IN THE SUPREME COURT OF FLORIDA

CARLOS BELLO,

Appellant,

vs.

Case No. 70,552

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT
BAR NO. 0143265

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PRELIMINARY STATEMENT

Appellant, CARLOS BELLO, was the defendant in the trial court, and will be referred to in this brief as appellant or by his proper name. Appellee, the State of Florida, was the prosecution and will be referred to as the state. The record on appeal, including the trial transcript, will be referred to by use of the symbol "R". All emphasis is supplied unless the contrary is indicated.

STATEMENT OF THE CASE

Carlos Bello, along with co-defendants Juan Amaro, Manuel Dorta, Juan Alejandro Rodriguez, and Sergio Jesus Villegas, was charged by indictment filed August 5, 1981 with first degree murder of Tampa police officer Gerald Rauft (R1516). The eight count indictment also contained four other charges against Bello: attempted first degree murder of Robert Ulriksen, possession of cannabis, delivery of cannabis, and resisting arrest with violence (R1516-18).

The Public Defender was permitted to withdraw based on conflict of interest, and attorney Walter M. Lopez, Jr. was appointed to represent Bello (R1522-23, 1528, 1378).

On September 28, 1981, counsel filed a motion to determine Bello's competence to stand trial (R1538-39). In support of this motion, counsel asserted that Bello had a history of psychiatric illness and hospitalization in Cuba; that he hears voices, suffers from headaches, and cannot sleep; that he had attempted suicide while in jail; and that he was unable to recall or discuss the circumstances of the charged offense with his attorney (R1538). Attached to the motion was a report by Dr. Raul F. Nodal diagnosing Bello as paranoid schizophrenic, and recommending his hospitalization for psychiatric treatment (R1539-41).

The trial court appointed three more Spanish-speaking psychiatrists, Dr. Arturo Gonzalez, Dr. A. F. Carra, and Dr. Guillermo Cadena, to examine Bello (R1544-46, 1549-51). These

three doctors each reported, in October, 1981, that Bello suffers from paranoid and catatonic schizophrenia, and that he was incompetent to stand trial (R1543, 1547-48, 1588-89).[1] Accordingly, the trial court entered an order committing Bello to the Department of Health and Rehabilitative Services for psychiatric hospitalization (R1590-91).

For the next five and a half years, Bello was hospitalized, first at South Florida State Hospital in Hollywood, and then (after August, 1982) at North Florida Evaluation and Treatment Center in Cainesville. During this time, he received various anti-psychotic and other psychotropic medications (see e.g. R1604, 1613, 1646, 1647, 1669, 1713, 1729-30, 1915). It was not until February of 1987 that Bello was adjudicated competent to stand trial (R1253). This determination was based on the reports of Dr. Carra and Dr. Gerald Mussenden, a clinical psychologist (R1814-19).

Back in April, 1982, defense counsel had filed a motion pursuant to Fla.R.Cr.P. 3.190(c)(4) to dismiss the charge of first degree murder, on the ground that the undisputed facts did not establish that the killing of Detective Rauft was premeditated (R1615-16). The state filed a traverse (R1619-24). After hearing, argument of counsel on May 21, 1982, the trial court denied the motion (R1419-29). On February 18, 1987, the week before the case

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[1] The results of the numerous psychiatric examinations of Bello, over the next five and a half years, will be discussed in more detail in the Statement of the Facts.

came to trial, defense counsel filed a renewed (c)(4) motion, on the same ground, which was again denied (R1807-08).

The trial took place on February 23-27 and March 3-4, 1987, before Circuit Judge Manuel Menendez and a jury. At the close of the state's case, the defense moved for judgment of acquittal as to each count, and specifically alleged that the state had failed to prove that the killing of Detective Rauft was premeditated (R741-42). The trial court denied the motion (R742). In the charge conference, defense counsel objected to the trial court's proposed instruction to the jury on "transferred intent", contending that such an instruction was not applicable under the facts of this case (R752-53, 757). The trial court overruled the objection (R753), and instructed the jury:

> If a person has a premeditated intent to kill one person, and in attempting to kill that person actually kills another person, the killing is premeditated.

(R841, 1831)

The jury returned a verdict finding Bello guilty of first degree murder (R1860, 890), and guilty as charged on each of the remaining counts (R1861-65, 890-91).

After a weekend recess, the trial was resumed for the penalty phase on Tuesday, March 3, 1987. Just before the testimony of the first witness, counsel asked to approach the bench, and the following occurred:

> MR. LOPEZ [defense counsel]: May it please the Court, I'm going to object and move for a mistrial at this time in that I have just looked

over at my client's feet, and they are shackled in the presence of this jury, and there's nothing underneath that table, any skirt of any kind. He has presented no evidence of wanting to run or to injure anyone. And to have my client appear shackled in the presence of that jury is very prejudicial, and I would move for a mistrial at this time.

THE COURT: All right. This is the very same jury that convicted him of murder in the first degree, and now he stands convicted, and perhaps it is a well thought out security measure. And I deny the motion for mistrial and overrule the objection.

MR. LOPEZ: I would ask, then, in the alternative, Your Honor, that the Court order the taking off of the shackles unless the State can show that there is a security threat.

THE COURT: Well, I don't know why he's shackled at this point. Perhaps the Sheriff feels because he now stands convicted of that and the nature of the posture of the case, that it's necessary. I will again decline to grant the last request, and he will remain shackled. If he needs to testify, you can let me know before that happens, and we will see what we do then.

(The bench conference was concluded).

(R919-20)

In the penalty phase, appellant presented the testimony of his sister Mercedes Rodriguez concerning his personal and family history of mental illness while in Cuba, as well as the

testimony of Dr. Gonzalez. The state countered with Dr. Mussenden. The jury recommended death by a **7-5** vote **(R1880, 1089).**

The trial court set sentencing for April **14, 1987 (R1090-91).** The defense filed renewed motions for judgment of acquittal (which were denied) (R1909-11), and also a motion for a mental examination to determine Bello's competence to be sentenced **(R1907).** On conflicting reports and testimony[2], the trial court determined that Bello was competent to proceed.

For the conviction of first degree murder, the trial court imposed a sentence of death **(R1937, 1962-67, 1371-72). As** aggravating circumstances, he found **(1)** previous conviction of a violent felony (based on Bello's contemporaneous convictions of attempted first degree murder of Detective Ulriksen and resisting arrest with violence); **(2)** great risk of death to many persons; **(3)** capital felony committed to avoid or prevent lawful arrest, and **(4)** capital felony committed to disrupt or hinder lawful exercise of any governmental function or the enforcement of laws **(R1964-64, 1361-67). As** a mitigating circumstance, the court found that the capital felony was committed while appellant was under the influence of extreme mental or emotional disturbance. **(R1965, 1397-68).** The trial court refused to find as a mitigating factor that appellant had no significant history of prior criminal

[2] Drs. Carra and Mussenden were of the opinion that Bello was competent to be sentenced (R1917, **1954, 1279,** 1314), while Dr. Gonzalez was of the opinion that he was not competent **(R1916, 1301, 1308).**

activity, because of the contemporaneous convictions which were used to establish the "prior violent felony" aggravating factor (R1965, 1367). On the remaining counts, the court imposed consecutive sentences of 15 years, 15 -years, life imprisonment, and 15 years (R1939-42, 1967, 1372), which represented a departure from the sentencing guidelines (R1968).

STATEMENT OF THE FACTS

A. THE EVENTS OF JULY 24, 1981

The evidence presented at trial, taken in the light most favorable to the verdict, was summarized by the trial judge in his sentencing order [record citations have been added by counsel for appellant]:

> Prior to that date [July 24, 1981] a Tampa Police Department Detective, Alfred Peterson, while working in an undercover capacity, negotiated for the purchase of fifty (50) pounds of marijuana with a Juan Amaro (R252-53, 255-58, 294-96). On July 24, 1981, Detective Peterson met with Amaro, as well as Juan Rodriguez, Sergio Villegas, and the defendant Carlos Bello (R266-78, 303-10). This meeting took place at 1410 29th Avenue in Tampa, Fla. In the northeast bedroom of that residence Detective Peterson was shown the marijuana (R273-78, 308-09). After viewing the 'marijuana Peterson exited the residence in order to retrieve the purchase money from his vehicle, and also signal back-up and surveillance officer[s] to "bust" the residence and arrest those involved in the "drug deal" (R277-79, 310-13, 354-55, 463, 496, 512). The detective utilized an electronic signaling device which apparently did not function properly (R261-64, 278-79, 301-02, 312-13, 380-81, 461-63, 494-97, 510-13, 543).
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> Once back inside the residence, Detective Peterson, seeing that his fellow officers had apparently not received his signal, stalled for time, he had defendant Bello count the purchase money ($13,500 cash), he asked for a scaie to weigh the marijuana, and asked to use the restroom (taking the purchase money with him) (R280-84,

> **314-16).** Inside the bathroom, Peterson again attempted to activate the electronic signal, this time successfully **(R283-84, 316-19).**
>
> Upon receiving the signal, officers began entering the residence (R284; **319-20, 340-41, 356-60, 463-64, 497-500, 513-14, 544, 554-58).** The officers were wearing "raid" jackets which identified them as Tampa Police Officers and they also made their identities known verbally as they entered the premises **(R357-59,** 471-**75, 480-82,** 513, **545, 547, 561-63).**
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> One of the officers, Detective Ulriksen, kicked the door of the northeast bedroom and upon entering the room he was shot and wounded three (3) times by the Defendant, Bello **(R362-66,** 369-70, **382-87, 497-500, 514-18, 552).** Moments later Detectives Mock and Rauft attempted to enter that bedroom (R368, **501-03, 518-20).** They pushed against the bedroom door, whereupon the Defendant Bello fired two shots through the door, mortally wounding Detective Rauft **(R368, 468, 502-05, 519-20, 527-29, 531-34, 550, 566-67).**

(Sentencing Order, R1961-62)

One of the co-defendants, Juan Rodriguez, was shot in the head and wounded by one of the bullets which had struck Detective Ulriksen (R369, **568,** 681, see R217). Of the other co-defendants, Villegas was apprehended in the southeast bedroom of the residence **(R469, 515);** Amaro climbed out the window of the northeast bedroom and ran across the back yard, where he was caught by Detective McAllister (R338-39, 341-43, 347-49, 547-49, **552);** and Dorta ran off the front porch, and was stopped by

Detective Bienek in the front yard (R343, 464-66). Dorta was carrying a tape-recorder at the time (R471). When the police later listened to what was on the tape, they discovered that twenty seconds of the raid and the shooting had been recorded (R471-72). This tape was introduced at trial as State Exhibit 21 (R471-75).[3]

Defense counsel's argument to the jury was primarily that the state's evidence failed to prove beyond a reasonable doubt that Bello was the person who did the shooting (see R220, 801-05, 824-25, 827-29, 831-34). [However, his motion for judgment of acquittal was based on the insufficiency of the evidence to establish premeditation (R741-42)]. One factual issue which arose at trial was whether the door through which Detective Rauft was shot was completely closed at the time (as stated by Detective Mock in his deposition, see R520-21, 527-29, 531-32), or whether it was slightly ajar (as Mock and Detective Ulriksen testified at trial, see R 367, 502, 519-20, 529).[4] Defense counsel argued that, either way, the angle of the shots through the door were such that Bello could not have fired them from the

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[3] The prosecutor successfully contended that the tape was admissible for the purpose of showing the warnings that were shouted by the police (R472). The tape does in fact contain a single loud and sharp shout of "Police!", followed by gunshots, screaming, and confusion. [See also the testimony of Detective Peterson, who, because he remained undercover, had locked himself in the bathroom, and who described what he heard at that point as "chaos, confusion" or "pandemonium" (R321)].

[4] According to Ulriksen, the door was open about two inches (R367).

position by the dresser where Detective Ulriksen placed him in the room (see **R796-97, 804-05,** 827-28, **832).** The prosecutor countered that this would be true only if you assume that Bello stayed in the same position behind the dresser (R811), and argued that it was a "logical inference" that Bello began moving across the room after firing at Ulriksen (R812). The prosecutor speculated that Bello might have moved across the room for one of two possible reasons; either to "deliver the final fatal shot" to the wounded Detective Ulriksen[5], or to get to the window to follow his buddy Amaro out, and try to escape **(R812-13).** Defense counsel, in his rebuttal argument, argued that there was no evidence that Bello jumped over the bed or moved toward the other side of the room **(R827, 832).**

In support of its contention that Bello was the one who fired the shots through the door which struck Detective Rauft, the state relied primarily on **(1)** Ulriksen's in-court identification of Bello as the person who shot him when he came into the bedroom (see R370); **(2)** evidence that the gun from which all five shots were fired belonged to Bello (see **R228-30, 440-41, 660-61,** 2007), and **(3)** process of elimination of the other co-defendants (see **R813-14, 816-18)**[6] Defense counsel, in support of his position.

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[5] Which, it should be noted, he did not do.

[6] The prosecutor's elimination of Juan Amaro as a possible triggerman depended in part on Detective McAllister's testimony that he heard two gunshots after he tackled Amaro in the back yard (after the latter had jumped out the window of the northeast bedroom) **(R547-49,** see R816). However, in his deposition, McAllister had not been sure whether he had heard gunshots or other sounds, such as bottles being thrown or doors being kicked (R560-61).

that the evidence failed to prove that Bello was the shooter, emphasized the angle of the shots through the door, as well as the fact that a neutron activation test conducted by an F.B.I. expert failed to detect any gunshot residue on Bello's hands **(R586-90, 596-605,** see **R800-01, 803, 828-29).**[7] Defense counsel also pointed out that there was no evidence of Bello's fingerprints on any item in the case, notably including the weapon (see **R800-02).**[8]

B. THE PSYCHIATRIC EVIDENCE: PRE-TRIAL, PENALTY PHASE, AND SENTENCING

In October, **1981,** Bello was adjudicated incompetent to stand trial, based on the unanimous opinion of three court-appointed psychiatrists (Drs. Gonzalez, Carra, and Cadena), and a fourth psychiatrist (Dr. Nodal) retained by a family friend, that

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[7] According to the F.B.I. agent, Asbury, presence of residue would indicate that the suspect had fired a gun, but absence of residue does not necessarily indicate that the suspect had not fired a gun **(R598-600, 604-05).** If a person fired a gun five times, as opposed to one time, that would cause somewhat more residue to be deposited on his hand, but not "geometrically" more **(R601-02).** Asbury stated that gunshot residue can be prevented by an intervening object covering the back of the hand, or can be wiped off by perspiration or rubbing against an article of clothing **(R598-99).** The prosecutor, accordingly, argued that this is what must have happened, while Bello was handcuffed **(R814-15).** Defense counsel pointed out that, while the police took swabbings from the hands of Amaro, Dorta, and Villegas as well as Bello, only Bello's kit was ever tested **(R585-90, 602-03).**

[8] The jury, by its verdict, resolved the contested issue of identity against Bello, and he is not raising this as an issue on appeal. However, the denial of his motion for judgment of acquittal of first degree murder, on the ground that the evidence was insufficient to prove premeditation, is an issue in this appeal.

he was acutely psychotic (schizophrenia of the paranoid and catatonic types), and incompetent to assist in his defense. After five and a half years of psychiatric hospitalization, during which time he was treated with anti-psychotic and other psychotropic medications (see R1604, 1613, **1646, 1647, 1669, 1713, 1729-30,** 1915), Bello was declared competent to stand trial in February, **1987.** This determination was made on the basis of the reports and testimony of Dr. Carra and Dr. Gerald Mussenden, a clinical psychologist, both of whom were of the opinion that Bello was now in "chemical remission" of his mental illness, and was, as a result, competent to stand trial (compare **R1646, 1712-13** with **R1818-19,** 1316-18, **1320, 1323-24,** (Carra); R1773, **1776, 1817, 1002, 1031-32, 1039-40, 1283-84)** (Mussenden).

Bello is not raising any issue on appeal regarding any of the determinations of competency. He is, however, contending that the death penalty is disproportionate in this case in light the totality of the circumstances, including his serious mental illness [see Issue IV], and also that imposition of the death penalty on a person who is acutely and chronically psychotic violates the Eighth Amendment's prohibition against cruel and unusual punishment [see Issue V]. For this reason, it is necessary to discuss the findings of the various psychiatrists and other mental health professionals who examined Bello prior to, during, and after his hospitalization.

Dr. Nodal examined Bello in August 1981, a month after the shooting incident. Drs. Gonzalez, Carra, and Cadena examined

him, pursuant to court order, in October of that year. [Gonzalez and Carra conducted a number of further examinations during Bello's hospitalization, and each examined him again before sentencing].

In their initial evaluations, Nodal and Carra noted Bello's history of psychiatric illness and hospitalization in Cuba (R1540, 1548). He was taking Thorazine, Stelazine, and anticholinergic drug[s] in Cuba, but discontinued the treatment when he arrived in the United States in 1980 (R1540). Each of the four examining psychiatrists noted a variety of psychotic symptoms or manifestations, including persecutory delusions (R1540, 1543, 1547, 1588); auditory hallucinations (R1540); autistic thinking (R1588); severe psychomotor retardation (or near catatonia) (R1588, 1547); loose associations (R1543); blocking of speech and thought (R1543); impaired judgment and insight (R1540, 1588); and minimal contact with reality (R1588). Dr. Carra stated that Bello was crying, agitated, and unable to give rational answers to simple questions, and that he was constantly talking about the "pistoleros" (R1547). Dr. Modal questioned Bello about an incident where he jumped from the second floor in the jail[9]:

> I also questioned the patient about the reasons why he jumped from the second floor and he said that there were mounted policemen coming towards him and horses and they were going to kill him. He repeated this two or three times and then, he added that the voices said

[9] This occurrence was considered by Dr. Carra to have been a "bona fide suicidal attempt" (R1547-48).

"Jump, jump, jump".

(R1540)

The four psychiatrists' respective diagnoses were:

> Nodal: "schizophrenia, paranoid type" (R1541).
>
> Gonzalez: "schizophrenia, mixed type, with paranoid and catatonic features" (R1543) (also commenting on Bello's "overt psychotic condition", R1543).
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> Carra: "catatonic schizophreni[a] with severe paranoid ideation" (R1547) (also stating that Bello was not malingering, and that "the nature of his mental illness is severe", R1548).
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> Cadena: "schizophrenia, catatonic type" (R1395, see R1588) (also noting that Bello is "acutely psychotic", R1589, end that he was not feigning his condition, R1398).

Each of the four psychiatrists found - unequivocally - that Bello was incompetent to stand trial (R1541, 1543, 1547, 1589, 1397). Each strongly recommended that he be hospitalized (R1541, 1543, 1548, 1589), and Drs. Gonzalez and Carra projected that with psychiatric treatment there was a substantial probability that he could be restored to competency in the foreseeable future.

Bello was hospitalized, first at South Florida State Hospital in Hollywood, and then (after August 1982) at North Florida Evaluation and Treatment Center in Gainesville. [These institutions will be referred to hereafter as SFSH and NFETC]. Upon his admission, according to SFSH psychiatrist Luis F.

Guerrero (in a report dated January 15, 1982), Bello "obviously showed symptoms of catatonic schizophrenia with severe paranoid ideation" (R1605). Due to his psychotic condition and his inability, even after medication, to do more than "mumbl[e] incoherent fragmented sentences",. he was unable to provide information concerning his present illness, his past history, or the charges against him (R1605). Bello's diagnosis at the hospital was "schizophrenic disorder, paranoid type" (R1604, 1606). Within the first two months of his hospitalization, his medication (Mellaril) was increased in dosage, and then supplemented with Prolixin Decanoate ("a more potent neuroleptic"), resulting thus far in no improvement (R1604). In Dr. Guerrero's opinion, Bello remained incompetent to stand trial, though with additional time and medication he was expected to improve (R1604).

A report filed in June, 1982 by Dennis F. Koson, senior forensic psychiatrist at SFSH, concluded that Bello remained "grossly" incompetent to stand trial, and that he has "a severe mental illness which is in poor remission" which would render him civilly committable as a danger to himself and others (R1614). The examination was conducted by the entire treatment team, as well as the clinical director of the Forensic Unit, and Dr. Koson (R1610). Koson wrote that Bello:

> ..... is still psychotic with persecutory delusions and suicidal thought. He is extremely fearful of participating in outside recreational activities because the "bandits are waiting outside to kill

> me". He does not function in group therapy and has not been able to provide any logical or coherent information to our staff. He usually remains silent and distant in the groups. Any time the staff needs him he is found sl'eeping or lying in bed. He has been receiving Prolixin Decamoate, 50 mg. IM every week and Haldol, 40 mg. at bed time and 10 mg. twice a day. He is extremely fearful and his level of communication is poor.
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> When questioned about hallucinations, he replies he sees and hears voices coming from a group of heavily armed bandits and telling him to kill himself. He describes them as wearing red shirts, blue pants, all riding horses and being heavily armed with all kinds of rifles and guns. When questioned about the reason for his being here, he claims the bandit captain brought him here.

(R1613)

According to Dr. Koson, Bello knew he was in a mental hospital, but did not seem to comprehend his situaticn or to be aware of the charges against him **(R1613).** The examination **by** the Disposition Board "corroborated a [lengthy history of] mental illness since he was hospitalized at Mazorra Hospital in Cuba", though Bello was unsure of when that was **(R1613).** During this examination, Bello was very flat in his affect, and seemed to be, confused and hallucinating **(R1613).**

Thus, in **1981** and **1982,** Bello was examined by no fewer than six psychiatrists - four in the community and two affiliated with the state hospital - each of whom found him to be acutely and chronically psychotic (schizophrenia with paranoid and catatonic

features), incompetent to assist in his defense or to understand the proceedings against him, and in need of antipsychotic medication in order to possibly become competent in the future.

The first evaluations which expressed the view that such a remission had occurred and that Bello had become chemically competent to stand trial came in reports filed in March and December, **1983**, prepared by NFETC rehabilitation specialist/clinical social worker Valentina Komaniecka[10] **(R1727-31, 1668-74,** same at **1703-09, 1734-40).** In the earlier of these, it was noted that during his evaluation at the Center, Bello displayed symptoms of chronic paranoid schizophrenia (currently in remission) **(R1729).** His persecutory delusions of bandits had persisted during much of his stay at the hospital, but now they were no longer in evidence; although he still complained of men coming to kill him in his sleep (R1729). The only time he ever felt free of these sleeping "delusions" was when he was given electroshock treatment in Cuba, and this has been a problem of long standing (R1729). The NFETC report speculates that "[g]iven Mr. Bello's history of "nerve" problems and psychiatric hospitalizations in Cuba, his condition (perhaps in remission when he first arrived in the United States in **1980)** was likely, exacerbated by lack of constant medical supervision and medication. As these two factors have been addressed [at NFETC], Mr. Bello's condition has improved" (R1729). While the report

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[10] The first **of** these was done jointly with clinical social worker Jean Ingram (R1730).

recommended a finding of competency, it cautioned that "it is necessary that [Bello] be maintained on his current medication while awaiting trial" (R1729).

Ms. Komaniecka's December, 1983 report contains an even stronger word of caution - one emphasized by the hospital administrator in his letter to the trial judge (R1639, same at **1666, 1701,** 1732):

> The only caveat is that Mr. Bello must be maintained on his current medication while he is awaiting trial in jail. He is a chronically mentally ill person who is stabilized only with anti-psychotic medication and who needs constant visilance, especially under stressful conditions.

(R1671)

Many of the evaluations from the NFETC[11] detail Bello's personal and family history of mental illness while in Cuba (R1668-69). He is the youngest of eleven children (all of whom are at least a decade older than he) born to elderly parents (R1668). It was feared that he had a brain tumor at birth, and "[a]lthough it was medically treated ..... the alleged tumor *was* given as the primary reason for his bizarre, nervous and seclusive behavior patterns through adolescence" (R1668).[12] His father died when he was nine (R1668). Raised by a godmother, Bello went to school

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[11] Record references are to the December, 1983, Komaniecka report. The same information can also be found elsewhere in the record.

[12] The report notes that, from Bello's functioning in the hospital, there was no indication of organic brain damage (R1671).

through the sixth grade, became a baker, and married at age 18 (R1668). Two children were born (R1668). However, because of his mental problems, Bello's wife twice had him committed to the Mazorra State Hospital, Cuba's state psychiatric facility (R1668). [Several of Bello's siblings had also undergone psychiatric treatment (R1668)]. Bello's service in the Cuban military was cut short after only a month because of "nerve" problems (R1668). Because of his previous psychiatric hospitalizations, Bello, along with two sisters, was given clearance in 1980 to leave Cuba on the Mariel boatlift (R1668). While living in New York with an older brother, he worked in a clothing factory and received outpatient psychiatric treatment and medication (R1669). When he moved to Florida to help support his sister's family, the treatment and medication were discontinued (R1669).

Upon Bello's transfer to NFETC, he claimed that he had not been taking any medication, and he was placed on a regimen of various drugs to address his psychotic symptoms (R1669). The "multidisciplinary treatment team designed a milieu-oriented program focused on responsible, cooperative behavior", (R1669). In contrast to his previous behavior, Bello became somewhat more active and verbal (R1670). He could recall people's names, canteen prices, and the procedure for using the sign-out board (R1670). His short and long-term memory seemed adequate, though he continued to be amnesiac with respect to the events surrounding his arrest (R1669, 1671). Ms. Komaniecka summarized the treatment team's observations by saying that "More often, Mr. Bello (although in a

rather lumbering, slow-moving fashion) does what is necessary to insure a smooth, hassle-free life in this environment" (R1670). She concluded that, as long as he is maintained on psychotropic medication to control his mental illness, he was now competent to stand trial (R1671). The diagnosis was now listed as "Schizophrenia, Paranoid Type, Chronic, in remission" (R1671).

The trial court re-appointed Drs. Gonzalez and Carra to examine Bello. Both were of the opinion that he remained grossly incompetent. Dr. Carra wrote ".....[T]his man for the second time has come from that particular treatment center in a severe psychotic state, disoriented, delusional, and hallucinating. He is totally incompetent to stand trial at any level whatsoever...." (R1645). Dr. Carra stated that, in order to regain competency within six months to a year, Bello should receive intramuscular phenothiazines such as Prolixin Decanoate Injections; "[o]therwise he will never regain competency" (R1646). Carra believed that administering Loxitane by mouth (as was being done at NFETC) was not sufficient (R1646). Worse yet, Bello was apparently not receiving even that at the County Jail, and, as a result, "he is again decompensating even further" (R1646, see R1663-65).

Dr. Gonzalez also found that Bello continued to be. without a rational or a factual understanding of the proceedings against him, and unable to consult with his attorney with a reasonable degree of understanding (R1647). [A judge, according to what Bello told Gonzalez, is one who "injects the sick" (R1647)]. Dr. Gonzalez wrote "He continues to be psychotic and

manifesting overt symptoms of his psychosis" **(R1648).** His delusions concerning the "pistoleros" continued:

> .... Mr. Bello opens the interview with the statement in Spanish "they have a pistol to my head and want to kill me". When asked who wanted to kill him he answered "the pistaleros (the bandits)". I asked him why and he stated "because I was the chief of them in Mazorra". He proceeded to tell us that he is a prisoner of these bandits, and that he is in a castle owned by them, and that they most likely will kill him.

(R1647)

Bello appeared disoriented to time and person (he thought Dr. Gonzalez most likely belonged to the Mafia). **(R1647).**

During **1983** and early **1984,** on at least three occasions, the trial judge found, based on the medical opinions of Dr. Carra and Dr. Gonzalez, that Bello continued to be incompetent to stand trial, and ordered him recommitted to the state hospital (R1433, **1100, 1104,** see **R1656-57, 1658-59).**

In July, **1984,** Ms. Komaniecka of the NFETC filed another evaluation, in which she reported that it was now the opinion of the treatment team that Bello was once again incompetent (R1680). The diagnosis (which in the two previous reports had been stated as chronic paranoid schizophrenia in remission) was back without qualification to chronic paranoid schizophrenia **(R1680).** While his behavior, affect, and functioning within the institution continued to be improved as noted in the earlier reports, and while his "hallucinatory activity" and the voices had "abated as

his medication has stabilized him" (R1678-79), Ms. Komaniecka also reported that "Psychological tests conducted in early July were internally consistent in support of the iudqment that Mr. Bello is psychotic" (R1678). His reality testing was impaired "in such a way as to suggest the presence of pervasive,. self referential, persecutory, and grandiose delusions" (R1678). In addition, according to Ms. Komaniecka, "Rorschach results confirm the presence of severe psychopathology", and an extremely limited ability to perceive his environment in a realistic manner (R1678). She summarized:

> Mr. Bello's current condition is consistent in many respects with his pattern exhibited during prior NFETC admissions. His propensity toward a chronic major thouaht disorder characterized by persecutory delusions and auditory hallucinations is well established by his own psychiatric difficulties in Cuba and in the United States, a family history of mental illness and the impact of the stressful event; surrounding Mr. Bello's arrest and subsequent incarceration. The alleged content of the delusions and hallucinations which reportedly occurred to Mr. Bello in the Hillsborough County Jail has been largely consistent over time.

(R1679-80)

However, Ms. Komaniecka noted that, because Bello had never exhibited any gross behavioral impairment while at NFETC (indeed, she described his behavior as responsible, more overtly

sociable, and, with a few minor exceptions, "exemplary"[13]), and because his memory impairment seemed selective, the issue of possible malingering arose (R1680). However, at that time, psychological evaluation dismissed malingering as a diagnosis, and found "no evidence that Mr. Bello is intentionally avoiding his legal/criminal situation" (R1680).

In May, 1985, the NFETC recommended that Bello's competency to stand trial had been chemically restored (R1741-50). The diagnosis remained that of chronic paranoid schizophrenia, but the report (prepared by rehabilitation therapist Alixa Reyes-Wajsman) concludes that "[t]hough psychotic, Mr. Bello presents as competent to stand trial" (R1745).[14] This report strongly suggests that, at this point in his hospitalization, Bello was using his delusional beliefs as a device to avoid his legal situation (see R1743-45). However, Ms. Reyes-Wajsman also notes that Bello retains those delusional beliefs "and may launch into a description of them", but he can be re-directed (R1745, 1749, 1750). Because of his prior history of decompensation, the report strongly and repeatedly recommends a number of measures to ensure "[t]he continued administration of antipsychotic medication on a

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[13] Contrast this with his fearful and near-catatonic behavior at South Florida State Hospital (described by Dr. Koson) before the medication had abated his "hallucinatory activity" and his delusions about the pistoleros and the horses.

[14] The Reyes-Wajsman evaluation notes that the testing done at the hospital in July 1984 indicated that Bello's IQ is "borderline"; with an overall score of 75 (verbal IQ - 70, performance IQ - 86). (R1743).

regular basis and intervention by local mental health professionals" (R1750, see R1746 (paragraphs 1 through 5)).

Pursuant to court order, Bello was re-examined (jointly) by Drs. Carra and Gonzalez, both of whom found little change in his condition. He was still psychotic, hallucinatory, delusional, and incompetent to assist in his defense (R1699-1700, 1712-13).

Dr. Rufus Vaughn, senior psychiatrist at NFETC, testified at a hearing held on June 27, 1985. Dr. Vaughn had been present when Bello was examined that morning by Drs. Carra and Gonzalez at the Hillsborough County Jail (R1154-56). Based on what he saw at that interview, he believed that Bello was not presently competent to stand trial (R1156, 1166-74, 1190-91), but based on his observations over the past three years at the hospital, he believed that Bello - although clearly psychotic (R1158-60) - was competent (R1146-50, 1191). Interestingly, Dr. Vaughn did not believe that the difference between Bello's behavior in the institution and in the jail interview was primarily attributable to malingering (R1157, 1162-63). Rather, it was a combination of yet another snafu on the part of jail personnel in failing to administer Bello's medication (R1164-65), coupled with a typical psychotic reaction to stress (R1157). Dr. Vaughn continued to be of the opinion, as recommended by the treatment team in its report, that Bello should immediately be returned to NFETC after the hearing because, as a psychiatrist, "I hate to see him suffer as he did this morning", and also because it was the only place he could be assured that Bello would receive

his medication (R1163-64, see **R1154, 1165-66).** If he goes two or three days without it "we're going to have rather serious difficulty" **(R1165).**

Dr. Vaughn acknowledged that Bello seemed to "have a conscious wish to remain with us at the hospital" (R1151) and to avoid facing his legal situation **(R1150-51, 1154, 1178-81).** He explained that paranoid schizophrenia and malingering are not mutually exclusive (R1184). However, as previously mentioned, Dr. Vaughn did not believe that Bello's psychosis, or his hallucinations and delusions, or his decompensation whenever deprived of medication were the result of malingering (see **R1157-65).** Dr. Vaughn first examined Bello in August **1983,** and his conclusion then was "clear confirmation of prior findings" that Bello suffers from chronic paranoid schizophrenia **(R1158-59).** "There has never been any question about his diagnosis" (R1158). Vaughn explained that "chronic" means that the likelihood of remission within a year is small; "it can be either a permanent condition or one which has ups and downs. [Bello's] appears to be a permanent condition". (R1159).

Dr. Vaughn stated that during the three years in which Bello was at NFETC, there were several times when he was "quite. clearly" incompetent to stand trial (R1159-60). For example:

> We sent Carlos back, I believe it was December of last year. And within a matter of a month or so he came back to us in very bad condition. He was extraordinarily frightened, he was complaining that he did not know me, he did not know Jean whom he had known for almost

> two years, that he didn't know where he was. He complained bitterly that the bandits in the castle. And he referred to the Hillsborough County Jail as the castle. And the bandits were attacking him.
>
> We knew that particular delusion was present. But it was so great that when he came back to us this past time he was terrified.
>
> MR. LOPEZ [defense counsel]: At that time did you arrive at any conclusion regarding any possible malingering; or was that an honest belief that he had?
>
> DR. VAUGHN: That is an honest internal distortion of reality:

(R1160)

At the conclusion of the hearing, Drs. Gonzalez and Carra proffered their opinions that Bello continued to be incompetent, but that it was still possible that he could be chemically restored to competency at some point (R1199-1201). Dr. Carra, as he had in the past, strongly recommended Prolixin Decanoate Intramuscular Injections, 25 mg. at least per week (R1201, 1713). The trial court found Bello incompetent and continued his psychiatric hospitalization (R1201).

In July 1986, Bello was again returned to court. This time the treatment team (in a report prepared by Human Services Counselor Arthur Fleming) unanimously concluded that he was malingering to avoid prosecution (R1751-52, 1754-56, 1757-58). This conclusion was based in part on his excellent functioning in the institutional environment, his selective and self-serving

memory impairment, and the fact that his delusional beliefs now seemed to surface only when confronted with his legal situation (R1154-58). His paranoid schizophrenia was now listed as being "in partial remission", and "malingering" was added to the diagnostic impression (R1758). The report concludes that "though mentally ill, Mr. Bello presents as competent to stand trial" (R1758); however, antipsychotic medication and psychiatric monitoring were strongly recommended to prevent decompensation (R1758-59, 1762).

The trial judge appointed Dr. Carra and Dr. Gerald Mussenden, a clinical psychologist, to examine Bello (R1763). Both reported that he was now competent (see R1783-84). Mussenden, who met Bello for the first time on July 25, 1986 when he administered a "grueling" battery of psychological tests, and then interviewed him for an hour on July 31, found him to be friendly, amiable, and relaxed (R1770-71). "[N]o schizophrenic thought processes were noticed; no paranoid ideology was apparent; and no unusual emotional disturbances appeared" (R1771). Dr. Mussenden concluded, from his testing and interview, that Bello was "an extremely intelligent individual"[15] who was intentionally malingering, and that "any mental problem which he may have had". was in remission (R1773, 1776, see R1771-76). Mussenden opined that, as long as he is being administered the medication that he

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[15] In contrast to the NFETC testing results, Dr. Mussenden measured Bello's IQ at 101, and stated that, because he did extremely well on certain subscales, his actual intelligence might be within the "Bright-normal" range.

as been receiving over the last few years, he should not require any additional [psychiatric] services (R1776).

On August 15 (nunc pro tunc, August 1), 1986 the trial judge entered an order declaring Bello competent to stand trial, and directed that he be returned to NFETC for continued treatment until further notice, in order to maintain his competence (R1783-85).

A week before trial, on February 19, 1987, Bello was re-evaluated by Drs. Carra and Mussenden, both of whom found him competent to stand trial (R1814-17, 1818-19, see R1805-06).

In the penalty phase of the trial, the defense called Dr. Gonzalez, who testified that Bello was under the influence of mental or emotional disturbance at the time (July 24, 1981) of the shooting which resulted in the death of Detective Rauft, and that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired (R952, 954). The state called Dr. Mussenden as a rebuttal witness; he testified that neither "mental mitigating circumstance" was applicable (R1012-13). The only other penalty phase witness was Bello's sister Mercedes Rodriguez, who told the jury about her brother's mental and emotional problems as a child and as an adolescent in Cuba (R920-23). She also testified regarding the family history of mental illness; Carlos' hospitalization in the Mazorra and San Juan Neos psychiatric institutions; the Cuban psychiatrists' diagnosis of chronic paranoid schizophrenia; and

his subsequent arrival in the United States on the boatlift **(R923-26)**.[16]

Dr. Gonzalez testified that his diagnosis from the first time he saw Bello (October 6, **1981)** to the present was chronic paranoid schizophrenia (R932, **933-34, 940, 948-49)**. Dr. Gonzalez further asserted that this has been the diagnosis of every doctor who has examined him[17] **(R940, 948)**. On those occasions when Bello appears relatively calm, that is the result of the medication; if the medication should be withdrawn he would most likely regress (as he has done in the past) to his prior condition **(R941,** see **R939, 945, 977)**. When Dr. Gonzalez first saw him, and when he was admitted to South Florida State Hospital in November, **1981**, Bello was overtly psychotic, with hallucinations and delusions involving heavily armed mounted bandits in red and blue coming to kill him, or telling him to kill himself **(R932-33, 936-37)**. Even after he was stabilized, when the orders get mixed up and he doesn't get his medication for a few days, he is back to the pistoleros and the other delusionary materials (R939). He "has a very elaborate

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[16] Dr. Gonzalez, for whom Mazorra State Hospital "[brought] back old memories" described it as close to "One Flew Over the Cuckoo's Nest" **(R937-38)**.

[17] If Dr. Gonzalez was referring only to psychiatrists, the record appears to back up his assertion. If he meant to include psychologists and other mental health professionals, the NFETC treatment teams consistently included chronic paranoid schizophrenia as all or part of their diagnosis (see R940). Dr. Mussenden had not yet said *so*, but later in the penalty phase, and again prior to sentencing, he grudgingly acknowledged that Bello's mental disorder is chronic paranoid schizophrenia, in remission as a result of medication (R1039-40, **1283-84**, see R1075-76).

paranoid system that he can unveil at the slightest provocation" (R960).

Dr. Gonzalez testified that, in serious criminal cases like this one, the possibility that the individual may be feigning mental illness is "uppermost in our mind" (R934). Nevertheless, when he examined Bello for the first time in October, 1981, he felt that what he was seeing was genuine; and made a notation "No malingering" (R935). The treatment teams at the state hospital, through their observations, and confirmed by their psychological testing and by Bello's "long history of psychiatric disturbance", reached the same conclusion (at least through 1985) that he was not malingering (R943, 987-90). However, according to Dr. Gonzalez, by 1986 Bello appeared to have attained a "partial remission" (R947); meaning that "due to the medication that he's taking, he's not now as crazy as he used to be. That's what it amounts to" (R948).

At that point in time, Dr. Gonzalez continued, Bello may have begun to malinger (R948). Gonzalez hypothesized that others in the tightly-knit Cuban sub-community in the Hospital may have told him, in effect, "Man, you are really in trouble. The best thing you can do is forget and claim amnesia" (R948). [Dr., Gonzalez pointed out that amnesia is not quite a symptom of schizophrenia anyway; rather it is the persecutions, the hallucinations, the blocking of speech, the loose associations, the fragmented thinking - all of which Bello has consistently displayed (R948).

On cross, Dr. Gonzalez further explained:

> .... [Y]ou can be psychotic and be manipulative..... Somewhere along the way the medication has worked on him and put his condition .... in partial remission chemically. And as a result, it has opened up an area where, then, he can manipulate, so to speak, if you would.

(R966)

Dr. Mussenden saw Bello for the first time on July 25 and **31,** 1986 (R997, **1001).** Based on the interview and the psychological testing he administered, Dr. Mussenden concluded that, if Bello was suffering from any mental disturbance, it was in remission (R1002). He was emotionally stable, extremely functional, extremely productive, and "in total control of his thought processes, his behavior, his feelings", and his memory **(R1003).** Dr. Mussenden stated that the most important factor in his reaching this conclusion was Bello's ability to take the six to seven hour examination, which amounted to an "endurance test" **(R1003).** Had he been severely disturbed in any manner, according to Mussenden, he would not have been able to take the tests **(R1003).**

Based on his reading of the reports of the various psychiatric evaluations in this case, and based on his review of statements and a tape recording made at the time of Bello's arrest, Dr. Mussenden was of the opinion that Bello was malingering his mental disturbance **(R1005-13, 1014-15).** For one thing, Dr. Mussenden made the observation (over defense objection

that it was far beyond his expertise) that:

> .....anyone who is that psychotic, as has been explained, could never be the head of a drug ring. People are not willing ta put their life in jeopardy for a person that is extremely disturbed, the drug market being as dangerous as it is.

(R1008)

Dr. Mussenden also felt that Bello's behavior at NFETC was contradictory to his having paranoid delusions (R1007). He noted that Bello played baseball and volleyball there: "That is all in an open area where somebody is going to shoot you; you're in a place to shoot you. A typical paranoid is not going to put himself in that position of danger. They will hide; they will stay indoors"[18] (R1008).

On cross, Dr. Mussenden testified that he saw the documents regarding Bello's hospitalization in Cuba, in which the Cuban doctors diagnosed him as paranoid schizophrenic (R1027-29). Asked whether it was his opinion that Bello has been malingering since day one, Mussenden replied:

> The day of his arrest he was not

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[18] Compare Dr. Koson's description of Bello's behavior at South Florida State Hospital in 1982, before the medication took effect (R1612-14) (psychotic with persecutory delusions and suicidal thought, "extremely fearful of participating in outside recreational activities because the 'bandits are waiting outside to kill me'", silent and distant in groups, spends all his time sleeping or lying in bed). Compare also Dr. Vaughn's testimony that when Bello was returned to NFETC (after decompensating in the Hillsborough County Jail when he failed to receive his medication), he was "in very bad condition" and was "extraordinarily frightened" of the bandits. "We knew that particular delusion was present. But it was so great that when he came back to us this past time he was terrified" (R1160).

> mentally disturbed. If he suffered a disturbance, it was while he was incarcerated many months later when competency was requested. He recovered, and for the last three years he has malingered..

(R1027, see also R1282)

When asked about Bello's decompensation in the County Jail in June 1985 (see R1141-1202, including the testimony of Dr. Vaughn), Mussenden acknowledged that he was not aware that that had happened (R1031). However, it was not surprising to Dr. Mussenden that his condition would deteriorate quickly when he does not receive his medication (R1032). Mussenden also acknowledged that the dosages of psychotropic medication which have been prescribed for Bello throughout his hospitalization have been high dosages (R1031-32).

Just before leaving the stand, Dr. Mussenden testified:

> BY MR. LOPEZ [defense counsel]:
>
> Q. Doctor, have you concluded in your report that so long as Mr. Bello receives and is administered his medication, that no more hospital services are necessary?
>
> A. I believe that's my opinion.
>
> Q. And why do you conclude that he needs the medication?
>
> A. Because I feel that will keep him stable, as I've seen him.
>
> Q. That's to stabilize his paranoid schizophrenia, chronic type?
>
> A. That's basically what I'm saying.

(R1039-40).

As previously noted, the jury recommended death by a 7-5 vote. On April 14, 1387, a final competency hearing was held to determine whether Bello was competent to be sentenced. Drs. Carra and Mussenden were of the opinion that he was (R1279, 1314), and Dr. Gonzalez was of the opinion that he was not (R1301, 1308). Mussenden again acknowledged that Bello suffers from chronic paranoid schizophrenia, but stated that the disorder was now in remission (R1284). Dr. Carra testified that Bello has chronic paranoid schizophrenia, which is presently stabilized with medication (R1316). He was now in "full chemical remission" (R1324, 1325), but if the drugs were withdrawn, he would probably relapse into the primary symptoms of his psychosis; the "[d]elusions and hallucinations in the past which were arrested many times with medication" (R1323). The malingering process, Dr. Carra explained, is "superimposed through this chronic psychiatric disorder" (R1314). Finally, Dr. Gonzalez, who felt that the symptoms of Bello's psychosis, including the auditory hallucinations and delusional visions, were basically just as acute as they ever were (R1296-99), agreed that the medication has at times helped to mask the symptoms (R1300-01). At the present time, his condition was "not quite in remission" (R1300), but if the medication were to be removed "I think there would be complete chaos. He would really go to pieces" (R1301).

The trial judge found that Bello was competent to be sentenced (R1326), and imposed the death penalty (R1371-72, 1937, 1962-67).

SUMMARY OF ARGUMENT

The circumstantial evidence surrounding the killing of Detective Rauft is susceptible of interpretation consistent with premeditation, and also susceptible of interpretation consistent with an unpremeditated, "depraved mind" homicide. See Hall v. State. As the evidence is not inconsistent with a reasonable hypothesis of innocence as to the element of premeditation, it is insufficient to sustain the conviction of first degree murder. Hall v. State; Wilson v. State. Pursuant to Fla.Stat. §924.34, this case should be remanded to the trial court for entry of a judgment and sentence (on Count I) for second degree murder [Issue I].

Even assuming arsuendo that the evidence were legally sufficient to go to the jury on the issue of whether the killing of Detective Rauft was premeditated, the jury's determination of that issue was irreparably compromised by the trial court's erroneous giving of an instruction (over defense objection) on "transferred intent". The doctrine of transferred intent applies, in a homicide case, where an actor intends to kill one person but (through mistake, accident, "bad aim", or otherwise) kills another person instead. In this situation, the original malice is transferred, as a matter of law, from the person against whom it was entertained to the person who actually suffered the consequences of the unlawful act. In order for the doctrine of transferred intent to apply, the premeditated intent to effect the death of A must exist at the time of the act which inadvertently results in the death of B. [Compare Wilson v. State with

Provenzano v. State].

In the instant case, the doctrine of transferred intent was not applicable under the facts, and appellant's objection to the instruction should have been sustained. The error cannot be dismissed as "harmless" [see State v. DiGuilio], because it authorized the jury, if it found that the attempted murder of Detective Ulriksen was premeditated, to automatically transfer that premeditation to the shooting through the door which resulted in the death of Detective Rauft. The facts of this case present two separate issues of premeditation, which were confused and intermingled by the inappropriate transferred intent instruction. The circumstantial evidence of premeditation was much stronger as to Ulriksen than it was as to Rauft. Because of the erroneous instruction, the jury may never have resolved the issue of whether or not Rauft's killing was premeditated. See People v. Birreuta. The error, therefore, had the unconstitutional effect of relieving the state of its burden of proof and its burden of persuasion on premeditation; the intent element which distinguishes first degree from second degree murder. See Sandstrom v. Montana; Francis v. Franklin; People v. Birreuta [Issue II].

During the penalty phase of his trial, appellant was, shackled in the presence of the jury. At the beginning of that proceeding, defense counsel objected and moved for a mistrial on the ground that the shackling was highly prejudicial, and that appellant had given no indication "of wanting to run or to injure anyone". The trial court overruled the objection, saying "Perhaps it is a well thought out security measure". Defense counsel then,

in the alternative, asked that the court order removal of the shackles "unless the State can show that there is a security threat". The trial court replied "Well, I don't know why he's shackled at this point", and he declined to find out why. Instead, he merely deferred to the Sheriff's decision to shackle appellant [see Woodards v. Cardwell].

The United States Supreme Court has recognized that bringing a defendant to trial in shackles is both prejudicial and "something of an affront to the very dignity and decorum of judicial proceedings that the judge is seeking to uphold". Illinois v. Allen; see also Holbrook v. Flynn (characterizing shackling as an "inherently prejudicial act"). In Elledae v. Dugger, the Eleventh Circuit recognized that the prohibition against shackling (in the absence of compelling reasons for it) is not bottomed on the presumption of innocence alone; there are broader concerns which apply just as forcefully in a life-or-death trial as they do in a guilt-or-innocence trial. For example, in a penalty trial, the "jury might view the shackles as first hand evidence of future dangerousness and uncontrollable behavior which if unmanageable in the courtroom may also be unmanageable in prison, leaving death as the proper decision". Elledae v. Duaaer (823 F.2d at 1450). [The jury in the instant case recommended death by the narrowest possible margin, 7-51.

While not absolutely prohibited under all circumstances, shackling should only occur as a "last resort"; and only when there is a case-specific showing that the shackling is "necessary to further an essential state interest" (For example, to prevent

the defendant from disrupting the trial, from attempting to escape, or from harming other people in the courtroom). See e.g. Illinois v. Allen; Elledge v. Dugger; Zygadlo v. Wainwright; Woodards v. Cardwell; State v. Castro. Moreover, since the use of shackles to physically restrain a defendant. infringes upon constitutional protections, the trial court must consider whether less restrictive, less prejudicial means could be employed to maintain security. Elledge v. Dugger; Woodards v. Perrin; State v. Castro. Finally, the defendant must be afforded a fair opportunity to challenge the information upon which the decision to shackle him was based. Elledge v. Dugger.

In the instant case, it is obvious that not even the most rudimentary of these substantive and procedural safeguards was observed. The trial judge abused his discretion (or more accurately, refused to exercise discretion, see Woodards v. Cardwell; Matire v. State) in allowing appellant to be shackled, and in declining to require the showing of a factual basis for the shackling. Appellant's death sentence must be reversed for a new trial on the issue of penalty [Issue III].

In light of the overwhelming evidence that appellant suffers from a severe and chronic mental illness, and in view of the non-applicability of the "heinous, atrocious or cruel" and "cold, calculated, and premeditated" aggravating factors, the death penalty is proportionally unwarranted in this case. See Fitzpatrick v. State. [Issue IV].

The trial court erred in finding, and in instructing the jury that it could find, two aggravating factors (crime committed

"to avoid lawful arrest" and "to disrupt or hinder law enforcement") based on the same aspect of the offense. See e.g. Sims v. State. [Issue VI]. He also erred in concluding as a matter of law that the "no significant history of criminal activity" mitigating factor was rendered inapplicable by virtue of appellant's convictions of contemporaneous crimes. . Scull v. State. [Issue VII]. In view of (1) the voluminous evidence that appellant suffers from chronic paranoid schizophrenia; (2) the trial court's finding of the "extreme mental or emotional disturbance" mitigating factor; and (3) the closeness of the jury's vote to recommend death, these errors may well have affected the weighing process and therefore cannot be written of as "harmless error". State v. DiGuilio; Elledge v. State.

ARGUMENT

ISSUE I

THE EVIDENCE WAS INSUFFICIENT TO PROVE THAT THE KILLING OF DETECTIVE RAUFT WAS PREMEDITATED

In Wilson v. State, 493 So.2d 1019, 1021-22 (Fla. 1986) this Court restated the basic legal principles regarding proof of premeditation:

> Premeditation is the essential element which distinguishes first-degree murder from second-degree murder. Anderson v. State, 276 So.2d 17 (Fla. 1973). Premeditation is more than a mere intent to kill; it is a fully formed conscious purpose to kill. This purpose to kill may be formed a moment before the act but must exist for a sufficient length of time to permit reflection as to the nature of the act to be committed and the probable result of that act. Sireci v. State, 399 So.2d 964, 967 (Fla. 1981), cert. denied, 456 U.S. 984, 102 S.Ct. 2257, 72 L.Ed.2d 862 (1982). Whether or not the evidence shows a premeditated design to commit a murder is a question of fact for the jury which may be established by circumstantial evidence. Preston v. State, 444 So.2d 939, 944 (Fla. 1984). ....
>
> ....[I]n order to prove a fact by circumstantial evidence, the evidence must be inconsistent with any reasonable hypothesis of innocence. Ross v. State, 474 So.2d 1170, 1173 (Fla. 1985); McArthur v. State, 351 So.2d 972 (Fla. 1977). Where, as here, premeditation is sought to be established by circumstantial evidence, the evidence relied upon by the state must be inconsistent with every other reasonable inference. See

Preston v. State, 444 So.2d at 944; Tien Wang v. State, 426 So.2d 1004, 1006 (Fla. 3d DCA), review denied, 434 So.2d 889 (Fla. 1983).

In Hall v. State, 403 So.2d 1319, 1321 (Fla. 1981), a Deputy Sheriff, Coburn, was shot, through an opening in the side of his bullet-proof vest, with his own gun, from a distance of two to five feet. This Court noted that whether or not the defendants had a homicidal intent "is subject to conflicting interpretations":

> One is that Hall or Ruffin seized Coburn's gun intending to kill him, took aim, and fired. If this were true, then this killing was premeditated. There are other interpretations, one of which is that Coburn struggled with one or both of the defendants until either Hall or Ruffin pulled the trigger without intending to kill. If this were true, then the killing was not premeditated.
>
> Hall v. State, supra, at 1320-21

The Court went on to conclude:

> To prove a fact by circumstantial evidence, the circumstances must be inconsistent with any reasonable hypothesis of innocence. McArthur v. State, 351 So.2d 972 (Fla. 1977); Davis v. State, 90 So.2 629 (Fla. 1956). While the circumstantial evidence in this case is inconsistent with any reasonable hypothesis of innocence as to the homicide of Deputy Coburn, it is not inconsistent with any reasonable exculpatory hypothesis as to the existence of premeditation. Therefore, the evidence is insufficient to prove premeditation, and the conviction for first-degree murder is reversed. We do find,

> however, sufficient evidence to sustain a conviction of second-degree murder.

Hall v. State, supra, at 1321

It has never been required, in order to establish premeditation, that the accused have deliberated on his act for any specific length of time. See e.g. Spinkellink v. State, 313 So.2d 666, 670 (Fla. 1975); Larry v. State, 104 So.2d 352, 354 (Fla. 1958). The corollary to this, however, is that:

> 'A premeditated design to effect the death of a human being is a fully formed and conscious purpose to take human life, formed upon reflection and deliberation, entertained in the mind before and at the time of the homicide .....
>
> Spinkellink v. State, supra, at 670; quoting McCutchen v. State, 96 So.2d 152, 153 (Fla. 1957).

See also Wilson v. State, supra.

In the present case, the evidence taken in the light most favorable to the verdict established that, in the course of an undercover drug bust, police officers (who had been alerted by an electronic signal) suddenly stormed the residence at 1410 29th Avenue. Detective Ulriksen kicked open the door of the northeast bedroom, and as he entered the room, Carlos Bello came up from behind the dresser and fired at him three times. Ulriksen was shot in the right elbow, the abdomen, and the upper arm. [The last bullet passed through Ulriksen's arm and struck a co-defendant, Rodriguez, in the head. The injury to Rodriguez was not fatal, and Bello was not charged with attempted murder or any

other crime in connection with Rodriguez' injury]. Ulriksen was lying on the floor, facing the door. He was concerned about the possibility that the person who shot him would "come around the bed to either view his handiwork or finish me off" (R367), and he was trying to figure out what he would do if that happened. Instead, as he saw (through a two inch crack in the doorway) Detective Rauft hit the door, he "heard distinctly one shot, and I also viewed the door splinter on the force of the bullet" (R368). In fact, two shots penetrated the door. Rauft was hit int the chest and mortally wounded. Detective Mock, who hit the door simultaneously with Rauft, was unhurt. A great deal of chaos or "pandemonium" followed, but Bello and the other four suspects were quickly apprehended.

It can clearly be seen that there are two separate issues of premeditation here: (1) whether Bello had a fully formed and conscious intent, when he shot three times at Detective Ulriksen, to take the life of this officer who had come into the bedroom; and (2) whether Bello had a fully formed and conscious intent, when he shot through the door, to take the life of whatever police officer was behind the door. Cf. Wilson v. State, supra, 493 So.2d at 1021-23 (analyzing separately the defendant's intent at the time of the murder of Sam Wilson, Sr. and at the time of the murder of Jerome Hueghley; and finding sufficient evidence of premeditation in the Wilson killing, but insufficient evidence of premeditation in the Hueghley killing). With regard to the shooting of Ulriksen, undersigned counsel will concede that

the evidence was legally sufficient to create a jury question on the issue of premeditation. See e.g. Spinkellink v. State, supra. As to the shooting of Rauft through the door, on the other hand, that is subject to conflicting interpretations, some of which are consistent with an unpremeditated, "depraved mind" murder.[19] See Hall v. State, supra, 403 So.2d at 1320-21; Wilson v. State, supra, 493 So.2d 1021-22. Putting aside the conflict as to whether the door was completely shut or whether it was open a crack, it is obviously true that the door was between Bello and Rauft at the time the shots were fired. Bello could not have known how many people were at the door, or exactly where they were standing, or whether they were short or tall. If he had "a settled and fixed purpose to take the life of a human being" [McCutchen v. State, supra], he could only have quessed where to aim the shots. Ironically, it was the prosecutor, in his closing argument to the jury, who suggested an equally reasonable alternative hypothesis. Since, because of the angle of the shots through the door, they could not have been fired from the area behind the dresser, the prosecutor argued that it was a "logical inference" that Bello began moving across the room after shooting at Ulriksen (R812). He speculated that Bello might have moved across the room for one of two possible reasons; either to

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[19] See Fla. Stat. § 782.04(2) which defines second degree murder as "[t]he unlawful killing of a human being, when perpetrated by any act imminently dangerous to another and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual".

"deliver the final fatal shot" to the wounded Ulriksen [which he did not do], or to get to the window to follow his buddy Amaro out, to try to escape (R812-13). Therefore, when more officers hit the door, Bello may simply have been firing to cover himself as he tried to escape, and to keep them from coming into the bedroom. He may never have entertained any conscious purpose to kill an officer on the other side of the door. While there certainly was a great danger that the shots would hit or might even kill one of the officers on the other side of the door, and while Bello's actions unquestionably evinced a depraved mind regardless of human life, that (absent proof of a fully formed and conscious purpose to take human life, formed upon reflection and deliberation) is second degree murder. Fla. Stat. § 782.04(2).[20]

The facts of this case are clearly distinguishable from those of Provenzano v. State, 497 So.2d 1177 (Fla. 1986). In Provenzano, the defendant came to the courthouse with several concealed weapons, and a premeditated intent to kill two police officers (Shirley and Epperson) who had arrested him six months earlier. [In the intervening months, Provenzano had continually followed and threatened to kill these officers]. When a bailiff said he was going to have to search him, Provenzano drew a gun, shot and wounded the bailiff, and fired several more shots at a

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[20] The act of intentionally firing a gun into a crowd of people, where there is no proof of a premeditated intent to kill anyone, constitutes second degree murder where a person is killed as a result of the shooting. See Pressley v. State, 395 So.2d 1175, 1177 (Fla. 3d DCA 1981); United States Fidelity and Guaranty Co. v. Perez, 384 So.2d 904, 905 (Fla. 3d DCA 1980).

correctional officer. After a chase, another bailiff, Wilkerson (the murder victim) advanced toward Provenzano, who had assumed a military stance in the corner of the hallway (497 So.2d at 1180). "Provenzano saw Wilkerson advancing, removed a loaded shotgun from a pocket inside his coat, and screamed 'I'm going to kill you, M___F___, I'm going to kill all of you', and fired the fatal shot when Wilkerson was two to three feet away" (497 So.2d at 1181). Under these facts, this Court found that "competent, substantial evidence exists from which a jury could conclude that Provenzano formed a premeditated design to kill Wilkerson" (497 So.2d at 1181).

The circumstances in the instant case surrounding the shooting through the door, which resulted in the death of Detective Rauft, are compellingly different from those in Provenzano. Here, the circumstantial evidence was not inconsistent with an unpremeditated, "depraved mind" killing. See Wilson; Hall. In accordance with Fla. Stat. § 924.34, this Court should remand this case to the trial court with instructions to enter a judgment and sentence (on Count I) for second degree murder. Hall v. State, supra, 403 So.2d at 1321.

ISSUE II

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON TRANSFERRED INTENT, AS THAT DOCTRINE WAS INAPPLICABLE TO THE EVIDENCE IN THIS CASE

A. THE DOCTRINE OF TRANSFERRED INTENT

In a homicide case, the doctrine of transferred intent applies where an actor intends to kill one person, but (through mistake, accident, "bad aim", or otherwise) kills another person instead. See Gladden v. State, 330 A.2d 176, 180-85 (Md. 1974), which contains a comprehensive review of the history and development of the common law doctrine of transferred intent, and a compilation of numerous decisions in various jurisdictions which recognize the principle. See also State v. Cole, 394 A.2d 1344, 1346 n.1 (R.I. 1978); Riddick v. Commonwealth, 308 SE.2d 117, 119 (Va. 1983); State v. Hall, 328 SE.2d 206, 209 n.2 (W.Va. 1985); Murry v. State, 713 P.2d 202, 205 (Wyo. 1986). As it has sometimes been expressed, "the malice or intent follows the bullet"[21] Murry v. State, supra, 713 P.2d at 205; see also Gladden v. State, supra, 330 A.2d at 184; Riddick v. Commonwealth, 308 SE.2d at 119; State v. Richardson, 321 SW.2d 423, 428 (Mo. 1959); State v. Rogers, 159 SE.2d 900, 902 (N.C. 1968). Another common illustration of "transferred intent" is where the actor lays out poison, intending to kill A, but B drinks the poison instead. See Coston v. State, 139 Fla. 250, 190 So. 520 (1939);

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[21] Or, as was held by an English court in 1576, the malice or intent follows the arrow. Reg. v. Saunders, 2 Plowd. 473, 75 Eng. Rep. 706 (1576) (quoted in Gladden).

Gladden v. State, supra, 330 A.2d at 181. As in the "bad aim" situation, "[t]he original malice as a matter of law is transferred from the one against whom it was entertained to the person who actually suffered the consequences of the unlawful act". Coston v. State, supra, 190 So. at 522.

The doctrine of transferred intent has long been recognized in Florida. See e.g. Pinder v. State, 8 So. 837, 27 Fla. 370 (1891); Hall v. State, 69 So. 692, 70 Fla. 48 (1915) Coston v. State, supra; Lee v. State, 141 So.2d 257 (Fla. 1962); Wilson v. State, 493 So.2d 1019, 1023 (Fla. 1986); Provenzano v. State, 497 So.2d 1177, 1181 (Fla. 1986); Pressley v. State, 395 So.2d 1175, 1177 (Fla. 3d DCA 1981). As this Court stated in Wilson (493 So.2d at 1023):

> Under the doctrine of transferred intent, as accepted by this Court: "One who kills a person through mistaken identity or accident, with a premeditated design to kill another, is guilty of murder in the first-degree.... The law transfers the felonious intent in such a case to the actual object of his assault...."

This Court has also recognized that, in order for the doctrine of transferred intent to apply in a first degree murder case, the premeditated design to effect the death of A must exist at the time of the act which inadvertently results in the death of B. Compare Provenzano v. State, supra, 497 So.2d at 1181 ("[T]he question here is whether at the time the murder [of bailiff Wilkerson] was committed, Provenzano was attempting to effectuate

his premeditated design to kill Officers Shirley and Epperson. The facts indicate that he was") with Wilson v. State, supra, 493 So.2d at 1023 (doctrine of transferred intent was inapplicable, where the evidence failed to show that the premeditated design to kill Wilson, Sr. existed at the moment Jerome Hueghley was accidentally stabbed").

B. THE INAPPLICABILITY OF THE DOCTRINE OF TRANSFERRED INTENT TO THE FACTS OF THIS CASE

The Florida standard jury instructions contain the following one on transferred intent, with the direction "[G]ive if applicable":

> If a person has a premeditated design to kill one person and in attempting to kill that person actually kills another person, the killing is premeditated.

Over defense counsel's objection that the transferred intent instruction was not applicable in this case (R752-53, 757), the trial court ruled that he would give the jury that instruction (R753), and did so (R841).

The giving of a transferred intent instruction in this case was prejudicial error. The evidence established that, when Detective Ulriksen kicked open the door and entered the bedroom, Bello came from behind the dresser and shot him three times, in the elbow, the abdomen, and the upper arm. The third shot passed through Ulriksen's arm and struck a co-defendant, Rodriguez, in the head, wounding him. [If Bello had been charged with attempted

murder of Rodriguez, or if Rodriguez had died and Bello had been charged with first degree murder of him, then the doctrine of transferred intent would clearly have been applicable. However, the state did not charge Bello with any crime based on the inadvertent shooting of Rodriguez].

After firing the shots at Ulriksen, Bello (according to the state's own hypothesis) began moving across the room; either to "finish off" the wounded Ulriksen (which he did not do) or to try to escape out the window as Amaro had done. At that point, Detectives Rauft and Mock (whom Bello could hear but almost certainly could not see) hit the door. Bello fired two more shots, which penetrated the door and struck Rauft in the chest, mortally wounding him.

On these facts, there are clearly two separate issues of intent which had to be resolved by the jury.[22] First, did Bello, at the time he came up from behind the dresser and fired the shots at Detective Ulriksen, have a premeditated design, formed upon reflection and deliberation, to effect the death of this officer who had come into the bedroom? The circumstances indicate rather strongly that he did. Second, did Bello, at the time he fired the shots through the door, have a premeditated design, formed upon reflection and deliberation, to effect the death of whatever officer was behind the door? Here, the circumstantial evidence is

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[22] That is, assuming arguendo that the evidence of premeditation in the death of Detective Rauft was even legally sufficient to go to the jury. Appellant contends [in Issue I] that it was not.

susceptible to interpretation consistent with premeditation; and also to interpretation consistent with an unpremeditated killing, but one committed by an imminently dangerous act, and with a depraved mind regardless of human life. Appellant has argued in Issue I that because the circumstantial evidence is consistent with either hypothesis, it is legally insufficient to sustain a conviction of premeditated murder. Hall v. State, supra; Wilson v. State, supra. But even assuming that the circumstantial evidence was sufficient to create a jury question as to Bello's intent when he shot through the door, it is obvious that the evidence of premeditation is much stronger as to the Ulriksen shooting that it is in the death of Rauft.

It is equally apparent that, when he fired into the door, Bello was not at that time acting out of a premeditated design to kill Ulriksen. Compare Wilson v. State, supra with Provenzano v. State, supra. Either (1) he thought Ulriksen was already dead or dying; or (2) he abandoned his intention to kill him; or (3) he never had a fixed purpose to kill him, and was satisfied with having immobilized him while he made his escape. When Bello fired through the door - if he had a premeditated design to kill anyone at that time - his intention was to kill the officer behind the door, not Ulriksen.

In Bradberry v. State, 67 So.2d 564 (Ala. App. 1953), the appellate court wrote:

> In our consideration of this case we have not overlooked the principle that the guilt of an accused who, intending to injure one

> person, accidentally injures another, is to be determined as if the accused had injured his intended victim. [Citations omitted].
>
> However we do not think that the above principle can find application under the facts of this case.
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> Under appellant's testimony Harbison was in a different direction from appellant than was Treece at the time Treece was shot, nor did appellant see Harbison after Treece grabbed his pistol. It cannot therefore be rationally said under such testimony that there was any intent on appellant's part to shoot Harbison at the time the bullets were fired into Treece. In this light therefore no transferable intent was extant.

Similarly, in the instant case, it cannot rationally be said that there was any intent on Bello's part to shoot Ulriksen at the time the bullets which struck Rauft were fired into the door.

The giving of a transferred intent instruction, under these facts, confused and intermingled the two issues of intent; and allowed the jury, if it found the attempted murder of Detective Ulriksen to have been premeditated, to avoid resolving the more difficult question of whether the death of Detective Rauft was premeditated. The instruction was inappropriate and prejudicial, and reversal for a new trial is required.

C. THE INAPPROPRIATE JURY INSTRUCTION ON TRANSFERRED INTENT CANNOT BE DISMISSED AS "HARMLESS ERROR"

In State v. DiGuilio, 491 So.2d 1129, 1139 (Fla. 1986), this Court summarized its discussion of the "harmless error" exception as follows:

> The test is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test. Harmless error is not a device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence. The focus is on the effect of the error on the trier-of-fact. The question is whether there is a reasonable possibility that the error affected the verdict. The burden to show the error was harmless must remain on the state. If the appellate court cannot say beyond a reasonable doubt that the error did not affect the verdict, then the error is by definition harmful.

In the instant case, it is possible that, notwithstanding the transferred intent instruction, the jury may have independently determined that the killing of Gerald Rauft was premeditated. However, it is at least equally possible that the jury did exactly what the "transferred intent" instruction authorized it to; i.e., that it found the attempted murder of Detective Ulriksen to have been premeditated, and then, as a matter of law[23], automatically "transferred" that premeditation to

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[23] See Coston v. State, supra; Pressley v. State, supra.

the killing of Rauft. Even if the jurors (or some of their number) concluded that Bello's act of firing through the door was an unpremeditated, "depraved mind" act, the transferred intent instruction authorized them to return a verdict of first degree murder on that charge. Therefore, it is entirely possible that some or all of the jurors did not believe that (apart from the intent transferred from the Ulriksen shooting) the killing of Rauft was premeditated. It is also possible, because of the inappropriate transferred intent instruction, that the jury never independently resolved the issue of whether Rauft's killing was premeditated. See People v. Birreuta, 208 Cal. Rptr. 635, 639-40, 162 Cal. App. 3d 54, 461-63 (1984). See also Connecticut v. Johnson, 460 U.S. 73, 85, 103 S.Ct. 969, 74 L.Ed.2d 823 (1983) ("An erroneous presumption on a disputed element of the crime renders irrelevant the evidence on the issue because the jury may have relied on the presumption rather than upon [the] evidence").

When the case is presented to the jury "on alternate theories, some of which are legally correct and others legally incorrect and the reviewing court cannot determine from the record on which theory the ensuing general verdict rested, the conviction cannot stand". People v. Birreuta, supra, 208 Cal. Rptr. at 640, 162 Cal. App. 3d at 462 (improper transferred intent instruction could not be deemed "harmless" where jury may have relied on this theory to find guilt; "such an error is a denial of the defendant's constitutional right to have the jury determine every material issue presented by the evidence"). See also Sandstrom v.

Montana, 442 U.S. 510, 526, 99 S.Ct. 2450, 61 L.Ed.2d 39, 52 (1979); Leary v. United States, 395 U.S. 6, 31-32, 89 S.Ct. 1532, 23 L.Ed.2d 57, 79 (1969); Stromberg v. California, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed.2d 1117 (1931).

Due process of law protects the accused against conviction except upon proof beyond a reasonable doubt of every element of the charged offense. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); Sandstrom v. Montana, supra, 442 U.S. at 510. Where a "challenged jury instruction ha[s] the effect of relieving the State of the burden of proof enunciated in Winship on the critical question of the [accused's] state of mind", such an instruction represents constitutional error. Sandstrom v. Montana, supra, 442 U.S. at 521; Francis v. Franklin, 471 U.S. 307, 313, 105 S.Ct. 1965, 85 L.Ed.2d 344, 352 (1985). Under the circumstances of the instant case, the inappropriate transferred intent instruction had precisely this effect, since it allowed the jury to convict Bello of first degree murder without resolving the issue of whether he had a premeditated intent to kill when he fired the shots that struck Detective Rauft. See Birreuta.

Under certain circumstances, even an instruction which unconstitutionally relieves the state of its burden of proof on intent can be harmless error. See Connecticut v. Johnson, supra, 460 U.S. at 87 (recognizing that "in rare cases" the harmless error exception can be applied to Sandstrom error, particularly where intent is not in issue); Rose v. Clark, 478 U.S. 570, 580-

81, 106 S.Ct. 3101, 92 L.Ed.2d 460, 472 (1986) (holding that the harmless error standard of Chapman v. California[24] applies to Sandstrom error; and noting that "[i]n many cases, the predicate facts conclusively establish intent, so that no rational jury could find that the defendant committed the relevant criminal act but did not intend to cause injury"). In the present case, however, the predicate facts surrounding the shooting through the door,which resulted in the death of Detective Rauft, cannot be said to "conclusively" establish a premeditated design to take life. The circumstantial evidence of premeditation was much stronger as to Ulriksen than it was as to Rauft. The fact that defense counsel chose to direct his jury argument to the question of identity does not mean that intent was not at issue.[25] To the contrary, defense counsel twice moved pre-trial to dismiss the charge of first degree murder on the ground that the evidence failed to establish premeditation (R1615-16, 1419-29, 1807-08), and at trial moved for judgment of acquittal on the same ground (R741-42). The evidence was such that the jury could rationally have found that Bello committed the relevant criminal act (the shooting of Rauft), but did not do so with a premeditated design

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[24] 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

[25] Presumably, the reason defense counsel did not specifically argue lack of premeditation in his closing statement is the well known disinclination of trial lawyers to assert inconsistent defenses to the jury; as in "My client didn't do it, but if he did, he didn't mean it". The fact that counsel chose not to argue the case in that manner does not amount to a concession of premeditation, nor does it relieve the state of its burden of proof on that issue.

to kill. Contrast Rose v. Clark. Therefore, without the improper transferred intent instruction, the jury could rationally have returned a verdict of second degree murder.

Because the state cannot meet its burden of showing beyond a reasonable doubt that the erroneous instruction had no effect on the verdict, "the error is by definition harmful". DiGuilio (491 So.2d at 1139); Chapman; Sandstrom; Birreuta. Bello's conviction of the first degree murder of Detective Rauft must be reversed for a new trial.

ISSUE III

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.

In Fitzpatrick v. State, 527 So.2d 809, 811 (Fla. 1988), this Court recognized that the principle that "death is different" is the background from which

> ..... we must examine the proportionality and appropriateness of each sentence of death issued in this state. A high degree of certainty in procedural fairness as well as substantive proportionality must be maintained in order to insure that the death penalty is administered evenhandedly.

In the instant case, in violation of his Sixth, Eighth, and Fourteenth Amendment right to a fair trial on the issue of penalty, appellant was shackled in the second phase for no apparent reason. The jury recommended by a 7-5 vote that he die in the electric chair.

In Elledge v. Dugger, 823 F.2d 1439, 1450-52, (11th Cir. 1987)[26], the court wrote:

> The Supreme Court has

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[26] On petition for rehearing and rehearing en banc in Elledge, Part III of the opinion (dealing with nonstatutory mitigating circumstances) was withdrawn. Otherwise, the petitions for rehearing were denied. Elledge v. Dugger, 833 F.2d 250 (11th Cir. 1987). The U.S. Supreme Court denied certiorari. Dugger v. Elledge, ___U.S.___, 108 S.Ct. 1487, 99 L.Ed.2d 715 (1988).

> characterized shackling as an "inherently prejudicial practice". Holbrook v. Flynn, 475 U.S. 560, ___, 106 S.Ct. 1340, 1345, 89 L.Ed.2d 525, 534 (1986). "Not only is it possible that the sight of shackles and gags might have a significant effect on the jury's feelings about the defendant, but the use of this technique is itself something of an affront to the very dignity and decorum of judicial proceedings that the judge is seeking to uphold". Illinois v. Allen, 397 U.S. 337, 344, 90 S.Ct. 1057, 1061, 25 L.Ed.2d 126 (1970). When shackling occurs, it must be subjected to "close judicial scrutiny", Estelle v. Williams, 425 U.S. 501, 503-04, 96 S.Ct. 1691, 1692-93, 48 L.Ed.2d 126 (1976), to determine if there was an "essential state interest" furthered, Holbrook; 475 U.S. at ___, 106 S.Ct. at 1345, 89 L.Ed.2d at 534, by compelling a defendant to wear shackles and whether less restrictive, less prejudicial methods of restraint were considered or could have been employed. Holbrook, 475 U.S. 560, 106 S.Ct. 1340, 89 L.Ed.2d 525; Woodard v. Perrin, 692 F.2d 220, 221 (1st Cir. 1982); Hardin v. Estelle, 365 F.Supp. 39, 47 (U.D.Tex.), aff'd an other grounds, 484 F.2d 944 (5th Cir. 1973).

The Elledge court noted that "Nothing in Holbrook [v. Flynn] indicates that the Supreme Court did not intend its ruling to apply to the penalty phase of a capital case; furthermore, it is unreasonable to believe that the court made its rule in Holbrook unaware that capital trials are bifurcated. We think Holbrook means what it says". (823 F.2d at 1451, n. 22).

The court also observed that the Supreme Court "has not bottomed the prohibition against shackling [in the absence of compelling reasons therefor] on the presumption of innocence alone" (823 F.2d at 1451); there are broader concerns which apply as forcefully in a life-or-death trial as they do in a guilt-or-innocence trial. Elledge v. Dugger, supra, 823 F.2d at 1450-51. In a penalty trial, the "jury might view the shackles as first hand evidence of future dangerousness and uncontrollable behavior which if unmanageable in the courtroom may also be unmanageable in prison, leaving death as the proper decision". Elledge v. Dugger, at 1450. In Illinois v. Allen, 397 U.S. 337, 344, 90 S.Ct. 1057, 25 L.Ed.2d 353, 359 (1970), the U.S. Supreme Court commented "Not only is it possible that the sight of shackles and gags might have a significant effect on the jury's feelings about the defendant, but the use of this technique is itself something of an affront to the very dignity and decorum of judicial proceedings that the judge is trying to uphold". See also Zygadlo v. Wainwright, 720 F.2d 1221, 1223 (11th Cir. 1983); People v. Duran, 545 P.2d 1322, 1327 (Cal. 1976). In addition, "the restraints may confuse the defendant, impair his ability to confer with counsel, and significantly affect the trial strategy he chooses to follow". Zygadlo v. Wainwright, 720 F.2d at 1223; see Illinois v. Allen, 397 U.S. at 344; Kennedy v. Cardwell, 487 F.2d 101, 106 (6th Cir. 1973).

Nevertheless, as there are countervailing interests to be considered, which may under certain circumstances outweigh the

defendant's right to be free of physical restraints at trial, the prohibition against shackling is not absolute. See Illinois v. Allen, supra; Zygadlo v. Wainwright, supra, 720 F.2d at 1223. While recognizing that such a technique should not be used "except as a last resort", the Allen Court wrote:

> It is essential to the proper administration of criminal justice that dignity, order, and decorum be the hallmarks of all court proceedings in our country. The flagrant disregard in the courtroom of elementary standards of proper conduct should not and cannot be tolerated. We believe trial judges confronted with disruptive, contumacious, stubbornly defiant defendants must be given sufficient discretion to meet the circumstances of each case.[27]

The judge's discretion, however, must be exercised within the following constitutional limitations: (1) There must be a showing that the shackling is "necessary to further an essential state interest". Elledge v. Dugger, 823 F.2d at 1452; see also State v. Castro, 756 P.2d 1033, 1045 (Hawaii 1988). For example, "[s]hackles may be necessary to prevent the defendant from disrupting the trial. They may also be necessary to prevent an escape and to protect the physical well-being of the jury,

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[27] As a prime example of a "disruptive, contumacious stubbornly defiant" defendant, see Jones v. State, 449 So.2d 253 (Fla. 1984). This Court, quoting the above passage from Illinois v. Allen, held that the trial judge properly exercised his discretion in shackling Jones (449 So.2 at 262). "Whatever prejudice [Jones] suffered resulted from his own willful attempt to disrupt, indeed stop, the orderly proceedings of the court" (449 So.2d at 261).

lawyers, judge, and other trial participants". Zygadlo v. Wainwright, 720 F.2d at 1223; see Elledge, at 1452; Woodards v. Cardwell, 430 F.2d 978, 982 (6th Cir. 1970). (2) Since the use of shackles to physically restrain a defendant "should rarely be employed as security device" [Zygadlo], the judge must consider whether less restrictive, less prejudicial means could be employed. Elledge v. Dugger, 823 F.2d 1452; Woodard v. Perrin, 692 F.2d 220, 221 (1st Cir. 1982); State v. Castro, supra 756 P.2d at 1033. Perhaps most importantly, there must be a factual basis for the trial court's exercise of his discretion to physically restrain the defendant. In Woodards v. Cardwell, supra, 430 F.2d at 981-82, the Sixth Circuit Court of Appeal affirmed the District Court's grant of habeas corpus, where "the state trial judge did not exercise his judicial discretion but rather deferred to the wishes of the sheriff, who, at the commencement of the trial requested that the restraints be retained. And the trial judge, by his own admission, never considered reasonable alternative methods to the shackling of petitioner in order to provide for the security of the courtroom". The court continued:

> All authorities agree that it is prejudicial for a defendant on trial to be shackled in the courtroom. Loux v. United States, 389 F.2d 911 (9th Cir. 1968). The rule that a prisoner brought into court for trial is entitled to appear free from all bonds or shackles is an important component of a fair and impartial trial. And shackles should never be permitted except to prevent the escape of the accused, to protect everyone in the courtroom, and to maintain order

> during the trial. Illinois v. Allen, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970); Way v. United States, 285 F.2d 253 (10th Cir. 1960); Odell v. Hudspeth, 189 F.2d 300 (10th Cir. 1951), cert. denied, 342 U.S. 873, 72 S.Ct. 116, 96 L.Ed. 656.
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> It is also well established that the use of handcuffs and shackles is ordinarily left to the sound discretion of the trial court. Loux v. United States, supra; Guffey v. United States, 310 F.2d 753 (10th Cir. 1962); DeWolf v. Waters, 205 F.2d 234 (10th Cir. 1953), cert. denied, 346 U.S. 837, 74 S.Ct. 56, 98 L.Ed. 358; Gregory v. United States, 365 F.2d 203 (8th Cir. 1966), cert. denied, 385 U.S. 1029, 87 S.Ct. 759, 17 L.Ed.2d 676. And sound discretion has long meant a discretion that is not exercised arbitrarily or wilfully, but with regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge to a just result. Langnes v. Green, 282 U.S. 531, 534, 51 S.Ct. 243, 75 L.Ed. 520 (1931). And this requires a knowledge and understanding of the material circumstances surrounding the matter calling for the exercise of sound discretion.

Woodards v. Cardwell, supra, 430 F.2d at 982.

See also Elledge v. Dugger, at 1451; State v. Castro, 756 P.2d at 1045 (when shackling occurs, it must be subject to "close judicial scrutiny"); cf. People v. Duran, 545 P.2d at 1322 (holding that the trial court abused his discretion where his decision to shackle the defendant was based on a "general policy" of shackling all prison inmate defendants accused of violent

crimes, and where there was no showing of necessity for physical restraints on the record of the particular case).

In Matire v. State, 232 So.2d 209, 210-11, (Fla. 4th DCA 1970), the Fourth District Court of Appeal, quoting this Court's decision in Carolina Portland Cement Co. v. Baumgartner, 99 Fla. 987, 128 So. 241, 247 (1930), observed:

> "Judicial discretion" does not imply that a court may act, or fail to act, according to the mere whim or caprice of the presiding judge, but it means a discretion exercised within the limits of the applicable principles of law and equity, and the exercise of which, if clearly arbitrary, unreasonable, or unjust, when tested in the light of such principles, amounting to an abuse of such discretion, may be set aside on appeal.

The court further emphasized: "A trial court, when exercising its discretion, must consider each case upon its individual facts and circumstances". Matire v. State, 232 So.2d at 211.

In the present case, there was no apparent reason, much less a manifest necessity, for appellant to be shackled in the courtroom. The trial court made no findings in support of his decision; in fact he did not even make the decision, but (as in Woodards v. Cardwell) merely deferred to what the Sheriff's deputies had done. Just before the first witness' penalty phase testimony, counsel asked to approach the bench, and the following occurred:

> MR. LOPEZ [defense counsel]: May it please the Court, I'm going to

> object and move for a mistrial at this time in that I have just looked over at my client's feet, and they are shackled in the presence of this jury, and there's nothing underneath that table, any skirt of any kind. He has presented no evidence of wanting to run or to injure anyone. And to have my client appear shackled in the presence of that jury is very prejudicial, and I would move for a mistrial at this time.
>
> THE COURT: All right. This is the very same jury that convicted him of murder in the first degree, and now he stands convicted, and perhaps it is a well thought out security measure. And I deny the motion for mistrial and overrule the objection.
>
> MR. LOPEZ: I would ask, then, in the alternative, Your Honor, that the court order the taking off of the shackles unless the State can show that there is a security threat.
>
> THE COURT: Well, I don't know why he's shackled at this point. Perhaps the Sheriff feels because he now stands convicted of that and the nature of the posture of the case, that it's necessary. I will again decline to grant the last request, and he will remain shackled. If he needs to testify, you can let me know before that happens, and we will see what we do then.

(R919-20)

Clearly, shackling a defendant in the courtroom cannot be constitutionally justified on the basis that "perhaps" it was a well-thought out security measure. Elledge v. Dugger; Woodards v. Cardwell; see Illinois v. Allen. This is particularly true in

light of the fact that, after the court overruled his objection and denied his motion for mistrial, defense counsel asked in the alternative that the shackles be removed unless the state could show that there was a security threat. This was an appropriate and reasonable request, and would have afforded the trial court an opportunity to learn the facts (if there were any) upon which the Sheriff's deputies were relying. Had the trial court done so, he might have had some basis on which to exercise his discretion to decide whether the shackling was a necessary security measure, and whether there might be a less restrictive, less prejudicial alternative. Instead, he deliberately remained ignorant as to why somebody in the Sheriff's Department thought it would be a good idea to shackle appellant. Saying "I don't know why he's shackled at this point", the court specifically declined to require a showing that there was any security threat, and ordered that appellant would remain shackled. This ruling was an abuse of discretion (or more accurately, a refusal to exercise discretion) which violated appellant's constitutional right to be free of physical restraints at trial, and which could only have prejudiced him in the eyes of the jury which was to determine whether he would live or die. Elledge v. Dugger; Woodards v. Cardwell; see Illinois v. Allen.

Moreover, the trial court's arbitrary refusal to require a showing of a factual basis for the shackling had the effect of totally denying appellant any opportunity to challenge the facts (if there were any) upon which the Sheriff's deputies based their

action. See Elledge v. Dugger, 823 F.2d at 1451 (finding that Elledge was deprived of an adequate opportunity "to challenge the untested information that served as the basis for the shackling").

Not only did the trial judge make no findings in support of his (or the Sheriff's) decision to shackle appellant, there is nothing in the record which demonstrates that appellant was a threat to disrupt the proceedings, or to escape, or to harm anyone in the courtroom. To the contrary, appellant was not shackled in the guilt-or-innocence phase of the trial, and there is no indication whatsoever of any "disruptive, contumacious, stubbornly defiant" behavior on his part in that proceeding.[28] Drs. Carra and Mussenden had determined that, in chemical remission of his mental illness, appellant was competent to stand trial (and capable of manifesting appropriate courtroom behavior), so long as he received his antipsychotic medication. As there is nothing in the record (or in the trial judge's comments) that indicates that appellant did not manifest appropriate courtroom behavior in the guilt-or-innocence phase, it is reasonable to conclude that the medication was sufficient for this purpose. Shackling appellant in the presence of the jury, therefore, was

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[28] Even appellant's psychiatric symptoms are inconsistent with the need for shackling. He showed no predilection for "acting out" behavior [contrast Jones v. State, supra], but instead tended, when acutely ill, to become withdrawn and even catatonic. When he was in chemical remission, on the other hand, as he was during much of his stay at North Florida Evaluation and Treatment Center (and as he was, according to Drs. Carra and Mussenden, at trial), he exhibited what was described as "almost exemplary" behavior, and followed the rules and procedures of the institution.

not only prejudicial, it was entirely unnecessary. There is nothing to suggest that appellant was likely to attack anyone, or try to escape, or obstruct the proceedings. There is no indication that he ever threatened to do any of these things. Apart from the incident for which he was on trial, which occurred in 1981, he has no history (before or since) of violent behavior.

The prejudicial impact of having appellant appear in shackles before the jury was enormous in this case. The jury recommended death over life imprisonment by the narrowest possible margin, 7-5. If even a single juror had voted otherwise, the result would have been a 6-6 tie, and a life recommendation. See Rose v. State, 425 So.2d 521, 525 (Fla. 1983). And, in view of the voluminous evidence of appellant's severe mental illness, going as far back as his childhood and adolescence in Cuba - in view of the fact that this is a man who cannot even assist in his defense at trial except when brought by antipsychotic drugs to a state of "chemical competency" - it can reasonably be assumed that, had there been a jury life recommendation, the trial judge would have followed it. [In the unlikely event that the trial judge would have overridden a jury life recommendation in this case, such an override plainly would not have met the Tedder standard.[29] See Ferry v. State, 507 So.2d 1373, 1376 (Fla. 1987) (reversing for imposition of a life sentence, where evidence overwhelmingly showed that Ferry suffers from an extreme mental

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[29] Tedder v. State, 322 So.2d 908 (Fla. 1975)

illness, and jury's life recommendation could reasonably have been based on this mitigating factor); see also Amazon v. State, 487 So.2d 8, 12-13 (Fla. 1986)].

One or more of the jurors in this case could easily have been led - even unconsciously - by the sight of appellant in shackles to view him as a chronically violent and uncontrollable individual; a security risk and an escape risk. Elledge v. Dugger, supra; see State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). The sight of the shackles could have focused their concern on whether appellant would harm other inmates, or, worse yet, correctional officers, in prison; or whether he could even be kept within the prison walls for twenty-five years to life. Elledge. The prejudicial effect was compounded by the total absence of any factual justification for the shackling. Appellant's death sentence must be reversed and the case remanded for a new trial on the issue of penalty.

ISSUE IV

BECAUSE OF APPELLANT'S SEVERE AND CHRONIC MENTAL ILLNESS, IMPOSITION OF THE DEATH PENALTY IS PROPORTIONALLY UNWARRANTED IN THIS CASE.[30]

As in Fitzpatrick v. State, 527 So.2d 809 (Fla. 1988), the record in this case is replete with evidence that Carlos Bello suffers from a severe mental disturbance; specifically, from chronic paranoid schizophrenia. His history of psychiatric hospitalization dates back to his young manhood in Cuba; while his disturbances of thought and behavior were noticed by family members since his childhood and adolescence. In the months following his arrest in Tampa for the murder of Detective Rauft, no fewer than four psychiatrists (three of them court appointed) agreed that he is severely and chronically psychotic, and that he was grossly incompetent to stand trial. There was some optimism that, through the use of psychotropic medication, he could eventually be restored to competency.

During the first year or so of his hospitalization, in South Florida, appellant continued to be acutely psychotic, hallucinating, delusional, and nearly catatonic; and the large dosages of antipsychotic medication he was receiving seemed to be having little or no effect. After his transfer to the North Florida Evaluation and Treatment Center, psychological testing strongly confirmed all of the prior diagnoses of severe paranoid

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[30] The facts underlying this Point on Appeal, and the next one (Issue V), are set forth at p. 12 - 35 of this brief.

schizophrenia. During his stay at NFETC, appellant began to respond favorably to the medication; and his symptoms (notably the visual and auditory hallucinations and the delusions about "pistoleros" and horses and castles) began to clear. On several occasions, appellant was returned to Tampa upon recommendation of the treatment team that he was now in chemical remission and was competent to stand trial. Each time, the recommendation was accompanied by a strongly worded warning to the effect that appellant "is a chronically mentally ill person who is stabilized only with anti-psychotic medication and who needs constant vigilance". Nonetheless, through negligence or bureaucratic snafu, the Hillsborough County jail personnel, on at least two different occasions, failed to give appellant his prescribed medication. As a predictable result, on each occasion, appellant rapidly decompensated. The overt symptoms of his psychosis - the hallucinations and delusions and catatonic behavior - returned in full force; leaving him incompetent to stand trial once again.[31] Ultimately, appellant was brought to trial in February, 1987, after nearly five and a half years of psychiatric hospitalization and drug treatment.

With regard to the question of malingering, it can be seen from the totality of the psychiatric evidence (especially when taken chronologically) that appellant did malinger, but only during those periods when the symptoms of his psychosis were in

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[31] See, especially, the testimony of Dr. Rufus Vaughn of the North Florida Evaluation and Treatment Center (R1142-91).

remission. When appellant was overtly and floridly psychotic, he had neither the need nor the ability to malinger. When, on the other hand, he was "stabilized" by the medication, and temporarily free of the more debilitating symptoms of his mental illness, this, in effect, opened up an area where he could malinger. The evidence establishes overwhelmingly, however, that during those periods when he has not been in chemical remission (and during the incidents of decompensation which occurred whenever medication was withheld), appellant's hallucinations and delusions are very real to him, and cause him great pain and terror.

As for the diagnosis of chronic paranoid schizophrenia, that has been the unequivocal conclusion of Dr. Nodal, Dr. Gonzalez, Dr. Carra, Dr. Cadena, Dr. Guerrero (of South Florida State Hospital), Dr. Koson (same), and Dr. Vaughn (of North Florida Evaluation and Treatment Center), as well as the Cuban psychiatrists at the time of appellant's hospitalization at Mazorra. Psychological tests administered at NFETC "were internally consistent in support of the judgment that Mr. Bello is psychotic" (R1678). The only mental health professional who indicated any doubt about whether appellant suffers from paranoid schizophrenia was Dr. Mussenden, a clinical psychologist, who never saw appellant until the summer of 1986, by which time appellant had undergone nearly five years of hospitalization and drug treatment. Unlike the psychiatrists who originally diagnosed appellant in 1981, and unlike the state hospital psychiatrists who were responsible for his treatment, Dr. Mussenden never saw

appellant at a time when he wasn't in chemical remission. Furthermore, Dr. Mussenden was not even aware of the two incidents when appellant decompensated in a matter of days when he failed to receive his medication in the Hillsborough County Jail. (Though, Mussenden indicated, it wouldn't surprise him). Mussenden's position was that if appellant had a mental disturbance, he has recovered, and has been malingering for the last three years.[32] Just before leaving the stand in the penalty phase, Dr. Mussenden testified:

> BY MR. LOPEZ [defense counsel]:
>
> Q. Doctor, have you concluded in your report that so long as Mr. Bello receives and is administered his medication, that no more hospital services are necessary?
>
> A. I believe that's my opinion.
>
> Q. And why do you conclude that he needs the medication?
>
> A. Because I feel that will keep him stable, as I've seen him.
>
> Q. That's to stabilize his paranoid schizophrenia, chronic type?
>
> A. That's basically what I'm saying.

(R1039-40, see also R1284)

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[32] Since this testimony was given on March 3, 1987, this would mean that, in Mussenden's opinion, appellant had "recovered" by early 1984. Note that one of the incidents of decompensation in the jail occurred in June, 1985 (see R1142-91), while the other apparently occurred in December, 1984 (see R1159-60).

The totality of the evidence strongly establishes that appellant is severely and chronically psychotic. Without antipsychotic medication, he would never have been able to stand trial, or to be sentenced. Without antipsychotic medication, he sees visions and hears voices - paranoid delusions of heavily armed bandits or "pistoleros", riding horses, coming to kill him or telling him to kill himself. Without antipsychotic medication, appellant is irrational, autistic, catatonic, and "in minimal contact with reality" (see e.g. R1540, 1543, 1547, 1588, 1605, 1613, 1645, 1647-48, 1699-1700, 1712-13, 1160, 1163).

Returning to the Fitzpatrick decision, in that case this Court reduced the defendant's sentence to life imprisonment, notwithstanding a jury recommendation of death, on the ground that the death penalty was not proportionally warranted. As in the instant case, Fitzpatrick shot and killed a police officer, while resisting arrest during the commission of another crime. As in the instant case, "the aggravating circumstances of heinous, atrocious and cruel and cold, calculated and premeditated [were] conspicuously absent" in Fitzpatrick (527 So.2d at 812). See also Wilson v. State, 493 So.2d 1019, 1023 (Fla. 1986); Ross v. State, 474 So.2d 1170, 1174 (Fla. 1985) (death penalty proportionally unwarranted where, inter alia, killing, although premeditated, was most likely upon reflection of short duration). Three of the aggravating factors in Fitzpatrick are the same as in the instant case: (1) prior conviction of a violent felony (in both cases based on offenses contemporaneous with the capital felony, rather

than on earlier crimes); (2) great risk of death to many persons; and (3) committed to avoid or prevent lawful arrest. In Fitzpatrick, the trial court found two additional aggravating factors which are not present in the instant case. Conversely, the only aggravating factor found by the trial court in the instant case which was not found in Fitzpatrick is "committed to disrupt or hinder governmental function or the enforcement of laws"; and that factor is invalid here because it amounts to a "doubling" of the "avoid arrest" circumstance [see Issue VI]. The most important similarity between Fitzpatrick and the instant case, however, is the overwhelming evidence of mental illness.

As Fitzpatrick demonstrates, the killing of a police officer does not necessarily mean that the death penalty is proportionally warranted. Where there is substantial evidence in mitigation, a sentence of life imprisonment may be more consistent with the punishment imposed in other, similar, cases, and may be sufficient to vindicate society's interest in deterrence and retribution. See also People v. Carlson, 404 NE.2d 233 (Ill. 1980); State v. Hill, 319 SE.2d 163 (NC 1984); Edwards v. State, 441 So.2d 84 (Miss. 1983), in each of which a death sentence, imposed for the killing of a law enforcement officer, was reduced to life on proportionality grounds. Where, as here, the defendant suffers from a mental illness so severe that it requires large dosages of antipsychotic medication even to render him "chemically competent" to stand trial, no meaningful societal purpose would be served by chemically treating him in order to put him to death. As

this Court wrote in Fitzpatrick (527 So.2d at 811):

> ... the legislature intended the death penalty to be imposed "for the most aggravated, the most indefensible of crimes" Id. at 8. In Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), Justice Stewart began his concurring opinion with an instructive admonition:
>
> > The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity.
>
> 408 U.S. at 306, 92 S.Ct. at 2760 (Stewart, J., concurring) (quoted in Hamblen v. State, 527 So.2d 800 (Fla. 1988) (Barkett, J., dissenting).
>
> It is with this background that we must examine the proportionality and appropriateness of each sentence of death issued in this state. A high degree of certainty in procedural fairness as well as substantive proportionality must be maintained in order to insure that the death penalty is administered evenhandedly.

Appellant's death sentence should be reversed, and the case remanded to the trial court with directions to impose a sentence of life imprisonment without possibility of parole for twenty-five years.

ISSUE V

EXECUTING THE MENTALLY ILL IS CRUEL AND UNUSUAL PUNISHMENT

The Eighth Amendment's prohibition of cruel and unusual punishment draws its meaning "from the evolving standards of decency that mark the progress of a maturing society". Trop v. Dulles, 356 U.S. 86, 101, 78 S.Ct. 590, 2 L.Ed.2d 630, 642 (1958). Appellant asserts that executing the mentally ill, as well as execution of children, adolescents, and the mentally retarded, violates those standards.

ISSUE VI

THE TRIAL COURT ERRED IN FINDING, AND IN 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

It is error for the trial court to find two aggravating circumstances based on a single aspect of the offense. Provence v. State, 337 So.2d 783, 786 (Fla. 1976). Whether such an improper "doubling" of aggravating circumstances will be considered reversible error, or harmless error, depends on whether it could have affected the weighing of the aggravating circumstances against the mitigating circumstances. If there are significant mitigating circumstances in the case, it cannot be shown beyond a reasonable doubt that the erroneous finding of an additional aggravating factor did not affect the penalty decision, and the error is harmful. Conversely, if there are no mitigating factors (or if the only mitigating factors are ones which this Court can say beyond a reasonable doubt were insignificant), then the weighing process was not impacted, and the error can be deemed harmless. See, generally, State v. DiGuilio, 491 So.2d 1129 (Fla. 1986); Elledge v. State, 346 So.2d 998, 1003 (Fla. 1977). Compare Provence v. State, supra, with Sims v. State, 444 So.2d 922, 925-26 (Fla. 1983) ("doubling" of aggravating factors "does not call the propriety of the sentence into question unless it interferes with the mandated process of weighing the circumstances"; since there were no mitigating

factors to be weighed, the error was harmless).

This Court has specifically (and repeatedly) held that it was error for the trial court to consider as separate aggravating circumstances that a homicide was committed to avoid or prevent a lawful arrest (Fla. Stat. §921.141(5)(e)), and that it was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws (Fla. Stat. §921.141(5)(g), where both aggravating circumstances are based on the same aspect of the offense. Sims v. State, supra, 444 So.2d at 925-26; Kennedy v. State, 455 So.2d 351, 354 (Fla. 1984); Thomas v. State, 456 So.2d 454, 459-60 (Fla. 1984); Jackson v. State, 498 So.2d 406, 411 (Fla. 1986). Nevertheless, in the present case, the trial court (over defense objection that it was an improper double consideration of a single aspect of the offense, R910-11, 1346-47, 1920-21) instructed the jury on both aggravating circumstances (R1084), and found both aggravating circumstances (R1363-66, 1964). By instructing on both, the court enabled the prosecutor to make the following argument to the jury:

> I suggest to you that as to the remaining aggravating factors, that there can be absolutely no question that Carlos Bello murdered Detective Rauft for the purpose of avoiding a lawful arrest. Bello knew that the police were attempting to arrest him. He heard their warnings and their implicit command not to resist when he heard the shouted warnings of, "Police, Police," the warnings that you heard on the tape during the course of this trial. He saw the word "Police" on the back of Detective Ulriksen's raid jacket.

> In that moment when Ulriksen held the gun on Rodriguez, he was moving around in those split seconds before the defendant shot him, shooting his right elbow, hitting him in the arm and hitting him in the gut. This was done for the express purpose of avoiding a lawful arrest.
>
> The last aggravating factor which you will be instructed on and which I mentioned to you just a few moments ago has -- relates to the hindering of the enforcement of the laws which govern all of us. All of us are subject to the laws of the State of Florida. I suggest to you that there can't be any reasonable doubt in anybody's mind that Carlos Bello murdered Detective Rauft to hinder the lawful exercise of a governmental function, that governmental function being the enforcement of the law. And he hindered it by trying to avoid being taken into custody.

(R1059-60)

The prosecutor continued that, not only did appellant try to keep himself from being taken into custody, he also wanted to keep the detectives from taking his accomplices into custody.[33] (R1060). Driving home his point (a point which illustrates the prejudicial effect of instructing the jury that it can find two aggravating factors when the evidence establishes only one), the prosecutor urged:

> I suggest to you that by his actions, he couldn't have done anything more than he did to hinder

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[33] The record in this case is devoid of any evidence that appellant was concerned about preventing anyone's arrest but his own. But even if he was, this would still fall within the "avoid or prevent a lawful arrest" circumstance.

> the enforcement of the laws of the State of Florida, those laws that everybody must obey if we're to live in an orderly society.
>
> I suggest to you that based on what you have heard during the course of this trial, that the murder of Detective Rauft was aggravated by every factor, by every single factor that Judge Menendez will direct you to consider in arriving at your recommendation.

(R1060-61)

As has been discussed in other Points on Appeal, the jury recommended death by the narrowest of margins, 7-5.

The state's successful attempt to persuade the trial judge to find both aggravating factors was based on a misreading of Francis v. State, 473 So.2d 672 (Fla. 1985) (erroneously referred to in the state's memorandum and in the judge's sentencing order as Francois) (R1929-30, 1964, 1365-66). The state argued:

> The disruption and hindrance of this narcotics investigation can be analogous to the murder of the confidential informant in Francis v. State, 473 So.2d 672, 675 (Fla. 1985). In that case, the defendant found out that the victim was associated with law enforcement and therefore, murdered him. This particular feature of the defendant's crime was considered a separate aggravating circumstance. The facts of the case at bar prove beyond a reasonable doubt that Mr. Bello realized that Detective Rauft was a part of law enforcement who discovered that Mr. Bello was involved in narcotics. Mr. Bello murdered Detective Rauft to disrupt or hinder the Tampa Police

> Department from exercising lawful governmental functions separate and apart from the arresting of Mr. Bello and his co-defendants.

(R1929-30)

The trial court, in his sentencing order, cited Francis in support of his decision to find both aggravating factors (R1964). That decision, however, does not stand for the proposition, suggested by the state, that it is okay to find both the "avoid arrest" and "hinder law enforcement" factors when the crime for which the defendant is trying to avoid arrest is a narcotics transaction. Francis, in fact, is not a "doubling" case at all. There, the defendant was arrested, based on information given to the police by a confidential informant. Francis - angry and out for revenge - vowed to kill the CI, and subsequently did do. The trial court found, and this Court affirmed, three aggravating factors: (1) cold, calculated, and premeditated; (2) heinous, atrocious, or cruel; and (3) crime committed to hinder enforcement of laws. This basis for the latter finding was:

> Mr. Francis knew that the decedent was a confidential informant and that the decedent was actively participating in a narcotics' investigation in Key West, Florida, and that information furnished by the decedent led to the arrest of the defendant, Mr. Francis, who advised a witness that, "The victim would have to die".
>
> Additionally, the defendant, Mr. Francis, told another witness that the, "Victim would be dead in two weeks".

(473 So.2d at 676)

Not only is Francis obviously distinguishable on its facts; it is not a "doubling" case at all, as the "avoid lawful arrest" circumstance was not found. In the instant case, if it could be said that appellant killed Detective Rauft to hinder law enforcement, he hindered it (in the prosecutor's words to the jury) "by trying to avoid being taken into custody" (R1060). Francis is as inapposite as Sims, Kennedy, Thomas, and Jackson are on point.

The trial court additionally observed, a suggested by the state (R1929), that the shooting of Detective Rauft "can be properly viewed as an attempt by Bello to prevent the police officers outside of the bedroom from entering and saving the life of the wounded Detective Ulriksen, as well as an attempt by Bello to prevent seizure of over fifty (50) pounds of marijuana and $13,500 in cash". (R1964). This, however, is pure speculation, and illogical speculation at that. See Barclay v. State, 470 So.2d 691, 695 (Fla. 1985). If appellant's concern had been to prevent the rescue of Detective Ulriksen it would have been a lot more logical to shoot Ulriksen again[34] than to shoot at the door. The fifty pounds of marijuana were in boxes in the corner of the bedroom, and another fifty pounds was in a suitcase (see R2000,. 275-76, 317). Obviously appellant could not crawl out the window and make his escape carrying items this heavy and bulky, nor is there any evidence that he tried. As for the $13,500, it was in

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[34] Ulriksen testified that he was afraid appellant might try to finish him off (R367), but appellant did not do this.

the bathroom with Detective Peterson (who had locked himself in there in order to electronically signal the outside officers to raid the residence) (R283-84, 316-18, 1962).

The only reasonable inference from the evidence is that appellant fired the shots through the door which struck Detective Rauft for the purpose of trying to escape; i.e., to avoid arrest. The police raid was (as it was supposed to be) sudden and surprising, and the reaction on the part of the suspects was every man for himself. Dorta and Amaro tried to flee, and were apprehended; appellant's intention was almost certainly the same. Unquestionably, appellant's involvement in a drug transaction (or, for that matter, anyone's involvement in any criminal activity) is contrary to the goals of law enforcement, but that is not the same thing as saying that the homicide was committed to hinder law enforcement. In the present case, in the prosecutor's own words to the jury "there can't be any reasonable doubt in anybody's mind that Carlos Bello murdered Detective Rauft to hinder the lawful exercise of a governmental function, that governmental function being the enforcement of the law. And he hindered it by trying to avoid being taken into custody" (R1060). A more classic example of an improper "doubling" of aggravating factors would be hard to find.

In view of (1) the compelling evidence of appellant's chronic paranoid schizophrenia; (2) the trial court's finding of the "extreme mental or emotional disturbance" mitigating factor; and (3) the closeness of the jury's vote to recommend death rather

than life imprisonment, this Court cannot conclude beyond a reasonable doubt that the error did not affect the jury's weighing process, nor can it conclude that it did not affect the trial court's weighing process. Elledge v. State, 346 So.2d at 1003; State v. DiGuilio, 491 So.2d at 1139. The "harmless error" exception therefore cannot be applied. Appellant's death sentence must be reversed for resentencing, before the court and a newly impaneled jury.

ISSUE VII

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

The trial court found as an aggravating circumstance that appellant has previously been convicted of a felony involving the use or threat of violence (R1962-63). This finding was based on two convictions arising from the same incident which resulted in the shooting death of Detective Rauft: (1) the attempted murder of Detective Ulriksen, and (2) resisting arrest.[35] Because of these contemporaneous convictions, the trial court concluded as a matter of law that the mitigating circumstance that the defendant "has no significant history of prior criminal activity" did not apply (R1965, see R1367). This was error [see Scull v. State, ___So.2d____ (Fla. 1988) (case no. 68,919, opinion filed September 8, 1988) (13 FLW 545, 548)], which violated the constitutional principle of Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2958, 57 L.Ed.2d 973 (1978); Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 896, 71 L.Ed.2d 1 (1982), and Skipper v. South Carolina, 476 U.S.

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[35] The indictment charged that appellant resisted arrest by obstructing Detective Rauft (R1518). Because that conviction involved not only the same incident as the murder, but also the same act and the same victim, it was improperly considered. Wasko v. State, 505 So.2d 1314, 1317 (Fla. 1987); Perry v. State, 522 So.2d 817, 820 (Fla. 1988). The attempted murder of Detective Ulriksen, on the other hand, was properly considered. See e.g. Johnson v. State, 438 So.2d 774 (Fla. 1973); Lucas v. State, 376 So.2d 1149 (Fla. 1979) (cited in Wasko).

1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986).

Lockett, Eddings, and Skipper stand for the proposition that the sentencer may not refuse to consider, as a matter of law, any relevant mitigating factor. In the present case, the trial court incorrectly concluded that the "prior violent felony" aggravating circumstance and the "no significant history of criminal activity" mitigating circumstance are mutually exclusive; therefore, since the contemporaneous convictions established the aggravating factor, they also negated the mitigating factor (R1965, 1367). This Court, however, held in Scull that the two factors are not mutually exclusive, and said "[W]e do not believe that a 'history' of prior criminal conduct can be established by contemporaneous crimes" (13 FLW at 548). This Court receded from language to the contrary in Ruffin v. State, 397 So.2d 277, 283 (Fla. 1981).

While it is true that the trial court did not have the benefit of the Scull opinion, neither did the trial judge in Scull. Even assuming that the trial court here was relying on the now invalid precedent of Ruffin, there is no "good faith exception" to the constitutional principle that a defendant is entitled to have all relevant mitigating circumstances fairly considered by the sentencer. Lockett; Eddings; Skipper. Appellant's death sentence must be reversed, and the case remanded for resentencing.

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

This constitutional issue is presently before the Court in Paul Alfred Brown v. State, case no. 70,483. As in Brown, appellant's jury recommended death by a bare 7-5 majority (R1880). Appellant adopts the argument made in Brown's brief on appeal, Issue VII, at p. 38-40.

ISSUE IX

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT THE FINAL DECISION AS TO PENALTY RESTED SOLELY WITH THE COURT

At the conclusion of the guilt phase of the trial, and again at the beginning of the penalty phase, the trial court instructed the jury that "the final decision as to what punishment shall be imposed rests solely with the Judge of this Court" (R900, 914). In the penalty phase jury instructions, the judge repeated, "As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the Judge" (R1082). On the authority of Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2663, 86 L.Ed.2d 231 (1985), and Adams v. Wainwright, 804 F.2d 1526, amended on rehearing, 816 F.2d 1493, rev. granted sub nom Dugger v. Adams, U.S. Supreme Court case no. 87-121 (42 CrL 4181), appellant asserts that these comments denigrated the jury's role in capital sentencing, and compromised the reliability of the death recommendation which they returned. Appellant's death sentence is constitutionally invalid, and must be reversed for a new penalty trial before a newly impaneled jury.

ISSUE X

APPELLANT'S SEPARATE CONVICTIONS AND SENTENCES FOR DELIVERY AND POSSESSION OF THE SAME MARIJUANA VIOLATES THE CONSTITUTIONAL GUARANTEE AGAINST DOUBLE JEOPARDY

In Blanca v. State, ___So.2d___ (Fla. 3d DCA 1988) (case no. 87-1393, opinion filed November 1, 1988) (13 FLW 2425), it was recognized that "[s]eparate convictions for the sale of cocaine and possession of that same cocaine violate the constitutional guarantee against double jeopardy". See also Gordon v. State, 528 So.2d 910 (Fla. 2d DCA 1988) (question certified).

In the present case, appellant and his accomplices possessed and delivered the same marijuana. One or the other of the convictions must be vacated.

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

The crimes in this case were committed on July 24, 1981, more than two years before the effective date of the sentencing guidelines. As the record is devoid of any indication that appellant made an affirmative election to be sentenced under the guidelines, his departure sentences (see R1968) on Counts II through V must be reversed.[36] Fla. Stat. § 921.001(4)(a); see e.g. Cannada v. State, 472 So.2d 1296 (Fla. 2d DCA 1985); Finklea v. State, 470 So.2d 90 (Fla. 1st DCA 1985). At resentencing, he may elect either to be sentenced under the guidelines, or under the laws in effect at the time of the offenses. Cannada.

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[36] In addition, one of the reasons given by the trial court for the departure - the quantity of drugs involved (R1968) - has been expressly disapproved by this Court in Atwaters v. State, 519 So.2d 611 (Fla. 1988).

CONCLUSION

Based on the foregoing argument, reasoning, and citation of authority, appellant respectfully requests that this Court grant the following relief:

> Reverse the conviction of first degree murder, and remand the case to the trial court with directions to enter a judgment and sentence for second degree murder [Issue I].
>
> Reverse the conviction of first degree murder, and remand for a new trial [Issue II].
>
> Reverse the death sentence, and remand the case to the trial court with directions to impose a sentence of life imprisonment without possibility of parole for twenty-five years [Issues IV, V and VIII].
>
> Reverse the death sentence, and remand for a new penalty proceeding with a newly impaneled jury [Issues III, VI, and IX].
>
> Reverse the death sentence, and remand for resentencing by the trial court [Issue VII].
>
> Vacate the conviction and sentence on either Count Two (delivery of cannabis) or Count Three (possession of cannabis) of the Indictment [Issue X].
>
> Reverse the guidelines departure sentences on Counts Two through Five, and remand for resentencing [Issue XI].

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 Bldg., 8th Floor, 1313 Tampa Street, Tampa, FL 33602, by mail on this 12th day of December, 1988.

Steven L Bolotin

STEVEN L. BOLOTIN