IN THE SUPREME COURT OF FLORIDA

CARLOS BELLO,

Appellant,

v. Case No. 70,552

STATE OF FLORIDA,

Appellee.

INITIAL BRIEF OF THE APPELLEE

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SUMMARY OF THE ARGUMENT

As to Issue I - Premeditation can be shown by circumstantial evidence. The accepted standard on review for circumstantial evidence is not whether the evidence failed to exclude every reasonable hypothesis but that of guilt, but whether there was substantial, competent evidence for a jury to so conclude.

The totality of the circumstances supports the jury's finding of premeditation. No reasonable hypothesis of innocence was presented to the jury.

Accordingly, the jury could reasonably have ignored the defendant's version of the homicide. As there was substantial, competent evidence to support the jury's verdict, the trial court did not err in denying the motion for judgment of acquittal.

As to Issue II - A review of the instruction conference shows that this argument was not presented to the trial court.

It is well settled that in order for an argument to be cognizable on appeal, it must be specific contention asserted as legal ground for the objection, exception or motion below.

If counsel felt there was a potential problem of confusion, he should have presented this argument to the trial court and a clarifying instruction could have been given. Counsel, however, only made a general objection to the instruction. The state strongly urges this Court to find that this objection was insufficient to preserve the issue for appeal.

However, even if the issue were properly before this Court, relief is not warranted as the instruction was properly given in

the instant case. As previously noted, the facts may have supported a conclusion that Bello was shooting at Mock, any of the other officers or (as suggested by Bello) unknown assailants or robbers.

Assuming arguendo, it was error, the giving of the instruction was harmless.

As to Issue III - Appellant urges this Court to remand this cause for resentencing because he was shackled during the penalty phase of the trial without the trial court first determining the necessity or any reasonable alternatives to shackling Bello.

It should be noted that counsel did not ask the court to make such a finding, nor did he cite to any authority contrary to the judge's understanding on the issue. Counsel simply made a general motion for mistrial. In Lucas v. State, 376 So.2d 1149 (Fla. 1979), this Court recognized that even in a death case, a reviewing court should not indulge in a presumption that a trial judge would have made an erroneous ruling had an objection been made and authorities cited contrary to his understanding of the law. At the time of sentencing, Bello was a convicted murderer with a history of mental illness. Absent specific motion for further findings, the trial court had a reasonable basis for maintaining the extra security measure.

Appellee urges this Court to avoid a blanket requirement of a hearing and require the appellant to show actual prejudice before limiting a trial court's duty to secure a courtroom and its occupants from potential. harm.

As to Issue IV - Fitzpatrick does not control the proportionality review of the case. Bello's mitigating evidence is not as compelling as that presented by Fitzpatrick. Proportionately the murder of Detective Rauft warrants the imposition of the death penalty.

As to Issue V - If and when appellant can show he is legally insane, §922.07, Fla. Stat. provides for a stay of the execution of the sentence.

As to Issue VI - The principle of Provence is not applicable here. Appellee submits the two circumstances involved here were two separate and distinct characteristics of the defendant's actions, not based on the same evidence and the same essential facts. Therefore, separate findings of the two factors were proper. Waterhouse v. State, 429 So.2d 301 (Fla. 1983).

As to Issue VII - Although this Court in Scull v. State, 533 So.2d 1137 (Fla. 1988) indicated a history of prior criminal conduct cannot be established by contemporaneous crimes, it was also indicated that the trial judge has broad discretion under this type of circumstance to determine if the mitigating circumstance of 'no significant prior criminal history' is applicable. The trial court in this instance exercised his discretion by not finding that mitigating circumstance.

As to Issue VIII - 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. The Alvord opinion remains the law and appellant's arguments to recede from Alvord are without merit.

As to Issue IX - This issue has been squarely addressed by this Court in Jackson v. State, 13 F.L.W. 146 (Fla. Feb. 18, 1988) and found to be meritless.

As to Issue X - Carawan v. State, 515 So.2d 161 (Fla. 1987 states that "sale of drugs can constitute a separate crime from possession."

Even if a conviction for a single amount is precluded, convictions for delivery and possession are valid when two quantities are involved as they were in the instant case. Pelaez v. State, 14 F.L.W. 152 (Fla. 2d DCA, December 28, 1988).

As to Issue XI - Appellee agrees that for crimes committed prior to October 1983, an affirmative election to be sentenced under the guidelines must be made.

ARGUMENT

ISSUE I

THE EVIDENCE WAS INSUFFICIENT TO PROVE THAT THE KILLING OF DETECTIVE RAUFT WAS PREMEDITATED. (As stated by appellant.)

In Provenzano v. State, 497 So.2d 1177 (Fla. 1986), this Court, relying on Spinkellink v. State, 313 So.2d 666 (Fla. 1975), cert. denied, 428 U.S. 911 (1976), recognized that premeditation can be shown by circumstantial evidence.

> "Premeditation is a fully-formed conscious purpose to kill, which exists in the mind of the perpetrator for a sufficient length of time to permit of reflection, and in pursuance of which an act of killing ensues. Sireci v. State, 399 So.2d 964, 967 (Fla. 1981), cert. denied, 456 U.S. 894, 102 S.Ct. 2257, 72 L.Ed.2d 862 (1982). This is no prescribed length of time which must elapse between the formation of the purpose to kill and the execution of the intent: a few moments' reflection will suffice. McCutchen v. State, 96 So.2d 152 (Fla. 1957)" Id. at 1181

Appellant contends, however, that circumstantial evidence must exclude every reasonable hypothesis of innocence and that the evidence in the instant case is insufficient to prove the element of premeditation. Accordingly, he contends the trial court erred in denying his motion for judgment of acquittal. The state disagrees.

In reviewing a defendant's claim that the trial court erred in denying a motion for judgment of acquittal, the reviewing court is prohibited from reweighing evidence under Tibbs v. State, 397 So.2d 1120, 1123 (Fla. 1981). The accepted standard

on review for circumstantial evidence is not whether the evidence failed to exclude every reasonable hypothesis but that of guilt, but whether there was substantial, competent evidence for a jury to so conclude. Bradford v. State, 460 So.2d 926, 931 (Fla. 2d DCA 1984); Rose v. State, 425 So.2d 521 (Fla. 1983); see also Tsavaris v. State, 414 So.2d 1087 (Fla. 2d DCA 1982). We also realize that in applying this standard the version of events related by the defense must be believed if circumstances do not show that version to be false. McArthur at 976. n. 12; Mayo. Where there is other evidence legally sufficient to contradict his explanation, a defendant's version of a homicide may be ignored by the jury. Williams v. State, 437 So.2d 133 (Fla. 1983). Bradford, supra at 931.

Recently, in Benson v. State, 526 So.2d 948 (Fla. 2d DCA 1988), the court reiterated the proper standard of review, stating:

> [W]hether there was a reasonably hypothesis of innocence and whether the evidence failed to eliminate such a hypothesis were issues for the jury to decide and were argued to the jury. *See, Heiney v. State,* 447 So.2d 210 (Fla.), cert. denied, 469 U.S. 920, 105 S.Ct. 303, 83 L.Ed.2d 237 (1984). See also ***Bradford*** *v. State,* 460 So.2d 926, 931 (Fla. 2d DCA 1984) ("The accepted standard on review. . . is not whether the evidence failed to exclude every reasonable hypothesis but that of guilt, but whether there was substantial, competent evidence for a jury to so conclude.") . . .
>
> The standard of review of the denial of a motion for acquittal is whether there was

substantial, competent evidence of guilt. *Bradford,* supra.

Benson, 526 So.2d 955 - 956.

In Lincoln v. State, 459 So.2d 1030, 1031 (Fla. 1984), this Court, quoting State v. Allen, rejected the notion that circumstantial evidence must raise only an inference of guilt in order for a conviction to be affirmed.

> Circumstantial evidence, by its very nature, is not free from alternate interpretations. The state is not obligated to rebut conclusively every possible variation, or to explain every possible construction in a way which is consistent only with the allegations against the defendant. Were these requirements placed on the state for these purposes, circumstantial evidence would always be inadequate to establish a preliminary showing of the necessary elements of the crime. Id. at 1031.

See also Huff v. State, 495 So.2d 145 (Fla. 1986) and Wilson v. State, 493 So.2d 1019 (Fla. 1986).

There was sufficient evidence presented to the jury below to support its finding that Bello premeditated the death of Detective Rauft. The evidence showed that in April of 1981 Bello purchased the murder weapon -- a two-inch, stainless steel .38 special. (R 225 229) Bello then became involved in the drug transaction. Bello appeared to be in charge of the deal as he gave instructions to the others and he negotiated with the undercover officer, Detective Alfred Peterson. (R 273 - 77, 282 - 3, 285) After Detective Peterson activated the "bust bug," Detective Ulriksen burst into the bedroom where the deal had been made. Bello and Juan Rodriguez were in the bedroom at that time.

Rodriguez was wedged behind the door by Ulriksen. Ulriksen then saw Bello come up from behind the dresser. Bello pointed the gun at Ulriksen. As Ulriksen attempted to draw on Bello he was shot in the right elbow, Bello then fired a second shot into Ulriksen's abdomen. After a third shot to his arm, Ulriksen fell to the floor. (R 362 - 65) Ulriksen testified that he could hear other officers outside the room warning that "Bobby (Ulriksen) was down" and signaling the code for an emergency. The door was cracked open two inches. Ulriksen could hear the Detectives running down the hallway. He saw Detective Rauft through the crack as they hit the door. Bello then fired two shots into the door, hitting and killing Detective Rauft. Rauft was killed by shots from the gun Bello purchased. The jury could have reasonably concluded that Bello armed himself before the transaction with the intent to use the weapon to avoid arrest in the event of a "drug bust." The jury could also reasonably conclude that upon hearing the approach of another officer, after having put three bullets into one police officer, that Bello formed the intent to kill the officers that could be heard and seen running toward the door. The totality of the circumstances supports the jury's finding of premeditation. No reasonable hypothesis of innocence was presented to the jury.

At trial, Bello's defense was that he was not the shooter. There was no claim of justification other than a suggestion that Bello may not have known it was the police who were outside the room. (R 830) Detective Ulriksen and Rauft were both wearing

police raid jackets and the officers repeatedly shouted the warning that they were police. Based upon the foregoing, the jury could readily have concluded that appellant's hypothesis of innocence was not reasonable. Accordingly, the jury could reasonably have ignored the defendant's version of the homicide. Williams, supra. As there was substantial, competent evidence to support the jury's verdict, the trial court did not err in denying the motion for judgment of acquittal. Provenzano, supra at 1181.

ISSUE II

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON TRANSFERRED INTENT, AS THAT DOCTRINE WAS INAPPLICABLE TO THE EVIDENCE IN THIS CASE. (As stated by appellant.)

During the jury instruction conference, defense counsel made the following objections to the state's request that the jury be instructed on the doctrine of transferred intent:

> MR. LOPEZ: Judge, the last paragraph of that says, "If a person has a premeditated design to kill one person and attempting to kill that person and actually kills another person, that killing is premeditated." The note to the Court indicates, "Give if applicable," and I contend it's not applicable in this case.
>
> THE COURT: Over that objection, that will be given. All right. Then, "Murder in the second degree," Page 23.
>
> (R 752)
>
> * * *
>
> MR. LOPEZ: Judge, that language appears previously, and I voiced my objection to it, I think.
>
> THE COURT: Which language?
>
> MR. LOPEZ: The language of transferred intent.
>
> THE COURT: On page 26-A?
>
> MR. LOPEZ: Right, it's a duplication, the one that we discussed previously. That language is continued in the old Page 22.
>
> THE COURT: Yes.
>
> (R 757, 758)

Now, on appeal, Bello contends that the instruction was erroneous because it allowed the jury to find the element of premeditation for the murder of Rauft by finding the shooting of Ulriksen was premeditated. Bello argues this confused and intermingled the two issues of intent. Appellant urges that the instruction was inappropriate and prejudicial and that reversal for a new trial is required. A review of the instruction conference shows that this argument was not presented to the trial court. (R 752 - 3, 757 - 8).

It is well settled that in order for an argument to be cognizable on appeal, it must be specific contention asserted as legal ground for the objection, exception or motion below. Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982); Robinson v. State, 487 So.2d 1040, 1041 - 2 (Fla. 1986).

In Tillman v. State, 471 So.2d 32 (Fla. 1985), this Court refused to address Tillman's claim that he should be given a new trial on the charge of attempted manslaughter because it was not the specific objection raised below. On appeal, Tillman argued that as a conviction for attempted manslaughter required proof of an act or procurement done with the requisite criminal intent and could not be based on merely culpable negligence, the jury's verdict must be clarified to determine if it rested on mere culpable negligence. At trial, however, Tillman argued that no judgment of conviction could be entered on the jury's verdict of attempted manslaughter because there was no such crime.

> "The foregoing argument is not the argument raised at trial or on appeal . . . In order to be preserved for further review by a higher court, an issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal or review must be part of that presentation if is to be considered preserved. . . . We therefore find that the issue petitioner presents is not properly presented, not having been raised at trial by specific objection or motion.
>
> Tillman, at 34, 35

The state requested this instruction due to the facts of the case. There was a suggestion by the defense to the jury that Bello may have thought they were being robbed. Detective Mock testified that he and Rauft hit the door at the same time. (R 501 - 2) Ulriksen testified that he could hear several officers outside the door and he heard the officers running toward the door of the bedroom. (R 5365 - 8) The state was concerned that the jury would erroneously believe that Bello had to intend to kill Rauft, rather than either of the police officers coming through the door. There was never any argument to the jury that if it found Bello intended to kill Ulriksen that this intent could be transferred to Rauft's murder. If counsel felt there was a potential problem of confusion, he should have presented this argument to the trial court and a clarifying instruction could have been given. Counsel, however, only made a general objection to the instruction. The state strongly urges this Court to find that this objection was insufficient to preserve the issue for appeal.

However, even if the issue were properly before this Court, relief is not warranted as the instruction was properly given in the instant case. As previously noted, the facts may have supported a conclusion that Bello was shooting at Mock, any of the other officers or (as suggested by Bello) unknown assailants or robbers. No suggestion was made to the jury that the instruction was intended to transfer the intent from Ulriksen to Rauft.

Assuming arguendo, it was error, the giving of the instruction was harmless. As the United States Supreme Court stated in Rose v. Clark, 478 U.S. 570, 92 L.Ed.2d 460, 106 S.Ct. 3101 (1986):

> Applying these principles to this case is not difficult. Respondent received a full opportunity to put on evidence and make argument to support his claim of innocence. He was tried by a fairly selected, impartial jury, supervised by an impartial judge. Apart from the challenged malice instruction, the jury in this case was clearly instructed that it had to find respondent guilty beyond a reasonable doubt as to every element of both first and second-degree murder. See also n. 2, supra. Placed in context, the erroneous malice instruction does not compare with the kinds of errors that automatically require reversal of an otherwise valid conviction. We therefore find that the error at issue here -- an instruction that impermissibly shifted the burden of proof on malice -- is not "*so* basic to fair trial" that it can never be harmless. Cf. Chapman, 386 U.S. at 23, 17 L.Ed.2d 705, 87 S.Ct. 824, 24 ALR2d 1065.
>
> Id at 478 U.S. 579 - 80, 92 L.Ed.2d 472 - 3.

The jury was instructed that it had to find premeditation. (R 840 - 41) There was no instruction that premeditation was presumed. The jury was not erroneously relieved of the duty to find an element of the crime as the evidence clearly supports the finding of premeditation, the error, if any, was harmless. Grossman v. State, 13 F.L.W. 127 (Fla. Feb. 18, 1988).

ISSUE III

WHETHER THE TRIAL COURT ERRED IN OVERRULING THE DEFENSE OBJECTION TO APPELLANT'S BEING SHACKLED DURING THE PENALTY PHASE OF HIS TRIAL, WHERE THERE WAS NO APPARENT REASON (MUCH LESS A MANIFEST NECESSITY) FOR THE SHACKLING: AND WHERE THE COURT GAVE NO JUDICIAL SCRUTINY TO THE DECISION TO SHACKLE APPELLANT, BUT MERELY DEFERRED TO THE SHERIFF'S ACTION. (As stated by appellant).

Appellant urges this Court to remand this cause for resentencing because he was shackled during the penalty phase of the trial without the trial court first determining the necessity of or any reasonable alternatives to shackling Bello.

It should be noted that counsel did not ask the court to make such a finding, nor did he cite to any authority contrary to the judge's understanding on the issue. Counsel simply made a general motion for mistrial. In Lucas v. State, 376 So.2d 1149 (Fla. 1979), this Court recognized that even in a death case, a reviewing court should not indulge in a presumption that a trial judge would have made an erroneous ruling had an objection been made and authorities cited contrary to his understanding of the law. At the time of sentencing, Bello was a convicted murderer with a history of mental illness. Absent specific motion for further findings, the trial court had a reasonable basis for maintaining the extra security measure.

As noted by Judge Edmonson in his dissent in Elledge v. Dugger, 823 F.2d 1439 (11th Cir. 1987):

> When the pivotal issue of presumption of innocence is lacking, the defendant's

> constitutional rights are significantly less. Treating unconvicted persons the same as convicted persons grossly trivializes the rights of persons not convicted of crimes.
>
> Elledge, at 1456.

The majority in Elledge indeed recognized a distinction between a defendant, convicted of a heinous murder, versus an individual who is presumed innocent before a jury renders its verdict:

> The jury knows he is not innocent. Having just convicted him of a crime that makes him a candidate for capital punishment, he is no longer entitled to a presumption of innocence.
>
> Elledge, at 1450

Appellant has taken the liberty of positing that the only effect appellant's restraints had upon the jurors was a negative one that invariably invited them down the path towards his death sentence. Again, the majority in Elledge recognized that a contrary view exists:

> Arguments could be made that the jury's view of such a convicted murderer would have no effect on the sentencing or, indeed, may benefit the defendant. A jury may be more inclined to give a life sentence if it feels that the defendant can be properly restrained, it is not necessary to give the death sentence in order to protect against future harm.
>
> Elledge at 1450.

Finally, Judge Edmonson noted that:

> . . . most citizens would not be surprised at - and probably would endorse - the practice of physically restraining felony convicted of violent crimes when those felons

> are removed from the controlled environment of their penal institutions. The Supreme Court acknowledged this practical, "common human experience' reality in ***Holbrook*** when it noted that four uniformed troopers in the courtroom "are unlikely to have been taken [by the jury] a sign of anything other than a normal official concern for the safety and order of the proceedings. ***Indeed, any juror who for some reason believed defendants particularly dangerous might well have wondered why [more extensive security precautions were not in effect.]***" (Citation omitted) (Emphasis supplied)
>
> Elledge, at 1455.

In the case sub judice, the appellant was in front of the same jury that had convicted him. They had already found him capable of dangerous and uncontrollable behavior and were about to pass on a sentence befitting his crime. After hearing evidence during the guilt-phase of the trial, it is unlikely that the sight of shackles about the killers legs would have propelled the jurors towards a death sentence, rather than the nature of appellant's crime earned him this state's ultimate penalty. Surely, the jurors realized that the presumption of innocence no longer followed appellant through the penalty-phase of the trial. Without some indication that any one of the jurors was actually influenced by the sight of the shackles, the appellant asks this Court to assume that the restraints caused the jurors to recommend the death penalty. Appellant urges this Court to believe that a normal courtroom security measure, such as shackling, caused a death recommendation rather than the nature of the evidence adduced at trial. In Hildwin v. State, 531 So.2d 124 (Fla. 1988), this Court found that a juror's viewing of the

d Eendant's "handcuffs, chains or other restraints is not *so* prejudicial so as to require a new trial." So too, in the instant case, the sight of shackles by the convicting juror's should not categorically be branded error worthy of reversal and resentencing absent a showing that the restraints, rather than the evidence, caused the appellant to draw the death sentence.

Appellant fails to realize that the jury may have actually "felt sorry" for him because he was placed in shackles despite his courtroom behavior during the guilt-phase of the trial. Yet, in the face of the evidence placed before them, the jurors may have overcome their pity and recommended capital punishment. Such a scenario is as worthy of consideration as appellant's theory that the shackles directly caused the imposition of a death sentence. Again, appellee urges this Court to avoid a blanket requirement of a hearing and require the appellant to show actual prejudice before limiting a trial court's duty to secure a courtroom and its occupants from potential harm.

ISSUE IV

BECAUSE OF APPELLANT'S SEVERE AND CHRONIC MENTAL ILLNESS, IMPOSITION OF THE DEATH PENALTY IS PROPORTIONALLY UNWARRANTED IN THIS CASE. (As stated by appellant.)

Appellant argues that the imposition of the death penalty is proportionally unwarranted in this case and relies on Fitzpatrick v. State, 527 So.2d 809 (Fla. 1988). Appellee submits that the instant case is dissimilar.

Fitzpatrick involved five aggravating factors and three mitigating factors. The instant case involves four aggravating factors. (1) Prior conviction of a violent felony; (2) Capital felony committed to avoid or prevent arrest: (3) Knowingly created a great risk of death to many persons; and, (4) Capital felony committed to disrupt or hinder the lawful exercise of governmental function or enforcement of laws, and only one mitigating factor: (1) capital felony was committed while defendant was under the influence of extreme mental or emotional disturbance. (R 1962 - 1965)

Unlike Fitzpatrick, the trial court did not find as mitigating factors (and in fact rejected the notion) that appellant lacked the ability to appreciate the criminality of his conduct or that the ability to appreciate the nature of his conduct was substantially impaired. (R 1966)

Additionally, in this case, the trial court rejected appellant's age of twenty-eight years as mitigation: in Fitzpatrick, in contrast, each expert testified that the

defendant's emotional age was between nine and twelve years of age. 527 So.2d at 812.

The instant case is not like Fitzpatrick. There, the unanimous opinion of mental and physical health professionals was that the defendant suffered from extreme mental and emotional disturbance and that his capacity to conform his conduct to the requirements of law was substantially impaired. The opinion of experts was not unanimous in the instant case. Dr. Gonzalez admitted that Bello was malingering and probably faking amnesia. (R 948) He also admitted there was no organic disease and that Bello was competent at the time of the crime. (R 949, 964) Dr. Mussenden testified at the sentencing hearing that the appellant malingers and his hallucinations are contrived. (R 1005 - 13, 1014 - 15) Dr. Mussenden also found that Bello was an extremely bright person with an I.Q. range of 115 to 120. (R 1011) The H.R.S. reports indicated that the issue of malingering became more apparent over time and Bello's hallucinations coincided only with times when his criminal situation was discussed. (R 1751 - 52, 1754 - 58)

Since there was sharp disagreement by experts, Fitzpatrick is inapposite.

The instant case is more similar to Remeta v. State, 522 So.2d 825 (Fla. 1988), wherein the trial court found four aggravating factors and four mitigating factors, including a mental age of thirteen years. This Court approved the trial court's judgment imposing a sentence of death and apparently did

not feel that a youthful mental age constituted a sufficient basis for concluding that death was a disproportionate penalty. So too in this case where the defendant did not have a mitigating age and his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was not found to be substantially impaired, this Court should conclude that the presence of multiple aggravating factors renders the imposition of the ultimate sanction appropriate.

More recently, in Hudson v. State, 14 F.L.W. 41 (Fla. January 19, 1989), this Court reviewed a similar case and found that Fitzpatrick did not control the proportionality review of the case. Bello's, like Hudson's, mitigating evidence is not as compelling as that presented by Fitzpatrick. Proportionately the murder of Detective Rauft warrants the imposition of the death penalty.

ISSUE V

EXECUTING THE MENTALLY ILL IS CRUEL AND UNUSUAL PUNISHMENT. (As stated by appellant.)

There is no evidence that Bello is legally insane. (R 964, 1012, 1002 - 03, 973, 948) If and when appellant can show he is legally insane, 8922.07, Fla. Stat. provides for a stay of the execution of the sentence. A claim of mental illness alone is not sufficient to preclude the imposition of the sentence when the evidence at the time of sentencing showed Bello was competent to be sentenced.

ISSUE VI

DID THE TRIAL COURT ERR IN FINDING AND INSTRUCTING THE JURY THAT IT COULD FIND TWO AGGRAVATING FACTORS (CRIME COMMITTED "TO AVOID LAWFUL ARREST" AND CRIME COMMITTED "TO DISRUPT OR HINDER LAW ENFORCEMENT") BASED ON THE SAME ASPECT OF THE OFFENSE? (As stated by appellant.)

Appellee is aware of this Court's decisions forbidding the improper doubling of aggravating circumstances. However, it is submitted that appellant has misread this Court's decision in Provence v. State, 337 So.2d 783 (Fla. 1976). This Court in Provence and its progeny indicated there is improper doubling when two aggravating circumstances necessarily flow from the same aspect of the defendant's conduct. The principle of Provence, however, is not applicable here. Appellee submits the two circumstances involved here were two separate and distinct characteristics of the defendant's actions, not based on the same evidence and the same essential facts. Therefore, separate findings of the two factors were proper. Waterhouse v. State, 429 So.2d 301 (Fla. 1983).

As the trial judge correctly pointed out, the entire shooting episode was done to accomplish two separate goals.

At the time of the murder, Bello was attempting to avoid arrest for his part in the drug sale. The shooting of both Ulriksen and Rauft is evidence of the attempt to avoid arrest for the drug deal. After shooting Ulriksen, Bello was confronted with a second problem. Ulriksen was still alive, and several officers were coming to his aid. Ulriksen testified that after he was

shot, the alert went up that an officer was "down." Ulriksen could see and hear the officers coming to his rescue. It can be reasonably determined that Bello was also aware of the impending rescue attempt by law enforcement. Thus, the murder of Rauft accomplished two separate goals; allowing Bello the opportunity to avoid arrest and hindering law enforcement from coming to the aid of the downed officer.

This Court has repeatedly stated that there is no reason why the facts in a given case may not support multiple aggravating factors. Agan v. State, 445 So.2d 326 (Fla. 1983), cert. denied, ___ U.S. ___, 105 S.Ct. 225, 83 L.Ed.2d 154 (1984); Waterhouse v. State, 429 So.2d 301 (Fla.), cert. denied, 464 U.S. 977, 104 S.Ct. 415, 78 L.Ed.2d 352 (1983). In Echols v. State, 484 So.2d 568 (Fla. 1985) this Court stated:

> There is no reason why the facts in a given case may not support multiple aggravating factors provided the aggravating factors are themselves separate and distinct and not merely restatement of each other as in a murder committed during a robbery and murder for pecuniary gain, or murder committed to eliminate a witness and murder committed to hinder law enforcement. *Squires* v. *State*, 450 So.2d 208 (Fla.), cert. denied, __ U.S. __, 105 S.Ct. 268, 83 L.Ed.2d 204 (1984); *Combs* v. *State*, 403 So.2d 418 (Fla. 1981), cert. denied, 456 U.S. 984, 102 S.Ct. 2258, 72 L.Ed.2d 862 (1982).
>
> Echols at 575

As both aggravating factors were separate and distinct, there was no error in finding both.

ISSUE VII

DID THE TRIAL COURT ERRED IN CONCLUDING, AS A MATTER OF LAW, THAT THE MITIGATING CIRCUMSTANCE OF "NO SIGNIFICANT HISTORY OF PRIOR CRIMINAL ACTIVITY" WAS INAPPLICABLE BY VIRTUE OF APPELLANT'S CONVICTION OF CONTEMPORANEOUS CRIMES? (As stated by appellant.)

Although this Court in Scull v. State, 533 So.2d 1137 (Fla. 1988) indicated a history of prior criminal conduct cannot be established by contemporaneous crimes, it was also indicated that the trial judge has broad discretion under this type of circumstance to determine if the mitigating circumstance of 'no significant prior criminal history' is applicable. The trial court in this instance exercised his discretion by not finding that mitigating circumstance. However, it is clear from a reading of the court's sentencing order that that factor was taken into consideration when the appropriate sentence was determined.

ISSUE VIII

APPELLANT'S DEATH SENTENCE VIOLATES THE EIGHTH AMENDMENT OF THE 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 relies on this issue as presented to this Court in Paul Alfred Brown v. State, Case No. 70,483.

This issue was presented to the trial court in Brown, and appropriately raised on appellate review. The argument presented herein was not presented to the court below. Accordingly, Bello is not entitled to review of the issue on appeal. Steinhorst v. State, 412 So.2d 332 (Fla. 1982); Tillman v. State, 471 So.2d 32 (Fla. 1985). In Paul Alfred Brown, counsel filed a motion to declare the death penalty unconstitutional as applied. This motion was based upon anlaysis of mathematical probabilities by an expert in the field of statistics. It demonstrated that a seven to five death recommendation was not statistically so different from a six to six tie vote life recommendation that it may be relied upon as reflecting the consciousness of the community. Bello made no such motion.

On Appeal Brown conceded 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. Brown, however, pointed out that the Alvord decision predated this court's holding in Tedder v. State, 322 So.2d 908 (Fla. 1975). As the appellee, the State of Florida, pointed out in its

answer brief to Paul Alfred Brown, the Alvord decision was predated by the Tedder opinion as Alford was still pending on rehearing at the time the Tedder decision was rendered. The Alvord opinion remains the law and appellant's arguments to recede from Alvord are without merit.

Further, as appellee pointed out in Brown, this Court in James v. State, 453 So.2d 792 (Fla. 1984), cert. denied, 469 U.S. 1098 (1984), declined the opportunity to receive from Alvord. Accordingly, Alvord remains the law in Florida and, there is no Sixth Amendment constitutional deprivation by allowing a jury recommendation of death based on a seven to five vote.

ISSUE IX

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT THE FINAL DECISION AS TO PENALTY RESTED SOLELY WITH THE COURT. (As stated by appellant.)

This issue has been squarely addressed by this Court in Jackson v. State, 13 F.L.W. 146 (Fla. Feb. 18, 1988) and found to be meritless. Jackson contended that the trial court erred in giving the standard jury instruction concerning the respective roles of the trial judge and the jury in the sentence process because the instructions unconstitutionally deluted the jury's sense of responsibility for it's sentencing decision, in violation of Caldwell v. Mississippi, 472 U.S. 320 (1985). Jackson had failed to make a contemporaneous objection to the jury instruction. Accordingly, the court held that the issue was not preserved for appellate review. The court further found no error as the standard jury instructions fully advise the jury of the importance of its role and a correct statement of the law. See also Grossman v. State, 13 F.L.W. 127 (Fla. Feb. 18, 1988).

Bello failed to make a contemporaneous objection, thereby precluding appellate review. Further, as this Court found in Jackson and Grossman, there is no merit to the argument. Accordingly, appellant is not entitled to relief on this issue.

ISSUE X

APPELLANT'S SEPARATE CONVICTIONS AND SENTENCES FOR DELIVERY AND POSSESSION OF THE SAME MARIJUANA VIOLATES THE CONSTITUTIONAL GUARANTEE AGAINST DOUBLE JEOPARDY. (As stated by the appellant.)

The Third District in Blanco v. State, 13 F.L.W. 2425 (Fla. 3d DCA 1988), and Bello mistakenly rely on and misread Gordon v. State, 528 So.2d 910 (Fla. 2d DCA 1988), as applicable to these charges. Rather, Gordon clearly states that the charges in that case were sale and possession with intent to sell a controlled substance. In Gordon, the Second District held that convictions for sale of cocaine and possession of that same cocaine with intent to sell violated his double jeopardy rights. Gordon relies on Carawan v. Stte, 515 So.2d 161 (Fla. 1987) to support this conclusion. Bello was not charged with sale and possession with intent to sell (both crimes prohibited by *Section 893.13(1)(a)*) but with delivery and possession (the first prohibited by *Section 893.13(1)(a)* and the second prohibited by *893.13(1)(f)*).

Carawan v. State, 515 So.2d 161 (Fla. 1987) specifically states that "sale of drugs can constitute a separate crime from possession, . . . " Carawan at 170. Carawan also specifically states that the intent of a legislature is controlling. The legislature has expressed its intent that separate statutes constitute separate offenses "if each offense requires proof of an element that the other does not, without regard to the accusatory pleading or the proof adduced at trial. *Section 775.021(4), Florida Statutes (1983).* Thereafter, the legislature has

more emphatically rejected Carawan by specific reference to the rule of lenity applied therein.

> "The intent of the legislature is to convict and sentence for each criminal offense committed in the course of one criminal episode or transaction and not to allow the principle of lenity as set forth in subsection (1) to determine legislative intent. Exceptions to this rule of construction are:
>
> (1) Offenses which require identical elements of proof.
>
> (2) Offenses which are degrees of the same offense as provided by statute.
>
> (3) Offenses which are lesser offenses the statutory elements of which are subsumed by the greater offense."
>
> *Section 775.021(4)(b), Florida Statutes (1988).*

The latter legislation is not a change, but a clarification of the prior law. It is now clear that the legislature intended separate convictions and sentences for both possession and sale of a controlled substance.

Both possession and sale require proof of an element which the other does not. It is not necessary to actually possess the controlled substance in order to sell it as explained by the Second District in Gordon, supra, at 912, before reaching the discussion of the charged crime of possession with intent to sell. Of course, delivery is not an element of simple possession. Thus, defendant's charged crimes of possession and delivery do not fit the first exception of *Section 775.021(4)(b), Florida Statute (1988).* Nor do the crimes charged fit the second

exception of being offenses which are degrees of the same offense as provided by statute. That leaves the third exception: offenses which are lesser offenses the statutory elements of which are subsumed by the greater offense. The delivery of the marijuana is the greater offense, being a second degree felony while possession of the marijuana is a third degree felony. However, the statutory elements of the possession are not subsumed by the greater offense of the delivery of the marijuana. Because one need not possess the drug to deliver it, Gordon, supra, the statutory elements of possession, without regard to the proof thereof, can never be said to be subsumed by the elements of the delivery. It is therefore clear that the legislature has always intended that possession and delivery be two separate offenses, subject to separate convictions and sentences. Carawan did not purport to nor actually change this, and the legislature has reaffirmed its original position.

Further, the evidence in the instant case clearly showed that in addition to the drugs delivered to the undercover officer, Bello possessed a separate container of drugs. (R 285) Even if a conviction for a single amount is precluded, convictions for delivery and possession are valid when two quantities are involved. Pelaez v. State, 14 F.L.W. 152 (Fla. 2d DCA, December 28, 1988).

ISSUE XI

APPELLANT'S GUIDELINES DEPARTURE SENTENCES ON COUNTS II THROUGH V MUST BE REVERSED, AS THERE IS NO INDICATION IN THE RECORD THAT HE AFFIRMATIVELY ELECTED TO BE SENTENCED UNDER THE GUIDELINES.

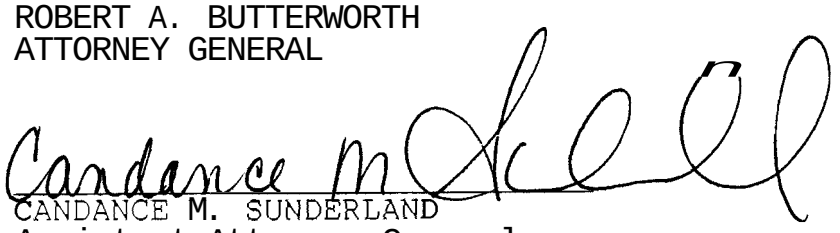
Appellee agrees that for crimes committed prior to October 1983, an affirmitive election to be sentenced under the guidelines must be made. Accordingly, as the record is devoid of any indication that appellant made an affirmative election, resentencing is required on Counts II through V

CONCLUSION

Based on the above and foregoing arguments, the judgment and sentence of the trial court should be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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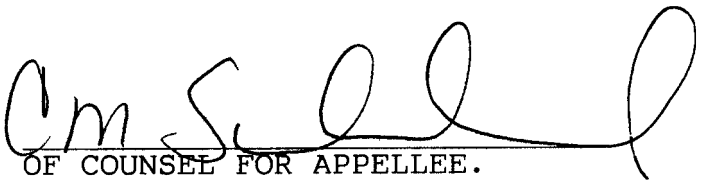
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Steven L. Bolotin, Assistant Public Defender, Polk County Courthouse, P. O. Box 9000, Drawer PD, Bartow, Florida 33830, this 10th day of February, 1989.



OF COUNSEL FOR APPELLEE.