constitution should prohibit a limitation on mitigating evidence which requires it to meet any particular burden of proof before the sentencer may consider it. The capital sentencer must be free to give any evidence in mitigation the weight which the sentencer believes it deserves.

Because the portion of the standard jury instructions which Brown requested the court to delete had the effect of establishing a burden of proof to be achieved before a mitigating circumstance could be considered by the jury, the capital sentencing proceeding at bar did not meet the constitutional requirements of the Eighth and Fourteenth Amendments.

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.

Over Appellant's objection (R616-7), the trial judge instructed the jury during penalty phase on the cold, calculated and premeditated aggravating circumstance [§ 921.141(5)(i)]. The court did so in the language of the standard instruction:

> The crime for which the Defendant is to be sentenced was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification (R659).

The jury was not informed of the limiting constructions which this Court has given to this aggravating factor in cases such as Rogers v. State, 511 So.2d 526 (Fla. 1987) (careful plan or prearranged design to kill) and Nibert v. State, 508 So.2d 1 (Fla. 1987) (heightened premeditation). Brown's jury was simply given this vague instruction which could be thought applicable to any premeditated murder. It was not an adequate definition of the § 921.141(5)(i) aggravating circumstance.

In Maynard v. Cartwright, 486 U.S. ____, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988), the United States Supreme Court held that the Oklahoma aggravating circumstance "especially heinous, atrocious or cruel'' was unconstitutionally vague under the Eighth Amendment, United States Constitution because this language gave the sentencing jury no guidance as to which first degree murders

met these criteria. Consequently, the sentencer's discretion was not channeled to avoid the risk of arbitrary imposition of the death penalty.

The Florida statutory language "committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification" gives no more guidance to a jury than the Oklahoma statute in Cartwrisht. A reasonable juror might well conclude that this aggravating circumstance applied to all premeditated murders unless there was a colorable claim of self-defense, defense of others, or accident.

The Cartwright decision cannot however, be cavalierly applied to the Florida capital sentencing scheme. In Oklahoma, capital juries are the sentencer and they must make written findings of which aggravating factors they found. In Florida, on the other hand, the jury's recommendation is advisory and no findings with regard to the aggravating factors weighed by the jury are made. We simply do not know in the case at bar whether all of the jurors found Brown's crime cold, calculated and premeditated, whether none of them did; or whether the jury split on its applicability.

What can be said is that there is a reasonable possibility that some of the jurors found the cold, calculated and premeditated aggravating factor proved and that at least one of these jurors joined in the recommendation of death. Had the jury been properly instructed concerning the limited construction given to this aggravating factor, there is a reasonable

possibility that fewer jurors would have found the cold, calculated and premeditated factor applicable and that for one juror this would be enough reason to recommend life instead of death. Thus a jury instruction which properly defined the limited applicability of the CCP aggravating factor (or no jury instruction at all on CCP) might well have resulted in a 6-6 life recommendation instead of a **7-5** death recommendation.

For this reason, Brown's death sentence is unreliable under the Eighth Amendment, United States Constitution. Although a Florida jury's sentence recommendation is advisory rather than mandatory, it can be a "critical factor" in whether a death sentence is imposed. LaMadline v. State, 303 So.2d **17** at **20** (Fla. **1974).** In Valle v. State, 502 So.2d **1225** (Fla. 1987), this Court held that a defendant must be allowed to present all relevant mitigating evidence to the jury in his effort to secure a life recommendation because of the great weight the sentence recommendation would be given. The corollary to this proposition is that the jury must not be misled into thinking that an aggravating circumstance applies because that circumstance was not properly defined to them. In either case, there is a likelihood of an erroneous death recommendation.

In Morsan v. State, **515** So.2d **975** (Fla. 1987), this Court noted the special vulnerability of a death sentence imposed after a **7-5** jury recommendation for death. An error which could have prejudiced the defendant's opportunity to win a life recommendation cannot be harmless when the difference between

life and death is only one vote. Accordingly, this Court should vacate Brown's sentence of death and allow him a new sentencing proceeding with a new jury.

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.

Post-trial but prior to sentencing, Appellant filed a Motion to Declare the Death Penalty Unconstitutional as Applied (R897-900). This motion was based upon analysis of mathematical probabilities by an expert in the field of statistics (R899-900, 705). It demonstrates that a 7-5 death recommendation is not statistically so different from a 6-6 tie vote life recommendation that it may be relied upon as reflecting the conscience of the community.

The statistical analysis is based upon a model population of jurors who would be evenly divided between death votes and life votes. If the twelve jurors actually picked truly reflected the model population, there would be a 6-6 tie vote life recommendation. However, if the jurors were randomly picked from this population, there would be a thirty-nine percent (39 %) probability that the actual jury would have at least seven death votes and wouid return a death recommendation (R706-7, 897-900). By contrast, the probability of nine or more death votes from this model population would be only seven percent (7 %).

The trial judge heard argument that a sentence of death which relied upon a jury death recommendation of 7 to 5 was unreliable under the Eighth and Fourteenth Amendments to the United States Constitution (R708). The court denied the motion

(R708).

In Johnson v. Louisiana, 406 U.S. 356 (1972) a plurality of the United States Supreme Court held that jury unanimity was not required under the Fourteenth Amendment in order to convict. A state statute allowing conviction by a 9-3 majority was upheld because nine jurors constituted a substantial majority. In his concurring opinion, Justice Blackmun emphasized the requirement of a substantial majority and stated that a 7-5 standard "would afford me great difficulty". 406 U.S. at 366.

The question posed by the case at bar is whether the heightened reliability requirement of the Eighth Amendment bars a sentence of death which is dependent upon a 7-5 jury death recommendation. While this Court previously held in Alvord v. State, 322 So.2d 533 (Fla. 1975) that a simple majority vote for a death sentence was sufficient, that holding should be re-examined in light of current death penalty jurisprudence.

To begin with, the Alvord decision predated this Court's holding in Tedder v. State, 322 So.2d 908 (Fla. 1975) which established a separate standard for appellate review of death sentences imposed following a jury life recommendation. This deference makes the jury's sentencing recommendation of "extreme importance". Copeland v. Wainwright, 505 So.2d 425 at 427 (Fla. 1987). Nor does the margin by which a jury recommends life have any relevance. In Craig v. State, 510 So.2d 857 at 867 (Fla. 1987), this Court wrote:

> Even when based on a tie vote, a jury recommendation of life is

entitled to great deference.

A shift of one vote in Brown's jury would have achieved a tie vote life recommendation. The trial judge might well have followed such a life recommendation. Had he chosen to override, this Court would have to reduce the sentence to life unless

> the facts suggesting a sentence of death [were] **so** clear and convincing that virtually no reasonable person could differ. Tedder v. State, 322 So.2d 908 at 910 (Fla. 1975).

With the abundance of evidence in mitigation contained in the case at bar, it seems clear that a fair application of the Tedder standard would result in a life sentence for Brown.

As the statistical evidence introduced below demonstrates, the difference of one vote in a jury recommendation is not to be given great weight. In effect, a single juror would be responsible for whether Brown lives or dies should this Court uphold the sentence of death. The Eighth Amendment, United States Constitution cannot permit a sentence of death to be imposed where a sole juror is effectively the decision-maker and the State has failed to convince more than a bare majority of the jury that death is the proper penalty.

ISSUE VIII

THE FINDING BY THE SENTENCING JUDGE THAT THE COLD, CALCULATED AND PREMEDITATED AGGRAVATING FACTOR APPLIED WAS ERRONEOUS.

In support of his finding that the homicide was committed in a cold, calculated and premeditated manner, the sentencing judge wrote that there was

> a lengthy, methodic and involved series of events that showed a substantial period of reflection and thought by the defendant. These include, among others, the defendant's, securing bolt cutters, going to the victims' residence in the middle of the night, cutting the lock, going back to the car to get the weapon, returning and entering where the victims slept ..... (R913, see Appendix).

This evidence, in itself, shows only that Brown planned the unlawful entry of the victims' residence. Premeditation of a felony is an insufficient basis for finding the CCP aggravating circumstance; this premeditation cannot be transferred to the murder itself. Gorham v. State, **454** So.2d **556** (Fla. **1984);** Jackson v. State, **498** So.2d 906 (Fla. **1986).**

Thus, in Rembert v. State, **445** So.2d **337** (Fla. 1984), the clubbing death of an elderly victim during the course of a robbery did not qualify as cold, calculated and premeditated. In Bates v. State, **465** So.2d **490** (Fla. 1985), the defendant entered the victim's office and awaited her return. He then proceeded to abduct her, rob her, and attempt a sexual battery before stabbing her to death. This Court characterized these events as a burglary "getting out of hand" and rejected the trial court's finding that the homicide was CCP.

Finally, in Maxwell v. State, 443 So.2d 967 (Fla. 1983), the armed defendant robbed a group of men who were playing golf. When one of the victims protested about giving up his gold ring, the defendant shot him once in the heart. This Court found the victim was killed "intentionally and deliberately" but struck the CCP aggravating circumstance.

These decisions show that even where a crime is methodically planned, if the killing of the victim is not a necessary part of the plan, the homicide does not fit the CCP aggravating circumstance. Brown's rnethodic cutting of the padlock and entry of the victims' residence while armed are insufficient to prove that the homicide was cold, calculated and premeditated.

One other aspect of the killing must also be considered in regard to the CCP aggravating factor; Brown's prior contemplation that he might have to shoot Pauline Cowell if she wouldn't listen to him and started "hollering". Detective Davis testified that Brown told him that his motivation for breaking into Pauline Cowell's apartment was to "reason with her and talk to her ... about some lies she had said" (R378). Detective Davis continued:

> Q. Did he tell you about his intentions with regard to harming her on his way over there that night?
>
> A. Yes, sir, throughout the full interview he made several statements to the effect that he had not -- he had no intentions of hurting the kid. He said that he loved her, basically, he said that two or three times, and that he had no intentions of killing the kid.
>
> I asked him did he -- I said, "Paul, did you think it might come down to that ?"

He said, "I figured it probably would come down to that," almost each time.

Q. Figured it would come down to what?

A. Him having to use his gun.

Q. Did he tell you why he figured it would come down to that?

A. Well, yes, sir. He made the statement, one statement, that he'd probably have to use his gun. He knew that he would have to use his gun if she would not sit and listen to reason or if she started hollering.

I asked him, "Had you thought about killing her?"

He said that he had thought about killing Pauline two or three times, and he felt that if he was going to shoot her, he wanted to shoot her in the head to make it quick. Therefore, she wouldn't have to suffer. **(R378-9)**

The actual sequence of events as recounted by Brown to the detective was:

He walked up to the residence. He walked through the door, walked up to Pauline, who was laying in the bed. At that time he said he shook her and said he was there to talk to her and he didn't mean no harm, he just wanted to talk to her. He said she started hollering.

I said, "What was she hollering?"

He said, "Get out. I don't want to talk to *you*. Leave me alone". He said, "At that time I pulled the trigger on her." (R381)

Significantly, Brown had the pistol in his trousers when he entered the residence and when he woke up Pauline (R391). Not until she started "hollering" did he take it out (R391).

In Rogers v. State, 511 So.2d 526 (Fla. 1987), this Court clarified the type of premeditation that fell within the cold,

calculated and premeditated aggravating circumstance. The Rosers court held that a "careful plan or prearranged design to kill" was required to prove "calculation". 511 So.2d at 533.

At bar, Brown's plan was not to kill Pauline, but to talk to her. He did envision the possibility that he would shoot her in the same way that an armed robber contemplates the possibility of killing his victim if met with resistance. The holdup man's demand "your money or your life" does not indicate a desian to kill although it contemplates the use of lethal force. Similarly, Brown's prior reflection that Pauline might disrupt his intent to talk with her and he would use the gun does not establish a design to kill.

The facts at bar must be distinguished from those in Middleton v. State, 426 So.2d 548 (Fla.), cert. den., 463 U.S. 1230 (1983). Middleton sat for an hour with a shotgun in his hands looking at his sleeping victim and thinking about killing her. When she woke up, he fired the shotgun into the back of her head. The victim's actions played no role in the determination to kill.

By contrast, Brown had no intention to kill Pauline Cowell unless she rejected his efforts to talk to her. Had the victim not yelled and told him to leave, Brown would not have shot her. That Brown chose to confront Pauline by entering her bedroom in the middle of the night shows irrational thinking. It does not however, show a cold, calculated and premeditated design to kill.

CONCLUSION

Based upon the foregoing argument, reasoning and authorities, Paul Alfred Brown, Appellant, respectfully requests this Court to grant him relief as follows:

Issues I and III - a new trial on guilt or innocence.

Issues IV and VII - remand for imposition of a life sentence.

Issues II, V and VI - remand for a new penalty trial before a new jury.

Issue VIII - remand for reweighing by the sentencing court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Attorney General's Office, Park Trammell Building, 8th Floor, 1313 Tampa Street, Tampa, Florida 33602, by mail on this 10th day of November, 1988.

Douglas S. Connor
DOUGLAS S. CONNOR